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SYMPOSIUM

DIAGNOSING AMERICAN HEALTH CARE: ECONOMIC STAKEHOLDERS AND BIOETHICAL CONSIDERATIONS

*Jonathan F. Will**

Cost. Access. Quality. These are three objectives that must drive a responsible discussion regarding reform of the delivery of health care in this country, and specifically, decreasing (or at least controlling) cost while increasing access and quality. A fool's errand? Maybe. A zero-sum game, with any reduction in cost leading to a concomitant decrease in access and quality? Not necessarily.

Why is reform needed? Quite simply, because the health care system of the United States is falling short in the areas of cost,¹ access² and, by certain measures, even quality.³ This year the *Law Review* of Mississippi College School of Law dedicated its annual symposium to bringing together scholars to discuss these and other difficult issues surrounding health care reform. As the articles and essays in this symposium issue demonstrate, it succeeded. The symposium was held on Friday, February 26, 2010, just one day after President Obama's "failed"⁴ summit on February 25, and less than a month prior to the President signing the historic Patient Protection and Affordable Care Act (PPACA) on March 23.⁵ There is timely, and then there is timely!

* Assistant Professor of Law, Director, Bioethics & Health Law Center, Mississippi College School of Law. A special thanks to the panelists who participated in the Symposium and to the members of the *Law Review* who did such an excellent job organizing the event.

1. Eric Kimbuende, Usah Ranji, Janet Lundy, and Alina Salganicoff, *U.S. Healthcare Costs: Brief Background* (updated March 2010), http://www.kaiseredu.org/topics_im.asp?imID=1&parentID=61&id=358 (reporting that in 2008, health care spending surpassed \$2.3 trillion).

2. In 2008, the number of uninsured in this country was reported to be 46.3 million by the United States Census Bureau. Carmen DeNavas-Walt, Bernadette D. Proctor, and Jessica C. Smith, U.S. Census Bureau, Current Population Reports, P60-236, *Income, Poverty, and Health Insurance Coverage in the United States: 2008*, at 20 (issued Sept. 2009, available at <http://www.census.gov/prod/2009pubs/p60-236.pdf>).

3. See Neil H. Buchanan, *Medicare Meets Mephistopheles: Health Care, Government Spending, and Economic Prosperity*, 29 Miss. C. L. REV. 319, 323-24 (2010) (suggesting that although the United States offers some of the most technologically advanced medical treatments in the world, infant mortality rates and life expectancy in the United States fall far short of other nations to which we would like to be compared).

4. E.g., Bob Frisch, *Health Summit Failed? Blame Bad Meeting Design*, WALL ST. J., Mar. 9, 2010, at B.; available at <http://online.wsj.com/article/SB10001424052748704784904575111770147757484.html>.

5. H.R. 3590 (as amended two weeks later by the Health Care and Education Reconciliation Act of 2010 (H.R. 4872)).

Regardless of one's stance on health care reform, Obama succeeded in pushing through legislation where others failed.⁶ As much of the legislation will be phased in or become effective over several years, only time will tell of the import and impact of this attempt to overhaul our nation's health care system. That said, the contributors to this issue, building upon their comments during a symposium that predated the final legislation, identify areas of success, predict possible outcomes and point out certain shortcomings of the PPACA.

The Symposium was structured around two panel discussions. The first panel entitled "The Economic and Practical Implications of Health Care Reform," featured Professors Neil Buchanan (The George Washington University Law School, currently a Visiting Scholar at Cornell Law School), Seth Chandler (University of Houston Law Center) and Larry Singer (Loyola University Chicago School of Law), and was moderated by Professor Jeffrey Jackson (Mississippi College School of Law). These panelists focused their remarks on the financial problems facing the health care system, with an emphasis on the interplay between reform efforts to increase access and costs that are already spiraling out of control.

Neil Buchanan's contribution to this issue expounds on the idea that although the PPACA is a success in increasing access to many Americans by changing "the conditions under which health insurance may be offered – and, more importantly, the situations in which it may be denied or withdrawn," the new legislation likely does not do enough to address the problem of rising costs and, in particular, rising costs due to waste.⁷ By leaving the essential payment structure and players unchanged without adequately addressing areas of waste (which, in turn, leads to a decrease in quality), the concern is that we will remain in a situation where "[w]e spend much more on health care than does any other country in the world, but Americans are less healthy than citizens in many, many other countries."⁸ Indeed, adequate reduction of waste is just the sort of reform that would serve to decrease costs without negatively impacting access or quality. While Professor Buchanan certainly does not here claim to have an answer to this problem, his work importantly raises these issues and ideas for further discussion and exploration.

Seth Chandler's article⁹ tackles the dilemma of how exactly it is that the PPACA will make health insurance affordable to many millions of

6. Efforts by presidents and presidential candidates to introduce a greater federal role in health care date at least back to Theodore Roosevelt's candidacy in the 1912 election, where he campaigned on the Progressive Party Ticket for national health insurance (he lost to Woodrow Wilson). Walter L. Stiehm, *Poverty Law: Access to Healthcare and Barriers to the Poor*, 4 QUINNIPIAC HEALTH L.J. 279, 282 (2001). The more relevant (and recent) failure at health care reform came during the Clinton administration.

7. Buchanan, *supra* note 3, at 320.

8. *Id.* at 334.

9. Seth Chandler, *The Architecture of Contemporary Healthcare Reform and Effective Marginal Tax Rates*, 29 MISS. C. L. REV. 335 (2010).

Americans who previously lacked it. The answer is mired within the interplay of complicated tax provisions and cost-sharing protocol awaiting those who choose to participate in the government-sponsored health benefit exchanges. Through the use of fictional (though entirely probable) examples and graphic displays, Professor Chandler walks the reader through how these provisions, as drafted, would impact various families. The resulting effective marginal tax rates produced under the existing framework, which have received very little attention in the health care reform debates, run the risk of creating adverse economic consequences; for instance, families foregoing additional income to avoid falling over the tax credit cliff contained in the PPACA.¹⁰ Professor Chandler brings these issues to the forefront in the hopes that steps are taken to reduce the negative consequences prior to the relevant provisions becoming effective beginning in 2014.¹¹

The second panel, which I had the privilege to moderate, was entitled “Bioethical Issues in Health Care Reform,” and featured Professors Dena Davis (Cleveland Marshall College of Law), W. Thomas (Tommy) Smith (University of Florida) and Joshua Perry (Indiana University). These panelists discussed bioethical concerns that arise at the beginning of, during and at the end of life that are implicated by health care reform, but all too frequently were lost (or given insignificant attention) in the reform debates in the face of the political machine.

Unlike effective marginal tax rates, which potentially will impact many under the PPACA, but received very little attention, no one can deny the presence and importance of the abortion discussions in the reform debate.¹² One need only look to the presidential order that was signed on March 24, 2010, which calls for the establishment of “an adequate enforcement mechanism to ensure that Federal funds are not used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), consistent with a longstanding Federal statutory restriction that is commonly known as the Hyde Amendment.”¹³ This order was promised by Obama at the eleventh-hour to secure the votes of Representative Bart Stupak (D-Mich.) and certain other pro-life Democrats thought essential to the passage of the PPACA.

That said, what received much less attention was the issue of a woman’s access to (through insurance coverage of) contraception. There is no requirement that insurance companies provide coverage for prescription contraceptives, and certain interests groups are outspoken in their opposition to contraception.¹⁴ Dena Davis’ essay argues that “abortion and contraception are fundamentally different actions that occupy fundamentally

10. *Id.* at 370-71.

11. *Id.* at 378.

12. David M. Herszenhorn & Jackie Calmes, *Abortion Was at Heart of Wrangling*, N.Y. TIMES, Nov. 7, 2009, available at <http://www.nytimes.com/2009/11/08/health/policy/08scene.html>.

13. Text of the Order is available at <http://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst>.

14. Dena Davis, *Contraception Abortion, and Health Care Reform: Finding Appropriate Moral Ground*, 29 MISS. C. L. REV. 379 (2010).

different moral space, and that justify fundamentally different political action.”¹⁵ While respecting the importance of the beliefs of those associating themselves with the pro-life/anti-abortion movement, Professor Davis challenges the use of the law-making process to advance anti-contraceptive views.

Tommy Smith’s article then addresses a population whose particular needs received relatively little attention in the popular press – but in this context, is one of the most in need of representation – those requiring long-term care during their lives.¹⁶ After discussing problems faced by these individuals in obtaining access to quality care, which is often very costly, Professor Smith outlines the essential elements of the Community Living Services and Supports (CLASS) Act.¹⁷ Originally introduced by the late Senator Ted Kennedy and now included in the PPACA, the CLASS Act seeks to increase access to long-term care, but in a way that promotes and respects “the dignity and autonomy of the elderly and persons with disabilities by supporting the choices these individuals make surrounding their long-term care needs.”¹⁸ As Professor Smith notes, however, one difficulty with the CLASS Act is that the program is intended to be funded through voluntary enrollment, and thus, without sufficient participation, the program will collapse under its own weight. This article calls us to become more educated about long-term care options and how those options are financed. Only then can the benefits and challenges of the CLASS Act be fully appreciated and addressed.

Finally, Joshua Perry’s addition to this issue attempts to dispel some of the political propagandizing that dominated discussions regarding reimbursement for end-of-life consultation.¹⁹ Dubbed bureaucratically-administered “death panels” by Sarah Palin, early drafts of reform bills contained provisions that would have provided reimbursement for physicians to undertake consultations with patients regarding treatment options at the end of life. Fueling the debate was the fact that no discussion related to end-of-life care could be had without frequent reference to the extraordinary costs associated with medical care in the last months of one’s life. Opponents latched onto this idea and suggested that the driving purpose behind these consultations was to “pull the plug on grandma”²⁰ in the interest of saving a buck.

As discussed, however, it is not quite so simple to state that reductions in cost necessarily equal decreases in access and quality. Professor Perry discusses studies suggesting that not all of the treatment at the end of life

15. *Id.* at 380.

16. W. Thomas Smith, *An Overview of Long-Term Care Services and Support in America*, 29 *MISS. C. L. REV.* 387 (2010).

17. *Id.* at 403.

18. *Id.*

19. Joshua E. Perry, *A Missed Opportunity: Health Care Reform, Rhetoric, Ethics and Economics at the End of Life*, 29 *MISS. C. L. REV.* 409 (2010).

20. *Id.* Professor Singer’s “grandmother” featured heavily during the panel discussions and Professor Perry’s own grandmother makes an appearance in his article.

ends up being wanted, with many patients reporting that access to end-of-life consultation, allowing treatment options to be explored, leads to a higher quality of care and at less cost.²¹ Of course, the provisions for reimbursement of such consultations did not make it into the PPACA. Admittedly, the proposed provisions were not without room for improvement, and with any luck, Professor Perry's work will stimulate further discussion of what he describes as a "missed opportunity."

Providing unwanted care that is extraordinarily costly sounds in terms of waste, which brings us full circle to Professor Buchanan's contribution to this symposium issue. How do we decrease costs while simultaneously increasing access and quality? These are complicated problems – it takes the PPACA 2,800 pages to scratch the surface of addressing them – but these are also exciting times. The coming years will tell us whether the new legislation has been successful with respect to reforming the delivery of health care in this country. In the meantime, it is our hope that the articles and essays in this issue will lead to further discussion in an effort to move us in the right direction.

21. *Id.* at 421-23.