

## SYMPOSIUM ISSUE INTRODUCTION AND DEDICATION

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The 2013 Jed D. Melnick Annual Symposium, which took place on November 18th, 2013, was entitled “Bioethics, Healthcare Policy, and Alternative Dispute Resolution in the Age of Obamacare.” Scholars and practitioners of bioethics alternative dispute resolution came together to discuss the likely impact of a health-care overhaul born of an ethical challenge: to achieve the greatest good for the greatest number while continuing to honor the value of the individual. Collectively, the Symposium participants anticipated the particular importance of mediation and bioethical debate within the complex health-delivery system that has been drafted under this biomedical imperative.

The designers of the Affordable Care Act aspire to help both the singular patient and the larger economy by promoting “accountability” in medical practice. This “accountability” entails the extensive compiling of clinical data on treatment and results, and the devising of financial incentives for clinicians to improve outcomes while lowering costs. Obamacare renders the practice of medicine intrinsically collective; every private encounter is assessed for its value not only to the health of the individual patient, but to the economic health of the medical group and of society as a whole. Medical attentiveness, on the one hand, and cost containment, on the other, are expected to pull the same wagon, with bioethics presumably holding the reins.

The viability of this ideal will be tested in the disputes that will inevitably arise under the new structure. Of course, Obamacare isn’t suddenly inventing antagonisms within the medical world. As we well know, disputes already arise along myriad axes in the healthcare setting, involving patients, physicians, hospitals, product manufacturers, and payers, among others. But it *is* worth noting that the Affordable Care Act will place new demands on this teeming arena of disputation.

Most concretely, by giving a large cohort of new patients access to medical care, the legislation is bringing more “players” onto

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the field of contention. But there are other significant factors working to heighten the likelihood of disputes. These have to do with all the axes on which *accountability* is demanded—cost containment, quality control, risk reduction, and evidence-based practice. In all these areas, the primary relationship between caregiver and patient will be subject to micromanagement by the practice group, the hospital, and the payer—and such palpable sharing of responsibility raises the likelihood of disputes about what constitutes appropriate care and reimbursement. In other words, clinical choices will be constantly undergoing a kind of second-guessing, and there will be contests for authority to determine the rightness of those choices.

The very term “Obamacare” is emblematic of these tensions, and I have been using it advisedly. When uttered by opponents who perceive a threat to individual autonomy, “Obamacare” has a derogatory aura. But when uttered by the President himself, the term proudly designates a strategy for marrying ethics to pragmatism.

So we can view Obamacare through one lens as a radically new kind of government-imposed rationing—that is, as a data-driven method of constraining how the clinician approaches the individual patient—or we can view it, through another lens, as the *dismantling* of a longstanding unfair system that rationed care according to patients’ personal wealth. But either way, we must recognize that the new system will expose bioethical tensions in the commerce between the patient, the doctor, and society. It would be particularly regrettable if the costs of the resultant disputes (costs measured in money, time, or loss of trust between clinician and patient) ate away at the potential benefits of the new system.

I need hardly persuade this journal’s audience that alternative dispute resolution (“ADR”) is a more efficient, less expensive substitute for litigation. We might readily agree that mediation and arbitration are born to serve Obamacare’s emphasis on the management of finite resources. But there are *qualitative* benefits, too, in that ADR permits the parties a sense of agency even as it supports the binding relationships they must maintain within the accountable-care system. Bringing cases to mediation can promote bioethical development within an institution: in the acute-care setting, clinical ethics committees offer a specialized form of mediated conflict resolution that not only settles individual cases, but also shapes institutional guidelines for future cases. Clearly, we can expect ADR to play a vital role in the ethically sensitive allocation of

medical care under the Affordable Care Act. But what will this role entail? Who will guide disputing stakeholders to resolution—internal ethics committees, external arbiters, or a new type of bioethics mediator? Will ADR itself have to refine and evolve its own methods in response to new challenges?

Thus, our Symposium investigated a host of interrelated issues, all of which predate Obamacare and all of which will come into greater visibility because of it. On behalf of my colleagues on the *Cardozo Journal of Conflict Resolution*, I want to express our pleasure at having hosted such an esteemed group of scholars to lead us on this intellectual journey: Edward Bergman, Nancy Berlinger, Arthur Caplan, Geoff Drucker, Autumn Fiester, Debra Gerardi, Mindy Reid Hatton, Michael Kosnitzky, Carol Liebman, Joe Miller, Thaddeus Pope, Charity Scott, Michelle Skipper, and Ellen Waldman.

This special Symposium Issue, which includes articles from many of the event's speakers, centers on the potential of ADR to remedy conflicts that raise bioethical questions. From end-of-life decision making to chronic treatment planning, bioethical inquiry inherently confronts often-agonizing interpersonal discord. Our authors examine both the "opportunities and limitations," to borrow from one article's title, of ADR within a realm that often has no "right" answers to its complicated problems.

This issue is dedicated to Professor Adrienne Asch, who had wished to deliver a keynote speech at the Symposium. The bioethics and disability-rights communities lost a very special scholar, teacher, and person in Professor Asch, who passed away on November 19th, 2013, after having devoted her life to disability studies and advocacy.

