

INTRODUCTION: UNDER THE KNIFE: HEALTH LAW, HEALTH CARE REFORM, AND BEYOND

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In a historic decision issued last summer, the Supreme Court of the United States upheld most of the Affordable Care Act, including its individual health insurance mandate. The Court did, however, find unconstitutional the federal government's threat to withhold existing Medicaid funding from states that declined to participate in the Affordable Care Act's Medicaid expansion. In the three years since President Obama signed the Affordable Care Act into law, the health care industry and its stakeholders have been very busy reading, interpreting, challenging, and now implementing the controversial legislation. At the same time, however, traditional health law issues have re-emerged. Developments in the areas of medical education, breast cancer gene testing, preimplantation genetic diagnosis, prenatal gender identification, and health information technology have called for scholarly description, analysis, and critique.

Titled "Under the Knife: Health Law, Health Care Reform, and Beyond," this symposium issue of the *Nevada Law Journal* features the scholarship of nine leading health law scholars. Distinguished authors include Susan A. Chanick, Professor of Law and Co-director of the Health Law Master's Degree Program, California Western School of Law; Susan E. Cancelosi, Associate Professor of Law, Wayne State University Law School; Barry R. Furrow, Professor of Law and Director of the Health Law Program, Earl Mack School of Law, Drexel University; Fazal Khan, Associate Professor of Law, University of Georgia School of Law; Lindsay Kessler, Attorney, Polsinelli Shughart; Elizabeth Weeks Leonard, Associate Professor of Law, University of Georgia School of Law; Seema Mohapatra, Assistant Professor of Law, Barry University School of Law; Alicia Ouellette, Associate Dean for Faculty Research and Professional Development and Professor of Law, Albany Law School; and Nicolas P. Terry, Hall Render Professor of Law and Co-director of the William S. and Christine S. Hall Center for Law and Health, Indiana University Robert H. McKinney School of Law.

The articles in this symposium issue are organized loosely by topic and are presented alphabetically by author within each topic. The first topic, disability law, is taken up by Dean Alicia Ouellette. In her article titled "Patients to Peers: Barriers and Opportunities for Doctors with Disabilities,"¹ Dean Ouellette

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¹ Alicia Ouellette, *Patients to Peers: Barriers and Opportunities for Doctors with Disabilities*, 13 NEV. L.J. 645 (2013).

exposes the barriers to admission to the medical profession faced by individuals with disabilities and argues that these barriers can and should be removed to ensure that the medical profession better serves individuals with disabilities when they are patients in the system. Dean Ouellette begins by examining the origins and justifications offered for the Technical Standards that are applicable to medical school applicants and the failure of the Americans with Disabilities Act and other antidiscrimination provisions to open the doors to medical school for individuals with disabilities. Dean Ouellette argues that inclusion of individuals with sensory and motor disabilities in medical schools—as students and teachers, not just as subjects and patients—is necessary not just as a matter of justice to applicants with disabilities, but also as an essential component of a medical system that respects individuals with disabilities. Dean Ouellette concludes by outlining potential strategies for removing restrictive barriers, including consideration of specialized, or differentiated, medical school curricular tracts.

The second set of articles, relating to technology, includes Professor Fazal Khan and attorney Lindsay Kessler's article discussing breast cancer gene analysis technology, Professor Seema Mohapatra's article addressing preimplantation genetic diagnosis and prenatal gender identification technology, and Professor Nicolas Terry's article relating to health information technology.

In "Genomics Unbound: The Scientific and Legal Case against Patents Based on Naturally Occurring DNA Sequences,"² Professor Fazal Khan and attorney Lindsay Kessler seek to rebut certain vested interests in the biotechnology industry and affirm the normative claim that gene patents improperly fetter genomics research and development. Through the lens of *Association for Molecular Pathology v. U.S. Patent & Trademark Office*, Khan and Kessler recount why there was such a strong public interest movement against recognizing such patents and show how breast cancer gene patents can stifle innovation, impede access to affordable testing, and detrimentally affect future developments in the cancer world. After examining the Supreme Court's legal reasoning in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, Khan and Kessler argue that the field of genomics needs *Prometheus* as much as the ancients needed fire.

In "Global Legal Responses to Prenatal Gender Identification and Sex Selection,"³ Professor Seema Mohapatra examines the legal and ethical issues associated with preimplantation genetic diagnosis, prenatal gender identification, and sex-selection abortion. Using legal efforts to restrict sex selection in India, China, the United Kingdom, Australia, Canada, and the United States as a platform, Professor Mohapatra considers issues of autonomy, justice, and class en route to concluding that restricting access to sex-selection technology is not necessarily the answer. In the end, Professor Mohapatra believes that public health policy curbing preference for sons and reducing daughter discrimination could be improved by large scale, public health research that correlates

² Fazal Khan & Lindsay Kessler, *Genomics Unbound: The Scientific and Legal Case against Patents Based on Naturally Occurring DNA Sequences*, 13 NEV. L.J. 668 (2013).

³ Seema Mohapatra, *Global Legal Responses to Prenatal Gender Identification and Sex Selection*, 13 NEV. L.J. 690 (2013).

the demographics in different countries with restrictions on both gender identification technology and sex selection.

In “Information Technology’s Failure to Disrupt Health Care,”⁴ Professor Nicolas Terry examines four possible reasons why information technology has made only modest, nondisruptive inroads into health care. Taking the position that the health information technology space either shares or reflects the market failures of health care, Professor Terry argues that modest attempts to correct health information technology market failure, including electronic medical record subsidies, still leave us short of the inflection point. In the end, Professor Terry suggests that intrinsically disruptive mobile devices and mobile medical applications may turn out to be the first major success story of health care disruption by information technology because they can disorder the high friction, embedded cost of location-specific medicine with a new model of “health care everywhere.”

The third set of articles address issues relating to health insurance, health care cost containment, and health care rationing. In “The Shifting Focus of Federal Intervention in Retiree Health Benefits,”⁵ Professor Susan Cancelosi follows the path of the federal government’s shifting focus from participants to employers in the context of retiree health benefits. Professor Cancelosi begins by addressing why employment-based retiree health insurance matters. After examining the challenge of employment-based retiree health insurance and reviewing federal intervention over the years, Professor Cancelosi concludes that federal intervention to ensure access to retiree health benefits has been understandable, but hardly successful. Professor Cancelosi also finds that the participant-oriented concerns of a few decades ago have ceded to a deferential, supportive focus on employer challenges and desires.

In “Health Care Cost Containment: No Longer an Option but a Mandate,”⁶ Professor Susan Channick examines the unsustainable trajectory of health care costs as well as cost containment initiatives under the Affordable Care Act as well as at the state level. Noting that four members of the Supreme Court would have struck down the Affordable Care Act in its entirety and that seven members agreed to limit the Affordable Care Act’s Medicaid expansion, Professor Channick emphasizes the imperative of cost containment regardless of the longevity of the health care reform bill’s most important provisions.

In “Cost Control and the Affordable Care Act: CRAMPing Our Health Care Appetite,”⁷ Professor Barry Furrow begins by identifying some of the “usual suspects” for health care cost inflation, including scientific and technological innovation, unnecessary physician spending, patient spending of others’ money, negotiated health care prices and disparities in price bargaining, and end-of-life care. Professor Furrow then examines several Affordable Care Act

⁴ Nicolas P. Terry, *Information Technology’s Failure to Disrupt Health Care*, 13 NEV. L.J. 722 (2013).

⁵ Susan E. Cancelosi, *The Shifting Focus of Federal Intervention in Retiree Health Benefits*, 13 NEV. L.J. 759 (2013).

⁶ Susan Adler Channick, *Health Care Cost Containment: No Longer an Option but a Mandate*, 13 NEV. L.J. 792 (2013).

⁷ Barry R. Furrow, *Cost Control and the Affordable Care Act: CRAMPing Our Health Care Appetite*, 13 NEV. L.J. 822 (2013).

provisions and their effect on cost drivers. In the end, Professor Furrow concludes that successful cost control will require the development and employment of high-value health care technologies and the lowering of patient expectations of care, among other measures.

Finally, in “Death Panels and the Rhetoric of Rationing,”⁸ Professor Elizabeth Weeks Leonard considers the rhetoric and the reality around the “death panel” controversy and its adverse impact on at least two provisions of the Affordable Care Act. Approaching the death panel issue as someone who thinks carefully and critically about issues of health care financing, regulation, and delivery, Professor Leonard begins by considering two taboos: subsidization and rationing. After reviewing approaches to rationing, Professor Leonard identifies legislative casualties of the death panel controversy, including a provision allowing Medicare patients to have conversations with their physicians about choices at the end of life and a provision supporting patient-centered comparative effectiveness research. In the end, Professor Leonard concludes that the next step will be to accept the need to limit how much we spend on health care (first-order rationing) and to decide how best to use those limited resources (second-order rationing).

⁸ Elizabeth Weeks Leonard, *Death Panels and the Rhetoric of Rationing*, 13 NEV. L.J. 872 (2013).