

PREFACE

This ninth edition of this casebook marks the thirty-fifth anniversary edition of this text, first published in 1987. Since that first edition, the American health care system has undergone striking changes. 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 the first edition was published; 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, more than 10 years after the passage of the Patient Protection and Affordable Care Act (ACA), health care and health care reform is the most politically controversial issue in America.

Since the last edition of this text, the COVID-19 pandemic has inflicted devastating loss of life and health, as well as profound economic and social disruption. It has exposed and exacerbated inequities experienced by racial and ethnic minorities, people with disabilities, and other disadvantaged groups, underscoring the growing view of health law and policy as part of a broader framework that encompasses movements addressing social inequities and injustices. The ninth edition centers the broader goal of a more just and equitable health care system, and reimagines the traditional concerns of cost, quality, access and choice through this lens. We still want to know, in pursuing justice and equity, 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 ninth edition of this casebook incorporates issues of equity and justice throughout 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 2022 and beyond. The notes expose students to a range of the most subtle health law inquiries under discussion at the time of publication, including issues raised by the COVID-19 pandemic.

This casebook is divided into an introduction and four major sections. Chapter 1 provides an introduction to health law and policy as part of a broader framework that encompasses justice and equity movements, and reframes traditional concerns of cost, access, quality and choice. The next four chapters (chapters 2 through 5) 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 analysis of both professional licensing law and medical malpractice law. In this edition, materials on the professional-patient relationship and medical malpractice have been combined into a single chapter.

The second part of the text (chapters 6 through 10) is substantially updated and the chapters reordered for this new edition. The section now begins with an expanded chapter on discrimination and unequal treatment in health care, followed by an updated chapter explaining the options available to those who want to reform the American health care system. The chapters then provide a full analysis of the consequences of ERISA, an updated chapter addressing the ACA 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 11 through 15) 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 16 through 21) 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 and up-to-date 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 current 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 U.S. (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, Kathy Cerminara, 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 McIver 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.

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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 new edition presents us with 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 retains the substantially slimmed-down size of the prior 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 the first edition authored by this group of five authors. We are deeply grateful to the original authors who created this book and sustained it over eight editions, Barry R. Furrow, Thomas L. Greaney, Sandra J. Johnson, Timothy S. Jost, and Robert L. Schwartz, for guiding us through the last edition. We know that we stand on your shoulders and are heartened by your trust in us to carry this book forward. We also thank Jaime King, who joined us for the eighth edition, and warmly welcome Liz McCuskey to the fold.

BRIETTA CLARK
LOS ANGELES

ERIN FUSE BROWN
ATLANTA

ROBERT GATTER
ST. LOUIS

ELIZABETH MCCUSKEY
PROVIDENCE

ELIZABETH PENDO
ST. LOUIS