Health Care As a Laboratory for the Study of Law And Policy

Clark C. Havighurst

Unlike most law school courses, health care law cannot be taught simply as a discrete body of legal doctrine. Instead, the teacher of health care law finds many points at which some larger body of public law (e.g., tax or antitrust) or private law (e.g., torts or insurance) impinges on health care providers or patients and creates special problems that warrant separate study. Although there are also many statutes, regulations, and legal rules that apply exclusively to the provision and financing of health care, they affect so many different matters, emanate from such diverse sources, and are so uncoordinated, inconsistent, and incomplete that they fail to constitute a coherent legal regime that can be studied as an integrated whole. In short, it quickly appears that the common denominator that best unifies the study of health care law is the health care industry itself.

My own course in health care law is organized around the special institutions of the industry and the public-policy concerns and issues to which they give rise. This essay attempts to indicate the substantive scope of the course and why I regard a course in health care law as potentially more than just a curricular frill and preparation for practice in a specialized field. Precisely because the legal framework within which the health care industry now operates is so amorphous and unsettled, health care law provides a uniquely valuable vantage point from which to view generally the operation of legal institutions and the interplay of law and policy. It is a fortuitous additional benefit that the course also includes lessons in ethics, professionalism, and professional regulation that carry over to the law student's own profession.

Teaching Law in Action

Making a single complex industry the focal point of a law school course is something of a pedagogical innovation. To be sure, there have been courses in transportation, communications, and banking law, but they have mostly focused on particular, relatively coherent regulatory regimes. Perhaps occasional courses in sports law, education law, entertainment law, or agricultural law have addressed a range of legal problems besetting a single field of activity, but these fields lack the magnitude, complexity, and universality of health care. The study of law in such specific contexts does have the virtue of capturing some of the reality of law practice—legal

Clark C. Havighurst is William Neal Reynolds Professor of Law, Duke University School of Law. This essay is adapted from the Foreword to Clark C. Havighurst, Health Care Law and Policy: Readings, Notes, and Questions (Westbury, N.Y., 1988).
problems pop up in all directions rather in accordance with some internal logic of the law itself. But health care law also offers superior opportunities for conveying information about, and insights into, the legal system itself. In my more idealistic moments, I visualize a course in Health Care Law and Policy as a third-year elective that students would value not so much as a bread-and-butter subject as an exercise in applied jurisprudence that shows how law evolves and how it influences, for better or for worse, the overall performance of a single, intrinsically fascinating industry. In any event, without neglecting the practical side, I try to teach the course in this way, come who may.

The health care sector of the economy offers a unique opportunity for the study of law in action for several reasons. First, the industry has undergone extraordinary changes in recent years as professional dominance has given way to other influences. The rapidity of the transformation and the absence of any single watershed event or impelling cause create opportunities for observing the performance of the legal system in promoting, retarding, and adapting to developments. Although the legal system originally bolstered the old medical regime and embodied most of its tenets, changes in legal rules and doctrine eventually contributed to the collapse of the old system and the development of a more chaotic, partly market-driven system. There are, however, many respects in which the law has been slow to change and still inhibits innovative responses to new economic conditions. The contribution of legislation to the evolution of the industry has been mixed, reflecting old ways of thinking as often as new ones. At the same time, many of the most crucial developments in health care law, especially in the all-important antitrust sphere, have been the result of judicial decision. Again and again, the student will need to ask whether a particular statute, regulatory action, legal doctrine, or judicial decision comports with new developments or with any clear-cut public policy toward the health care field.

Health care law also provides special insights into the lawmaking process because so many significant issues affecting the industry and its legal environment remain unsettled. The questions yet to be resolved include not only legal fine points but many fundamental policy issues of a kind that are rarely open for more than academic debate. In addition to a continuing regulation-versus-competition debate, there has been an even more fundamental tension between, on the one hand, centralization of decision making in professional or governmental hands and, on the other hand, devolution of authority to consumers and their voluntarily selected agents. There are many useful lessons to be learned from witnessing efforts of the legal system to accommodate the aspirations of professionals, the interests of consumers, the rights of patients, the imperatives of the political system, and the democratic appeal of reforms based on consumer sovereignty and restored cost-consciousness.

The diversity of the sources of law governing health care also makes the health care industry a valuable laboratory for the study of the legal system. Both Congress and state legislatures have major roles. In addition to presenting issues of statutory policy and interpretation, the course offers
many illustrations of federalism in action (e.g., the Medicaid program and
many delegation and preemption issues, including several under the
state-action doctrine of antitrust law, the McCarran-Ferguson Act, and
ERISA). The administrative process is also heavily involved in health care;
the Health Care Financing Administration, the Federal Trade Commission,
and state licensing and other regulatory agencies all have major roles. Local
government is involved in the provision and financing of services and in
health planning.

Defining the proper law-making role of the judiciary presents especially
challenging issues in the study of health care law. Courts acting primarily
in a common-law mode govern several important areas (e.g., redressing
medical malpractice and defining hospital/physician relations and the
powers of voluntary associations). Federal and state courts are also involved
in evaluating health care legislation under constitutional norms, interpret-
ing statutes and their underlying (and sometimes conflicting) policies, and
supervising administrative action. Perhaps most tellingly, there are enlight-
ening opportunities for questioning the very need for judicial intervention.
The question of the appropriate scope of judicial activism arises vividly in
the health care field in the interpretation and enforcement of private
contracts, in the supervision of private actions (e.g., hospital staffing
decisions), in the oversight of voluntary organizations (e.g., agencies
engaged in accreditation and credentialing), in judicial review of question-
able statutes and administrative actions, and in the administration of
antitrust law.

Finally, cutting across everything else that the student must consider in
the study of health care law are major social policy issues. In addition to
engaging the student's political interest as an advocate for or against
extensive in-kind redistribution, the health care sector offers a good
opportunity to address such issues pragmatically, by focusing on both the
legal and practical details of entitlement programs and the disadvantages as
well as the benefits of different ways of addressing the needs of the poor.
Without losing sight of the important patient interests at stake, students can
examine issues relating to costs, including the hidden cross-subsidies
implicit in expedient legislative or judicial policies. Because American
society falls well short of honoring its professed commitment to providing
health care to those who cannot finance it for themselves, law students have
an excellent opportunity to encounter volatile public issues in the context of
the real-world governmental institutions and private actors that must be
involved in any redistributive effort.

Teaching Policy and Economic Issues

In addition to shedding light on the workings of the legal system, the
study of health care law can illuminate problems of public policy that a
student may not encounter so explicitly or so forcefully elsewhere in law
school. The problem of controlling health care costs, which absorbs so
much public and private energy, is best understood as a challenge to
achieve efficiency in the allocation of societal resources. Emerging evidence
about the limits of medicine and about the extent of scientific uncertainty dramatizes the challenge. Similarly, many of the claims made on behalf of the quality of care also raise (or should be seen to raise) questions of the how-much-is-enough variety. Although efficiency is a central theoretical concern of economics, attempts to achieve it in health care by either market or nonmarket means encounter major political and practical difficulties emanating from the prevalent belief that health (and, by implication, health care) has, or should have, no price. Law students would benefit from an introduction to such societal dilemmas and to the practical problems they present both to advocates and to public and private decision makers.

Other persistent themes in the rigorous study of health care law include the twin market imperfections that bedevil all risk shifting and insurance: “moral hazard” and “adverse selection.” At stake are the viability of private health care financing and the currently dominant policy of relying upon competition between financing plans to achieve efficiency. The market peculiarities that complicate health care financing often determine the form of public and private actions to control costs without sacrificing essential quality. A course in health care law can serve as an excellent introduction to the complexities of both social and private insurance.

Other large policy themes to which a student can be introduced through the study of health care law include the tension in the American polity between centralized and decentralized decision making—that is, between an orderly, regulated system featuring homogeneity, paternalism, and orthodoxy, on the one hand, and a disorderly, pluralistic marketplace featuring producer independence, consumer sovereignty, and competitive diversity, on the other. Although it is customary to speak of a health care “system,” developments in recent years appear to have moved the nation away from earlier visions of a social enterprise operated under fairly strict professional or governmental control. A related issue is whether government regulation or some more market-oriented alternative offers the better solution to the severe dysfunctions of the health care economy.

Breaking down the general themes further should lead the student to contemplate other issues that may not surface explicitly or with the same force elsewhere in legal training. The student is confronted at many points by questions concerning the performance of the legislative branch of government. Indeed, health personnel regulation and statutory prohibitions on commercial practices in health care provide some of the best illustrations of the ability of interest groups to use state legislative processes to secure their own advantage. An introduction to “public choice” theory may impart some desirable sophistication while also preparing the student for the legislative struggles that are a constant feature of health care law at both the state and federal levels.

The study of health care law also invites attention to the role and utility of economic incentives and self-interest in motivating market participants, both lay and professional. A great deal of health care law revolves around the legitimacy of such incentives and of corporate agents, both nonprofit and for-profit, as intermediaries between professional and patient. Few law students are otherwise introduced to issues of this kind, to the not-for-profit
corporation, or to federal, state, and local tax exemptions. The policy context of the course can make the introduction to such issues particularly memorable.

Health care law also deals with information, the quantity and quality of which are vital to social control through either governmental action or market forces. The health care industry helps to offset the market's chronic underproduction of information when it provides authoritative opinion on quality by granting accreditation for institutions and credentials for personnel. The public, however, still lacks a diversity of sources and views on many debatable matters that are implicit in these judgments on provider quality or competence. Law students can ponder the role of information and the power of the legal system to influence its production and dissemination (e.g., in the parallel use of first amendment principles and antitrust law to lift artificial restraints on professional advertising). In many respects, the health care sector is appropriately viewed as a malfunctioning marketplace of competing ideas and not merely as a market for technical services. Indeed, many of the economic failures of the health care market can be laid at the door of one-party rule by the medical profession and the consequent lack of public debate and informed consumer choice.

Overview of a Course in Health Care Law and Policy

My course begins by introducing the basic institutional, legal, economic, and policy framework of the health care industry. In addition to highlighting access issues, this introduction focuses on the legal and policy tensions between altruism and professionalism, on the one hand, and commercialism and antitrust policy, on the other. The course then covers sequentially the two sides of the all-important quality/cost tradeoff without losing sight of the central reality around which the course revolves—the tradeoff itself. Personnel credentialing and regulation are taken up first, followed by careful consideration of the quality-of-care and related organizational and liability issues in institutions. Tort liability is examined at length as a quality-assurance mechanism, but with its policy implications in full view. The course then turns to cost containment, focusing first on government regulation of the private sector and then on cost-control measures employed in public programs. Finally, cost containment in the private sector, including such innovations as health maintenance organizations and preferred-provider arrangements, receives extensive attention. Throughout the treatment of specific legal topics, policy threads can be woven to produce a rich fabric.

Unfortunately, time constraints require that most "bioethics" issues be left in the background for another course or seminar. My course does, however, include at the end—as issues requiring a synthesis of cost, quality, and access concerns—some dilemmas related to medical technology and the rationing of health services, especially in the context of so-called "catastrophic" disease. Questions involving such hard choices and many others in the bioethical sphere seem to me best addressed only after one has a firm sense of the health care industry, its financing and cost problems, its mix of
public and private decision making, and the various mechanisms by which resources are or might be allocated to health care. In an ideal curriculum, bioethics would be taught in a last-semester seminar.

If teachers who were originally drawn to health care law by a fascination with philosophical dilemmas and the qualitative aspect of the doctor/patient relationship choose not to teach the proposed course because bioethical issues are downplayed, perhaps someone else on the faculty might be recruited to undertake the course. Although the subject matter may not fall into anyone's particular specialty, there are apt to be some law teachers who are looking for a vehicle—a laboratory, as it were—in which to impart to students the broad perspectives on legal institutions and public policy that a course focused on the health care industry can provide.