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THE SPACE BETWEEN TWO WORDS: FOREWORD TO THE *HEALTH LAW* SYMPOSIUM

*Elizabeth Y. McCuskey**

THIS year's Law Review Symposium explored the modern state of health law under the heading, *From Scalpel to Gavel.* By situating its discussion in the space between the health sciences and law, this symposium embodied the inherently interdisciplinary nature of health law. The gathering of scholars, physicians, counsel, enforcers, and community groups bridged the spaces among numerous disciplines, promoting the exchange of empiricism, ideas, and experiences that have come to define health law.

The symposium seizes a unique moment in health law: the confluence of a growing coherence in the field of health law and the earliest opportunity to examine nearly full implementation[1] of the most profound piece of health law legislation in the past 50 years.[2] At this moment, health law celebrates is capacious interdisciplinary identity and examines its existence in context of the Affordable Care Act's[3] sweeping health care reforms.

Health law's interdisciplinarity always has defined it. Health law transcended its "Law & Medicine" origins to incorporate population health, finance, economics, and other related disciplines into its ambit.[4] Certainly the

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1. *See Key Features of the Affordable Care Act by Year*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/healthcare/facts/timeline/timeline-text.html (last visited July 13, 2015) (noting effective dates of the Act's major provisions, most of which occurred by fall 2014). *But see* Juliet Elperin & Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-Size Employers Until 2016*, WASH. POST, Feb. 10, 2014, http://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html (explaining the extension of provisions originally set for implementation in 2014); U.S. TREAS. DEP'T, FACT SHEET: FINAL REGULATIONS IMPLEMENTING EMPLOYER SHARED RESPONSIBILITY UNDER THE AFFORDABLE CARE ACT (ACA) FOR 2015, http://www.treasury.gov/press-center/press-releases/Documents/Fact%20Sheet%20021014.pdf (summarizing implementation in 2015).

2. *See, e.g.*, Kristin Madison, *Building A Better Laboratory: The Federal Role in Promoting Health System Experimentation*, 41 PEPP. L. REV. 765, 766 (2014) (characterizing the ACA as "[e]asily the most significant piece of federal health care-related legislation since the adoption of the Medicare and Medicaid programs").

3. Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

4. *See* Mark A. Hall, *The History and Future of Health Care Law: An Essentialist View*, 41 WAKE FOREST L. REV. 347, 348 (2006).

recent trend throughout law, generally, has been to reach out to other disciplines.[5] But health law is perhaps more *inherently* interdisciplinary than the many other legal hybrids.[6]

Its multidisciplinary origin has prompted evaluation of whether health law coheres as its own legal field, or merely catalogues the array of different laws applicable to the health care industry.[7] Coherence has gained some traction, as health law has evolved beyond an effort to make sense of disparate statutes and "Law &" pairings, into a more conscious set of organizing principles and values: namely, quality, cost, access, and ethics.[8]

The Affordable Care Act may have accelerated that evolution by constructing a new point around which to cohere. The ACA provides a convenient referent—not just health law, *The* Health Law. Rather than simply a diffuse collection of laws that impact health care, intentionally or tangentially, *The* Health Law seems to offer the field of health law a more obvious marketing message, or at least a more centralized collection of its modern features. But the ACA does not cement health law's identity so much as reflect it in the varied provisions dispersed across topics as wide-ranging as comparative effectiveness research, insurance coverage, technology, and tax. Despite *The* Health Law, health law's variety persists, as its central interdisciplinarity endures.

Four years into the Affordable Care Act's implementation, this symposium offered a moment of deep reflection and contemplation of how health care informs law and is shaped by it on both the existential and pragmatic levels. The essays in this issue exemplify the breadth and depth of that dialogue over quality, cost, access, and ethics from the intimate doctor-patient relationship to the broadest concerns for population health. Professor Marshall Kapp and Dr. Paul Burcher's essays approach the dialogue from the perspective of medical quality and decision-making, while essays by Professors Elizabeth Weeks Leonard, Nicole Huberfeld, and Jessica Roberts offer insights on access to care through private and public insurance programs.

Professor Kapp's essay approaches quality of care from empirical, public health, and legal perspectives. He examines health policy efforts to increase doctors' reliance on evidence-based medicine (EBM) over intuition and anecdotal experience. Professor Kapp's essay then turns to law's role as both an impediment to and potential conduit of implementation for EBM, highlighting an

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5. *See* Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319 (1999); Ron Harris, *Legal Scholars, Economists, and the Interdisciplinary Study of Institutions*, 96 CORNELL L. REV. 789, 789-90 (2011) (noting law's "trend towards interdisciplinary research," led by other disciplines).

6. Likely each field of interdisciplinary research sees in itself a paradigm of productive collaboration. Just as likely, I suffer from the bias of self-reflection in my view that this paradigm is truest for health law.

7. *See, e.g.*, M. Gregg Bloche, *The Emergent Logic of Health Law*, 82 S. CAL. L. REV. 389 (2009); Theodore W. Ruger, *Health Law's Coherence Anxiety*, 96 GEO. L.J. 625 (2008); Einer R. Elhague, *Can Health Law Become a Coherent Field of Law?*, 41 WAKE FOREST L. REV. 365 (2006).

8. *See, e.g.*, Hall, *supra* note 4.

area of dysfunction in the health/law relationship and proposing innovative ways law could encourage adoption of these quality-enhancing measures.

Dr. Burcher provides the clinician's perspective on the doctor-patient relationship in its historical and philosophical contexts, revealing the complexities of a "good" relationship. His essay offers a nuanced picture of shared decision-making, informed by bioethics and cognizant of constraints imposed by physicians' numerous other duties.

Professor Leonard examines how the Affordable Care Act and its implementation have perpetuated a "*non*-system" for delivering a crucial part of health care: the insurance to pay for treatment. Her detailed explication of the ACA's coverage provisions and their erosion through rule-making and litigation invites a deeper consideration of how to bring coherence to this essential aspect of access to care.

Professors Huberfeld and Roberts extrapolate from history and empirics the profound social role that access to insurance plays, particularly in the expansion of Medicaid. They argue that access to health care through the Medicaid program has acquired such a profound role that it has taken the form of social insurance.

The live presentations on four panels expanded into other convergences of health and law. The symposium's keynote speaker, Dr. Maxwell Gregg Bloche, invited discussion about how financial, political, and legal concerns influence the practice of medicine. Lauri Cooper, Associate Vice President and Senior Legal Counsel for The University of Toledo Medical Center and Professor Ann Marie Marciarille tackled emergent issues in health care quality and delivery. Dr. Kristopher R. Brickman, Chair and Medical Director of the University of Toledo Medical Center's Department of Emergency Medicine, addressed the evolution of population health in emergency medicine. David Koeninger, Managing Attorney at Advocates for Basic Legal Equality, highlighted the social determinants of health. Professors David Orentlicher, Jesse Goldner, and Walter Edinger debated bioethics considerations in treatment decisions and medical research.

Practitioners and enforcers also convened to tackle health care fraud and regulation issues, including a discussion among George Breen of Epstein Becker & Green, P.C.; Keesha Mitchell, Section Chief of the Ohio Attorney General's Health Care Fraud Section; David Tanay, Division Chief of the Michigan Attorney General's Health Care Fraud Division; and Matthew Albers of Vorys, Sater, Seymour and Pease LLP. Attendees from the numerous professional disciplines and communities concerned with health law—including lawyers, doctors, nurses, pharmacists, and community activists—contributed to the discussion. In sum, this symposium *lived* in the interstices of interdisciplinary exchange.

Health law is most vibrant in the space between its component disciplines—between scalpel and gavel, if you will. What takes place in this space will determine health law's coherence and continued relevance. On behalf of the University of Toledo College of Law, I thank the authors, panelists, and attendees who filled the space between health and law with rich discourse. It was a pleasure to marshal the University's health science communities and tradition

of interdisciplinary education to host such a productive gathering. Congratulations especially to Andrew Heberling, the Symposium's Editor whose vision guided its success, and to the University of Toledo Law Review for their efforts to further this important conversation.