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## *Symposium*

### THE LAW AND POLICY OF HEALTH CARE RATIONING: MODELS AND ACCOUNTABILITY

#### FOREWORD

As questions about the need to reform the American health care system dominate the national agenda, the editors of the *University of Pennsylvania Law Review* are pleased to present this Symposium on health care rationing. Our aim is to explore the concept of rationing amidst the pressing and contradictory problems presented by the large number of individuals without adequate health insurance and the rapidly rising costs of health care. While proposals to change our health care system are abundant, thorough analyses of the underlying issues are not, particularly among elected officials. This collection of articles by policymakers, health care scholars, lawyers, political scientists, philosophers, and representatives of organizations with a vital interest in the provision of health care services should correct this deficiency and provide, we hope, the most sophisticated examination of the rationing controversy to date.

The Introduction section of the Symposium presents opposing views by two prominent policymakers: Richard Lamm, former

Governor of Colorado, and Joseph Califano, Jr., former Secretary of Health and Human Services. Governor Lamm makes the case in favor of rationing, arguing that given the conflict between infinite demands and limited resources, a thoughtful allocation of health care resources would result in improved national health. Mr. Califano counters that explicit health care rationing is unnecessary; the resources we currently spend would be sufficient to provide adequate care for all Americans if inefficiency and waste could be eliminated.

The next section of the Symposium, *Models of Rationing*, presents various perspectives about whether and how health care rationing is and should be implemented in the United States. By way of introduction, Dr. Jan Blustein of New York University and Dr. Theodore Marmor of Yale University address the argument that the need for explicit rationing can be obviated by cutting wasteful medical practices. Their analysis illuminates the overlap between disputes over how to define "waste" and the debate over rationing.

Dr. Robert H. Blank, now of the University of Canterbury, Christchurch, New Zealand, and Leonard M. Fleck of Michigan State University, address models of rationing that prominently feature the political process. Dr. Blank rejects the notion of an individual right to unlimited health care. He advocates a comprehensive rationing scheme based on government regulation of a single payer system. While conceding that the need for rationing is inescapable, Professor Fleck denies that bureaucratic mechanisms should have primary authority for rationing decisions. He argues that since health care rationing is fundamentally a moral problem, it can be done fairly only through an informed democratic consensus model. The place of democratic values in the rationing process is explored further in the final section of the Symposium.

Focusing on the role of the courts and the judiciary in the rationing of health care are Mark A. Hall, Professor of Law at Arizona State University and Gerald F. Anderson, Director of the Center for Hospital Finance and Management at Johns Hopkins University, as well as David Mechanic, René Dubois Professor of Behavioral Sciences at Rutgers University. Professors Hall and Anderson cite widespread judicial disregard of larger public policy issues when extending the coverage of health insurance policies to "last hope" treatments, causing an added drain on finite spending resources. They propose a model contractual arrangement in which the parties explicitly bargain for a process of resolving disputes over medical appropriateness and policy coverage. Professor Mechanic

believes that the most realistic and appropriate way to allocate health care services is an implicit rationing approach that establishes budgetary limits but allows clinical discretion in the allocation of services. In such a system, protection against withholding of efficacious services could be achieved through appropriate grievance procedures, the strengthening of professional peer review, and the ultimate threat of state law malpractice claims.

A final model of rationing is provided by Clark C. Havighurst, Professor of Law at Duke University and author of a leading textbook on health care law. Professor Havighurst rejects models that rely heavily on government intervention and defends implicit rationing through unregulated free market mechanisms as the best means of allocating health care resources.

Additional commentary on health care rationing models is provided by Edward B. Hirshfeld of the American Medical Association, Andrew Smith and John Rother of the American Association of Retired Persons, and Sara Rosenbaum of George Washington University (formerly of the Children's Defense Fund). Mr. Hirshfeld contends that the most important issue for the nation is not how to accommodate new forms of rationing, but how to define what constitutes necessary as opposed to unneeded care. In making this determination, Mr. Hirshfeld, on behalf of the A.M.A., argues that physicians must adhere to traditional patient-interest oriented ethical and legal standards when developing medical information and forming opinions about necessity. Messrs. Smith and Rother insist that explicit rationing of beneficial health care, especially age-based rationing, is neither economically nor morally justifiable; instead, the system of health care provision and reimbursement must be reformed to achieve cost containment and provide universal access within the limits of the country's resources. Ms. Rosenbaum reviews the health status of American children and examines the inadequacy of children's insurance coverage and access to health services. She argues that since much of the deplorable state of children's health is due to their lack of access, adoption of a national child health policy is central to any new approach to allocating health resources.

The next section of the Symposium, Consumer Expectations, addresses the role of public expectations in health care rationing. Professor Leslie Pickering Francis of the University of Utah assesses the moral and legal significance of American consumers' most important current expectations about health care in light of the national debate over reform of the health care system. Professor

Francis identifies a discontinuity that needs greater attention in the ongoing political debate—significant legal protection of contractually based expectations, but not other expectations for which there is arguable moral support. In a Commentary on Professor Francis's article, Paul T. Menzel, Professor of Philosophy at Pacific Lutheran University, agrees that both contractually and morally based expectations deserve respect, but stresses the inadequate development of a theory about what level and scope of care a person has a moral right to expect. This question is explored in greater depth in a postscript to this Symposium.

The final section of the Symposium, Political Accountability, highlights the importance of political accountability and democratic theory in making decisions about the allocation of health care resources. Professor James Morone of Brown University, Professor Howard Leichter of Linfield College, and Professor Jack H. Nagel of the University of Pennsylvania all address the issue of how to ensure accountability in the process of health care rationing. Professor Morone examines the obstacles to health care reform that are innate to American sensibilities and the American political system. To Professor Morone the history of reform movements is a history of attempting to overcome the American dread of government. Thus far this American bias has been fatal to broad reforms in health care rationing. Professor Leichter examines why traditional mechanisms for holding officials responsible for their actions are inadequate in the context of rationing health care, and explores alternative measures for guaranteeing that the rationing process remain faithful to principles of participatory democracy. He then analyzes the extent to which the Oregon process of prioritizing health services satisfies criteria of public scrutiny and involvement. Professor Nagel also focuses on the Oregon experiment, contending that it falls short of being a true participatory process. He suggests that future public-influenced health policy decisionmaking can ensure adequate representation by drawing on the lessons from Oregon while employing more finely tuned community involvement mechanisms.

In a postscript to the Symposium, Dr. Paul E. Kalb of Sidley & Austin focuses on a question logically prior to, and an answer assumed by those participating in, the debate over health care rationing: What constitutes an adequate minimum standard of care to which all citizens must have access? While acknowledging that this question may be unanswerable, Dr. Kalb issues a call for scholarship and public debate, since even the attempt to define an

adequate package of health care benefits calls attention to a central problem of the rationing debate.

The editors of the *University of Pennsylvania Law Review* second Dr. Kalb's call for continued public debate. It is our hope that this Symposium not only makes an important contribution in its own right to the health care rationing literature, but also acts as a catalyst for further intensive discussion. Only through continued consideration of the legal, moral, political, and policy issues, both among scholars and the public at large, can we ultimately achieve the twin goals of controlling excessive costs and providing adequate access to health care for all.

