

REVIEW

Judging Medicine

By George J. Annas
Clifton, N.J.: Humana Press, 1988
438 pp.
Price US \$24.95, ISBN: 0-89603-132-2.

*Bernard M. Dickens*¹

GEORGE ANNAS is the Utley Professor of Health Law at Boston University School of Medicine and Chief of the Health Law Section, Boston University School of Public Health, a leading medico-legal analyst in the United States, and the most prominent commentator on contemporary medico-legal developments. He writes frequently for the *American Journal of Public Health* and the *Journal of the American Medical Association*, and since 1976 has written on medical law and ethics for the *Hastings Center Report*, the leading bioethical publication in the United States and the Common law world. He has co-edited, with Dr. Aubrey Milunsky, three volumes of *Genetics and the Law*, and has written *The Rights of Patients* (2nd ed. 1989), *The Rights of Doctors, Nurses and Allied Health Professionals* (1981), both American Civil Liberties Union handbooks, and, with Dr. Sherman Elias, *Reproductive Genetics and the Law* (1987). He is also a frequent contributor to and Editor-in-Chief Emeritus of *Law, Medicine and Health Care*, a journal of the American Society of Law and Medicine, on whose Board of Directors he has held numerous posts.

His book *Judging Medicine* brings together many of his contributions to the *Hastings Center Report*, sometimes in an expanded form, and other related writing to produce a wide-ranging, cohesive and freshly challenging book in which Canadian no less than U.S. students of medical law will find great instruction and stimulation. George Annas is sure-footed as he steps nimbly from one contentious issue in medical law to another, always knowing the path he determines to follow and the values to be protected and prioritized. Not everyone will agree that the values so promoted should necessarily prevail over competing

1 Ph.d., LL.D., Professor of Law, Faculty of Law, Faculty of Medicine and Centre for Bioethics, University of Toronto, President (1990-91), American Society of Law and Medicine.

values, but readers will be left in no doubt as to the values for which George Annas stands. His writing is clear, frequently aggressive, and occasionally acid in condemnation of practices that are considered to violate both ethical and legal principles. Dedicated to the Rule of Law, the author does not hesitate to criticise decisions of trial and appellate courts whose judgments he finds inadequate or defective to defend central values of legal and/or ethical rules.

Such rules cut across the medical themes according to which the book's materials are organized. The nine themes are respectively Patients' Rights; Conception; Pregnancy and Birth; Reproductive Liberty; Medical Practice; The Mentally Retarded and Mentally Ill Patient; Death, Dying and Refusing Medical Treatment; Government Regulation; and Transplants and Implants. The time span covered by the book has been one of change and paradox. The opening essay, "The Hospital: A Human Rights Wasteland", first appeared in *The Civil Liberties Review* of Fall, 1974, and the later pieces have been published since then, particularly in the last dozen years.

They have been years of considerable change in such areas as resort to human reproductive technology and refusal of terminal care, where reforms have tended to favour patients' autonomy, and in such areas as treatment and non-treatment of physically and mentally handicapped patients, where health professionals have come under increasing regulation by law. A paradox of the Reagan years in the U.S., initiated by the politically popular call for deregulation and "getting government off the backs of the people" was the ever tighter governmental regulation of medicine, partly to control expenditures and partly to serve ideological goals, particularly the anti-abortion agenda. At the same time litigation, much of it resulting from libertarian challenges to paternalistic and conservative medicine, subjected health professionals to expanding bodies of judicially-set legal rules, such as in the areas of patients' informed choice regarding proposed treatment, and potential victims' rights to be warned of dangers presented by patients.

Canadian lawyers will find familiar George Annas' early deploring of medical patients' lack of rights to exercise the self-control inside hospital that they enjoyed outside hospital as mature adults. The needs of administrative efficiency, convenience and economy that restrict the behaviour of hospital and other health institutional patients, and the parentalistic activities and presumptions of health care professionals, have been no less common in Canada than south of the border. The U.S. position may be distinguishable to some extent, however, by hospitals' incentives to determine whether the costs of the services prospective patients' care may require can be met from personal, insurance or governmental payments. Canada has been spared the phe-

nomenon of indigent patients being transported from for-profit hospitals to municipal hospitals where the costs of their care will be met from public funds, and of patients being discharged prematurely because their health insurance cover has expired.

The cause of patients' rights, particularly to self-determination in the choice whether or not to receive medical treatment, has motivated much of George Annas' work in medical law. The success of his philosophy in the key cases of *Cobbs v. Grant*² and *Canterbury v. Spence*³ has been echoed in Canada in the Supreme Court's decision in *Reibl v. Hughes*⁴. It is recognized in such cases that the choice whether or not to have medical treatment is considered in law not to be a medical decision, but a personal decision unique to the person to whom the treatment is offered. The decision has to be medically informed, and informing the patient to an adequate standard discharges the duty of care either assumed in contract law or imposed by the courts in negligence law, but it remains a personal decision of the patient.

Much of the writing of George Annas is at the intersection of medical law and ethics, often described, though with an unduly limiting implication, as bioethics. Medical lawyers are frequently brought into discussion of ethical matters because legal analysis often discloses legitimate discretions. That is, medical science shows what can be done, and the law what may be done and occasionally what must be done, but ethics addresses the question of what should be done. Particularly when a legitimate discretion exists to act or not, a decision on what to do cannot be made solely by reference to the law.

Annas introduces the dilemma through a Federal Circuit trial court decision in Arkansas the appeal of which became moot. The setting was a hospital that refused a nurse specially trained and qualified in obstetrics and gynecology the right to work in a delivery room. This would clearly have been unlawful, as a violation of anti-discrimination laws, had the decision been based on the ground that the nurse was black, or held non-mainstream religious convictions. The actual reason in this case, which the hospital clearly explained, was that the nurse was not acceptable in the delivery room because the nurse was male. He filed a discrimination charge with the U.S. Equal Employment Opportunity Commission, which issued a letter saying the nurse had a right to sue because sex was not a *bona fide* occupational qualification for a delivery room nurse. At trial under the 1964 Civil Rights Act, the federal district court judge upheld the hospital's policy, which was based on the consideration, not supported by submitted evi-

2 (1972), 502 P. (2d) 1

3 (1972), 464 F. (2d) 772

4 (1980), 114 D.L.R. (3d) 1

dence, that male nurses offend female patients' concerns for privacy and personal dignity in childbirth.

Annas condemns the judge's decision as overtly sexist in its underlying finding that male nurses attending female patients present hospitals with problems that hospitals are entitled to escape by the challenged policy, which the judge held defensible as a business necessity. Annas finds the decision to show gender bias, in that it rests on a preconceived notion of sex roles. No objection was found to male doctors attending female patients at delivery, nor to female nurses attending male patients, including for tasks where exposure of the genitals occurred. The judge accepted, however, that the form of nursing in issue is not appropriate for a male to undertake, and tacitly accepted that, in anticipation of delivery, a patient's objection to the role of a member of the nursing staff because he is male would have to be respected; a patient's objection to a nurse on grounds of race or colour, for instance, would presumably be distinguishable. The judge observed that, in labour and delivery, "services of all male nurses are inappropriate ... it is their very sex itself which makes all male nurses unacceptable".

Before the appeal could be heard, the nurse left his job, and the appeals court found the issue moot and declined to rule on it. Annas challenges us, however, in Canada no less than in the U.S., to ponder whether the court's decision was or was not right, not so much in terms of legal precedents but in terms of the justice or ethics of the decision. Annas makes no issue of the fact that the federal district court judge in the case was a woman. Once we have made our decision, we may apply it to the case of the woman jail guard denied experience and prospects of career promotion when male convicts objected to her supervision when they took showers or used exposed latrines.

Annas has been particularly exercised by legal and ethical issues raised by the new reproductive technologies, and addresses them in a series of related chapters. The redefinition of parenthood they require raises legal questions concerning the relationship between genetic parenthood and social or psychological parenthood. Legal paternity has been determined in law as much by historic presumptions in favour of women's husbands and against the bastardization of children as by scientific evidence of biological origins. An opponent of rewarded gestational arrangements, popularly though misguidedly called surrogate motherhood agreements, Annas wrote his pieces before the much-discussed New Jersey *Baby M* case. He therefore does not follow in this book the development from such arrangements of "partial surrogacy", in which a woman is inseminated to bear a child that is genetically hers, to "full" or "total" surrogacy agreements in which fertilization is achieved *in vitro* by use of the commissioning couple's ova and sperm,

and the resultant pre-embryo is transferred to and gestated by a woman who bears no genetic relationship to the child. Annas insists that a woman who gestates and delivers a child must in law be irrefutably presumed to be its mother. It would be interesting to hear his response to a recent incident when an Ontario judge issued a declaration that, when twin children conceived *in vitro* from an infertile couple's ova and sperm were born to a gestating mother and voluntarily surrendered by her to the couple, the children's birth registration was to show the genetic and social mother as their mother, as opposed to the gestating mother, who co-applied for the declaration.

Many of the pieces in this collection disclose a strong pro-patient orientation that, in so-called maternal-fetal conflicts, appears as a feminist orientation. While aware of the implications for fetuses of women's consumption of alcohol and drugs in pregnancy, for instance, Annas responds that "Attempts to define fetal neglect, and to set up a prenatal police force to protect fetuses from their mothers, are steps backward in terms of both women's rights and fetal protection... The best chance the state has to protect fetuses is through actions to enhance the status of all women through fostering reasonable pay for the work they do, and equal employment opportunities, and providing a reasonable social safety net, quality prenatal services, day care programs, etc." (p. 96). His convictions that the state should take initiatives and devote resources to ameliorate social disadvantage and inequality may make Annas sound like a voice in the political wilderness, particularly in contemporary America and under the U.S. Supreme Court of the post-Reagan era.

Espousing the ideology of the political Left, Annas opposes judicial and legislative expressions of the ideology of the Right. Pro-choice on abortion, he deplors attempts to overturn the landmark 1973 U.S. Supreme Court judgment in *Roe v. Wade*⁵, but is more guarded regarding judicial and legislative denials of the so-called "wrongful life" action. Abortion opponents resist acceptance of a child's power to succeed in litigation against those such as genetic counsellors or clinical laboratories due to whose professional negligence parents were uninformed of the prospects of conceiving or continuing pregnancy of a severely handicapped fetus, which was subsequently born, because of the motivation the claim may create to advise and perform abortions. Annas concurs in the view, however, that "wrongful life" is a misnomer for the child's claim, which is not that its life *per se* is wrong, but that a child's suffering from a predictable and avoidable deformity should be compensated when its parents were denied relevant choice through a

5 (1973), 93 S.Ct. 705

professional's failure to behave according to the standards of professional practice. The concept that health professionals owe duties of care not only to their patients but also to their patients' as yet unconceived children, accepted in such cases as *Renslow v. Mennonite Hospital*⁶ in the Illinois Court of Appeal, is not necessarily acceptable to Canadian courts.

Canadian physicians frequently follow their U.S. colleagues' conviction that there is a medical malpractice liability "crisis", and that it has been caused by self-seeking and unconscionable lawyers. Annas shares a scepticism about whether there truly is such a crisis that would be appropriate in Canada. He believes that there is, or has been, a "crisis" in the availability of malpractice insurance coverage, but attributes that to the way in which the insurance industry does its work rather than to the way in which physicians or lawyers do theirs. The Canadian context is quite different, however, from that of the U.S., since few Canadian lawyers take such cases on a contingent fee basis, and Canadian courts, unlike those in the U.S., will usually order unsuccessful plaintiffs to pay successful defendants' legal costs. Patients can sue more easily in the U.S. where, on failing in their legal complaints, they pay neither their own lawyers' fees nor their opponents' legal expenses. Further, the professional self-defence organization of doctors, the Canadian Medical Protective Association, ensures that Canadian doctors face no problems in gaining financial protection against suit.

George Annas has contributed much to the medico-legal literature on how treatment decisions are made regarding those who are unable to express their own preferences, and are perhaps unable to formulate ideas and preferences. The temporarily incompetent, those formerly competent who never again will be, and the mentally retarded who have never been competent, are not necessarily governed by the same legal principles, and Annas reviews the differences among them. His writing anticipated and perhaps contributed to judicial findings that priority should be given to the wishes of patients, even when they oppose health professionals' perceptions of the patients' best interests. Patients' wishes prevail even when they are no longer able to state them, provided that they have been adequately evidenced during competency. Annas anticipated and would endorse the Ontario Court of Appeal decision in *Malette v. Shulman*⁷, upholding damages for assault for a Jehovah's Witness patient who was given a blood transfusion when taken to hospital unconscious following an accident. Even if the transfusion may have saved her life, it should not have been administered once it was apparent that the patient carried a card refusing blood.

6 (1976), 351 N.E. 860

7 (1990), 67 D.L.R. (4d) 321

What evidence is adequate for withholding treatment that it is advisable for a patient to have for survival, health and comfort is a matter of standards set in practice by courts. Advance directives given by patients, or specific instructions passed on under enduring powers of attorney, may be expected to be effective. If evidence is absent, however, patients' wishes cannot be given effect. The role of the family is to give such evidence, if it exists, and not itself to make an independent decision to be applied as if it were the patient's choice. When a personally-oriented decision cannot be made, an impersonal decision must be made based on the patient's best interests, which family members can help to identify. Annas devotes several chapters to critical issues regarding medical treatment of mentally incompetent persons, and considers several well-known cases that have been the focus of attention in Canada as well as the U.S., including the *Quinlan*, *Saikewicz* and *Bouvia* cases.

A Canadian case, *Attorney-General of B.C. and Astaforoff*⁸, is relevant to the consideration Annas gives to prisoners who engage in hunger strikes. *Astaforoff* involved a Doukhobor prisoner who refused to eat. In litigation on the incident, it was held that there was no duty to force-feed her, but an inference of the decision was that a power existed to feed her in order to save her life. This was done once, but on her reconviction and reimprisonment followed by a renewed hunger-strike, she was not force-fed while conscious, and was unable to be saved from death when she became unconscious. Annas considers three cases involving prisoner hunger-strikers and concludes that "we restrict the rights of prisoners in many ways. Force feeding them, rather than permitting them to starve themselves to death, is probably one of the most benign" (p. 362).

As chairman of the Massachusetts Department of Public Health Task Force on Organ Transplantation, which reported in 1984, George Annas brings special authority to consideration of how scarce health care resources, including transplantable human organs, are fairly allocated among different potential recipients. Different allocation approaches are compared and contrasted, including the market approach, which is rejected, the lottery approach, which may compromise achieving the best possible outcome, the customary approach, claimed to apply medical or clinical criteria but which often includes significant non-medical factors, and a committee-selection process, which can lead to vaguely explained decisions based on individual judgments that may allow agreed outcomes but for diametrically opposed reasons. Canada too faces questions of whether, for instance, transplantable organs or

access to machines should go first to the sickest, those with most promise of recovery, the most socially "valuable" patients, those with most dependents or most needful dependents, or, for instance, be given on a top-of-the-waiting list (or first-come, first-served) basis. The latter may give physicians and patients an incentive to register on the waiting list as quickly as possible, and not seek alternative, perhaps less drastic and less costly treatment options first.

Exploration of the problem illustrates the value to be derived from reading this collection of the writings of George Annas. The studies are brief, easy to understand, and plumb profound depths in medical and public health law, and health policy. Some studies are slightly dated, and none is directed to Canada, but almost every chapter casts some light on a contemporary problem that must be addressed and resolved in Canada. Not all of the solutions Annas favours are necessarily appropriate for Canada, but the purpose of the book is more to identify key questions and indicate approaches rather than to give right answers. It discharges this function admirably.