1997

Introduction: The Law-Medicine Center 50th Anniversary Symposium: The Field of Health Law: It's Past and Future

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THE LAW-MEDICINE CENTER 50TH ANNIVERSARY SYMPOSIUM

THE FIELD OF HEALTH LAW: ITS PAST AND FUTURE

INTRODUCTION

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IN 1953, OLIVER SCHROEDER, together with two others, founded the Law-Medicine Center at what was then Western Reserve School of Law. This marked the beginning of the field of health law as an organized discipline, and we are celebrating the 50th anniversary of the Center this year with a number of special events, one of which is this symposium issue of Health Matrix. For this issue, we have invited a number of people who have been teaching in the field for many years to provide their perspectives on how they became involved in the subject, where the field is going, and whether its trajectory is sound.

When I began teaching law, I had been practicing a subset of health care law for nine years at Arnold & Porter in Washington, DC. Lacking any particular background in science or medicine, I stumbled upon the specialty by accident. Although I attended Yale Law School, where Jay Katz taught courses in medical law, I never took a class from him. I did have one acquaintance with health law while at Yale, however. I had gone to a small boarding school in Massachusetts, and during the summer after my first year of law school, one of my former teachers, Kenny Edelin, was indicted for murder in Boston for performing a late-term abortion, and I volunteered a month of my summer to do research for his lawyer. Edelin was convicted but later exonerated by the Massachusetts Supreme Judicial Court. (He went on to be chairman of the board of Planned Parenthood.)

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The experience in Boston was exhilarating, but I had no plans to practice health law when I graduated law school; my goal was public service, and I chose A&P because of its pro bono record and the opportunity to work in Washington. About six months after I began work, I was standing in the senior pro bono partner's office discussing a case going back to the McCarthy Era[1] when the phone rang. The senior pro bono partner was also the senior partner in the firm's food and drug practice, and a client needed him to handle a new matter. He in turn needed help from a junior associate. He looked around the room, saw me, and asked if I was interested. Anything was better than the Byzantine antitrust case I had been working on, so I jumped at the opportunity. One thing led to another and my fate was sealed.

When I began teaching Health Law at Case nine years later, there were only two casebooks available, and both were out-of-date. Apart from our Center, the only other program in the field was at St. Louis University School of Law.[2] The American Society of Law, Medicine, and Ethics (ASLME) was largely focused in Boston. There were a number of law professors teaching variations on medical malpractice law and law and bioethics, but only a handful exploring regulatory and corporate aspects of health law.

One of the first issues I began investigating when I became a law professor was the fiduciary nature of the physician-patient relationship (as, betraying the lingering influence of traditional physician paternalism, the patient-physician relationship was then called). To my astonishment, a number of courts and commentators questioned whether the relationship technically was "fiduciary," on the premise that it was not one of the classic fiduciary relationships recognized in the learned treatises. Instead, they wanted to denominate it merely a "confidential relationship," a category reserved for relationships of trust that did not fall into any "well-defined category of law."[3] In short, the field of health law was not sufficiently developed doctrinally for its central relationship to merit membership in the class.

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[1] The case, on behalf of Beatrice Braude, is described in STANLEY I. KUTLER, THE AMERICAN INQUISITION 33-58 (1982).

[2] George Annas maintains that William Curran was running a health law program at Boston University since shortly after our center began, but apparently it did not start to promote itself as a formal program until a few years ago.

[3] GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 482 (2d. ed. 1978), discussed in Maxwell J. Mehlman, *Fiduciary Contracting: Limitations on Bargaining Between Patients and Health Care Providers*, 51 U. PITT. L. REV. 365, 366, n.6 (1990).

How things have changed. My shelf groans under the weight of health law casebooks. Over a dozen law schools have established health law programs, and many offer at least one course on the subject. Over a hundred professors regularly attend the annual Health Law Teachers Meeting of the ASLME. And over the years, a bright, energetic, dedicated, and growing group of scholars has delved deeply and sophisticatedly into the mysteries of law and medicine to the point where the field is both well-defined and possesses a substantial doctrinal foundation.

Our work still is cut out for us, however. The truism has long been proclaimed that the law is years behind developments in science and medicine. Despite the heroic efforts of scholars, legislators, judges, and practitioners, as well as research funding from sources like the Ethical, Legal, and Social Implications Program of the National Human Genome Research Institute at the National Institutes of Health, this certainly remains the case. Meanwhile, we have to contend with another set of rapid developments: new types of health care delivery and financing systems. For academics, a major culprit is the comparatively glacial pace of scholarly publishing. We need greater recognition for fast-turn-around, peer-reviewed outlets, including validation for purposes of promotion and tenure. We also need closer collaboration between academics, judges, practitioners, physicians, and scientists.

I hope you enjoy this symposium issue as much as I have enjoyed helping the student editors put it together. The celebration of the 50th anniversary of our discipline is a salute to you all.