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Symposium Articles

SYMPOSIUM

Current Topics in Health Law: Papers from the 2019 ASLME Health Law Professors Conference

Guest Edited by John D. Blum

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Symposium articles *are solicited by the guest editor for the purposes of creating a comprehensive and definitive collection of articles on a topic relevant to the study of law, medicine and ethics. Each article is peer reviewed.*

Independent articles *are essays unrelated to the symposium topic, and can cover a wide variety of subjects within the larger medical and legal ethics fields. These articles are peer reviewed.*

Columns *are written or edited by leaders in their fields and appear in each issue of JLME.*

Next Issue:

LawSeq: Building a Sound Legal Foundation for Translating Genomics into Clinical Application

A Symposium Guest Edited by Susan M. Wolf, Ellen Wright Clayton, and Frances Lawrenz

The health care industry has moved at a rapid pace away from paper records to an electronic platform across almost all sectors — much of it at the encouragement and insistence of the federal government. Such rapid expansion has increased exponentially the risk to individuals in the privacy of their data and, increasingly, to their physical well-being when medical records are inaccessible through ransomware attacks. Recognizing the unique and critical nature of medical records, the United States Congress established the Health Care Industry Cybersecurity Task Force under the Cybersecurity Information Sharing Act of 2015 for the purpose of reviewing cybersecurity risks within the health care industry and identifying who will lead and coordinate efforts to address such risks among the various agencies. The Task Force has since issued a report setting forth six high-level imperatives that the health care industry needs to achieve in order to combat cybersecurity, and, notably, many of the vulnerabilities plaguing the industry identified in the Report as requiring correction are not necessarily related to specific flaws in the current cybersecurity framework, but rather susceptibilities presented by the infrastructure and associated regulatory regime that has evolved over the last few decades over the health care industry generally. That is, the current health care infrastructure by its nature exacerbates cybersecurity risk. Between a lack of information sharing of industry threats, risks, and mitigations, disparate leadership and governance goals for cybersecurity, the confluence and contradiction of existing federal and state laws, fragmentation in the fee-for-service delivery system, lack of care coordination, and disparate resources across and among sectors, the industry suffers from heightened cyber risk. Solutions that are reactive to problems within the current infrastructure will likely have little long term impact toward reducing cybersecurity vulnerabilities because they do not address the underlying system challenges. All of these confluences causes one to wonder whether if in fact the current health care delivery infrastructure is a contributing factor to the incidents of cybersecurity attacks and the exorbitant costs associated with resolving data breaches, should Congress look not just to curb breach incidents, but to address root cause systematic challenges in the health industry infrastructure that create increased exposure of cybersecurity threats? This article argues that cybersecurity risks will continue to be heightened and more costly to the health care industry as compared to other industries unless and until some general system redesign is achieved that allows for (1) greater sharing of resources among industry participants to ensure the same protections are implemented at all levels of the industry, which can be strengthened through greater interoperability of systems across the health care industry; and (2) increased focus and attention on the importance of cybersecurity issues as a priority among system reforms.

This essay argues that feminist legal theory offers an important, and underutilized, perspective to examine health law and policy. We use several theoretical frameworks developed by feminist legal theorists including relational autonomy, intersectionality, vulnerability theory, and the feminist critique of the public-private divide to demonstrate the utility of these theories to health law analysis. These frameworks provide insights relevant not only to issues that obviously relate to gender, but also to matters of choice, quality, and access that are less obviously gender-related. We map three key areas of existing scholarship and future inquiry at the intersection of health law and feminist legal theory: (I) patient choice and relational autonomy, (II) patriarchy, power and patient safety, and (III) access to health care and healthy living conditions at the public-private divide. Uniting these areas of inquiry is a nagging question central to the relationship between critical legal scholarship (including feminist scholarship) and pragmatic action to combat injustice: Can we use legal rights to achieve our aims even as we recognize them as tainted tools that have propped up oppressive social structures? A feminist agenda for health law and policy must grapple with this dilemma.

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