Cure, Botch or Opiate?
Law, Politics, & the Constitutionality of
The Patient Protection and Affordable Care Act

FIU LAW REVIEW SYMPOSIUM
FALL 2010

November 12, 2010
The Patient Protection and Affordable Care Act (PPACA) makes a number of changes to the provision of health care in the United States. Celebrated by some and rejected by others, the PPACA is making waves in the debate regarding health care reform, causing over twenty states to file suit challenging its constitutionality. The politics surrounding PPACA and the policy changes it implements remain controversial, causing some to call for partial or complete repeal.

We welcome you to our Fall 2010 Symposium as experts in constitutional law, and health policy, explain and debate the issues surrounding the law, politics, policies, and constitutionality of PPACA.

Presented by:
FIU Law Review
SCHEDULE OF EVENTS

8:30 – 9:15 A.M.  Breakfast
FIU College of Law Atrium

9:30 – 9:45 A.M.  Welcome and Introduction
Large Courtroom – RDB 1000

Speakers:

HON. R. ALEXANDER ACOSTA, Dean, FIU College of Law
FRANK HOUSTON, Editor-in-Chief, FIU Law Review

9:45 – 11:30 A.M.  Panel I: The Constitutionality of PPACA
Large Courtroom – RDB 1000

Panelists:

GERARD N. MAGLIOCCA  Professor of Law
Indiana University School of Law

DAVID B. RIVKIN, JR.  Partner
Baker Hostetler LLP

ILYA SHAPIRO  Senior Fellow in Constitutional Studies
Cato Institute

Moderator:

ELIZABETH PRICE FOLEY, Professor, FIU College of Law

– 15 minute break –

11:45 – 1:15 P.M.  Lunch
FIU College of Law Atrium

1:15 – 2:30 P.M.  Panel II: The Politics of Health Reform & PPACA
Large Courtroom – RDB 1000

Question & Answer Panelists:

KEVIN SACK  National Correspondent & Senior Writer
The New York Times

DAVID FREDDOSO  Editorial Page Editor
The Washington Examiner
Moderator:

ELIZABETH PRICE FOLEY, Professor, FIU College of Law

– 15 minute break –

2:45 – 4:30 P.M.  Panel III: The Law and Health Policies of PPACA
Large Courtroom – RDB 1000

Panelists:

DR. DAVID ORENTLICHER  Professor of Law
Indiana University School of Law
Associate Professor of Medicine
Indiana University School of Medicine

FRANK PASQUALE  Professor of Law
Seton Hall School of Law

ELIZABETH PENDO  Associate Dean and Professor of Law
Saint Louis University School of Law

DR. FERNANDO VALVERDE  Associate Dean and CEO of FIU HealthCare Network
FIU Herbert Wertheim College of Medicine

Moderator:

HOWARD M. WASSERMAN, Associate Professor, FIU College of Law

4:30 – 6:00 P.M.  Closing Reception
FIU College of Law Atrium

Final remarks:

HON. R. ALEXANDER ACOSTA, Dean, FIU College of Law
HON. R. ALEXANDER ACOSTA is the Dean of FIU College of Law. A native of Miami, Dean Acosta earned his undergraduate degree from Harvard College and his law degree from Harvard Law School. After serving as a law clerk to Justice Samuel A. Alito, Jr., then a judge on the United States Court of Appeals for the Third Circuit, Dean Acosta practiced law at the law firm of Kirkland & Ellis and taught at George Mason School of Law.

Dean Acosta returned to public service as a Senate-confirmed member of the National Labor Relations Board. As a Board Member, he participated in or authored more than 125 opinions. Dean Acosta was again confirmed by the Senate to be the first Hispanic to serve as Assistant Attorney General, Civil Rights, at the Department of Justice.

Most recently, Dean Acosta became the longest serving United States Attorney in South Florida since the 1970s, sitting as the senate-confirmed United States Attorney for the Southern District of Florida, which carries one of the busiest trial calendars in the nation. Dean Acosta additionally focused on creating an innovative approach to prosecuting health care fraud, including the first Health Care Fraud strike force in the nation. These efforts made South Florida the top district in the nation for health care fraud prosecution.


ELIZABETH PRICE FOLEY came to the FIU College of Law from Michigan State University, where she was a Professor of Law and an Adjunct Professor at the MSU College of Human Medicine. She previously served as a law clerk to the Honorable Carolyn Dineen King of the U.S. Court of Appeals for the Fifth Circuit and spent several years on Capitol Hill as a health policy advisor, serving as Senior

An energetic and innovative classroom teacher, Professor Foley received the "Professor of the Year" award for the 2009-2010 academic year. Her research interest centers around the intersection of health care law and constitutional law. Her first book, “Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality,” was published by Yale University Press in October 2006. Her second book, "The Law of Life and Death" will be published by Harvard University Press in Spring 2011. She is also the author of numerous law journal articles and op-eds, and is a frequent media commentator, having appeared on or been quoted by The Wall Street Journal, New York Times, Washington Post, Miami Herald, Detroit Free Press, Detroit News, National Law Journal, National Public Radio, Fox News, CNN and the BBC. In 2005, Professor Foley was appointed to serve as a member of the Committee on Embryonic Stem Cell Guidelines of the Institute of Medicine, National Academy of Sciences. In Spring 2011, Professor Foley will serve as a Fulbright Scholar at the College of Law of the National University of Ireland, Galway—conducting research on the topic of medical futility, which will be the topic of her third book.

Professor Foley graduated summa cum laude from the University of Tennessee College of Law, where she was an Articles Editor of the Tennessee Law Review, inducted into Order of the Coif, and graduated first in her class. She has a B.A. in History from Emory University and an LL.M. from Harvard Law School. She teaches constitutional law, civil procedure, bioethics, and health care law.

GERARD N. MAGLIOCCA joined the faculty following two years as an associate with Covington & Burling and one year as a clerk for Judge Guido Calabresi on the Second Circuit. He received the Best New Professor Award from the student body in 2004 and the Black Cane (Most Outstanding Professor) Award in 2006. In 2007, his book on Andrew Jackson was the subject of an hour-long program on C-Span's "Book TV." In the Fall of 2008, Professor Magliocca held the Fulbright-Dow Distinguished Research Chair of the Roosevelt Study Center in Middelburg, The Netherlands. He is also a regular blogger on Concurring Opinions and Balkinization.
**DR. DAVID ORENTLICHER** is the Samuel R. Rosen Professor of Law and Co-director of the William S. and Christine S. Hall Center for Law and Health. He teaches health care law, trust and estates, constitutional law, criminal procedure and professional responsibility.

In addition to his positions at the law school, David Orentlicher is an adjunct professor of medicine at Indiana University School of Medicine. Before coming to IU, he served as director of the Division of Medical Ethics at the American Medical Association for six-and-a-half years. While there, he led the drafting of the AMA’s first patients’ bill of rights, guidelines for physician investment in health care facilities that were incorporated into federal law, and guidelines on gifts to physicians from industry that have become the industry standard and a standard recognized by the federal government. He helped develop many other positions—on end-of-life matters, organ transplantation, and reproductive issues—that have been cited by courts and government agencies in their decision-making. He also held adjunct appointments at the University of Chicago Law School and Northwestern University Medical School.

Following law school, where he was a commentary and book review office chair of the *Harvard Law Review*, he clerked for the Honorable Alvin B. Rubin, U.S. Court of Appeals for the Fifth Circuit. He has practiced both medicine and law, each for about two years, and is a member of the American Law Institute. He has held a number of distinguished visiting professorships, serving as Visiting DeCamp Professor in Bioethics at Princeton University, Frederick Distinguished Visiting Professor of Ethics at DePauw University, and George E. Allen Professor of Law at T. C. Williams School of Law, University of Richmond. He has published *Matters of Life and Death* with Princeton University Press, and is co-author of the casebook *Health Care Law and Ethics*, now in its 7th edition. He also has written widely in leading legal and medical journals on critical issues in medical ethics, including end-of-life decisions, new reproductive technologies, and organ transplantation, as well as on affirmative action and other questions in constitutional law.

As a member of the Indiana House of Representatives from November 2002 to November 2008, he authored legislation to make health care insurance more affordable, increase the pool of venture capital for new businesses, and ensure better protection of children from abuse and neglect.
FRANK PASQUALE joined Seton Hall after practicing law as an attorney at Arnold & Porter LLP, where his work included antitrust and intellectual property litigation. Professor Pasquale's prior experience includes clerking for the Honorable Judge Kermit Lipez of the United States Court of Appeals for the First Circuit and serving as a fellow at the Institute for the Defense of Competition and Protection of Intellectual Property in Lima, Peru.

During his time at Yale Law School, Professor Pasquale served as a teaching assistant for first year students and as an editor of the Yale Law and Policy Review and the Yale Symposium on Law and Technology before graduating with a J.D. in 2001. He also served as a student director in the clinical program's Disabilities Clinic, focusing on advocacy in the health and benefits fields.

Pasquale has focused his scholarship on enriching intellectual property and health law with insights from economics, philosophy, and social science. His work on search engines has been excerpted in Bellia, Post, & Berman's Cyberlaw and delivered to a plenary session of the Intellectual Property Scholars Conference. His work on retainer medicine was selected for presentation at the St. Louis University Health Law Scholars Workshop.

Pasquale teaches Administrative Law, Intellectual Property Law, Health Care Finance, and a seminar entitled Technology, Human Rights, and Equality. He also plans and participates in programs sponsored by the law school's Gibbons Institute for Law, Science & Technology, and its nationally ranked Health Law & Policy Program. He is the Associate Director of the Gibbons Institute.

Professor Pasquale blogs at Concurring Opinions and Madisonian.net, and has guest-blogged at Jurisdynamics. At the Co-Op, his posts focus on methodology in legal scholarship, health law, and IP. The Madisonian blog has a technology focus. Along with Gaia Bernstein and Jim Chen, Pasquale organized a virtual symposium at Law & Technology Theory.

Pasquale has been quoted in the New York Times, San Francisco Chronicle, Los Angeles Times, Boston Globe, Financial Times, and many other publications. He has appeared on CNN to comment on Google's China policy. He has been interviewed on internet regulation on David Levine's Hearsay Culture podcast, WNYC's Brian Lehrer Show, and on National Public Radio's Talk of the Nation.

Professor Pasquale has testified before Congress and before the New York City Broadband Advisory Commission. He presented Internet Nondiscrimination
Principles for Competition Policy Online before the Task Force on Competition Policy and Antitrust Laws of the House Committee on the Judiciary, appearing with the General Counsels of Google, Microsoft, and Yahoo. He appeared with Congressman Bob Goodlatte to discuss *Reputation and Privacy in an Age of Social Networking* at the State of the Net West Policy Conference at Santa Clara Law School.

**ELIZABETH PENDO** joined the SLU LAW faculty in 2008 after a year-long visit. She is a member of the Center for Health Law Studies and the William C. Wefel Center for Employment Law. Professor Pendo teaches and writes in the areas of disability discrimination, health law and bioethics, employment discrimination law and civil procedure. Her scholarship focuses on the intersection of issues of disability, gender and race in health insurance, health care and employment.

Professor Pendo graduated with a B.A. in English Literature from the University of California, Los Angeles and received her J.D. from the UC Berkeley School of Law. Before entering academia, Professor Pendo served as a Pro Se Law Clerk for the U.S. Court of Appeals for the Second Circuit, and she practiced as an ERISA litigation specialist in the law department of MetLife in New York. She is a member of the state bars of California and New York.

Prior to joining the faculty at SLU LAW, she taught at Saint Thomas University School of Law in Miami, Florida. While in Florida, Professor Pendo served as appointed member and elected Chair of the Florida Agency for Health Care Administration's Managed Care Ombudsman Committee, investigating and resolving health care consumer complaints regarding services received through managed care programs.

Professor Pendo has also taught health law and bioethics-related courses in the Masters of Science in Health Law Program at Nova Southeastern University Shepard Broad Law Center, for the Certificate Program for the Center for Health Care Ethics at Saint Louis University and at The Royal College University Escorial Maria Cristina in Spain.
DAVID B. RIVKIN JR. is a member of the firm’s litigation, international and environmental groups and co-chairs the firm’s appellate and major motions team. He has extensive experience in constitutional, administrative and international law litigation.

Mr. Rivkin has represented corporations in alien tort statute and civil RICO litigation, as well as in challenges to federal agency actions and constitutional challenges to state statutes. He also represented States in challenges to the constitutionality of federal statutes. He has provided compliance advice to companies, as well as handled enforcement proceedings before government agencies on issues arising out of various multilateral and unilateral sanctions (ITAR, EAR and questions relating to dealings with proscribed countries), Foreign Corrupt Practices Act (FCPA), anti-boycott issues and environmental and energy matters. Mr. Rivkin has considerable experience with litigation involving national security-related matters, including defending *Bivens* actions. From 2004 through 2007, he served as an expert member of the United Nations Subcommission on the Promotion and Protection of Human Rights.

From 1993 to December 1999, Mr. Rivkin was a member of the Hunton and Williams law firm. Prior to returning to private practice, Mr. Rivkin served from 1987-1993 in various capacities in the federal government. During 1992-1993, he was Associate Executive Director and General Counsel of the President’s Council on Competitiveness at the White House. While there, he was responsible for the review and analysis of legal issues related to the regulatory review conducted by the Council.

He handled the development and implementation of President George H.W. Bush’s deregulatory initiatives, which entailed review of all existing federal regulatory strictures and the application of a more rigorous cost-effective standard to new regulations. His substantive areas of responsibility included international sanctions, energy, environment, and tax issues. He played a leading role in the development of Order 636, which introduced major changes to the regulation of the interstate natural gas pipelines and simultaneously served as the Special Assistant for Domestic Policy to then Vice President Dan Quayle.

Mr. Rivkin also served as the Associate General Counsel, U.S. Department of Energy (DOE) from 1990-91. At DOE he was responsible for international, constitutional, environmental and energy matters, including global climate change problems, natural gas, hydro and electricity issues, development and implementation of the Natural Energy Strategy, implementation of the Clean Air Act Amendments of 1990, wetlands policy and related issues, development
of RCRA and Clean Water Act legislative proposals and deregulation of energy markets. Mr. Rivkin played a significant role in developing the Reagan and Bush Administrations’ regulatory and legislative proposals affecting natural gas and electric utility industries.

In addition to his positions with the Council on Competitiveness and the Department of Energy, he served in the office of then Vice President George Bush as Legal Advisor to the Counsel to the President, and as Deputy Director of the Office of Policy Development (OPD), U.S. Department of Justice. While at OPD, he worked on a wide variety of constitutional, domestic and international issues, including judicial selection, legal policy, immigration and asylum matters and intelligence oversight.

Prior to embarking on a legal career, Mr. Rivkin worked as a defense and foreign policy analyst, focusing on Soviet affairs, arms control, naval strategy and NATO-related issues, and served as a defense consultant to numerous government agencies and Washington think tanks.


Mr. Rivkin has filed Supreme Court and appellate amicus briefs in several leading post-September 11 National Security cases and has been a frequent commentator and guest on TV and radio shows, including CNN, NBC and MSNBC, CBS, ABC, Fox News, NPR, PBS, BBC, Canadian Broadcasting Corporation and numerous Australian, French, German and Swiss TV stations.

**KEVIN SACK** is a national correspondent and senior writer for The New York Times, where he previously held the positions of bureau chief in Albany, N.Y., and Atlanta. He also was a national correspondent and projects writer at the Los Angeles Times. He shared the Pulitzer Prize for National Reporting and a George Polk Award in 2001 for the New York Times’ series ”How Race is Lived in America,” and in 2003 he received the
Pulitzer for National Reporting for a series of articles in the Los Angeles Times on the Marine Corps’ Harrier jet. He rejoined the New York Times in 2007 and has been covering Health Care since that time.

ILYA SHAPIRO is a senior fellow in constitutional studies at the Cato Institute and editor-in-chief of the *Cato Supreme Court Review*. Before joining Cato, he was a special assistant/advisor to the Multi-National Force in Iraq on rule of law issues and practiced international, political, commercial, and antitrust litigation at Patton Boggs and Cleary Gottlieb. Shapiro has contributed to a variety of academic, popular, and professional publications, including the *Harvard Journal of Law & Public Policy*, *L.A. Times*, *Washington Times*, *Legal Times*, *Weekly Standard*, *Roll Call*, and *National Review Online*, and from 2004 to 2007 wrote the "Dispatches from Purple America" column for *TCS Daily.com*. He also regularly provides commentary on a host of legal and political issues for various TV and radio outlets, including CNN, Fox News, ABC, CBS, NBC, Univision, "The Colbert Report," and American Public Media's "Marketplace."

He lectures regularly on behalf of the Federalist Society and other educational and professional groups, is a member of the board of visitors of the Legal Studies Institute at The Fund for American Studies, was an inaugural Washington Fellow at the National Review Institute, and has been an adjunct professor at the George Washington University Law School. Before entering private practice, Shapiro clerked for Judge E. Grady Jolly of the U.S. Court of Appeals for the Fifth Circuit, while living in Mississippi and traveling around the Deep South. He holds an A.B. from Princeton University, an M.Sc. from the London School of Economics, and a J.D. from the University of Chicago Law School (where he became a Tony Patiño Fellow). Shapiro is a member of the bars of New York, the District of Columbia, and the U.S. Supreme Court. He is a native speaker of English and Russian, is fluent in Spanish and French, and is proficient in Italian and Portuguese.

DR. FERNANDO J. VALVERDE is Chief Executive Officer of the Florida International University (FIU) College of Medicine HealthCare Network. Dr. Valverde also holds the positions of Assistant Professor of Medicine and Associate Dean for Community and Clinical Affairs at the FIU Herbert Wertheim College of Medicine, contributing to curriculum development at the College.
Dr. Valverde is a physician entrepreneur who over the past 20 years has contributed to the growth of the healthcare field both on a regional and national basis. Early in his career he was in private practice for eight (8) years in the area of Internal Medicine. Dr. Valverde is considered a pioneer in the field of physician practice management and managed health care. In the 1990’s he was responsible for founding, managing and expanding the largest Internal Medicine physician group with more than 100 full time internists practicing across Florida. This state-wide network of physicians and practices provided more than 500,000 patient visits each year in more than 70 locations. He has received numerous awards which includes an outstanding leadership award from Mount Sinai Medical Center, Miami Beach, Florida. He was also a co-author and inventor of “Back Page” technology which received a patent from the U.S. Patent and Trademark office.

Dr. Valverde has also served as a Director on the Board of Trustees of diverse private and NYSE public companies, with both local and national presence. He currently is Director’s Council for the Patricia and Philip Frost Art Museum at Florida International University.

Howard M. Wasserman joined the FIU College of Law faculty in 2003. He graduated magna cum laude from the Northwestern University School of Law, where he was an associate articles editor of the Law Review and was named to the Order of the Coif.


He also has been a visiting professor at Saint Louis University School of Law and Florida State University College of Law. Professor Wasserman teaches civil procedure, evidence, federal courts, civil rights and First Amendment. His scholarship focuses on the freedom of speech and on the role of procedural and jurisdictional rules in public-law and civil-rights litigation. He also regularly blogs at PrawfsBlawg and at Sports-Law Blog and is a regular media commentator on issues related to sports and the law. He also has a book forthcoming, titled “Institutional Failures: Duke Lacrosse, Universities, the News Media, and the Legal System.”
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