Did Legal Education Fail Health Reform? And How Health Law Can Help

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DID LEGAL EDUCATION FAIL HEALTH REFORM?
AND HOW HEALTH LAW CAN HELP

Wendy K. Mariner∗

I. INTRODUCTION
The challenges to the constitutionality of several provisions of the Patient Protection and Affordable Care Act1 (ACA) should put an end to any question that health law is a field.2 In court, the issues were presented as

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2 Several scholars have examined the nature of the health law field from different perspectives. See, e.g., George J. Annas, Health Law at the Turn of the Century: From White Dwarf to Red Giant, 21 Conn. L. Rev. 551 (1989); M. Gregg Bloche, The Invention of Health Law, 91 Calif. L. Rev. 247 (2003); Henry T. Greeley, Some Thoughts
questions of constitutional law, specifically Congress's power to regulate commerce and to tax and spend for the general welfare. Nevertheless, analyzing whether those powers encompassed the minimum coverage requirement (also known as the individual mandate) and the Medicaid eligibility expansion necessitated more than passing knowledge of health care and health insurance. Constitutional scholars suddenly had to be health law experts. The arguments and resulting opinions, however, reflect significant gaps in knowledge about health insurance and the health care system in general.

This essay argues that this gap in knowledge matters and that it may offer lessons for improving legal education. Part 1 considers how ACA litigation arguments framed in traditional doctrinal terms missed much of the reality of health care. This suggests that the legal education may have failed to prepare advocates on both sides to identify and explain relevant arguments. Thus, Part 2 summarizes several relevant critiques of legal education. Part 3 then considers aspects of health law that offer promising responses to some of these critiques. Part 4 offers ideas for a broader vision for educating scholars and lawyers in health law. Most important, the legal profession, like the medical profession, faces a system in which services are increasingly costly and concentrated among those with the greatest resources. The history of health reform itself may

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3 See U.S. CONST. art. I, § 8, cl. 1, 3 (“Congress shall have Power To lay and collect Taxes . . . provide for the common Defence and general Welfare of the United States: . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”).
hold lessons for the legal system and how to prepare lawyers to provide affordable services to all those in need.

II. THE ACA CHALLENGE WAS NOT AN EASY CASE

When the ACA was first challenged, some constitutional scholars believed it would be an easy case. That assumption was belied by the fact that both ACA opponents and supporters believed it was an easy case. Nothing as path breaking as the ACA, the most significant national legislation in the health care field since the 1965 enactment of Medicare and Medicaid, was likely to be easy. Nonetheless, to many, the constitutional questions seemed straightforward when viewed from a traditional scholarly point of view. But, there were at least two points of view, based in large part on conceptions of federal power, and neither was adequate to argue or predict the outcome. Neither side fully understood how “commerce” and “spending” functioned in the health care system, so their arguments remained largely abstract and detached from the facts. To varying degrees, the Justices reflected a similar detachment in their opinions in the case.

By now, the arguments are well known and will not be repeated here. Suffice it to say that the arguments over the minimum coverage requirement parsed cases on Congress’s Article I powers to tax and spend and to regulate commerce. The briefs, oral arguments, published articles, and the decision itself repeatedly analyzed Supreme Court decisions like Wickard, Lopez, Raich, and Comstock.

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8 Gonzales v. Raich, 545 U.S. 1 (2005).
None of these cases offered an exact precedent for the minimum coverage requirement. Congress had never imposed a precisely comparable requirement on individuals before. This alone made it a difficult case.

Of course, the fact that a law is novel does not make it unconstitutional. During the Great Depression, the Social Security Act was vigorously challenged as an unprecedented expansion of federal government authority to tax and spend – a point that Justice Ginsburg tried to make in the ACA oral argument. In 1937, the Social Security Act challengers argued that Congress’s power to tax and spend for the general welfare did not include the power to pay old-age pensions only to the elderly. In Helvering v. Davis, the Supreme Court upheld the constitutionality of the Social Security tax on employees to provide pensions to the elderly, but the outcome was not a foregone conclusion. Justices McReynolds and Butler dissented on the grounds that the Act was “repugnant to the Tenth Amendment,” just as the ACA challengers argued that the individual mandate invades state sovereignty.

Writing for the majority, Justice Cardozo apparently felt compelled to explain the national need for federal financial aid. He did so in language that could apply to health insurance today:

11 But see Sebelius, 132 S.Ct. at 2586 (Opinion of Roberts, C.J.) (“But sometimes ‘the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent’ for Congress's action.”).
14 Helvering, 301 U.S. at 646 (Reynolds, J. and Butler, J., dissenting).
Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent change with the times.

The purge of nation-wide calamity that began in 1929 has taught us many lessons. . . . Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. . . . But the ill is all one . . . whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house . . . .15

This kind of contextual explanation was largely missing from the ACA litigation.16 Without it, however,

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15 Id. at 641.
16 An exception was Solicitor General Donald Verrilli’s last minute plea at end of the last day of oral argument:

There is an important connection, a profound connection between that problem and liberty. And I do think it’s important that we not lose sight of that . . . [because of the Medicaid expansion] there will be millions of people with chronic conditions like diabetes and heart disease, and as a result of the health care they will get, they will be unshackled from the disabilities that those diseases put on them and have the opportunity to enjoy the blessings of liberty. And the same will be true for – for a husband whose wife is diagnosed with breast cancer and who won’t face the prospect of being forced into bankruptcy to try to get care for his wife and face the risk of having to raise his children alone, and I could multiply example after example after example.

constitutional doctrine was not sufficient to resolve a matter of first impression either way.\textsuperscript{17} The Court’s majority and dissenting opinions found little precedent to support their conclusions, despite occasionally tortured efforts to identify analogies and distinctions in earlier cases. But this should not mean that novel cases can be decided on the basis of the Justices’ outcome preferences. Where doctrine alone cannot control, it becomes necessary to understand what the law at issue actually does, so that doctrine can be refined in principled ways. The novelty of the ACA meant applying doctrine – which itself was less than crystal clear – to complex issues of health care and health insurance financing. Resolving the constitutional question depended on knowledge of the health care system, insurance, and how insurance is used to pay for health care. Few, if any, constitutional scholars or practitioners had that knowledge.\textsuperscript{18}

Counsel for the challengers framed the Commerce Clause claim most simply: that a requirement to obtain health coverage was simply a mandate to buy a commercial
product, which amounted to requiring people to engage in commerce, not regulating any existing commerce. Of course, the ACA permits the coverage requirement to be satisfied by government-funded health benefit programs, such as Medicare, Medicaid, the Department of Veterans Affairs, and the Bureau of Indian Affairs, as well as employee group health plans. Nevertheless, Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Alito accepted the characterization of health insurance as a commercial product. Thus, if Congress could require individuals to buy this commercial product, then surely it could require individuals to buy other products. In light of


21 See generally Sebelius, 132 S. Ct. 2566. The Chief Justice and the Justices in the Joint Dissent described health insurance only as a commercial product, and then only in terms of traditional non-group indemnity insurance, which is underwritten so that it is actuarially fair: you only pay for your own personal risks. However, all but a small proportion of health insurance in the United States is either public benefit programs or private employee group insurance, which is not underwritten. See Fronstin, supra note 20, at 5 fig. 1; Paul Fronstin, Employment-Based Health Benefits: Trends in Access and Coverage, 1997-2010, EMP’T BENEFIT RESEARCH INST. ISSUE BRIEF NO. 370, Apr. 2012, available at http://www.ebri.com/publications/ib/index.cfm?fa=ibDisp&content_id=5042. Only about 7 percent of the nonelderly U.S. population is covered by underwritten, individual (non-group) health insurance policies. Fronstin, supra note 20, at 5, fig. 1.

22 Sebelius, 132 S. Ct. at 2590 (“The mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money.”), at 2642 (Scalia, J., Kennedy, J., Thomas, J., Alito, J., dissenting). In fact, the major reason that people are uninsured is that they cannot afford the cost of insurance. SUMMARY HEALTH STATISTICS FOR THE U.S. POPULATION: NATIONAL HEALTH INTERVIEW SURVEY, 2009, U.S. DEPT OF
the breadth of commerce in today’s national and global markets, such an expansive power looks more like the states’ police power than a specific, enumerated federal power. These five Justices expressly sought to preserve the distinction between federal and state sovereignty. Their solution was to draw a bright line between those who are and are not active or engaged in interstate commerce, with federal authority to regulate commerce limited to the former. Although the Justices did not constrict the scope of Congress’s commerce power, the majority would not expand it to include the power to require individuals to do something.

Applying the active/inactive in commerce rule may not be as easy as the Justices seemed to assume. As Judge Sutton noted in his concurring opinion upholding the individual mandate for the sixth circuit Court of Appeals below, many instances of doing nothing can be characterized as doing something else and vice versa. The absence of any analysis of how the boundaries may blur deprives the majority’s commerce clause opinions of some measure of persuasiveness.

Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, dissented from the majority’s commerce clause conclusions. Her opinion demonstrated a better understanding of the health care system. It viewed health insurance not as a fungible commercial product, but as a necessary means of paying for health care. Since virtually
everyone uses health care, they are already engaged in commerce, so the coverage requirement simply regulated how and when they pay for care. This, she argued, would not open the door to federal requirements that individuals buy cars or vegetables, because other products do not share health insurance’s characteristics. This was a more complex argument to make, one requiring knowledge of the health care system.

The majority and minority Justices appeared to view the case through the lens of federalism. What was needed to convince a majority of the Justices to uphold the ACA’s federal mandate under the Commerce Clause was a principled distinction between a requirement for health insurance coverage and a requirement to buy anything else – one that also served to distinguish the Commerce power from the police power. Such a distinction depended on facts specific to the health care system that would not apply to the purchase of all products. In short, to win the commerce clause argument, the government needed a limiting principle, and neither the government nor any Justice was able to articulate a sufficiently convincing one.

29 Id. at 2620 (Ginsburg, J.) (“Persons subject to the mandate must now pay for medical care in advance (instead of at the point of service) and through insurance (instead of out of pocket).”).

30 Id. at 2624 (Ginsburg, J.) (“One could call this concern the ‘broccoli horrible,’” referring to the Chief Justice’s mention of a mandate to buy green vegetables).

31 Id. at 2591, 2642 (Scalia, J., Kennedy, J., Thomas, J., Alito, J., dissenting).

32 The Brief of 104 Health Law Professors as Amici Curiae in Support of Petitioners at page three, Dep’t of Health & Human Serv. v. Fla., 132 S. Ct 2566 (2012) (No. 11-398), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-398_petitioneramcu104healthlawprof.pdf (offering a factual description) was submitted to provide the Court with those facts. Together with Mark A. Hall, the author helped draft the Brief, organized health law professors’ participation, engaged counsel, and signed the Brief.

33 Sebelius, 132 S. Ct. at 2642 (Scalia, J., Kennedy, J., Thomas, J., Alito, J., dissenting). Paul Clement, representing the state challengers, argued that the federal government had no limiting principle for Congress’s power to require individuals to buy commercial products,
Instead, both the parties and the Justices argued the case in terms of abstract principles of federalism and barely looked beyond their own preferred interpretations of the Commerce power.

A better understanding of health insurance itself might have compelled the Justices to think more deeply about what was being regulated. In the absence of cogent explanations, the Court was left with an inadequate factual basis for determining whether the commerce power could apply to the minimum coverage requirement without implying that Congress could force people to enter markets involuntarily.\footnote{The majority’s decision on the Medicaid eligibility expansion also demonstrated incomplete knowledge of the structure and history of Medicaid, but the decisive factor appeared to be preserving state jurisdiction over the state’s laws implementing Medicaid programs. Sebelius, 132 S. Ct. at 2601-8. The Chief Justice’s opinion relied for the first time on the concept of coercion to find that the spending power precluded the federal government from ending all federal Medicaid funding of states that declined to adopt the newest category of eligible beneficiaries (adults under 65 years of age with incomes less than 133% of the federal poverty level) added by the ACA. Id. at 2606-7; 42 U.S.C. §§ 1396(a)(10)(A)(i)(VIII), 1396c (2012).} Thus, the Justices’ opinions tracked their

and began his oral argument by stating that the individual mandate is “an unprecedented effort by Congress to compel individuals to enter commerce.” Transcript of Oral Argument at 55, Dep’t of Health and Human Serv. v. Fla., 132 S. Ct. 2566 (2012) (No. 11-398). \( \text{See Mariner, supra note 17, at 201-201 (noting the need for a persuasive limiting principle).} \) This is not the first time that constitutional law scholars have misjudged the Supreme Court in health law cases. Professor Laurence Tribe argued on behalf of patients for the right to have physicians assist their suicides. Vacco v. Quill, 521 U.S. 793 (1997). At the time, colleagues suggested that it should be an easy win: the Supreme Court would find a constitutional right to physician-assisted suicide and strike down laws prohibiting physician assisted suicide, perhaps relying on Justice Kennedy’s ”mystery of human life” language in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992). But, the Court did not do so. Its decision made clear that the Court wanted a limiting principle on the purported right to assisted suicide, which the litigants did not provide. Wash. v. Glucksberg, 521 U.S. 702, 733 (1997).
views of the boundary between federal and state jurisdiction.35

The idea that the parties failed to appreciate relevant facts about the structure and financing of the health care system is significant, but not because a factual analysis should displace doctrinal analysis. Rather, doctrine requires interpretation when it is applied to new subject matter, and meaningful application of doctrine requires an accurate understanding of the subject matter. If the subject matter is misunderstood, the doctrine may be interpreted in incongruous ways, which may distort doctrine in its applications in other contexts.36 Regardless of whether such an analysis would have upheld the individual mandate, it should have produced a more robust and persuasive refinement of the definition of commerce.

III. DOES LEGAL EDUCATION CONTRIBUTE TO INEFFECTUAL SCHOLARSHIP OR PRACTICE?

Two conclusions can be drawn from the public and courtroom debate over the constitutionality of the individual

35 This is not to say that the Justices are motivated by public opinion or politics, which are not the same as ideology. See Lawrence Baum & Neal Devins, Why the Supreme Court Cares About Elites, Not the American People, 98 GEO. L. J. 1515 (2010) (arguing that the Justices probably care more about the opinions of elites than the public).

36 For example, in his opinion on the Medicaid expansion, the Chief Justice called the addition of the new eligibility category “a shift in kind, not merely degree.” Sebelius, 132 S. Ct. at 1575. Yet, the opinion does not identify any relevant factual distinction between the eligibility categories originally in effect and added by pre-2010 amendments and the category added by the ACA. See generally Sara Rosenbaum & Timothy Stoltzfus Jost, All Heat, No Light – The States’ Medicaid Claims before the Supreme Court, 366 NEW ENG. J. MED. 487 (2012). Without a clear distinction, the decision invites confusion and future litigation over whether statutory amendments qualify as amendments or create entirely new programs. The Joint Dissent’s characterization of generous federal funding as “coercive” is similarly unclear. Sebelius, 132 S. Ct. at 2643 (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting). See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999); S.D. v. Dole, 483 U.S. 203 (1987).
mandate: (1) health law issues pervade modern society; and (2) well trained lawyers failed to adequately explain or justify their positions on the constitutionality of the ACA. Both conclusions suggest that legal education may be missing an opportunity to prepare both scholars and practicing lawyers for effective careers today. Several critiques of legal education offer clues to what might contribute to this missed opportunity.

The critiques of interest here are a highly selective sample. I will not address the challenges that universities themselves face, which include increasing competition for students in a difficult economic environment with rising costs, income inequality, and high student loan debt.
technological advances, and pressure to disclose graduate employment data, \textsuperscript{39} reduce tuition, augment endowments, and demonstrate the value-added of a university education. \textsuperscript{40} Most law schools sit within universities, and their fate is tied to a significant degree with the fate of their university. \textsuperscript{41} But law schools face their own unique challenges. Perhaps the most pressure to conform to a traditional model of legal education comes from the rankings, whose criteria drive law schools’ activities and metrics. \textsuperscript{42} But these are so well known, and almost

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\textsuperscript{40} In an address at the University of Michigan in January 2012, President Obama said:

\textquote{\textit{So, from now on, I’m telling Congress we should steer federal campus-based aid to those colleges that keep tuition affordable, provide good value, serve their students well. We are putting colleges on notice. . . . If you can’t stop tuition from going up, then the funding you get from taxpayers each year will go down.” Obama in Ann Arbor: Text of the President’s Speech on Affordability, ANNARBOR.COM (Jan. 27, 2012), http://www.annarbor.com/news/obama-in-ann-arbor-text-of-the-presidents-speech-on-college-affordability/}, last visited Nov. 8, 2012.


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universally lamented, that there is no need to mention them further.  

The best-known criticisms of legal education are what I call the Ivory Tower Critiques. These argue that legal education (1) is overly abstract and distant from real world problems, with too much emphasis on theory, (2) offers limited attention to practice issues, in particular, what lawyers do interacting with clients, prosecutors, businesses, administrative agencies, and other lawyers, and (3) produces scholarship of limited relevance to practitioners or judges.

Legal education has been criticized for its distance from practice for decades, notably by Karl Llewellyn and Jerome Frank. A notorious example of the ivory tower critique is Justice Roberts’ comment at a 4th Circuit Judicial Conference in White Sulphur Springs, West Virginia, in June 2011. He reportedly said:


Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.\footnote{Law Prof. Ifill Challenges Chief Justice Roberts’ Take on Academic Scholarship, AM. CONSTITUTION SOC’Y BLOG (July 5, 2011), http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99-take-on-academic-scholarship (last visited Nov. 8, 2012).}

Perhaps this is why judges rarely read law review articles. Few law school professors would dispute the claim that their legal research, at least before tenure review, focuses on developing novel theories of law, which are read almost exclusively by other law professors.\footnote{See Erwin Chemerinsky, Why Write?, 107 MICH. L. REV. 881, 885 (2009).}

The grain of truth in the ivory tower critique – one that is relevant to the ACA litigation – is that the focus on theory may blind lawyers to the need for more specific and intensive examination of the subject matter to which theory and doctrine may apply. However, this does not mean that law schools ought to abandon rigorous teaching about theory and doctrine.\footnote{See, e.g., Richard A. Posner, The Deprofessionalization of Legal Training and Scholarship, 91 MICH. L. REV. 1921 (1993); George L. Priest, The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards, 91 MICH. L. REV. 1929 (1993); Lee C. Bollinger, The Mind in the Major American Law School, 91 MICH. L. REV. 2167 (1993).} Such teaching is foundational – necessary, but not sufficient. Rather, the critique raises the perennial question of whether law schools should be training practitioners, as in the historical trade school model, or educating research scholars, as in the traditional Ph.D model.\footnote{See William R. Trail & William D. Underwood, The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools, 48 BAYLOR L. REV. 201 (1996).}
Law schools and lawyers have struggled with the question of which model suits legal education since the Civil War era.\(^{50}\) Nineteenth century German and other European university systems, which had established faculties in theology, philosophy, medicine, and law, apparently impressed several influential academics.\(^{51}\) The European conception of law as a science that required formal study distinguished the legal profession from a mere guild for craftsmen.\(^{52}\) It helped to characterize law as an academic discipline, instead of a trade, and worthy of placement within a university at a time when universities were becoming research institutions. It also offered an opportunity to develop an elite class of law professors capable of teaching the science – full-time academics who gradually replaced practicing lawyers as teachers.\(^{53}\) These attractions elevated research and scholarship over occupational training as the benchmark for academic standing. The development of formal legal education supplanted apprenticeship with practicing lawyers and culminated in today’s model of a three-year program of graduate studies following a university undergraduate degree.\(^{54}\)

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\(^{54}\) STEVENS, supra note 50, at 205, 209.
Law professors have been expected to write scholarly articles, perhaps since then Dean of Harvard Law School urged it as one of three essential elements of the faculty in 1901.55 Yet, the quality of law faculty scholarship is highly variable. Despite Chief Justice Roberts’ critique, there are thoughtful, relevant and useful law review articles (many of them in health law).56 However, the more practical and relevant they are, the less likely they are to provide support for tenure. If we are honest, we must concede that the pressure to be original in theory or, to a lesser extent, doctrine can produce irrelevant – sometimes ridiculous – scholarship that would never be accepted in any other field of research.57 Furthermore, there is almost no supervision

55 James Barr Ames, *The Vocation of the Law Professor*, in *Lectures on Legal History and Miscellaneous Legal Essays* 364 (1913) (noting that the other elements are teaching, id. at 362, and influencing legislation and the development of the law, id. at 367).


57 See, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism”,* 151 U. PA. L. REV. 1211 (2003) (“The fact that suicide is currently illegal marks a classic form of heavy-handed paternalism . . . . An alternative policy . . . is to sanction suicide, but only after a mandatory cooling-off period. Such a policy might, for example, require a suicidal person to ‘give notice’ of the desire to commit suicide one month in advance with the ability to rescind the notice at any point during the intervening period.”). The authors were apparently not aware that suicide was (and is) not illegal, so their factual premise was in error. Instead, they made an interesting theoretical argument for replacing the non-existent crime with an impractical alternative, since a majority of suicide attempts are spur of the moment decisions, which are not likely to be affected by any notice requirement. *Institute of Medicine, Reducing Suicide: A National Imperative* (S.K. Goldsmith et al. eds., 2002); Keith Hawton, Christopher Ware, Hamant Mistry, et al., *Why Patients Choose Paracetamol for Self-Poisoning and Their Knowledge of Its
of the accuracy of legal research. 58 Student journal editors are well trained in paragraph structure and reference formatting, but are rarely familiar with the subject matter of the article they “edit.” Few law journals use peer review to vet articles submitted for publication, so external experts have no opportunity to evaluate the premises, methods or conclusions of papers before publication. Moreover, few experts who are able to notice errors even read the journals. Law students typically rely on law review articles for their own research, so that errors embedded in journals are often perpetuated rather than corrected over time.

Law schools do some things well. The very first observation of the Carnegie Report was:

> [...] students demonstrate new capacities for understanding legal processes, for seeing both sides of legal arguments, for sifting through facts and precedents in search of the more plausible account, for using precise language, and for understanding the applications and conflicts of legal rules. Despite a wide variety of social backgrounds and undergraduate experiences, they are learning, in the parlance of legal education, to ‘think like a lawyer.’ 59

Learning how to think like a lawyer is especially valuable for issue-spotting, but it has a downside. One

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58 There is some irony in the fact that legal scholarship was intended to resemble that of research for Ph.D.s in university departments, partly to justify legal studies as graduate level academic work, but did not adopt the same oversight and peer review requirements. See Stevens, supra note 50.

disadvantage arises from the use of casebooks, which publish highly edited versions of reported appellate cases — stripped of factual details — to demonstrate legal principles. The Carnegie Report observes that:

most law schools emphasize the priority of analytic thinking, in which students learn to categorize and discuss persons and events in highly generalized terms. This emphasis on analysis and system has profound effects in shaping a legal frame of mind. At a deep, largely uncritical level, the students come to understand the law as a formal and rational system, however much its doctrines and rules may diverge from the common sense understandings of the lay person.60

The idea that law is a science – a set of (ideally neutral) principles that can be discerned with the appropriate analytic and conceptual skills – remains embedded in the core justification for legal education.61 US law schools narrowed the scope of the original European idea of law as science. Nineteenth century European curricula included history, economics, political theory, sociology, Roman law, and comparative law as part of the study of law. US law schools dropped those subjects for decades and only slowly reintroduced them in somewhat different forms, typically under specialized rubrics like law and economics and law and society.62 To be sure, critiques from successive movements – legal realism, positivism, critical legal theory, feminist theory, and social theory – have substantially

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60 Carnegie Summary, supra note 59, at 5.
61 See generally Stevens, supra note 50; Herget, supra note 52.
weakened law’s claim to universality and neutrality. But the core claim is hard to give up. If law is simply the result of power struggles, what science remains for law schools to teach? Our students might be better off in departments of political science, economics, or sociology.

The solution cannot be to ignore theory or return to the days of apprenticeship training. However, insistence on developing novel and arcane theories divorced from the factors that influence law is driving scholarship farther away from making a meaningful contribution to jurisprudence. The future of law schools may depend on a revolutionary rethinking of their structure and curriculum. Of course, law schools have not ignored these challenges. Nonetheless, a multitude of obstacles has stymied meaningful change. Most valuable reforms implemented so far, such as clinical seminars and externships, tend to be additions to a crowded curriculum. Moreover, they are often taught by clinical faculty, who complain of second class citizenship, often quite rightly. The real problem is that patching in new courses does little to change the perspective of legal education.


This brings me to a different set of criticisms of legal education, which I call the Social Justice Critique. This critique argues that many programmatic elements of the curriculum narrow the scope of legal analysis to one that preserves the status quo, perpetuates powerful elites68 and stifles creative thinking about the law and solutions to legal problems. Of particular concern is the categorization of required and elective courses. To social critics, the foundational courses of contracts, torts, civil procedure, and property immediately establish an image of law as primarily private case law. This private law emphasis reinforces the idea that corporate and property issues are the core of law, because they are the focus of learning how to think like lawyers. Directly or indirectly, it can train students to accept the existing structure of public and private institutions and financial relationships as normative and neutral in their effects, and thus to perpetuate the status quo.69

Courses in legislation, administrative law, employment law, anti-discrimination law, and the like are typically relegated to elective status, creating the impression such subjects are peripheral in value. This can create a distorted picture of the legal landscape, especially since so much legal practice involves the drafting, interpretation, and application of legislation and regulations.

While the case method has substantial value in learning to think like a lawyer, the use of edited casebooks

68 Joan Williams notes that “one role of law school has been to train members of the elite to assume elite positions,” and “Langdell invented his curriculum at Harvard to boss around other members of the elite,” but adds that it now also serves as a pathway for non-elites to enter the elite class. Bob Gordon, Jack Schlegel, James May & Joan Williams, Colloquium: Legal Education Then and Now: Changing Patterns in Legal Training and in the Relationship of Law Schools to the World Around Them, 46 AM. U. L. REV. 747, 769 (1998).

69 The expense of a legal education and the concentration of employment in corporate-oriented practice may exacerbate this effect, making access to justice unaffordable for low and middle-income Americans. See Gene R. Nichol, Jr., Judicial Abdication and Equal Access to the Civil Justice System, 60 CASE W. RES. L. REV. 325 (2010); Rhode, supra note 42, at 23.
sometimes undermines creative thinking. Some casebooks drain the life out of legal problems. Few contain facts to illuminate the context of legal problems. The discussion of cases leads students to focus on the legal issue, separate and apart from the social context. Problems are abstracted from their human dimension and considered only with respect to whether they fall within a rule. The Supreme Court’s oral arguments exemplified a similar “bloodless” debate. It teaches that the ethical and social consequences of justifiable principles are beyond the scope of relevant consideration.

The absence of context – how and why legal problems arise in a particular society – gives students little opportunity for thinking about how to make strategic choices. Without practice at attention to context, law graduates may not recognize the complexity of their clients’ problems. In light of the dynamic nature of many legal rules, and especially regulations, there is significant need for thinking carefully not only about what legal remedies are available, but also why only these and not others exist, and whether others could be developed. In this way, context can nurture useful new theories in law.

The Carnegie Report also notes that law schools pay less attention to the civic, professional, ethical and leadership roles of lawyers. Thus, graduates may miss important opportunities to exercise leadership to improve social

71 See, e.g., CARNEGIE REPORT, supra note 37, at 187.
institutions. Furthermore, a tight focus on legal doctrine can breed hammer-and-nail problems: when your only tool is a hammer, every problem looks like a nail. If law is your tool, you may tend to view law as the sole cause of — and therefore the only solution to — a problem. Sometimes, law is not the answer. Lawyers who fail to recognize complex sources of problems causes can miss the most effective solutions.

IV. HEALTH LAW OFFERS A MODEL FOR RETHINKING LEGAL EDUCATION, AT LEAST IN PART

The health law field suffers less from these criticisms than do most other legal fields and has several advantages that could be translated to other areas in the law curriculum. A particular advantage of health law in responding to critiques of legal education is that, as an applied area, it cannot avoid attention to real world problems. Moreover, these problems range across social and economic life from birth to death, exposing students to a wide array of both doctrinal and practical issues. After

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76 For example, liability for injury is often cited as a major cause of problems like the high cost of some pharmaceuticals, the limited development of new vaccines, the price of medical malpractice premiums, and insufficient volunteers in emergencies, without examining other reasons, such as low return on investment, lack of market demand or resources, or better alternatives. See generally Aaron S. Kesselheim & Kevin Outterson, Improving Antibiotic Markets for Long Term Sustainability, 11 Yale J. Health Pol’y L. & Ethics 101 (2011); Charles H. Schultz & George J. Annas, Altering the Standard of Care — Unnecessary and Dangerous, 59 Annals Emergency Med. 191 (2011); Marc A. Rodwin, Hak J. Chang & Jeffrey Clausen, Malpractice Premiums and Physicians’ Income: Perceptions of a Crisis Conflict with Empirical Evidence, 25 Health Aff. 759 (2006); William M. Sage, Medical Malpractice Insurance and the Emperor’s Clothes, 54 DePaul L. Rev. 463 (2005):

77 See Clark C. Havighurst, Health Care as a Laboratory for the Study of Law and Policy, 38 J. Legal Ed. 499, 499 (1988) (noting that
all, in 2010, national health expenditures were $2.6 trillion dollars or 17.9% of GDP.\textsuperscript{78} Thus, health law teaching and scholarship is firmly connected to the real world. Even theoretical scholarship in the health law field demands connection to facts.\textsuperscript{79}

Health law issues also invite – indeed demand – attention to the larger context in which legal problems arise, because the consequences of interpreting some laws in one way rather than another can be significant when health is at stake.\textsuperscript{80} At the same time, the process of applying different laws can inspire new theories and valuable critiques of doctrine in light of their implications for solving legal problems.\textsuperscript{81} Ethical issues are especially salient, and not just in abortion, euthanasia, and treatment refusal.\textsuperscript{82} For instance, laws governing medical marijuana should take into account how effective medical treatments for different diseases are. Evaluating conflicts of interest among researchers requires familiarity with the way in

\textsuperscript{78} Anne B. Martin et al., \textit{Growth In US Health Spending Remained Slow In 2010: Health Share Of Gross Domestic Product Was Unchanged From 2009}, 31 \textit{Health Aff.} 208, 208-9 & exhibit. 1 (2012).

\textsuperscript{79} To be sure, as in all fields, health law scholarship includes theory divorced from facts, but that is a different question of the quality and accuracy of scholarship, not its subject matter. \textit{See infra} notes 95–99 and accompanying text.

\textsuperscript{80} \textit{George J. Annas, Standard Of Care: The Law Of American Bioethics} 246-249 (1993).


\textsuperscript{82} Many biomedical ethics texts present issues that also raise legal questions. \textit{See, e.g., Ethical Issues In Modern Medicine} (Bonnie Steinbock, John Arras & Alex John London, eds., 7th ed. 2008); \textit{George J. Annas, American Bioethics} xv (2005) (reiterating that “American law, not philosophy or medicine, is primarily responsible for the agenda, development and current state of American bioethics”). Some casebooks now combine both ethical and legal issues. \textit{See, e.g., Health Care Law And Ethics}, (Mark A. Hall, Maryann Bobinski & David Orentlicher, eds., 2007).
which biomedical research is conducted. Larger questions of distributive justice can arise when interpreting or critiquing statutes that regulate financing and access to care. A recent example is the controversy over health insurance coverage of contraceptives, now required under the ACA.83 The study of health law can encourage critical thinking about whether a particular legal approach should be used instead of another, in light of their respective civic and ethical implications.84 In short, as Annas has noted, studying medical problems provokes thinking about what it means to be human and “therefore what rights and obligations humans should have.”85

Legal issues arise in clinical care, public health programs, biomedical research, corporate structures, product standards, conditions of employment, health insurance coverage and financing, responsibilities for children, and professional licensure, as well as the physician-patient relationship. Health law specialists must identify all laws that may affect a problem. Therefore, health law applies law from many legal domains: administrative law,86 antitrust, antidiscrimination,


85 ANNAS, supra note 80, at 248.

86 A remarkable number of administrative agencies deal with health issues, including the Centers for Medicare and Medicaid, the Food and Agriculture Drug Administration, the Environmental
constitutional law, contracts, corporations, criminal law, employment law, environmental law, insurance, international law, patents, privacy, and torts. So many different legal issues are connected to health that one might devote one or more semesters to them without sacrificing attention to important doctrinal learning, not only because the field is so broad, but also because doctrine taught in other courses can be learned within health law courses.87

Applied fields have many opportunities to use problem-oriented methods, which require students to identify the different legal tools that could be brought to bear on a real problem. This approach is closer to law practice than the study of domains of law or legal doctrine in the abstract.88 Many health law professors have embraced practical lawyering skills somewhat more enthusiastically than most other specialties, offering students opportunities to work with law firms, hospitals, and legislatures, and to draft briefs amici curiae for relevant litigation.89 Northeastern University School of Law is a leading example of experiential (practice-based) legal education: its co-operative program places law students in supervised

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87 ANNAS, supra note 80, at 258.
89 This is not to suggest that health law teaching is always successful. The American Health Lawyers Association surveyed 94 health law practitioners in 2011 on their evaluations of new health law graduates. Preliminary results suggest that those surveyed reported that the new associates were best at legal research, analytical and reasoning skills, and advocacy and persuasion. They were less well prepared in writing skills, strategic thinking, problem solving, administrative law and the regulatory process. Kevin Outterson, Associate Professor of Law at Boston University, Presentation at the American Health Law Association Annual Meeting (June 25, 2012) (copy on file with author).
practice settings, especially in public interest, international and human rights law.  

Scholarship in health law is often relevant to policy-makers. Health law issues appear in the news almost daily, as well as in legislatures and courtrooms around the country. Keeping abreast of the field necessarily requires paying attention to real world developments, and this includes problems of economics, politics, and moral reasoning. One way to influence the development of the law is to reach policy-makers, and health law scholars often publish in medical and policy journals, such as Health Affairs and the New England Journal of Medicine, which policy-makers are likely to read. Empirical research is also growing in health law, perhaps because of its emphasis on effective solutions to real problems. Opportunities for

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92  See Martin Partington, Empirical Legal Research and Policy-Making, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 1002 (Peter Cane & Herbert M. Kritzer, eds. 2010) (arguing that empirical legal research should be valuable to policy makers, because it can provide evidence to identify gaps and weaknesses in current law, strategies for change, and areas where legislation is not likely to solves problems, id at 2003-4). For examples of empirical research in health law, see Nicolas P. Terry, Meaningful Adoption: What We Know and Think We Know about the Financing, Effectiveness, Quality and Safety of Electronic Medical Records, J. LEGAL MEDICINE (forthcoming 2012); Ann Hwang, Sara Rosenbaum & Benjamin D. Sommers, Creation of State Basic Health Programs Would Lead to 4 Percent Fewer People Churning Between Medicaid and Exchanges, 31(6) HEALTH AFF. 1314 (June 2012); Bernard Black, Charles Silver, David A. Hyman & William
employment in health law grow almost as fast as the health system, and this growth should accelerate as the ACA is implemented. New ideas and new courses have entered the curriculum most often when there was a need for new legal skills. For example, in the 1800’s, Harvard Law School prepared its graduates to become legislators and social leaders by teaching the Federalist and also political science. 93 After the New Deal created new administrative agencies, law schools began teaching administrative law and policy to prepare graduates to lead those agencies. 94 When the administrations of Presidents Reagan, George H.W. Bush, and George W. Bush favored more libertarian approaches to governing, they began to appoint lawyers trained in law and economics as well as Federalist Society members to federal administrative positions and judgeships. 95 Today, there should be expanded opportunities for employment for lawyers who know the health care system, as well as those in environmental law. These opportunities exist not only in private law practice, but also in government agencies, legislatures, and commercial and nonprofit health-related organizations. Health law training can prepare lawyers for all these options, because it includes systematic knowledge of health systems.

Of course, the health law field is not without its own problems. The most daunting is its scope. 96 It is difficult to master all the relevant legal domains and avoid


dilettantism. As a result, the quality of health law scholarship remains uneven. Some of the health law field’s advantages may undermine rigor in scholarship. For example, empirical and other research that is funded by external donors may be influenced, perhaps unwittingly, by the money itself or the donor’s goals, in the same ways that conflicts of interest can affect biomedical research. If funding is available for drafting new laws limiting liability, for example, but not for laws reducing the risk of harm, then more recommendations for liability limits are likely to be produced.

Health law often considers valuable insights from other disciplines, which should expand and enhance our view of the law and its effects. At times, however, viewing a legal issue only from a single disciplinary perspective can distort the analysis. Learning a little bit about economics, sociology or epidemiology, for example, can be a dangerous thing, if one begins to view all law from the perspective of that discipline alone. In some cases, the new disciplinary perspective overtakes the law, reversing their roles. If that happens, the law can be seen simply as a tool to achieve the

97 In this respect, health law resembles emergency medicine, which requires knowledge of many medical specialties. The medical profession did not recognize emergency medicine as a distinct specialty for many years, partly because of its applied nature. See generally BRIAN J. ZINK, ANYONE, ANYTHING, ANYTIME—A HISTORY OF EMERGENCY MEDICINE (2005).

98 The potential for conflicts of interest to create bias in biomedical research is well known. See, e.g., BERNARD LO, CONFLICTS OF INTEREST IN MEDICAL RESEARCH, EDUCATION, AND PRACTICE 195 (2009); Lee Friedman & Elihu Richter, Relationship Between Conflicts of Interest and Research Results, 19 J. GEN. INTERNAL MED. 51 (2004); David Korn, Conflicts of Interest in Biomedical Research, 284 JAMA 2234 (2000); Dennis Thompson, Understanding Financial Conflicts of Interest, 329 NEW ENGL. J. MED. 573 (1993).

goals of the other discipline, rather than a field with its own values and goals.100

A different kind of bias may arise from one’s philosophy of law or personal ideology.101 Although this is hardly unique to health law, health law scholarship may have more opportunities to fall prey to such bias, because it examines so many controversial social issues on which most people have strong opinions. It can be difficult to maintain a truly neutral perspective when analyzing laws or doctrines that affect the outcome of an issue important to the scholar.102 This is especially risky in applied fields like health law, where scholars may have a somewhat shallow understanding of the doctrine that applies to a hot-button issue and neglect to adequately analyze precedent and arguments that contradict a preferred interpretation.103 It

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100 See David M. Trubek, The Place of Law and Social Science in the Structure of Legal Education, 35 J. LEGAL EDUC. 483 (1985). For example, the concepts of law and economics added a valuable perspective to legal analysis, but some adherents began to argue that law itself should conform to classical microeconomic theory. TELES, supra note 95, at 90-134. See ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 130-48 (2008) (describing the Federalist Society and the development of a conservative movement to change constitutional law). Another example can be found in public health law, where some scholars see the law as simply a tool to achieve health, regardless of other goals, such as justice and liberty. For a critique of this approach, see Wendy K. Mariner, Law and Public Health: Beyond Emergency Preparedness, 38 J. HEALTH L. 247, 279-284 (2005).


102 See DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (describing theories and empirical research in psychology demonstrating how people often fail to analyze complex questions or accept evidence that contradicts their experience, biases or preferences).

103 Compare, e.g., Leonard H. Glantz & George J. Annas, Handguns, Health, and the Second Amendment, 360 NEW ENGL. J. MED. 2360, 2361-63 (2009) (noting that the Supreme Court had not specifically decided whether the Second Amendment protected an individual or collective right to bear arms before District of Columbia v. Heller, 554 U.S. 570 (2008)), with Lawrence O. Gostin, The Constitutional Right to Bear Arms, 300 JAMA 1575 (2008) (noting that earlier cases were understood to limit the Second Amendment’s protection to a collective right to maintain a militia).
can be easy to convince ourselves that our preferred understanding of doctrine or precedent is the indisputably correct interpretation, especially where precedent is limited and open to interpretation.\textsuperscript{104} Some constitutional law scholars seem to have succumbed to this error in arguing about the scope of the Commerce Clause during the ACA litigation.\textsuperscript{105}

Strong convictions about the correct interpretation of law can lead to advocacy. Of course, practicing lawyers properly advocate for their clients, and make clear that they are doing so. Scholarship is a different matter. It should offer honest, balanced analysis that recognizes different approaches and opinions. Scholarship does not preclude arguing for a particular interpretation or approach, but arguments are not statements of fact. There should be no hidden agendas in scholarship. When scholarship presents a preferred interpretation as fact or doctrine, it is poor scholarship.\textsuperscript{106} It may also cross the line into advocacy. If it


\textsuperscript{106} See for example Matthew L. Myers, Protecting Public Health by Strengthening the Food and Drug Administration’s Authority over Tobacco Products, 343 NEW ENGL. J. MED. 1806, 1808 (2000), for a discussion of how health lawyers believed, before the Food Drug and
fails to disclose its advocacy goal, it can be seen as deceptive.

Scholars in the health law field have many tempting opportunities to write as advocates, because the health care system has so many issues of public importance on which people hold strong views. When scholars write articles, as opposed to advocacy or opinion pieces, on such topics, it is essential to remain open-minded and use one’s critical analysis skills to recognize facts and arguments that challenge one’s preferred outcome. This is especially important in health law, where decision makers may rely on health law scholarship to develop policy far more than they may rely on more esoteric scholarship on legal theory.

V. A Broader Vision for Health Law

The Carnegie Report’s first recommendation for improving legal education was to develop an integrated curriculum with 3 goals:

(1) the teaching of legal doctrine and analysis, which provides the basis for professional growth; (2) introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients; and (3) exploration and assumption of the identity, values and dispositions consonant with the fundamental purposes of the legal profession. Integrating the three parts of legal education would better prepare students for the varied demands of professional legal work.107

Cosmetic Act was amended to authorize the FDA to regulate tobacco, that the FDA already had statutory authority to regulate the tobacco industry and were surprised when the Supreme Court found that the FDA’s authority – to approve only safe and effective new drugs – could not include tobacco in FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

107 WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION
One need not accept the Report’s specific critiques or conclusions to recognize that health law offers a good model for a law school curriculum that integrates knowledge, analysis, theory, attention to context, practical application, values, and meaningful change.

A common theme underlying many proposals to reform legal education is that of increasing attention to the role of lawyers in society: to inculcate in students an understanding of the obligation of lawyers to the rule of law and the importance of justice overall. Too often the lawyer’s role is understood narrowly, focusing only on the ethics of the private practice of law. If law is a profession, it must stand for something, and that something should be justice. Moreover, justice is for everyone, not only a client. So, a deeper understanding of the role of lawyers and the rule of law requires expanding our intellectual horizons to encompass the role of law in society.

This begs the question of what law is: a question well beyond the scope of this essay. Nevertheless, it is worth asking whether we can honestly say that law is a science with formal rules and neutral, objective principles of justice. I think not—as long as there are differing theories of justice and no universally accepted standard for choosing among them. The periodic waves of jurisprudential scholarship

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109 *Carnegie Report, supra* note 37, at 131; *McCrate Report, supra* note 37, at 140-41 (“striving to promote justice, fairness, and morality” is one of the four fundamental values of the legal profession).

110 The vast literature on theories of justice is testimony to the multitude of different perspectives. *See, e.g.*, MICHAEL J. SANDEL,
from different perspectives are evidence of an unsettled system.

So, what can we teach? If law constructs rules based on justice and fairness, we can, and often do, turn to political economy, economics, social theory, and moral philosophy to try to determine what is fair. Each of these fields offers important insights and perspectives to enrich our thinking. But, each also has its own ambiguities and internal conflicts, so that the same lack of consensus can reemerge in different jargon: no ultimate neutral standard of justice. Law professors, not fully expert in those fields, can be understandably nervous about relying on any single approach for ultimate insights.

For me, the only realistic answer is to live with the messiness of law. It means giving up the idea that there necessarily is a right answer, while continuing the search. We need to keep asking why we should accept a legal principle. What purpose does it serve, not only in principle, but in people’s daily lives? It means analyzing doctrine in the context of the world in which law applies and its consequences for real people. It means recognizing the need for change, interacting with people who are affected by the law (and the absence of law), and, most importantly, explicitly considering the social, financial, and moral implications of law – not merely in theory, but as experienced by all those affected.111

In his President’s Report to the Board of Overseers of Harvard University for 1981-82, Derek Bok aptly compared the legal system to the health care system, finding both to be increasingly sophisticated, but also complex, costly and

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maldistributed across the population.\textsuperscript{112} His conclusion remains true today: “The blunt, inexcusable fact is that this nation, which prides itself on efficiency and justice, has developed a legal system that is the most expensive in the world, yet cannot manage to protect the rights of its citizens.”\textsuperscript{113} Although there may be no more court cases per capita than in the past, there are more statutes and regulations to negotiate, just as there are more medical tests and therapies for disease. Like medical students, law students often choose lucrative private practice specialties rather than public service, partly to repay the increasing cost of their educations. Specialties in both medicine and law are more rewarding, both in money and prestige, than primary care and general practice. The growth of large multistate and multinational law firms mirrored the consolidation of both hospital systems and insurance companies, resulting in higher compensation for partners and associates and higher fees for clients,\textsuperscript{114} although the recession has dampened that trend.\textsuperscript{115} Major law firms concentrate on providing services at rates that only large organizations and wealthy individuals can pay. Low and middle-income families and small businesses cannot afford much justice. Legal service organizations and public defenders are generally underpaid while reaching only a fraction of those who need their help. In this respect, the health care system performs somewhat better, because public and private health insurance, as well as uncompensated care pools, are available.

\textsuperscript{112} Derek C. Bok, \textit{A Flawed System of Law Practice and Training}, \textsc{Harvard Magazine} 38, 38, 40 (May-June 1983), \textit{reprinted in} 33 \textsc{J. Legal Educ.} 570, 570, 572 (1983).

\textsuperscript{113} \textit{Id.} at 41.


\textsuperscript{115} \textit{America’s Law Schools and Firms: Trouble with the Law}, \textsc{The Economist}, Nov. 13, 2010, at 79, \textit{available at} \url{http://www.economist.com/node/17461573}. 
Bok’s report sparked many commentaries, but few concrete changes. Here, health law may offer some valuable perspectives. Because health lawyers often deal with issues of equitable access to health care, they should be particularly attuned to the ways in which laws promote or hinder access to justice. Thus, they may be alert to problems of justice and fairness in the legal system.

The Affordable Care Act lays out a program for near universal access to health care. Although the ACA does not directly control the health care costs that created pressure for reform, it puts the cost of care on the agenda for future experiments and reforms. Perhaps it is time to initiate reform not only in legal education, but, as Bok urged, in the legal system as a whole. Real reform would go beyond ongoing efforts to improve law school curricula. Reform goals should include enabling access to essential legal services for the entire population. For example, adapting the model of medical residencies for graduates of medical schools, creating a one or two year residency program in which law graduates spend time working for low and middle-income clients under the supervision of licensed attorneys would give graduates important practical experience and expand the services available to those in need. To integrate such training and experience into the


118 See An Act Improving The Quality Of Health Care and Reducing Costs Through Increased Transparency, Efficiency And Innovation, 2012 Mass. Acts, in which Massachusetts enacted payment reform legislation intended to slow the growth of health care costs, only a few years after enacting health care reform.

119 For early recommendations for similar clinical years, see CARNEGIE, REPORT, supra note 37, at 192; STEVENS, supra note 50, at 242-3. An alternative might be to borrow an approach from European legal
curriculum before graduation, the third year of law school could be transformed into an analog of medical school clerkships. Third year students could work in government agencies, non-profit, and legal service organizations. There should be plenty of opportunities for such placements in the health care system, but similar opportunities could surely be found in education, housing, family law, energy and environmental placements. In this way, legal education might begin to respond more effectively to both the Ivory Tower and Social Justice critiques and improve access to justice for everyone.

VI. Conclusion

Arguments over the constitutionality of the ACA – in the courts, in public debates, in scholarly articles, and blogs – illustrate the pervasiveness of health law issues in society. It also demonstrates that many participants in that debate, both those for and against the ACA, remained wedded to theories that have become disconnected from twenty first century realities. Legal education may have something to answer for in this respect. The more law moves away from strict principles into nuanced adjustments to new circumstances, the more lawyers will need to understand the circumstances. As the search for more affordable, responsive, and responsible legal education continues, it is worth emulating the best features of health law. Health law scholars should be proactive in translating their successes into broader curriculum changes, especially attention to context, both in theory and practice. Because the context includes how law affects society at large, meaningful reform should adopt as its ultimate goal extending affordable access to justice for all.

education, which requires law graduates who pass a partial licensure examination to practice for two or three years (much like a medical residency) and then take another examination to qualify for full licensure.