LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

Medical progress proceeds in a constant flow from clinical investigation to implementation of new techniques in medical practice. At every stage of this continuous process the law seeks to guide, stimulate, or restrain the efforts of the medical profession, and in this way medical science is made more particularly responsive to society's needs and values. This symposium first reviews some of the ways in which the law bears on each stage in the flow of medical progress and then seeks to show how law and modern medicine confront social as well as scientific frontiers. The following introductory paragraphs may help to establish a framework for appraising the law's role in helping to deliver to the public the benefits of modern science.

The critical legal influences at the investigational stage in the flow of medical progress include, of course, all of the governmental policies and mechanisms that provide and direct the application of funds for medical research. The experimentation process itself is more directly affected, however, by legal rules and professional codes governing the conduct of experiments in which human subjects are employed, a step essential in perfecting practically any means of medical treatment; Professor Fletcher and Dean Stason explore these matters in their articles herein. Dr. Stickel's article on organ transplants illustrates how experimentation often cannot be separated from medical practice and calls appropriate attention in passing to what the author senses may be a failure of the law fully to respect medicine's investigative function.

Introducing new developments into medical practice presents a number of special problems for the law, which must seek to guard patients against dangerous methods not yet generally accepted without unduly inhibiting the introduction of valuable new techniques. Direct regulation accomplishes the necessary balancing in the area of prescription drugs, permitting their interstate sale only after efficacy and relative safety are established. On the other hand, in areas not subject to direct regulation, legal standards of care developed in malpractice cases are sometimes alleged to impede implementation of medical progress by deterring departures from current practices; this is said to result from the law's practice of comparing the physician's actions with the custom and practice of his peers in the community. While one may doubt that fear of malpractice claims often causes a doctor to resist employing a new procedure or drug in which he has well-founded confidence, it is probably true that doctors do not at present feel impelled by legal considerations to discover and evaluate the newest developments and to adopt the treatment that is best in light of the very latest learning. Of course, malpractice law would be an unwieldy device for assuring that medical breakthroughs are promptly implemented. Compulsory postgraduate education or periodic testing would perhaps be a more fitting response to a need that can only become greater as progress continues.

Several other articles herein deal with specific problems of implementing progress in health care. Mr. Freed's piece speculates on the possible confrontations between established legal doctrines and the computer as it is being adapted for uses in medicine, and Mr. Ruge deals with the special problem of how advertising of drug products can be and is being made to perform an educational rather than a purely promotional function. In both of these areas, problems of dealing with the private-industry adjuncts of the health care professions are considered. Finally, in Dean Stason's and Dr. Stickel's reviews of the legal problems involved in securing human organs for transplantation and other purposes, we have another useful case study of the law's need to accommodate itself to particular medical breakthroughs.

Once newly developed techniques have become routine in medical practice, the problems encountered would seem to fall outside the compass we have set for the symposium. Yet the perennial legal requirement of obtaining the patient's "informed" consent to treatment, delineated in up-to-date form by Dean Stason, seems to become more and more complex as medical advances accumulate: the more the doctor knows or should know the more he will almost necessarily be required to tell the patient, thereby heightening the doctor's problems of patient management and the demands on his time and powers of exposition. Likewise, however, the patient's ultimate dependence on the physician must also increase with added complexity, and, as this dependency is recognized, the consent required by law may come to be valued more as a ritual in recognition of the patient's humanity than because of any real enhancement of his control of his own fate. If, as Professor Fletcher's article suggests in a related context, the ritualistic element is indeed paramount in the consent situation, courts would be warranted in evaluating the doctor's method of obtaining consent solely on the basis of whether, under all the circumstances, he accorded the patient his full due as a human being (unless, as may sometimes be the case, what is really being tested is the physician's *own* awareness of the risks). Interestingly, Professor Fletcher's ethical point, introduced in this context, may link up with Professor Mechanic's discussion of the doctor's "sustaining" role and with the impression of many doctors that "bedside manner" is the most important factor in avoiding malpractice claims.

In the symposium's final two articles we have important appraisals of the structure of medical practice in the light of higher costs and a public commitment to wider availability of health care. Professor Mechanic surveys the inevitable trend toward increasing incidence of bureaucracy as an organizing and depersonalizing force in medical practice, and Dr. Forgotson reviews the anachronisms in occupational licensure laws governing the health professions. These articles convey a useful view of the institutional environment in which quality health care will be extended to the disadvantaged persons in American society, and, together with Dean Stason's discussions of gifts of human tissues and abortion laws, they highlight some of the larger questions about how the law and legislatures should govern the medical profession.

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