This eighth edition of this casebook marks the thirty-first anniversary edition of our text, first published in 1987. Since that first edition, no part of the American landscape has changed more than the American health care system. The system has been stressed by demographic changes, buffeted by the winds of political change, and utterly transformed by social and economic developments. The formal structure of the business of health care was a small part of the subject of health law when we published our first edition; it is now the largest industry in the country and the subject of entire graduate programs. The for-profit commercial sector of the health care economy sounded like a lamb twenty years ago; now it roars like a lion. Until a few years ago virtually no one attained elective office because of her position on issues related to health care; now health care and health care reform is the most politically controversial issue in America.

While the perspective that we must bring to the legal analysis of health care is far broader now than it was thirty years ago, the fundamental concerns on which that analysis is brought to bear are surprisingly unchanged. As was the case in 1987, we want to know what role the law might play in promoting the quality of health care, in organizing the delivery of health care, in assuring adequate control of the cost of health care, in promoting access to necessary health care, and in protecting the human rights and the individual values of those who are provided care within the health care system.

The eighth edition of this casebook continues to use the broad organization that health law teachers and students found so helpful in the prior editions. As was the case in previous editions, we employ materials from a variety of sources. This book continues to contain the most significant and useful judicial opinions dealing with the issues of health law, drawn from the federal and state courts. The book also contains statutes, legislative history, administrative regulations, excerpts from contracts, consent forms, trial transcripts and a host of other kinds of materials designed to bring the subject of health law to life in the classroom. It also contains many classroom-tested problems that should be helpful in encouraging reflections on these materials. While many of the problems and other materials have been brought forward from earlier editions of this book, every section of this casebook has been rewritten and the organization of the text reflects new developments in American health care. All cases, statutes, regulations, and other materials in the casebook have been edited to enhance their teaching value while assuring that they reflect problems faced by health lawyers coping with the health system in
2018 and beyond. The notes expose students to a range of the most subtle health law inquiries under discussion at the time of publication.

This casebook is divided into an introduction and four major sections. Chapter 1 provides a brief introduction to major issues and themes addressed in the rest of the book—cost, access, quality and choice. The next five chapters (chapters 2 through 6) address ways in which the law can contribute to the promotion of the quality of health care. This part of the casebook includes thorough treatment of governmental efforts to assure the quality of health care services, including the interaction between public and private quality initiatives, as well as extensive analysis of both professional licensing law and medical malpractice law.

The second part of the text (chapters 7 through 11) is substantially reorganized and rewritten for this new edition. These chapters address both private and public financing mechanisms in the many varieties that have been formed and reformed over the past several years. This section includes a new, dedicated chapter on discrimination in health care, a full analysis of the consequences of ERISA, a newly restructured and rewritten chapter explaining the options available to those who want to reform the American health care system, an updated chapter addressing the Affordable Care Act and its subsequent legal and political challenges, and a chapter on the two largest government health care financing programs—Medicare and Medicaid.

The third part of the book (chapters 12 through 16) describes the role of the law in organizing the health care enterprise. This section of the casebook includes materials on different ways in which the business of health care delivery can be organized, materials describing the legal relationships among different players in the health care enterprise, including separate chapters on professional relationships in health care, organizational structures and corporate law, tax, health care fraud and abuse, and the application of antitrust law to health care.

Finally, the fourth major section of the text, (chapters 17 through 22) provides students with background on the role law plays in protecting the human rights of those who interact with the health care system as patients or as participants in medical research. This section of the casebook addresses the current status of laws regulating abortion, contraception, assisted conception, and human reproduction. This section of the casebook provides extensive discussions of the controversies over the definition of death, organ transplantation, the law of health care decision-making, and medically assisted dying. The casebook also includes a review of legal regulation of research involving human subjects, and it concludes with a chapter that addresses developments in population health. Throughout the text, we have included materials on genetics, as well as updated and expanded materials on issues of justice and equity across many
dimensions. All of these materials have been reviewed to assure that a wide range of perspectives leaven the authors’ analysis of health law.

This casebook is designed to be a teachable book. We are grateful for the many comments and helpful suggestions that health law teachers across the United States (and from elsewhere, too) have made to help us improve this new edition. We attempt to present all sides of policy issues, not to evangelize for any political, economic or social agenda of our own. This task is made easier, undoubtedly, by the diverse views on virtually all policy issues that the several different authors of this casebook bring to this endeavor. A large number of very well respected health law teachers have contributed a great deal to this and previous editions by making suggestions, reviewing problems, or encouraging our more thorough investigation of a wide range of health law subjects. We are especially grateful to Charles Baron, Eugene Basanta, David Bennahum, Robert Berenson, Kathleen Boozang, Don Chalmers, Ellen Wright Clayton, Judith Daar, Dena Davis, Arthur Derse, Kelly Dineen, Ileana Dominguez-Urban, Stewart Duban, Barbara Evans, Margaret Farrell, Rob Field, David Frankford, Michael Gerhart, Joan Mclver Gibson, Susan Goldberg, Jesse Goldner, Andrew Grubb, Sarah Hooper, Art LaFrance, Diane Hoffmann, Jill Horwitz, Amy Jaeger, Eleanor Kinney, Thomasine Kushner, Pam Lambert, Theodore LeBlang, Antoinette Sedillo Lopez, Mary Pareja, Lawrence Singer, Joan Krause, Leslie Mansfield, Thomas Mayo, Maxwell Mehlman, Alan Meisel, Vicki Michel, Frances Miller, John Munich, David Orentlicher, Vernellia Randall, Ben Rich, Arnold Rosoff, Karen Rothenberg, Mark Rothstein, Sallie Sanford, Giles Scofield, Jeff Sconyers, Charity Scott, Ross Silverman, Loane Skene, George Smith, Roy Spece, Jr., Carol Suzuki, Michael Vitiello, Sidney Watson, Lois Weithorn, Ellen Wertheimer, William Winslade and Susan M. Wolf for the benefit of their wisdom and experience.

We wish to thank those remarkable research assistants who provided support for our research and the preparation of the manuscript, Debra Au, Elizabeth Bertolino, Elysa Buckley, Erin O’Malley Gleim, Laura Hagen, Joshua Hasyniec, Delanie Inman, Min Ji Kim, Alexandra Montague, Kristin E. Rodrigues and Anna Zaret. We are also very appreciative of the tremendous support and the publication assistance provided by Greg Olson, Jon Harkness and Cathy Lundeen of West Academic Publishing. We are also indebted to our casebook shepherds—Mary Ann Jauer for the first 25 years of the casebook, and now Cheryl Cooper. We appreciate those who were there for us during the nights and weekends we spent working on this project: Roger Fuse Brown, Maripat Loftus Gatter, Robert Johnson, Nancy Jones, James King, Donna Jo Napoli, Ruth Stoltzfus Jost, Ben Walker, Cary White and Jane Zwisohn. Finally, we wish to thank our deans, Roger Dennis, David Faigman, Dan Filler, Wendy Hensel, Steven J. Kaminshine, William Johnson, Sergio Pareja and Michael Waterstone.
It has been a splendid opportunity to work on this casebook. It has been a constant challenge to find a way to teach cutting edge issues influencing our health care system—at times before the courts or legislatures have given us much legal material for our casebook. Each time we have done a new edition, there have been developments that we find difficult to assess as to whether they will become more significant during the lifespan of the edition or are simply blips. It is always difficult to delete materials that required much labor and still remain quite relevant but that have been eclipsed in importance by others, and the length of each succeeding edition attests to our challenge. The good news is that this edition reverses one trend of the past twenty-five years; it is actually shorter than its predecessor edition. We do not write this casebook for our classes alone, but for yours as well. We enjoy teaching, and we hope that comes through to the students and teachers who use this book.

Finally, this edition marks a substantial change in the authorship of the material. After thirty-one rewarding years writing and rewriting this casebook, the original authors are now passing off the torch (and the benefit that goes with it) to five thoughtful and inspired successors. This is not because the original five authors have grown tired of the endeavor—we all still love doing this quadrennial casebook labor. We have come to realize, though, that the casebook needs to be revisualized through the eyes of scholars and teachers who have come to this enterprise more recently and who have new and exciting approaches to teaching law more generally. We feel especially lucky to have found five brilliant health law scholars in complementing areas who are willing to take on this project and work collectively. In this edition, all ten authors worked to produce the final casebook. In the following editions, the new five authors will be responsible for all facets of the casebook. You will be able to find the original five authors in our respective pastures, blithely grazing (albeit still concerned about systemic health reform).

BARRY R. FURROW
BELLAGIO, LAKE COMO, ITALY

THOMAS L. GREANEY
THE TAVERN, SANTA CRUZ,
CALIFORNIA

SANDRA H. JOHNSON
DISNEY WORLD, FLORIDA

TIMOTHY S. JOST
BADEN-BADEN, GERMANY

ROBERT L. SCHWARTZ
PAGO PAGO, AMERICAN SAMOA
Preface

Brietta Clark
Los Angeles

Erin Fuse Brown
Atlanta

Robert Gatter
St. Louis

Jaime King
San Francisco

Elizabeth Pendo
St. Louis

April 2018