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A Critique of Expertise for Health Law

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Abstract: A health justice approach requires a progressive critique of expertise. This article considers two recent high-profile cases – the mask mandate and medication abortion -- to understand how we should think the mobilization of expertise in the context of public health law. Following from this, the article offers news ways to better understand how to think of the relationship between health law, expertise, and politics.

Health law needs a progressive critique of the relationship between law, regulation, and expertise. By *progressive* critique this article means a critique of expertise that will help us arrive at better distributional outcomes of health services and public health resources. Here, the concept of health justice, to which this symposium issue is dedicated, becomes relevant. Health justice, as articulated by Lindsay Wiley, Seema Mohapatra, RuquiijahYearby, and Emily Benfer, is framework for understanding how to better remedy health disparities through recognizing the way health inequality manifests through modes of structural subordination.[1] A call for a progressive critique of expertise sits in contrast both to the basic desire by conservatives in our current political moment to discount and undermine science-based institutions and to the desire of progressives to defer reflexively to expert medical or scientific authority. Instead, a progressive critique, with a vision towards justice, understands that evidence and expertise are situated in and co-produced by law to see how this interaction reproduces inequalities.

Why Do We Need a Critical Perspective of Law and Expertise in Adjudication on Health Law

As the anti-science policies of the Trump administration gained momentum, signs appeared on the yards of progressives across the country. In direct contrast to the administration's attacks on scientific facts and evidence, these signs declared "we believe in science." This idea was reproduced not only in in slogans and bumper car stickers but also by scholars who argue that law and policy on public health should always and only be based on evidence and expertise. This line of

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scholarship served an important purpose: it reminded politicians and thought leaders that there was studied, grounded, and proven methods that could be used to address public health problems and challenges. But it also often shared a common logic: if we always defer to expertise — in the form of expert agencies, epidemiologists, and scientists — we will always arrive at the right answer.

Two recent cases, and the progressive reactions to them, show how this "follow the evidence" approach sometimes works in practice.

The first case, *Health Freedom Defence Fund, Inc. v. Biden*, was brought by the Health Freedom Defense Fund as well as two other plaintiffs in United States District Court (Middle District of Florida Tampa Division).[2] They argued that the federal mask mandate, which required masks in airports, on airplanes, in train stations and other transportation hubs, was unconstitutional. Further, they claimed that the federal order violated the rules of the Administrative Procedures Act, namely, that it did not allow for public participation in accordance with the APA's requirements, that it violated the CDC's statutory authority, and that Congress improperly delegated its legislative power to the CDC.[3]

The controversial decision held for the plaintiffs and struck down the CDC's mask mandate. The Court held that the mask mandate exceeded the CDC's authority, reasoning that the requirement of masks went beyond the scope of agency powers enumerated in the Public Health Service Act Section 264(a), which authorizes the CDC to act [in the context of] "inspection, fumigation, disinfection, sanitation, pest extermination, destruction…and other measures."[4] While the Government argued that that the mask mandate is a sanitation measure, District Court Judge Mizelle concluded that a mask does not clearly fit any these categories. She states that by definition "sanitation" measures "clean" or are cleansing and that masks do not fit this definition. Also that the mask mandate ought to be read not as sanitation but rather within the agencies powers to detain and quarantine people in the context of travel. Yet even in this reworked understanding of the mask mandate, the CDC action was too broad, as the agency is typically only allowed to use detention measures for individuals traveling from abroad. Finally, Judge Mizelle agreed with the plaintiffs that the CDC did not engage in proper procedure by enacting the mask mandate without going through the usual notice and comment period required by the Administrative Procedures Act.[5]

The Court grants its own authority to review the case by overriding the deference that Courts should pay to agency interpretation of a statute in instances where the "statute is ambiguous and the interpretation is reasonable." (Typically understood as Chevron deference). Judge Mizelle states that the Court does not need to defer, because the statute is not ambiguous and that the government's interpretation of the statute is not reasonable. According to the District Court Judge, deferring to the CDC would grant "breathtaking" power to the agency allowing it to engage a series of actions against businesses and individuals, under the threat of civil and criminal penalties, and with impact on the economy.[6]

A call for a progressive critique of expertise sits in contrast both to the basic desire by conservatives in our current political moment to discount and undermine science-based institutions and to the desire of progressives to defer reflexively to expert medical or scientific authority. Instead, a progressive critique, with a vision towards justice, understands that evidence and expertise are situated in and co-produced by law to see how this interaction reproduces inequalities.

Criticism of the decision came largely from progressives. Public health experts were upset that a single federal judge could put in place an injunction that would impact agency policy necessary for the pandemic. Most criticized the fact that in the pandemic the nation was not deferential enough to expert agencies who had the primary and most legitimate authority to define what and how public health policy should look, and that one judge shouldn't have the power to undermine agency judgement in a pandemic.[7]

Compare this outcome and reaction to another recent high-profile issue: access to medication abortion.

Since its approval, mifepristone, a drug utilized in medication abortion, had been under stringent usage regulations by the FDA. In May 2020, in the midst

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of the pandemic, and worried that in-person dispensation of medication abortion, which included the highly regulated mifepristone, would lead to more COVID exposure, a group of organizations sued the FDA. These organizations included the American College of Obstetricians and Gynecologists (ACOG), the Council of University Chairs of Obstetrics and Gynecology (CUCOG), the New York State Academy of Family Physicians (NYSAFP), and Honor MacNaughton, M.D. Along with these physician associations was the SisterSong Women of Color Reproductive Justice Collective, a "national multi-ethnic membership organization dedicated to improving policies and systems related to reproductive lives of marginalized communities."[8] The organizations wanted to make medication abortion easier to access in the pandemic. This would require the FDA lifting the in-person drug dispensation and signature requirement.

At the District Court level Judge Chuang found for the petitioners. The Court held that a preliminary injunction against the FDA's enforcement was necessary.[9] Examining the regulations through the lens of the "undue burden standard," Judge Chuang asked if the regulation had "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Following the Supreme Court's application of the standard in *Whole Women's Health v. Hellerstedt*[10] and *June Medical Services v. Russo,*[11] which balanced the benefits and burdens of the laws under review, the District Court, too, found that the FDA regulations created a substantial obstacle to abortion access.[12]

The District Court felt it had the authority to review the FDA's judgement given the medical uncertainty surrounding the regulation of medication abortion. Following the Court's holding in *Whole Woman's Health v. Hellerstedt* the Court saw a role for itself in reviewing questions of medical uncertainty.

Advocates for public health and, more specifically, reproductive health, celebrated the district court opinion. Unlike the case of the mask mandate in which a singular judge was seen to be disrupting public health policy put forward by an agency, here advocates hailed the injunction as a victory of evidence over politics. In this instance, the FDA, unlike the CDC in the context of mask mandates, did not represent a technocratic body of experts, but instead an agency that had acted politically in approving the regulations to begin with.

This celebration was short lived; in August of 2020, the FDA went to the Supreme Court requesting a stay of the injunction. In his concurring opinion, Justice Roberts echoed the progressive critique of the decision striking down mask mandates:

> [T]he circumstances here —in which a single district court, presented with a suit by a single physician and a handful of organizations, displaced the FDA's scientific judgement with respect to every medication abortion provide in the country — illustrates the problems with allowing district courts to award relief untethered to the established injuries of the specific plaintiffs before them.[13]

The Court found for the FDA holding that the FDA could continue to enforce the regulations on mifepristone. The Chief Justice said that the Supreme Court should defer to "politically accountable entitles with the background, competence, and expertise to assess public health."[14] The holding was short lived: the transition to the Biden administration, resulted in the FDA lifting in-person dispensation requirements.

Public health advocates celebrated the shift in policy as an enactment of evidence-based regulation. Unlike the changes wrought on the CDC mask mandate by a singular judge, the pressures on the agency by lower court judges and the administration to alter its rules were celebrated as a victory.

A Critique of Expertise in Adjudication

To be sure, one way to read the contradictory positions taken by progressive public health advocates is that they are always following what is considered to be the best scientific, medical and public health evidence no matter the institutional context in which a legal question about public health regulation arises. From this perspective, following the evidence should always give you the right answer. A deference to evidence and expertise depoliticizes decision making in the healthcare space and keeps them in the realm of the technocratic. In turn, institutions that follow the best evidence can guard themselves against accusations of political interference in issues of science and medicine or arbitrariness in designing and implementing regulation. In the process of adjudication, many of these concerns arise, and do so in the above examples, in the course of deploying a separation of powers analysis: a jockeying of which institution is best equipped to answer a fact-based set of concerns.[15]

There are several assumptions built into a mode of public health decision making that relying on a "follow the evidence" approach. First, the approach assumes that expertise and evidence itself is apolitical and neutral. Second, it assumes there is settled evidence. Third, it assumes that evidence and expertise are made distinct from law. And, finally, the approach

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assumes that it is preferable to base health law on evidence over political considerations.

Lost in these assumptions is the idea that legal institutions are themselves a part of the larger political ecosystem that will legitimate particular ideas about whose health matters and why. The claim that we should always follow the evidence erases a complex set of questions emerging from the iterative relationship between law, expertise, and evidence.

The idea that we should be skeptical of expertise as part of a necessary approach to achieving health equality roots in the social movement activism of the 1960s and 1970s. This insight guided health-based advocacy of the 1960s and 1970s including efforts of the Black Panthers to improve access to health care, feminist advocates who were skeptical of the medical establishment, and free clinics of the new left.[16] These progressive movements sought to make law and science better for people. Today, the health justice perspective opens the door to a similar critique. A health justice perspective demands asking questions that help us stay focused on manifestations of inequality in health law. A critique of expertise helps us broaden our understanding of how adjudication mobilizes evidence and expertise for political purpose with distributional goals. Further, it helps us track the effects on social movements for health — the environment in which they can advocate and how they are empowered or disempowered to do so.

First, instead of asking the court to defer to evidence and expertise, taking a critical perspective on expertise requires examining how the court deploys evidence and expertise in the context of a separation of powers to accomplish particular political goals.[17] Evidence and expertise can be mobilized for the desired political project of a particular legal institution. It is especially important to note how expertise and evidence is mobilized in moments of scientific uncertainty, like the COVID-19 pandemic, in which competing claims of truth (with differing distributional consequences) can be mobilized by institutional actors to justify legal decisions. Or to look at how a judge, like Justice Roberts does in *ACOG v. FDA*, mobilizes the idea of agency expertise in order to delegitimize the individual expertise of physicians with the effect of denying people access to abortion.

Second, in times of contested knowledge (or where courts and legislators make it seem as though knowledge is contested), deploying evidence and expertise can legitimate contested claims about health. This new legitimacy can mean the birth of a new "fact" that can go on to have a life of its own.[18] In other words, expertise and evidence can be shaped by the law and emerge through the interaction of law and science. The most profound example of this has been the idea that abortion causes negative mental health concerns — an idea that was proposed by anti-choice advocates and eventually legitimated repeatedly by courts.

Third, in keeping with the long-standing call of progressive advocates to be included in policy making, a critical view would ask us to question how and why some people, institutions, and ideas are seen as legitimate exertions of expert authority. We must ask instead how do the processes of adjudication empower or disempower certain institutions as "experts" or certain questions as grounded in evidence, or, in the alternative uncertain? Taking this view allows for a broadening of whose voices might count as part of the design of public health regulations ensuring that there are fewer negative unintended consequences of lawmaking on the most marginalized communities.

Conclusion

Achieving health justice requires an active critique of expertise and evidence rather than a simple deference to it. The examples of the mask mandate and medication abortion serve as an important example of retaining this critique matters for achieving progressive goals in the context of lawmaking and adjudication on health. Understanding evidence and expertise as emerging from interactions with legal institutions, instead of sitting outside of it, helps to identify the political and distributional outcomes of lawmaking on health — a necessary part of crafting legal strategies to move towards a more equitable distribution of health resources.

Note

The author has no conflicts of interst to disclose.

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The Journal of Law, Medicine & Ethics, 50 (2022): 682-686.

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