May 2022

Ethics Dispatch

"The object of philosophy is the logical clarification of thoughts. Philosophy is not a theory but an activity."

- Ludwig Wittgenstein

Hot Topic: Moral Dimensions of Medical Negligence

A Tennessee nurse was recently convicted of gross neglect and negligent homicide in a case involving an inadvertent medication error. Even though RaDonda Vaught's subsequent sentencing was light – three years of probation – the criminal conviction has shaken an already besieged and demoralized nursing profession.

According to a recent article on NPR, Ms. Vaught was a caregiver for 75-year-old Charlene Murphey, who had been admitted to Vanderbilt Medical Center for a brain injury. She was improving, and prior to discharge Ms. Murphey was being prepped for a routine medical scan. Her nurse meant to give the patient an injection of Versed, a calming sedative. Instead, Ms. Vaught mistakenly injected Vecuronium, a paralytic agent. This error ultimately resulted in the patient's transition to brain death.

According to an investigation report filed in her court case, the nurse overlooked several warning signs as she withdrew the wrong drug — including that Versed is a liquid but vecuronium is a powder — and then injected Murphey and left her to be scanned.

A Dangerous Precedent?

Media accounts of the jury trial and conviction suggest that Vaught's actions were the result of negligence, meaning that there were numerous warnings that should have helped to "catch her mistake," i.e., to prevent one from occurring. These warnings went unheeded and the patient died.

The indictment, trial and verdict in the Vaught case has understandably caused a great deal of concern in the healthcare community, especially among nurses. The American Nursing Association issued the following statement:

"We are deeply distressed by this verdict and the harmful ramifications of criminalizing the honest reporting of mistakes. Health care delivery is highly complex. It is inevitable that mistakes will happen, and systems will fail. It is completely unrealistic to think otherwise. The criminalization of medical errors is unnerving, and this verdict sets into motion a dangerous precedent."

We can all agree that egregious mistakes of a magnitude sufficient to induce a patient's death ought never to happen. Yet when they do happen, and when truly inadvertent and promptly reported, should such mistakes then be dealt with as criminality? Was RaDonda Vaught rightly indicted, tried and convicted? The district attorney in Nashville apparently believed so. His argument, roughly, is that the justice system is quick to criminalize negligent drunk drivers for unintentionally killing an innocent victim. By analogy, RaDonda "killed" Charlene through her negligence. Ergo, RaDonda's actions should be criminalized.

Consequences of Honest Reporting

The district attorney's argument, and the case in general, invites a slew of questions on the ethics of negligence. For example, are all instances of medical neglect "created equal?" Are cases where drunk drivers kill innocent bystanders in any way analogous to RaDonda's case? On the face

of it, the former seems more morally problematic than the latter. But what justifies this intuition?

What's more, even if we assume that both Drunk Driver and RaDonda-like behaviors are morally "wrong," should instances of medical error routinely be criminalized? Are we better off, safer, as a society for having done so in this case or in the multitude of cases that might follow by way of precedent? What sort of consequences would this have on honest reporting when mistakes occur, on truth-telling? How would it impact systems and policy-making, the nursing profession, and other healthcare professions already in crisis mode due to COVID?

Bioethics in the News

The Code Blue Pharmacist
Abortion: Welcome to the 60's
The Untold Story of an Overlooked Pioneer Bioethicist
Language in Medical Records May be Due for an Update

Case Study

John is a freshly minted RN at a nursing home. He is a care provider for an 86- year-old male-identifying resident by the name of Lyle.

Lyle is relatively healthy compared to most of the residents John cares for. He is fully "with it," no noticeable dementia, and a very active elder. Lyle's eyesight became poor from macular degeneration such that he gave up driving years ago, but he ambulates around the facility with relative ease. He dines with friends, attends social gatherings on a regular basis, and has become a favorite among the other residents and staff.

After a late lunch, John notices Lyle walking down the hallway to his room with a pronounced limp. Concerned, he asks Lyle if he's okay. Nursing home

residents are always at risk of falling, and Lyle is no exception despite his typical agility.

“Oh, I’m fine," Lyle replies. "Just bumped my leg on the table earlier. Or something. Just a clumsy old man. Anyway, I'm on my way to the bathroom. Kinda need to get there quick." With a wry grin, he adds, "Don't want to make a mess on the floor that you'd need to clean up after me!”

John asks if he wants assistance getting to the restroom.

“It hurts a bit, but I’ll be fine. Thanks anyway,” Lyle

replies.

John is concerned, so he assesses the situation. Lyle grimaces from the pain, but appears fine otherwise, and the limp obviously hasn't kept him from getting around. Given this, plus Lyle's rebuffing the offer of assistance, John tells himself that it’s probably safe for Lyle to go to the restroom by himself. The nurse does remind Lyle to use the call bell if needed, that "I’ll be right around the corner.” John watches for a moment as Lyle shuffles down the hallway, wobbling just a bit also, as though dizzy. Lyle is actually struggling more than he lets on, but who isn't struggling in this place, if able to walk at all?

"Lyle, are you sure you're okay?"

"I said I'm fine!"
He seemed uncharacteristically testy, but everyone's entitled to a bad day every so often. Lyle too.

John shrugs and leaves quickly to attend to another patient in the nursing facility, silently grateful that Lyle didn't want any help. There are so many others here who demand attention, so many medications to dispense and nursing assistants to supervise. John has been on duty for eight hours already, with four more to go, and he is exhausted. Staff turnovers and

illnesses have left them short-staffed. Again. The stress of this job just never ends, making sleep difficult between multiple twelve-hour shifts back-to-back.

Fifteen minutes after John had encountered Lyle in the hallway, nursing home staff hear someone yelling out in pain. It's Lyle. They rush to find him on the floor of his bathroom. There is blood everywhere from what appears to be a deep gash on the head. Lyle's leg is at an awkward angle suggesting a hip fracture as well. While Lyle is being evaluated, he loses consciousness, and someone calls for an ambulance. EMTs arrive within minutes, work with nursing home staff to stop the hemorrhaging and protect his airway. They gently place Lyle on a stretcher and rush him to the ER a few miles away.

John was among those helping Lyle after his fall, and he feels a great deal of guilt for having left the resident to ambulate on his own given the red flags that he was at risk. Fall risk protocols at this facility are stringent, and this situation might have triggered a preventive response -- had John been paying better attention. John is the only RN in the facility. He is the one who is supposed to model compliance for all other staff and enforce it also. Had he neglected his duty to care and lead? There were protocol triggers that John had noticed but then swept aside for what seemed valid reasons at the time. But were they? Had he been insufficiently attentive, overly distracted due to workload and stress?

Back on task, John files an incident report, honestly disclosing everything both in writing and in a verbal report to the facility administrator. He apologizes profusely for what happened. "I take full responsibility. It was my fault. I should have been paying more attention. Should have insisted on either helping Lyle or finding a CNA to do so. I feel so bad. If Lyle doesn't recover, if he dies . . . .
Oh, my God. Did I kill him?"

John is distraught. His boss is worried too, both for the resident and for institutional liability. He assures his RN that it will be alright. "You did the right thing by disclosing, John. And we'll need to do so to Lyle and his family, also,

of course. But mistakes happen. Just finish up and then get home and get some rest. Hopefully, Lyle will be okay."

Ethical Musings: Moral Negligence and Blameworthiness

In 2000, Susan Hunter wrote a paper where she distinguishes between the concepts of *legal negligence* and *moral negligence.* The former concept captures instances where someone fails to meet their civil responsibility to care "when they are obliged and able to do so." In the context of medical practice, physicians, nurses, and healthcare providers generally, have duties to care as established by scope of practice and standards of care. A failure to meet these standards -- for example, by not admitting an ER patient in obvious need of inpatient care -- might constitute *legal negligence.* If nothing else, the Emergency Medical Treatment and Active Labor Act (EMTALA) would require emergency admission. Failure to do so is a violation of federal law. It is a legal matter.

Judging Moral Cuplability

Is it "moral negligence" also, per Hunter?

"The term "moral negligence" signifies a moral judgement about the culpability of an agent for an action that results in a person being harmed. Moral negligence occurs when the power to choose to act as the relevant moral rule requires (such as nonmaleficence) lies within agents' ability, but they fail to recognize the act as morally wrong; disregard all the relevant moral features of the act; or act in accordance with what their moral deliberation and judgement dictates." (p. 381)

In short: *moral negligence* is the idea that individuals are blameworthy in cases where they have the ability to act in accordance with a moral principle but fail to do so. It seems possible that some cases of moral negligence might also

involve illegality, but not always. In the context of nursing or medical practice, we say healthcare providers have a duty to uphold the principles of nonmaleficence, beneficence, respect for autonomy and justice. A failure to uphold these principles when one is perfectly able to do so amounts to a moral failure -- even if the moral lapse does not violate any law. One is still morally culpable for acting in morally negligent ways, or for failure to do one's duty.

RaDonda and John Revisited

What does this concept imply for the hypothetical RN John or for the real-life former nurse RaDonda Vaught? In RaDonda's case, we might say that by
issuing the wrong medication to Charlene Murphey, her nurse violated the principle of nonmaleficence, i.e., the "do no harm" principle. She could have taken additional steps to ensure that she was in possession of Versed instead of the tranquilizer, but she didn't. Given this, she neglected Charlene in a way that violated a moral principle of nursing professionalism. The offending nurse is therefore morally culpable, at least according to the definition above.

The same might be said of John. By neglecting to investigate further John's reported leg injury and subsequently his impaired ambulation, John erred relative to standard nursing practices. He also failed to ensure that Lyle was able safely to get back to his room and into the restroom, thereby surely violating the "fall risk" protocols for his facility. In terms of fundamental principles for clinical care, John failed to exercise sufficiently the principle of beneficence ("do good to your patient") and possibly also that of nonmaleficence ("do no harm"). He was morally negligent.

Moral negligence in healthcare makes one blameworthy relative to the standards and principles of one's profession. It does not necessarily follow that such blameworthiness also constitutes legal negligence and culpability relative to healthcare law. When it does, it ought not to be surprising that legal

process follows. And while intent often matters for moral blameworthiness, intentionality is not always the point of distinction for matters of law or ethics. This is true even if most of us can feel greater empathy for cases involving unintentional harms such as that of RaDonda Vaught.

Blameworthy But Not Criminal

What then can be said ethically of her situation as it impinges upon the profession of nursing but also on patient safety? We return to questions of consequence raised earlier: Are we better off, safer, as a society for having held RaDonda Vaught legally, criminally accountable for her error? Will we as patients likely be safer or less safe as a consequence of Vaught's conviction? Are nurses apt to be more or less negligent for having made an example of an erring peer? Is this unique case a "one off," or do we risk a multitude of criminalized cases of medical error that might follow by way of precedent? What sort of consequences will this have on honest reporting when mistakes do occur? How does the Vaught case impinge upon truth-telling by healthcare professionals henceforth? How will this impact systems and policy-making, the nursing profession, and other healthcare professions already in crisis mode due to COVID?

We do not have the prescience to answer questions of future consequence, but asking them is within the scope of ethics also. It is reasonable, if admittedly

speculative, to worry that holding RaDonda Vaught criminally accountable for her reported error will have, is having, a chilling effect on disclosure of error. If so, nurses and other healthcare professionals are not made more virtuous but less. It is at least anecdotally evident already that nurses are further stressed by this case, that even more nurses are questioning their continuation of practice as a result. If so, and to the extent that nursing hemorrhage is a consequence of criminalizing medical error of the Vaught sort, patients are not safer and our society is not better off.

Doing what makes us less safe and worse off is ethically indefensible. RaDonda Vaught ought *not* to have been criminally charged, ought *not* to have been held accountable *legally*, but only as a matter of serious *moral* negligence.

- By Polo Camacho, PhD and Terry Rosell, PhD, DMin