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Timothy Stoltzfus Jost

Washington and Lee University School of Law, jostt@wlu.edu

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The Uses of *The Social Transformation of American Medicine*: The Case of Law¹

Timothy Stoltzfus Jost
Washington and Lee University

The Social Transformation of American Medicine (1982) is a historical study written by a sociologist. Much of the influence of the book, however, has been on disciplines other than history and sociology. Joel Howell demonstrates in his contribution to this issue that the book has been widely read by physicians. This is unsurprising because the book is about physicians. The book has been widely cited in other fields as well, fields as diverse as health services research, nursing, social work, bioethics, philosophy of medicine, dentistry, and anthropology. It is possible, however, that in no other single discipline has the book been referenced as often as in law.

Although Paul Starr himself was a fellow in law, medicine, and science at the Yale Law School in the mid-1970s, law plays a minor role in *The Social Transformation*. Indeed, one could argue that Starr seriously underestimated the role of law in shaping the major trends that the book documents, for example the part played by the corporate practice of medicine doctrine in supporting the dominance of doctors in the early twentieth century or the importance of antitrust law in undermining that dominance in the late twentieth century.²

Legal scholarship has not neglected Starr's work, however. As of the summer of 2003, *The Social Transformation of American Medicine* had been cited more than fourteen hundred times in 433 law review articles found in Westlaw.³ It has additionally been cited many more times in legal texts and treatises, in articles by legal academics in medical or health policy journals, and in law review articles that are not available on Westlaw (which still does not include all law journals and included far fewer in the 1980s), but it is not possible to get accurate counts of citations in this literature. *The Social Transformation* is clearly the most cited single source in law review articles dealing with health law.⁴ By contrast, Jay Katz's classic work, *The Silent World of Doctor and Patient* (1984), has been cited in 331 articles, while Kenneth Arrow's celebrated article "Uncertainty and the Welfare Economics of Medical Care" (1963) has been cited in only 154. The citation frequency of *The Social Transformation* in law review articles dwarves that of other classic medical history texts: Charles Rosenberg's history of the hospital, *The Care of Strangers* (1987), has been cited in only twenty-four articles, while Rosemary Stevens's *In Sickness and in Wealth* (1989) has been cited in only thirty-eight articles. Although the Starr book was cited particularly often in articles published during the Clinton health plan

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² Both legal phenomena are briefly noted in *The Social Transformation* (204-205, 305, 327, and 418).

³ The articles were located using a search of the Journals and Law Review (JLR) database consisting of Starr w/s "Social Transformation."

⁴ The *Health Law* series of casebooks, text, and treatises written by Barry Furrow, Thomas Greaney, Sandra Johnson, Timothy Jost, and Robert Schwartz have been cited in more than five hundred articles, but this count includes citations to successive editions and versions of the books.

debate of the early 1990s, in which Paul Starr was personally engaged, citation of the book has not declined markedly as the book has aged: it was cited in twenty-four articles in 2001 and in twenty-one in 2002.

The book has also had a major influence on the academic discipline of health law. Though law and medicine has existed as an academic legal specialty for decades, prior to the 1970s it was concerned primarily with malpractice and forensic medicine. During the 1970s, court decisions such as *Roe v. Wade* (410 U.S. 113 [1973]) and *In re Quinlan* (355 A.2d 647 [N.J. 1976]) brought bioethics into the medical law curriculum. Other court decisions from the 1960s and 1970s creating the doctrine of informed consent and applying antitrust law to health care, as well as legislative enactments expanding regulatory oversight of health care, enlarged the domain of health law itself (Jacobson 2002: 49– 67). The modern academic discipline of health care law, however, is a creation of the 1980s.⁵ While the academic discipline of medical law had focused almost exclusively on physicians, health law focused on the health care industry in its entirety. While medical law texts had been confined largely to tort, criminal, and evidence law, the modern health law curriculum encompassed additionally administrative, antitrust, tax, fraud and abuse, and regulatory law, as well as bioethics.

The academic field of health law was heavily influenced by four texts that appeared between 1987 and 1990: Barry Furrow, Sandra Johnson, Timothy Jost, and Robert Schwartz's *Health Law* (1987); Clark C. Havighurst's *Health Care Law and Policy* (1988); George Annas, Sylvia Law, Rand Rosenblatt, and Kenneth Wing's *American Health Law* (1990); and William Curran, Mark Hall, and D. H. Kaye's *Health Care Law, Forensic Science, and Public Policy* (1990), the fourth edition of Curran and E. Donald Shapiro's classic *Law, Medicine, and Forensic Science* (1970 [1960]). Each of these books in its own way defined broadly the study of health law, and these books (as well as others that have joined them since) have been used to educate a generation of thousands of health law students. Each of the authors of these books read *The Social Transformation*, and each of these books referred to it repeatedly. Moreover, each of these books and its authors picked up on distinctive themes in *The Social Transformation*, which spoke both to those scholars who emphasized the importance of markets in health care and to those who stressed alternatively the importance of social justice and the need for government programs.

Finally, *The Social Transformation* may have had an influence on the law itself, though this assertion is more dubious. The book has been cited in only a half dozen judicial opinions, but it was quoted extensively in a key case involving the tax-exempt status of nonprofit organizations. It also may have influenced, or at least encouraged, the development of health care antitrust law.

This article considers first the way in which *The Social Transformation* has been used in legal citation. Second, it examines the influence of the book on the development of the health

⁵ See, for example, Clifford Stromberg's 1982 review of the third edition of Curran and Shapiro's law and medicine text, hailing "health law" as a new term, broader than the traditional "forensic medicine" or "medical jurisprudence" and addressing the "relations of health care providers, professionals, third-party payors, and patients" (Stromberg 1982: n. 1)

law discipline and on health law scholars. Finally, it raises the question of whether the book has had an effect on the law itself.

The Uses of *The Social Transformation of American Medicine* in Law Review Citations

Law reviews are a most peculiar form of academic literature. Every reputable law school has at least one law review or journal; many have several. They are viewed as part of the educational process (Posner 1995), and most are student-edited. Law students select and edit articles for publication (almost always without the assistance of peer review).

Citation plays a curious role in law journals. Law review articles are very heavily referenced; a law review article can contain literally hundreds of footnotes, many of which contain text and multiple references. By convention, every sentence must have a footnote, and multiple footnotes within sentences are not uncommon. Student editors rarely permit an author to simply assert a fact—or even state an opinion—without a citation to published authority, regardless of how long the author has worked in the field or how highly the scholar is regarded by his or her peers (Sanger 1993).

One can only speculate as to why law reviews are so obsessed with citations. They serve the same purposes, of course, as references do in other disciplines: to substantiate disputable statements of fact, to suggest bibliography for further inquiry, and to identify the sources of quotes. But their multitude is far in excess of what would be necessary for these tasks. It is understandable that students, who themselves have little basis in their own nascent educations for evaluating the assertions of an author, would feel more comfortable knowing that an already published source supports the assertions (Bacchus 2002). It is also possible that citation practices are related to the nature of authority in law generally (Mikva 1985). In the Anglo-American common law tradition, cases are decided through analogical reasoning based on earlier case decisions. Judicial opinions do not simply describe or explain reality (in the sense that articles in the sciences would describe or explain naturally occurring phenomena)—they are the reality on which future decisions are based. Early law review articles were largely explications of case law (Crampton 1986), and it is likely that the obsession with published sources that characterizes modern law reviews is related to the traditional reverence that legal epistemology has accorded published legal opinions.

How is *The Social Transformation* used in law review articles? It is by and large used as a reference work, much like an encyclopedia. Indeed, though law review articles that explore topics of medical history in some depth often cite other historical scholarship, such as the work of Rosenberg or Stevens, if only one historical cite is needed, it is almost always to *The Social Transformation*. In most instances, an assertion is made about the history of medicine, and a footnote is inserted to a page or section of *The Social Transformation* that supports the assertion made.

Some authors cite the book as a comprehensive treatise on the history of American medicine in a “see generally” citation or cite it without page reference as a general account of a particular development in the history of medicine, but both practices are uncommon. Most frequently, following general law review practice, citations are to specific pages or chapters,

often with a parenthetical describing more fully the particular assertion for which the book is cited. This indicates that the reader was not just generally familiar with the book as a classic source, but actually read it or at least glanced through it or its index to find relevant pages.

Sometimes the book is cited as a source for specific facts, such as the authors and date of publication of domestic medicine manuals in the eighteenth and nineteenth centuries (Szczygiel 1994). More often the book is cited for its general narrative of trends in health care, such as the rise to dominance of physicians in the nineteenth and early twentieth century. A little more than half of the articles cite the book only once (232 articles), but many cite it multiple times, often several times in succession. Student-written notes, which tend to be more narrowly focused and to use fewer sources, often cite the book repeatedly. One article cites the book fifty-four times (Perry 1999), while three cite it forty-two times.

The Social Transformation is cited most commonly as a historical source. It is cited almost two hundred times as a source on the history of the rise of private health insurance and on the evolution of the American hospital; approximately 130 times for its discussions of battles over national health insurance and of the creation of Medicare and Medicaid; and around a hundred times each for its discussions of the development of the medical profession and the corporatization of medicine. Starr's theme of the rise to power of the medical profession is often cited in law review articles, though articles focus alternatively on physicians' acquisition of political power, cultural power, and power in the physician/patient relationship. Other common themes include the history of alternative or domestic medicine, the battle over prepaid health services, and the history of medical licensure.

The Social Transformation is also referenced as a sociological text. Articles exploring the sociology of the legal profession often cite *The Social Transformation* as a leading text on the sociology of the medical profession. The book is also often cited in articles exploring the relationships between professionals and clients or those discussing the cultural authority of professionals. More surprisingly, the book is occasionally cited as a basic text in health economics, for example, to define terms such as "moral hazard" or "adverse selection."

Although most articles simply cite *The Social Transformation*, a number quote it in the text of the article, and more quote it in the footnotes. Much rarer are attempts actually to engage Starr's overarching theses. Though several authors do explicitly discuss general themes of the book, I was unable to find a single instance in which an author laid out a thesis of the book and then specifically took issue with that thesis in the text of an article. *The Social Transformation* is viewed much more as an authoritative description of what happened in the past than as the statement of a controversial thesis as to why it happened as it did.

This is not to say, however, that authors do not build on the themes of *The Social Transformation* in their own scholarship. A number of references show great admiration for the work. One states: "Any teacher new to health law should begin by reading in full Paul Starr's unsurpassed history of the American health care system" (Boozang 2000: 597). Others describe the book as "an excellent and comprehensive history" (Jacobson and Cahill 2000: n. 98), as "the definitive social history of organized medicine" (Ross 1999: 601), or as "describing in brilliant detail the historical development of medical paternalism" (Caveney 2001: n. 43). A few authors

go further, however, in actually engaging the text. Mark Hall (1988: n. 56), in an early article on the institutional controls of physician behavior, states:

The central project of this article is to demonstrate that undergirding the “institutional reinforcement of professional authority” observed by medical sociologists is a strong legal infrastructure. Because the law absorbs and reflects the values and relationships of traditional medicine, it has codified the ethic of professional dominance, effectively shielding physicians from the institutional influence contemplated by revolutionary changes in health care policy.

The passage cites *The Social Transformation* and the work of Elliot Freidson. Hall’s article proceeds to explore how the legal reinforcement of the physician dominance described by Starr makes control of physician behavior by health care institutions (specifically cost control) very difficult.

Rarely are law review authors so explicit in acknowledging the influence of *The Social Transformation*, however. One must rather deduce from their repetition of the book’s account of history or explanation of professional dominance that their thinking was directly influenced by Starr or indirectly influenced through their absorption of Starr’s ideas from reading other health law literature. Alternatively one could ask them.

The Effect of *The Social Transformation* on Health Law Scholarship

At the 2003 American Society of Law Medicine and Ethics (ASLME) Health Law Teacher’s Conference, I questioned a dozen health law teachers who were actively engaged in scholarship and teaching in the 1980s (Haavi Morreim, Jack Snyder, Sara Rosenbaum, George Annas, Sylvia Law, Wendy Mariner, Max Mehlman, Skip Rosoff, Mark Hall, Eleanor Kinney, Ken Wing, and Tim Greaney). All had read *The Social Transformation* in the 1980s, and all stated that the book had been important to them. Several acknowledged the power of its narrative, stating that they could not put the book down while they were reading it. Several described it as the “first time someone put it all together,” or the “best description of what was going on” in the late 1970s in health care. Mark Hall related that when, while still in practice, he first called Ken Wing to inquire about a career in health law, Ken told him to prepare for such a career by reading *The Social Transformation* and by attending the ASLME Health Law Teacher’s Conference. Several of those interviewed stated that they had used the book in teaching. Virtually all have cited it in their scholarship.

The Social Transformation of American Medicine came along at a key moment in the development of health law as a discipline. The roots of the modern health law course are found in the law and medicine courses that originated in the middle of the twentieth century. The first teaching book in medical law was William Curran’s *Law, Medicine and Forensic Science*, which appeared in 1960. The first edition of the book was heavily focused on forensic medicine, with some coverage of malpractice. The second edition included material on bioethics, as well as some material on professional licensure and regulation. In the 1970s and early 1980s other teaching books appeared, including Walter Wadlington, Jon Waltz, and Roger Dworkin’s *Cases and Materials on Law and Medicine* (1980) and the 1982 edition of Curran and Shapiro’s *Law,*

Medicine, and Forensic Science. These books added more material on professional regulation and bioethics and early cases on antitrust and health planning and the Professional Standards Review Organization program.

In the late 1980s, however, four casebooks appeared in rapid succession that changed the focus of health law study and created the modern health law course. The first of these, Furrow et al.'s *Health Law* (1987), identified the policy concerns of the discipline of health law as cost, quality, access, and autonomy and added substantial new material on the business of health care and health care regulation. Havighurst's *Health Care Law and Policy* followed in 1988, adding a new focus on market competition as an alternative to regulation and professional control in health care. The third casebook, Annas et al.'s *American Health Law* (1990), offered an emphasis on access to health care. Finally, the fourth edition of Curran et al.'s *Health Care Law, Forensic Science, and Public Policy* (1990), to which Mark Hall contributed, refocused that venerable book on the broader concerns of health law.

Each of these books was concerned with health care as an industry. Forensic medicine was largely lost as a theme, as was (unfortunately) public health law, an early concern of Curran, who taught in a public health program rather than a law school. Malpractice was deemphasized and placed in a larger health policy context. Each of these books retained some materials on bioethics, but each reinterpreted bioethics to fit with its own key understanding of health law. New bioethics books also appeared at the same time, making it possible for those who were only interested in bioethics to teach freestanding courses.

These books reflected changes that had been going on in health care law and health law scholarship over the preceding two decades. Three new health law journals had appeared in the 1970s: *American Journal of Law and Medicine* in 1975; this journal, *Journal of Health Politics, Policy and Law*, in 1976; and *Journal of Legal Medicine* in 1979. From the outset, each focused on the health care industry, its organization, and finance, as well as on the traditional concerns of medical law. The new health law scholarship contended that the role of the medical profession, and of law as it related to the profession, could be properly understood only in this larger context. This was precisely the message of *The Social Transformation*, which was received enthusiastically as illuminating the way for, perhaps even legitimizing, this broadening of focus from medical law to health law.

As the new discipline of health law emerged, its politics were also being defined. Clark Havighurst became editor of *Law and Contemporary Problems* in 1965, and in 1968 and 1970 he edited groundbreaking symposia on health care, which included articles by David Mechanic, Milton Roemer, and Rosemary and Robert Stevens. Havighurst continued to write about antitrust law, health planning, and professional standards review organizations throughout the 1970s and 1980s and was joined in this effort by James Blumstein. Havighurst and Blumstein favored a market-oriented agenda in health care and were among the primary theoreticians of the drive to apply antitrust law to health care.

At the same time, a quite different school of health law scholarship arose around the legendary Edward Sparer at the University of Pennsylvania. Sparer's Health Law Project was

established around 1970 and attempted to use the law to extend social justice to those denied access to health care (Law 1988). A generation of health law scholars, including Sylvia Law, Rand Rosenblatt, Ken Wing, and Sara Rosenbaum, came out of or were influenced by Sparer's health law program, the National Health Law Program, or local legal services programs. These scholars supported efforts to expand social justice in health care, including litigation to establish Medicaid as an entitlement and enforce Medicaid rights, extend the effectiveness of the Hill-Burton program, and broaden rights to reproductive choice. The debate between James Blumstein and Rand Rosenblatt on the use of markets for rationing medical care in 1981 and 1982 issues of *Texas Law Review* was one of the most notable instances in which these two traditions engaged in dialogue over the future of health care (Blumstein 1981, 1982; Rosenblatt 1981). Each school was also represented in the new teaching books, which could be arrayed along a left-to-right spectrum in terms of their approach to health care policy. This spectrum in turn reflected a general division in legal scholarship at the time, between the market-oriented Right, invigorated by the growing law and economics movement, and those on the Left who continued to draw their inspiration from the civil rights and civil liberties movements of the 1960s and 1970s and drew increasingly from the new field of critical legal studies.

Surprisingly, each of these schools of thought found resonance in *The Social Transformation*. Law reviews rarely include book reviews and review nonlegal books even less often. Nevertheless, the book was reviewed in two law journals, the *University of Pennsylvania Law Review* (Capron 1985) and the *Journal of Legal Medicine* (Schneller 1984). Capron's review described Starr's thesis in some detail and was largely favorable. Schneller, a nonlawyer academic, was largely critical of the book, comparing it unfavorably to other contemporary historical and sociological works. Both noted, however, the book's popularity, and *The Social Transformation* quickly began to be read by legal academics and cited routinely in the law review literature. Legal scholars from a wide range of perspectives found in the book an elegant, accessible, and comprehensive history of physician dominance of health care, which supported their own vision of how the health care system had to change.

Havighurst led the first edition of his casebook with an excerpt from a Starr article and cited *The Social Transformation* several times in the book. He has cited *The Social Transformation* in seven of his articles (in addition to contributing to this issue), while Blumstein has cited *The Social Transformation* in nine of his. The market-oriented health law scholars viewed Starr as sympathetic to prepaid medical plans and to the use of managed competition in health care (as was later evidenced by Starr's work on the Clinton plan and is documented in Havighurst's article in this issue). They noted Starr's refutation of Kenneth Arrow's relatively benign explanation of professional power as a corrective for market failure and sided with Starr in seeing professional dominance as the result of a conscious effort, which was in some instances a violation of the antitrust laws. In particular, *The Social Transformation* supported Havighurst's identification of professionalism as an alternative form of organization of the health care industry to either markets or regulation, one of the themes around which Havighurst's *Health Care Law* book was organized.

But health care law scholars who emphasized social justice also found resonance in *The Social Transformation*'s deconstruction of physician dominance. Sara Rosenbaum recounted in an interview with the author that she read the book "in wonderment" and claimed that it has

“never left my mind” and that it “redefined how lawyers think about medicine.” Indeed, Rosenbaum began her March 2003 *JAMA* article “The Impact of United States Law on Medicine as a Profession” with a discussion of the rise of physician dominance and autonomy documented by *The Social Transformation* and the erosion of this autonomy and dominance by modern health law, driven in part by a “profound shift toward egalitarianism” in the twentieth century. Rand Rosenblatt’s 1988 essay “Conceptualizing Health Law for Teaching Purposes: The Social Justice Perspective” (part of a *Journal of Legal Education* symposium on teaching health law) presented health law as focused on social choice and social justice. Rosenblatt envisioned the story of health law in the United States as that of the rise and partial decline of professional dominance, the conflict between viewing health care as a commodity or an entitlement, and the rise of movements for self-determination and human dignity and cited Starr in support of this view. The left wing in health law scholarship saw *The Social Transformation* as offering a framework for thinking about the problem of professional dominance across a range of issues in health law, from definition of the standard of care in malpractice to an understanding of why national health insurance had failed in the United States.

Although the left and the right wings of the health law profession used *The Social Transformation* to argue for very different policy choices, both saw in the book a common message: the medical profession had come to a position of power in the American health care system not because this dominance was inevitable, or even because it was in the best interest of either patients or society in general, but rather because of the ability of the profession to leverage its cultural authority to achieve political and economic power. Many health law scholars saw this power as undesirable, either because it stood in the way of the development of functioning markets in health care or because it blocked the development of a more equitable and just health care system. Regardless of their own policy prescriptions, however, both sides read *The Social Transformation* as saying that the power of the medical profession was contingent on and capable of being subjected to legal oversight. The power of the doctors, therefore, was subject to challenge by legal advocacy, and legal academics readily took up the challenge of championing this fight.

The Effect of *The Social Transformation* on American Health Law

Although it seems clear that *The Social Transformation* had an effect on health law scholars and on health law scholarship, it is less clear that the book had an influence on health law itself. *The Social Transformation* has been cited in only six judicial opinions, three from the federal courts and three from state courts. This paucity of citation is not terribly striking. Courts tend to cite very different legal materials than do law review authors and obviously focus on materials immediately relevant to the dispute before them (Merritt and Putnam 1996). In five of the decisions in which *The Social Transformation* appears, it was merely cited as a historical reference source. The book played no significant role in the decision itself.

In the sixth case, however, *The Social Transformation* has much more of a presence. *Utah County v. Intermountain Health Care* (709 P.2d 265 [Utah Sup. Ct. 1985]) was a Utah Supreme Court case involving the constitutionality under the Utah state constitution of a Utah statute providing for local property tax exemptions for hospitals. Utah County was contesting the decision of the State Tax Commission granting a tax exemption to two nonprofit hospitals owned

by Intermountain Health Care. The question was whether the hospitals were charities, as the Utah Constitution permitted tax exemptions only for charities.

The Utah Supreme Court recited *The Social Transformation's* account of the history of American hospitals, which originally were funded by charitable donations to offer free care to dependent indigents but which had long accepted fees for service and that increasingly were turning into "polycorporate enterprises" indistinguishable from for-profit businesses. The Utah court seems to have read Starr's prediction of the coming of the corporation as an account of the present state of hospitals, but it also relied on the book's account of the origins of American hospitals in book one. Applying a multifactor test for determining whether the hospital before it was in fact a charity, the court rejected the view that nonprofit hospitals were per se charitable and held the statute unconstitutional. *The Social Transformation's* discussion of the economic environment of the modern hospital, the court stated, was

critical to our analysis in this case because it is an analysis which is generally not present in any of the cases relied upon by the dissenting opinions [to support the argument that hospitals were charities]. Those cases, in our view, do not take into account the revolution in health care that has transformed a "healing profession" into an enormous and complex industry, employing millions of people and accounting for a substantial proportion of our gross national product. (*Utah County*, 709 P.2d at 272)

One could argue that the Utah County case was a unique case, which had little further effect on the law outside of Utah. Utah County's result was rejected by courts in Tennessee and Maryland.⁶ Only one other reported decision followed the Utah County reasoning, and that case was reversed on appeal.⁷ Even in Utah, the case was considerably undermined by guidelines subsequently developed by the tax commissioner for evaluating tax exemption claims (Noble, Hyams, and Kane 1998).

On the other hand, the case was widely noted in the scholarly literature.⁸ The case appears, with citations to *The Social Transformation*, in most health law teaching books, and a generation of health law students has been taught the law of state hospital tax exemption from the case. Scholars in the health policy literature saw the case as signaling a clear divergence from the previous notion that hospitals were per se charitable, focusing on its symbolic significance and overemphasizing the legal importance of the case itself (Potter and Longest 1994).

Moreover, in the years following the case, the notion that hospitals were per se charitable institutions began to be questioned by both the state and the federal governments, and a number of states adopted statutes or regulations requiring hospitals to do more than simply provide hospital services to qualify for state tax exemptions (Noble, Hyams, and Kane 1998). Arguably

⁶ *State Department of Assessments and Taxation v. North Baltimore Center, Inc.*, 743 A.2d 759, 767 (Md. App. 2000); *Downtown Hospital Association v. Tennessee State Board of Equalization*, 760 S.W.2d 954, 957 (Tenn. Ct. App. 1988).

⁷ *Southwestern Oregon Public Defender Services, Inc. v. Department of Revenue*, 1990 WL 46742, at *2+; 11 Oregon Tax Reports 339, 342+ (April 4, 1990).

⁸ Westlaw notes that the case was cited in ninety-six "secondary authorities," a designation that includes law review articles, treatises, and continuing legal education materials.

the Utah County case played an important role in a paradigm shift in thinking about the charitable nature of hospitals for tax exemption purposes, and *The Social Transformation* contributed to that shift.

It can also be argued that *The Social Transformation* influenced the development of antitrust law, though this argument is much more speculative. Prior to the mid-1970s, it was thought that antitrust law did not apply to most of health care. Health care was provided by professionals, not sold in interstate commerce, and only commerce is governed by the antitrust laws. In 1975, the U.S. Supreme Court, in *Goldfarb v. The Virginia State Bar* [421 U.S. 773], rejected this position, and in 1982, the Court held, in *Arizona v. Maricopa County Medical Society* [447 U.S. 332], that a county medical society had committed a per se violation of the antitrust laws by illegally setting maximum fees. By the early 1980s, when *The Social Transformation* appeared, the Justice Department and Federal Trade Commission had undertaken a major initiative to enforce the antitrust laws against health care professionals and providers in a wide variety of contexts. Professor Thomas Greaney, who was in the Justice Department working on health care antitrust cases at the time, recalls that *The Social Transformation* was widely read by those litigating these cases and provided scholarly authority to support the belief of antitrust prosecutors that the economic dominance of physicians was not an inevitable result of the nature of health care markets, but rather often the result of conscious and concerted activity.

The antitrust scholars of the time, who provided an intellectual framework for the government's enforcement efforts, also often cited Starr. Havighurst's 1984 *Duke Law Review* article, "Doctors and Hospitals, an Antitrust Perspective on Traditional Relationships," cited *The Social Transformation* repeatedly and has itself been cited repeatedly in health care antitrust cases. The same thing can be said of James Blumstein and Frank Sloan's "Antitrust and Hospital Peer Review" (1988). In sum, while *The Social Transformation* certainly did not cause the antitrust revolution in health law (indeed, the book noted that this revolution was already under way), it arguably gave it encouragement and legitimacy and thus played some role in this development.

Conclusion

When one writes a book, one can never know who will read it. It is unlikely that Paul Starr saw legal academics as a primary audience for his book. Law appears rarely in the book and is by no means a major theme in it. Yet *The Social Transformation* has been read and cited by a generation of health law scholars. Though one can only speculate why this has been so, I believe that *The Social Transformation* confirmed for many health law scholars what they had otherwise suspected, that doctors had for the past century run health care in the United States for their own interest rather than the public interest. Many in health law concluded that maybe the law could be used to fix the problems the doctors had caused, whatever that meant from their own perspective, and set about describing how this could be accomplished. Their writing forms the corpus of health law scholarship for the past two decades, and much of that literature grounds many of its claims in *The Social Transformation of American Medicine*.

References

- Annas, G. J., S. Law, R. Rosenblatt, and K. Wing. 1990. *American Health Law: Cases and Materials*. Boston, MA: Little, Brown.
- Arrow, K. J. 1963. Uncertainty and the Welfare Economics of Medical Care. *American Economic Review* 53:851–883.
- Bacchus, M. 2002. Strung Out: Legal Citation, the Bluebook, and the Anxiety of Authority (Comment). *University of Pennsylvania Law Review* 151:245–276.
- Blumstein, J. 1981. Rationing Medical Resources: A Constitutional, Legal, and Policy Analysis. *Texas Law Review* 59:1345–1400.
- . 1982. Distinguishing Government’s Responsibility in Rationing Public and Private Medical Resources. *Texas Law Review* 60:899–918.
- Blumstein, J., and F. Sloan. 1988. Antitrust and Hospital Peer Review. *Law and Contemporary Problems* 51:7–92.
- Boozang, K. 2000. A Health Law Reader: An Interdisciplinary Approach. *Journal of Legal Medicine* 21:593–599.
- Capron, A. M. 1985. Whither Health Care? Review of *The Social Transformation of American Medicine*. *University of Pennsylvania Law Review* 133:535–547.
- Caveney, B. J. 2001. Going, Going, Gone . . . The Opportunities and Legal Pitfalls of Surgical Auctions. *West Virginia Law Review* 103:591– 618.
- Crampton, R. 1986. “The Most Remarkable Institution”: The American Law Review. *Journal of Legal Education* 36:1–10.
- Curran W. J., M. A. Hall, and D. H. Kaye. 1990. *Health Care Law, Forensic Science, and Public Policy*. 4th ed. Boston, MA: Little, Brown.
- Curran, W., and E. D. Shapiro. 1970 (1960). *Law, Medicine, and Forensic Science*. 2d ed. Boston, MA: Little, Brown. (1st ed. [1960] published under the title *Law and Medicine*.)
- Furrow, B. R., S. H. Johnson, T. S. Jost, and R. L. Schwartz. 1987. *Health Law: Cases, Materials, and Problems*. St. Paul, MN: West.
- Hall, M. 1988. Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment. *University of Pennsylvania Law Review* 137:431–536.
- Havighurst, C. C. 1984. Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships. *Duke Law Journal* 33:1071–1162.

- . 1988. *Health Care Law and Policy: Readings, Notes, and Questions*. Westbury, NY: Foundation.
- Jacobson, P. D. 2002. *Strangers in the Night: Law and Medicine in the Managed Care Era*. New York: Oxford University Press.
- Jacobson, P. D., and M. T. Cahill. 2000. Applying Fiduciary Responsibilities in the Managed Care Context. *American Journal of Law and Medicine* 26:155–173.
- Katz, J. 1984. *The Silent World of Doctor and Patient*. New York: Free Press.
- Law, S. 1988. Teaching Health Law: A Symposium. Introduction. *Journal of Legal Medicine* 35:485–488.
- Merritt, D., and M. Putnam. 1996. Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles? *Chicago-Kent Law Review* 71:871–899.
- Mikva, A. 1985. Goodbye to Footnotes. *University of Colorado Law Review* 56:647–653.
- Noble A., A. Hyams, and N. Kane. 1998. Charitable Hospital Accountability: A Review and Analysis of Legal and Policy Initiatives. *Journal of Legal Medicine and Ethics* 26:116–132.
- Perry, M. 1999. Fragmented Bodies, Legal Privilege, and Commodification in Science and Medicine. *Maine Law Review* 51:161–210.
- Posner, R. 1995. The Future of the Student Edited Law Review. *Stanford Law Review* 47:1131–1138.
- Potter, M., and B. Longest. 1994. The Divergence of Federal and State Policies on the Charitable Tax Exemption of Nonprofit Hospitals. *Journal of Health Politics, Policy and Law* 19:393–419.
- Rosenbaum, S. 2003. The Impact of United States Law on Medicine as a Profession. *Journal of the American Medical Association* 289:1546–1556.
- Rosenberg, C. 1987. *The Care of Strangers: The Rise of America's Hospital System*. New York: Basic Books.
- Rosenblatt, R. 1981. Rationing “Normal” Health Care: The Hidden Legal Issues. *Texas Law Review* 59:1401–1420.
- . 1988. Conceptualizing Health Law for Teaching Purposes: The Social Justice Perspective. *Journal of Legal Education* 38:489–497.

- Ross, E. C. 1999. Regulating Managed Care: Interest Group Competition for Control and Behavioral Health Care. *Journal of Health Politics, Policy and Law* 24:599–625.
- Sanger, C. 1993. Editing. *Georgetown Law Journal* 31:513–527.
- Schneller, E. 1984. The Social Transformation of American Medicine. *Journal of Legal Medicine* 5:153–162.
- Starr, P. 1982. *The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry*. New York: Basic Books.
- Stevens, R. 1989. *In Sickness and in Wealth: American Hospitals in the Twentieth Century*. New York: Basic Books.
- Stromberg, C. 1982. Health Law Comes of Age: Economics and Ethics in a Changing Industry. *Yale Law Journal* 92:203–217.
- Szczygiel, A. 1994. Beyond Informed Consent. *Ohio Northern University Law Review* 21:171–262.
- Wadlington, W., J. Waltz, and R. Dworkin. 1980. *Cases and Materials on Law and Medicine*. Mineola, NY: Foundation.