

## SOME THOUGHTS ON ACADEMIC HEALTH LAW

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### INTRODUCTION

These are odd times for professors of health law. The field is booming and yet it seems to be suffering from what President Jimmy Carter, in his famous “malaise” speech, called a “crisis of confidence.”<sup>1</sup> The workshop from which this symposium issue was drawn was organized by Professors Mark Hall, Carl Schneider, and Lois Shepard, whose proposal for the workshop opened with:

A specter haunts health law, the specter of exhaustion. Our field was once vibrant with new issues and fresh ideas. Today, scholarship routinely recycles old proposals about recurring problems. The dominant paradigms—patient autonomy and market theory—have largely done their work and run their course. And while new perspectives are struggling to be born, they are tentative and incomplete.<sup>2</sup>

As someone who has taught a course called Health Law and Policy for about twenty years and who has written in health law and related fields for nearly as long, I have to confess that I find myself

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1. Energy and National Goals: Address to the Nation, 2 PUB. PAPERS 1235, 1237 (Jul. 15, 1979). Surprisingly, Carter never used the word “malaise” in his speech.

2. Mark Hall, Carl Schneider & Lois Shepherd, *Rethinking Health Law: Introduction*, 41 WAKE FOREST L. REV. 341 (2006) (footnote omitted). The opening line comes from the first line of the Communist Manifesto: “A spectre is haunting Europe—the spectre of Communism.” KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 54 (Frederic L. Bender ed., W.W. Norton & Company, Inc. 1988) (1848). Whether the source of the paraphrase has some deeper meaning—and, if so, what that meaning is—I leave to its authors.

singularly unspooked. There are some unusual aspects of health law, which come with some disadvantages, but also with some advantages. In this brief Essay, I want to set out my thoughts on the current state of health law, on the difficulties of being a health law academic, and on the malaise (unjustified, I think) that some of my colleagues feel.

### I. A GOLDEN AGE OF HEALTH LAW?

Writing about the current state of health law requires, at least, a general definition of the field. I believe health law should be defined very loosely, as encompassing all legal *and* public policy issues involving the provision of health care (medical or otherwise) or health status. Importantly, this includes policy questions about what the laws or, more broadly, the non-legal rules or standards as they affect health care should be and not just what they are. Its center, to me, includes issues of access to health care, assurance of health care quality, and the relationships between patients and health care providers.<sup>3</sup> But it also extends to issues of drug and medical device regulation, bioethics, biomedical research, mental health, and (I would argue) disability discrimination. I would also extend it to public health issues, from infectious disease to addiction to obesity, although even I get nervous about extending the definition to include some issues I think are legitimate public health issues, such as automobile accidents or crime. Obviously, work (either in practice or in academia) can be in both health law and something else; tax, antitrust, or criminal law issues with particular relevance to health care will belong to two fields.

Defined this way, the practice of health law is a huge, growing, and vibrant activity. I do not have a source for statistics to demonstrate that fact, but I strongly believe it to be true.<sup>4</sup> Allegations of medical malpractice or drug or medical device defect, whether litigated or resolved without litigation, are the most dramatic aspects of health law, though they are surely dwarfed by the day-in, day-out work of lawyers and others helping physicians, hospitals, insurers, health maintenance organizations, employers, and the whole host of others (including, very occasionally, actual patients) involved in the American health care system deal with the

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3. A common division of the core of health law adds a fourth general category for "regulation," but all, or almost all, regulation of health care is in service, at least allegedly, of either quality assurance or access (read as "cost").

4. One thing I raised at the workshop was the plausibility of empirical research to assess the *size* of health law, both in terms of the budgets of health care organizations and in terms of the contribution to the business of law firms and lawyers.

intricate web of laws, regulations, and contracts governing the country's most expensive activity. Some lawyers will specialize in areas that largely or entirely involve health, such as Medicare fraud and abuse laws or how to set up health related organizations in light of their state's version of the corporate practice of medicine doctrine. Other lawyers, who think they are specialists in securities law, mergers and acquisitions, or administrative law, will spend much of their time and energy on clients in health care. Every time total spending on health care increases (which is every year) spending on health law must increase. Every time some corner of the health care system is "reformed," the effort put into health law grows—the Health Insurance Portability and Accountability Act ("HIPAA") privacy regulations alone must have accounted for several billions of dollars of work by lawyers, consultants, and others.

Academic health law is only a tiny part of health law.<sup>5</sup> Most of academic health law takes place in law schools—and it is surely most easily countable there—but academics work on legal issues in health in medical schools, public health schools, nursing schools, public policy schools, other academic settings, and quasi-academic think tanks. Within American law schools, the *2005-2006 Directory of Law Teachers*, published by the Association of American Law Schools, lists 271 full-time or emeritus faculty members as working in "Health Care Law," around 140 of them in their first five years of teaching in the field.<sup>6</sup> Another 282 faculty members are listed in "Law and Medicine," 125 in their first five years.<sup>7</sup> Another forty-nine are listed under "Bioethics,"<sup>8</sup> bringing the total for those three categories to 602. Some people are listed in more than one of these categories. When the duplications are eliminated, a total of 466 faculty members are listed in one or more of these three categories. Another 350 or so appear in other related fields.<sup>9</sup> This compares with 494 listed between the two fields ("Bioethics" was folded into "Law and Medicine") in 2000-2001 and 317 in between the two fields in 1991.<sup>10</sup> The current Directory lists about ten thousand law

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5. The "tip of the iceberg" is a tempting metaphor, but it may, in a self-serving way, imply too high a position for academics.

6. ASS'N OF AM. LAW SCHS., THE AALS DIRECTORY OF LAW TEACHERS 2005-2006, 1271-73 (2005).

7. *Id.* at 1307-09.

8. *Id.* at 1151-52.

9. Other directly relevant listed specialties include "Forensic Medicine," two; "Law and Psychiatry" (there is no "Mental Health Law" listing), about 115; and "Law and Science," about 140. *See id.* Another roughly 160 faculty are listed as teaching "Insurance Law," some of whom likely cover health insurance or malpractice liability insurance. *See id.*

10. ASS'N OF AM. LAW SCHS., THE AALS DIRECTORY OF LAW TEACHERS 2001-

teachers; over five percent of them teach some form of health law.<sup>11</sup> And this does not include the many dedicated and expert adjuncts who teach courses on health law and related fields in many law schools.

Survey courses in health law appear to be widely offered and they are supported by at least four casebooks currently in print.<sup>12</sup> Two of the leading casebooks—Furrow, Greaney, Johnson, Jost, and Schwartz and Hall, Bobinski, and Orentlicher—have even been split into thirds, with each smaller book useful for a course on a large subsection of the class (access, quality, and bioethics).<sup>13</sup> Courses also seem to be widely offered and casebooks published in bioethics,<sup>14</sup> mental health law,<sup>15</sup> public health law,<sup>16</sup> medical

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2002, 1266-68, 1302-04 (2001); ASS'N OF AM. LAW SCHS., THE AALS DIRECTORY OF LAW TEACHERS 1991-1992, 1057-58, 1079-81 (1991).

11. See ASS'N OF AM. LAW SCHS., *supra* note 6.

12. BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST & ROBERT L. SCHWARTZ, *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* (5th ed. 2004) is thought to be the market leader. Other general health law casebooks include MARK A. HALL, MARY ANNE BOBINSKI & DAVID ORENTLICHER, *HEALTH CARE LAW AND ETHICS* (6th ed. 2003); CLARK C. HAVIGHURST, JAMES F. BLUMSTEIN & TROYEN A. BRENNAN, *HEALTH CARE LAW AND POLICY* (2d ed. 1998); RAND E. ROSENBLATT, SYLVIA A. LAW & SARA ROSENBAUM, *LAW AND THE AMERICAN HEALTH CARE SYSTEM* (1997).

13. See BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST & ROBERT L. SCHWARTZ, *BIOETHICS: HEALTH CARE LAW AND ETHICS* (5th ed. 2004); BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST & ROBERT L. SCHWARTZ, *THE LAW OF HEALTH CARE ORGANIZATION AND FINANCE* (5th ed. 2004); BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST & ROBERT L. SCHWARTZ, *LIABILITY AND QUALITY ISSUES IN HEALTH CARE* (5th ed. 2004); MARK A. HALL, MARY ANNE BOBINSKI & DAVID ORENTLICHER, *BIOETHICS AND PUBLIC HEALTH LAW* (2005); MARK A. HALL, MARY ANNE BOBINSKI & DAVID ORENTLICHER, *THE LAW OF HEALTH CARE FINANCE AND REGULATION* (2005); MARK A. HALL, MARY ANNE BOBINSKI & DAVID ORENTLICHER, *MEDICAL LIABILITY AND TREATMENT RELATIONSHIPS* (2005).

14. See CARL H. COLEMAN, JERRY A. MENIKOFF, JESSE A. GOLDNER & NANCY N. DUBLER, *THE ETHICS AND REGULATION OF RESEARCH WITH HUMAN SUBJECTS* (2005); JANET L. DOLGIN & LOIS L. SHEPHERD, *BIOETHICS AND THE LAW* (2005); MARSHA GARRISON & CARL E. SCHNEIDER, *THE LAW OF BIOETHICS: INDIVIDUAL AUTONOMY AND SOCIAL REGULATION* (2003); PATRICIA A. KING, JUDITH AREEN & LAWRENCE O. GOSTIN, *LAW, MEDICINE AND ETHICS* (2006); ARTHUR B. LAFRANCE, *BIOETHICS: HEALTH CARE, HUMAN RIGHTS, AND THE LAW* (1999); MICHAEL H. SHAPIRO, ROY G. SPECE, JR., REBECCA DRESSER & ELLEN WRIGHT CLAYTON, *BIOETHICS AND LAW: CASES, MATERIALS AND PROBLEMS* (2d ed. 2003).

15. See GEORGE J. ALEXANDER & ALAN W. SCHEFLIN, *LAW AND MENTAL DISORDER* (1998); MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CASES AND MATERIALS* (2d ed. 2005); RALPH REISNER, CHRISTOPHER SLOBOGIN & ARTI RAI, *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* (4th ed. 2004).

technology or drug law,<sup>17</sup> law and genetics or biotechnology,<sup>18</sup> law and science,<sup>19</sup> disability law,<sup>20</sup> and other related fields.<sup>21</sup> And the books appearing in the footnotes are only casebooks; they exclude textbooks, readers, treatises, hornbooks, and other ways of conveying health law to students.

But health law academics do more than teach; they write—prolifically. I have not tried to count the total number of published health law articles; I know there are far more than I can even pretend to read. The health law journals of the Social Science Research Network,<sup>22</sup> a subscription service that makes abstracts, entire articles, and working papers available online, posted over 400 articles in 2005; many more were undoubtedly published in general or specialized law reviews. And the number of health law articles has grown over time. The Index to Legal Periodicals contains information on hundreds of law reviews, in annual volumes that run from September to August. The number of articles that fell within health law related topics grew from 828 in 1990-1991 to 1119 in 2000-2001 to 1544 in 2004-2005 (the last volume available).<sup>23</sup>

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16. See LAWRENCE O. GOSTIN & PETER D. JACOBSON, *LAW AND THE HEALTH SYSTEM* (2006); VICTORIA SUTTON, *LAW AND BIOTERRORISM* (2003).

17. See PETER BARTON HUTT & RICHARD A. MERRILL, *FOOD AND DRUG LAW: CASES AND MATERIALS* (2d ed. 1991); LARS NOAH & BARBARA A. NOAH, *LAW, MEDICINE, AND MEDICAL TECHNOLOGY: CASES AND MATERIALS* (2002).

18. See LORI B. ANDREWS, MAXWELL J. MEHLMAN & MARK A. ROTHSTEIN, *GENETICS: ETHICS, LAW AND POLICY* (2002); ROBERT A. BOHRER, *A GUIDE TO BIOTECHNOLOGY LAW AND BUSINESS* (forthcoming 2006); PATRICIA KUSZLER, KATHRYN BATTUELLO & SEAN O'CONNOR, *GENETIC TECHNOLOGIES AND THE LAW: CASES AND MATERIALS* (forthcoming 2006); VICTORIA SUTTON, *LAW AND BIOTECHNOLOGY: CASES AND MATERIALS* (forthcoming 2006).

19. See STEVEN GOLDBERG & LAWRENCE O. GOSTIN, *LAW AND SCIENCE* (2006); LAWRENCE O. GOSTIN, JUDITH AREEN, PATRICIA A. KING, STEVEN GOLDBERG & PETER D. JACOBSON, *LAW, SCIENCE AND MEDICINE* (3d ed. 2005); VICTORIA SUTTON, *LAW AND SCIENCE: CASES AND MATERIALS* (2001).

20. See PETER BLANCK, EVE HILL, CHARLES D. SIEGAL & MICHAEL WATERSTONE, *DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS* (2005); RUTH COLKER & ADAM A. MILANI, *THE LAW OF DISABILITY DISCRIMINATION* (5th ed. 2005); LAURA ROTHSTEIN, *DISABILITY LAW: CASES, MATERIALS, PROBLEMS* (3d ed. 2002).

21. See WILLIAM E. ADAMS, JR., MARY ANNE BOBINSKI, MICHAEL L. CLOSEN, ROBERT M. JARVIS & ARTHUR S. LEONARD, *AIDS: CASES AND MATERIALS* (3d ed. 2002); MARCIA M. BOUMIL & DAVID J. SHARPE, *LIABILITY IN MEDICINE AND PUBLIC HEALTH* (2004); JUDITH DAAR, *REPRODUCTIVE TECHNOLOGIES AND THE LAW* (2006); DAVID C. PATE & ROBERT F. CORRIGAN, *REGULATION OF HEALTH CARE PROFESSIONALS: A CASEBOOK APPROACH* (2002).

22. Social Science Research Network Homepage, <http://ssrn.com> (last visited Mar. 19, 2006).

23. These numbers are somewhat inflated, as the totals were compiled without trying to eliminate articles that appeared in more than one category.

Health law has also seen the growth of specialty law journals dedicated to the field. A review of the Index to Legal Periodicals and Westlaw's list of journals shows thirty-three publications with a health law focus, from the *American Journal of Law and Medicine* to the *Yale Journal of Health Policy, Law, and Ethics*.<sup>24</sup> And, of course, health law academics also publish outside the law reviews, in leading medical and scientific journals such as the *New England Journal of Medicine*, the *Journal of the American Medical Association*, *Science*, and *Nature*, as well as health policy journals such as *Health Affairs* and the *Journal of Health Policy, Politics, and Law*.

This appears in many ways to be a Golden Age for health law—and it should be. The legal and policy issues in health law are not only intellectually fascinating, but also are of enormous and growing practical importance. Different people are drawn to health law and its related fields by different lures, but I would suggest three quite different ways in which the field is crucial—in its roles in legal practice, public policy, and morality.

The first stems from the consequences for legal practice and commentary of the sheer size of health care. This year in the United States, nearly one dollar out of every six spent on goods and services will be spent on health care—more than \$2 trillion in all.<sup>25</sup> This sum is noticeably smaller than the GDP of only the United States, Japan, and Germany.<sup>26</sup> It is about the same as the GDP of France or the United Kingdom.<sup>27</sup> It is clearly larger than the GDP of every other country in the world.<sup>28</sup> The health care system will spend about \$7,000 this year for each man, woman, and child in the United

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The degree of inflation may have increased over time as more categories have been added, but it seems unlikely that this affects the overall trend. We did not count the total number of articles in each year and cannot say whether health law articles are increasing as a percentage of all articles in the Index to Legal Periodicals.

24. Interestingly, some of the journals listed in Westlaw were not listed in the Index to Legal Periodicals, indicating that the number of articles was actually undercounted.

25. Christine Borger et al., *Health Spending Projections Through 2015: Changes on the Horizon*, 25 HEALTH AFF.—WEB EXCLUSIVE, Feb. 22, 2006, at W61, W62, <http://content.healthaffairs.org/cgi/reprint/hlthaff.25.w61v1.pdf>.

26. CIA, The World Factbook, Rank Order—GDP (Official Exchange Rate), <http://www.cia.gov/cia/publications/factbook/rankorder/2195rank.html> (last visited Mar. 19, 2006).

27. *Id.*

28. *Id.* If purchasing power parity is used instead to calculate GDP, China, Japan, India, and Germany are larger than the U.S. health care system; France and the United Kingdom are smaller. CIA, The World Factbook, Rank Order—GDP (Purchasing Power Parity) <http://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html> (last visited Mar. 19, 2006).

States,<sup>29</sup> affecting the pay checks, tax bills, and bank accounts of every American, as well as the expenses—and profits—of almost all American businesses. That big of an industry generates a lot of law and a lot of business for lawyers. Lawyers need to be trained to provide relevant services; academics can provide useful analysis and commentary on the laws governing health care.

The second is the policy importance of not just the size of the health care system, but its clear instability. Health care costs are already growing at an unsustainable rate. Medicare, Medicaid, and private health coverage are all seeing rapidly increasing costs with no end in sight.<sup>30</sup> The aging of the large baby boom generation will certainly make the situation worse, for health costs in general and for long term care costs in particular. Barring a *deus ex machina* solution, at some point in the not too distant future, I cannot see how Americans can avoid facing not one but several health care crises.<sup>31</sup>

The third is the large role of morality in health law. Health law has moral overtones that come from the suffering of ill patients and their uniquely dependent situation. It has moral overtones that come from its interventions at the end and at the beginning of life. And, through advances in biomedicine, it increasingly challenges our understanding of what it means to be human. It is a rare joy—and responsibility—to be able to talk, write, and *think* about those issues, not as abstract speculation but in realistic contexts . . . and to be paid to do it.

## II. THE DIFFICULTIES OF ACADEMIC HEALTH LAW

But being a health law academic is not all beer and skittles.<sup>32</sup> Compared with other areas of academic law, health law does have

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29. Borger et al., *supra* note 25, at W62.

30. *Id.* at W67.

31. I, however, have taken that position before in print, fifteen years ago. Henry T. Greely, *The Future of the American Health Care System: An Introduction to the Health Symposium*, 3 STAN. L. & POL'Y REV. 16, 18 (1991). I have just made the same prediction again in almost the same place. Henry T. Greely, *Introduction to the Health Care Symposium*, 17 STAN. L. & POL'Y REV. (forthcoming 2006). I take comfort from the thought that if I keep predicting the oncoming crisis, sooner or later I am almost certain to be right. Sometime.

32. The “skittles” in this British phrase is a bowling game, often played in pubs, involving nine pins and a “cheese.” It does *not* refer to the fruit-flavored candy, Homer Simpson to the contrary notwithstanding:

Homer: “I’m feelin’ low, Apu. You got any of that beer that has candy floating in it, you know, Skittlebrau?”

Apu: “Such a product does not exist, sir! You must have dreamed it.”

Homer: “Oh. Well then just gimme a six-pack and a couple of bags of Skittles.”

its own special challenges, challenges that make it both difficult and, in some ways, isolating.

Although self-serving comments like the following should always be suspect, I do believe health law is unusually hard. The *law* in health law is hard because it is largely state law, largely regulatory law, and altogether large law.

Areas where the law is largely state-based are particularly difficult to write about. One can write about the law of one state, and substantially limit the interest, importance, and appeal of the work, or one can try to write about the laws across states, but just determining the laws of fifty states (plus the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and various territories) can consume enormous amounts of time and energy. Analyzing information from more than fifty jurisdictions and then presenting it in a useful and interesting way are also challenging. Some state law based courses and fields are active sources of teaching and scholarship, such as torts, contracts, and criminal law, but much of the discussion in those fields, to the extent that it is based in “the law” at all, looks at cross-jurisdictional sources of law—the Restatements,<sup>33</sup> the Uniform Commercial Code,<sup>34</sup> or the Model Penal Code.<sup>35</sup> Others could be state law courses but instead focus heavily on their federal law aspects, such as civil procedure, constitutional law, and, possibly, evidence. There are no good equivalents in health law. There are only five uniform acts about health law, four of which concern bioethics; only two of the five have been widely adopted.<sup>36</sup> State law also has the relative disadvantage of being decided in state courts, with fewer opportunities to analyze the positions of well-known judges.

Health law is not only largely state law, but, state or federal, it is often regulatory law. This is another obstacle, because, as a general matter, regulations are harder to find, harder to read, longer, and change more often than statutes or lines of judicial authority. The initial publication of the HIPAA Privacy Rule,

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33. *See, e.g.*, RESTATEMENT OF RESTITUTION (1937); RESTATEMENT (SECOND) OF TORTS (1965).

34. U.C.C. (1977).

35. MODEL PENAL CODE (2001).

36. They are the Uniform Anatomical Gift Act (twenty-five jurisdictions; the 1968 version of the Act, of which this is an updated form, was adopted by every U.S. jurisdiction), Uniform Determination of Death Act (forty-three jurisdictions), Uniform Health-Care Decisions Act (seven states), Uniform Health-Care Information Act (two states), Uniform Status of Children of Assisted Conception Act (two states, in substantially different forms). National Conference of Commissioners on Uniform State Laws, <http://www.nccusl.org/nccusl/uniformacts-alphabetically.asp> (last visited Mar. 19, 2006).

admittedly an extreme example, totaled about 400,000 mind-numbing words.<sup>37</sup> Medicare law, enormously important to patients, the health care system, and public policy, is not only heavily regulatory but features a very technical and frequently amended statute. Understanding even the “uniform” federal law of Medicare is a full-time job. And, of course, some important health law is both state law and regulatory law. Medicaid law, though created by a federal statute and governed in its broad outlines by federal law, actually comprises more than fifty “plans” created and interpreted by state statutes, regulations, and courts.<sup>38</sup> Understanding Medicaid law, across all the jurisdictions, may well be impossible for any one person.<sup>39</sup>

Adding to the poor health law academics’ problems is the fact that there is so much health law. Teaching a good survey of the field requires knowing—and finding time to teach—about the doctor-patient relationship, medical malpractice, state professional licensure and discipline, hospital regulation, Medicare, Medicaid, private health coverage, end-of-life issues, and reproductive law. Another seven or eight big topics lurk in the wings, to be inserted if the teacher has any extra time. The division of two of the major health law casebooks into three smaller books each reflects the reality that the “survey course” is best taught as three courses. I struggled for years to cram a somewhat broad knowledge of health law into one four-unit course before eventually going to two three-unit classes—and still not having enough time. Of course, even someone who teaches across all of health law need not—as a practical matter, cannot—publish across the entire breadth of the field, but real health law problems often require broad knowledge. A bioethics issue involving the end of life may be crucially affected by issues of Medicaid coverage, nursing home regulation, state physician disciplinary procedures, and the federal Controlled Substances Act.

But the “law” is only one of the difficulties in health law—the

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37. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462-829 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160 and 164).

38. See HALL ET AL., *supra* note 12, at 912-13.

39. It is also the case that some of the most important “law” is not “law” at all. The main regulator of hospitals is neither the federal government nor the states, but the Joint Commission on the Accreditation of Healthcare Organizations, a private, non-profit organization controlled by organizations of hospitals and health care providers. Its Comprehensive Accreditation Manual for Hospitals is, in practice, the most important “law” determining what a hospital must do (and be) in order to operate legally. See JOINT COMM’N ON ACCREDITATION OF HEALTHCARE ORGS., COMPREHENSIVE ACCREDITATION MANUAL FOR HOSPITALS: THE OFFICIAL HANDBOOK (2006).

“health” is another. For the most part, to do a good job in teaching or writing about health law, an academic needs to know something about medicine and medical science. Writing about health law without some understanding of medicine is like writing about the culture of a foreign country without knowing its language; you may have a few useful insights, but you also run a substantial risk of being completely wrong. This can be a challenge, especially for a typical law school graduate who holds an undergraduate degree in economics, political science, history, or English. Some health law professors are doctors as well as lawyers;<sup>40</sup> my own path crucially involved marrying a doctor. It is certainly possible to acquire this knowledge—possible, fascinating, and enjoyable—but it takes more effort than many more self-contained areas of legal scholarship. People teaching securities regulation should know something about the securities industry, but the information is perhaps less technical and certainly less distant from law than in health law.

A second, and more serious, problem is the issue of audience. Health law academics who want to have an effect on policy will often need to reach readers who do not read law review articles. On at least the policy side of health law (and often the more legal side as well), publications in the *New England Journal of Medicine*, the *Journal of the American Medical Association*, *Science*, *Nature*, or other, less stellar, journals will have a much greater potential impact than a lead article in the *Yale Law Journal* or the *Stanford Law Review*. (The same is true of publications in the few dedicated health policy journals, notably *Health Affairs* and, although the articles are longer, to some extent, the *Journal of Health Policy, Politics, and Law*.) The relevant audience knows the importance of the medical and scientific journals and will actually read them regularly.

But publishing in medical or scientific journals requires a law professor to make a whole series of adjustments. First, and most important, the articles are short. Anything longer than 3,000 words of text is unlikely to be published; the journals prefer articles of 2,000 to 2,500 words, which they claim, with some plausibility, are much more likely to be read.<sup>41</sup> That is about eight to ten pages of double-spaced text or roughly the length of the introduction to a law

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40. A few examples include Ellen Wright Clayton at Vanderbilt University, William Sage at Columbia University, David Hyman at the University of Illinois, Gregg Bloche at Georgetown, and David Orentlicher at Indiana University-Purdue University at Indianapolis.

41. See, e.g., New Eng. J. Med., Frequently Asked Questions About Submissions, <http://authors.nejm.org/Misc/SubFAQ.asp> (last visited Mar. 19, 2006).

review piece.<sup>42</sup> Footnotes are replaced by endnotes and textual endnotes are unknown; if it is not important enough to go into the (very short) text, it must be cut. Citations (called references in that world) do not obey the Uniform System of Citation—or any other uniform system. The journals often vary substantially in citation details, but they are united in never being similar to *The Bluebook*.<sup>43</sup>

Last, articles in medical and scientific journals are almost always peer-reviewed. The professional or faculty editors decide among thousands of submissions by asking other academics to comment on them. This has several important consequences, even without considering whether it yields a better product. First, simultaneous submission is banned. No journal wants to incur the costs of peer review (costs in the time, patience, and willingness of their volunteer reviewers to continue doing this work) if the manuscript is also under submission elsewhere. Second, peer review often leads to revisions being requested by the reviewers (and required by the editors), with the reviewers sometimes wanting mutually inconsistent changes. Third, the whole process takes time. Even without revisions and resubmissions, peer review will normally take a minimum of several months. Add revisions, resubmissions, and a lack of success at the first few journals and a paper can easily be in the review process for a year or longer before acceptance.<sup>44</sup>

The real problem for health law academics, particularly junior

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42. I downloaded the five full articles contained in two recent issues of the *Stanford Law Review* (issues 1 and 2 of volume 57). I found the introductions averaged 2,617.4 words. The actual articles averaged 46,295.8 words with footnotes and 31,639.4 words without the footnotes. The five articles averaged 399.8 footnotes. One of the articles was particularly long (84,244 words and 832 footnotes). If we somewhat arbitrarily exclude it, the averages were 2,033 words for the introductions, 36,808.75 words for the whole article, 25,448.75 words for the text, and an average of 291.75 footnotes. I am not arguing that these differences between law review articles and medical or scientific journal articles are good, bad, or indifferent; just that switching between them requires adjustments from health law academics. See Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59 (2004); Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1 (2004); Chris William Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291 (2004); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

43. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

44. For what it is worth, academics in science and medicine are amazed when law professors describe the usual law review world—student editors, no peer review, 100 page articles with 400 footnotes (many textual), and, especially, simultaneous submission.

ones, is not writing articles for publication outside law reviews, but getting credit for it. In hiring and tenure decisions, law faculty and deans may not know how to weigh medical and scientific journal articles. And if the article has co-authors—the norm in the medical and scientific world, a rarity in law reviews—evaluation becomes more difficult still for law faculties. The upshot is that a junior law faculty member who has published important work that might actually influence health care or bioscience may face problems in obtaining tenure.<sup>45</sup> I have come, reluctantly, to advise junior health law academics to ignore the audience that is important for their long-term intellectual careers and to write two long law review articles before the tenure decision in order to secure their jobs. I always feel guilty when I give that advice, but I feel guiltier when I do not.

Health law professors may have another problem even when they publish in traditional law reviews. Many people in the field believe that the most prestigious journals are particularly unlikely to publish articles in health law. Using the (somewhat arbitrarily selected and definitely alphabetically ordered) law reviews from Chicago, Columbia, Harvard, Stanford, and Yale, those journals published only seven of the 1544 health law articles found in the Index to Legal Periodicals in 2004-2005, five out of 1119 for 2000-2001, and eight out of 828 in 1990-1991. Whether these numbers are unfairly low is certainly not clear, but it is clear that the several hundred health law academics face long odds against getting an article published in one of those journals. And casual observation leads me to believe that constitutional or corporate law scholars face better odds.

Health law academics may face a last, and more subtle, problem. Working in health law may lead to an uncomfortable sense of distance from one's law school colleagues. The more engaged you become in health care, the more your "true" colleagues can become medical school professors, scientists, bioethicists, and others outside of legal academia. The issues that entrance and worry you are issues that your law school colleagues may not know or understand; their concerns and issues may seem increasingly foreign to you. Making new colleagues in new fields and exploring new areas is a wonderful consequence of health law, but it can result in a bit of homelessness, of being stranded between two worlds and not fully a member of either.

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45. Legal academics sometimes suffer on the other side from the uniqueness of the law review model, as grant applications sometimes seek a listing of only peer reviewed articles, thus excluding what may be a large part of the academic's work.

## III. SUCCESS AND ITS DISCONTENTS

Being a health law academic does come with a set of special challenges, as described above, but some participants in the workshop expressed other concerns about the field. Those concerns involve both the status of health law classes in the law school curriculum and the nature (and status) of health law scholarship. I am not convinced of the significance, or in some cases the reality, of those concerns, at least as I understand them.

There seemed to be some concern that students do not perceive health law as an essential class. Teachers, at least in elective courses, like having more students, even though more students bring more work. Enrollment figures can be viewed as a measure of a field's importance, and perhaps of its status. But, of course, enrollments in electives are only a measure of a field's importance to law students, as law students and as perceived by law students. Courses achieve high enrollments in five ways: they are required, the subject is on the bar examination, they have a great teacher, the subject is viewed as very important for future employment, or the subject is otherwise interesting. Health law is not likely to break into the small number of required courses, most of which are foundational in a way that health law is not. Health law is not likely to be added to any bar examinations in the near future.<sup>46</sup> I know of no reason to think that health law classes are any more, or any less, likely to be taught by greater teachers. That leaves the subject's perceived career importance and general interest.

Course enrollments, and offerings, vary in law schools over time based on differing assessments of these factors. It is my recollection that twenty to thirty years ago, classes in intellectual property were uncommon and sparsely attended. Now they are booming. Classes in regulated industry law, on the other hand, have nearly disappeared, along with traditionally regulated industries. I suspect the number of health law courses and the number of students enrolled in them has steadily increased over time;<sup>47</sup> I expect that steady increase to continue as the issues health care poses become more and more important. It certainly would not hurt for health

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46. Although, at least for the state portion of the bar examination, there is some precedent for including subjects dealing with particularly prominent industries. Texas, Louisiana, and a few other states long included oil and gas law on their bar examinations. *See, e.g.*, Tex. Bd. of Law Exam'rs, Texas Bar Examination Subjects, <http://www.ble.state.tx.us/Rules/NewRules/appendixA.htm> (last visited Mar. 19, 2006).

47. Interestingly, enrollments in my own health law and policy class peaked around the time of the Clinton health plan, which focused great interest on the area.

law teachers to make the field's growing importance clearer to law students.

One slightly different concern was also expressed, that our health law classes are not perceived as important by the "best students" and we need to make sure that more future Supreme Court clerks take health law. Of course, future Supreme Court clerks are uncommon at even the most prestigious schools; at most law schools, they do not exist.<sup>48</sup> But the underlying point is an interesting one: are the "best" students, however that is measured, more or less likely to take health law? The answer undoubtedly varies from school to school and teacher to teacher. I have no guess about it, even for my own classes and my own law school. Some great students have taken my health law courses,<sup>49</sup> but plenty of great Stanford students have not.

Another side of this issue of class enrollments needs to be mentioned. Having a "niche" class has its advantages. Students taking a class because they find the issues particularly compelling are, in general, more enjoyable than students taking a class because it is required, on the bar, or thought to be important to their future career. Health law teachers naturally believe health law is important and fascinating and that more law students should take our classes; we need to be careful about what we wish for.

The other, and deeper, concern expressed at the workshop involved the intellectual foundations of health law, in terms of its paradigms or its methodologies. If a specter is in fact haunting health law, that specter appears to be "The Law of the Horse."

*Cyberspace and the Law of the Horse* is a 1996 essay by Judge Frank Easterbrook.<sup>50</sup> Attributing the term to his law school's former dean (and my university's now former president), Gerhard Casper, Judge Easterbrook denounced the idea of cyberlaw as another "Law

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48. Professor Brian Leiter recently compiled the statistics for Supreme Court clerks, by school, from the 1991 term through the 2005 term. In those fifteen years, only thirty-four of the country's nearly 200 law schools produced a single Supreme Court law clerk. Only twenty-two produced more than one and only eight averaged one or more clerks per year. During that time, only four schools had one percent or more of their students serve as Supreme Court law clerks: Yale, Chicago, Stanford, and Harvard, in order. Brian R. Leiter, *Leiter's Law School Rankings, Supreme Court Clerkship Placement, 1991 Through 2005 Terms*, [http://www.leiterrankings.com/jobs/1991scotus\\_clerks.shtml](http://www.leiterrankings.com/jobs/1991scotus_clerks.shtml) (last visited Mar. 19, 2006).

49. Including, I am very proud to say, two of the other law professors at the workshop, William Sage and Russell Korobkin.

50. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207. *But see* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999) (defending the value of "cyberlaw").

of the Horse.”<sup>51</sup> Easterbrook argued that most “law and” subjects are the products of law professors as ignorant dilettantes: “Beliefs lawyers hold about computers, and predictions they make about new technology, are highly likely to be false. This should make us hesitate to prescribe legal adaptations for cyberspace. The blind are not good trailblazers.”<sup>52</sup> Instead, Easterbrook argued, law professors should focus on general legal areas.

[T]he best way to learn the law applicable to specialized endeavors is to study general rules. Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on “The Law of the Horse” is doomed to be shallow and to miss unifying principles.<sup>53</sup>

Instead of proclaiming, or studying, cyberlaw, law professors should “[d]evelop a sound law of intellectual property, then *apply* it to computer networks.”<sup>54</sup>

Is health law a “real” legal category, like contracts, torts, property, and so on, or is it just an industry-specific law of the horse, best analyzed by applying the separate approaches of fundamental legal subjects as they are relevant? It is tempting to say “I don’t know and I don’t care”<sup>55</sup> and leave it at that. It is important and fascinating; that should be enough.

But I will note a few things. First, Easterbrook is completely right that law professors should not speculate in ignorance about other fields. The right answer is not to withdraw from specific areas, but to learn about them, and to work closely with other people who are specialized in them. The right answer cannot be to perfect general legal rules that are then applied to all fields. Applying an otherwise admirable privacy scheme, for example, to health care, without a real knowledge of health care, may well be a mistake.<sup>56</sup>

Second, many time-honored law school subjects and legal fields are, in their own ways, laws of the horse. Admiralty and

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51. Easterbrook, *supra* note 50.

52. *Id.* at 207.

53. *Id.*

54. *Id.* at 208.

55. That is, of course, the classic answer to the question: “Are you ignorant or just apathetic?”

56. See, e.g., Henry T. Greely, *Trusted Systems and Medical Records: Lowering Expectations*, 52 STAN. L. REV. 1585 (2000) (scrutinizing the application of a system developed for the delivery and control of electronic music to the management of electronic medical records).

administrative law, bankruptcy and banking law, civil procedure and corporate law, environmental and employment law, family law, and so on through the alphabet to zoning and land use—all are courses and fields about the law as it is applied in specific settings, not about generalized law as some kind of “brooding omnipresence in the sky.”<sup>57</sup>

Last, although health law provides some insights that may be useful in other areas of the law, such as evidence on the limits of assumptions about people as rational actors, that is not crucial to its importance. Some areas of law are, in fact, more fundamental than others. Lawyers in every field have to know something about contracts or property, but being more or less fundamental does not necessarily make something more or less important. The element ytterbium<sup>58</sup> is more fundamental than the molecule made up of two hydrogen atoms and one oxygen atom, but ytterbium has no clear uses while water is absolutely vital.<sup>59</sup> Our human cells are more fundamental than our human selves, but not nearly as important. “The Law of the Horse” is a catchy put-down, but with very little substance.

The concerns expressed about health law are more substantive than just misgivings about equine jurisprudence. Some health law professors worry that health law does not have either a dominant paradigm or a broadly adopted methodology.<sup>60</sup> They point out, accurately I believe, that such consistent approaches bring some advantages. People agreeing on the same basic approach can, more easily and efficiently, discuss topics in greater depth. They share the same language.

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57. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

58. Ytterbium is an element in the rare earth family with an atomic number of 70 and an atomic weight of 173.04. “Ytterbium metal has possible use in improving the grain refinement, strength, and other mechanical properties of stainless steel. One isotope is reported to have been used as a radiation source substitute for a portable X-ray machine where electricity is unavailable. Few other uses have been found.” Chemistry Division, Los Alamos National Laboratory, Periodic Table of the Elements: Ytterbium, <http://periodic.lanl.gov/elements/70.html> (last visited Mar. 19, 2006).

59. *Id.*

60. Paradigms and methodologies are related, but not the same. I see a dominant paradigm as a broadly shared way of looking at the field, an understanding of what is important and why. Different people have suggested that professional autonomy, patient autonomy, social justice, economic efficiency, patient suffering, or trust have been, are, or should be dominant paradigms for health law. A methodology is more a process for exploring a set of issues. A paradigm may or may not imply a methodology. “Economic efficiency” as a paradigm implies economic analysis, but “trust” could be approached through many different methods.

Lurking in the concern about a paradigm or a prevailing methodology may be a worry about status. Scientists used to talk about “physics envy,”<sup>61</sup> a reaction to the high status of particle physics, which dealt with the most fundamental, the most “pure,” and, perhaps not coincidentally for its status, the most militarily explosive set of scientific issues. Fundamental building blocks, unified paradigms, and powerful methodologies—these can be sources of status for a field. Like science, academic law has its own pecking order, widely understood but rarely discussed, at least in print. I suspect most legal academics would rank constitutional law and corporate law near the top of the order and would agree that theoretical analyses, whether economic or deconstructionist, have higher status than practical applications. Health law is not a high-status field in legal academia, though whether that is a result of its lack of unified approach, of its relative youth, or of its difficulty and its distance from much of academic law is not clear. Nor is it clear that we should be concerned about its status. But, if we are, I would note that fields can increase their status without creating a dominant paradigm; intellectual property may be an example. And that, in science, particle physics has been knocked off its pedestal by the much messier molecular biology, which in turn may be challenged by the still more chaotic neuroscience.

I am not opposed to the existence of a dominant paradigm for health law.<sup>62</sup> I just think that one is unlikely to develop for two strong reasons—experience and logic. “Rethinking Health Law” was only the most recent of many discussions of the need for a dominant paradigm in health law. Two of its organizers published a very useful discussion of the topic two years ago.<sup>63</sup> They traced the search for a paradigm, an organizing principle, a unifying idea, or an animating concern back at least twenty years.<sup>64</sup> Two decades of effort have not produced agreement on a paradigm for health law and last December’s workshop did not make any progress toward that end. That, in spite of substantial efforts, no one has yet been able to mount an argument for a paradigm that has, in fact, convinced most health law academics does not, of course, prove that the goal is impossible. But it surely is some evidence for that

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61. See, e.g., Doreen Massey, *Space-time, ‘Science’ and the Relationship Between Physical Geography and Human Geography*, 24 *TRANSACTIONS OF THE INST. OF BRIT. GEOGRAPHERS* 261, 263-65 (1999).

62. Given my personality, I suspect I would be skeptical of, if not opposed to, claims of very broad applicability for any particular paradigm, but I could do that while recognizing the paradigm’s value.

63. Mark A. Hall & Carl E. Schneider, *Where is the “There” in Health Law? Can It Become a Coherent Field?*, 14 *HEALTH MATRIX* 101 (2004).

64. *Id.* at 101 nn.3-4.

proposition.

Nor should this be surprising. It is a logical consequence of the very breadth of health law. The laws governing corporations, mergers and acquisitions, or families are about more limited sets of topics than health law. Compensation schemes for vaccine-related injuries, regulation of abortion, financial relationships between hospitals and their physician staffs, the appropriate uses of quarantine in epidemics, whether and how biological products can become generic—these and many other diverse issues fall within health law. Why would one expect that they can all, or even almost all, be encompassed in a single approach?

In the end, the argument about dominant paradigms or methodologies in health law may be as much about personalities as anything. Isaiah Berlin famously wrote of writers as being either “hedgehogs” or “foxes.”<sup>65</sup> Hedgehogs are writers who see the world through one lens, who know only one thing and bring it to everything they write.<sup>66</sup> Foxes are writers who see a wide variety of perspectives and whose work is not suffused with a single theme.<sup>67</sup> Dante is his first-listed hedgehog, Shakespeare his first fox.<sup>68</sup> Neither is right; they are just different. Some scholars may be more comfortable with health law if it can be fit neatly into a nice, precise paradigm; others may prefer a messy, sprawling, and loosely connected field. Neither group is right or wrong in the abstract; which feels more comfortable to most health law scholars will be determined by whether any one paradigm is, in fact, broadly adopted.

For the reasons expressed above, my bet is against the emergence of a dominant paradigm for health law, but I may be wrong. Time will tell. I do insist, however, that the existence or absence of a dominant paradigm has nothing to do with the value of academic health law. With one or without one, the study of health law is both important and fascinating. And that is more than enough to justify spending a career on it.

#### CONCLUSION

A specter may be haunting health law, or at least some health

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65. ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY 2* (1953). The title comes from a line from a fragment by the early Greek poet Archilochus: “The fox knows many things, but the hedgehog knows one big thing.” *Id.* at 1.

66. *Id.* at 1-2.

67. *Id.*

68. *Id.* at 2. Berlin's essay was actually about Tolstoy, whom he considers a fox who thought he should be, and tried to become, a hedgehog.

law academics, but me, I don't believe in ghosts. As Ebenezer Scrooge said to his first ghostly visitor, "[y]ou may be an undigested bit of beef, a blot of mustard, a crumb of cheese, a fragment of an underdone potato. There's more of gravy than of grave about you, whatever you are!"<sup>69</sup>

Health care presents crucial legal, policy, and moral problems in the United States and around the world. Academics with legal training have much to contribute to their elucidation and, I hope, to their alleviation, and even, perhaps, to their cure. We can provide essential knowledge about both the substance and the processes of the law, which are as alien to our health care colleagues as differential diagnoses are to us. We can help with our knowledge of how other fields have dealt with similar problems. And we can provide a type of disinterested and skeptical analysis that may advance these conversations. We cannot, and should not want to, dominate discussion of these issues; our approaches, our perspectives, and our talents provide only a few of the many necessary contributions. But our contributions can be both real and important. We should get back to them. There is work to be done.

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69. CHARLES DICKENS, *A CHRISTMAS CAROL* 25 (1st U.S. ed., Candlewick Press 2006) (1843). Of course, in that case, Scrooge was wrong—but then, Scrooge—and his visiting spirits—are also fiction.