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Law, Medicine and Forensic Science, Third Edition (By William J. Curran and E. Donald Shapiro)

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BOOK REVIEW

Law, Medicine and Forensic Science (Third Edition). BY WILLIAM J. CURRAN & E. DONALD SHAPIRO. BOSTON: LITTLE, BROWN AND COMPANY. 1982. Pp. 650. \$28.

*Reviewed by Marshall B. Kapp**

Mention the term "health law" to the average person, including most attorneys and health professionals, and one will immediately conjure up visions of medical malpractice litigation. Private lawsuits brought by individual patients seeking monetary damages from their health care providers based on alleged breach of professional duty have been a part of this nation's legal and social landscape for a considerable time.¹ The prosecution and defense of such claims has kept a substantial number of attorneys quite gainfully occupied. Medical malpractice continues today to be an increasingly prolific area of legal activity, owing to factors like the ever-growing organizational and technological complexity and impersonality of health care delivery, the escalating costs of obtaining health care, and generally more demanding public attitudes fostered by the civil rights and consumer movements—and their triumphs—of the past quarter century. New legal theories, unthought of just a few years ago, such as "wrongful life" and "corporate liability," are now routinely argued, and in many cases accepted, bases for imposing financial liability upon individual and institutional health care providers. Malpractice litigation continues to be a major and expanding source of legal employment.

But the subject of health law today encompasses an ever-widening field of constitutional, statutory, regulatory, and common law of which medical malpractice is but one small part. In definitional terms, health law is "a specialty area of law and law practice related to the medical and other health fields."² It is comprised of many separate but interrelated components of which two are primary.

Medical law consists of that body and practice of law that directly affects the manner in which health care is organized, delivered, and

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1. See, e.g., J. LIEBERMAN, *THE LITIGIOUS SOCIETY* 66-82 (1981).

2. Curran, *Titles in the Medicolegal Field: A Proposal for Reform*, 1 *AM. J.L. AND MED.* 1, 11 (1975) [hereinafter cited as Curran].

financed.³ It is what the legal system does for, and to, the health care system. Examples would be medical malpractice (essentially common law), regulations governing reimbursement to health professionals for services rendered under government financed health programs like Medicare⁴ and Medicaid⁵ (administrative law), state legislation controlling the licensing and conduct of health practitioners⁶ (statutory law), and judicial rulings concerning the availability of abortions⁷ (constitutional law). This is a field that has exploded in recent years, especially with the entry of government on the scene as a substantial purchaser of health services. Virtually no component of today's health care system, from the individual physician to the thousand-bed university tertiary medical center, escapes the tentacles of federal, state, and local intervention into its affairs.

The other principal side of health law concerns what health professionals, with their particular expertise and abilities, have to offer to the legal system. Many legal disputes depend for their just resolution on obtaining and comprehending facts and concepts that are peculiarly within the province of health professionals. For example, a homicide prosecution may turn upon the results of a coroner's autopsy report concerning the cause or time of the victim's death. A former worker's claim for public or private disability benefits will hinge on a physician's clinical evaluation of the degree of the individual's functional disability. These are instances of forensic medicine, "the specialty area of medicine, medical science and technology concerned with the investigation, preparation, preservation, and presentation of evidence and medical opinion in courts and other legal, correctional, and law enforcement settings."⁸ This aspect of health law has also burgeoned, keeping pace both with the growth of legal issues requiring health expertise to settle and the enhanced ability of health experts to provide the types of data and interpretation that legal decisionmakers find useful.⁹

As the field of health law has blossomed the past fifteen or twenty years have witnessed a new breed of animal entering, and prospering within the jungle of legal practice. This is the full time "health law-

3. See *id.* at 10.

4. Social Security Act, 42 U.S.C. § 1395(c) (1976). Medicare is a federally financed and administered health insurance program for the elderly (and certain disabled persons).

5. Social Security Act, 42 U.S.C. § 1396 (1976). Medicaid is a state administered program financed through federal, state, and in some cases local resources that provides payments to health practitioners for rendering specified health services to the poor.

6. See, e.g., OHIO REV. CODE ANN. § 4731 (Page 1977).

7. *Roe v. Wade*, 410 U.S. 113 (1973).

8. Curran, *supra* note 2, at 10.

9. See e.g. Barnard, *The Colors of Pain*, DISCOVER, Feb. 1981, at 62.

yer."¹⁰ An enlarging number of attorneys, many of them young, now deal exclusively in advising and representing health-related clients (providers, consumers, financers, or regulators) about health-related problems. This vanguard of lawyers finds employment in a growing array of settings:¹¹ private practice representing consumers or providers; in-house counsel to a hospital, nursing home, clinic, health maintenance organization (HMO),¹² or other institution; federal, state, or local public service on the administrative or legislative levels, working with government in either its provider or regulator of health services roles; in-house counsel to an insurance company; an academic position in a professional school of law, medicine, nursing, pharmacy, or health administration; or staffing a public interest agency.

As the field of health law and the number and variety of its practitioners has accelerated, so too has grown the pressing need for formal educational experiences to prepare attorneys for this challenging sphere of endeavor and to maintain and enhance the knowledge and competence of those already engaged on this battleground. A number of responses aimed at fulfilling this vital need have been forthcoming. Some attorneys have actually enrolled in medical, nursing, or allied health profession schools and received professional degrees. The number of individuals who hold both a J.D. or L.L.B. and an M.D. or D.O.¹³ degree has become so significant that these hybrids even have their own professional organization, the American College of Legal Medicine,¹⁴ where joint degree ownership is a prerequisite for full membership status. Many attorneys attain degrees from programs involved in the administrative or policy-making aspects of health care, such as the Masters in Public Health (M.P.H.) earned by this reviewer.¹⁵ The

10. See Letter from David M. Kinzer, President, Massachusetts Hospital Association, to the editor of the *AM. J.L. AND MED.*, reprinted in 4 *AM. J.L. AND MED.* 403 (1978-79); editors response from John Norris, Editor in chief to John Norris, reprinted in 4 *AM. J.L. AND MED.* 407 (1978-79).

11. See NATIONAL HEALTH LAWYERS ASSN., *CAREERS IN HEALTH CARE LAW* (1981).

12. For a description of health maintenance organizations (HMOs), see generally Haverhurst, *Health Maintenance Organizations and the Health Planners*, 1978 *UTAH L. REV.* 123 (1978); Kissam & Johnson, *Health Maintenance Organizations and Federal Law: Toward a Limited Theory of Reformmongering*, 29 *VAND. L. REV.* 1163 (1976). See also Curran & Moseley, *The Malpractice Experience of Health Maintenance Organizations*, 70 *Nw. U.L. REV.* 69 (1975).

13. A D.O. is a Doctor of Osteopathy degree, obtained upon successful completion of a course of study at a professional school of osteopathy. In virtually every state, a D.O. is eligible for licensure to practice medicine on the same basis as those who have earned M.D. degrees from medical school.

14. The American College of Legal Medicine is located at 875 North Michigan Avenue, Suite 3744, Chicago, Illinois 60611.

15. The reader should be made aware that, during this reviewer's pursuit of the M.P.H. degree, my academic advisor (and much more) was Professor William J. Curran, co-author of the
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literature of legal medicine has proliferated in the form of professional books and periodicals which focus completely on, or regularly feature items discussing, topics of interest to the health lawyer.¹⁶ Numerous professional organizations have arisen in the past several years devoted to, among other things, the educational requirements of health law practitioners.¹⁷

Attorneys, however, are not alone in needing learning opportunities concerning the interface of law and health care. The health professional, whether a direct caregiver, planner, administrator, or monitor, can no longer afford to remain ignorant of concepts and developments in this field. Both self-preservation and protection of the interests of the health system's consumers (also known as clients or patients, depending upon who is speaking) dictate that those who are planning, administering, delivering, or paying for health services cultivate and maintain an adequate level of sophistication about the impact of legal mandates and prohibitions on their operations, as well as the kinds of legal cases they may be called into as experts. These educational needs are being met currently in an assortment of ways. Many, perhaps a majority, of the joint degree holders mentioned earlier are currently utilizing their law degrees in health services instead of legal careers. Much of the medicolegal literature already referred to is specifically written for health professionals, and hardly an issue of a leading health journal like the *New England Journal of Medicine*, *Journal of the American Medical Association*, or *American Journal of Public Health* is published without containing one or more articles centered on legal problems. Among the several professional organizations alluded to above, many regularly present segments of publications or educational programs geared consciously to the backgrounds and interests of practicing health professionals.

Despite these many fine attempts at interprofessional education, it has been recognized by astute leaders in both law and health care that there is no substitute for endeavoring to reach the fledgling legal or health professional as early in his formal professionalization process as possible. Interprofessional learning experiences made available at the incipient states of career development—that is, during law school, med-

book under review.

16. See Sagall, *Attorney's Guide to Medical Literature*, 3 AM. J.L. AND MED. 361 (1977-78), Sagall, *Directory of Periodical Publications of Medicolegal Interest*, 3 AM. J.L. AND MED. 115 (1977-78).

17. See Braverman, *Report on the National Health Lawyers Association*, 4 AM. J.L. AND MED. 413 (1979); Dunn, *Report on the Medicine and Law Committee of the American Bar Association's Section of Insurance, Negligence and Compensation Law*, 4 AM. J.L. AND MED. 159 (1978); McMahon, *Directory of Organizations and Resource Centers of Medicolegal Interest*, 3 AM. J.L. AND MED. 87 (1977).

ical school, nursing school, or other health professions school—are most likely to pay significant dividends in terms of sensitizing individuals to important issues, concepts, arguments, and processes, establishing attitudes of tolerance and open-mindedness, and building the foundation for substantive skills and knowledge.¹⁸ In acknowledgment of this, a variety of health law curricula, ranging from single lectures to full-scale comprehensive required courses, have begun to be integrated into the formal programs of leading higher institutions of legal, medical, nursing, and other health-care education.¹⁹ As the delivery of health care tends to become more complicated and consumers become more aware of, and vociferous about asserting, their real and perceived rights,²⁰ the trend toward implementation of cross-disciplinary health law curricula can only escalate.

As is true for most other types of classes offered in professional schools, health law courses will depend for their success in large measure upon the existence of adequate texts to serve students and teachers as background preparation for classroom lectures, discussions, and demonstrations. Such works are not plentiful. It is in light of this essential need and existing deficiencies that *Law, Medicine and Forensic Science* (Third Edition), by William J. Curran and E. Donald Shapiro, must be evaluated.

William J. Curran holds the only American endowed chair in legal medicine, the Francis Glassner Lee Chair at Harvard School of Public Health and Medical School. (The existence of the chair preceded him, but he is the first attorney to occupy it.) He is the real pioneer in this now popular field and has been labelled correctly as possessing the most impressive *curriculum vita* in the business.²¹ Just as significant as his scholarly and service achievements, however, Professor Curran's teaching prowess has directly influenced scores of leading health lawyers and legally-aware health professionals.

E. Donald Shapiro is another major figure in this area. Dean and

18. See Annas, *The Way We Teach . . . Law and Medicine*, 2 MEDICAL TEACHER 273,274 (1980); [hereinafter cited as Annas]; Gibson and Schwartz, *Physicians and Lawyers: Science, Art, and Conflict*, 6 AM. J.L. AND MED. 173, 181 (1980).

19. See Annas, *supra* note 18; Grumet, *Legal Medicine in Medical Schools: A Survey of the State of the Art*, 54 J. MED. EDUC. 755 (1979); Lebang, *Law and Medicine: A Model Academic Program at Southern Illinois University School of Medicine*, 1 J. LEGAL MED. 1 (1979); MICHIGAN MEDICAL SCHOOLS COUNCIL OF DEANS, MEDICAL-LEGAL PROJECT, MODEL MEDICAL-LEGAL EDUCATION CURRICULUMS (1980); Reece, *Wright State Review*, 37 MEDICAL NEWS 21 (1981); Schramm & Hencke, *The Teaching of Health Law in 1980: Results of a Survey*, 6 J. HEALTH POL., POL'Y., AND L. 558 (1981).

20. See, e.g., P. HAMILTON, HEALTH CARE CONSUMERISM (1982).

21. Gold, Book Review (*Modern Legal Medicine, Psychiatry, and Forensic Science*, edited by William J. Curran, A. Louis McGarry, and Charles S. Petty), 6 AM. J.L. AND MED. 214, 215 (1980).

Professor of Law at the New York Law School, he co-authored with Professor Curran the Second Edition of this text, published in 1970, and its 1974 Supplement. (Curran was solely responsible for the 1960 First Edition.) Mr. Shapiro also has numerous other professional credits in this field.

The volume is divided into eleven chapters, each addressing a different but interrelated aspect of the law/medicine interface. The tone is set in Chapter 1, which uses a collection of essays, brief quotations, and professional codes to illuminate the perspectives of these two often divergent and conflicting fields of human endeavor. Stressing the issues of communication and interprofessional dialogue, the authors have designed their materials to illustrate the practical problems and philosophical differences that make legal practice in this field so interesting and challenging.

Chapter 2 introduces the attorney to the basic and clinical medical sciences, including an explanation of medical terminology, the concepts of medical diagnosis and case management, and the content and meaning of hospital patient records. Chapter 3 deals with the forensic sciences, encompassing scientific evaluations, tests, and data analysis useful in resolving legal issues. Medical proof in litigation is the subject of the next chapter, which provides cases and notes on the role and treatment of lay and expert witnesses, the basis and content of medical testimony, and the part that medical records, medicolegal photography, medical tests, and courtroom demonstrations may play in the fact-finding process.

The theme then shifts to the role of law in regulating the delivery of health care. Chapter 5, the longest in this volume, covers medical and hospital malpractice. Following an introduction to the organizational aspects of the medical profession, medical practice, and medical care facilities, this section delves into the basis of malpractice liability, special evidentiary issues (*res ipsa loquitur* and *negligence per se*), informed consent, defenses to malpractice actions, and "reform" (although most plaintiffs' attorneys would disagree with that label) movements undertaken in response to the perceived malpractice "crisis."

Chapter 6 moves from the judicial enforcement of quality of care through private lawsuits to the subject of legislative and administrative attempts (often interpreted and implemented by the courts) to ensure professional qualifications, compulsory reporting of certain diseases and injuries, fair and efficient health facilities management, fair competition among service providers, and cost containment and quality assurance. The increasingly important topic of patients' rights²³ is the focus

²³ See Kaye, *Book Review* (The People's Hospital Book, by Ronald Gots and Arthur

of the subsequent chapter. After some introductory text and the reproduction of, and comment on, a number of representative Patients' Bills of Rights, the chapter contains materials on the right to medical and psychiatric treatment. The final section of Chapter 7 concerns what is probably the most emotion-laden (for physicians, attorneys, and the public) subject in the entire field: the refusal of treatment, compulsory measures, and care of the terminally ill. In this heartrending area, as throughout the whole book, Professor Curran's²³ deep sensitivity for ethical as well as legal implications is evident. Chapter 8 specifically addresses this interest, centering on the modern medical-moral problems of procreation and contraception, abortion and fetal rights, sterilization, artificial insemination and *in vitro* fertilization for human conception, genetic screening and counseling, and unconventional sexual conduct.

In Chapter 9, the legal ramifications of drug and alcohol addiction are discussed. Innovations in medicine, such as clinical research guidelines, organ transplantation and artificial human organs, anatomical donations, evolving definitions of death, and the advent of computer use, are treated in Chapter 10. This volume concludes with an interesting section on international health and medicolegal programs.

This third edition of *Law, Medicine and Forensic Science* represents a substantial revision of the previous versions. The chapters on malpractice, patients' rights, treatment of the terminally ill, and health care industry regulation are all new, mirroring the past decade's evolving activities. Keeping pace with the dizzying unfolding of developments in the field, fully fifty percent of the principal cases appear for the first time. Important new material on medical-moral issues, technological advances, international health programs, and forensic science has been added to this edition. The strategically-placed authors' notes that provide both medical and legal citations to authorities have all been updated and expanded.

This book compares most favorably with the few other existing textbooks designed for use in formal medicolegal academic courses. The other primary works in this category²⁴ are both excellent educational tools in the traditional law school casebook genre. They provide an excellent means of teaching law students (and practicing attorneys)

Kaufman and *The Patient's Advocate*, by Barbara Huttman), 305 NEW ENG. J. MED. 1355 (1981).

23. See S. REISER, A. DYCK, & W. CURRAN, *ETHICS IN MEDICINE: HISTORICAL PERSPECTIVES AND CONTEMPORARY CONCERNS* (1977).

24. D. SHARPE, S. FISCINA, & M. HEAD, *LAW AND MEDICINE: CASES AND MATERIALS* (1978); W. WADLINGTON, J. WALTZ, & R. DWORKIN, *LAW AND MEDICINE: CASES AND MATERI-*

skills for identifying and analyzing substantive and procedural legal issues in health care. *Law, Medicine and Forensic Science*, however, goes beyond its competitors in several respects. For the legal profession, this book provides an understanding and feeling for the actual organization, environment, and practice of the health care industry that cannot be adequately conveyed through the standard casebook format.²⁵ By sensitizing attorneys to the real life dilemmas, challenges, and frustrations experienced by health care professionals, this text recognizes that the ability to communicate and cooperate with one's medical counterparts is as valuable a legal skill as being able to recite the letter of the law. The law professor concerned with generating, and the law student or practitioner appreciating the importance of, an interest in the ethical and social policy ramifications of medicolegal practice will be well-served by this text. It creates a true interprofessional spirit.

This book is also superior to its existing competitors for use in medical, nursing, public health, and health administration courses. Health professions students (especially future physicians), in this reviewer's experience, are not in the main terribly motivated or capable, intellectually or because of legitimate competing demands on their limited time and energy, to agonize through case reports and statutory and regulatory language. This reaction is understandable, as the development of legal reasoning abilities is less important for this audience than is a working comprehension of the practical impact of the legal system upon the carrying out of health care. This orientation tends to make a standard law school casebook an unsatisfactory educational instrument for this audience. *Law, Medicine and Forensic Science* appeals to health professions students, principally those enrolled in medical school, by strategically placing purely legal materials in a larger context that makes these items appear more relevant to broader social policy and to actual situations arising in health care delivery. The thorough interprofessional integration of its content should make this volume at least palatable, if not downright fascinating, to all but the most myopic of its intended beneficiaries. At some future point, it will be interesting to compare this aspect of this work to a forthcoming legal textbook by one of Professor Curran's more accomplished former students compiled specifically for use in medical school classrooms.²⁶

For better or worse, lawyers and physicians (as well as other health care deliverers) will come into contact with each other more and

25. The casebooks cited at *supra* note 24 do present some materials touching on the structure and functioning of the medical enterprise, but this element is not made a major, integrated part of either work. That is accomplished in the text under review.

26. G. Adams, A. Edwards, & J. Curran, *TEXTBOOK OF HEALTH CARE* (1982—In Press).

more in future years. It is important that this contact be as positive and productive as possible, not only for the sanity of the involved participants but for the ultimate welfare of the clients/patients²⁷ whom both professions exist to serve. Formal educational experiences conducted in professional school can accomplish much to enhance the tone and result of future medicolegal encounters. Teaching tools like *Law, Medicine and Forensic Science* make a significant contribution to the professional development and maturation of future (and present) legal and health care practitioners and to the burgeoning interdisciplinary field in which they will increasingly perform their labors.

27. An increasing number of health professionals are beginning to refer to those whom they serve as "clients" rather than "patients", in acknowledgment of the pervasive modern influence of legal considerations in the provider/recipient relationship. See, e.g., G. HANNAH, W. CHRISTIAN, & H. CLARK, *PRESERVATION OF CLIENT RIGHTS: A HANDBOOK FOR PRACTITIONERS PROVIDING THERAPEUTIC, EDUCATIONAL, AND REHABILITATIVE SERVICES* (1981). Physicians are much slower than their colleagues to accept this lexicographical change and its accompanying implications.

