Book Review: Legal and Healthcare Ethics for the Elderly

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LEGAL AND HEALTHCARE ETHICS FOR THE ELDERLY


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INTRODUCTION

Aging is a dynamic human process. Because increasingly larger proportions of America's population are aging, this personal process—multiplied by the tens of millions of current and prospective elderly—represents a profound social and economic force. Decisions are made daily about matters that are, at one level, intensely personal and private: How much autonomy in the tasks of daily living can this senior exercise? How much external support is required? How will that support be provided and by whom? How will this care be financed? Who has the legal and ethical right to be involved in making decisions concerning medical treatment? When does so-called "ordinary" medical treatment rob a person of the dignity with which he or she should be allowed to face death? Should older persons be allowed to choose their own time and means of death when faced with a terminal illness? Particularly because each one of these decisions has a component involving financing through taxpayers' dollars, the resolutions to these questions ineluctably enter the public arena of legislation, governmental policy and, ultimately, common law. The micro experience matters on the macro level; in turn, policies determined at the macro level shape the micro experience.

Anyone beginning to work on either the micro or macro levels in "elder law" confronts a compelling, albeit bewildering, interplay among various disciplines, including, among others, law, medicine, sociology, anthropology, economics, moral philosophy, religion, and politics. Moreover, although books and articles abound, not many offer a concise yet comprehensive overview of the entire subject area geared to the needs and sophistication of the general reader. There is, of

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*Geriatrics and the Law*, as one might infer from the title, mediates between the health care practitioner and the law, explaining to medical professionals working in the field of geriatrics what legal challenges affect their provision of clinical services. Those who are more philosophically inclined and policy-oriented might turn to Judge Richard Posner's recent exegesis on the full spectrum of the process, *Aging and Old Age*.1 What references, at a moderate level of sophistication, address the interests of others, such as attorneys in private practice, legislators and their aides, judges, and consumers of health care services? Professor George Smith's *Legal and Healthcare Ethics for the Elderly* is well designed to fill the bill for this large, diverse, and important market.

Although the title might imply to some that Smith will speak about legal ethics and the elderly, in fact, he describes only the legislatively and judicially created laws that affect biomedical decisions and health care financing decisions concerning the elderly. He does so in a succinct 200 pages (plus index). Those 200 pages take the reader on a fast-paced excursion through the contemporary elder law landscape, focusing briefly on such key topics as the ethics of health care rationing and the quality of life, informed consent, living wills and durable powers of attorney, elder abuse, and death with dignity. The endnotes proffer additional resources to which the reader may turn for further information on the subjects raised. The appendices give easy-to-understand examples of critical documents, such as a medical directive.

Taken altogether, *Legal and Healthcare Ethics for the Elderly* provides a more complex and wider view of the subject area than one would find in a law practitioner's primer. It offers the larger framework for understanding that a thoughtful novice would seek. After this useful introductory tour, however, the reader may well wish to return to examine specific issues in greater depth. If so, an excellent resource would be the collection of multi-disciplinary essays on incapacity, ethics, and guardianship that comprises another recent addition to the literature, *Older Adults' Decision-Making and the Law*, edited by Michael Smyer, K. Warner Schaie, and Marshall Kapp.2

**AUTHOR AND CONTENT**

George P. Smith, II, is a professor of law at Columbus School of Law, Catholic University of America, in Washington, D.C. *Legal and

1 R. POSNER, AGING AND OLD AGE (1995)
Healthcare Ethics for the Elderly represents the product of four years' research, scholarship, and collaboration with various premier law and medicine programs throughout the United States, New Zealand, Ireland, and England. Undeniably, the author comes to the venture with distinguished credentials amassed through years of visiting fellowships, lectureships, and professorships. He demonstrates with gusto his comfort with the dialect of the field. His usage of terminology throughout provides the novice reader a good opportunity to see key words and phrases used in their proper contexts, as terms of art but without pretension. This is no mean feat.

Overall, Professor Smith shows a fine baseline knowledge of progressive concepts concerning patient autonomy generally and cultural impact specifically. However, at some critical points one cannot help wondering what his core beliefs are regarding aging and the elderly. The following extended quote from Philip Zeigler, with which Smith begins the book, provides an early example of the philosophic ambiguity that sometimes clouds his otherwise clear exposition.

There comes a point in nearly everybody's life when he must accept the fact that he is old; from that moment onwards all that is left is a melancholy process of decay, sometimes mitigated by remissions or apparent recoveries, sometimes proceeding headlong to total degeneration. With one victim the mind decays more quickly than the body, with another the physical collapse comes first, but always the path leads the same way, only the pace is different.\(^3\)

This somber passage, presented without further amplification, sets a grim foundation and tone for the exploration that follows; all aging is an unrelenting pathology, it seems to say. It stands in stark contrast to the later statements explaining aging and, indeed, death itself, as natural processes that are not so horrifyingly and unrelentingly negative. Did the author intend here a potent bit of dry irony? One would certainly prefer to believe so. A more palatable interpretation of the quoted passage might be that how the process of aging is perceived makes a critical difference in how the aged are valued. Further, the character of this perception will play a pivotal role in establishing whether autonomy and self-determination merely will be given lip service, or whether they will have true application in the care of the elderly. This alternative view is offered in the spirit of a friendly amendment, as are other suggestions made later herein for further exploration that might enhance the reader's experience.

*Legal and Healthcare Ethics for the Elderly* consists of 12 chapters covering the spectrum of health care law and bioethics concerning the

aged. The first third of the book presents an overview of the field, beginning with a discussion of aging as a sociological, medical, and demographic phenomenon. Smith rapidly moves on to describe the world of "bureaucratic medicine" that shapes policies and practices regarding care for the elderly. This becomes the foundation for Smith's subsequent discussion of ethical obligations in health care delivery. It introduces questions about the proper role of medical technology balanced against concern for the "whole patient" and that patient's autonomy.

Professor Smith's coverage of health care financing may disappoint someone seeking a primer on the operations of Medicare, Medicaid, managed care organizations, and the like. However, his objective clearly is not to create an instructional manual. Instead, he identifies in these chapters the major policy issues in public and private financing of health care services insofar as they have a direct and significant impact on how clinical services are provided to the elderly. Indeed, it appears that the first third of the book seeks to piece together a macro view of health care resource allocation before turning to the microlevel of rationing and individual case management. This focus on the ethics of rationing, coupled with Smith's frequent references to the critical role of culture in understanding values, makes it all the more puzzling that there are few, if any, references to aged members of minority groups. Neither the main body of the text nor the endnotes make mention of the disparate experience of minorities, including their difficulties in accessing services. One might expect such inclusion in a contemporary overview of the field, and much of the extant literature obliges this expectation.

The next several chapters shift focus to the individual, discussing autonomy and self-determination, particularly in long-term care institutions. Smith opens Chapter 5 with a direct and well-aimed assault on how theories of self-determination seem to have decreasing applicability in the real world of extended-care facilities and nursing homes. His portrait of long-term care and health care decisionmaking illustrates,

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5 As Smith describes:

Autonomy is either compromised or neglected every day in nursing homes. The reasons for this are not accidental, but socially structured; within the institutional life of nursing homes are embedded impersonal ways of daily operation, with staff members being socialized according to various professional norms that are barriers to even a semblance of autonomy. Often infantilized and cast in passive roles, nursing home residents are afforded few opportunities to enter into meaningful decisions in their period of heroic helplessness.

in brief, the central, troublesome, ethical dynamic in caring for the elderly. The traditional practice of medicine and nursing does not follow a cooperative, collaborative model; instead, it follows a parentalistic approach, treating the elderly recipient of care as a passive object rather than a partner in a joint endeavor, and certainly not as the principal controller of his or her own treatment. Furthermore, the health care provider is likely to proceed from a value system "fixed on objective scientific criteria," considered without sufficient communication with the patient. As Smith explains, these factors play a pivotal role in understanding the legal and ethical problems associated with guardianship and competency determinations.

This attitudinal dynamic reaches even more broadly. It has influence well beyond the determination of legal competency for those elders arguably incapable of making their own health care decisions. It operates—on a subtler yet no less powerful level—in the process of health care decisionmaking even when the patient's decisional capacity appears to be legally adequate. Consequently, Professor Smith wisely has placed the discussion of parentalism and autonomy in the chapter immediately preceding the chapter discussing "Informed or Negotiated Consent."

He presents the common-law principles of informed consent in a clear, straightforward manner. However, the exposition becomes muddier when he moves beyond exposition of conventional informed consent doctrine to set forth his conception of "negotiated consent." Ostensibly, negotiated consent seeks to strike a balance between the need for patient autonomy and self-determination on the one hand and the long-term care institution's practical need to control the patient's environment on the other. The ideal sketched sounds attractive and unassailable: that "many legitimate views must be considered regarding the patient, family and institution." This will, according to Smith, result in "a shared or dispersed authority for decision-making in which no single party has the exclusive power of decision and a non-algorithmic process whereby negotiation is not governed by strict deductive rules."

Many readers may be quite surprised to read that legal authority for health care decisionmaking has left the patient's hands or that, if

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6 Of late, some have taken to using the gender-neutral term "parentalistic" in lieu of "paternalistic" to acknowledge that this is not merely a male behavior.
7 What constitutes "adequate" decisional capacity is, of course, a matter of some controversy. As Smith points out, "no established criterion exists for determining the level of competency that meets the requirements of informed consent, and there have yet to be developed objective, valid, and reliable methods for assessing a patient's decisional capacity." G. Smith, supra note 5, at 47. On this point generally, see Rosoff & Gottlieb, Preserving Personal Autonomy for the Elderly: Competency, Guardianship, and Alzheimer's Disease, 8 J. Legal Med. 1 (1987).
8 G. Smith, supra note 5, at 48.
the patient is incapable of making those decisions, such authority does not pass to an appropriate member of the patient’s family. This disempowerment of the patient and his or her family is insinuated earlier in Smith’s explanation, but the full impact of this underlying supposition does not really manifest until one reaches the discussion of negotiated consent. In this regard, most of the communication processes that one would expect as a matter of meeting traditional standards of informed consent are transformed into new techniques for achieving negotiated consent. On the other hand, Professor Smith’s pragmatic construct of traditional informed consent probably comports with the day-to-day reality of how such decisions are made in all too many long-term care institutions. Sadly, his proposed model of negotiated consent remains an outlier on the bell curve, not the mean.

Chapters 7 and 8 treat some of the hottest topics in bioethics—advance directives, the right to refuse treatment, and do-not-resuscitate orders (styled as passive euthanasia). Smith returns to stride here, blending plain English and medical and legal terminology in a way that is easy to follow. His summaries of the legislative and case law activity in these areas would give an experienced health attorney good background material for a lecture or speech to a general audience. Further, Smith includes financial and demographic data that enrich the perspective. In the subsequent chapter, he attempts to describe the labyrinthine field of efforts by physicians, medical ethicists, government officials, religious institutions, and legislators to develop guidelines for when technology should be restrained and made to yield to the natural process of dying. The populations covered include not only the geriatric but also disabled newborns and incompetent adults, regardless of age. Professor Smith wisely does not style his presentation as the definitive or ultimate statement on this emotional and rapidly changing area; instead, he offers the chapter more as a catalyst for further discussion and exploration.

In the remaining chapters of Legal and Healthcare Ethics for the Elderly, Smith turns his attention once again to the macro level. Long-term care institutions and the regulatory processes for assuring quality

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9 Additionally, some serious questions could be raised about whether such a transfer has ever occurred under the law. In my view, because legal authority for health care decisionmaking rests with the patient or the patient’s legal representative, not with the institution or physician, acquiescence to parentalism is inappropriate. Implying that parentalism and provider control over decisionmaking constitute the legal norm is troubling even when this is coupled with suggestions for overturning that common practice.

10 Readers might be assisted by additional references to some of the current video and printed materials that illustrate how medical treatment decisions are negotiated in practice. See, e.g., Center for Health Law & Justice, University of New Mexico, The Case of Rachell Ward (videotape, 1993) (and its accompanying instructional manual).
of care receive particular emphasis. Chapter 9, "The Nursing Home Industry," attempts to describe skilled nursing facilities, intermediate care facilities, and board and care homes as they exist in contemporary America. Topics covered include quality of care and the role of market forces, the impact of case management, costs, placement, transfer and discharge, hospice care, and ethics. Again, because Smith quite rightly focuses on access, his failure even to footnote the glaring and continuing problem of racism in the nursing home industry constitutes a significant omission."

Chapter 10, "Ethical and Legal Rights of Long-Term Care Residents," opens with the hortatory language of the "bill of rights" included in the federal Omnibus Budget Reconciliation Act of 1987 (OBRA '87). Chief among those rights, a resident in a long-term care facility has the right to free choice regarding medical treatment, the right to be free from restraints, and the right to privacy and confidentiality. The chapter then moves fairly quickly into an extended discussion of elder abuse in its many forms, including physical and chemical restraints. Special consideration is given to the role of the ombudsman as patient advocate to prevent abuse and to implement the bill of rights. Smith closes with a call for a more active criminal justice system as the most effective means of controlling elder abuse; he favors having prosecutors, rather than victims, file charges, to curtail threats by perpetrators.

For more grounding on patients' rights fundamentals, the reader might wish to consider some other works that offer deeper insights into the human and operational dynamics of negotiating daily care in a nursing home. The formal structures of ombudsmen, prosecutors, and regulators actually operate on the fringes of the picture. These persons typically become involved only after a catastrophe has occurred. The figures occupying the center remain the facility staff, the physician, the patient, and the patient's family. First and foremost, these persons need assistance in understanding how to communicate effectively with each other in order to prevent inappropriate restraints and other undue limits on the autonomy of an incapacitated elder. Consider, for example, the thoughtful analysis by Charles W. Lidz, Lynn Fischer, and Robert M. Arnold, The Erosion of Autonomy in Long-Term Care. This 1992 book presents an empirical study of the ways in which nursing home regulations and health care professionals

either have limited or expanded autonomous choices by residents, both
directly and indirectly. The reader also might find it helpful to examine
the problem more broadly through the perspective of the chronic illness
experience generally.\footnote{See S. Thorne, Negotiating Health Care: The Social Context of Chronic Illness (1993).}

At 20 pages, Chapter 11, on “Death with Dignity,” is the longest
chapter in Legal and Healthcare Ethics for the Elderly. Smith’s approach
is consistent with earlier chapters on autonomy and self-determination.
Clearly, the author views Chapter 11 as the capstone to the previous
discussions of how “modern technological processes” can rob a person
of the right to “a good death.” As he frames the issue, medical science
can make life “almost endless.”\footnote{G. Smith, supra note 5, at 107.}
Therefore, it may be necessary literally
to perform “euthanasia” to ensure a person the “good death” that
the procedure denotes. Smith identifies and manages to clarify some
blurred definitions differentiating passive from active euthanasia. Much
of the chapter is devoted to reframing issues and terminology to bring
some modicum of order to the chaos of moral, religious, and legal
distinctions extant.

The remainder of the chapter sets the discussion in a legislative
and case law framework that compares the United States with other
countries, particularly the Netherlands. Smith proposes, ultimately, that
the entire debate be reframed to eliminate discussion of red-flag issues
such as “rational assisted suicide.” Instead, the major focus would be
whether the person exercised “his or her powers of rational thinking”
and whether this decision resulted from “enlightened self-determina-
tion or autonomy.”\footnote{Id. at 127.} Within the logic of Smith’s presentation, this
approach is coherent. However, I suspect that some readers—spoiling
for a more vigorous fight—will find the resolution unsatisfying. Once
more, I would caution that the book did not intend within the confines
of its tidy length to provide a multi-level exploration of metaphysics,
law, and medicine. The references suggested in the endnotes offer
interested readers a good beginning for further analysis and discussion.

Professor Smith closes Legal and Healthcare Ethics for the Elderly
with a look at the future of long-term care. He casts a wary, nervous
eye, as any prudent attorney must, given the unsettled nature of the
field. Nevertheless, the themes that appeared consistently throughout
the book reinforce his summation:

[S]ociety must examine its attitude regarding the intrinsic worth of the
institutionalized elderly and strive to respect their rights, to treat them
CONCLUSION

*Legal and Healthcare Ethics for the Elderly* offers a valuable first look into a complex, often overwhelming, field. As our country moves closer (asymptotically, one hopes) to the long-anticipated collapse of the Medicare trust funds, more people must be prepared to engage in meaningful inquiry and debate as to how we should finance and allocate services to the aged. Anyone seeking to become knowledgeable about these critical issues would do well to start with George Smith’s useful and welcome new addition to the literature.

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13 Id. at 131.