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Ken Wing

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LETTER TO THE EDITORS OF HEALTH MATRIX

Ken Wing[†]

OVER THE LAST FEW DECADES (and, apparently, beginning in 1953 at Case Western Reserve University) a lot of people in medicine and other health-related professions have developed a strong interest in legal issues, and a lot of lawyers have taken a comparable interest in health and health care-related issues. That's good. I hope they continue to do so. There are any number of health-related and legal problems that need to be attended to and taught and addressed through improved professional practice. Yet, have these activities produced a special or unique field or something that should be celebrated as such? I think not.

If there is something identifiable as health law, it certainly is not found in the wide and diverse range of academic activities that get offered under that label. People who teach law students about health-related topics claim to teach health law. People who teach public health students about law teach health law they say. As do people who teach medical students and nursing students and public policy students and anyone else who will sign up for Health Law 101. Are they teaching the same thing? No. Teaching law to health students is teaching mostly—surprise—law; teaching a health-related course to law students can be any one of a number of very different things, but it is a very different activity than teaching law to health students. (In fact, the people teaching law to health students would be better served, and provide better service to their students, if they entirely divorced their activities from those of people who teach health-related topics to law students.)

Even if you overlook the differences between these different target audiences, I do not think you can define something called health law by the topics or issues that are addressed in these courses either. In fact, if everything that gets taught in classes labeled “health law” is a field, it almost would be easier to answer the question “what's *not* health law?” If you need some visible evidence, consider the range of textbooks and the range of other materials that get used under the ae-

[†] J.D., Harvard 1971; M.P.H., Harvard 1972; currently Professor of Law, Seattle University.

gis of teaching health law. The syllabi for the health law course taught by a Chicago-school antitrust lawyer and that developed by a former poverty law attorney have nothing in common, save the title. There are health law textbooks that are almost entirely concerned with medical malpractice and others that are organized around traditional public health activities. Some at least claim to offer a cafeteria of health law topics from which one can selectively choose, but even these have surprisingly little in common with one another. Much of this diversity has to do with turf, but that's another story. But there is not much here that looks like a unified field.

And I surely don't think there is something called health law that is defined by the nature of its professional practice. To the contrary, the practitioners who claim to be doing so would be the first witnesses for their own prosecution. Imagine empanelling this group of lawyers: one who does malpractice, one who does the business transactions for physicians and other providers, and one who helps prospective nursing home patients qualify for Medicaid. Each might well claim that to be a practitioner in the "dynamic" (and, in two of the three cases, lucrative) field of health law. Do they or their work have anything in common? If each is a specialist in health law, why is it that none of them would have any idea about what the other is doing or even talking about? Add some other health law wannabes to your panel: a physician who really wanted to go to law school (or, worse yet, one who *did* and became one of those delightfully odd joint-degree people), or a bioethicist, or someone who works in forensics. It begins to sound like one of those "three guys are stuck in a lifeboat" jokes, doesn't it? What it does not sound like is a group of experts from the same field talking about the same thing. To the contrary, it sounds like, well, most of the conferences and symposia that have been put on during the last few decades under the title of "health law." Some of these conferences have been interesting and some have been educational or at least worth the several hundred dollar registration fee. Most have been somewhat disjointed and none should have convinced anyone that a separate field called health law has been discovered and defined.

There just is not enough that is unitary here. There is no severable body of principles, or even a set of issues, defined by either circumstances or type of controversy. Health law involves the legal issues that arise in the delivery of patient care? Well, that begins to define the subject, but that is only part of what's called health law. Legal issues related to health care? To health? I suppose those definitions work, but what is the point of such a broad and meaningless definition – and what makes the field special?

Contrast some things that *are* discrete fields: contracts, or torts, or even constitutional law. There are some knotty borderline problems in sorting them out, but most of us can roughly describe what they are and what they are not. There are specialty areas of law that derive from their unique statutory bases: tax law, antitrust law, or, arguably, welfare law. Is health law a severable body of principles? Is it defined by some set of health laws or statutes? No and no. There are some specialized statutory schemes involved in the pursuits of those who would be health lawyers, the Medicaid or Medicare statutes, or, perhaps the best example, the federal fraud and abuse laws, but they are only one small part of what gets called "health law." As the members of that eclectic panel will quickly remind you, my health law statute is not your health law statute. More importantly, to the extent that I understand what I was told at the last health law conference I attended, as a good, up-to-date health lawyer, I have to know not only what's happening with Medicaid and Medicare and the federal fraud and abuse laws, but also the recent shifts in antitrust law and some new cases in malpractice law and some new things about contracts and torts and constitutional law. Message received. Effort made. Does that make me a specialist? Is it helpful, let alone accurate, to think of myself as a specialist when trying to do what I need to do in academia or in my practice?

Arguing about whether or not health law is a discrete field might be simply academic if there were some unique contributions or notable accomplishments that had been made under the banner of health law. But frankly, I can't find much that would qualify. Have there been any great works produced by this emerging field of health law? Check those health law teaching materials again. Ask around at the next conference or get-together for the "must reads" of health law. The answers you will get will be ambivalent and unconvincing. *The Social Transformation of American Medicine*¹ will come up a lot, a 1982 work written by a sociologist (who, I am fairly sure, hates lawyers, specialized or otherwise). There are some oldies but goodies that you may hear about, such as *The Dance of Legislation*² or *A Sacred Trust*,³ to pick a couple of likely examples. Shouldn't a new field pro-

¹ PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* (1982) (discussing the evolution of health care in the United States).

² ERIC REDMAN, *THE DANCE OF LEGISLATION* (1973) (using the National Health Service Corps bill to illustrate the interaction between the staff and the legislators in the lawmaking process).

³ RICHARD HARRIS, *A SACRED TRUST* (1966) (describing the thirty year battle for the passage of health care legislation, culminating in the passage of Medicare).

duce something that is new? There are God's own quantity of special reports about law and health care and the nation's health and what is wrong with any or all of them. Some people still read those tomes produced by the President's Commission on Bioethics back in the 1970s. In the last few years the Institute of Medicine has issued some interesting reports on the quality of health care.⁴ I've read them and taught from them and I may do so again, unless I find something better in the annual report from the Medicare Payment Advisory Commission or the final report on of the National Bipartisan Commission on the Future of Medicare or the latest GAO study documenting horrible things happening in nursing homes. Lots of good people have written about lots of important things. Is there anything among them that could be the called the great works of health law, or of health lawyers, or provide evidence of the existence of either? Will you be rereading any of these five years from now?

The journals, law reviews, and other offerings of what could be called health law scholarship are more notable for their number than their contribution; they have not provided articles that every health law student ought to read. Is it possible to name even one crucial article? Many have been called to write; few have answered in any memorable way. Quick, can you name three law review articles that every health law student ought to read? Name two. One? I have my favorite works and favorites authors. Deborah Stone has written a couple of terrific essays on health care financing⁵ and I highly recommend them. I'll read anything written by Bruce Vladeck or Sarah Rosenbaum. I think Robert Evans' stuff on health economics is terrific and very readable.⁶ (Say that about another economist!) Others will say comparable things about the writings of Lucien Leape or Ewe Reinhardt or any one of a number of other talented people. But there is no evidence among these works and these people of the burgeoning of a distinguished or distinct field. Most of these people aren't even lawyers let alone some subspecies called health lawyers.

The closest thing I can think of to a health law "must read" that has been written in the last decade is the book *Ashes to Ashes*.⁷ Un-

⁴ E.g., COMMITTEE ON THE QUALITY OF HEALTH CARE IN AMERICA, INSTITUTE OF MEDICINE, TO ERR IS HUMAN: BUILDING A SAFER HEALTH CARE SYSTEM (Linda T. Kohn et al. eds., 1999).

⁵ Deborah Stone, *The Struggle for the Soul of Health Insurance*, 18 J. HEALTH POL. POL'Y & L. 287 (1993); Deborah Stone, *Managed Care and the Second Great Transformation*, 24 J. HEALTH POL. POL'Y & L. 1213 (1999).

⁶ E.g., Robert G. Evans, "We'll Take Care of it for You": Health Care in the Canadian Community (1988); Robert G. Evans, *Canada*, 25 J. HEALTH POL. POL'Y & L. 889 (2000).

⁷ RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR*

fortunately, it is already out-of-date and, more to the point, I wouldn't characterize it as health law, and, I believe, neither would its author. Indeed, most of the good writing that might be called great health law is not law at all, health or otherwise, but is rather a mixture of economics, history, political science, and journalism. There are good writers who have written materials that concern health and law, but if there is a discrete health law field, it has not produced a Richard Kluger, or even a Bruce Vladeck or a Robert Evans. Some field.

This field which is not a field has not produced any statesmen or politicians either. In the last several decades Congress and, on occasion, a few upstart state legislatures have considered various large-scale health care reform measures. You would think that if there were a growing cadre of specialized health lawyers out there—people with unique “health law” skills or special “health law” knowledge or just enhanced enthusiasm for the subject—their contributions to these debates would be the ultimate proof of why they deserve to be treated as denizens of a separate and notable field. But again I think the evidence is more than lacking and it points in the other direction. Health lawyers, collectively or individually, failed to distinguish themselves in the debates over Carter's plans for national health care reform, or George Bush, Sr.'s short-lived effort to establish catastrophic health insurance, or whatever it was that Hillary Clinton didn't manage to do for us. The principles of health law were not a helpful part of the debates in Vermont, Washington, or any of the other states that could not wait for national reform. Those political moments and opportunities came and went without a visible health law sighting, despite all that was written for and against reform, and about the process of its consideration, and in memoriam to its failure. Nothing, among all that writing, made the case that health law lives and thrives or that the voice of health law is extant and should be even more prominent in the next debate. And I don't even want to talk about the contributions of health law and health lawyers to the public debates that have been spawned by the AIDS epidemic or to the more recent debates concerning national security and the threat of bioterrorism.⁸ Indeed, the best work and the most significant contributions to these issues have come from scientists and public health workers and people who have little or nothing to do with something called “health law.”

CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS (1996) (chronicling the history of the American tobacco industry and the impact, or lack thereof, from lawsuits, legislation, and public health initiatives).

⁸ I have talked about this before. See Ken Wing, *Policy Choices and Model Acts: Preparing for the next Public Health Emergency*, 13 HEALTH MATRIX 1, 71 (2003).

Professionals and their organizations often do things to enhance their own status, at least in their own eyes. We have our professional societies and annual get-togethers. We take turns giving each other awards of recognition and leadership and dramatically declare what we did first or best. We claim we are leaders of specialties and sub-specialties, in part because, after all, it is easier to be among the leaders in a small field than in a big one. When someone asks me about the past and future of health law, my fear is that what is driving that inquiry is the kind of lets-admire-ourselves-in-the-mirror mentality that drives the Seattle Chamber of Commerce and the Northwest Academy of Dance Instructors and the National Association of Deputy Sheriffs. Why can't we just be lawyers and teachers? Isn't that enough? What we do as lawyers and teachers is create opportunities for people to sit and talk and think about important problems relating to health and health care. We do so as lawyers and teacher, not as health law specialists. If the Law-Medicine Center began it all, that's great and that's enough. Let's celebrate that. But let's not worry about what it's called. The important thing is that we all do it well and try to get better at it in the future. The truth of the matter is that I do not think there is much out there that deserves to be called health law, let alone a whole field of it. So as to where health law has been—or is going—I do not have much of an answer because I do not think it is much of a question.