The Elderly and Health Care Rationing

George P. Smith II
The Catholic University of America, Columbus School of Law

Follow this and additional works at: https://scholarship.law.edu/scholar

Part of the Elder Law Commons, and the Health Law and Policy Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
The Elderly and Health Care Rationing

GEORGE P. SMITH, II*

I. LIMITATIONS ON ELDERLY ACCESS TO MEDICAL CARE .................... 171
   A. Introduction .............................................................................. 171
   B. Health Care Allocation and Rationing ...................................... 172
   C. Justifying Age-Based Health Care Rationing .............................. 173
   D. Arguments Against Age-Based Rationing ................................ 174

II. THE EQUALITY OF AGE-BASED HEALTH CARE ALLOCATION AND
    RATIONING .................................................................................. 176
   A. In General .................................................................................... 176
   B. The Equal Opportunity Argument ............................................ 176
   C. Elderly Discrimination ............................................................... 177

III. PATIENT DUMPING ......................................................................... 178
    A. In General .................................................................................... 178
    B. Ethical Obligations to Treat the Elderly .................................... 179

IV. WHO SHOULD DECIDE? .................................................................. 180

V. CONCLUSIONS ............................................................................... 181

I. LIMITATIONS ON ELDERLY ACCESS TO MEDICAL CARE

A. Introduction

Health is not an absolute condition, but is assessed by reference to age and other factors. Therefore, a relative scale is necessary to determine whether an elderly person's right to health care is being satisfied.¹ Today, older Americans are increasingly affected by the growing need to regulate health care delivery. Since 1900, those over the age of eighty-five have become twenty-one times more numerous in society, and those over the

* Professor of Law, The Catholic University of America. B.S., J.D., Indiana University; LL.M., Columbia University; L.L.D., Indiana University.

Some of the ideas in this essay are derived from my book, LEGAL AND HEALTHCARE ETHICS FOR THE ELDERLY (1996), and adopted from my essay, Our Hearts Were Once Young and Gay: Health Care Rationing and the Elderly, 8 U. FLA. J.L. & PUB. POL’Y 1 (1996).

age of sixty-five have become eight times more numerous.² Given the
need to curb rising health care costs—particularly expenses related to car-
ing for older individuals—and improve access to health care, society has
effectuated two methods of governing the distribution of limited health
care resources: allocation and rationing.³

B. Health Care Allocation and Rationing

The allocation of health care resources involves a societal determina-
tion of what resources should be devoted to a particular program.⁴ The
allocation process is typically performed on a “macro” level, with alloca-
tion decisions often affecting only statistical lives.⁵ In contrast to the iden-
tifiable lives often affected by health care rationing, statistical lives af-
fected by allocation decisions are much more readily sacrificed.⁶ A com-
mon means of deciding health care allocation is through political
processes. Government decisions pertaining to health care spending and
regulation typically involve allocation determinations. For example, the
Medicare and Medicaid programs allocate resources for numerous purpos-
es.⁷ Hospitals, too, regularly make allocation decisions in determining the
quantity and type of resources to have available.⁸ Their actions, in turn,
impact directly upon physicians who subsequently also become health care
allocators.

Whether there exists a duty to the elderly citizens affected by such al-
location decisions is the subject of much debate. The government arguably
does have a duty, based on a collective social obligation, to help people
live out a natural life span.⁹ Yet, without a limit on investments into health
care for the elderly, younger generations will suffer based on an inadequa-

³. See David C. Hadon & Robert H. Brook, The Health Care Resource Allocation Debate: Defin-
    ing Our Terms, 266 J. AM. MED. ASS’N 3328, 3328 (1991) (contrasting allocation and rationing);
    see generally Marilyn Chase, Too Often, the Elderly Don’t Get the Drugs or Care They Need, WALL
    ST. J., Sept. 24, 1999, at B1 (reporting that the elderly have been undertreated for many medical conditions).
⁴. BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 633 (2d ed.
    1991); see generally George P. Smith, II, Accessing Health Care Resources: Economic, Medical,
    Ethical and Socio-Legal Challenges, in AUTONOMY AND HUMAN RIGHTS ch. 20 (David N. Weisstub &
    Guillermo Diaz Pinto eds., 2008); George P. Smith, II, Human Rights and Bioethics: Formulating a
    Universal Right to Health, Health Care, or Health Protection?, 38 VAND. J. TRANSNAT’L L. 1295
    (2005).
⁵. A statistical life is the statistical determination of various life and death rates based on the evalua-
tion and computation of numerous factors. FURROW ET AL., supra note 4, at 633.
⁶. Id.
⁷. Id.
⁸. Id. at 634.
cy of available health care resources. Others argue that individuals should support health care plans allocating fewer resources to health care in old age in exchange for more comprehensive health care earlier in life.

In broad terms, rationing commonly refers to the equitable division of scarce items by limiting the amount to which individuals are entitled. Rationing of medical care is more narrowly defined as the deliberate denial of treatment to some individuals who might benefit from it. The pervasiveness of rationing in the health care industry no longer represents the deliberate, equitable sharing of a scarce commodity. Rather, rationing has come to represent discrimination in access to health care services on the basis of socioeconomic status.

C. Justifying Age-Based Health Care Rationing

Proponents of rationing contend that anything short of rationing will lead to an economic catastrophe in America's health care system. Specifically, the proponents argue that rationing is the only way of managing unbridled patient demand, an aging population, and the open floodgates of medical technological developments. They argue that an explicit system of rationing health care services must be implemented to avert a national disaster. This argument, however, is founded on more than mere economic considerations.

Older persons seem particularly susceptible to rationing efforts. Commentators have argued that an integral part of a rationing system is to ration care among the elderly, thereby restricting expensive, high-technology, life-sustaining care for those who have reached a certain age. Implicit in this argument is the principle that elderly health care represents "an investment of scarce resources with few returns." In addition, this argument reflects an intuitive conclusion that an older person has "less

10. See Jecker, supra note 2, at 3013 (arguing that age-based rationing gives the old and the young equal access to health care resources as they move through life).
11. Id.
15. DANIEL CALLAHAN, WHAT KIND OF LIFE: THE LIMITS OF MEDICAL PROGRESS 21–23 (1990); Smith & Rother, supra note 14, at 1848.
16. Smith & Rother, supra note 14, at 1848.
17. Id. at 1849.
18. Id. at 1849–50.
chance of achieving a successful clinical outcome." Therefore, commentators have made the claim that vast resources are spent on care for the dying elderly and have bolstered this claim with empirical evidence. In further support of age-based rationing, proponents have proffered a wide gamut of benefits, including productivity, equality, natural lifespan, inter-generational justice, and medical benefits.

Others have justified the withholding of costly medical treatment to the elderly on the basis of waning productivity in the later years of life. This argument centers on an investment return theory, suggesting that the dollars spent on elderly health care may better benefit society when invested in patients with greater "potential."

In addition to the greater-investment-return argument, some have suggested that individuals should have the right to live until the same age as others. Proponents of this argument claim that health care services for the elderly should be curtailed in order to allow for such an outcome. By limiting health care for the elderly, services can be provided to allow all, to the extent possible, to reach a certain age.

Others have justified age-based health care rationing on the basis of inter-generational justice and a "natural lifespan" view. Supporters of this view articulate the theory that health care costs for the elderly invariably deprive younger generations of access to adequate health care and thereby limit their exposure to other life experiences. According to this theory, the elderly should recognize that their own welfare is the result of other generations' hard work and that their health care needs are therefore inferior to those of younger generations.

D. Arguments Against Age-Based Rationing

Some may argue that health care services should not be rationed at all, particularly not on the basis of age. Proposals in support of age-based ra-

21. Id. at 1852.
22. Id. at 1853.
24. Smith & Rother, supra note 14, at 1853.
26. Smith & Rother, supra note 14, at 1853-54.
tioning do not generally advocate the withholding of all medical treatment from older persons. Rather, such proposals suggest that expensive, aggressive care should be withheld from elderly patients.\textsuperscript{28} According to one study, withholding all care for high-cost Medicare decedents would have resulted in a $2.8 billion savings in 1987.\textsuperscript{29} While withholding high-cost health care from older patients who are seriously ill may save some money, this savings must be balanced against the cost of ending many lives.

The consistently recurring theme in all of the analyses of age-based rationing centers on defining the value of an elderly person’s life. Some argue that excluding the elderly from expensive medical treatment may allow society to realize a greater return for its invested dollars.\textsuperscript{30} Moreover, commentators argue that limitations on health care to the elderly will allow for greater equality in the number of life years attained.\textsuperscript{31} This position affixes a demeaning, monetary value to an elderly person’s life. Regulating access to medical care based on age runs against the egalitarian nature of society and the principle that all human life is sacred and equally deserving of protection.\textsuperscript{32}

Another widely discussed justification for rationing life-sustaining health care for the elderly is the “natural lifespan” principle.\textsuperscript{33} This proposal attaches a normative average to valuating a person’s natural lifespan—calculated to be roughly around the late seventies or early eighties—after which a person should receive only supportive and palliative care.\textsuperscript{34} The goal of establishing an acceptable age after which health care should be rationed is an attempt to apply a homogeneous criterion to a very heterogeneous society. The contributions made by elderly citizens to society vary widely and make any attempt to value a human life strictly based on age and natural lifespan very difficult. In addition, although some suggest that the elderly should give priority to the health care needs of a younger generation,\textsuperscript{35} intergenerational equality is a two-way street. Although the work and contributions of younger generations provide for much of the older generation’s welfare, the sacrifices of the elderly created many of the

\begin{thebibliography}{9}
\bibitem{28} Smith & Rother, supra note 14, at 1850.
\bibitem{30} KILNER, supra note 23, at 90.
\bibitem{31} WICCLAIR, supra note 13, at 90.
\bibitem{32} KILNER, supra note 23, at 90.
\bibitem{33} Smith & Rother, supra note 14, at 1854.
\bibitem{34} CALLAHAN, supra note 9, at 20.
\end{thebibliography}
resources, opportunities, and services that younger generations now enjoy.36

II. THE EQUALITY OF AGE-BASED HEALTH CARE
ALLOCATION AND RATIONING

A. In General

The theory of equal medical treatment corresponds with the proposition that persons with similar health conditions receive roughly the same health care. Given the reality of scarce medical resources, however, society is faced with the obligation of allocating the resources as equitably and efficiently as possible. Thus, the debate is no longer whether health care should be rationed, but rather how to ration it equitably.

The presumption that old age hinders the possibility of favorable medical outcomes may be statistically accurate, but it remains a highly undependable clinical outcome predictor.37 What must be considered is that older people generally are physiologically and psychologically very different from each other. As such, curtailing treatments pursuant to an arbitrary, age-based policy will not result in the most efficient use of medical resources, and fails to recognize individual human potential.38

B. The Equal Opportunity Argument

Empirical studies make immediately apparent that, given the rate at which the number of elderly and their needs are increasing, no society has available all the resources necessary to completely fulfill those needs.39 With age-based rationing, however, the aim of equal access to health care is ostensibly achieved in that, with the passage of time, individuals inevitably move through the various stages of life. Furthermore, the opportunity to live out one’s life includes such aspects as work, love, procreation, raising a family, and enjoying life with others.40 Most aged members of society have experienced these opportunities of life. As such, age-based ration-

36. Greene, supra note 27, at 723, 724.
37. Smith & Rother, supra note 14, at 1852.
38. See generally SMITH, ETHICS, supra note 13, at chs. 1, 4.
40. Jecker, supra note 2, at 3013.
ing does in essence provide elder citizens with the same opportunities afforded to younger citizens.\textsuperscript{41}

One such age-based rationing plan sets forth the goal of guaranteeing a minimally decent level of health care for all while limiting the private demands of ailing elders. Specifically, the plan proposes to cut off all but the most basic medical care at the age of eighty.\textsuperscript{42} This policy would be instituted through the Medicare/Medicaid system and would consistently refuse to fund intensive treatment beyond the established age limit.\textsuperscript{43} Proponents of the plan argue that it is both decent and manageable and that only through such an active plan can society avoid a genuinely serious crisis in health care costs.\textsuperscript{44}

C. Elderly Discrimination

Promoting age-based rationing is detrimental to the elderly because it devalues the status of older people and caters to the values of a youth-oriented culture—a culture in which negative stereotyping based on age is prevalent. Age-based rationing carries the danger of signaling to society that the old are not as respected as the young. In addition, denying life-extending treatment to the elderly may foster the growing trend of unequal respect towards the elderly.\textsuperscript{45}

Unequal access to basic goods and services promotes inequality and demeans those who are excluded. Medical treatment, however, cannot be conserved in the same manner as other goods or resources. It is morally unacceptable to ration beneficial health care except in the most extreme of situations. Thus, medical treatment cannot ethically be denied from any predetermined segment of the population based on age. Such a denial could, in essence, deny patients of life itself. The factor determining the propriety of medical treatment should, therefore, be the patient’s condition, and not an artificial criterion such as age or status.\textsuperscript{46}

\textsuperscript{41} Id. \textit{But cf.} Soldo, \textit{supra} note 39, at 290 (claiming that the transfer of social resources “[pits] the needs and preferences of one generation against another”).


\textsuperscript{43} Id. at 88.

\textsuperscript{44} Id. at 89; \textit{see generally} George P. Smith, \textit{II, Patient Dumping: Implications for the Elderly}, \textit{6 Elder L.J.} 165 (1998) [hereinafter Smith, \textit{Patient Dumping}].

\textsuperscript{45} \textit{See Smith, Ethics, supra} note 13.

\textsuperscript{46} Russ, \textit{supra} note 42, at 89; Smith \& Rother, \textit{supra} note 14, at 1856–57.
III. PATIENT DUMPING

A. In General

Although patients in “right to refuse medical treatment” cases have trouble terminating their medical care, many experience difficulty obtaining medical care in the first place, because they are refused admission to hospitals. This problem is termed “patient dumping.”

Patient dumping, also known as “demarketing of services” or “management of patient mix,” refers to the hospital practice of transferring or refusing to treat persons who are indigent, uninsured, or otherwise undesirable to admit. Patient dumping originated from the common law no-duty rule. This rule provides that hospitals have no duty to admit and treat all patients who seek care, and in some cases, have no duty to even specify reasons for rejecting patients. Hospitals often “dump” patients who arrive at hospital wards without health insurance or with only Medicaid insurance—a program which physicians know provides low reimbursement payments.

The economic pressures placed upon hospitals over the past decade increased the frequency of patient dumping in cases falling under the no-duty rule. This rule and the ability of hospitals to refuse medical treatment have been limited by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and the Emergency Medical Treatment and Active Labor Act—an amendment to COBRA.

The final analysis will show that the elderly will only be secure from the indignity of patient dumping when society and the health care industry acknowledge their inherent value as an important segment of contemporary American life.

48. Rosenstein, supra note 47, at 256.
49. Id.
51. Id.
52. See HEALTH AND SOCIAL POLICY ch. 2 (Marvin D. Feit & Stanley F. Battle eds., 1995).
B. Ethical Obligations to Treat the Elderly

In a society where the elderly are more susceptible to illness and disability than any other age group, they "ought to command special attention in matters pertaining to health care." Access to hospitals and health care resources are important concerns to them. In fact, many have Medicare, private insurance, or both; however, many others have neither. Just like society as a whole, the elderly population is composed of persons having various income levels, interests, and needs. Even if society's ethical consensus advocated for unlimited access to health care, health care providers would still be unlikely to provide health care to persons unable to pay for it. Patient dumping and access to health care remain prominent issues for the elderly because elderly persons are not typically economically productive. Indeed, the population of elderly is disproportionately impoverished and economically disadvantaged.

Some physicians and patients have adopted a consumerist image of the physician as an independent contractor who sells his knowledge and skill to patients who demand care. This contractual model of medical care overlooks the moral and ethical considerations inherent within an emergency patient-physician situation and belittles the idea that a doctor should make "a correct technological (medical) choice consonant with a patient's needs and desires." In addition, for-profit hospitals face an inelastic demand for services, which contributes ultimately to their unresponsiveness regarding altruistic social winds.

57. Id. at 679.
59. See SMITH, ETHICS, supra note 13, at ch. 1.
61. See Caplan, supra note 56, at 668-73.
62. See id. at 675.
64. See Bruce Jennings et al., Ethical Challenges of Chronic Illness, HASTINGS CTR. REP., Feb.–Mar. 1988, at 51, 58.
Americans should be particularly offended when hospitals "dump" elderly patients because the elderly are recruited to poverty after relatively decent working lives.\textsuperscript{67} An elderly person's "social worth" and corresponding health care resource allocation should not be determined by his ability to be a rational consumer\textsuperscript{68} by saving money to purchase healthful retirement years. Instead, health care should be allocated by considering the fairness to the persons who need care the most—specifically, the sick and indigent elderly.

When society allows health care providers to operate and profit in any community, an ethic of fairness—which respects the wisdom,\textsuperscript{69} self respect,\textsuperscript{70} and achievement of the elderly—should be in place and, indeed, controlling.\textsuperscript{71} Respect for the dignity and autonomy of elderly patients, as well as the underlying motive to help them, must replace the all-consuming profit motive held by both hospitals and physicians as the lodestar for American health care delivery. In order to reach this goal, society should restrict medical licenses to health care providers who will care for the indigent elderly as a condition for doing business with the rest of society. Only then might the incidence of dumping elderly patients be diminished.

IV. WHO SHOULD DECIDE?

The ultimate decision on the merits of age-based rationing and the provision of life extending care is directly linked to society's perception of health care for the elderly and society's medical capabilities. This decision-making process inevitably introduces value considerations into policy formulations—specifically, the allocation of expensive health care resources for the elderly. Allowing values to be a factor may ultimately hinder the resource allocation planning process. Safeguarding the personal values of older Americans may require such a compromise.\textsuperscript{72}

Formulating a national policy on health care requirements of the aging leads to inevitable value conflicts. A common perception is that the transfer of social resources essentially polarizes the younger and older generations.\textsuperscript{73} Nevertheless, such an intergenerational clashing of interests must not be viewed as an obstacle. Rather, the rational resolution of competing

\textsuperscript{67} See Ronald Bayer & Daniel Callahan, \textit{Medicare Reform: Social and Ethical Perspectives}, 10 J. \textsc{Health Pol'y, Pol'y & L.} 533, 536 (1986).
\textsuperscript{68} See Caplan, \textit{supra} note 56, at 668.
\textsuperscript{69} See \textsc{John Rawls, A Theory of Justice} 440 (1971).
\textsuperscript{70} See \textsc{Smith, Ethics, supra} note 13, at ch. 1.
\textsuperscript{71} See \textit{id.} at chs. 2, 12.
\textsuperscript{72} See generally Alfred F. Conard, \textit{Elder Choice}, 19 \textsc{Am. J.L. \& Med.} 233 (1993).
\textsuperscript{73} Soldo, \textit{supra} note 39, at 289.
health care policy considerations demands that conflicting values be scrutinized and, through some factor, interlinked with one another. It must be remembered that values generally serve as self-justifying ordering-and-selecting principles unless they are critically and impartially evaluated. Thus, regardless of how objective an approach society takes toward constructing an equitable national policy on health care allocation to the elderly, the competing value concerns must be addressed in an orderly, critical, and reasonable way. The tool allowing society to undertake such a critical evaluation is ethics.\textsuperscript{74}

Ethics is an unparalleled regulator of value selection and must therefore be factored into the formulation of a national elderly health care policy. The American Medical Association’s \textit{Principles of Ethics}, for instance, states that notwithstanding the societal interest in containing health care costs, “concern for the care the patient receives will be the physician’s first consideration.”\textsuperscript{75} The weighing of the ethical aspects of medical decision-making for the elderly would indicate how aggressive treatments or intervention should be in prolonging a life otherwise viewed as having limited potential.\textsuperscript{76}

V. CONCLUSIONS

In order to confront the issue of health care rationing for the elderly, society must effectively integrate the disciplines of moral and ethical reasoning with the quantitative formulations of needs and resources. Such an effort, supported by an abundance of public debate and discussion, will result in an equitable policy on elderly health care rationing with long-term viability. However, the greatest danger to avoid is the perpetuation of daily “nondecisions” regarding health care treatment for the elderly. Such “decisions” frequently result in the nontreatment of elderly patients and institutional residents because of an inability to assess effectively the equitable and efficient allocation of scarce health care resources.\textsuperscript{77}

The real moral question raised from this debate is not whether too much treatment or too little is offered. Rather, “it is how to optimize the appropriateness of the treatment”; therein lies the moral obligation of

\textsuperscript{74} Id.

\textsuperscript{75} American Medical Association, \textit{CODE OF MEDICAL ETHICS: CURRENT OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS} \S 2.09 (1992).

\textsuperscript{76} Terrie T. Wetle, \textit{Ethical Aspects of Decision Making for and with the Elderly}, in \textit{LEGAL AND ETHICAL ASPECTS OF HEALTH CARE FOR THE ELDERLY}, supra note 60, at 258, 266.

\textsuperscript{77} Soldo, \textit{supra} note 39, at 293.
health care as well. However difficult or tragic the decision to allocate, taking no action is perhaps the most pernicious conduct of all. Society must realize that aging is not a disease, but an inherent part of human life.