PART II

Tools of Private Law

Torts, Contracts, and Property as Vehicles of Health Policy Introduction

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This part takes up the quintessential tools of private law – torts, contracts, and property – and considers their potential for fixing what ails our health care system. The list of problems in need of solutions is long. But at the top of that list are *cost* – we spend twice as much per person on health as peer nations – *quality* – we perform worse than peer nations in important quality metrics – and *access* – too many Americans are uninsured, underinsured, or otherwise lack equitable access to care.

The authors in the chapters that follow take a nuanced approach to a wide range of issues impacting health policy. They don't all agree on whether private law is the right tool to deploy, or whether we should instead be turning to public law, such as statutory or regulatory fixes. What emerges is a view that private law can be a useful tool, particularly when public law fixes are inadequate or unavailable, but that it cannot solve all problems.

The first two chapters consider the promise of tort law. Mark A. Hall, in Chapter 7 "Adaptation of Tort Law to Modern Health Care Delivery in the Restatement of Medical Malpractice," takes up the classic example of medical liability law. As a reporter for the American Law Institute's first project to restate medical liability law, he explores whether tort law is meeting the needs of a rapidly evolving health care system that bears little resemblance to its much simpler origins. Hall discusses three examples from the new Restatement: the formation of a treatment relationship, the scope of individual liability when professionals work in treatment teams, and the extent to which institutions may be liable for medical error. In a nuanced discussion, he concludes that tort law's dual features of inertia and adaptability make it capable of evolving as practice evolves but also make it not well suited to leading reform.

Alberto De Diego-Habel, Jill Horwitz, and Daniel Rodriguez also consider the promise of tort law – in their case, to both compensate for and deter pandemic harms. The harm that flowed from COVID-19 was immense, not just in the loss of over 1 million American lives but also in the health and economic consequences for

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many more. In their chapter (Chapter 8), "Pandemic Harms and Private Law's Limits: A Proposal for Tort Replacement," they argue that civil tort claims proved an inadequate legal tool and will continue to be ill-suited to address the harms of future pandemics. Difficulty proving causation largely stymied the usefulness of tort to COVID-19 victims. But it is also not clear that a better result would have been opening up the floodgates of liability to businesses already operating in a tenuous time. Instead, they argue that a publicly administered tort-replacement scheme – a form of compensation through social insurance – would be a better alternative in providing quicker, more efficient, more equitable compensation to those harmed, while also providing finality and certainty to businesses.

Two chapters then take on the promise and peril of using contract law as a vehicle of health policy.

In their chapter (Chapter 6), "States as Contractor: Attempts to Drive Health Care Cost Containment through State Purchasing Power," Christine H. Monahan, Maanasa Kona, and Madeline O'Brien describe how states, functioning as "de facto private actors," are using their contract powers to further public policy goals like cost containment. Some states use their gatekeeping power over their state-based ACA exchange to negotiate lower prices and better product offerings. States can extract concessions from insurers who seek access to state enrollees. Other states have contracted with private insurers to offer market-based public options, which advance cost containment goals without requiring a state to operate its own health insurance plan. State employee health plans also leverage their contracting power to contain costs, primarily by using their market power to negotiate lower reimbursement rates. In a world where regulatory price control might be the first-best option for cost containment but is politically infeasible, Monahan, Kona, and O'Brien see promise in state contractual approaches to control cost.

Craig Konnoth's chapter (Chapter 5), "Data Transparency, ERISA Preemption, and Freedom of Contract," similarly describes a complicated interplay between private actors, state law, and freedom of contract. Specifically, Konnoth takes on the recent proliferation of state laws aiming to improve transparency in health care, including regulation promoting All Payers' Claims Databases, requiring disclosure of pharmaceutical pricing methodology, and obligating plans and providers to disclose network status to guard against surprise medical bills. As a category, transparency laws serve a public regulatory function, but also support private market functioning, providing information to support consumers in making more informed choices. Courts have been finding state transparency laws to be preempted by ERISA. But Konnoth argues that courts may be more likely to reject ERISA preemption challenges if they consider the role transparency laws play in supporting contracting between private parties. Konnoth turns the original question on its head, addressing the extent to which public law or regulation should be used to improve the functioning of private markets.

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Finally, in Chapter 9 "The Human Body Commons: A Private Law Contribution for the Advancement of the Right to Health," Enrique Santamaría Echeverría takes on the important problem of the privatization of research, which can hinder innovation to promote collective health. Echeverria acknowledges the difficulty of the problem. On the one hand, keeping scientific knowledge in the public domain has tremendous value for researchers who seek to build on each other's work. On the other hand, innovation is spurred along by a promise of profits, which incentivizes innovators to protect their work from the public domain. Recognizing both the importance of the profit motive and the benefits of open access to research, Echeverria explores how private law, including contracts and property rights, can promote both interests.

These chapters together suggest important, continuing roles for tort, contract, and property law to promote the health and welfare of society. But they also highlight the insufficiency of these tools standing alone. Policymakers and lawmakers will have to continue to wrestle with how private law can be used to bolster systemic goals, but also with which policy goals and reform efforts require statutory and regulatory intervention.

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