PART V

Private Law Applied

The Pharmaceutical Industry, Nursing Homes, and the End of Life Introduction

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This part closes the volume with an exploration of private law within two very different sectors of health care: the pharmaceutical industry and the aging and end-of-life sector. At first glance, it may seem that these two components of the health care field have little in common.

But when the reader has a chance to dive into the four chapters of Part V commonalities emerge, especially in regard to the use and scope of private law. As one of the authors in this part, Barry Furrow, writes, "[p]rivate law can have a powerful role." Three of the chapters in this part speak to opportunities to harness private law to address problematic incentives and profit seeking across the health care field. The last chapter serves as a warning, arguing that private law and organizational choices can undermine public policy and legislation if not properly harnessed. In summation, these chapters provide the reader with a sense of the value of private law in influencing health policy across the field, and the importance of using it well.

In the first chapter of Part V, "Private Equity Firms and Digital Clinical Trials: Tensions between Efficiency and Drug Evidence Access," Chapter 19, Ximena Benavides considers the role of private actors in producing pharmaceutical research. Benavides traces the rise of decentralized clinical trials (DCT), especially during the COVID-19 pandemic. She argues that DCTs make investment in biomedical research particularly appealing to private equity firms. Benavides then argues that private equity firms' profit incentives call into question their ability to support quality research. While Benavides does call for improved regulation, she also notes that private equity firms must accept greater moral responsibility than they have to date.

Rebecca E. Wolitz is likewise concerned with the impact that profit incentives can have on access to pharmaceuticals. She notes that many managers and directors of pharmaceutical companies feel that their investors expect profit maximization, which spurs business decisions that lead to unreasonably expensive prescription

drugs. But she notes that for the past several decades shareholders have raised concerns about drug pricing through access to medication shareholder resolutions. Wolitz highlights that the resolutions are a private law tool that can be used to provide a unique perspective and work in tandem with regulatory and legislative efforts to address drug pricing.

The third chapter of Part V, "The Hollowed-Out American Nursing Home: Using Private Law to Police Poor Quality Care and Expand Owner Responsibilities," Chapter 21, shifts the focus of Part V from pharmaceutical research to aging care and nursing homes. Barry R. Furrow, like Ximena Benavides, is concerned with the impact that private equity ownership will have, in this case on nursing homes. Furrow is concerned that the private equity focus on short-term, significant returns for its investors will lead to low-quality care for nursing home residents. He notes, however, that regulatory oversight has been particularly weak for nursing homes, meaning that public law tools may not be optimal for safeguarding nursing home residents. Instead, Furrow offers a model of robust fiduciary duty, using the private law doctrinal framework to better police private equity actors in this space.

The last chapter, "Health Care Organization Policies about the California End of Life Option Act: A Paper Victory of the Medical Aid in Dying Movement," Chapter 22, by Megan S. Wright and Cindy L. Cain, illustrates how private choices can undermine public policy. Wright and Cain focus on the implementation of medical aid in dying (MAiD) in California, calling it a public policy "paper victory" because very few individuals are able to meet its requirements to qualify for MAiD. They flag that private law or organizational choices create a roadblock to meaningful access to MAiD. California allows health care organizations to opt out of providing MAiD, which many religiously affiliated hospitals have chosen to do. Other health care organizations opt into providing MAiD but use internal policies, such as choosing to not publicly post their MAiD policy or require additional appointments and assessments, to limit its use by their patients.

At first glance, Wright and Cain's chapter creates somewhat of a contrast with the work of Benavides, Wolitz, and Furrow, all of whom are arguing for private law tools to address policy concerns. But upon further reflection, Wright and Cain's chapter serves as a warning against ignoring the power of private law. In California, the MAiD legislation did not consider how the choices of private actors could create a "paper victory." Had MAiD advocates understood the importance of private law tools in achieving meaningful access to services for all, they might have found inspiration in the other chapters of Part V, and in the rest of the volume, for ways to harness private law to support their goals.