



Essentials of Health Policy and Law

THIRD EDITION

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Prologue

The third edition of *Essentials of Health Policy and Law* is a textbook that describes and analyzes the transformations taking place across the healthcare delivery and public health systems in the United States. Building on the core content and engaging style of earlier editions, this edition is heavily influenced by the implementation and interpretation of the Patient Protection and Affordable Care Act (ACA), the most far-reaching effort at national health reform in generations. Professors Joel Teitelbaum and Sara Wilensky are both experienced in analyzing and communicating about the ACA and many other aspects of health policy and law, and this edition benefits from their expertise. Beyond the issue of health reform, *Essentials of Health Policy and Law, Third Edition* takes a broad approach to the study of health policy and law and provides a coherent framework for grappling with important healthcare, public health, and bioethical issues in the United States.

Health policies and laws have become an inescapable and critical component of our everyday lives. The accessibility, cost, and quality of health care; the country's preparedness for disasters; the safety of the food, water, and medications we consume; the right to make individual decisions about one's own health and well-being; and scores of other important issues are at the heart of health policy and law. Health policies and laws have a strong and lasting effect on our quality of lives as individuals and on our safety and health as a nation.

Professors Teitelbaum and Wilensky do a marvelous job of succinctly describing not only the policy- and lawmaking machinery and the always-evolving healthcare and public health systems, but also the ways in which policy and law affect health care and public health, and vice versa. They have a unique ability to make complex issues accessible to various readers, including those without a background in health care or public health. Their training as policy analysts and lawyers shines through as they systematically describe and analyze the complex field of health policy and law and provide vivid examples to help make sense of it. Equally apparent is their wealth of experience teaching health policy and law at both the undergraduate and graduate levels. Between them, they have designed and taught many health policy and/or law courses, supplemented the content of health policy and law by integrating writing and analytic skills into their courses, designed a Bachelor of Science degree program in public health, and received teaching awards for their efforts. Readers of this textbook are the beneficiaries of their experience, enthusiasm, and commitment, as you will see in the pages that follow.

Essentials of Health Policy and Law, Third Edition stands on its own as a text. Even so, the accompanying *Essential Readings in Health Policy and Law* provides abundant illustrations of the development, influence, and consequences of health policies and laws. The carefully selected articles, legal opinions, and public policy documents in the supplemental reader will allow students to delve deeper into the topics and issues explored in this book.

I am pleased that *Essentials of Health Policy and Law* is a part of the *Essential Public Health* series. From the earliest stages of the series' development, Professors Teitelbaum and Wilensky have played a central role. They have closely coordinated efforts with other series authors to ensure that the series provides a comprehensive approach with only intended overlap. This is well illustrated by the numerous additions and revisions that have taken place with the publication of this third edition, a description of which can be found in the Preface.

I am confident that you will enjoy reading and greatly benefit from *Essentials of Health Policy and Law*. Whether you are studying public health, public policy, healthcare administration, or a field within the clinical health professions, this textbook is a key component of your education.

Richard Riegelman, MD, MPH, PhD

Editor, *Essential Public Health* Series



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Richard K. Riegelman, MD, MPH, PhD, is Professor of Epidemiology-Biostatistics, Medicine, and Health Policy, and Founding Dean of the George Washington University Milken Institute School of Public Health in Washington, DC. He has taken a lead role in developing the Educated Citizen and Public Health initiative, which has brought together arts and sciences and public health education associations to implement the Institute of Medicine of the National Academies' recommendation that "all undergraduates should have access to education in public health." Dr. Riegelman also led the development of the George Washington University's undergraduate major and minor and currently teaches Public Health 101 and Epidemiology 101 to undergraduates.



Preface

Health policy and law are matters of national and local focus and concern. Public opinion polls, media coverage, and policy debates at all levels of government and in private industry, ranging from the health of the national economy to the health of state populations to the health of a single individual sickened by Ebola hemorrhagic fever, attest to the important place that health care and public health hold in the minds of the American public, policymakers, and lawmakers. The constant attention showered on health policy-related topics also highlights their complexity, which stems from multiple factors.

First, like most challenging public policy problems, pressing health policy questions simultaneously implicate politics, law, ethics, and social mores, all of which come with their own set of competing interests and advocates. Second, health policy debates often involve deeply personal matters pertaining to one's quality—or very definition—of life, philosophical questions about whether health care should be a market commodity or a social good, or profound questions about how to appropriately balance population welfare with closely guarded individual freedoms and liberties. Third, it is often not abundantly clear how to begin tackling a particular health policy problem. For example, is it one best handled by the medical care system, the public health system, or both? Which level of government—federal or state—has the authority or ability to take action? Should the problem be handled legislatively or through regulatory channels? The final ingredient that makes health policy problems such a complex stew is the rapid developments often experienced in the areas of healthcare research, medical technology, and public health threats. Generally speaking, this kind of rapid evolution is a confounding problem for the usually slow-moving American policy- and lawmaking machinery.

Broadly defined, the goal of health policy is to promote and protect the health of individuals and of populations bound by common circumstances. Because the legal system provides the formal structure through which public policy—including health policy—is debated, effectuated, and interpreted, law is an indispensable component of the study of health policy. Indeed, law is inherent to the expression of public policy: major changes to policies often demand the creation, amendment, or rescission of laws. As such, students studying policy must learn about the law, legal process, and legal concepts.

The range of topics fairly included under the banner of “health policy and law” is breathtaking. For example, what effect is healthcare spending having on national and state economies? How should finite financial resources be allocated between health care and public health? How can we ensure that the trust funds established to account for Medicare's income and disbursements remain solvent in the future as an enormous group of Baby Boomers becomes eligible for program benefits? What kind of return (in terms of quality of individual care and the overall health of the population) should we expect from the staggering amount of money we collectively spend on health? Should

individuals have a legal entitlement to health insurance? How should we attack extant health disparities based on race, ethnicity, and socioeconomic status? What policies will best protect the privacy of personal health information in an increasingly electronic medical system? Can advanced information technology systems improve the quality of individual and population health? Should the right to have an abortion continue to be protected under the federal Constitution? Should physician assistance in dying be promoted as a laudable social value? Will mapping the human genome lead to discrimination based on underlying health status? How prepared is the country for natural and man-made catastrophes, like pandemic influenza or bioterrorism attacks? What effect will chronic diseases, such as diabetes and obesity-related conditions, have on healthcare delivery and financing? How should we harness advancing scientific findings for the benefit of the public's health?

As seen from this partial list of questions, the breadth of issues encountered in the study of health policy and law is virtually limitless, and we do not grapple with all of the preceding questions in this book. We do, however, introduce you to many of the policies and laws that give rise to them, provide an intellectual framework for thinking about how to address them going forward, and direct you to additional relevant readings. Given the prominent role played by policy and law in the health of all Americans, and the fact that the Institute of Medicine recommends that students of public health and other interdisciplinary subjects (for example, public policy or medicine) receive health policy and law training, the aim of this book is to help you understand the broad context of American health policy and law, the essential issues impacting and flowing out of the healthcare and public health systems, and how health policies and laws are influenced and formulated. Think of this textbook as an extended manual—introductory, concise, and straightforward—to the seminal issues in American health policy and law, and thus as a jumping off point for discussion, reflection, research, and analysis. To further assist with those pursuits, this book is accompanied by *Essential Readings in Health Policy and Law* (Jones and Bartlett Publishers, 2008), a compilation of carefully selected readings meant to allow for deeper analysis of issues covered in this textbook, as well as some issues not covered due to space constraints.

The health policy and law landscape has changed dramatically since publication of the first edition of this textbook in 2007 as a result of the passage, implementation, and interpretation of the Patient Protection and Affordable Care Act (known as the Affordable Care Act, or ACA), which was signed into law by President Barack Obama in March of 2010. The ACA has been hailed as the most important set of changes to health insurance since the 1965 enactment of Medicare and Medicaid and, over time, this hugely complex law could effectively reorder most aspects of the healthcare system.

At its core, the ACA represents two landmark achievements in health policy: major reform of the private health insurance market and, relatedly, a redistribution of resources to groups and individuals who, by virtue of indigence and/or illness, have historically been excluded from the health insurance market and/or healthcare system. Although, in the end, the approach taken was to build on the existing public and private health insurance coverage system rather than tossing out that system to replace it with something else—such as a government-sponsored single payer insurance system—the ACA nonetheless made sweeping reforms with an eye toward achieving near-universal health insurance coverage by 2019. Indeed, if fully implemented, the ACA would move the nation toward a more affordable, equitable, and stable insurance system, not only for the millions of individuals who have and are expected to gain insurance, but also for the tens of millions of people who no longer face the threat of a loss or lapse of coverage. At the same time, full implementation is still just a goal, as many federal and state politicians and large blocs of the voting public, continue an effort to undermine the law.

Although the ACA is most properly understood as a series of policy and legal decisions aimed at transforming health insurance coverage, the law includes dozens of other important reforms and new programs unrelated to insurance. For example, more efficient and higher quality health care, population health, healthcare access, long-term care, the health workforce, health disparities, community health centers, healthcare fraud and abuse, comparative effectiveness research, health information technology, and more all receive attention by the ACA.

The key to the many reforms put forward in the ACA is a reordering of the relationships that lie at the heart of the healthcare system. Individuals, providers, insurers, employers, governments, and others have been forced to alter once-normative behaviors in response to the policy and legal decisions underpinning the law. These changes are described

in relevant places throughout this book, but we provide here a few examples. Most notable is the ACA's requirement that individuals carry "minimum essential health coverage" or face specified financial penalties. This "individual mandate," as it is known, is perhaps the most important provision in the ACA, because it creates a new and large pool of premium-paying individuals that operates as the *quid pro quo* to insurers. Insurers are now forced to accept individuals—whom they once deemed "uninsurable" because they are relatively unhealthy—as insured beneficiaries. For individuals unable to attain the type of minimum coverage mandated by the ACA, subsidies are made available.

A second change key to health system reordering is a series of reforms that prohibit or curtail commonplace practices on the part of health insurers and health plans. These include prohibiting the use of preexisting condition exclusions and discriminatory enrollment practices based on an individual's health status; guaranteeing the availability of health insurance and the renewability of an individual's existing insurance; requiring coverage of certain preventive screening and immunization services recommended by the federal government; and guaranteeing coverage for dependent children who are under age 26. A third key shift is the ACA's creation of health insurance "exchanges" and, relatedly, the expansion of Medicaid eligibility standards. The state exchanges and a single federal one were established for the purpose of giving individuals and small groups an opportunity to purchase health insurance products from a more heavily regulated (and therefore relatively stable) market than was the norm prior to the ACA's passage. The Medicaid expansion covers for the first time all U.S. citizens and legal immigrants with incomes below 133% of the Federal Poverty Level.

A final word, for now, about the ACA and its implementation. As described in Chapter 10, passage of the ACA was anything but smooth. The law passed by the slimmest of margins after months of rancorous debate, and backlash against the law after its passage was swift and forceful. At the time of this writing, the country is experiencing the fall-out from yet another U.S. Supreme Court decision decoding the ACA, and dozens of states, individuals, and organizations continue to attempt to use the courts and state legislatures as vehicles for slowing down, if not outright halting, implementation of the law. The outcomes of these lawsuits and policy debates will no doubt be discussed in both the national media and in the health policy and law courses in which you register, and they will be devoted space in the pages of this book in future editions. Whatever the outcome of these individual episodes, however, we urge readers not to lose sight of an important principle: whether the ACA ultimately survives wholly intact or undergoes changes as a result of courts' interpretation of it is largely beside the point; the more important point is that the ACA has put the country on a path toward a more just, equitable, and accessible health system.

A second significant change since 2007 that is relevant to this textbook and the entire *Essentials of Public Health* series has occurred in the field of public health education. Since the initial publication of this textbook, the Association of American Colleges and Universities (AAC&U) has worked with public health educational associations, including the Association of Schools and Programs of Public Health (ASPPH), to develop the Educated Citizen and Public Health Initiative. This initiative seeks to integrate public health perspectives into a comprehensive liberal education framework and to develop and organize publications, presentations, and resources to help faculty develop public health curricula in the nation's colleges and universities. As a result, public health perspectives generally, and health policy and law specifically, are increasingly being integrated into courses as diverse as political science, history, sociology, public policy, and a range of courses that prepare students for the health professions. We are proud that this textbook as well has played a role in shaping (and supplying) the market for health policy and law education as part of a liberal education framework, and we aim with this third edition to make the material as accessible to these diverse audiences as possible.

As a result of the changes just described and also in response to comments we received from users of previous editions of the textbook, this edition of *Essentials of Health Policy and Law* has undergone many revisions. Among them is a new chapter covering the social determinants of health and the role of law in optimizing health; updates to several chapters to reflect the ACA's influence; revised and expanded content in the chapters covering healthcare quality and public health preparedness; updated figures, tables, timelines, and discussion questions; and more.

Part I of this textbook includes five preparatory chapters. Chapter 1 describes the influential role of policy and law in health care and public health and introduces various conceptual frameworks through which the study of health policy and law can take place. The chapter also illustrates why it is important to include policy and law in the study of

health care and public health. However, an advanced exploration of health policy and law in individual and population health necessitates both a basic and practical comprehension of policy and law in general—including the policymaking process and the workings of the legal system—and an understanding of the nation's somewhat fragmented healthcare and public health systems. Thus, Chapter 2 discusses both the meaning of policy and the policymaking process, including the basic functions, structures, and powers of the legislative and executive branches of government and the respective roles of the federal and state governments in policymaking. Chapter 3 then describes the meaning and sources of law and several key features of the American legal system, including the separation of powers doctrine, federalism, the role of courts, and due process. Chapter 4 provides an overview of the healthcare system, including basic information on healthcare finance, access, and quality, and examples of how the U.S. system differs from those in other first-world nations. Part I closes with an overview, in Chapter 5, of the public health system, including its evolution and core functions.

Part II offers several chapters focusing on key substantive health policy and law issues. The opening chapter examines the ways in which the law creates, protects, and restricts individual rights in the contexts of health care and public health, including a discussion of laws (such as Medicaid and Medicare) that aim to level the playing field where access to health care is concerned. The chapter also introduces the “no-duty-to-treat” principle, which holds that there is no general legal duty on the part of healthcare providers to render care and which rests at the heart of the legal framework pertaining to healthcare rights and duties. Chapter 7 describes how social factors play a critical role in the attainment (or not) of individual and population health, discusses the ways in which law can both exacerbate and ameliorate negative social determinants of health, and introduces readers to the concept of medical-legal partnership. Chapters 8 and 9 cover the fundamentals of health insurance and health economics, respectively, and set up a subsequent thematic discussion in Chapters 10 and 11. Specifically, Chapter 8 describes the function of risk and uncertainty in health insurance, defines the basic elements of health insurance, discusses important health policy issues relating to health insurance, and more; Chapter 9 explains why it is important for health policymakers to be familiar with basic economic concepts; the basic tenets of supply, demand, and markets; and the way in which health insurance affects economic conditions.

The focus of Chapter 10 is on health reform, including the ACA. The chapter discusses the reasons why for decades the United States failed to achieve national health reform prior to the ACA, why the ACA passed given this history, and what the ACA aims to achieve. Chapter 11 explains how the federal and state policymakers have created health insurance programs for individuals and populations who otherwise might go without health insurance coverage. The basic structure, administration, financing, and eligibility rules of the three main U.S. public health insurance programs—Medicaid, the State Children's Health Insurance Program, and Medicare—are discussed, as are key health policy questions relating to each program. Chapter 12 reflects on several important policy and legal aspects of healthcare quality, including the advent of provider licensure and accreditation of health facilities (both of which represent quality control through regulation), the evolution of the standard of care, tort liability for healthcare providers and insurers, preventable medical errors, and, with the ACA as the focal point, improving healthcare quality through quality improvement and provider incentive programs. Part II concludes with a chapter on public health preparedness policy, including discussions about how to define preparedness, the types of public health threats faced by the United States, policy responses to these threats, and an assessment of where the country stands in terms of preparedness. The textbook concludes in Part III by teaching the basic skills of health policy analysis. Because the substance of health policy can only be understood as the product of an infinite number of policy choices as to whether and how to intervene in many types of health policy problems, Chapter 14 explains how to structure and write a short health policy analysis, which is a tool frequently used by policy analysts when they assess policy options and discuss rationales for their health policy recommendations.



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Professor Teitelbaum has taught graduate-level courses on health services law, healthcare civil rights, public health law, minority health policy, and long-term care law and policy, and an undergraduate survey course on health law. In 2009 he became the first member of the School of Public Health faculty to win the GW-wide Bender Teaching Award. He has also received the School's Excellence in Teaching Award and in 2007 he was inducted into the ASPH/Pfizer Public Health Academy of Distinguished Teachers.

Professor Teitelbaum has authored or co-authored many articles, book chapters, policy papers, and reports on civil rights issues in health care, insurance law and policy, health reform and its implementation, medical-legal partnership, and behavioral healthcare quality, and he has directed or managed many health law and policy research projects. In 2000 he was co-recipient of The Robert Wood Johnson Foundation Investigator Award in Health Policy Research, which he used to explore the creation of a new framework for applying Title VI of the 1964 Civil Rights Act to the modern healthcare system.

He is heavily involved in GW service activities: among other things, he has served as Chair of the Medical Center Faculty Senate's Executive Committee; Chair of the School Curriculum Committee; Chair of the Department's Appointments, Promotion, and Tenure Committee; and Co-Chair of the committee that created and implemented GW's Bachelor of Science degree in public health.

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As Director of the Undergraduate Program in Public Health, Dr. Wilensky is responsible for the day-to-day management of the program, including implementation of the dual BS/MPH program. In addition, she is responsible for faculty oversight, course scheduling, new course development, and student satisfaction.

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Prior to joining GW, Dr. Wilensky was a law clerk for federal Judge Harvey Bartle III in the Eastern District of Pennsylvania and worked as an associate at the law firm of Cutler and Stanfield, LLP, in Denver, Colorado.



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