Introduction

Susannah Baruch, I. Glenn Cohen, Wendy Netter Epstein, Christopher Robertson, and Carmel Shachar

Health care today is the most regulated industry in America. Statutes and regulations govern everything from licensing and insurance to privacy and emergency care. In pursuit of the iron triangle of improved access, better quality, and lower cost, health law scholars have long focused on "public law," or law that involves governmental action, including action by administrative agencies at both the state and federal levels.

At the same time, US health care is substantially governed by private relations and dependent on operation of the private market. Two-thirds of Americans are covered by private health insurance. Private insurers even play an important role in administering public programs like Medicare and Medicaid. Hospitals and nursing facilities are largely privately owned.

Hospital mergers and private equity acquisitions affect the delivery of care and the prices patients pay for that care. Medical debt continues to be a wide-ranging problem affecting the everyday lives of Americans, a problem worsened by the high price of pharmaceuticals sold by private manufacturers. Private employers also play an important role in health care, making decisions about benefits that can impact, for instance, whether employees can access reproductive services or gender-affirming care.

"Private law" classically refers to the law circumscribing relations between individuals and institutions behaving as private actors, for instance, the law that governs when one person reaches an agreement with another person for a given set of services and at a given price. The state's role is in the background to enforce the parties' agreement.

Although private law plays a central role in the delivery of health care, the intense focus on public law as the right mechanism to fix our health care system stems from two main conceits. The first is that government oversight is essential when it comes to something as crucial as the health and well-being of our citizens. The second is

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that the private market is subject to clear market failures in health care, including agency problems, collective action problems, and information problems.

In this volume, twenty-seven contributors take a fresh look at private law approaches to issues in health law, focusing on the US context. The chapters that follow consider whether private law is a pathology of or a potential fix for the US health care system. They interrogate in what ways private law might be used as a catalyst for health care reform, separate from federal or state initiatives. And they also explore the limits of private law approaches.

In Part I, *What Is Private Law? Theory and Structure*, the first chapter by William Sage, *Public Funds, Public Functions, Private Actors*, describes a cognitive dissonance at the heart of the American health care system: Private actors and private contractual relationships, fueled by large amounts of money, seem in constant conflict with public needs and struggling public health care systems. Barbara J. Evans engages with these assertions in *Private Ordering Is Ubiquitous in Health Care, but Why*? arguing that in the United States private ordering has been central as a practical necessity, in the face of constitutional constraints on government regulation of the health care system. In *Abandoning Fiduciaries in Health Care*, Lauren R. Roth uses game theory and game strategy to show how health fiduciaries are not adequately constrained in the face of conflicts of interest in the health care system. The part concludes with a comparative chapter, *European Distinctions between Private and Public Law in Health Care and the Emerging Influence of Private Lobbies* in which Barry Solaiman explores how private law and private entities operate in European health care systems, focusing on the United Kingdom.

Part II, *Tools of Private Law: Torts, Contracts, and Property as Vehicles of Health Policy*, reintroduces these three traditional tools of private law. Editor Wendy Netter Epstein's introduction asks us to consider how these tools might or might not address our most pressing problems. In his chapter, *Adaptation of Tort Law to Modern Health Care Delivery in the Restatement of Medical Malpractice*, Mark A. Hall explores medical liability. He sees tort law as capable of evolving with medical practice but not the right tool to effect change itself. Next, in *Pandemic Harms and Private Law's Limits: A Proposal for Tort Replacement*, Alberto De Diego-Habel, Jill R. Horwitz, and Daniel B. Rodriguez consider tort law in the context of the Covid-19 pandemic, arguing for a public tort replacement social insurance system to provide both compensation to those harmed and clarity to businesses. Turning to contract law, in *States as Contractor*, Christine H. Monahan, Maanasa Kona, and Madeline O'Brien describe how states can function as private actors and use contracting power to control costs. Craig Konnoth's chapter, *Data Transparency, ERISA Preemption, and Freedom of Contract*, argues that state laws to improve transparency in health care can serve a public regulatory function while also supporting private market functioning, which might encourage courts to reject ERISA preemption challenges. Finally, in *The Human Body Commons*, Enrique Santamaría Echeverría explores

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how private law might advance the right to health by supporting both open public access to scientific knowledge and innovation.

In Part III, "Russian Dolls, Reproduction, and Private Law," Editor I. Glenn Cohen introduces the relationship between private law and reproductive health care policy by describing a "nesting doll" structure like Russian *matryoshka* dolls. Even as private and public law influence each other, watershed events such as the 2022 decision in *Dobbs v. Jackson Women's Health Organization*[1] can still upend the project. Valarie K. Blake and Elizabeth Y. McCuskey's chapter, *Employer-Sponsored Abortion Coverage*, demonstrates how private employers have become policymakers on abortion access in America through both the health insurance they provide employees and their coverage decisions that impact care. Myrisha Lewis' chapter on *Reproductive Innovation and Reproductive Exceptionalism* focuses on family formation through reproductive technologies and the great variety of coexisting public laws and private employer policies that are still evolving. In *Business Responses to* Dobbs, Asees Bhasin looks critically at corporate gap-filling and private law itself, noting that corporate responses lack enforceability and prioritize profit maximization. Finally, Thomas Williams' chapter, *Privatizing the Creation of Equity in Women's Health*, looks at how private law (especially corporate law and contract law) and private equity influence "Femtech" – technologies aimed at promoting women's health and reproductive health.

In Part IV, *Controlling Costs: Private Law's Impact on Health Care Financing and Pricing*, Editor Christopher Robertson's introduction focuses on the centrality of private law – in a broader market largely dominated by the federal government – to issues of cost, who pays, and how physicians and insurers operate. Erin C. Fuse Brown's chapter, *Federalism, Private Law, and Medical Debt*, explores the issue of medical debt and the interplay between federal and state laws, which provide limited protection, noting that private enforcement mechanisms like Unfair and Deceptive Acts or Practices (UDAP) might bring increased accountability. In *Paying for Health Care and Private Law's Internal Point of View*, James Toomey focuses on opaque pricing in health care, noting that traditional contract law enforces agreed-upon prices while exploring the idea that contract law could draw from tort law's use of "reasonableness." In *Health Law's Sheathed Sword*, Jackson Williams finds high health care costs based on legal contracts are hard to solve with civil litigation and considers approaches such as class actions, involvement of state attorneys general, and lawsuits sponsored by foundations, unions, or other employee-based groups. In *The Canary in the Coal Mine*, Jamie S. King argues antitrust enforcement in health care has not kept pace with market changes, suggesting private actors could bring cases challenging problematic practices and potentially lowering prices. Finally, Jessica Mantel's chapter, *Health Care Finance Law's Relational Bias*, considers how to align the incentives of the provider with the interests of the patient,

[1] 597 U.S. 215 (2022).

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exploring Multi-Payor Alignment Incentives and ultimately arguing for a public law framework.

Part V, *Private Law Applied: The Pharmaceutical Industry, Nursing Homes, and the End of Life*, is introduced by Editor Carmel Shachar, who notes that while the chapters examine different aspects of health care, they reveal commonalities. In *Private Equity Firms and Digital Clinical Trials*, Ximena Benavides considers the role of private equity and private actors in pharmaceutical research, and the need for a greater sense of moral responsibility. Rebecca E. Wolitz, in *Shareholder Resolutions and Access to Medications*, notes that while managers and directors of pharmaceutical companies believe investors expect profit maximization, shareholder resolutions – a private law tool – reveal investors' concerns about high drug pricing. In *The Hollowed-Out American Nursing Home*, Barry Furrow argues that although private equity's focus on short-term returns for its investors means low-quality care for nursing home residents, a private law model of robust fiduciary duty could create meaningful protections. Finally, in *Health Care Organization Policies about the California End of Life Option Act*, Megan S. Wright and Cindy L. Cain show that despite implementation of medical aid in dying (MAiD) in California as a public policy, few individuals can meet its requirements because the private choices of health care organizations to opt out or limit its use undermine the policy.

As our society considers the experience and lessons of Covid-19 and the ongoing challenges in health care, it is a unique moment to document the interplay of public policy and private action in health law. Perhaps we may take solace in the possibility that openness to revised approaches, including theories of private law, may lead us toward a more effective legal framework.

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