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Am I My Parents' Keeper? An Essay on Justice Between the Young and the Old

By Norman Daniels.* *New York: Oxford Univ. Press. 1988. Pp. vii, 194.*

I. The Need to Care for America's Aging Population Will Increase the Demand on Already Scarce Resources

America is aging. In March of 1990, the Department of the Treasury submitted to the President and to the Congress a report entitled Financing Health and Long-Term Care (the Report).[1] According to the Report, the "[n]eeds for long-term care are expected to grow in the future due to longer life expectancies [and the] aging of the population generally . . . ."[2] In support of this statement, the Report states that 21.7% of America's population will be sixty-five years old and older (elderly) by the year 2040—just fifty years hence.[3] This is almost a two-fold increase over 1980's elderly population percentage of 11.3.[4] This increase is partially due to "demographic changes such as the aging of the post-World War II baby boom generation and the decline in the birth rate."[5]

Another reason for the increase, however, "is directly re-

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* Professor, Tufts University.

1. The Dep't of the Treasury, Financing Health and Long-Term Care (1990) [hereinafter Financing Health and Long-Term Care].

2. *Id.* at 1.

3. *Id.* at 5. *See also* Panel on Statistics for an Aging Population, Comm'n on Nat'l Statistics, Comm'n on Behavioral and Social Sciences and Educ. & Nat'l Research Council, The Aging Population in the Twenty-First Century: Statistics for Health Policy 1 (D. Gilford ed. 1988) [hereinafter Statistics] (citation omitted):

> In the coming decade, the nation's decision makers will continue to be challenged by changing demands for social and health services due to the anticipated rapid rate of growth of the elderly (65 years or older) and especially the oldest-old (85 years or older) populations. In the 12 years until the year 2000, it is anticipated that the very old (80 years or older) U.S. population will be the largest single federal entitlement group, consuming $82.8 billion (1984 dollars) in benefits. The growth of these populations will be even more rapid soon after the turn of the century, as the post World War II baby-boom cohorts become elderly.

4. *See* Financing Health and Long-Term Care, *supra* note 1, at 5.

5. *Id.*

lated to the longer life spans of individuals."[6] For example, the life expectancy of males sixty-five years of age has increased from 11.9 years in 1935 to 14.9 years in 1987, while the life expectancy of females sixty-five years of age has increased from 13.2 years to 18.8 years over this fifty-two year period.[7] This trend is expected to continue.[8]

The Report concludes that the increase in America's elderly population "may lead to a significant increase in the demand for long-term care,"[9] and that "[f]inancing of [this demand] must come from one of the following sources: the income and wealth of the elderly and their families, time contributed by members of their families and communities, private long-term care insurance, Federal and state tax subsidies, or other Federal, state, and local programs."[10]

Norman Daniels' book *Am I My Parents' Keeper?*[11] is similar to the Report submitted to the President and to the Congress in two respects: both recognize the increasing demand for scarce resources created by an aging America, and both identify potential sources to satisfy this demand. Unlike the Report, however, Professor Daniels not only focuses on the increasing needs of the elderly and the sources to satisfy those needs, but also compares the elderly's needs with the needs of other age groups (e.g., children and young families[12]) competing for the same scarce resources and basic social goods.[13] Professor Daniels also considers the burden such needs place on the age group which is currently contributing to the pool of basic social goods (the working class[14]).

Ultimately, Professor Daniels suggests that each age group,

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6. *Id.*

7. *Id.* at 12.

8. *Id.* at 11.

9. *Id.* at 7.

10. *Id.*

11. N. DANIELS, AM I MY PARENTS' KEEPER? AN ESSAY ON JUSTICE BETWEEN THE YOUNG AND THE OLD (1988).

12. *Id.* at 4-7.

13. "Basic social goods" include income support (e.g., Social Security), health care (e.g., Medicaid and Medicare), and other types of benefits and services necessary to provide each individual with his or her normal life expectancy and a desirable quality of life. *See id.* at ix, 58-59, 68-76.

14. *Id.* The "working class" has also been referred to as the "Sandwich Generation," because its members are financially sandwiched between providing for their children and providing for their parents. *See, e.g.*, Goldstein, *Economic Squeeze Darkens Boomers' View of Future*, The Washington Times, June 14, 1990, at C.1; Stern, *Baby Boomers Face Triple Financial Squeeze*, The Reuter Business Report, June 13, 1990.

whether young or old, whether resource provider or resource user, can be treated equally over its lifespan.[15] Professor Daniels christens his suggestion "The Prudential Lifespan Account."

II. The Prudential Lifespan Account

In order to understand the rationale and justifications for the Prudential Lifespan Account, Professor Daniels encourages the reader to acknowledge one fact of life: we all age. Therefore, although we may currently be part of the working class, which is providing basic social goods, in the future we will be elderly and receive such goods. It follows, then, that "[i]f we treat the young one way and the old another, then over time, each person is treated both ways, [and the] advantages (or disadvantages) of *consistent* differential treatment by age will equalize over time."[16]

The Prudential Lifespan Account can be thought of as an individual's fair share of all available basic social goods, and can be illustrated as follows. Assume, for example, that each individual's fair share of all available basic social goods is valued at $100,000. This $100,000 "account" must cover all of an individual's needs not covered by her own resources or those shared with her by her family and friends. The account is available to educate the individual from pre-school and kindergarten through high school, college and post-graduate school. It must provide, as is often necessary, food and shelter for the individual and her children. And, more the focus of Professor Daniels' book, it must cover the individual's health care and other living costs in her elder years.

Professor Daniels recognizes that if an individual's Prudential Lifespan Account is made immediately available, that individual, because of human nature, will probably spend it in a way that will provide immediate benefits.[17] Unfortunately, this will leave too little of the account to meet the individual's future needs.[18] For example, a high school graduate, if given the choice, might choose to receive $40,000 of her account now to cover tuition and living expenses during college. Such a use of her ac-

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15. N. Daniels, *supra* note 11, at 41.
16. *Id.* (emphasis in original).
17. *Id.* at 55.
18. *Id.*

count might leave an insufficient balance to provide health care for her in her elder years.

To alleviate this problem, Professor Daniels suggests that "prudent planners" or "prudent deliberators" predetermine each individual's allocation.[19] Professor Daniels also suggests that "[t]hese planners must make their choices . . . from behind a veil of ignorance that keeps them from knowing their age or their conception of what is good in life."[20] They must base their choices only on an "index of primary social goods."[21]

Professor Daniels, in the context of health care,[22] suggests that the prudent planners should allocate to health care providers those resources that a given individual would allocate to himself if unconditionally prudent. The planners' goal is to provide to all individuals an equal and normal opportunity over their lifespan,[23] with an eye toward maximizing each individual's opportunities given his specific skills and talents.[24] Professor Daniels is quick to point out that "equality of opportunity does not require opportunity to be equal for all persons. It requires only that it be equal for persons with similar skills and talents."[25]

With this goal in mind, and in the context of allocating scarce resources to health care institutions, Professor Daniels criticizes the current allocation of resources to prolong for a few days an elderly patient's life.[26] Professor Daniels states, "prudent deliberators might well reduce expenditures on medical resources which have little impact on protecting [the] normal opportunity range (for example, lavish rescue attempts to extend the lives of the terminally ill . . .)."[27] Professor Daniels suggests instead that prudent deliberators should favor allocations to

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19. *Id.* at 55-65.

20. *Id.* at 64-65.

21. *Id.* Professor Daniels realizes that "[t]his point is overstated as it stands." *Id* at 64 n.8.

22. *Am I My Parents' Keeper?* discusses two primary areas of social welfare: health care and income support. Because Professor Daniels illustrates the Prudential Lifespan Account by focusing on the health care area, this book review focuses on the health care area also.

23. In essence, an "equal and normal opportunity" is achieved when an individual lives to his or her normal life expectancy and has enjoyed a desirable quality of life. N. DANIELS, *supra* note 11, at 68-76.

24. *Id.* at 69-70, 73-74.

25. *Id.* at 70.

26. *See id.* at 79, 109.

27. *Id.* at 108-09.

long-term care providers because such care better achieves the planners' goal of providing to all individuals an equal and normal opportunity over their lifespan.[28]

III. Making the Difficult Choice: Rationing Scarce Health Care Resources by Age

Professor Daniels hesitantly suggests that rationing scarce health care resources by age might be justified under certain conditions. As support for his suggestion, Professor Daniels refers to a similar practice in the British National Health Service (BNHS). Professor Daniels notes, for example, that hemodialysis is rationed by age in the BNHS, with few people beyond the fifty-five to sixty-five age bracket being given dialysis.[29]

As difficult as it may seem from a moral perspective—denying available treatment to a patient merely because she is old may seem intuitively immoral—age rationing, under the Prudential Lifespan Account, may be necessary. The prudent planners' goal is to provide to all individuals an equal and normal opportunity over the lifespan, *given the scarcity of health care resources*. The emphasized language inherently means that a choice *must* be made—not every individual is entitled to all known medical treatment because the cost of such treatment simply is not within the resources available under the Prudential Lifespan Account.

Because a choice must be made, and because the prudent planners' goal is to provide individuals with their equal and normal opportunity, the planners might choose to allocate more resources to younger individuals, which will better achieve this goal than allocating resources to the elderly. For example, assume the prudent planners have $60,000 to allocate to health-care providing institutions. This amount represents the total amount of resources available to two individuals. The first individual is a fifty-five year old man with a normal life expectancy of twenty more years. The other individual is a seventy-four year old man with a normal life expectancy of one more year. The prudent planners' goal is to allocate the available resources in a way that will enable the younger man to live twenty more years—thus providing him with his "normal" opportunity. Similarly, the planners' goal is to allocate the available resources in a

28. *Id.*
29. *Id.* at 83-84.

way that will enable the older man to live one more year—thus providing him with his "normal" opportunity.

Now assume the younger man needs an operation that costs $60,000. Without the operation, the younger man will die in two years. With the operation, he will live his full life expectancy. Likewise, the seventy-four year old man needs an operation costing $60,000, which will prolong his life one year.

Obviously, the planners do not have enough resources to provide both men with the needed operation; they must make a choice. Allowing the younger man to have the operation will extend his life twenty years. Allowing the older man to have the operation will extend his life only one year. In addition, the older man has already lived nineteen years longer than the younger man.

In this situation, the prudent planners, realizing that their allocation decision will effect their own lives as they pass through their fifties and sixties and into their seventies, will probably choose to allocate the resources to the younger man. Such allocation is not necessarily based on the younger man's age now, but rather on the balance of the younger man's life that he is expected to live.

The seventy-four year old may feel cheated by such allocation because the planners have failed to afford him his normal life expectancy of seventy-five years. But, under the Prudential Lifespan Account, he was once a fifty-five year old who, because the prudent planners have placed more value on living from fifty-five to seventy-five than seventy-four to seventy-five and have allocated scarce resources accordingly, would have received the life-extending operation at that time had he needed it. Thus, although age rationing seems unfair to the older man, the Prudential Lifespan Account has treated both men equally when considered over their entire lifespan.

Notwithstanding the logic of this example, Professor Daniels recognizes that in the United States, "[t]he dominant view reflects the principle that health status, not age, is the morally relevant basis for distributing health-care resources."[30] However, because under the Prudential Lifespan Account age rationing treats all individuals equally over their lifespan, Professor Daniels considers age rationing necessary and acceptable in certain situations due to the scarcity of health care resources.

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30. *Id.* at 98.

IV. Long-Term Care: An Efficient Way to Provide Individuals with Their Normal Opportunity

Long-term care, both formal (provided by health professionals[31]) and informal (provided by family, friends, communities, congregations, corporations, etc.[32]) appears to be one type of care to which scarce health care resources can be allocated in a way that will efficiently provide individuals with their normal opportunity. Professor Daniels defines long-term care in much the same way that the Treasury Department did:

> [Long-term care] covers the support of individuals with chronic physical or mental disabilities that make it difficult for them to care for themselves over an extended period of time. Long-term care often involves custodial skills that many adults are able to provide, such as bathing, cooking, and shopping, rather than medical skills.[33]

Professor Daniels identifies two central problems in America's current long-term-care system:

> First, there is confusion about the moral importance of long-term-care services, that is, about the relative importance of long-term-care services and medical services. Second, there is controversy about how to mesh public obligations to provide long-term care with the belief that families are responsible for caring for their elders.[34]

A. *Long-Term Care is Not Only Morally Important, it is Crucial to the Prudential Lifespan Account*

Under the Prudential Lifespan Account, the moral importance of medical services must be assessed by the extent to which they help individuals achieve their normal opportunity.[35] An individual has been afforded her "normal opportunity" when she has reached her normal life expectancy and has enjoyed a reasonable quality of life. Under the Prudential Lifespan Account, then, long-term care appears to be morally important be-

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31. D. Haber, Health Care for an Aging Society 73 (1989).

32. *See id.* at 45, 57.

33. *See* Financing Health and Long-Term Care, *supra* note 1, at 1; *see also* N. Daniels, *supra* note 11, at 103.

34. N. Daniels, *supra* note 11, at 105.

35. *Id.* at 106.

cause it not only helps individuals reach their normal life expectancy, it also helps individuals enjoy a reasonable quality of life.

1. Long-term care helps individuals reach their normal life expectancy

It might be argued that long-term care, because it is not medical care in the strictest sense, does not help individuals reach their normal life expectancy. This argument fails to recognize, however, that certain long-term care, e.g., informal long-term care provided by a loving family, friends, visiting nurses, etc., provides what is often the only "medical treatment" to which an elderly individual responds. A brief digression, in the form of a personal narrative,[36] is both timely and illustrative.

In August of 1988, just as my then-expecting wife and I were preparing to leave Arizona to go to law school, my grandmother was diagnosed as having cancer. She was then eighty-two years old, and lived with her husband of fifty-eight years in the beautiful mountains of northern Arizona.

The doctors, as they often do, gave her between six months and one year to live. They considered chemo-therapy and radiation unwise alternatives due to my grandmother's advanced age. The prescription: those drugs necessary to keep my grandmother comfortable, and lots of tender loving care (TLC).

By Thanksgiving, partially due to the cold weather in the mountains, my grandmother's health had deteriorated significantly. At that time my mother took my grandmother, her mother, into her home to care for her. Just as my wife and I cared for our new baby, my mother cared for her mother who was bedridden by this time. She bathed her, fed her and entertained her. It was a daily task that gave my mother almost no free time. After a while, my mother arranged for visiting nurses to come to her home to help care for my grandmother and provide necessary medical care. These nurses were wonderful.

When my wife and I and our four month old daughter arrived home for Christmas, my grandmother had not been awake for three days. My grandfather, who had been sitting by his dear wife's side since leaving the mountains, cried. This was the first time I ever saw my grandfather cry. Although he and my grand-

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36. For a recent article on narratives and their impact on law reform, see Weisbrod, *Divorce Stories: Readings, Comments and Questions on Law and Narrative*, 1991 B.Y.U. L. REV. 143.

mother had been together for nearly sixty years, and she had "lived a full life," as some people say, it was nevertheless tearing him apart to watch her die, and think about life without her.

Christmas was joyous, but rather solemn. We included my grandmother, who "woke up" when the family started to arrive for Christmas, in all of the festivities. We all made a special effort to show her our love. We brought her water and Christmas treats—she especially loved the home-made divinity.

Shortly after Christmas, my mother wrote and told us that my grandmother's appetite was coming back. Next, a phone call from my mother brought news that my grandmother was feeling much better and wanted to go to "Mattas," her favorite Mexican food restaurant.

The next thing we heard was that a therapist was coming to my mother's house on a regular basis to teach my grandmother to walk again. She needed to learn to walk again because, according to her, she was preparing to go back to the mountains—she longed for her independence.

My grandmother got her independence. She is back in her mountain home with my grandfather. They just celebrated their sixty-first wedding anniversary on March 20, 1991. The doctors are still scratching their heads. They can find no trace of the cancer. Of course there was medical treatment along the way—drugs, tests, and the like, but my family attributes my grandmother's recovery, which has allowed my grandmother to reach and even surpass her normal life expectancy, to what the Treasury Department and Professor Daniels call long-term care—mixed, of course, with lots of TLC.[37]

2. Long-term care helps individuals enjoy a reasonable quality of life

Long-term care can have a dramatic impact on an individual's opportunity to carry out otherwise reasonable parts of a plan of life.[38] For example, having the nurses visit my grandmother in my mother's home provided my grandmother a certain independence in her living arrangements. It also allowed my grandfather to be with his wife continuously. This alone increased my grandmother's quality of life. Although long-term

37. *See* D. HABER, *supra* note 31, at 45-71 for an excellent summary of the extent to which informal caregiving meets the needs of the frail elderly.

38. N. DANIELS, *supra* note 11, at 106.

care will not always allow total independence, I believe my grandmother's experience justifies the general conclusion that long-term care not only increases the patient's independence during the illness, but significantly increases that patient's chances to be totally independent again. Independence is, of course, essential to a desirable quality of life.

Professor Daniels recognizes that Americans have been too quick to institutionalize their elderly and by so doing have neglected to provide adequate long-term care.[39] He considers this morally indefensible because institutionalization significantly decreases an individual's independence and quality of life.[40] Accordingly, everything the Prudential Lifespan Account is striving to achieve is frustrated by institutionalization, which Professor Daniels believes should be used only as a last resort.[41]

B. *The Family as Long-Term Care Provider: Is There a Filial Obligation?*

Although family members may be the only ones who can provide certain long-term care, Professor Daniels observes that there is no one basis for imposing an obligation on family members to care for their elderly.[42] Those arguing that family members should be obligated to care for their elderly base such an obligation on tradition, the corollary of parental duties to care for children, and law.

1. *Tradition as a basis for obligating family members to care for their elderly parents*

Some people suggest that what children owe their parents today can be extrapolated from traditional practice.[43] Professor Daniels recognizes, however, that such an extrapolation is impossible for two reasons. First, "[t]here is a mismatch between traditional and current needs for care of the elderly," and second, "[t]here is a mismatch between traditional and current possibilities for [providing such] care."[44]

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39. *Id.* at 106-07. *See also* STATISTICS, *supra* note 3, at 148-49. In 1985, $35.2 billion, almost 1 percent of the gross national product, went for nursing home care. In contrast, only $2.3 billion went for home health care, a type of informal long-term care. *Id.*

40. N. DANIELS, *supra* note 11, at 106-07.

41. *Id.* at 107.

42. *Id.* at 28-34.

43. *Id.* at 24.

44. *Id.*

In looking at traditional needs for elderly care, it is necessary to look at some historical data. In 1900, for example, only sixty-three percent of women surviving to childbearing years could expect to reach a sixtieth birthday.[45] Today, eighty-eight percent of such women will celebrate that birthday.[46] Further, the percentage of the population age sixty or over has more than doubled in the last seventy-five years.[47] Finally, in 1900 only four percent of those sixty-five years and over were age eighty-five or older.[48] By 1975, the percentage had doubled, and those over eighty-five make up the fastest growing age group in the country.[49] These statistics show that a child's obligations to care for a frail parent were far less likely to be called upon at the turn of the century, because so few people lived to be the frail elderly.[50]

Changing social patterns also render the traditionalist view inappropriate. For example, families have become more mobile and children living close enough to their parents to provide necessary care is not as common as it was at the turn of the century.[51] In addition, families today have more limited human resources with which to care for elderly parents because fewer adult women are at home.[52] Delayed child bearing and the delayed entry of children into the labor market greatly extend the period during which obligations to children continue and conflict with obligations to parents—as the Baby Boom generation is now coming to understand.[53] In sum, although certain traditions are attractive, they do not form a reasonable basis for imposing on children the obligation to care for elderly parents.[54]

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *See id.*

51. *Id.* at 25.

52. *Id.*

53. *Id.* at 24-25. *See also* Goldstein, *supra* note 14; Stern, *supra* note 14.

54. One Scandinavian tradition which has the effect of law, known as *Flaetfoering*, allows a parent who has divided his property among his children to make a circuit of their households, spending time with each of them in proportion to the share each received. *See* N. DANIELS, *supra* note 11, at 27. Although this tradition is not common in America, it does have a certain appeal.

2. Corollary duty as a basis for obligating family members to care for their elderly parents

That parents are obligated to care for their children does not necessarily mean that children should be obligated to "return the favor" in their parents' elder years. People choose to be parents, while children are not born of their own volition.[55]

Additionally, that parents provide their children with valuable benefits does not mean that the children acquire an obligation to reciprocate. Not every bestowal of a benefit imposes an obligation to reciprocate. A school teacher, for example, bestows benefits on his students every day, but the students acquire no obligation to reciprocate.[56]

Another significant problem with the corollary duty or reciprocal benefit basis for imposing an obligation on children to care for their parents is the measure of the obligation. Reciprocity, by definition, implies that that which is returned be the same as that which is initially given. Does a Rockefeller then owe his parents the same care that a child reared in poverty owes his parents? And what if the child is physically abused in her childhood, does this justify reciprocal treatment of her parents in their elder years?[57]

3. Law as a basis for obligating family members to care for their elderly parents

"Honor thy father and thy mother: that thy days may be long upon the land which the Lord thy God giveth thee."[58] Although Moses' admonition to the Israelites might be interpreted as imposing an obligation upon children to care for their elderly parents, only approximately thirty states have statutorily imposed such an obligation.[59] The Alaska statute is illustrative, and reads,

> *Duty of Parent and child to maintain each other.* Each parent is bound to maintain the parent's children when poor and una-

55. *See id.* at 29-30.

56. *See id.* at 30.

57. *See id.* at 31.

58. Exodus 20:12.

59. *See generally* Bulcroft, Van Leynseele & Borgatta, *Filial Responsibility Laws*, 11 RESEARCH ON AGING 374 (1989).

> ble to work to maintain themselves. Each child is bound to maintain the child's parents in like circumstances.[60]

Even though these statutes are enforceable through civil and/or criminal actions, and generally have been held constitutional,[61] Professor Daniels nevertheless criticizes them because they fail to establish one uniform set of filial obligations.[62]

4. Beneficence as a basis for obligating family members to care for their elderly parents

Professor Daniels, after refuting traditional, corollary duty, and law as bases for imposing an obligation on family members to care for elderly parents, suggests that beneficence may be a basis for recognizing such an obligation. Under this view,

> children have obligations because they are in a unique position to help parents. It is the view someone might express as follows: "It's not that I owe it to Mom for what she's done, but there's no one else she can turn to and it would be wrong to turn my back on her need."[63]

This view appears genuinely reasonable, and is a justifiable basis upon which to expect family members to provide long-term care for their elderly parents.

V. Conclusion

Although *Am I My Parent's Keeper?* is "a philosophical essay rather than a detailed analysis of policy options,"[64] Professor Daniels' Prudential Lifespan Account introduces ways in which we can better care for the elderly by better allocating scarce resources. In allocating scarce resources, we must all remember one fact: we all age. Each of us was once young, and each of us will (hopefully) become old. Therefore, we should not focus on

60. Alaska Stat. § 25.20.030 (1983).

61. *See generally* Bulcroft, Van Leynseele & Borgatta, *supra* note 59, at 387-89.

62. N. Daniels, *supra* note 11, at 35. Professor Daniels attributes the lack of uniformity to the disagreement in moral beliefs for imposing an obligation on children to care for their elderly parents. This disagreement stems in part from some laws basing the obligation on tradition, and others basing it on the corollary duty a child has to its parent. *Id.*

63. *Id.* at 32.

64. *Id.* at vii. *See also* K. Dychtwald, M. Zitter & J. Levison, Implementing Eldercare Services: Strategies That Work (1990) (information helpful to the practical implementation of effective and efficient methods to allocate scarce social welfare resources).

our immediate needs, and demand our share of the available basic social goods based on that need, but rather we should step back and look at our entire lifespan and distinguish our present "needs" from our present "wants."

Professor Daniels suggests that America invest in long-term care for the elderly rather than expend scarce resources on last-minute life-extending measures for the elderly. This suggestion appears to be more palatable than his timid suggestion that we allocate scarce resources based on age.

Professor Daniels' suggestion that beneficence is a basis for obligating family members to provide long-term care to their elderly parents appears valid. Based on personal experience, I know that beneficence allows each of us the greatest chance to achieve a normal life expectancy, while providing independence and a desirable quality of life.

Reviewed by Jay M. Allen