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Foreword

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Foreword

The Winter edition of Volume 13 of the *Annals of Health Law* reflects the continuing commitment of the Institute for Health Law to publish a journal rich in scholarship and relevant to academics, practioners, legislators, students, and policymakers, alike. The seven articles set forth in this edition demonstrate the wide ranging nature of health law and reflect current legal issues and trends.

The rights of incompetent persons to make decisions about their bodies is a topic that has always ignited debate. Illustratively, the topic was widely discussed this fall by the national media and state politicians in the context of the Terri Schiavo case in Florida. The first two articles in this edition touch on different aspects of this debate.

Professor George Smith examines the rights of patients, particularly incompetent patients, in long-term care facilities to refuse psychotropic medication. In exploring this topic, Professor Smith focuses on the provisions of the Omnibus Budget Reconciliation Act of 1987 ("OBRA 87") which was part of a Congressional solution to afford greater protection to residents of long-term care facilities. Despite the high expectations for sweeping reform in the nursing home industry following the promulgation of final OBRA '87 rules in 1991, little has changed to protect patients' rights to refuse medication. Although OBRA '87 enumerates specific rights for nursing home residents, it defers the determination of competency, and the concomitant right to refuse medication, to state law. Thus, while a competent resident has the right to be free from any physical or chemical restraint, in the case of a resident determined to be incompetent under state law, an individual is appointed by the State to exercise the rights of the resident and act on his behalf. Professor Smith focuses on the procedural protections that are in place under both state common law and state and federal constitutional law to protect an incompetent person's right to refuse medication. Because both state and federal efforts in combating elder abuse and nursing home deficiencies have proven to be inadequate, Professor Smith argues that further legislative action is needed to protect the dwindling bundle of rights of the elderly, particu-

larly the incompetent. He advocates for a balanced solution that promotes the rights of the patient—competent or incompetent—while at the same time recognizes the necessity for a cost-effective administrative framework.

Professor Norman Cantor discusses the puzzling question of how to relate autonomy-based rights to never-competent persons. He argues that, while profoundly disabled persons cannot be entitled to make their own medical decisions, they have a Fourteenth Amendment right to have a bonded surrogate make important medical decisions on their behalf. According to Professor Cantor, such a right is necessary in order to protect the disabled patient's constitutionally-grounded interests in bodily integrity, well-being, and dignity. This right invalidates the state cases (in California, New York, Wisconsin, and Michigan) that have sought to confine end-of-life decisions to situations where the dying patient has given clear and convincing instructions. Such preclusion of surrogate choice leaves every never-competent patient in a medical limbo that sometimes constitutes an undignified inhumane status. The Supreme Court's 1990 *Cruzan* decision is criticized and distinguished.

Another important and timely topic is examined by Amy Dilcher in her work on the need for a comprehensive pain policy. Ms. Dilcher argues that opioids—a form of narcotics in the morphine class that are highly effective in the treatment and management of pain—should be legally and practicably accessible to medical professionals and their patients as and when needed to provide relief from pain. This thorough article synthesizes a number of perspectives regarding the comprehensive regulation of pain management and demonstrates that the inadequate treatment of pain stems from a multitude of barriers, including restrictive governmental pain policies, vigilant enforcement of benign prescribing, inadequate education about opioids, and limited reimbursement polices for those who need pain medication. Ms. Dilcher notes that efforts to improve pain management have been piecemeal and thus incomplete and argues that a more comprehensive approach is needed. After reviewing recent Congressional action on the topic, Ms. Dilcher concludes with recommendations for a better pain policy that would enhance the management of pain through controlled substances.

Tiana Lee provides an overview and update on the latest in the Emergency Medical Treatment and Active Labor Act (EMTALA), the nearly twenty-year-old statute that requires hospitals to provide a medical screening examination to all persons who present to an emergency department. However, the problems EMTALA was meant to solve persist and continue to affect providers and the public. Ms. Lee provides a thorough overview of the history of the statute, an explanation of some of the most pertinent regulations, and an exploration of government enforcements to date. Highlighting the benefits and drawbacks of the statute, Ms. Lee makes recommendations to ameliorate EMTALA's weaknesses but points out several factors that will continue to compromise the future effectiveness of EMTALA, including the costs of enforcement and the re-ordering of Federal priorities following September 11th. Ms. Lee argues that, in order for EMTALA to achieve its intended purpose, federal tracking systems and enforcement procedures must be improved upon, and financial assistance to providers must be considered so that EMTALA does not continue to be an unfunded mandate.

Two authors confront issues of federal preemption, although in different contexts. Commander Michael Jackonis explores the key issues involved in understanding the impact of Medicare preemption on state laws affecting the federal purchase of managed care products as a consideration in Medicare reform. Preemption provisions contained in federal legislation affecting health care, such as provisions contained in the ERISA and Medicare legislation, restrict the ability of state legislatures to reform and control the quality and design of managed care plans. Accordingly, the scope of preemption coupled with the absence of federal regulation can create a legislative void, negatively affecting the quality and quantity of care provided under managed care plans. Commander Jackonis points out the challenges created by federal preemption in terms of revising Medicare in the future; if reformers fail to address preemption issues or to provide comprehensive preemption language in new program designs, managed care organizations may avoid the Medicare managed care market because of complex and varying state law requirements and increased costs. On the other hand, addressing preemption issues but failing to provide regulation of the structure and operation of a Medicare managed care plan

invites the difficulties that are prevalent with the current ERISA-governed plans. Commander Jackonis argues that any further Medicare reform must address the impact of federal preemption on the quality and quantity of care purchased in order to ensure the existence of a market of product providers, as well as to ensure protection of patient rights and benefits.

Leatrice Berman-Sandler also tackles issues of federal preemption in a narrower context and from a different perspective. Ms. Berman Sandler reports on independent medical review (IMR), a state-based statutory remedy, and reflects on how ERISA preemption challenges states' abilities to make IMR available to wider populations receiving care from employer-sponsored health plans. Having conducted a qualitative survey of four states' IMR programs, Ms. Berman-Sandler reviews those findings to address the question of whether IMR is a viable legal remedy and a productive way to exact accountability from the health insurance and managed care industries. A second and related inquiry concerns the relationship between IMR and ERISA preemption. Ms. Berman-Sandler reviews relevant case law concerning the narrowing scope of ERISA preemption and opines that in light of the Supreme Court's *Rush Prudential HMO, Inc. v. Moran* decision, the stage has been set for broader application of state insurance regulation, thus narrowing ERISA preemption and allowing states to expand the IMR remedy. Therefore, Ms. Berman-Sandler concludes that there are strong legal and public policy reasons for state legislatures to broaden the application of IMR and for the Court to further narrow ERISA preemption to increase accountability in the managed care arena.

Finally, ethical issues are at the forefront of public debate surrounding health law. Authors Dr. Erin Egan, Dr. Kayhan Parsi, and Cynthia Ramirez compare various models of ethics education and how these models are employed by both medical schools and law schools. The authors suggest ways that each profession can enhance their ethical teaching, and consequently, produce graduates who are more knowledgeable and appreciative of ethical issues in practice. Egan, Parsi, and Ramirez conclude by arguing that ethics education in both medicine and law should combine the most beneficial elements of each educational model and thereby present a more comprehensive and systematic curriculum to its students.

We know that you will find this Winter edition of the *Annals* thought provoking and useful. The editorial staff has worked diligently to produce a journal that we hope you will reference in your own work and writing. We look forward to your comments and suggestions. Happy New Year!

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