

Foreword

KEY ISSUES IN LAW AND MEDICINE

This edition of the *Journal* is the first to be published for the American Society of Law & Medicine by the Massachusetts Institute of Technology (MIT) Press. It is also the first edition in our new quarterly publication schedule.

Correspondence to the *Journal* during our first two years of publication indicates that we are meeting an important need: the need for a scholarly yet practical journal providing timely, in-depth articles and selective, thorough reference materials in the field of medicolegal relations. We believe that our expanded publication schedule and our new relationship with the Massachusetts Institute of Technology will enhance our ability to meet this need successfully.

With the *Journal* on a firm footing, we are better prepared than ever to confront and to begin to resolve the most significant medicolegal problems of our time. We enthusiastically welcome old and new subscribers alike as supporters of, and participants in, our endeavor.

What are today's key issues at the interface of law and medicine? Many exist, and we hope that our articles and reference materials will address as wide a range of such problems as possible. But in my view, five problems in particular cry out for immediate, constructive input from medicolegal professionals, specialists in health-related fields, and the public.

Government Regulation. Undeniably, state and federal involvement in the organizing, financing, allocation, and monitoring of health care services is burgeoning. Accompanying this involvement is an intense new level of government regulation of the health care industry. Particularly active in regulation are those states which are hard pressed to meet their financial commitment to publicly funded health programs. Hospitals and other health institutions now must wade through a maze of regulations, audits, and other forms of governmental or quasi-governmental involvement. Many of the matters that once were within a hospital's own sound management or professional judgment are now controlled by federal, state, or quasi-public agencies. Unfortunately, many times the regulatory efforts of these agencies seem to have been counterproductive.

I believe that former Assistant Secretary for Health, Theodore Cooper, M.D., stated the problem very crisply in the Winter 1976–77 edition of the *Journal*:¹

Both the medical schools and the law schools of this country need to concern themselves with the relationship between increasing regulation and rising expectations. In our society, we have adopted the notion that increasingly stringent and pervasive regulation of the health care system can make health care more available, more effective, more uniform, and less risky. Certainly there is a need for responsible regulatory action. But we have to examine very carefully, from both the medical and legal standpoints, the extent to which regulation itself promises more than the art and science of medicine can deliver.

In former President Gerald R. Ford's words, "We have more than one thousand different federal programs, more than 80 regulatory agencies and more than 100,000 [federal] workers whose primary responsibility is to tell other Americans what the Congress has said they can and cannot do."² The fact is that America now has a combined federal, state, and local government work force of 14.5 million people and annually expends over 523.2 billion dollars—37 percent of the gross national product—for government at all levels.³ Public regulation of the health care industry is exhausting a significant, if not disproportionate, share of these expenditures.⁴

Is increased regulation the answer to problems of cost, access, and quality, or does increased regulation simply exacerbate such problems? What will be the effect of constant governmental scrutiny, or active intervention, on a hospital's fiscal stability and employee morale? Do the regulators understand the effects on an individual health institution of the enactment of sweeping, and often inflexible, across-the-board standards? Do the hospitals understand the intent and the methodologies of the regulators? Is the new wave of regulation simply the precursor to future nationalization of the industry? If so, what will this mean insofar as patients, health care professionals, and health care institutions are concerned? In my view, planned de-regulation—or at the very least the elimination of duplicative and contradictory regulations—of the health care

¹ Theodore Cooper, M.D., *Liability of Manufacturers and Providers of Health Related Goods and Services*, 2 AM. J. LAW & MED. 261 (1977).

² Address of President Gerald R. Ford to National Association of Manufacturers (July 1976), printed in NAT'L ASS'N MANUFACTURERS REPORTS, Sept. 1976, at 3.

³ Address of Trustee George M. Mullen at October 1976 Program on Government Regulation, University of Rochester.

⁴ Unfortunately, because these expenditures have been inappropriately allocated among competing regulatory programs, experimental "private" programs—such as the HSA program and the PSRO program—have been critically underfunded.

industry is essential. Implementation of a policy of zero-based regulation—an expansion of President Carter's concept of zero-based budgeting—appears to be another useful approach.

Economics. More than ever, economic concerns are dominating all other decision-making considerations in matters involving health care. For reasons which are complex, health care costs are rising rapidly. Inventive, yet realistic, approaches to financing the delivery of health goods and services are desperately needed. Responses to the malpractice insurance and third-party reimbursement crises—which are key contributors to rising costs and to the depletion of health industry morale—must be evaluated from both practical and legal perspectives, and solutions chosen must be implemented wisely. Economic considerations must not be allowed to continue to dominate all other considerations in the setting of public policy.

Access to High Quality Health Services. The benefits of modern medicine can be great—for those who have access to them. But vast economic and geographic discrepancies affecting access are endemic to our current health care system. Rural areas often suffer from a lack of trained medical personnel. Many Americans simply cannot “afford” to become ill. One person may collect from two separate policies for the same surgery, while his neighbor may have no insurance coverage at all. Some Americans receive as a non-taxable fringe benefit comprehensive coverage for any medical needs they or their families may have. They would not accept anything less. Why then do many of those same Americans resist the sharing of their favored status with others through some well thought out form of comprehensive medical insurance? Is there some minimum level of health and health services (both preventive and corrective) to which all Americans who do not voluntarily abuse themselves are entitled?

To these difficult questions must be added the problem of access to scarce or expensive medical resources such as kidney dialysis machines, CAT scanners, and other innovations. Some socially rational method for determining the production levels and the economic and geographic allocation levels of such economically expensive products must be developed.

Preventive Medicine. A consensus is developing that the health care professions have in the past focused too heavily on treatment rather than prevention of illness, and that some alteration in this emphasis is now desirable. For example, a growing number of studies tends to show a connection between certain diseases and environmental factors—such as residence in a certain area, ingestion of certain foods, or employment in certain industries. Medicolegal specialists must actively help to define society's role in making the environment healthier without unnecessarily curtailing individual freedoms.

Ethics. Questions of right and wrong in medical practice and research are being framed continually. Is the fetus a person? Is there a right to die—perhaps even a right to be put to death? When is human experimen-

tion permissible? What criteria apply? What is our responsibility to seriously disabled persons? These and other difficult questions must be resolved by integrating our reasoning powers, our values, and the feelings we have about ourselves and other human beings. Our laws should reflect the conclusions we reach.

All of the foregoing are examples of topics the *Journal* will be addressing in the months and years to come. Our obligation is to provide a forum for thoughtful, clear expression on such problems, and to provide reference tools facilitating further research of their parameters and their solutions.

Occasionally, we will have a “special issue” dealing with a specific topic of broad general concern. Indeed, two of our issues—the Summer 1976 issue and this Spring 1977 issue—spontaneously became “special issues” because the papers we selected were on related topics. Last summer’s issue contained three papers dealing with life, death, and the law. This Spring issue has several papers dealing with regulation of the health care industry.

The success of our efforts will depend on our readers to a large extent. We want to learn what subjects each of our readers feels the *Journal* should address. I recently mailed 100 personal letters to leaders of national organizations representing a wide range of health-related professions asking them to suggest topics. Their responses have helped me to define the *Journal*’s goals more clearly. I hope you will write to me with your ideas for topics and with your comments concerning the format and content of the *Journal*—both positive and negative. This kind of communication is essential if we expect to help shape the course of medicolegal events.

The dedicated people who work with me in editing and publishing the *Journal* and I want to see the *Journal* become the catalyst for the growth of a nationwide network of individuals concerned with resolving the medicolegal problems of health care in America today. Any assistance you can give in creating this community of shared concerns will be appreciated.

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