Pendulums Swing

Author : Mary Crossley

Date : November 5, 2015

Nicholas Bagley, *Medicine as a Public Calling*, 114 **Mich. L. Rev.** 57 (2015).

Even as some in Congress continue to vote to repeal the Affordable Care Act, most observers and political participants agree that the health reform law's central elements are here to stay. Yet broad agreement also exists that, despite the law's progress in decreasing the number of uninsured Americans, serious problems still plague the U.S. health care system. Escalating costs figure centrally among these problems, and recent news reports have highlighted the plight of insured Americans who face burdensome premiums or out-of-pocket costs. What is the most promising "fix" for addressing the persistent problems Americans face in accessing and affording medical care?

Against this backdrop, Nicholas Bagley's new article Medicine as a Public Calling suggests approaches in the tradition of public utility regulation as a plausible response. Bagley's argument is that—as we try to figure out how to move forward in a post-ACA landscape—we would do well to recognize how the public utility model shaped health care regulation in the twentieth century. The article is descriptive, rather than prescriptive. Bagley does not advocate regulation of health care prices, access, or supply, but he wants to make sure readers realize that such regulation would have a long lineage. I found the article's careful description of this lineage tremendously valuable. Keeping up with the rapid pace of changes in health law, policy, systems, and technology is a constant challenge for health law teachers and scholars. These changes make it all too easy to think that "taking a historical perspective" means looking back ten years or so, which obscures understanding of the legal historical path to today's vantage point. Bagley's article corrects that historical shortsightedness.

The article addresses Bagley's concern that contemporary policy choices are often boiled down to a dichotomy: move toward a single-payer system or give market forces more sway in distributing health care. That dichotomy, though, ignores a third path—treating the health care system as akin to a public utility. He highlights how public utility regulation traditionally strives to address "the sorts of problems in market ordering—supply imbalances, access restrictions, and abusive and discriminatory pricing—that have long afflicted the medical industry." Bagley acknowledges that the law-and-economics movement and the recent influence of market-based approaches to health care may make advocacy for a public utility model for health care seem passé. But he emphasizes both the durability of historical measures reflecting a public utility approach and the (re)emergence of federal and state initiatives resembling public utility regulation forebears. Suggesting that the policy pendulum may have already begun to swing away from market-based approaches, his explicit aim is "to give the pendulum a gentle push" back towards a public utility regulatory model.

Bagley begins by describing troubling aspects of the health care system—"supply shortages, access restrictions, and capricious, exorbitant prices"—that manifest failures in the health care market and, thus, suggest a public utility-inspired response. In particular, he notes the danger that the ACA's efforts to "defragment" and coordinate care may prompt anticompetitive consolidation, in some cases producing dominant hospital systems that look like natural monopolies. He suggests that public utility regulation, by retaining "the basic architecture of the private financing system while asserting state control over the medical industry's perceived excesses," could offer a more moderate response than socialized insurance. Then, he identifies the precedent for that moderate approach, describing how laws recognizing medicine's public calling historically have shaped health law.

Central to Bagley's historical account is a description of the law of public callings that emerged by the early twentieth century. According to his account, public callings shared two key attributes: a business with a public calling "met an important human need," and "some feature of the relevant market presented the risk of oppression." Historically,

public utility regulation did not demand an actual natural monopoly; instead, the touchstone was widespread consumer disadvantage in the market. Readers familiar with the history of health care in the U.S will likely accept Bagley's explanation of why medicine was not deemed a public calling in the early 1900s and will nod with recognition as he identifies regulatory interventions in the second half of the twentieth century that demonstrate a public utility-inspired approach. These include Hill Burton and health planning legislation, civil rights laws, the community benefit standard, EMTALA, state and federal insurance rate-setting reforms, and state hospital rate regulation schemes.

Bagley does not claim that medicine was ever viewed as a true public utility or that the past few decades of health policy (at least pre-ACA) have continued the public utility tradition. Rather, he pushes back against a dominant narrative of health care regulation that obscures a deeply embedded historical understanding of the health care industry as having a public calling. That history is important, argues Bagley, as we consider how to address the persistent problems around supply, access, and pricing that have survived the ACA's implementation. Bagley concludes by pointing out contemporary examples of state intervention in the market that embody public utility approaches. His examples resonated, in part because they echoed what I've been hearing on the news. While I was reading his article and writing this review, the news has been full of stories about outrage over exorbitant pricing increases by drugmakers and how Maryland is using hospital global budgeting to control costs, to give just two examples.

Before reading Bagley's article, I would not have seen a public utility connection between these two news stories, but now it is obvious to me. *Medicine as a Public Calling* does not create a new paradigm. Instead, it reveals and establishes the contemporary relevance of an old paradigm—understanding the medical industry as being affected with a public interest that justifies intervention akin to public utility regulation. Reading the article permitted me to see the history of health care regulation—and today's issues—differently. It's the difference between seeing a bunch of stars up in the sky and seeing a constellation. Bagley's article illuminates both the connection between seemingly disparate historical and contemporary regulatory points, as well as their linkage to the public utility model. I recommend the article for anyone who seeks a richer understanding of the historical context in which today's health policy debates occur.

Cite as: Mary Crossley, *Pendulums Swing*, JOTWELL (November 5, 2015) (reviewing Nicholas Bagley, *Medicine as a Public Calling*, 114 **Mich. L. Rev.** 57 (2015)), https://health.jotwell.com/pendulums-swing/.