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WHERE IS THE "THERE" IN HEALTH LAW? CAN IT BECOME A COHERENT FIELD?

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GERTRUDE STEIN COMPLAINED OF OAKLAND, "There is no there there."1 Churchill complained of his pudding that "it has no theme."2 And everybody complains of health law that it lacks an organizing principle. Health law scholars bemoan the "pathologies" of health law3 and its contradictory and competing "paradigms"4 which form a "chaotic, dysfunctional patchwork."5

But it should not surprise us that any field which grows by accretion lacks a unifying idea or animating concern. And health law certainly grew by accretion. It began in the 1960s, when the Law-

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1 GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 289 (Cooper Square Publishers 1976) (1937).
3 Einer Elhauge, Allocating Health Care Morally, 82 CAL. L. REV. 1449, 1452 (1994) (arguing that health law suffers from the pathology of applying its four different paradigms inconsistently).
5 Bloche, supra note 4, at 321.
Medicine Center was established, concerned with medical proof in litigation, physicians' malpractice, and public-health regulation. During the 1970s, bioethics was taken into the fold. And in the 1980s, economic and regulatory topics gained prominence in the field.

Health law, then, is more the creature of history than of systematic and conceptual organization. It looks hardly more cohesive than a "law of horses." As Judge Easterbrook once quipped about cyberlaw: "Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on 'The Law of the Horse' is doomed to be shallow and to miss unifying principles." 6

This is not to say that there have been no attempts to give health law the dignity of an explaining principle. Medical law has in recent years entertained two competing paradigms - the patients' rights approach and the law and economics approach. The patients' rights approach at heart hopes that medicine can be regulated by endowing patients with rights of autonomy to which medical professionals and institutions must defer. The law and economics approach at heart hopes that medicine can be regulated in the market, by consumers making purchasing decisions that discipline medical institutions.

Both these approaches have their merits. Not least, both have helped temper the tendency of medicine to exalt its guild interests and have helped put the patient at the center of the law's concerns. Nevertheless, there is today discontent with both paradigms. Few people suppose that markets can solve all problems, and many people doubt that the medical marketplace can ever work really well. Furthermore, the law and economics paradigm offends the political sensibilities of many scholars who write in the area. The patients' rights view has enamored academics, but today even many academics are beginning to feel that that view is bumping against the point of diminishing returns. In addition, while both the patients' rights and the law and economics approaches put the patient at the center of their universe, they imagine a patient who does not exist. The patients' rights approach imagines patients vigorously exercising and protecting their autonomy in order to pursue unique "life plans." The law and economics approach imagines consumers making purchasing decisions based on a well-developed understanding of what they want and what the mar-

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kets offer. Crucially, however, real patients are little like either of these stick figures.

We suspect there is no grand organizing principle for medical law because there cannot be. Medical law deals with medical activities in too many settings and must borrow from too many areas of law. Nevertheless, we believe medical law can adopt a more useful analytical perspective, one that tends to distinguish it from other areas of law. We propose an analytical framework that views health care law as a law of relational webs rather than a law of transactions.

A transactional perspective takes the atomistic view that each medical encounter is a discrete event rather than part of an on-going web of relationships. A relational web perspective, on the other hand, views medical encounters more holistically, as part of a larger context formed by the parties' interactions with each other and their relationships with other individuals and institutions. For example, informed consent law essentially requires separate consent for each component of service within an illness (invasive testing, surgery, pharmaceuticals, etc.). A relational perspective, on the other hand, views medical encounters more holistically, as part of a larger context formed by the parties' interactions. For example, the law recognizes patients' dependence by structuring the duty to treat around episodes of illness and preventing physicians from unilaterally dropping a sick patient without either the patient's permission or enough notice to give the patient time to find another doctor.

The transactional perspective grows out of the fact that medical law generally has not answered its basic questions by developing a set of doctrines specific to its subject. Rather, it has treated medicine as a business virtually like any other, and it has drawn its doctrines from the many fields of law that govern ordinary commercial affairs. But business law abstracts. It is disinclined to search out the particular aspects of each business that might make it different from other businesses and relies instead on generalizations about how all business works and should work. Law sometimes considers the ways medicine is a business that poses special problems, but other times it does not. And it rarely asks which approach is preferable. In short, medical law thus analyzes events in isolation from their context, it repeatedly misunderstands those events and assigns inappropriate legal consequences to them. Medical law thus condemns itself to operate at a fatal remove from reality.

All this becomes clearer when we understand the reality that a transactional approach ignores. First, real patients live their lives embedded in a web of relationships and personal histories that shape their thought and behavior in ways not easily incorporated by a trans-
actional model. Little in the lives of most people makes them the enthusiastic and skilled decision-makers that transactional law often imagines. And insofar as patients think about themselves in medical contexts, they think—we suspect—primarily in non-transactional terms. They think that, at its heart, health care is about a relationship—the relationship between doctor and patient—that is in its essence and at its best not a legal relationship. Instead, it is a relationship which in some ways is damaged by being considered in transactional legal terms. In this way it resembles another institution generally apt for legal regulation: marriage, a relationship in which trust is crucial and personal relations are central.

Second, real patients not only live in a web of relationships with their friends, families, and physicians that affect the way they act as rights-holders and as consumers. They also have web-like relationships with various medical institutions. Doctors organize into practice groups and refer patients to specialists and clinics. When patients are sicker, they enter hospitals and other complex parts of the health care enterprise. Furthermore, patients have increasingly elaborate financial and treatment relationships with health insurers. And, important decisions about insurance are frequently made through employers.

Unfortunately, the law tends to view each of these relationships as bilateral and one dimensional, rather than as part of a complex web of relationships. For instance, courts that adjudicate disputes over insurance coverage often fail to see that decisions about medical necessity for insurance purposes might also affect physicians’ standard of care under liability law. Also, because law operates at a level of abstraction, it ignores a good deal about the circumstances of medical personnel and institutions by assuming they respond in predictable ways to a narrow range of stimuli.

In sum, considering the psychological reality of treatment encounters and the complex structure of relationships among patients, physicians, facilities, insurers, employers, and many others, we need a law of relationships that accommodates the unique features of the medical arena, not a set of generic or abstract legal principles derived largely

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7 See, e.g., Carl E. Schneider, The Practice of Autonomy: Patients, Doctors, and Medical Decisions (1998) (examining whether patients actually want the responsibility of making medical decisions for themselves and whether they have the ability to do so effectively).


from commercial law or the law of individual rights. That law of rela-
tionships must be based on a view of the world as it actually is, of
people and institutions as they actually are. Not least, that law must
recognize the status of patients and the psychological and emotional
vulnerabilities entailed in seeking medical care.

So what is to be done? Lawmakers need to be alert to the choice
between transactional and relational perspectives in medical law.
Examples of each can be found sporadically in judicial decisions,
statutory and regulatory authorities, and academic commentary, but
these choices are usually made without reflection. Therefore, no con-
sistent pattern has emerged, and the choices are often ill advised (in
both directions). In short, some areas may benefit from being less
transactional, while others may need to remain primarily transactional,
or become less relational. An analytical framework is needed to iden-
tify the important issues and provide conceptual tools for deliberation
and resolution.

If lawmakers are to make wise choices about when to proceed
transactionally and when to proceed relationally, they will need to
understand better than they do how the world actually works. And
crucially that will be possible only if scholars are willing to do what
they have been promising to do since the legal realists—empirical
research. Indeed, even if courts and legislatures persist in an implaca-
bly transactional approach, the malign effects of that approach will be
considerably ameliorated if the nature of the transactions and the ef-
fects of legal regulation of them are better understood. Only in this
way will medical-law scholars and lawmakers realize just how often
the world works in unanticipated ways that keep law from achieving
its purposes.

The search for a general theory of medical law is the search for a
chimera. But scholars of medical law can usefully unite in a shared
analytical framework—one that brings more rigor to the intuition that
medicine differs in fundamental ways from other social and business
arenas. Doing so will generate conceptual and empirical tools for
deciding whether and when these special qualities should matter for
the law and when they should not. In sum, we may find medical law’s
“there” not in grander principles but in a wiser method.