CHAPTER 5

The Elusiveness of Closure

Abstract Unlike what happens in the classroom, where discussions can end in conflict, with agreement nowhere in sight, ethical problems in clinical health care require that decisions be made. Some form of closure is required in order to move forward. And closure can be elusive indeed. In this chapter we look at efforts to achieve closure through the use of multistep processes, as proposed by some bioethicists.

Keywords Health care · Clinical ethics · Closure · Multistep processes Judicial decision making · Legal process · Institutional constraints Professional education · Socialization · Expertise

In clinical practice, ethical problems do not arise out of nowhere. They develop, over time, from preexisting, but evolving, clinical situations. We start this chapter with a vignette adapted from the clinical experience of the second author (KK).

Vignette: A Morbidly Obese, Developmentally Delayed 14-Year-Old

A family presents with a 150-kilogram (330-pound), epileptic, developmentally delayed, violent 14-year-old boy with a genetically related dementing illness. He had recently started refusing to leave home, with the consequence that he has not been attending school. At the observational

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> admission, the clinical situation is assessed by the full range of health professionals at the hospital. Particular problems are identified as amenable to intervention, and both staff and family members are given various follow-up tasks to complete, including the following: a trial of different medications; provision of respite services for the parents; organization of services to assist in transporting the child to school on a regular basis; further review of the boy's behavior-management program; and an assessment of the mother's and possibly father's mental and physical health.

In most such clinical situations, even the most difficult ones, health professionals are able to work out viable solutions without consciously addressing even a single issue perceived as ethical. But situations sometimes do not develop in the way one hoped, and serious conflicts may arise—conflicts that bioethicists would immediately identify as raising complex ethical questions. Consider the following sequel to the above clinical situation.

> Over the course of the next year, the father's increasing stress about the situation at home led him to withdraw from the family, to spend more time at work, and to opt for more work-related travel assignments. The mother became increasingly depressed, could not, on her own, summon up the energy required to maintain the son's educational and health status, and lost her capacity to resist his demands for food. As a consequence, the son's weight continued to increase; he stopped attending school again; he was rarely leaving his bed; and a medical assessment concluded that without a return to the previous routine, the son's hypertension would become uncontrollable, and he would develop further, potentially life-threatening complications of both obesity and immobility. Though neither the mother nor father was capable of providing proper care for their son, they were also both adamant that the child's care was their business alone and that health professionals and others should stay away. The health professionals noted that without adequate care, the boy would likely either die very prematurely or end up creating an indeterminate (and presumably vast) stream of medical costs that would come out of the public treasury and decrease the funds available to care for other patients.

In a standard textbook on health care ethics, the case would likely here with the question "What should be done?"—or perhaps with a series of questions about, for example, the various stakeholders, their rights and interests, which have priority, how one decides such matters, whether a 14-year-old is potentially competent to make decisions in his own behalf, and whether family privacy overrides the public interest.

What is certain is that such a case would provide the basis for a class discussion that would be interesting, engaging, or even exuberant. But engaging students in a classroom discussion is one thing. Reaching a single, sound clinical decision in a situation permeated with suffering and distress is quite another.

Multistep Processes for Achieving Closure

For the purpose of reaching decisions in difficult clinical situations, bioethicists have proposed various sorts of multistep processes for health professionals to follow, enabling them to address all the relevant issues. For example, in *Ethics and Law for the Health Professions* (2013, pp. 138–139), Ian Kerridge and colleagues present a seven-step process: (1) identify the ethical problem; (2) get the facts; (3) consider core ethical principles; (4) consider how the problem would look from another perspective or using another theory; (5) identify ethical conflicts; (6) consider the law; and (7) identify a way forward. The full scope of what is required becomes manifest only in the complete description of the seven steps (see Text Box 5.1).

Text Box 5.1: A Model for Ethical Problem Solving in Clinical Medicine

[Step 1] **Identify the ethical problem:**

Consider the problem within its context and attempt to distinguish between ethical problems and other medical, social, cultural, linguistic and legal issues.
Explore the meaning of value-laden terms, e.g. futility, quality of life.

[Step 2] **Get the facts:**

Find out as much as you can about the problem through history, examination and relevant investigations.
Take the time to listen to the patient's narrative and understand their personal and cultural biography.
Identify whether there are necessary facts that you do not have? If so, search for them.

Use the principles of Evidence-Based Medicine (EBM) where possible when assessing or epidemiological evidence.

[Step 3] **Consider core ethical principles:**

Autonomy: what is the patient's (or surrogate's) preferences, goals and values; what is the patient's approach to the problem?
Beneficence: what benefits can be obtained for the patient?
Non-maleficence: what are the risks and how can they be minimized or avoided?
Justice: how are the interests of different parties to be balanced? How can equity or fairness be maximized?
Confidentiality/privacy: what information is private and does confidentiality need to be limited or breached?
Veracity: has the patient and their family been honestly informed and is there any reason why the patient cannot know the truth?

[Step 4] **Consider how the problem would look from another perspective or using another theory:**

Who are the relevant stakeholders? What is their interest? What do they have to lose? How salient are their interests? How powerful are they? How legitimate are they? How urgent are they?
How would the problem look like from an alternative ethical position? For example, consequentialist, rights-based, virtue-based, feminist, communitarian, or care-based.
Has someone else solved a similar problem in the past? How did they do it?

[Step 5] **Identify ethical conflicts** (e.g. between principles, values or perspectives):

Explain why the conflicts occur and how they may be resolved.

[Step 6] **Consider the law:**

Identify relevant legal concepts and laws and how they might guide management.
Examine relationship between clinical-ethical decision and the law.

[Step 7] **Identify a way forward:**

Identify ethically viable options;
Identify the option chose, for example, by specifying how guiding principles were balanced or by clarifying what issues or processes were considered most significant, and why;
Be clear about who was responsible for the decision;
Communicate the choice and assist relevant stakeholders determine an action plan;
Document the process;
Assist/mediate resolution of any conflict;
Evaluate the outcome.

From Kerridge I., Lowe M., and Stewart C., *Ethics and Law for the Health Professions*, 4th ed. (Sydney: Federation Press, 2013). Reprinted with permission.

More concretely, in presenting multistep processes as a means of addressing ethical "dilemmas"—presumably, situations in which a straightforward application of ethical principles yields no unequivocal answer—bioethicists implicitly assert that such processes actually will lead, in some way, to the desired closure. But such processes, if brought to closure via a full consideration of all the relevant issues, are even more complex than Kerridge's seven steps would suggest. Just how complex can be seen if we look not at bioethics but at what's involved when law courts consider cases that have been appealed. In such situations, a lower court would have made a decision based on its consideration of both the law and the facts, as in a jury trial. On appeal—in a process that closely parallels the multistep consideration of difficult ethical questions in bioethics—the appeals court considers only matters of law, against the background facts as determined by the lower court. That process of

appealing a decision by a lower court can be considered, for our purposes, as an elaborated version of Kerridge's multistep process for addressing ethical issues in health care.

In considering the work of appeals courts, our goals are twofold: first, to understand the complexity of such multistep processes, and second, to understand why, in law, they actually work as a means of reaching decisions. In the section after that, we return to consider the use of multistep processes in bioethics.

The Multistep Process of Appeals Courts

Framing and the Diversity of Perspectives

The work of appeals courts is to make decisions about the law in relation to cases that have previously been decided by lower courts. In particular, a case comes to an appeals court when one side of a case argues that the lower court, in making its decision, was mistaken in how it interpreted or applied the law. The task of the appeals court is to determine whether that interpretation or application was mistaken or not, given the facts as determined by the lower court.

For an appeals court judge (we will be taking U.S. appeals courts as a model here),[1] an initial step is to request each side to prepare a written legal *brief* presenting arguments to support their own interpretation of the law (or laws) in question—which is parallel to what happens in bioethics courses as students set out to defend their own views against those of their classmates. In these briefs, each side constructs, as it were, a view of the world that seeks to persuade the court to see the case in that way, too. For this purpose, the attorneys involved may well end up invoking the full range of factors used in ethicists' multistep processes. Historical, cultural, and social factors might be part of framing—and arguing—a case. Linguistic factors are always important in law and may prove central, even decisive. No argument can be made without direct reference to established legal rules and to what that particular court and other courts have done in the past (i.e., relevant *precedents*). Policies underlying a particular area of law are regularly invoked. And references to ethical principles are made, too, if they help to support one's argument (e.g., by referring to factors such as "fundamental fairness"). Another crucial factor in preparing any legal brief, as in a bioethicist's multistep process, is the need to anticipate and address the arguments of the other

side; one test of this comes with oral argument, which enables the judge to probe the positions of the attorneys for each side.

In the case of our morbidly obese, bedbound teenage boy, let's suppose that (1) a child-protection agency had attempted to remove the boy from his family, (2) the family, possibly with the assistance of some sort of pro bono or public organization (and therefore free or low cost), decided to oppose the removal, and (3) in a court proceeding, it was decided that the agency was legally justified in removing the child. If that decision was then appealed, both sides would be asked to prepare legal briefs presenting their positions. And if one assumes that the situation received attention in the local papers, one would also expect that there might be some, or even many, additional briefs submitted by amici curiae—friends of the court. A family-oriented, pro-parent group might insist that the rights of the parents be protected and that they be allowed to retain their child at home, no matter what the consequences. Likewise for any group writing from either the far right or far left, who would presumably be opposed to the intrusion of the state into what they considered a fundamentally private matter. Some groups representing health professionals or institutions would support the child-protection agency, arguing that protecting the health and well-being of the child is the community's fundamental concern, whereas other groups might oppose removal, either to protect the psychological health of a disabled, dependent child or to prevent the child's exposure to physical or sexual abuse in various sorts of foster-care settings. Law professors might write carefully researched, persuasive briefs on both sides of the dispute, often by citing not just the law but the sociological, historical, or anthropological factors relevant to the case.

It is difficult to overstate the potential degree of complexity in such situations. Each brief submitted not only argues in favor of a certain result but provides a distinct set of arguments that typically frame the case in a way that reflects the broader interests of whoever prepared or commissioned that particular brief. Based on such framing, the central issue in the case might be seen as one involving, among others, statutory interpretation, parental rights, children's rights, state interests, abuse of power, domains of interest (public versus private), or the limits of the judicial authority. And each of these arguments might actually have some real merit.

The Complexities of Closure

In many legal cases, one might think that the availability of an established (and relevant) legal rule would carry the day and move directly to closure. If the case were so simple, however, it would never have been appealed

(or accepted for appeal). For example, even when a judge agrees that, *other things equal*, "the established rule in such situations is that . . . ," it is still an open question whether other things actually are equal. Deciding that question—and how narrowly or broadly to apply or interpret an established rule—is often a key element in the case, and a key element for judges to determine. In this context, courts need to consider all of the elements discussed in the preceding subsection and also a potentially wide range of subsidiary factors, including the following: How quickly is a decision required? Does the court have the time and resources to assess particular factors? Is there a simpler way of deciding a case without getting into complicated, controversial, or time-consuming issues? Is the issue "ripe"; that is, is enough known, often through previous litigation, about the factors relevant to a particular type of legal situation, enabling the court to make a reasoned, informed decision that is likely not to seem, in time, ill-founded or premature? Likewise, will deciding a case in a particular way end up upsetting established law, with the consequence that the decision would be considered unjustified or would create uncertainty in an area of law (e.g., contracts) where clarity and predictability are especially valued?

Against this background of conflicting legal arguments and, one might say, conflicting views of the world, the judge has to decide not only on a result—that is, which side "wins"—but also on the reasoning that led to that result and on what particular remedy, or course of action, to order. In the example we're considering—the morbidly obese 14-year-old—the judge might decide in favor of the child-protection agency, set forth (or not) a set of reasons why the arguments presented by the opposing briefs were ultimately not persuasive, and then authorize the agency to remove the child but only pursuant to certain conditions. Such conditions might include (1) the availability of a public institution or even another family to take proper care of the child, (2) provision (or not) for the family to visit the child, and (3) conditions, if any, under which the child's parents might petition the court to have the child returned home. Alternatively, and as often happens, the judge might decide in favor of the parents, provide a justification for that decision, and leave it to the child-protection agency to determine how best to protect the child at home.

What should be clear, no matter what, is that choosing exactly which arguments are "correct" (or stronger or more persuasive than the others) is no simple, determinate process. And it's not as if there are only two potential results. A judge might find some middle or different ground for a decision—one not presented by any of the parties or amici curiae.

The judge needs to take all the diverse factors into account, as best as he or she can, and with the knowledge that except in unusual cases, there will no single, correct answer, and no single correct legal analysis. Different judges and different courts may reach different results, and even when the actual outcome is the same, they may have reached that position through a different line of reasoning. Judicial decisions are as different as the judges themselves, each with their own sensitivities, political views, attitudes toward risk, need for control, and personal and intellectual histories, among many other differences.

What Makes a Judicial Decision a "Good" One?

That said, what makes a judicial decision a good one, and not merely a legally authoritative one because issued by a judge? The main criterion here is the judge's capacity to credibly apply existing law and potentially to advance it (if only by a smidgen) while holding true to the constraints within which all judges are expected to act. These constraints include the facts as known, the diverse dimensions of existing law—statutory law (made by the legislative branch of government), case law (judicial branch), and regulatory law (executive branch)—and the wide-ranging histories, social forces, and public policies that have shaped these separate areas of law.

The broader institutional character of law comes into play here. Informed assessments of judicial decisions emerge, over time, though the work of other judges, lawyers, and potentially also commentators and critics from the academic community—which can be understood, in effect, as expressing the collective wisdom of the profession. This institutional feedback will influence, in the short term, whether the decision is appealed to (and changed or overruled by) a higher court and, in the long term, the actual "meaning" of the decision. A decision deemed good will generally be interpreted more broadly and therefore have more legal impact in both the short and long term than a decision deemed poor.

Over time, the overall impact of these assessments is to define relatively stable, fixed points in the legal system that enable lawyers and judges to determine what can and cannot be argued effectively, what can or cannot be reasonably interpreted as a point in contention. Likewise, by virtue of their legal training and professional experience, lawyers and judges come to understand which points are relatively fixed and which not, as well as how hard, and by what sorts of arguments, such fixed

points can be questioned. Some points of law and some policies are more fixed than others; some points can be budged fairly easily (albeit only with very good reasons for doing so), whereas others require something much more than that. In the United States, for example, the confidentiality of the psychiatrist-patient relationship can be overridden only when the safety of another person is at risk—as in the case of a patient who tells his therapist that he is planning to murder someone.[2] Various constitutional doctrines have a similar, high threshold for arguing exceptions. Judge-made law actually does evolve, and sometimes change radically, over time. But in general, judges or lawyers who ignore or move too far away from established fixed points of the law are apt to find their own work ignored, disregarded, or disparaged.

Why Does the Judicial Process "Work"?

This multistep process of judicial decision making is well accepted, used in some form or other worldwide, and, if the judges themselves are competent, considered to generate good results. In short, the model works, and as we see it, there are four main reasons for that.

1. The persons implementing the model—judges and lawyers—are themselves *experts in the relevant field*: law. And they bring this expertise to bear throughout the process, from (at the very outset) deciding which cases to litigate, to every stage of the litigation, to the ultimate decision by, and reasoning of, the judge.
2. The *law itself*—substantively and procedurally—operates as a constraint. Substantive legal rules permeate and shape the process of judicial decision making, from outset to conclusion. These rules, though not inflexible, are relatively fixed signposts for such decision making. Procedural rules, such as those concerning documentary evidence or the examination of witnesses—keep the legal proceedings moving ahead on a defined path, and without having to recreate the process at every step and for every case.
3. More concretely, the *history of each case* serves to frame the relevant issues, and this history helps to determine, in effect, what points of fact and law are in contention, and which are not. It is not that the case, if it arose afresh, might not be seen as raising different issues. The point, instead, is that the history of a case serves to limit the range of issues and focus the attention of the court and the parties involved in the case.

4. The *institutional framework* of the law operates as a strong constraint on lawyers and judges, and serves to channel their attention and legal work. Beginning with the professional socialization that occurs in law school and continuing with the bar examination, professional organizations, continuing legal (and even judicial) education, and myriad other activities, life in the law is lived within educational, social, and legal institutions that define what it is to live and work as a lawyer.

Revisiting Bioethics

The judicial process, as described above, can be understood for our purposes as a formalized, detailed version of the multistep process that Kerridge and colleagues (2013) recommend for addressing ethical issues in health care. As with the judicial process, the multistep process of ethical decision making should not be expected to produce unique, determinate, "correct" answers. It may be that, in the end, the various dimensions of the ethical problem at hand will be well, even deeply understood. But just how to integrate and balance the various factors remains indeterminate. As in the case of judges and the judicial process, different people will reach different results and for different reasons. More importantly, however, the multistep process in bioethics is not subject to the same constraints that channel the judicial process and that lead to what legal commentators see as generally good results.

The proposed multistep process for making ethical decisions incorporates *none* of the four constraints that channel the judicial process and that lead toward good, generally respected decisions. The most obvious and important difference is that health professionals are not experts in bioethics or in reasoning from ethical principles—the form of reasoning required by Kerridge and colleagues' multistep process (or, indeed, by other multistep processes). Although bioethicists and philosophers undoubtedly feel comfortable with, and are adept at, analyzing ethical problems through the use of abstract ethical principles, they have reached that point only through explicit, lengthy training in academic programs designed just for that purpose. Needless to say, health professionals have not had that sort of training, and there is no reason to expect them to think and act as though they had.

A second shortcoming of bioethics' multistep process is that ethical principles do not have the same, relatively stable and knowable structure as the law. As noted above, the judicial process operates within substantive and

procedural constraints that channel the work of lawyers and judges—and it is just this rule-defined structure that law students learn in law school and that is, in large part, tested for in state bar examinations (without which no one can legally practice law). Put quite simply, these substantive and procedural constraints—the fixed points that serve to define an entire field of human activity—have no parallel in bioethics or in ethics generally. The problem here is easy to explain. Suppose that two ethical principles conflict. How does one proceed to address the conflict? Bioethicists and philosophers might have some relevant expertise. Health professional simply do not.

A third shortcoming of bioethics' multistep process is that clinical situations raising ethical problems are not well defined in the way that they are in judicial decision making. Cases are not accepted for appeal because they have been, in some generic way, improperly decided by a lower court. Appeals are made, and accepted by higher courts, because some particular point or points of law—the *grounds for appeal*—may have been decided incorrectly by a lower court. This focus enables the process to move toward closure. By contrast, the bioethical process actually moves in the direction of increased complexity. The closer one looks, and the more exhaustively one attempts to address the full range of issues presented by an ethical situation, the more there is to see (with more and more issues to be explored and decided), the more complex the emotions experienced by the participants, and the more one moves away from a single, potentially determinate result. Judges expect such complexity and, indeed, are expected to make decisions that take into account such complexity. That's their job! But it isn't what health professionals are trained to do, and there's no reason to think that they can do it, especially within the time constraints of clinical health care.

A fourth shortcoming of bioethics' multistep process is that the institutional framework that constrains and channels the work of health professionals is oriented toward the provision of health care—understanding and treating disease and health-related problems. Analyzing difficult ethical problems by using abstract ethical principles is not part of that institutional framework. Health professionals are not trained, and not socialized, to deal with difficult ethical problems in that way. Health professional do, indeed, deal with such problems whenever they arise. But they do so only after careful discussions, insofar as possible, with colleagues as well as with patients and their families and carers. Each clinician brings to these discussions his or her own clinical experience and established, clinically informed ethical views. But using abstract ethical

principles to address ethical problems is not an integral part of this process, and of what it is to live and work as a health professional.

The Way Forward

Confronted with the suggestion that they engage in a multistep process for making ethical decisions, one can easily imagine the following—but hypothetical—response by health professionals:

> Lawyers are trained in the complexities of such models, and they work with such models, in such systems, their entire professional lives. Likewise, judges learn to make decisions in situations involving innumerable complexities of law, ethics, and public policy, all with underlying human dimensions. Much the same might be said of bioethicists, who are specifically trained to deal with ethical principles and all their complexities. But we have not been trained in any of those ways, and we aren't comfortable dealing with ethical theory and matters of public policy. Our world is concrete and clinical, and our goals are tied in with the welfare of our particular patients. In lieu of a multistep process requiring abstract analysis and the application of ethical principles, give us something that we can work with.

That's exactly what the rest of the book is about.

Notes

1. Although we are, for the sake of simplicity, discussing the appeals process as if a single judge were deciding the case, federal appellate cases are typically decided by a panel of three judges. One judge writes the majority opinion, and the other two either *join* that opinion or write separate opinions of their own, either in concurrence or dissent.
2. By contrast, if the patient tells the psychiatrist about someone whom the patient has already murdered, confidentiality remains intact (Tarasoff v. Regents of the University of California, 1976).

References

Kerridge, I., Lowe, M., & Stewart, C. (2013). *Ethics and law for the health professions* (4th ed.). Annandale, NSW: Federation Press.

Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976).