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SOME REFLECTIONS ON TEACHING LAW AND MEDICINE IN LAW SCHOOL SINCE THE '60s

Walter Wadlington[†]

WHEN I BEGAN TEACHING and writing in the field of law and medicine in the 1960s, there was little formalized course structure. Some old law school hands dismissed the subject as devoid of significant intellectual content and simply another of the trendy “Law and . . .” courses that were cropping up in the law school curriculum at the time. Some of those detractors seemed to regard a young law professor’s venture into the field as a something akin to academic lemmingsmanship. My own law school’s initial attitude toward my new involvement seemed first to be one of acquiescence; fortunately it soon became more supportive. Some of our senior medical school administrators and professors were very encouraging from the start and even willing to participate. I like to think that they agreed with me that medicine was on the verge of major structural changes in the direction of a regulated industry, that it was about to confront major legal issues such as patient privacy; and that the medical community needed to learn more about law, to communicate more closely with lawyers, and to stop regarding lawyers in general as persons who might sue them for malpractice at any moment for no good reason. (I do not suggest that the last view was universal, but it was surprisingly widespread).

A separate but related field, law and psychiatry, had gained early acceptance and prominence, perhaps because of an existing regulatory structure and a more clearly delineated scope, the early availability of collections of readings and teaching materials, as well as longstanding legal debates and court decisions about rights of the mentally ill in both criminal and civil settings. The field remains important today, though it has remained largely distinct and has not experienced the prodigious growth seen in law and medicine in recent years. Although there has been some cross teaching, many law and psychiatry professors focus almost entirely on that field.

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The development of a "standard" Law and Medicine course long has been elusive. Twenty-seven years ago, in an address to the Society of Public Teachers of Law in England (who were curious about what we were doing), I pointed out at least five types of basic areas that could form core courses under the Law and Medicine label in United States law schools.¹ These were described as:

1. Courses, which emphasize most strongly the problems of professional negligence, or malpractice. A variation within this category would distinguish courses designed primarily to train lawyers to be plaintiff or defense counsel from those offerings which try to develop alternative compensation schemes as a way out of our present chaotic state.
2. Courses which approach medicine as another regulated industry and deal with the legal aspects of a complex health care delivery system. Key concerns include licensure . . . , hospital governance, problems of cost control, programs for peer review, group practice, and development of new organizational approaches such as the Health Maintenance Organization (HMO). Fair game also would be the problems of implementing our nascent national health care system and developing a more inclusive one at a cost we can afford without lowering the quality of care
3. Courses which are oriented most strongly toward grappling with the legal and social challenges presented by the rash of major scientific and medical breakthroughs which we have witnessed recently, including work in the area of genetics. These "How do we cope with bio-medical progress?" courses have great attraction for students who may have little concern for the day-to-day problems of malpractice and hospital administration. Organ transplantation, surrogate motherhood, genetic engineering, amniocentesis, cloning and providing a workable definition of death would be typical of areas of interest. Participation by ethicists and theologians in some such courses is at least as important as that of doctors.
4. Courses which emphasize problems of forensic medicine, particularly methods of proof, assessment of disability, the work of the medical examiner, the effectiveness of various types of testing and examinations from blood typing and voice prints to lie detectors and hypnosis. Within this frame-

¹ Walter Wadlington, *Teaching Law and Medicine in the United States*, 14 J. SOC'Y PUB. TCHRS. L. 96 (1977).

work the emphasis may vary in accordance with whether the concern is for criminal or personal injury litigation.

5. Courses which focus on the potential problems of securing and protecting against the invasion of human rights within the medical framework. The problems of human experimentation, whether on children or adults, are stressed in such an offering, along with abortion, the right to receive and/or refuse treatment.²

I suggested that the model approach probably would include a basic survey course and an additional group of specialty courses,³ which is typical of what we have today in many schools. I also pointed out that ready availability of teaching materials would be important to expansion.⁴ That need soon began was resolved with the publication of traditionally styled collections of cases and materials in hard cover;⁵ typically these included material from all of the above categories and more, allowing considerable eclecticism in structuring a course or for use in teaching several different courses.

A number of other factors soon helped fuel an increase in the number and scope of courses, including legal reforms of professional liability and a greatly expanded interest in biomedical ethics. Some persons ostensibly approaching the biomedical ethics field, which is not fully defined even now, assumed that lawyers were the appropriate persons to deal with the subject, and it was not uncommon for some program planners to invite only a lawyer to a bioethics meeting to serve as a twofer. This may have reflected the popular misassumption that if something was ethical, it was also legal. Over time, lawyers have gained greater backgrounds in bioethical issues, and courses on the subject are available in many law school curricula, for which separate sets of teaching materials are available.

Another explanation for greater student interest in law and medicine was the increase in the numbers and types of job opportunities in law practice. It is sometimes said that physicians discovered due process of law in the context of staff privilege contests. The relatively new position of hospital counsel developed from these kinds of managing issues. While there had long been a few specialty areas, such as food and drug law, the demands of new entities such as HMOs and IPOS, and specific transactions, such as buying and selling medical

² *Id.* at 96-97.

³ *Id.* at 96.

⁴ *Id.* at 102.

⁵ See, e.g., WALTER WADLINGTON, JON R. WALTZ & ROGER B. DWORKIN, *CASES AND MATERIALS ON LAW AND MEDICINE* (1980).

practices, created new, highly specialized, and often fragmented practice areas. Boutique law firms developed and many major firms established separate health care sections, some of them highly specialized.

The annual Association of American Law Schools Directory of Law Teachers lists law school faculty members who describe themselves as teachers in a particular field. A review of the numbers over the past thirty-five years testifies to the increasing interest in the field. The 1967-68 Directory listed 123 Law & Medicine teachers, only 11 of whom had experience in the field for over 10 years.⁶ There was no separate listing for Law & Psychiatry. The 1971-72 Directory listed 125 Law & Medicine teachers with no more than 5 years experience, 27 teachers with 6-10 years and 23 with over 10 years (there was still no separate listing for Law & Psychiatry).⁷ The 1989-90 list included a category of Law & Psychiatry which included 121 persons, 60 of whom had been involved more than 5 years.⁸ The Law & Medicine section included 221 persons (39 of them with over 10 years experience), as well as a separate Health Care Law category with 51 persons, only 7 with more than 5 years experience.⁹ A notation in the Directory should be pointed out because it states that both Bioethics and Forensic Medicine are included in the Law & Medicine List;¹⁰ under the "Health Law" heading, a note indicates to see also Law & Medicine.¹¹ Unfortunately, we do not know why some persons choose one category or the other (and why some names appear in both), except for these notations. Nor are we certain how many persons in either category were currently teaching a course in the area. But even though the statistics are "soft," it is obvious that there had been a major increase in interest in law and medicine in law schools. The 2002-2003 list testifies to even further growth: 230 are listed under Health Care Law, 319 under Law & Medicine, and 114 under Law & Psychiatry.¹²

At one time, some law school curriculum observers thought that Law and Medicine might go the way of the ancient, usually required,

⁶ DIRECTORY OF LAW TEACHERS IN AMERICAN BAR ASSOCIATION APPROVED LAW SCHOOLS 661-62 (West Publ'g & Found. Press 1971) (1967).

⁷ DIRECTORY OF LAW TEACHERS 1971, at 661 (West Publ'g & Found. Press 1971).

⁸ DIRECTORY OF LAW TEACHERS 1989-90, at 1004 (West Publ'g & Found. Press 1989).

⁹ *Id.* at 983.

¹⁰ *Id.* at 1003.

¹¹ *Id.* at 983.

¹² THE AALS DIRECTORY OF LAW TEACHERS 2002-03, at 1260-61 (West Publ'g & Found. Press 1989).

course of agency. One explanation of agency's demise was that every law school course taught agency so it was simply not needed. The counterpart to this assertion for law and medicine was that much of it should be incorporated into existing offerings in administrative law, antitrust, torts, contracts and constitutional law. This argument is no longer viable, if indeed it ever was, if only because other courses are burgeoning with material aside from law and medicine already. Even the current inclusion of some law and medicine material within them does not permit the degree of probing and coverage that is now demanded.

I am now convinced that while there is still a place for a survey course in Law and Medicine, the present needs and demands make a series of more specialized courses, typically utilizing the same number of credit hours as the basic course, far more effective. For example, I have found in my course on children's medical care, co-taught with a physician/economist, that focusing on specific policy and legal issues (consent, privacy, religious issues, specialization, the hospital, and financial coverage, to name a few) can provide a more realistic perspective of the health care system today. And since my courses usually include fourth year medical students, residents, and fellows as well as law school students, interaction between class members is especially valuable. Indeed, a key goal in including medical students and physicians is to afford them a better understanding of how lawyers approach problems. The law students, on the other hand, learn about the milieu in which physicians must make decisions. Obviously, this is but one way of experimenting with the curriculum and it may not become a standardized course. However, it is my sense that other experiments are going on elsewhere, utilizing available resources, and that such variation of approach is becoming mainstream.

With the proliferation of courses in Law and Medicine, some law schools have started what are typically labeled as health care programs; some are directed at the graduate level and may include students from disciplines other than law or medicine. Other schools that have not formally announced such a structure nevertheless provide guideline information to students who profess their interest in a career in health law. These suggestions usually stress the importance of courses such as administrative law, intellectual property, and antitrust for the law student who wants to be best prepared for a career in health law. So even though there are many courses now offered under the land medicine rubric, the need for a basic legal foundation is not forgotten. This, of course, reflects the reality of the legal marketplace.

Perhaps the area of greatest current curricular experimentation involves increased interdisciplinary teaching. This may involve instructors from different fields outside of law, either team teaching or alone.

Or it can involve a class of students from different disciplines. (Obviously, it can also be taught by an interdisciplinary team with different student populations.) My most satisfying teaching in the field in recent years has been in courses divided between law students and medical students, residents, or fellows. This can present difficult logistical problems because of the different schedules of law and medical students, and the rigorous schedules of residents or fellows. Sometimes this can be overcome by short, intense offerings utilizing the elective blocks of medical schools. Aside from the substantive material that is covered, the lawyers learn about the milieu in which physicians must make decisions that may have potential legal implications while the doctors, on the other hand, gain far greater understanding of how lawyers approach problems and how the legal system works. The past 35 years have seen amazing growth in the law and medicine field, but it continues to expand and achieve greater sophistication through the many new specialty offerings and the different approaches that are being utilized today.