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# OLD LAWYERS, BLUE EYES, AND THE MEDICALIZATION OF AGING

Michael J. Myers\*

## INTRODUCTION

*“Life is endless. We are all in the very middle of it. We alone are responsible. There is no way out except through it.”<sup>1</sup>*

Chronologically,<sup>2</sup> at age seventy-three, I am past the middle of this incarnation, nudging into its fourth quartile, a placement producing increased interaction with older lawyers and discussions regarding PSA testing, cholesterol levels, the ingestion of statin drugs, bypass surgery, and replacement parts for shoulders, hips and knees. These interactions substantiate my long-held and admittedly biased perspective that serves as the central thesis of this paper: that ours is a weakened generation, suffering from what the late social critic Ivan Illich characterized as *the medicalization of life*<sup>3</sup> and now, as suggested

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1. AJAHN SUMANO BHIKKHU & EMILHY POPP, MEETING THE MONKEY HALFWAY 7 (Samuel Weiser, Inc. 2000).

2. Chronological aging is most frequently used to measure a person’s age. It is simple and straightforward, calculated by days, months and years. There is also “biological aging,” “psychological aging,” and “social aging.”

3. IVAN ILLICH, MEDICAL NEMESIS: THE EXPROPRIATION OF HEALTH 39 (Random House, Inc. 1975).

herein, *the medicalization of aging*.<sup>4</sup> This condition is rooted in what Illich contends is this generation's refusal to "suffer our reality," reminding us that "[o]ld age, for example, which has been variously considered a doubtful privilege or a pitiful ending but never a disease [until its recent placement] under doctor's orders."<sup>5</sup> Old age is now an established disease, and arguably a contagious one.<sup>6</sup> Its treatment is enormously profitable, holding out the "magical thinking" of a cure for "the countless midlife and older people who squander incalculable money, time and energy on products and services promising that the disease of aging can be slowed, stopped, or reversed."<sup>7</sup> We are reminded of earlier searches for slowing or stopping the disease:

Ancient Chinese prevented ejaculation to allow semen to remain as a rejuvenant in the body. Bacon, a 13<sup>th</sup> century English monk, fashioned compounds of arsenic, gold, mercury and sulfur into an 'elixir of immortality.' In the early 1500s, Ponce de Leon devoted the prime of his youth to exploring the New World for what natives assured him was the Fountain of Youth. French neurologist Brown-Sequard sought to avoid aging contagion by injecting himself with semen, blood and water extracted from guinea pig and dog testicles in 1889. In 1925, Russian physician Voronoff grafted monkey testicles onto elderly men to cure old age.<sup>8</sup>

Seniors – Medicare and Medicaid cards in hand – now

4. I have been treated by a physician on only one occasion over the past forty-nine years (when I placed my foot into the blade of a lawnmower). My last physical exam occurred in 1980 as a precondition to obtaining the COO position at Mayo-St. Mary's Hospital, Rochester. At age sixty-eight I gave up racquetball and jogging in favor of a daily early-morning Zen workout incorporating yoga with Chi Kung and moved substantially toward a plant-based diet. Hence, I have successfully avoided what I have characterized as "the medicalization of aging." I embrace the notion that the body is more of a "garden" than a "machine."

5. See ILLICH, *supra* note 3, at 81.

6. Carol A. Gosselink, "Don't Touch That! You Might Catch Something": *Contagious Aging*, 5 No. 1 VERB 2 (2007), available at <http://verb.lib.lehigh.edu/index.php/verb/article/view/70/61>.

7. *Id.* at 12.

8. *Id.*

migrate by the hundreds of thousands to healthcare systems to have coronary arteries reamed, discs removed, spines realigned, electronic devices implanted, and to obtain tackle boxes filled with drugs intended to lower cholesterol, raise or lower blood sugars, reduce pain, increase sexual stamina and dull fear-of-death anxiety. It is a continuation of the “magic thinking” of previous societies in the denial of the one certainty of life – death. They believe modern medicine will give them ten to twenty-five years more earthly life than was given to their ancestors. But – screening for the market exaggeration of modern medicine and extended life spans in the twenty-first century – the reality is that a person age fifty today can expect to live only one year longer than a fifty-year-old in the year 1900.<sup>9</sup>

Another reality is that people harbor an irrational fear of death and will respond to the illusions of medical effectiveness as fostered by the medical-industrial complex, choosing, as observed by MIT Professor Dan Ariely, in his book, *Predictably Irrational: The Hidden Forces That Shape Our Decisions*,<sup>10</sup> costly, invasive and risk-laden surgery and drugs over less-expensive, safer and more effective naturopathic treatments.<sup>11</sup> Ariely has discovered, in twenty years of researching behavioral economics, that people tend to behave irrationally in a predictable fashion.<sup>12</sup> He tells us why cautious people make poor decisions about sex when aroused,<sup>13</sup> why patients get

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9. RON KENNEDY, *THE THINKING PERSON'S GUIDE TO PERFECT HEALTH: THE TRANSFORMATION OF MEDICINE* 90 (Context Publications 1996). Kennedy writes,

The increase in overall life expectancy is due primarily to the conquest of transmittable diseases in children. Modern medicine has met with abject failure regarding the diseases that occur in adulthood. As for prevention of illness, modern medicine has abandoned that field to others—except for the perpetuation of the simple-minded idea that cholesterol is somehow responsible for vascular disease.

*Id.*

10. See generally DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (Harper Collins Publishers 2008).

11. See *id.* at 173-76.

12. See *id.* at xi.

13. *Id.* at 96-97.

greater relief from a more expensive drug over its cheaper counterpart,<sup>14</sup> and why honest people may steal office supplies or communal food, but not money.<sup>15</sup> But in the business of selling hospital and physician services (a business in which I have had considerable experience,)<sup>16</sup> Ariely's premise concerning the value of preventive medicine<sup>17</sup> collides with what Illich and I consider to be the "illusion of medical effectiveness."<sup>18</sup> We see a collective and cultural naiveté within contemporary America wherein the masses willingly present their bodies for examination and treatment by physicians and hospitals incentivized by for-profit, fee-for-service rewards.<sup>19</sup> Ariely—a beneficiary of modern medicine's life-preserving technology after suffering severe burns<sup>20</sup>—equates contemporary healthcare systems with "health," or at least a resource capable of enhancing health.<sup>21</sup>

#### WHERE THE MONEY IS

The medicalization of aging finds its financial rewards in the top ten chronic health conditions for the elderly, in rank order: arthritis, hypertension, heart disease, hearing loss, orthopedic impairment, cataracts, chronic sinusitis, cerebrovascular disease,

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14. *Id.* at 181-84.

15. *Id.* at 217-30.

16. The author is a former CEO of Mayo-St. Mary's Hospital, Rochester, Minnesota; CEO of Fairview Medical Center, Minneapolis; and COO of Mercy Medical Center, Sioux City, Iowa.

17. ARIELY, *supra* note 10, at 117-21.

18. See ILLICH, *supra* note 3, at 15. "The study of the evolution of disease patterns provides evidence that during the last century doctors have affected epidemics no more profoundly than did priests during earlier times. Epidemics came and went, imprecated by both but touched by neither." *Id.*

19. The author teaches healthcare law and reviews model contracts between healthcare systems and physicians, noting that such contracts invariably contain "production" clauses, tying volume to physician income.

20. See ARIELY, *supra* note 10, at xii-xiv (describing an explosion that left 70% of his eighteen-year-old body with third-degree burns and a subsequent three-year hospitalization. Accordingly, he deserves to embrace a favorable view of hospitals and their technology).

21. *See id.*

diabetes, and visual impairment.<sup>22</sup> Chronic health conditions, that in earlier times were accepted as part of growing old, are now markers of the disease of aging.<sup>23</sup> Arthritis is the most familiar chronic disease of later life, afflicting nearly half of all persons over sixty-five.<sup>24</sup> Osteoporosis is a condition marked by the deterioration or disappearance of bone tissue that invites its victims to undergo various shoulder, hip, and knee surgeries.<sup>25</sup> Parkinson's disease is "a degenerative neurological disorder characterized by a loss of control over bodily movement. It afflicts about a half million people in the United States."<sup>26</sup> Cardiovascular disease is the leading cause of death for people over age sixty-five.<sup>27</sup> Forty-three percent die from heart disease and another 9% die from strokes.<sup>28</sup>

### MEDICINE'S "SUBJECTIVE FACTORS"

I use my experience of employing doctors, negotiating contracts with health insurers and implementing five-, ten-, and fifteen-year hospital business plans to convey to law students the financial underpinnings of the health care. During the first week of healthcare law we learn from Alain Enthoven that:

Most people think of the need for medical care as an insurable event, very similar to insured hurricane or automobile collision damage. You are either sick or well. If you are sick, you go to the doctor. The doctor diagnoses your illness, applies the standard treatment, and sends the bill for his or her 'usual, customary, and reasonable fee,' all or most of which is paid by your insurance company. Our entire Blue Cross-Blue Shield and commercial insurance system was built on that view of the problem. Medicare and Medicaid . . . were

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22. HARRY R. MOODY, *AGING: CONCEPTS AND CONTROVERSIES* 7 (Pine Forge Press 3d ed. 2000).

23. *See, e.g.*, Gosselink, *supra* note 6.

24. *See* MOODY, *supra* note 22, at 7.

25. *Id.* at 8.

26. *Id.*

27. *Id.* at 9.

28. *Id.*

built on the same model. The consequence is a financial disaster. Our society has accepted the casualty insurance model for health care financing, only to find that it contributes to excessive and excessively costly care.<sup>29</sup>

Then my students review the astonishing perspectives on clinical decision-making and notes on variations in medical practice authored by John Wennberg, M.D., whose research identified "subjective factors" that determine whether a child's tonsils are taken out, a woman's uterus extracted, or a man's prostate is removed.<sup>30</sup> Wennberg disclosed the following: (a) in one area of Vermont, only 8% of children had undergone tonsillectomies, as compared to 70% of the children in another area of the same state; (b) in two areas of Maine, the percentages of women aged seventy who had had hysterectomies were 20% and 70% respectively; (c) the overall rate of surgeries in these examples varies more than two-fold between areas<sup>31</sup> and is more a function of the number of hospital personnel and hospital beds than of the population's health status.<sup>32</sup>

Wennberg explained that whereas most people view the medical care they receive as being necessary and provided by doctors who adhere to scientific norms, that in fact when the contents of the medical "black box" are examined, the choice of service is strongly influenced by "subjective factors."<sup>33</sup> The dominant subjective factor I experienced as a hospital CEO was the capacity of a diagnostic, therapeutic or surgical service to produce "margins," known as "profits" in the business sector. Our specialty physicians shared in the net margins resulting from imaging, laboratory and other departmental services. Those production-based incentives assured us that the power of

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29. ALAIN C. ENTHOVEN, *HEALTH PLAN: THE ONLY PRACTICAL SOLUTION TO THE SOARING COST OF MEDICAL CARE 1* (Addison-Wesley Publ'g Co. 1981).

30. John E. Wennberg, *Dealing with Medical Practice Variations: A Proposal for Action*, *HEALTH AFF.*, Summer 1984, at 7-9, available at <http://content.healthaffairs.org/cgi/reprint/3/2/6.pdf>.

31. *Id.* at 9.

32. *See id.* at 16-17.

33. *Id.* at 7.

the physician's pen would be used to meet budget targets. We were rarely disappointed.

### **SIXTY PERCENT OF ALL SURGERIES MAY BE UNNECESSARY<sup>34</sup>**

We hospital administrators liked Wennberg's research. It demonstrated the elasticity of clinical judgment and the capacity for the aggressive sales of tests, surgeries and therapies. Also, we knew that charges of overtreatment could be repudiated by equating testing, imaging, surgeries, and intensive therapies with life-saving and life-extending quality of care. Criticism from consumer advocates overwhelmingly arose from the denial of care, not from concerns about excessive care.

### **WHAT IS "HEALTH"?**

The word "health" and its definition are relevant to my thesis concerning the medicalization of aging and its political-legal transmission. During the early 1970s, while serving as general counsel for five Mercy hospitals in Iowa and Indiana, I was involved in the formation of the Mercy Healthcare System, a twenty-one-hospital system headquartered in Farmington Hills, Michigan. It had been previously known as a "hospital system." Our consulting group advised that the term "hospital" was inherently negative, equated with disease and sickness, a place where patients experienced near-death or death itself. They advised of a new trend: "hospital systems" were being renamed "healthcare systems," a description promoted by the American Hospital Association and well received by industry marketers. We became a "healthcare" rather than a "hospital" system. The trend grew and currently "the roughly 3,900 nonfederal, short-term acute care general hospitals in the United States"<sup>35</sup> are

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34. See TERRY A. RONDBERG, *UNDER THE INFLUENCE OF MODERN MEDICINE* 131 (1998).

35. *Nonprofit, For-Profit, and Government Hospitals: Uncompensated Care and Other Community Benefits: Hearing Before the H. Comm. on Ways and Means, 109th Cong.* 4 (2005) (statement of David M. Walker, Comptroller General of the United States).



owned by or affiliated with a "healthcare system."

Now for Illich's definition of health:

"Health," after all, is simply an everyday word that is used to designate the intensity with which individuals cope with their internal states and their environmental conditions. In *Homo sapiens*, "healthy" is an adjective that qualifies ethical and political actions. In part at least, the health of a population depends on the way in which political actions condition the milieu and create those circumstances that favor self-reliance, autonomy, and dignity for all, particularly the weaker. In consequence, health levels will be at their optimum when the environment brings out autonomous personal, responsible coping ability. Health levels can only decline when survival comes to depend beyond a certain point on the heteronomous (other directed) regulation of the organism's homeostasis. Beyond a critical level of intensity, institutional health care – no matter if it takes the form of cure, prevention, or environmental engineering – is equivalent to systematic health denial.<sup>36</sup>

Illich—described as "one of the contemporary world's greatest thinkers, social philosophers, and yes . . . even a noteworthy cultural anarchist"—died in 2002 at age seventy-six.<sup>37</sup> He observed that "[t]he compulsion to do good is an innate American trait."<sup>38</sup> This produces vulnerability to the politics of both the left and the right. Liberals seek to emulate the European model of universal healthcare. Conservatives are reluctant to curb the present system's capacity for profit. The prospect of inviting our weakened, also known as "wimp," generation to the third-party table-of-plenty will assure

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36. See ILLICH, *supra* note 3, at 7.

37. Christopher T. Carey, *Ivan Illich Died for Your Sins!*, MAYDAY CAFE (Apr. 2004), <http://webs.lanset.com/aeolusaero/Articles/Mayday%20Cafe--Apr%2004--Ivan%20Illich.htm>. Andrew Todd and Franco La Cecla described Illich as "an archeologist of ideas, rather than an ideologue." Andrew Todd & Franco La Cecla, *Obituary: Ivan Illich: A Polymath and Polemicist, His Greatest Contribution Was as an Archaeologist of Ideas, Rather than an Ideologue*, THE GUARDIAN at 22 (LONDON), Dec. 9, 2002.

38. See IVAN ILLICH, *CELEBRATION OF AWARENESS: A CALL FOR INSTITUTIONAL REVOLUTION* 19 (Doubleday, 1970).

enhanced prosperity for present and future purveyors of “healthcare.” Hence, we have the current political gridlock in healthcare reform. I have suggested to students—and I assume Ariely would agree—there will be no meaningful healthcare reform until the system’s perverse financial incentives are recognized and dampened.

### HEALTH CARE REFORM: MY VERSION

My “five pillars” of healthcare reform would include:

(1) *Restraining Physician Production.* A model of fixed, competitively earned compensation would replace fee-for-service, volume-based payments to hospitals, physicians, and allied caregivers. Increasingly, physicians practice under employment contracts with healthcare systems, and these contracts generally contain a “production” clause that permits a staff physician to increase her base salary of, say, \$300,000, by \$50,000 or \$100,000, pursuant to a formula integrating both institutional payments and professional fees.<sup>39</sup> Such productivity clauses are inherently troublesome, posing ethical and financial conflicts of interest. They should be restrained.

(2) *Rewarding the Healthy.* People would be rewarded for staying healthy (code for staying away from doctors and hospitals). Under my model, a person who remained healthy and did not invade the corpus of the health plan treasury for a year would receive a check in a predetermined amount – e.g., \$1,000 to \$1,500, ideally delivered during the first week of the Christmas shopping season.

(3) *Independent Commission Oversight.* A blue-ribbon commission, functioning independent of Congress or state regulatory bodies, would be established for the purpose of

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39. As General Counsel for the Mercy Health Care System and CEO of Fairview Riverside Medical Center, I was involved in generating physician contracts containing production incentives, both as a device to increase treatment protocols and in response to physician objections to fixed salaries. Mayo remains unique in paying its physicians an agreed-upon annual salary independent of output.

setting fees and approving insurance rates and eligibility standards. Healthcare systems would be prohibited from implementing their own insurance companies under the guise of "health plans," thereby removing the blatant conflict of interest whereby hospitals and physicians determine how much they will pay themselves.

(4) *Public Education on Iatrogenesis.* The commission would implement a national program of public education concerning the limitations and risks associated with hospital and clinic care, addressing an indefensible C-section rate,<sup>40</sup> the estimated 90,000-plus deaths that occur from hospital-borne infections,<sup>41</sup> the

40. Two Sioux Falls, South Dakota, hospitals reported their 2008 C-section rates: 38% at Sanford USD Medical Center, and 31% at Avera McKennan Hospital. Janna Farley, *After a C-section*, ARGUS LEADER, June 29, 2009. Compare these rates to a World Health Organization position that "no region in the world is justified in having a cesarean rate greater than 10 to 15 percent." Cesarean Fact Sheet, <http://www.childbirth.org/section/CSFact.html> (last visited Oct. 25, 2009). "A cesarean section poses documented medical risks to the mother's health, including infections, hemorrhage, transfusion, injury to other organs, anesthesia complications, psychological complications, and a maternal mortality two to four times greater than that for a vaginal birth." *Id.*

41. Responsible numbers are elusive, but the scope of the death rate from hospital borne infections can be found in website discussions such as: "Why is it not big news that hospital born [sic] infections now kill an est. 90,000 per year? This is more than die from HIV and cancer together per year [and] . . . twice as many as were killed in Vietnam over a ten year period using airplanes, tanks, ammo, man power, land mines, grenades, warships, guns and rifles." UK Coalition, <http://www.ukcoalition.org/HIV-Infection/3731.htm> (last visited Oct. 25, 2009). And the rebuttal reads:

Your outrage is misplaced. It isn't as if hospital staff go around pouring bacterial slurries on people and making them ill. No. The simple act of caring for patients can lead to transmission of illnesses. . . . I deal with hospital outbreaks sometimes in my job. Things like Norovirus (viral gastroenteritis) spread like wildfire because they are very contagious, especially among people in confined spaces. The best you can do is damage control.

*Id.* Ben Lynch writes, "Yep, doctors and hospitals rank #3 for the leading cause of death in the USA." Ben Lynch, *Pennsylvania Hospitals Disclose Hospital Borne Infections Leading to Death*, EZINE ARTICLES, Oct. 15, 2005, <http://ezinearticles.com/?Pennsylvania-Hospitals-Disclose-Hospital-Borne-Infections-Leading-to-Death&id=83181>. And on the positive side, the Mayo Clinic Florida "has decided to push the envelope, and tackle the five major types of infections with the ambitious goal of eliminating them in a slim 18-month window." Kimberly Morrison, *Mayo Clinic Pushes to Wipe Out Hospital-Borne Infections*, JACKSONVILLE BUS. J. (Apr. 10, 2009), <http://www.bizjournals.com/jacksonville/stories/2009/04/13/story5.html>.

overuse of antibiotics,<sup>42</sup> another 100,000 hospital deaths that occur from tortious conduct,<sup>43</sup> and what Kennedy describes as the “simple-minded idea that cholesterol is somehow responsible for vascular disease.”<sup>44</sup> The coupled message: “Hospitals are scary places, and you will receive a check if you avoid them.”

(5) *Expanded Allied Scope-of-Practice Laws.* And finally, we should loosen the AMA’s grip on scope-of-practice laws. Scope-of-practice boundaries should be expanded for allied healthcare personnel, particularly nurse practitioners, physician assistants, naturopaths, and pharmacists.

The above proposals would be delivered within the context of Illich’s rhetoric concerning the state of our “cultural iatrogenesis” and the dark side of the system’s capacity to injure and kill.<sup>45</sup> Admittedly, if my “reward-for-staying healthy” proposal was adopted, some old men would die holding an Orvis catalogue turned to a page advertising \$1,000 to \$15,000 canoes. Liberals would be outraged. Surgeons would be deprived of surgical fees. Such reforms will not be adopted by a Congress dependent upon monies from the medical establishment, not as long as the U.S. Supreme Court equates money with free speech.<sup>46</sup>

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42. Centers for Disease Control and Prevention: Your Online Source for Credible Health Information, *Get Smart: Know When Antibiotics Work*, <http://www.cdc.gov/getsmart/campaign-materials/about-campaign.html> (last visited Nov. 13, 2009).

43. See Cathleen F. Crowley & Eric Nalder, *Within Health Care Hides Massive, Avoidable Death Toll*, DEAD BY MISTAKE, Aug. 10, 2009, <http://www.chron.com/dispatch/story.mpl/deadbymistake/6555095.html>.

44. See KENNEDY, *supra* note 9, at 90.

45. See ILLICH, *supra* note 3, at 14-15.

After a century of pursuit of medical utopia, and contrary to current conventional wisdom, medical services have not been important in producing the changes in life expectancy that have occurred. A vast amount of contemporary clinical care is incidental to the curing of disease, but the damage done by medicine to the health of individuals and populations is very significant. These facts are obvious, well documented, and well repressed.

*Id.*

46. *Buckley v. Valeo*, 424 U.S. 1 (1976) (ruling that limiting political

Now, tying together the anxiety of aging, money, free speech, a weakened generation captured in Illich's "cultural iatrogenesis"<sup>47</sup> and functioning within Ariely's four corners of predictable irrationality,<sup>48</sup> where do we find evidence for my "medicalization of aging" thesis? It is, in part, to be found in the behavior of aging lawyers—both in what they say and what they do.

## DEATH-ANXIETY AND THE ANNUAL PHYSICAL

I presume that lawyers, as a cohort, fear death as much as non-lawyers, perhaps more in view of their relatively high rate of divorce and alcoholism.<sup>49</sup> To what extent, we might ask, does anxiety concerning death contribute to an older person's use of and reliance upon the medical-industrial complex? Was Ernest Becker correct in his 1973 book *The Denial of Death* that no function of society is more crucial than the strengthening of individual defenses against death anxiety?<sup>50</sup> Is this what is behind Medicare's urging and willingness to pay the cost of certain preventive services?<sup>51</sup> And to what extent does aging-

contributions limits free speech). This holding prompted blogger Paul Siegel to observe that "Conservatives love the current system for a simple reason: These are the guys with the money . . . The role of money in politics has gotten so bad, that Democrats, who are supposed to represent the little guy, the one without money, are getting money from big donors, as well." Paul Siegel, *Money = Free Speech: Invitation to Corruption*, WATCHBLOG: POL. NEWS, OPINION & COMMENT, Jul. 7, 2006, <http://www.watchblog.com/democrats/archives/003937.html>.

47. See ILLICH, *supra* note 3.

48. See generally ARIELY, *supra* note 10 (exploring how irrational and illogical forces often affect our decision-making).

49. Daniel Rein, *How Lawyers Make for Good Alcoholics*, ASSOCIATED CONTENT, Jan. 12, 2007, [http://www.associatedcontent.com/article/115257/how\\_lawyers\\_make\\_for\\_good\\_alcoholics.html?cat=7](http://www.associatedcontent.com/article/115257/how_lawyers_make_for_good_alcoholics.html?cat=7) ("Dentists may have the highest rate of suicide . . . but attorneys have the most alcoholics. . .")

50. See generally, ERNEST BECKER, *THE DENIAL OF DEATH* (The Free Press 1973) (contending that death is people's most profound source of concern and that this anxiety is so intense that it generates many if not all of the specific fears and phobias people experience in everyday life). Becker's analysis of society convinced him that many beliefs and practices are in the service of death denial. *Id.*

51. Medicare Preventive Services include reviews of an individual's medical and social history, potential for depression and other mood disorders, and functional ability and level of safety; they also provide a physical examination and end-of-life planning. Brochure on Medicare Preventive Services Expanded Benefits,

related anxiety contribute to Illich's "medicine as an epidemic"<sup>52</sup> and the excesses described by Shannon Brownlee in her book *Overtreated: Why Too Much Medicine Is Making Us Sicker and Poorer?*<sup>53</sup> Brownlee prompts us to ask why "we've decided to put up with an unfair, dysfunctional, and spectacularly expensive system."<sup>54</sup> She suggests it is because we fear universal care will result in a rationing of the stuff sold by doctors, hospitals, and pharmacies,<sup>55</sup> stuff I do not buy. Accordingly, I find the notion of healthcare rationing—based upon cultural iatrogenesis rather than economics—to be individually beneficial. I stop short of Illich's sweeping rejection of technical care.<sup>56</sup> How do we obtain the benefits of one-third of the system without having to purchase and endure the other two-thirds?

Airely considers the avoidance of annual physical examinations to be a form of procrastination and thus an irrational act.<sup>57</sup> Illich, the contrarian, viewed all physician visits to be grounded on the illusion of medical effectiveness.<sup>58</sup> Thus we have a brilliant behavioral economist and a brilliant social critic judging the other's observations to be irrational. Yet, they have a shared view of the hidden forces that cause old lawyers to obtain large amounts of expensive, ineffective, and often harmful services to evade the physical deterioration that accompanies aging.<sup>59</sup> For example, persons over sixty purchased the majority of the 305,000 lower lumbar spinal fusions performed in the United States during 2004, only tiny fractions

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Ctrs. for Medicare & Medicaid Servs. (Jul. 2009), available at [http://www.cms.hhs.gov/MLNProducts/downloads/Expanded\\_Benefits.pdf](http://www.cms.hhs.gov/MLNProducts/downloads/Expanded_Benefits.pdf).

52. See ILLICH, *supra* note 3, at 13.

53. See generally SHANNON BROWNLEE, *OVERTREATED: WHY TOO MUCH MEDICINE IS MAKING US SICKER AND POORER* (Bloomsbury USA 2007).

54. See *id.* at 2.

55. See *id.*

56. See ILLICH, *supra* note 3.

57. See ARIELY, *supra* note 10, at 117 ("Everyone knows that preventive medicine is generally more cost-effective—for both individuals and society—than our current medical approach. Prevention means getting health exams on a regular basis, before problems develop.")

58. See ILLICH, *supra* note 3, at 15-22 ("Doctors' Effectiveness—An Illusion.")

59. See ARIELY, *supra* note 10; ILLICH, *supra* note 3.

of which were surgically remedial.<sup>60</sup> It is not unusual for older lawyers to be heard comparing their cholesterol and PSA scores. I wrote a book entitled *The Mayo Clinic and Blue Eyes*, in which I quote a University of California urologist to have said to his conference colleagues: "You might as well biopsy a man because he has blue eyes [rather than because he has an elevated PSA reading]."<sup>61</sup> He was Thomas Stamey, M.D., professor of urology, who declared, "[t]he era of [the PSA test] is now over in the USA."<sup>62</sup> "Our study raises a very serious question of whether a man should even use the PSA test for prostate screening any more."<sup>63</sup> Stamey tells us that "prostate cancer [is] a disease that all men [get] if they live[] long enough."<sup>64</sup> The Stanford study appears to have had little impact upon the volume and PSA testing.<sup>65</sup> It is a permanent fixture of the male physical examination. Physicians order it, insurers pay for it, and men worry about it. I have never had a PSA test; hence, no worry, no anxiety. It turns out that Professor Stamey was wrong: the PSA era is not over.<sup>66</sup>

The medicalization of life is profitable. The medicalization of aging is even more profitable. The result is a \$2 trillion industry,<sup>67</sup> a byproduct of "medicine as an epidemic" and a

60. See BROWNLEE, *supra* note 53, at 136-37 (telling us that "36 percent of people over sixty had herniated disks, and 80 percent had disk degeneration, bulges and narrow bits" and "[a]bout 85 percent of patients with lower-back pain can't be given a precise diagnosis.") Yet, at my fifty-fifth high school reunion, about a third of the seventy-three-year-olds in attendance had undergone orthopedic repairs of back, knees and hips but were unable to perform a credible "Bunny Hop" dance.

61. See generally MICHAEL J. MYERS, *THE MAYO CLINIC AND BLUE EYES* 234 (Healthcare Marketplace 2004).

62. See generally Thomas A. Stamey, *The Era of Serum Prostate Specific Antigen as a Marker for Biopsy of the Prostate and Detecting Prostate Cancer Is Now Over in the USA*, 94 *BRIT. J. OF UROLOGY INT'L* 963 (2004).

63. See generally Sarah Boseley, *Prostate Test 'All But Useless': Researchers Say Men Put at Risk of Impotence*, *THE GUARDIAN* (LONDON), Sept. 11, 2004, available at [http://www.guardian.co.uk/uk\\_news/story/0,3604,1302055,00.html](http://www.guardian.co.uk/uk_news/story/0,3604,1302055,00.html).

64. *Id.*

65. See, e.g., William J. Catalona & Stacy Loeb, *The PSA Era Is Not Over for Prostate Cancer*, 48 *EUR. UROLOGY* 541 (2005).

66. See *id.*

67. See generally REGINA HERZLINGER, *WHO KILLED HEALTH CARE?: AMERICA'S \$2 TRILLION MEDICAL PROBLEM — AND THE CONSUMER-DRIVEN CURE* (2007).

market-hyped healthcare system producing clinical damage that outweighs its potential benefits. Its victims—in the context of older males—are lured into the system through a legal-political transmission enhanced by aging-related anxiety. It may be best for old lawyers to heed the advice offered by B.K.S. Iyengar in his book *Light on Life: The Yoga Journey to Wholeness, Inner Peace, and Ultimate Freedom*.<sup>68</sup> When asked whether a person will live longer if she or he adheres to his yoga breathing techniques, Iyengar responded, “Why worry about it? Death is certain. Let it come when it comes.”<sup>69</sup>

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68. See generally B.K.S. IYENGAR, *LIGHT ON LIFE: THE YOGA JOURNEY TO WHOLENESS, INNER PEACE, AND ULTIMATE FREEDOM* (Rodale Inc. 2005).

69. *Id.* at 104.



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