200 NEJM ANNIVERSARY ARTICLE

Doctors, Patients, and Lawyers — Two Centuries of Health Law

George J. Annas, J.D., M.P.H.

Medical care in 2012 is unrecognizable as compared with what it was in 1812, and no 19th-century physician would be at home in a modern hospital. A 19th-century lawyer, however, would be completely at home in a contemporary courtroom, as would a present-day lawyer transported back to the early 19th century. Although slavery was still legal and women did not yet have the right to vote, the U.S. Supreme Court was the highest court in the land and the U.S. Constitution and its Bill of Rights would be familiar, as would the jury and the common law system adopted from England.

From the Department of Health Law, Bioethics, and Human Rights, Boston University School of Public Health, Boston. Address reprint requests to Dr. Annas at the Department of Health Law, Bioethics, and Human Rights, Boston University School of Public Health, Boston, MA 02118, or at annasgj@bu.edu.

N Engl J Med 2012;367:445-50.
DOI: 10.1056/NEJMra1108646
Copyright © 2012 Massachusetts Medical Society.

Physicians and lawyers did not necessarily get along better in 1812 than they do today, primarily because of medical malpractice litigation. Herman Melville's 1851 metaphoric Massachusetts masterpiece, *Moby-Dick*, symbolizes the view of many physicians, then and now, that medical malpractice litigation is the white whale: evil, ubiquitous, and seemingly immortal (Fig. 1). Medicine and law were nonetheless often viewed as the two major professions, and for the leading physicians at that time, including Walter Channing (Fig. 2), editor-in-chief from 1825 to 1835 of what is now the *New England Journal of Medicine*, the relationship between medicine and law was of great intellectual and practical interest.[1]

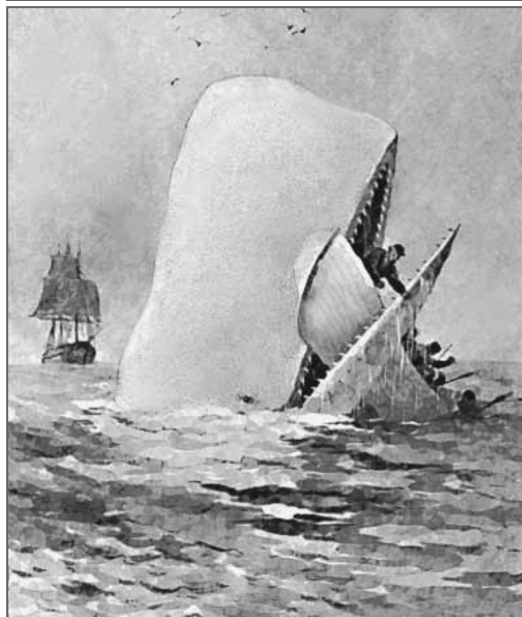

Figure 1. The Whale.
Medical malpractice litigation, in the eyes of many physicians, is like the white whale in Melville's *Moby-Dick* (1851).

Over the past two centuries, the discipline of medical jurisprudence — the application of medical knowledge to the needs of justice — has been renamed legal medicine (including forensic science), and applying the law to medicine has expanded from medical law to health law. Legal procedures and courtrooms have changed little, but there have been almost as many changes in the application of law to medicine over the past 200 years as there have been changes in the practice of medicine. Health law's intimate relationship with medical ethics also has a strong precedent. Thomas Percival's original title for his 1803 *Medical Ethics* text,

The New England Journal of Medicine
Downloaded from nejm.org at UNIV STUDI PIEMONTE ORIENTALE on August 1, 2012. For personal use only. No other uses without permission.
Copyright © 2012 Massachusetts Medical Society. All rights reserved.

which has been described as "the most influential treatise on medical ethics in the past two centuries,"[2] was *Medical Jurisprudence*.[3] More than half of Percival's text specifically addresses "professional duties . . . which require a knowledge of law."[3]

Walter Channing's almost-poetic academic title was Professor of Midwifery and Medical Jurisprudence.[1] In his lectures on the latter subject at what would become Harvard Medical School, he relied primarily on the 1823 text by Theodoric Beck, *Elements of Medical Jurisprudence*.[1,4] The major areas of medical jurisprudence in the early and mid-19th century were forensic pathology (determination of the cause of death in criminal cases, especially when poisoning was suspected) and forensic psychiatry (determination, for example, of whether a defendant was "sane" at the time he committed a crime). In 1854, the year Channing retired from teaching, his course was entitled "Obstetrics and Medical Jurisprudence."[1] Insight into the medical jurisprudence of Channing's times can be found in a remarkable three-part book review, spanning 24 journal pages, which he wrote 6 years later.[5] The book he reviewed, by physician–lawyer John J. Elwell, *A Medico-Legal Treatise on Malpractice and Medical Evidence: Comprising the Elements of Medical Jurisprudence*, was also published in 1860.[6] Both the book and Channing's review can help us see how medical jurisprudence evolved into health law in much the way that midwifery evolved into obstetrics.

PHYSICIANS AND THE LAW

Apart from the many areas of the law that directly affected the practice of obstetrics in the 19th century (most notably, abortion, feticide, and infanticide), medical jurisprudence was not Channing's main subject.[1] Nonetheless, primarily on the basis of the importance of medical testimony in both civil and criminal cases and on the basis of his own courtroom experiences as an expert witness, Channing strongly believed that physicians should know enough law to be useful and credible witnesses in court. He made this conviction a core of his medical school lectures on the subject. Channing believed that medicine and law, "two of the most diverse callings may act in perfect harmony, and for the equal benefit of both."[5] He also quoted medicolegal expert David Paul Brown: "A doctor who knows nothing of law, and a lawyer who knows nothing of medicine, are deficient in essential requisites of their respective professions."[5] Two cases dealt with in some detail by Elwell illustrate the standards to which courts held physicians (and quacks) in the late 18th and early 19th centuries.

MEDICAL MALPRACTICE AND MEDICAL LICENSURE

The first is the celebrated case of *Slater v. Baker and Stapleton*, decided in England in 1767.[7] Slater had broken his leg, it had not healed well, and he had sought treatment from another physician, a surgeon named Baker (and apothecary Stapleton). They broke the leg again and set it in "a heavy steel thing that had teeth" to stretch it, with a poor result. Slater sued them, and three surgeons testified that the "steel thing" should not have been used.[7] The jury awarded Slater £500 (approximately £60,000 today), and the defendants appealed. The appeals court affirmed the award, saying that a radical experiment could itself be considered malpractice, at least in the absence of the patient's consent. In the court's words,

> this was the first experiment made with this new instrument; and although the defendants in general may be as skillful in their respective professions as any two gentlemen in England, yet the Court cannot help saying that in this particular case they have acted ignorantly and unskillfully, contrary to the known rule and usage of surgeons.[7]

Elwell reasonably objected to the court's conclusion that if a physician is engaging in a unique experiment, then that fact alone makes the physician "guilty of rashness and recklessness."[6] He noted that the "recklessness" standard "points strongly to criminal intent or of foolhardiness and culpable rashness [which would make the physician] actually guilty of a crime."[6] Later in his text, Elwell described just such a case, which he termed "the leading American case on criminal malpractice" and which I call "the case of the coffee quack."[8]

The coffee quack was charged with murder in the death of his patient. He had come to Beverly, Massachusetts, in 1807 and announced himself as

The New England Journal of Medicine
Downloaded from nejm.org at UNIV STUDI PIEMONTE ORIENTALE on August 1, 2012. For personal use only. No other uses without permission.
Copyright © 2012 Massachusetts Medical Society. All rights reserved.

a physician with "the ability to cure all fevers." He used several concoctions, including drugs he called "coffee," "well-my-gristle," and "ram-cats." He administered these drugs, together with heat and blankets, for approximately 1 week to a patient who had employed him to cure a severe cold. The patient vomited frequently, became exhausted, and within days suffered a series of convulsions from which he died. There was testimony that in high doses the "coffee" drug could act as a poison. The jury was instructed that to find the coffee quack guilty of murder they must find that the killing was done with malice, and there was no evidence of this. A finding of manslaughter required that the killing be "the consequence of some unlawful act,"[8] but there was no legal requirement at the time for either licensure or education in order to call oneself a physician. The judge summed up his instructions to the jury:

> It is to be exceedingly lamented, that people are so easily persuaded to put confidence in these itinerant quacks . . . If this astonishing infatuation should continue, there seems to be no adequate remedy by a criminal prosecution, without the interference of the legislature, if the quack . . . should prescribe, with honest intentions and expectations of relieving his patients.[8]

The jury accordingly found the defendant not guilty. At least partially as a result of this verdict, the Massachusetts legislature passed its first physician-licensing law in 1818. That law prohibited unlicensed healers from using the courts to collect payment. It was not until the end of that century that practicing medicine without a license was made a crime.[9]

Figure 2. Portrait of Dr. Walter Channing (William Franklin Draper, after Joseph Alexander Ames, 1946).
Channing, Professor of Midwifery and Medical Jurisprudence and editor-in-chief of what is now the *New England Journal of Medicine* from 1825 to 1835, wrote and lectured on the relationship of medicine and law in his day; his writings help us see how the field has evolved into contemporary health law. Portrait courtesy of Harvard Art Museums, Fogg Museum, Harvard University Portrait Collection; photograph by the Imaging Department, Harvard College.

MEDICAL MALPRACTICE AND LAY JURIES

Historian Michael Bliss argues that in the 19th century, "much of the therapeutic power of medicine stemmed from surgery."[10] Whether or not it was therapeutic, Channing noted in the mid-19th century that malpractice was "almost exclusively charged on surgical practice."[5] Elwell catalogued and provided specific examples of the most common surgical malpractice cases, those involving amputation and the treatment of fractures.[6] Beck also appropriately devoted, in Channing's words, "much of his work" (15 of 42 chapters, and 232 of 582 pages) to the issue of medical malpractice, which "gives to his volume a great value, and makes him a large benefactor to the profession."[4,5]

Although Channing thought the jury a wonderful institution, he did not think it was appropriate for medical malpractice cases. He argued that medicine was inherently difficult to understand and not suited to lay juries, which he thought were mostly influenced by dueling expert witnesses whose testimony they could not fathom.[5] Channing asked, in words that find common expression today, "What shall be done to remedy so glaring a defect in our jurisprudence — a defect involving so much evil to the accused, and to a profession?"[5] His own response was to suggest that, like military officers, physicians should be tried by their "peers" because

The New England Journal of Medicine
Downloaded from nejm.org at UNIV STUDI PIEMONTE ORIENTALE on August 1, 2012. For personal use only. No other uses without permission.
Copyright © 2012 Massachusetts Medical Society. All rights reserved.

"there is no other way it is possible for them to get justice."[5]

His view was not unique at the time. It has been independently reported that "between 1845 and 1861 physicians were truly alarmed at the increase of malpractice claims," and an 1850 communication to the Massachusetts Medical Society referred to the "alarmingly frequent" prosecutions for malpractice and the belief that some surgeons were closing their practices because of this.[11] The Massachusetts Medical Society "recommended that a disinterested physician be engaged to adjudicate a threat of malpractice by a disgruntled patient."[11]

A century and a half of "malpractice reforms" has not changed the medical profession's views on medical malpractice litigation, which is still seen as unnecessarily adversarial, shaming, and unfair.[12-14] To many physicians, medical malpractice litigation remains the dangerous white whale. Lawyers themselves are not uncommonly viewed as sharks or vultures, bringing to mind Melville's description of the sharks that harass the whale boats, "seemingly rising from out the dark waters . . . maliciously snap[ping] at the oars . . . following them in the same prescient way that vultures hover."

CONTEMPORARY HEALTH LAW AND THE SUPREME COURT

Law and medicine have been intimately associated for at least the past two centuries, but it was not until 1964 that the *Journal* inaugurated a regular feature on the subject (then called "medicolegal relations") and William J. Curran began writing his "Law–Medicine Notes."[15] Like Elwell and Beck before him, Curran devoted a significant number of his articles to medical malpractice (including hospital liability), forensic medicine (including abortion), and forensic psychiatry, but he also addressed new topics, including the physician's changing roles in capital punishment, torture, care of the dying, fetal research, and determining death according to brain criteria.[15]

In 1991, I began writing a *Journal* feature called "Legal Issues in Medicine" (now "Health Law, Ethics, and Human Rights"). Of the 60 articles that I have written under these two rubrics, approximately 20% have dealt with the power of government over physicians and medical practice; 20% with abortion, pregnancy, and childbirth; 20% with public health issues; and the remainder with research, care of the dying, patient rights, forensic medicine, and forensic psychiatry. What is perhaps most noteworthy, however, is the number of health law cases that have been decided by the U.S. Supreme Court.

Health law — that is, law applied to the health care field — has expanded far beyond anything Channing could have imagined. The recognition of patients' rights and the expansion of regulatory-oversight rules and mechanisms, for both medical practice and financing, has vastly enlarged the field. Patients' rights, especially the doctrine of informed consent, were furthered by such judgments as that at the trial of the Nazi doctors at Nuremberg (1946–1947)[16] and the Supreme Court's decision on abortion in *Roe v. Wade* (1973).[17] Informed consent is the core of the Nuremberg Code, as it could have been the core of *Slater v. Baker* nearly 250 years ago. On its face, *Roe v. Wade* overturned most state laws that made abortion a crime, but its impact on medical care goes far beyond abortion. The Court ruled that the rights of both the physician and the patient have a constitutional dimension that limits the state's power to interfere in the physician–patient relationship.[17] The politics of abortion have led the Court to decide more than 3 dozen cases on state abortion laws in the past 40 years. The evolving structures of health care financing and practice would also be unrecognizable to 19th-century medical practitioners, including private health insurance plans, Medicare and Medicaid, managed care, the health insurance exchanges and accountable care organizations encouraged by the Affordable Care Act, antitrust regulations, measures to prevent fraud and abuse, and financial disclosure requirements.

A third development is also noteworthy — the application of health law to the field of international human rights, including the right to health, the regulation of research on human subjects, and the physician's role in war and civil conflict. Physicians and lawyers now work together in U.S.-based organizations such as Physicians for Human Rights and Global Lawyers and Physicians. Working separately, medical associations, including the British Medical Association and the World Medical Association, rather than legal associations, deserve much of the credit for the growth of the international "health and human rights" arena.[18] Both law and medicine are criti-

The New England Journal of Medicine
Downloaded from nejm.org at UNIV STUDI PIEMONTE ORIENTALE on August 1, 2012. For personal use only. No other uses without permission.
Copyright © 2012 Massachusetts Medical Society. All rights reserved.

cal tools for improving health and well-being on a global level, and each profession is more effective when the two work together.

Law remains interwoven with the practice of medicine, as it was in the 19th century. Physicians who do not have a basic understanding of the law are, as Channing recognized, at a distinct disadvantage when practicing medicine. The evolution of medical jurisprudence into health law over the past two centuries has been dramatic (Table 1). But equally consequential are the ways in which health law issues are framed and the legal forums in which they are resolved. State laws governing medical practice (including abortion and end-of-life care) are now challenged as unconstitutional infringements of individual rights, with the final determination made by the Supreme Court. The Court has also become active in determining the constitutionality of federal health-related legislation and in interpreting the meaning of federal statutes in the health field, ranging from regulation of tobacco and drugs to gun control. The fate of the Affordable Care Act, the major "health law" of the past decade, has also been decided by the Supreme Court — unthinkable in Channing's day.

The changes in substance and emphasis in health law from the publication of *Moby-Dick* can be appreciated by reading a contemporary nonfiction best seller about an event that occurred in 1951, which was 100 years after Melville published his masterpiece: the taking of cells that would later be called "HeLa" cells from Henrietta Lacks.[19] Although malpractice remains a concern, more central legal issues in contemporary medical practice include the fiduciary nature of the doctor–patient relationship, patient rights and patient safety, informed consent, privacy, commercialization, the regulation of medical research and biobanking, the patenting of genes and cell lines, the application of genomic information to medical practice, racial disparities, and equitable access to quality medical care.[20,21] The author of *The Immortal Life of Henrietta Lacks*, Rebecca Skloot, opens her book with the words of Elie Wiesel that almost all physicians and lawyers would agree should apply to all patients, not least because of the "fiduciary duty" that physicians owe patients under the law (and medical ethics): "We must not see any person as an abstraction. Instead, we must see in every person a universe with its own secrets, with its own sources of anguish, and with some measure of triumph."[19]

Table 1. Some Health Law Highlights.

Year	Event
1767	*Slater v. Baker and Stapleton,* CB Eng Rptr (UK) (medical experimentation)
1803	Percival's *Medical Ethics* published (original title, *Medical Jurisprudence*)
1809	*Commonwealth v. Thompson,* 6 Mass. 134 (wrongful death, quackery)
1818	First medical licensure statute enacted in Massachusetts
1823	Theodoric Beck's *Elements of Medical Jurisprudence* published
1840	Medical malpractice litigation appears in the United States
1860	John J. Elwell's *A Medico-Legal Treatise* published
1905	*Jacobson v. Massachusetts,* 197 U.S. 11 (no right to refuse smallpox vaccination)
1946–1947	Doctors' Trial at Nuremberg (Nuremberg Code set forth in the judgment)
1955	American College of Legal Medicine founded
1966	Medicare and Medicaid enacted
1972	American Society of Law and Medicine founded
1973	*Roe v. Wade,* 410 U.S. 113 (right to terminate pregnancy)
1990	*Cruzan v. Director,* Missouri Department of Health, 497 U.S. 261 (right to refuse life-sustaining treatment)
1997	*Washington v. Glucksberg,* 521 U.S. 702, and *Vacco v. Quill,* 521 U.S. 793 (no right to physician-assisted suicide)
2010	Patient Protection and Affordable Care Act enacted
2012	*National Federation of Independent Business v. Sebelius* (upheld all of the Patient Protection and Affordable Care Act as constitutional except the penalty for states that do not expand their Medicaid programs)

Disclosure forms provided by the author are available with the full text of this article at NEJM.org.

I thank my health law colleagues Leonard Glantz and Wendy Mariner for their thoughtful comments on early drafts of this article.

REFERENCES

1. Kass AM. Midwifery in Boston: Walter Channing, M.D., 1786-1876. Boston: Northeastern University Press, 2002.
2. Beauchamp TL, Childress JF. Principles of biomedical ethics. 5th ed. New York: Oxford University Press, 2001: 31.
3. Percival T. Medical ethics. Manchester, United Kingdom: S. Russell, 1803: 7.
4. Beck TR. Elements of medical jurisprudence. Vol. 2. Albany, NY: Webster & Skinner, 1823.
5. Channing W. A medico-legal treatise on malpractice and medical evidence — a review. Boston Med Surg J 1860;62:233-41, 259-65, 300-7.
6. Elwell JJ. A medico-legal treatise on malpractice and medical evidence: comprising the elements of medical jurisprudence. New York: John S. Voorhies, 1860.

The New England Journal of Medicine
Downloaded from nejm.org at UNIV STUDI PIEMONTE ORIENTALE on August 1, 2012. For personal use only. No other uses without permission.
Copyright © 2012 Massachusetts Medical Society. All rights reserved.

7. Slater v. Baker and Stapleton, C.B. Eng. Rptr. 860 (Michelmas Term, 8 Geo III, 1767).
8. Commonwealth v. Thompson, 6 Mass. 134 (1809).
9. Derbyshire RC. Medical licensure and discipline in the United States. Baltimore: Johns Hopkins Press, 1969.
10. Bliss M. The making of modern medicine. Chicago: University of Chicago Press, 2011.
11. Burns CR. Malpractice suits in American medicine before the civil war. In: Burns CR, ed. Legacies in ethics and medicine. New York: Science History Publications, 1977:107-22.
12. Mehlman MJ. The shame of medical malpractice. J Leg Med 2006;27:17-32.
13. Dickens BM. Patients' interests and clients' wishes: physicians and lawyers in discord. Law Med Health Care 1987;15:110-7.
14. Sage WM. Medical liability and patient safety. Health Aff (Millwood) 2003;22(4):26-36.
15. Curran WJ. Law–medicine notes: progress in medicolegal relations. Waltham, MA: NEJM Books, 1989.
16. Annas GJ, Grodin MA. The Nazi doctors and the Nuremberg code: human rights in human experimentation. New York: Oxford University Press, 1992.
17. Roe v. Wade, 410 U.S. 113 (1973).
18. Mann JM, Gruskin S, Grodin MA, Annas GJ, eds. Health and human rights: a reader. New York: Routledge, 1999.
19. Skloot R. The immortal life of Henrietta Lacks. New York: Crown, 2010.
20. Sanbar SS, Firestone MH, Fiscina S, LeBlang TR, Wecht CH, Zaremski MJ. Legal medicine. 7th ed. Philadelphia: Mosby Elsevier, 2007.
21. Furrow BR, Greaney TL, Johnson SH, Jost TS, Schwartz RL. Health law: cases, materials and problems. 6th ed. St. Paul, MN: West Publishing, 2008.

Copyright © 2012 Massachusetts Medical Society.

The New England Journal of Medicine
Downloaded from nejm.org at UNIV STUDI PIEMONTE ORIENTALE on August 1, 2012. For personal use only. No other uses without permission.
Copyright © 2012 Massachusetts Medical Society. All rights reserved.