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Constitutional Values and the Ethics of Health Care: A Comparison of the United States and Germany

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CONSTITUTIONAL VALUES AND THE ETHICS OF HEALTH CARE: A COMPARISON OF THE UNITED STATES AND GERMANY

William Joseph Wagner

A variety of causes – economic, social and political – have introduced a new era in health care. Those participating in the delivery of health care services in this new era are in need, more than ever, of the foundation and direction which a sound ethics supplies. At the same time, the press of market forces and resulting changes in economic forms of organizing the delivery of health care services mean that even the most basic ethical principles must be reformulated and promulgated anew, and concrete moral dilemmas accompanying rapid innovation in medical technologies call for an unprecedented stream of specific and detailed answers to new ethical problems. Nor can society delegate the task of renewing an ethics of health care to a sub-specialty of professional ethics. (These developments place at issue the integrity of a web of societal relationships, which are sufficiently far reaching in extent to put at stake society's basic commitment to remaining a moral and political association.) The litigation of legal disputes in the delivery of health care services will eventually lead our courts to adjudicate the role of constitutional values as a foundation for a societal-sanctioned ethics of health care. Gradually, the law will institutionalize some resolution of the ethical issues arising with the new era in health care. For better or worse, that legal resolution will bring with it a re-interpretation of our system of constitutional values.

In the first section, this essay will consider questions the new era in health care poses for a health-care ethics of ends. The second section will address the question this emerging era raises for a health-care ethics of duty. Under the rubric of an ethics of ends, the essay examines, more particularly, the ends of health and efficiency. Under that of duty, it addresses the duties of respect for the dignity of the human person; respect for the covenant of treatment; and respect for justice in distribution. In each case, it seeks to identify the basis for an adequate response in the constitutional orders of the United States and Germany.

The purpose of the essay is to offer an account of the contemporary challenges to an adequate ethics of health care, and to draw the reader's attention in very broad outlines to the framework that exists in American constitutional law for considering them. In the course of so doing, it seeks to point, in general terms, to contrasting elements in German

constitutional law. The essay intends to provide a basis for evaluating responses to the present situation in American health care, with general reference to the potential role of the German constitutional order as a source of insight in comparative law, which might enhance, in its own distinctive way, the prospects of success of American jurists, ethicists and policymakers, as they seek to formulate a health care ethics for a new era.

I. AN ETHIC OF ENDS IN HEALTH CARE

A. The End of Life and Health

The most fundamental ethical challenge which contemporary health care places before society is the search for an adequate definition of health as the *end* or goal of medicine. The logic, order and proportion of ethical reasoning depend on attending to some coherent purpose. If the purpose is incoherent, so, of necessity, will be the ethics. What is needed is an understanding of life and health as forming an objective, thereby distinguishing medicine from other activities. At issue is society's capacity to recognize life and health as goods, which are distinctive in themselves. At issue is our capacity to recognize patterns in biology as the source of objective moral benefits forming a starting point for human decision and action. Such capacities are essential, not only to defining goals, but to recognizing when we have done all we can to attain our ends and when the time has come to stop investing in a given plan of action.

A contemporary tendency is to view health as no more than an incidental means, and the fact of biological integrity as no more than a virtually random opportunity, to other, purely elective, ends. From this angle, medicine becomes a mere biological technique. Where the ethicist loses the ability to recognize patterns in biology as an objective measure of human benefit – say a human conception or progress of an individual person within the natural aging cycle – he or she loses his or her ability to chart the mean of due action. In such a world, the agenda of health care becomes one of commensurating among aggregations of preferences. Actions become a matter of securing the marginal enhancement of an individual's hopes and an allaying of his or her fears. Since it does not refer to the good, in any substantive sense, the scope of health care becomes boundless, and a common measure of medicine's satisfactory progress becomes impossible.

B. Life and Health as Values in the Constitutional Order

The order of American constitutional values militates against the recognition of life and health as distinctive values. With the exception of

the protection of individual liberties, American constitutional law generally safeguards an allocation of power which is deemed to further the effective formation of political communities and ensure the conditions of maximal individual freedom, leaving it to the market to affirm what constitutes value in any substantive sense. In this framework for the distribution of power and liberty, life and health are values essentially because individuals or society elect to value them as such. That "life" may not be taken without due process of law, for example, is more a protection of autonomy, and less one of the substantive enjoyments of life. In the *Casey* decision, the plurality opinion emphasized that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[1] Among liberal justices, this mode of considering value tilts towards justifying broad legislative power to advance elective goals. Thus in his dissent in *United States v. Lopez*,[2] Justice Stephen Breyer argues that the means-oriented reasoning of economics subsumes virtually the entire field of legislative deliberation, so that local education comes within the purview of the federal congress as "commerce." While, at the same time, in his majority opinion in the case, the conservative Justice William Rehnquist denies that education comes within the scope of congressional power, asserting that it is a value distinct from commerce.[3] Significantly, the conservative no less than the liberal justice ascribes value to education by reference to the power to control it, imputing this power to state rather than to federal legislators. In distinguishing education from commerce, he sticks to a semantic parcing of the text of the Constitution, prescinding from any ontological analysis of a distinction in the natures of education and commerce.

Within American constitutional law, if the ethics of health care are to find their way to a sound definition of life and health as intrinsic ends, it is not likely to be with the help of the judiciary as the protector of constitutional values, but rather with the assistance of the legislature, whether it be, federal or state, where legislative power is deemed to reside. If one assumes that people are more often than not basically reasonable, reliance on the legislature has the virtue of incorporating the healthy moral instincts of the people's elective representatives and their practical judgments as they confront the dilemmas on the cutting edge of contemporary experience. The less helpful side to relying on the

1. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (holding that a state may not impose an "undue burden," which is a substantial obstacle in the path of a woman seeking an abortion).

2. 514 U.S. 549 (1995).

3. *Id* at 561-62.

legislature in this manner is that it tends to reduce all substantive values to the expression of preference or will, which results in terms of value losing their capability of supplying society with an enduring moral direction.

One notes that the German constitution differs from the American in referring to objective human values. It acknowledges the dignity of the person as inviolable.[4] And, it recognizes the social nature of the state.[5] German courts accordingly recognize that the values of life and health are constitutive of both the good of the individual and of the social order, and are essential references, as well, in validating their own constitutional authority to engage in the adjudication of the issues before them. In this regard, German courts, in contrast to American, can be expected to seek to reinforce normative conceptions of life and health as ends which lend direction to health care ethics. The cost of the German approach is a certain rigidity in societal institutions, making them less responsive to the human instinct for seizing practical advantages under evolving social circumstances. If the American medical profession were equipped within American society to advance a substantive vision of life and health as ends guiding health care, the American constitutional mentality favoring formal respect for elective preferences might be more credible. Under existing circumstances, the prospects of an adequate ethics of health care would appear to be more sanguine as it is likely to evolve under the German model. American jurists would do well to continue to study the solutions German courts and the German parliament eventually reach on ethical questions arising in contemporary health care.

C. The End of Efficiency

The second basic end that gives health care ethics its basic direction is that of efficiency. As the saying goes, "waste not, want not." Health care planning revolves around the goal of the cost-effective coordination of the many diverse means available to modern medicine – pharmaceuticals, hospitalization, diagnostics, monitoring, and therapeutic protocols – within the treatment of a single patient. The multiplicity of transactions that occur when implementing a treatment plan for a single patient introduces as many openings for the entry of inefficiency. Excluding such inefficiency becomes an overriding concern for the planner. In addition, the planning of delivery of medical services requires a formula for the allocation and

4. "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." GG Art. 1 (F.R.G).

5. "The federal republic of Germany is a democratic and social federal state." GG Art. 20(1) (F.R.G).

distribution of resources across populations. The distributive function introduces the possibility of spreading risks and costs as a source of the efficiency flowing from shared means and from predictable outcomes.

At one time, the physician in direct consultation with the patient was thought to make nearly all of the ethically sensitive judgments about the patient's care. But as the differentiation of roles, functions, and technologies has progressed in medicine, and as decisions about the allocation of resources within medicine has become more centralized, ethically sensitive judgments, once formulated wholistically within the immediate doctor-patient relationship have been splintered and scattered across a grid of relationships remote from direct contact with the patient. More often than not, they are reached based on general policy judgments regarding patterns of general distribution and about the generic value of ends and means, rather than as treatment decisions. Providers making these judgments may not be legally accountable to the patient due to the absence of contractual privity. Under the American model, in which health tends to be the subject of more than one market transaction, economic pressures have led to the vertical integration of functions in managed care.

As measured by its claim to deliver complex and advanced medical treatment to large numbers of people who could not otherwise receive it, managed care deserves a fair hearing. At the same time, such systems may need to be limited or even rejected, whenever their quest for efficiency oversteps its bounds at the expense of the moral autonomy and integrity of the physician. Wherever efficiency comes into view, it always pays to ask, "*whose* values are to be efficiently advanced?" There is the danger that delivery of health care services in the mode of managed care will unacceptably undermine the ethical minimum of autonomy required for the physician, or freedom for the patient in the choice of physician or form of treatment. This is also the danger, currently pressing, that it will unacceptably undermine the autonomy of the patient's moral community seeking to minister to its members in accordance with the tenets of their faith. Hospitals run by the Adventists or Catholics become vulnerable to a concept of health care being imposed upon them in violation of their fundamental tenets. Thus, the danger arises that efficiency will be won, within a standardized relationship of health care delivery, at the cost of other forms of social relationship grounded in covenants and commitments, essential to the identity of the patients, and contributing to the moral resources and integrity of the society.

D. Efficiency as a Value in the Constitutional Order

Within the American constitutional order, the First Amendment can be read as advancing the value of efficiency as an end in itself. Unencumbered competition among ideas in the "market place of ideas" can be seen as maximizing wealth.[6] Bars on commercial advertising by professionals are *prima facie* illegitimate.[7] The Commerce Clause advances efficiency by mandating federal action in furtherance of economic optimalization and by barring state action interfering with interstate economic activity.[8]

The hierarchy of values within the American constitutional order sometimes subordinates efficiency to other values. This relativization serves as a check on the untrammelled pursuit of efficiency within the American system. Life and health, as developed above, do not function with sufficient clarity as constitutional values to constitute such checks. Rather, the clearest such check is the priority the Constitution gives to individual liberty under the equal protection and due process clauses of the fourteenth amendment. The Supreme Court has recognized, for instance, the patient's right to informed consent, as a constitutional value.[9] This limitation may come into play in legal disputes over legal care decisions in a manner which checks the value of mere efficiency.

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6. Abrams v. United States, 250 U.S. 616, 630 (1919). (In the words of Oliver Wendell Holmes, Jr., "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

7. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (holding that commercial speech consisting of truthful information about entirely lawful activity is protected under the First Amendment).

8. On the scope of federal commerce power, *see* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (holding that intrastate activity may not be federally regulated as interstate commerce unless it has a close and substantial relationship to interstate commerce); on restrictions on the power of states even incidentally to regulate in a way which impedes interstate commerce, *see* S. Pac. Pacific Co. v. Ariz., 325 U.S. 761, 767-769 (1945) (holding that a safety measure that puts a significant burden on interstate commerce violates the commerce clause).

9. Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 269-273 (1990) (reasoning that a competent adult has a constitutionally protected liberty interest in not being forced to undergo unwanted medical procedures, including life sustaining measures).

In addition, there is support in American constitutional law for the idea that the value of association should take priority over efficiency at times. For example, the fourteenth amendment protection given to the parent-child relationship, although the parent cannot exercise any autonomy for the child that he or she has not been left under the constitution for him or herself.[10] A case like *Roe v. Wade* accords recognition to the patient-physician relationship, but essentially does so as a way of respecting the freedom of the patient.[11] There is also the right of the free exercise of religion under the first amendment which religiously-affiliated health care facilities could propose as a basis for giving their religious tenets priority over the claims of efficiency in the form of standard terms set under insurance schemes.[12] But, legally mandated terms of health care coverage tend to take the form of value judgments which are neutral and of general application, and so come within the rejection of a right to exemption represented by *Employment Division, Dept. of Human Resources v. Smith*,[13] with the consequence that the Constitution would at most permit the legislative grant of such exemptions, but not require them. Where legislatures have recognized such liberty for religious believers, they have tended to do so out of consideration for individual autonomy in religious choice, not for the integrity of the associations in question. Even the high water mark of protection offered by legislatures heretofore does not guarantee the degree of protection which would be needed to give religious associations dedicated to the delivery of health care services the protection they currently need against the pressures for efficiency.

The German Constitution gives a firmer and more general endorsement of the priority of the value of human associations and relationships over the pursuit of efficiency. It recognizes that the Federal Republic of Germany is a "social state."[14] The German constitutional order recognizes the concepts of family, church and profession as constitutive elements of society.[15] In practice, this integration of societal relationships into the

10. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-535 (1925) (ruling that parents have the right to direct the education and upbringing of their children).

11. Roe v. Wade, 410 U.S. 113, 163 (1973) (finding the constitutionally protected right to privacy broad enough to encompass a woman's decision whether or not to terminate her pregnancy).

12. *See* Catholic Charities of Sacramento v. Super. Ct. of Sacramento County, 2001 Cal. App. LEXIS 515; 2001 Daily Journal DAR 6821 (2001) (*cert. granted*).

13. 485 U.S. 660, 669-670 (1988).

14. *Supra* note 5.

15. "Marriage and the family shall enjoy the protection of the state." GG Art. 6(1) (F.R.G); "Religious instruction shall form part of the regular curriculum in

constitutional order may not work out smoothly, or easily, as one sees in the practice of the involvement of religious associations in the abortion counseling provisions of German law.[16] But it would still reward the effort for American jurists to look for parallel ways, as an offset to the forces of the market and efficiency, to give recognition in the setting of American health care decision-making to the transmission of basic values within social, family and religious relationships.

II. A HEALTH CARE ETHIC OF DUTY

A. A Duty to Respect the Dignity of the Person

No duty is more fundamental to an ethics of health, or less readily explained and justified at the level of the foundations of ethics today, than the duty to respect the inviolable dignity of the human person. Disagreement about where to draw the line concretely on such issues as abortion has led to hesitancy in a moral commitment to treat people as ends-in-themselves. The technological means of differentiating and separating the process of reproduction into isolated components of living cells with potential for life means that acts which symbolize disrespect for the person in him or herself may not be directed against any specific individual.[17] The influence of the Millian idea that only harm to specific individuals warrants limiting the freedom of another person makes it difficult to defend a duty not to act under such circumstances, even though the harm to the moral fabric of society may be real enough.[18] Under these circumstances, health care ethics continues to need some coherent and generally accepted concept of the duty to respect the inalienable dignity of the human person.

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state schools, with the exception of non-denominational schools." GG Art. 7(3) (F.R.G); "All Germans shall have the right freely to choose their occupation or profession, their place of work, their place of training." GG Art. 12(1) (F.R.G).

16. Pope John Paul II, *Letter to the German Bishops* (asking the Roman Catholic bishops of Germany to withdraw from issuing certificates at Church-run counseling centers under Germany's Pregnancy and Family Assistance Act of 21 August 1995), *L'Osservatore Romano* (Weekly Edition in English) 11 February 1998, at 2.

17. Moral objections can be raised to the use of stem cell lines because they were once begun with an act destroying a human embryo. *Debate Over Cloning Puts the Political in Science*, WASH. POST, June 10, 2002, at A09.

18. John Stuart Mill proposed that society could justify a legal restriction on individual freedom only where it resulted in "other-regarding" harm against specific individuals. John Stuart Mill, ON LIBERTY (1869) (Chap. IV, "Of the Limits to the Authority of Society Over the Individual").

B. Respect for the Dignity of the Person in Constitutional Law

Although the concept of personhood is fundamental to the American constitutional scheme, such law provides implicit support for the duty to respect human dignity. The weakness of American constitutional law on the point obviously arises through the Supreme Court's abortion decisions, particularly *Roe v. Wade*.[19] *Roe* both declared that a fetus is not a person without adequate philosophical support, and, more devastatingly, asserted its own authority to adjudicate the issue of abortion without the foundation of some established criteria of legal personhood.[20] The Court is on stronger ground in *Washington v. Glucksberg*,[21] holding unanimously that the individual liberty interest in suicide is subordinate to society's interest in preserving life, so that legislatures may constitutionally prohibit assisted suicide.[22] Here again the Court shies away from any direct endorsement of an intrinsic moral duty to respect the dignity of the individual, relying instead on historical continuity in practice and concern about the potential for economic coercion. At this point, a serious concern emerges, namely, the lack of consensus among apparently reasonable, educated people on what counts as normatively compelling arguments on such issues. It is sobering that while the United States Supreme Court endorsed the reasoning of the legislature as virtually compelling by labeling it "unquestionably important and legitimate," Judge Reinhardt writing for the Ninth Circuit offers the opinion that it did not even meet the minimal requirements of rationality, asserting that the state's interests were "at a low point...no matter how much weight we could legitimately afford the state's interest in preventing suicide, that weight, when combined with the weight we give all the other state's interests, is insufficient to outweigh the terminally ill individual's interest in deciding whether to end his agony and suffering by hastening the time of his death..."[23] The conceptual consistency and order of the German constitutional order, with its explicit acknowledgment of the inviolable dignity of the human person provides a beneficial contrast, worthy of

19. 410 U.S. 113 (1973).

20. *Supra* note 11, at 153 (In his majority opinion, Justice Harry Blackmun stipulates that the Supreme Court has the authority to adjudicate the abortion issue without resolving whether the right to privacy in the question is grounded in the fourteenth amendment, in keeping with what he states the Supreme Court "feels" or in the Ninth Amendment as the court below had "determined").

21. 521 U.S. 702 (1997).

22. Washington v. Glucksberg, 521 U.S. 702, 709 (1997) (ruling that there exists no constitutionally protected right to commit or be aided in suicide).

23. Compassion In Dying v. State of WA, 79 F.3d 790, 837 (9th Cir. 1996).

ongoing study by American jurists in the quest of a stable constitutional basis for the treatment of the ethics of health care in American law.

C. Respect for the Covenant of Treatment

A second duty traditionally understood as central to the ethics of health care is the duty of trust flowing from the covenant between patient and physician. In systems of managed care, the context for this duty of trust has been fractured. Physicians owe a duty to the system which may conflict with his or her duty to the patient. Functionaries within the system who do not stand in a relationship of privity with the patient are entrusted with aspects of the patient's welfare including, for instance, the custody of information. Within the patient-physician relationship itself, the duty in question becomes subject to compromise because the physician may be subject to conflicting duties or otherwise be subject to divided loyalties within the bureaucracy of managed care. Assuming that the integration of the treatment relationship within the edifice of group health care in some form is irreversible, there is a need for reliably securing trust as the appropriate basis of the relationship between the patient and the immediate caregiver. Further, there is a need for an adequate articulation of concepts describing the terms and conditions of fiduciary trust between the patient and remote or indirect providers of aspects of his or her treatment.

D. Respect for the Covenant of Treatment in the Constitutional Order

In the American Constitution, the right of privacy has been held to extend to the physician-patient relationship.[24] The privacy principle suggests that the terms of physician-patient consultation are to some degree between the physician and the patient and not subject to disclosure, for reasons of efficiency or otherwise. On the other hand, the Supreme Court has ruled that the government may impose a limit on advice given at a family planning clinic, as a condition of the clinic's receipt of federal funds.[25] Thus, to some uncertain extent there is a constitutional basis for valuing the freedom of consultation in the immediate physician-patient relationship. In addition, under the common law, the contract between a hospital and patient or physician and patient is

24. *Supra* note 11.

25. Rust v. Sullivan, 500 U.S. 173, 179 (1991) (The federal regulation in question required the provider to respond to inquiries about abortion, in the following terms: "the project does not consider abortion as an appropriate method of family planning and therefore does not counsel or refer for abortion").

considered clothed in the public interest, and thus subject to implied-in-law terms ensuring that the patient can rely on the intrinsic covenant appropriate to physician and patient regardless of the express terms of the agreement, where these depart from the intrinsic norm.[26] In the German Constitution, a separate basis exists through the constitutional status conferred on the idea of a "profession." Accordingly, the ethical requirements of integrity within the medical profession have a constitutional foothold.[27]

E. Respect for Justice in the Distribution of Health Care

As the society engages progressively in centralized health care planning at the governmental level, duties in justice shift from the commutation of rights and duties between physician and patient to the distribution of benefits and burdens across the population. As health care services are coordinated more and more through common insurance schemes, then coverage and payment decisions by the insurance carrier also raise issues in distributive justice. The cost of the most effective medical technologies and treatments has become so expensive, that in some cases, no significant portion of the population can afford them except through the pooling of risks and costs. The economics of producing such technologies and delivering such services is such that they can only be carried forward through such cost-sharing schemes. While agreements to share health care costs with a pooling of risks ensure that innovative technologies and treatments will be available to some or many, the threshold expense of joining the pool cannot be afforded by all, introducing the separation of the population into the "haves" and "have-nots". The issues of whether such a division is compatible with social stability, let alone a societal commitment to distributive justice, and whether the creation of a universal pool of risks, costs and coverage does not become a political imperative are joined.

26. Tunkl v. Regents of University of California, 383 P.2d 441, 445-46 (1963) (holding that an exculpatory clause that releases a hospital from any and all liability for the negligent or wrongful acts or omissions of its employees is against the public interest and invalid).

27. "The practice of an occupation or profession may be regulated by or pursuant to a law." GG Art.12(1) Rust v. Sullivan, 500 U.S. 173, 179 (1991).

F. Respect for Distributive Justice in Health Care within the Constitutional Order

The American Constitutional order revolves around concerns of the allocation of power and freedom. The principle of distributive justice applies in this order only to the extent of a guarantee of equal access to the market and the political process. Fuller notions of distribution justice concerned with the allocation of shares of participation in substantive goods do not apply. An example can be seen in *DeShaney v. Winnebago County Dept. of Social Services*.[28] In that case, the Supreme Court held that a dependent individual did not have a constitutional right to expect that the state would follow through and deliver social services with sufficient competency to ensure that he or she is protected from physical assault resulting in permanent mental and physical disability. The pervasive American philosophy is that limiting distributive justice to the equal distribution of opportunity will ensure greater economic efficiency, which, in turn, will maximize wealth.

Ensuring patterns of distribution in substantive goods is relegated to the elective considerations of the legislature. In the legislative realm, as it functions within the American constitutional order, distributive schemes tend to receive their meaning not in relationship to justice, but rather utility. Thus, as American legislatures consider devoting proportionately larger shares of their available financial means to funding more universal participation in health care, they will look to how the resulting satisfaction of the majority compares to the satisfaction which other modes applying resources would generate. This question will tend to be answered according to the relative value the average voter places on being insured against the risks of ill health in old age or against the chances of simultaneously falling into poverty.

The German constitutional order departs sharply from the American on the issue of distributive justice in health care. The German constitution provides that the Federal Republic of Germany is a social state.[29] The adoption of the concept of the social state commits the German constitutional order to ensuring the universal participation of the population in the basic substantive goods such as health and education, and the acceptance of the cost of doing so as a common responsibility. The commitment is conceived as one of fundamental distributive justice, as opposed to an elective duty. This commitment within the contemporary German constitutional order reflects a historical commitment predating

28. 489 U.S. 189, 196 (1989).

29. GG Art. 20 (1) (F.R.G.).

the current German constitution, and reflects a corporativist and communitarian element in the German legal and constitutional tradition. American jurists attempting to come to terms with distributive issues in contemporary health care ethics can learn much through the study both of the longer German tradition and contemporary German constitutional order.

III. CONCLUSION

The new era in health care, now underway, pits values of patient autonomy, the integrity of associations and life and health as substantive goods, against the value of efficiency in the delivery of health care services. A fair, reasonable, and principled resolution of such conflict becomes essential to a sound health care ethics. The American constitutional order has traditionally emphasized the values of autonomy and efficiency. Its manner of ordering the priority of these values provides some limited assistance in resolving the conflicts before the health care system. Taken alone, however, the American constitutional order, as it is received from the recent past, does not give adequate direction to resolve the disputes arising between autonomy and efficiency, under the complexities of emerging circumstances. The American constitutional order leaves substantive values like life and health, traditionally organizing the activity of medicine, to the shifting preferences of the legislative process. While it gives some respect to the value of associations and basic familial and religious relationships, since the Second World War it has tended to subordinate these values to the leading themes of autonomy, equality, and efficiency.[30] Because the German constitutional order rests not just on the elements of respect for individual choice and market freedom emphasized in America, but, on the substantive goods implied by respect for the concept of human dignity and on the constitutive status, within the social order, of basic associations such as profession, family, and church, as well, and because it assumes a responsibility in distributive justice for the universal participation in these goods, it is in a better position than the American, as a matter of coherence at the constitutional level, to supply "the third term" that can mediate in resolution of conflicts between autonomy and efficiency. It is also in a better position to offer a constitutional basis for the resolution of all of the issues relating to the

30. The subordination of the right of association has occurred in relation to a priority accorded racial equality. *See e.g.* Shelley v. Kraemer, 334 U.S. 1 (1948) (ruling that judicial enforcement of a discriminatory term in a private contract constitutes state action in violation of the fourteenth amendment).

ends and duties defining a sound ethics of health care for the future. It is safe to assert that, notwithstanding the deep-seated differences in culture and history accounting for the differences between the two legal systems, American jurists and health care ethicists have much to gain by studying the alternative represented by the German approach.