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Taking Consumers’ Rights Seriously

by JAMES C. ROBINSON

Health Care Choices: Private Contracts as Instruments of Health Reform
by Clark C. Havighurst
(Washington: AEI Press, 1995) 330 pp., $34.95 cloth, $17.95 paper

Clark Havighurst is a radical. His new book, Health Care Choices, rages like the rivers Alpheus and Peneus through the Augean stables of health policy discourse, filled as they are with intellectual leavings of medical, legal, and bureaucratic elites that for decades have denied consumers their rights under the pretense of promoting those rights and enfeebled the citizenry under the pretense of protecting it. Havighurst takes seriously the principle that people should have the right to make choices and to assume responsibility for the consequences. In the first instance, this implies that Americans should be permitted to economize if they so desire, by choosing health plans and insurance contracts that offer thin benefits, alternative dispute resolution mechanisms, and tight provider networks in exchange for lower premiums. More broadly, Havighurst extends the principles of popular sovereignty to encompass choice among alternative rules for interpreting, adjudicating, and enforcing choices.

Consumer choice and consumers’ rights are the common currency of the American political vocabulary. Everyone is in favor. Yet the actual choices traditionally available to consumers of health care services have borne a resemblance to Tweedledum and Tweedledee. In the golden age of professional dominance, patients’ choices were limited to clinicians with similar training (no midwives, chiropractors, and lay therapists), practicing in similar solo settings (no integrated delivery systems), paid through similar fee-for-service mechanisms (no capitation or salaries), and adhering to the same canon of appropriate care (whatever any licensed physician recommended). The past twenty years have witnessed a dramatic expansion of choice among types of delivery systems and types of payment mechanisms as the principles of managed competition have taken hold. Now consumers are being offered plans with different provider networks, different degrees of cost sharing, different methods of utilization management, and, importantly, different premiums. This has caused a tidal wave of consumer choice in favor of managed care plans that offer lower price in exchange for tighter networks.

But Havighurst wants consumer choice and consumers’ rights to go further. He wants consumers to be able to forgo access to interventions of marginal utility in exchange for lower expenditures. This does not imply that consumers should be forbidden access to these treatments by some national health board or other elite entity, but rather that they should retain the possibility and the authority to choose. Consumers also should retain the right to select among alternative mechanisms for adjudicating whether particular treatments are covered by their insurance plans and, furthermore, among alternative mechanisms for establishing compensation in the event of medical malpractice.

This far-reaching conceptualization of consumers’ rights and choice propels the author into the domain of contract theory in law and economics. The weakly drafted agreements of the era of professional dominance, filled with vague terms such as medically necessary, have frustrated attempts to choose a less than gold-plated form of health care. Individual patients and physicians are prone to inter-

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interpreting insurance contracts as covering every-thing they want, despite the implications of this expansive interpretation for the affordability of the coverage to other subscribers. In cases of dispute and litigation, judges and juries also are prone to interpreting vague language in a noneconomizing way.

Not surprisingly, the United States exhibits a paradox of excess and deprivation: The nation has the highest health care expenditures and the largest number of uninsured citizens in the industrialized world. Havighurst advocates a more explicit and tightly drafted set of health insurance contracts to reduce ambiguity and limit judicial discretion. Explicitness promotes consumers’ rights by making clear the characteristics of the contract and facilitating comparison among alternative plans. Clinical practice guidelines and protocols, once incorporated by reference into plan contracts, open new possibilities for extending choices over alternative courses of treatment. Such contractual explicitness would offer great advantages over the prevailing implicit standards governing utilization “management.” Havighurst inveighs against the sub rosa limitations on treatments now being imposed by managed care plans without disclosure to consumers. Limitations on utilization are ethical only if they are understood at the time of purchase (which implies that the purchaser will demand an offsetting benefit in the form of a lower price).

The medical profession traditionally kept clients uninformed and disempowered under the principle that only physicians can understand the complexities of diagnosis and treatment. The patients’ rights movement replaced this pretension with the doctrine of informed consent. It is now generally accepted that patients have the final say over their course of treatment, even to the extent of contravening professional advice. But the paternalistic ethos of the earlier age has been retained by the legislature and the courts. The history of health law and politics is littered with legislative solicitousness to the well-financed special pleading of provider organizations to discourage economizing in health care contracts, through “corporate practice of medicine prohibitions, mandated benefits, antitrust exemptions, tax subsidies, licensing laws, certificate-of-need entry barriers, and any-willing-provider clauses. Twenty years of struggle by aroused purchasers have slowed partially and reversed the momentum of legislative limits on the freedom of contract. But the courts continue to abrogate the right to interpret and enforce contracts in ways clearly at variance with the economizing intent of the negotiating parties.

Havighurst is an impassioned advocate of contractual innovation as the keystone in the managed competition architecture. But this is not a “see no evil” gloss on the very real problems facing consumers and health plans seeking to draft, interpret, and enforce contracts. Havighurst highlights the cognitive and linguistic difficulties besetting any attempt to formalize cost and coverage trade-offs in a highly technical and rapidly evolving field such as medicine. Moreover, he emphasizes the limitations imposed on meaningful consumer choice that stem from difficulties in understanding contracts, the small number of contractual options, and the transaction cost difficulties of coordinating consumers into effective purchaser coalitions. He sees hope in health plan purchasing cooperatives and other sponsoring entities as organizational contexts for supporting consumer choice and purchasing power. He also insists on the necessity for public subsidies to low-income citizens to enable them to choose with dignity.

Once freed from the restraints imposed by self-interested providers, sanctimonious judges, and heavily lobbied legislators, contracts can provide an ethical foundation for
the difficult trade-offs that need to be made between devoting resources to medical care and devoting those same resources to public health, education, and other worthy goals. As Havighurst writes, “The supermarket paradigm of consumer choice [for example, without effective right of contract] provides an extremely convenient justification for paternalism that not coincidentally enhances the power of the political Hegelian system to control people’s lives and the authority, prestige, and incomes of its apparatchiks.” Health Care Choices throws down the gauntlet: If consumer choice and market contracts are not to be society’s instruments for making the difficult decisions in health policy, what will take their place?

Changes And Challenges In Health Care

BY HENRY S. WEBBER

The Changing Health Care Marketplace: Private Ventures, Public Interests
by Walter A. Zelman
(San Francisco: Jossey-Bass, 1996), 348 pp., $34.95

Walter Zelman opens his new book with the story of being asked in the middle of a presentation on health care trends and new partnerships: “Walter, what does all this mean for people?” By this, the questioner was referring to the sweeping changes occurring in the health care marketplace. In this extraordinarily ambitious and insightful volume, Zelman reviews these changes and analyzes the policy issues they raise and their impact on health care consumers.

Zelman is an appropriate guide through these issues. A longtime California consumer advocate, Zelman became special deputy for health insurance to California State Insurance Commissioner John Garamendi in 1990 and was the leader in formulating the California health care reform program, known as the Garamendi plan. The plan became an important bridge between advocates of managed competition and advocates of a single-payer system in the Democratic Party and strongly influenced the Clinton health care plan. Indeed, Zelman, who joined the White House staff in 1993, was reputedly the author of many of the Clinton plan’s key provisions.

The Changing Health Care Marketplace attempts to prescribe the proper roles of the private and public sectors in organizing the U.S. health care system. Increased competition, the rise of organized delivery systems, and new organizational arrangements, Zelman argues, have the potential to greatly reduce the cost of health care and increase the quality of care. For that potential to be fully realized, however, government must impose rules that restrict or eliminate competition on risk selection and hence foster competition on price and quality. In addition, strong government action will be needed to ensure health care for the uninsured. The goal of government health policy, Zelman says, is to maximize the positive potential of market changes (p. 313).

Relying heavily on recent California experience, Zelman chronicles the rapid consolidation and growth of the managed care industry and the rise of new organizational forms. He provides useful definitions of the core elements of an organized delivery system and a summary of the strengths and weaknesses of various sectors of the health care system as organizers of new delivery models. Particularly interesting is his discussion of the biggest surprise in the managed care industry in the past decade: the failure of large, highly integrated staff- and group-model health maintenance organizations (HMOs) to greatly increase market share. Instead, somewhat looser organizational arrangements, based on partnering agreements, seem to be dominating the managed care landscape. Parti-