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INTRODUCTION: THE FRAME OF NATURE, GERONTOLOGY, AND LAW*

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The frame set for us by nature is at least as fundamental as other—cultural and social—frameworks considered by legal scholars. “All cultures,” one anthropologist has told us, “constitute so many somewhat distinct answers to essentially the same questions posed by human biology and by the generalities of the human situation.”¹ Or, as another put it, there exist “limits set to culture by physical or organic factors. The so-called ‘cultural constants’ of family, religion, war, communication and the like appear to be biopsychological frames variably filled with cultural content.”² “We may,” some have concluded, “appropriating Marxian terms, call our physical needs a substructure on which a cultural superstructure of need satisfaction is created.”³

In our era “human biology” and “the generalities of the human situation”⁴ no longer pose their questions in quite the same way as they have since the dawn of the species. The Preacher may have told us that

* Introduction to Hasko, Hollock & Young, *Gerontology and the Law: A Selected Bibliography*, 56 S. CAL. L. REV. 289 (1982). An earlier bibliography appeared as Mabarak, Sapienza & Shimane, *Gerontology and Law: A Selected Bibliography*, 73 LAW LIBR. J. 255 (1980), with an introduction, Levine, *Themes and Issues in Gerontology and Law*, 73 LAW LIBR. J. 259 (1980).

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1. Kluckholm, *Universal Categories of Culture*, in ANTHROPOLOGY TODAY 507, 520 (A. Kroeber ed. 1953).

2. Kroeber, *The Concept of Culture in Science*, 3(3) J. OF GEN. EDUC. 182, i87 (1949).

3. 2 W. STARK, THE SOCIAL BOND 194 (1978). “That superstructure can be as different from society to society as the houses which may be built on the same plot of land. . . . Many cultural flowers may grow from one biotic root.” *Id.*

4. See Kluckholm, *supra* note 1, at 520.

"there is nothing new under the sun,"⁵ but the frame of biological and population presuppositions that nature sets for culture and society has altered in our time. Improvements in public health and shifting demographic trends, among other developments,⁶ have changed the questions, by introducing a new theme in our culture—that of the aging of society.

The new theme has a tetrad of manifestations. First, the average person in this country now has a life expectancy at birth much greater than that throughout the history of mankind. Second, the usual period of vigorous health is unprecedentedly long. Third, for the first time, there are large numbers of older persons who have survived the tasks of raising the next generation,⁷ are no longer necessarily devoted to the task of making a living,⁸ and who are still alive and vigorous. Finally, the fraction of society that is old is unprecedentedly large, and so the ratio of those of traditional working age to those who are older is unprecedentedly small.

The tetrad of changes in life and health expectancy and in the proportion and number of the elderly has been accompanied by a vast number of technological, socioeconomic, and cultural changes. Opinions differ as to whether there is a causal connection between the cultural changes and the tetrad of demographic changes.⁹ In any event,

5. *Ecclesiastes* 1:9. "Is there a thing of which it is said, 'See, this is new?' It has been already in the ages before us." *Id.* at 1:10.

6. Other developments in our era have also changed the presuppositions underlying every previous culture and society. *See, e.g.,* BULL. OF THE ATOM. SCIENTISTS, November 1945 to the present.

7. Many women are now confronting what has been called the "empty nest syndrome." *See* Strong, *History of Aging*, 16 *AGING AND THE LAW CURRICULUM MATERIALS* 27-28 (1979); [B]eginning in the 19th Century, a gap between [a woman's] maternal functions and her life began to appear. In 1850, women's mean age of death was 62, two years after her last child married. In 1950, the youngest child was married when its mother was 48, with more than thirty years of life expectancy ahead of her. Never before had a woman had to adapt to such a long period in which she lacked a maternal role.

8. Tibbits, *Preface* to *HANDBOOK OF SOCIAL GERONTOLOGY: SOCIETAL ASPECTS OF AGING* ix-xi (C. Tibbits ed. 1960).

9. Some argue that cultural perceptions of aging and social actions toward the elderly reflect demographic and economic trends—the growing proportion of the elderly in the population and their declining participation in the labor force. Cowgill, *The Aging of Population and Societies*, 415 *ANNALS* 1, 18 (1974). Those trends in turn need not be treated as independent variables, but are arguably more-or-less inevitable aspects of modernization, that is, of such developments as industrialization, urbanization, and mass education. *Id.* at 1; Cowgill & Holmes, *Summary and Conclusions: The Theory in Review*, in *AGING AND MODERNIZATION* 305, 305 (D. Cowgill & L. Holmes eds. 1972). Similarly, some argue that changing retirement practices are a reflection of changes in underlying economic realities. W. GRAEBNER, *A HISTORY OF RETIREMENT: THE MEANING AND FUNCTION OF AN AMERICAN INSTITUTION, 1885-1978*, at 263-70 (1980).

Others, however, question that causal chain and argue instead that "the 'aging problem' is as

the social and economic institutions that have evolved over centuries and millenia were never designed to cope with the contemporary demographic situation. The legal concepts and rules relating to the aged and aging, like their nonlegal counterparts in the received cultural wisdom and familiar patterns of social relationships, must therefore be reexamined.

Some new ideas salient for the law and older persons are now current. They may be direct intellectual responses to the new realities. Alternatively, perhaps the elderly, whose new numbers now render them a politically and culturally more influential group, inspire the production of ideas from which they will benefit.¹⁰

One such idea now abroad is the concept of "age discrimination."¹¹ Some argue, for example, that it is an injustice akin to racial discrimination to force older workers out of their jobs when they, as individuals, are still productive.¹² In the past year, two law review symposia and a treatise were devoted to considering age discrimination.¹³ Age discrimination was also a major theme of the 1981 White House Conference on Aging.¹⁴

much a cultural as a demographic and economic phenomenon." Kolker & Ahmed, *Aging and Society*, in *AGING* 17, 17 (A. Kolker & P. Ahmed eds. 1982). The proponents of this position conclude that the contemporary devaluation of aging was not caused by changing age composition or modernization, but that the chronology shows that cultural transformations occurred first. See D. FISCHER, *GROWING OLD IN AMERICA* 107 n.33 (1977). See generally W. ACHENBAUM, *OLD AGE IN THE NEW LAND* (1978) (discussing cultural developments concerning views on aging). Thus, they believe that responses to aging are primarily shaped by "intellectual expectations," see *id.* at 171, which, likewise, have largely influenced changing retirement practices. See Haber, *Mandatory Retirement in Nineteenth-Century America: The Conceptual Basis for a New Work Cycle*, 12 *J. Soc. Hist.* 77, 78 (1978).

10. For an explication of the sociology of ideas, see P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1967); K. MANNEHEIM, *IDEOLOGY AND UTOPIA* (1962).

11. Levine, "Age Discrimination" and Other Models for Analyzing Age-Work Issues, in *WORK AND RETIREMENT: POLICY ISSUES* 45, 45 (P. Ragan ed. 1980).

12. See, e.g., *THE 1981 WHITE HOUSE CONFERENCE ON AGING*, 2 *FINAL REPORT* 47 (1982) (address by Congressman Claude Pepper) [hereinafter cited as *WHITE HOUSE CONFERENCE*].

13. The symposia are: *Symposium: Age Discrimination: National Conference on Constitutional and Legal Issues Relating to Age Discrimination and the Age Discrimination Act*, 57 *CHI-KENT L. REV.* 805 (1981), and *Age Discrimination: A Symposium*, 32 *HASTINGS L.J.* 1093 (1981). The treatise is I H. EGLIT, *AGE DISCRIMINATION LAW* (1982); parts of other treatises which deal with age discrimination are 4 A. LARSON & L. LARSON, *EMPLOYMENT DISCRIMINATION* apps. 36-39 (1982), and B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 393-440 (1976).

14. UNITED STATES SENATE SPECIAL COMM. ON AGING, *SURVEY OF DELEGATES TO THE 1981 WHITE HOUSE CONFERENCE ON AGING: A PRELIMINARY REPORT* 5 (1982). By contrast, age discrimination was not as important a theme in the 1982 World Assembly on Aging. See *World Assembly on Aging*, *FACTS* 82/4 (June 1982) (U.N. Div. Econ. & Soc. Info.); *Interview with William M. Kerrigan, Secretary-General, WAA*, *WORLD ASSEMBLY ON AGING NEWSLETTER* No. 2 (Spring 1982).

Another line of new thinking concentrates on the Social Security system, and worries that the alteration in the ratio of workers and retirees will bankrupt the system.¹⁵ Thus, the most controversial issue at the White House Conference was how to maintain Social Security benefits and continue to fund the system.¹⁶ Outside the particularities of the Social Security program, others are concerned with society's overall dependency ratio, that is, the ratio between those who are employed and those who are supported.¹⁷ They wonder, among other issues, whether more people will have to work longer, whether there will be more workers, whether the standard of living of workers or of retirees must decrease, whether there will be intergenerational conflict, or whether increases in productivity and decreases in the number of dependent children will compensate for the increased number of retired persons.¹⁸ These questions are examples of the many new puzzles generated for the law by cultural, social, and natural changes related to the aging of society.

I. THE TETRAD OF CHANGES

The tetrad of aging-related changes in the "generalities of the human situation"¹⁹ will now be reviewed in greater detail. First, the changes in individual life and health expectancy are examined. Next, this Article analyzes the pair of changes inherent in the aging of the population.

15. See generally Pitts, *Social Security and Aging Populations*, in *THE ECONOMIC CONSEQUENCES OF SLOWING POPULATION GROWTH* 157 (T. Espenshade & W. Serow eds. 1978) (discussing the impact of an aging population on the Social Security system).

16. Recommendations concerned with maintaining the soundness and benefits of the Social Security system made up four out of the ten White House Conference recommendations most favored by the delegates. 3 WHITE HOUSE CONFERENCE, *supra* note 12, at 10, 15.

17. See generally PRESIDENT'S COMMISSION ON PENSION POLICY, *WORKING PAPERS, DEMOGRAPHIC SHIFTS AND PROJECTIONS: THE IMPLICATIONS FOR PENSION SYSTEMS* (1979) (examination of the implications of demographic trends on the pension structure). The United Nations World Assembly on Aging considered the changing dependency ratio worldwide:

In Western Europe the ratio was 718 dependents in every thousand, consisting of 394 children and 324 in the 60-plus group. By the year 2025 this ratio is expected to reach 809 per thousand, 324 of them in the youthful group and 485 in the over 60's. At that time the figures for Africa are estimated at 688 per thousand, with 576 in the children's group and 112 aged 60 or more.

WORLD ASSEMBLY ON AGING NEWSLETTER NO. 2, at 3 (Spring 1982).

18. See, e.g., Clark & Spengler, *Changing Demography and Dependency Costs: The Implications of Future Dependency Ratios and Their Composition*, in *AGING AND INCOME: PROGRAMS AND PROSPECTS FOR THE ELDERLY* 55 (B. Herzog ed. 1978); Clark, Kreps & Spengler, *Economics of Aging: A Survey*, 16 J. ECON. LITERATURE 919 (1978).

19. See Kluckholm, *supra* note 1, at 520.

A. LIFE AND HEALTH

The old maxim has it that there's nothing certain but death and taxes.²⁰ By stressing the certainty of those two realities, the saying is emblematic of deep concerns. The nature of our bodies sets biological limitations upon us, of which death is the archetype. The nature of organized society sets its own limits upon us, symbolized by the demands of government, its laws and its taxes. This sense of limits is not unlike Freud's, in *Civilization and its Discontents*.²¹ The changing biopsychological frame, however, leads one to rethink the certainty of death and taxes.

Can death be less certain? Shakespeare said, "[t]hou owest God a death."²² The death rate is the same as it always has been: one. But

20. Concerns about death and taxes are old. The maxim itself comes from Ben Franklin, our country's first elder statesman. Letter from Benjamin Franklin to M. LeRoy (Nov. 13, 1789), reprinted in 10 WORKS OF BENJAMIN FRANKLIN 409, 410 (J. Sparks rev. ed. 1840). The concerns seem to be almost species-specific, that is, characteristic of homo sapiens, for as long as they have lived in organized groups.

Complaints about taxes go back as far as we have written records, to the Sumerian Empire, 4500 years ago in the city of Lagash. There, complaints of every kind imaginable were recorded about taxes. S. KRAMER, HISTORY BEGINS AT SUMER 45-50 (1959) (Actually, we do not have the text of the complaints themselves; what we have are records of a new leader boasting that he lowered the high taxes of his predecessor, still a familiar occurrence).

Man's concerns for death can be documented even further back—long before mankind could write. The burials of the cave men show how important it was to them to try to deal with death, even among the Neanderthals and more clearly among the Cro-magnons. For example, archeologists have found the body of a cave woman in Moravia, whose grave was dug in the floor of the hut where she had lived. She died at about 40, a ripe old age for that era. She was buried facing west toward the setting sun, and was covered with bones and with red coloring. Thus, the dead were not separated from the living, and there seems to have been use of ceremony and of the symbol of lifegiving blood. J. HAWKES, THE ATLAS OF EARLY MAN 21-22 (1976). There at the dawn of humanity, people were struggling to come to terms with old age and death.

One can trace the same concerns about death and taxes in one of our most comprehensive sources on what ancient man thought, the Bible. In the First Book of Samuel, we read the prophetic warning that to have a king, that is, an organized government, means to pay high taxes. I *Samuel* 8:11-17. And, in the Psalms we read poetic laments about old age and death, such as, "The years of our life are threescore and ten or perhaps, if we are strong, fourscore, Yet their span is but toil and trouble; they are soon gone, and we fly away." *Psalms* 90:10.

In our modern world, the reality underlying these concerns is not quite the same as it was to our forefathers: neither death nor taxes is quite as certain as Ben Franklin thought. More than humor was captured in the recent April Fool's Day parody of the "Wall Street Journal" which had a front page column headlined, "Avoiding Death and Taxes." See *infra* text accompanying notes 22-57, 104-08.

21. S. FREUD, *Civilization and Its Discontents*, in 21 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (J. Strachey trans. 1961).

22. W. SHAKESPEARE, *Henry IV*, Part I, V, i, 126, in SHAKESPEARE: THE COMPLETE WORKS 647 (1952).

there are now some differences in the way that death confronts the individual.

The tale of Ponce de Leon's search for the Fountain of Youth²³ can serve as an allegory of the attempt to conquer the certainty of death. Within the allegory, one could say that there are three different Fountains of Youth—three different ways in which we are trying to make death somewhat less certain. First, we try to make old age older, that is, to lengthen the maximum lifespan potential.²⁴ Second, we try to find out how more people can survive long enough to reach old age, that is, to lengthen the average life. Third, we try to make old age younger, that is, to prolong youth so that, even if we lived no longer, we could have more years of health and vitality. We are closer to finding two of the Fountains of Youth than the other.

1. *Increased Maximum Life Span*

Many thinkers have speculated about the first Fountain of Youth—increasing the maximum life span. Some surmise that there is no such thing as aging per se, that what we call aging may just be the accumulation of insult and injury to the body. Thus, Condorcet in 1774 said that the day must come when there would be no assignable limit to the period between birth and decay, unless there was some accident.²⁵ Assuming Condorcet's hypothesis, if the aging process could be totally eliminated so that the mean health was, say, that of a thirty year old male, under present environmental hazards the mean lifespan would be about 350 years.²⁶ The maximum lifespan potential would, of course, be much longer.

Some doctors and scientists have such hopes. One work, *The Human Agenda*,²⁷ dreams of what will come from the new genetics, organ transplants, creation of artificial organs, and perhaps life suspension. Its author suggests that we are on the threshold of a new era for

23. See R. BILLINGTON & M. RIDGE, WESTWARD EXPANSION: A HISTORY OF THE AMERICAN FRONTIER 17-18 (3rd ed. 1967).

24. A differentiation is commonly made between mean lifespan and maximum lifespan potential. Cutler, *Life-Span Extension*, in AGING: BIOLOGY AND BEHAVIOR 31, 32 (J. McCaugh & S. Kiesler eds. 1981).

25. "Would it be absurd . . . to suppose that . . . there may come a time when death shall be no more than the result either of extraordinary accidents or of the ever more gradual decay of the vital forces, and that, finally, the average interval elapsing between birth and this decay may itself have no assignable limit?" Condorcet, *Historical Picture of the Progress of the Human Mind*, in GREAT TREASURY OF WESTERN THOUGHT 979 (M. Adler & C. Van Doren eds. 1977).

26. Cutler, *supra* note 24, at 36.

27. R. GORNEY, THE HUMAN AGENDA (1972).

prolongation of lifespans. Another researcher predicts "we're going to be able to push 100 for sure and maybe beyond, within this decade."²⁸

Other researchers, however, believe that the average human lifespan is biologically determined to be about eighty-five years with a statistical spread so that a few live up to age 100 or 115 or so.²⁹ Over the history of the human race, the maximum lifespan potential has thus far remained constant.³⁰ We have not yet progressed toward the first Fountain of Youth.

2. *Increased Average Life*

We have done fairly well in seeking the second Fountain of Youth: more people are living to old age. Alexander the Great died at thirty-three; so did Jesus. Several thousand years ago, the mean lifespan of humans was about twenty or thirty years; a few hundred years ago it was thirty or forty years; now it is seventy or seventy-five years.³¹ In 1776, the percentage of people who lived until their sixties was still only twenty percent. Now, eighty percent of the population does so.³² In this century the average life expectancy has gone from about forty-five years to about seventy-five years—an increase of over fifty percent.³³

There have been a few specific areas of major progress toward increasing the average lifespan this century. The primary factor responsible for this increase has been the elimination of the dreaded plagues. Public health measures—sanitation, public water and sewer facilities,

28. Remarks of Dr. Allan Goldstein, Chairman, Biochemistry Department, George Washington University Medical School, *quoted in Hume, Science Taps Fountain of Aging Mystery*, L.A. Times, July 27, 1982, § I, at 1, col. 3, at 14, col. 1. Similarly, Dr. Robert J. Morin, a U.C.L.A. pathologist and president of the new American Longevity Association says, "[I]t is definitely possible to extend the human life span 20 to 30 years by the end of the century and possibly more in the next century." Sherwood, *Berle's New Act: Longevity Research*, L.A. Times, Sept. 7, 1982, § V, at 1, col. 3, at 2, col. 2. Doctor Edward L. Schneider, associate director of the National Institute of Aging, concludes, "From all the evidence I've seen, we're significantly extending not only the average but the maximum lifespan." NEWSWEEK, Nov. 1, 1982, at 57, col. 1.

29. J. FRIES & L. CRAPO, VITALITY AND AGING: IMPLICATION OF THE RECTANGULAR CURVE 3 (1981).

30. Cutler, *Evolution of Human Longevity*, in AGING, CANCER AND CELL MEMBRANES, 7 ADVANCES IN PATHOBIOLOGY 47 table 4 (C. Borek, C. Fenoglio & D. King eds. 1980).

31. Cutler, *supra* note 24, at 33, 35; Deevey, *The Human Population*, 203 SCI. AM. 195, 199 (1960).

32. Butler, *Overview on Aging: Some Biomedical, Social, and Behavioral Perspectives*, in AGING: SOCIAL CHANGE 1 (S. Kiesler, J. Morgan & V. Oppenheimer eds. 1981).

33. At the turn of the century, life expectancy at birth was 46 years for males and 48 years for females; in 1980 the figures were 70 and 78. 1 WHITE HOUSE CONFERENCE, *supra* note 12, at 8.

pasteurization, inoculation, and vaccination—have worked wonders.³⁴ This century, the death rate from infectious diseases has fallen by ninety percent. Tuberculosis and influenza used to kill more people than cancer and heart disease; now they kill approximately one-twentieth as many.³⁵ Furthermore, women no longer are in extraordinary mortal danger at childbirth, primarily because of antiseptic conditions.³⁶

Moreover, some of the increase in average life has come about because more of the old are living longer. There have been sharp reductions in the death rates of middle-aged and older adults.³⁷ As recently as 1940, only sixty-one percent of Americans who reached age sixty-five could expect to live ten years longer; now it is seventy-three percent.³⁸

For all these reasons, people on the average are living longer today than at any time in the history of the world. Most of the improvement has come about because of fewer deaths in infancy and youth, thereby increasing life expectancy at birth.³⁹ There probably will be further increases in average life expectancy as diet, exercise, and available medical care improve.⁴⁰

3. *Prolongation of Youth*

We are also making progress toward prolonging the period of health, seeking the third Fountain of Youth. We are beginning to understand the biological process through which molecules, individual cells, organ systems, and whole bodies grow older. One resolution of the 1981

34. Havighurst, *Health Problems in Aging*, in AGING, *supra* note 9, at 141. The decline in mortality, and increase in overall population, for the last century and a half is almost entirely due to a decrease in death from infectious disease. T. McKEOWN & C. LOWE, AN INTRODUCTION TO SOCIAL MEDICINE 6 (1966). The rising standard of living has been credited with prime importance; hygienic measures (i.e., public health efforts) have been ranked second; and specific preventive and curative therapy has been said to be, relatively, least in importance. *Id.* at 14.

35. PRESIDENT'S COMMISSION FOR A NATIONAL AGENDA FOR THE EIGHTIES, GOVERNMENT AND THE ADVANCEMENT OF SOCIAL JUSTICE, HEALTH, WELFARE, EDUCATION, AND CIVIL RIGHTS IN THE EIGHTIES 45 (1980). See also Butler, *supra* note 31, at 1 (discussing increase in life expectancy as a result of improvements in medical care).

36. WILLIAM'S OBSTETRICS 4-5, 8-9 (L. Hellman & J. Pritchard 14th ed. 1971).

37. Sheppard, *Preface* to AGING, *supra* note 9, at xv.

38. Fingerhut & Rosenberg, *Mortality Among the Elderly*, in HEALTH: UNITED STATES 22 (1981).

39. See NATIONAL COUNCIL ON AGING, FACT BOOK ON AGING: A PROFILE OF AMERICA'S OLDER POPULATION 104 (1978); Havighurst, *supra* note 34, at 142. As of 1966, one authoritative work stated, "The most striking feature of the trend since 1900 has been the decline in infant mortality . . ." T. McKEOWN & C. LOWE, *supra* note 34, at 13.

40. See 1 WHITE HOUSE CONFERENCE, *supra* note 12, at 8.

White House Conference on Aging called for further research to clarify how the physiological decline that accompanies aging renders biological systems more susceptible to disease.⁴¹ Through such research, we may disentangle the complex factors of the disease-aging relationship.

Furthermore, the new work, *Vitality and Aging*,⁴² suggests hope for a meaningful kind of rejuvenation—so that even though the maximum lifespan is not prolonged, the period of vitality is. Such thinking suggests the possibility that we may go full strength until the end and then just go all at once, with lives like the one horse shay in Oliver Wendell Holmes' poem.⁴³

Normal aging does not typically lead to disability, though there is a gradual decline in function—a lessening of energy, a loss of physical agility, and an increase in susceptibility to chronic illness. Many decrements of aging have been found to occur as the result of illness or disease, rather than of aging per se.⁴⁴ Thus, these decrements are not universal, not inevitable, and not necessarily incurable.

Senility, for example, is not a necessary part of aging. The notion that serious decline in the healthy brain of mammals is the inevitable fate of old age has been challenged by scientists of the government's Gerontology Research Center.⁴⁵ Disease, not aging, defeats the mammalian brain. Robert Butler, longtime head of the National Institute on Aging, believes there is hope for the conquest of senility of the Alzheimer disease type. He believes that within a decade or two "this scourge of humanity that accounts for so much fear about growing old" may come to an end or at least be measurably improved.⁴⁶

The prolongation of health might also be achieved through a decrease in the "rate of aging." The aging rate has remained constant for human beings over the last 40,000 years or so.⁴⁷ If the overall aging rate itself could be decreased, it would not only produce a prolongation

41. 3 WHITE HOUSE CONFERENCE, *supra* note 12, at 198 (Recommendation No. 593).

42. J. FRIES & L. CRAPO, *supra* note 29, at 7. See also Fries, *Aging, Natural Death and the Compression of Morbidity*, 303(3) NEW ENG. J. MED. 130, 133 (1980) (in the future, the end of vigor in adults will occur at a later age).

43. O.W. HOLMES, *The Deacon's Masterpiece: Or The Wonderful "One-Hoss-Shay,"* from THE AUTOCRAT OF THE BREAKFAST-TABLE 252 (1886).

44. Zarit, *Gerontology—Getting Better All the Time*, in READINGS IN AGING AND DEATH: CONTEMPORARY PERSPECTIVES 11 (S. Zarit ed. 1977).

45. NATIONAL INSTITUTE ON AGING, SPECIAL REPORT ON AGING 1981, at 4 (NIH Publication No. 81-2328).

46. *Butler Optimistic About Prospects for Overcoming Senility*, 6(30) OLDER AM. REP. 1, 1-2 (July 30, 1982).

47. Cutler, *supra* note 24, at 36.

of the period of youthful good health, but it could also at last increase the maximum lifespan potential.⁴⁸

4. *Youth Lasts Longer Than Most Think*

Furthermore, the period of active healthy life may already be longer than is generally believed—there are many things often confused with physical aging that are not really aging at all. Popular estimates of the disabilities of aging, for example, may be confounded by misapprehensions of the range of variation that exists. Thus, there is enormous variability as to the characteristics of older people of the same age. Age is a good predictor of characteristics of a six month old, but is a less useful one for a sixty-five year old.⁴⁹ There is even greater variability between older persons of different ages: we must remember that the range of years encompassed by old age is greater than that between birth and age twenty-one. Clearly, eighty-five year olds are vastly different from sixty-five year olds—so much so that Bernice Neugarten has proposed differentiation between “the young old” (those sixty-five to seventy or so) and the “old old” (those eighty to eighty-five or older).⁵⁰ Furthermore, many things we mistakenly think of as results of aging are really differences between one age cohort and the next.⁵¹ Some people who are now elderly may indeed function lower physically and intellectually than some people who are now middle-aged. However, that difference may be because the current elderly were born and raised under very different conditions, often in foreign countries or on farms, and often received poor nutrition and little formal education. Of those now of retirement age, for example, more than half lived in rural areas when they were children.⁵² Over one-quarter of the population over sixty-five is composed of Euro-Americans; this is primarily because from the 1880's until World War I over twenty-three million immigrants arrived, mainly from Eastern and Southern Europe.⁵³ Because of these cohort effects, more difference may be observed if one coin-

48. See *supra* text accompanying notes 25-30.

49. See Baltes & Schaie, *The Myth of the Twilight Years*, PSYCHOLOGY TODAY 35 (March 1974); Birren & Loucks, *Age Related Change and the Individual*, 57 CHI-KENT L. REV. 833 (1981); Riley & Butler, *Foreward to LEADING EDGES: RECENT RESEARCH ON PSYCHOLOGICAL AGING* xi, xii (B. Hess & K. Bon eds. 1981) [hereinafter cited as LEADING EDGES].

50. Neugarten, *Age Groups in American Society and the Rise of the Young-Old*, 415 ANNALS 187 (1974).

51. Hess, *Introduction and Overview to LEADING EDGES, supra* note 49, at 3.

52. Uhlenberg, *Demographic Change and Problems of the Aged*, in AGING FROM BIRTH TO DEATH 153, 159 (M. Riley ed. 1979).

53. THE 1981 WHITE HOUSE CONFERENCE ON AGING, REPORT OF THE MINI-CONFERENCE ON EURO-AMERICAN ELDERLY 4 (1981).

compares the current elderly and the current middle-aged than if one compares the same people in their older and middle-aged years.

In addition, there is another set of factors often confused with physical aging: older people are often treated in a way that encourages deterioration and discourages mature and autonomous functioning. This has sometimes been called "extrinsic" dependency.⁵⁴

Finally, many differences in characteristics are limited,⁵⁵ are of less real-life importance than might be thought, are offset by other strengths, or can be slowed, reversed, or compensated for by new task strategies that are relatively simple to learn.⁵⁶ My grandfather, in his nineties, used to tell me that his legs were weak, but his head was still strong.

Thus, the stereotypes of the elderly are at best half-truths. Some older persons in certain relevant characteristics are better workers than the young; there is wide variability among the elderly; the differences between old and young are not as great as often thought.⁵⁷ Much of what we perceive as problems of physical aging are not necessarily that at all. A longer life of health and vitality is available than was historically possible and further improvement is likely.

B. THE GRAYING OF AMERICA

Increased life and health expectancy are the first two parts of the tetrad of changes in our aging society. In addition, there has been an aging of our whole population—what has been called the graying of America,⁵⁸ a phenomenon that encompasses the remaining two parts of the tetrad.

This century has witnessed a dramatic increase in the number of Americans over age sixty-five. In 1900 there were three million elderly; now there are about twenty-five million, an eightfold increase. By the year 2035 there will be almost fifty-six million.⁵⁹ The elderly, along

54. See, e.g., Gaylin, *In The Beginning: Helpless and Dependent*, in *DOING GOOD: THE LIMITS OF BENEVOLENCE* 29-35 (W. Gaylin, I. Glasser, S. Marcus & D. Rothman eds. 1978).

55. Physical decline is often limited. The physical difficulties of most senior citizens involve weakness of their legs: 39% have trouble walking quickly; 34% have difficulty climbing stairs. A *REPORT ON AGING IN AMERICA: TRIALS AND TRIUMPHS* 40 (1980).

56. R. CLARK & J. SPENGLER, *THE ECONOMICS OF INDIVIDUAL AND POPULATION AGING* 75-77 (1980).

57. See generally A. FONER & K. SCHWAB, *AGING AND RETIREMENT* 13-28 (1981) (criticizing traditional stereotypes of older workers).

58. See, e.g., H. SHEPPARD & S. RIX, *THE GRAYING OF WORKING AMERICA: THE COMING CRISIS IN RETIREMENT-AGE POLICY* (1977).

59. Rice, *Foreward* to *AGING*, *supra* note 9, at xi.

with young adults, are the fastest growing age group in America. Since 1950, the elderly population has increased twice as fast as the population as a whole.⁶⁰

The fastest growth rate among the elderly population is among the old old. In the last three decades from 1950 to 1980, the population aged seventy-five to eighty-four doubled in size, from three and one-half million to over seven million; the population over eighty-five almost quadrupled, from six hundred thousand to two and three-tenths million.⁶¹ These older, frail, elderly are most likely to be in need of health and other services.

The increase in absolute numbers of the elderly is a result both of declines in mortality occurring across the age spectrum and—what might not be thought of at first—of variations in the birth rate. A large number of children born sixty to ninety years ago means a large number of old people now. In addition, the increase is a product of the migration rates; high immigration rates in the years before World War I brought young immigrants then who are grandparents today.⁶²

Beyond the increase in the *number* of elderly, there has also been a sharp increase in the *fraction* of the population that is over sixty-five. In 1900 about one American in twenty-five was elderly. Today it is about one in ten. By the beginning of the twenty-first century, it is estimated that one in five Americans will be over age sixty-five.⁶³ By the year 2035, there will be only three younger persons for every older person.⁶⁴

The increase in the fraction of the population that is over age sixty-five is attributable to many factors. Obviously, one of the major factors is the increase in the absolute number of the elderly. Additionally, in most of the years since the early part of this century, both the average birth rates and the immigration rates have been lower. Therefore, there are relatively fewer people living today among most middle-

60. *Id.* The median age of the population was 23 years in 1900, but by 1970 had climbed to 28 years. Between 1940 and 1970, the overall population increased by 54%, while the population over 65 increased by 122%. Today, well over 15% of the population over 18 is 65 or older. Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311, 1312 (1974).

61. Rice, *supra* note 59, at xi.

62. See *supra* text accompanying note 53.

63. AM. PSYCHIATRIC ASSOC., SELECTED COMMENTS AND RECOMMENDATIONS RELATED TO THE APA CONFERENCE ON THE TRAINING OF PSYCHOLOGISTS FOR WORK IN AGING (1981) (on file with U.S.C. Law and Aging program); Rice, *supra* note 59, at xi.

64. Rice, *supra* note 59, at xi.

aged and young cohorts. The relative increase in the number of the elderly combined with a relative decrease in the number of the young and middle-aged is primarily responsible for the increase in the fraction of the population that is elderly.⁶⁵

II. THE MANY PUZZLES OF GERONTOLOGY

The law's response to the tetrad of changes in the natural frame occupies a large part of the agenda of the new subject of law and gerontology; the subject, of course, also includes other topics not directly related to the demographic changes.⁶⁶

Gerontology itself may not really be an academic discipline: it has no unique method of research, for example, no single underlying theory, and no agreed upon core subject matter.⁶⁷ It does, however, label a set of important problems, and the attempts to solve them.⁶⁸ The

65. See Fingerhut & Rosenberg, *supra* note 38, at 15:

The aging of the U.S. population in the 20th century has been a consequence of two factors—declining fertility and declining mortality. Declining fertility reduces the proportion of young persons relative to the older population, while declining mortality results in more persons surviving. During the first half of this century, the major factor was declining fertility. . . . The cohort of women born during 1865-75 completed their childbearing years with an average of about four children each, whereas women born at the turn of the century had an average of two to three children each

During the same period, however, declining mortality operated in an opposing fashion. Mortality decline was concentrated at the younger ages, resulting in a relative increase in the number of younger people in the population. On the other hand, decreases in mortality occurred across the age spectrum during the second half of this century. This has resulted in a larger elderly population than would have occurred had declines in mortality remained solely at the younger ages.

Id.

66. See, e.g., Cain, *The Growing Importance of Legal Age in Determining the Status of the Elderly*, 14 GERONTOLOGIST 167 (1974) (discussing the effect of legal definitions of the onset of old age on the status of the elderly). For discussions of the major topics in law and gerontology, see R. BROWN, *THE RIGHTS OF OLDER PERSONS* (1979); E. Cohen, *Legal Research Issues on Aging*, 14 GERONTOLOGIST 263 (1974); Levine, *Research on Law and Aging*, 20 GERONTOLOGIST 163 (1980); Levine, *supra* note *.

67. Levine, *Guest Editorial: Does Gerontology Exist?*, 21 GERONTOLOGIST 2 (1980).

68. The Final Report of the 1981 White House Conference on Aging identified three goals for the "National Policy on Aging": (1) to provide the elderly with the opportunity to live an independent and healthy life in the economic and social mainstream; (2) to provide economic, medical, and social support to "the elderly who really need help" and (3) to encourage discussion of the choices that must be made as a result of the changing demography. It emphasized the self-determination of the elderly and the desirability of encouraging the elderly to be self-reliant and to determine the course of their own lives. It stressed that most older people live very much like their younger neighbors, and that only a minority "genuinely need assistance." 1 WHITE HOUSE CONFERENCE, *supra* note 12, at 9-10. The National Policy constitutes the recommendation of Secretary of Health and Human Services Richard S. Schweiker; it reflects ideas current among gerontologists as well as President Reagan's policy to limit government programs to the "truly needy."

Senator Chiles' list of the current basic policy issues for older Americans consists of: preserv-

major puzzles in gerontology today reflect enduring concerns as well as concerns that are the result of the changing demographic situation. Four puzzles can serve as organizing concepts for much of contemporary gerontological research, including thought in law and aging. These puzzles are: the aging of the body, the aging of the individual person, the aging of society as a whole, and the problem of ageism.⁶⁹

This section considers what the law has to do with these four basic questions of gerontology and outlines how the law responds to the changing natural frame. Law is an important context for the aging of the individual. The law has a relationship to bodily and personal aging, particularly important in an era when the average life expectancy and the usual period of physical vigor have increased dramatically. Law is also a mechanism through which society adapts its institutions to the increasing number and proportion of older persons. Legal rules and legal concepts play significant roles in this adaptation, as do government programs that are regulated by law, and the legal process itself as a way of resolving disputes and providing access to other resources. The topic "law and aging" includes legal rules and institutions that are explicitly age-based (such as eligibility for Social Security), those that are supposedly age-neutral but have a high impact on the elderly (such as procedures for appointing guardians and conservators), and those that concern relations between the generations (such as age discrimination laws).⁷⁰

A. THE AGING BODY

Law has a hypothetical contribution significant to the biological

ing the solvency of the Social Security system, controlling the inflation of health care costs, combating crime, and establishing a new national policy on work and retirement. 2 *id.* at 50-53.

Research issues are identified in the current version of the National Plan for Research in Aging. It identifies its central goal as promoting "health and well-being by extending the vigorous and productive years of life." Particular goals for gerontological research are identified in that Plan: to understand the basic processes of aging, to understand and control clinical manifestations of aging and age-related disorders, to understand the interaction between older people and society, and to increase the opportunity for older people to continue to contribute productively to society. NEW PROSPECTS IN AGING RESEARCH: AN INTERIM REPORT ON THE NATIONAL RESEARCH PLAN ON AGING IN PREPARATION BY SCIENTIFIC ADVISORS TO THE NATIONAL INSTITUTE ON AGING (distributed by the 1981 White House Conference on Aging) (on file with the U.S.C. Law and Aging Program).

69. A survey of recent gerontological research concludes that most studies focus on the individualistic or microlevel and exhibit a "coping mentality." Fewer than two percent of the articles in the *Journal of Gerontology* between 1972 and 1979 dealt with "the larger political, social, or economic factors shaping the current 'crisis' of the elderly." McAdam, *Coping with Aging or Combating Ageism?*, in *AGING*, *supra* note 9, at 237.

70. See generally sources cited *supra* note 66.

problems of the aging of the body. The key to whether someone will be healthy or sick, live a long life or die prematurely, is his personal habits. In theory, the law could effectively command that people not smoke, limit drinking, obey automobile speed laws and seat belt requirements, and behave sensibly as to diet, sleep, and exercise. One line of research has found that if people have seven certain habits, they will live eleven years longer, on the average, than those who do not follow these health practices.⁷¹ But in this era, the common understanding of what it means to be a free country⁷² means that we are unlikely to force people to take care of themselves.

There are many implications of keeping people young for a longer period of time. One study of economic effects concludes that such a change would increase the length of productive life and thus would significantly increase economic welfare, permitting a higher level of consumption in every year the individual is alive.⁷³ Furthermore, the percentage of physically ill old people in the population would decline, and thus health care costs would be reduced. Social Security and pension rules would have to be adjusted to accommodate the longer lives.⁷⁴

B. GROWING OLD SUCCESSFULLY: THE LEGAL CONTEXT OF AGING

Law has more to do with the social aging of the individual person than with biological aging. A major theme in gerontological literature is the aging of the individual—how do we learn to grow old successfully?⁷⁵ Common problems of personal aging include loneliness, impairment of faculties, poverty, inactivity, meaninglessness of life, and depression.⁷⁶ A major problem of aging, particularly for the old old, is chronic illness and sometimes neurosis; for successful aging it is important to promote physical health and mental health, as well as to treat and rehabilitate

71. Belloc, *Relationship of Health Practices and Mortality*, 2 PREVENTIVE MED. 67, 67 (1973); Breslow & Enstrom, *Persistence of Health Habits and Their Relationship to Mortality*, 9 PREVENTIVE MED. 469, 469 (1980).

72. On this "constitutional choice," see generally Levine, "The Great Executive Hand of Criminal Justice": *The Crime Problem and the Activist Judge*, 7 HASTINGS CONST. L.Q. 907, 957-60 (1981) ("constitutional choices" are basic policy selections on the nature of our polity, inherent in the constitutional text).

73. See Kotlikoff, *Some Economic Implications of Life-Span Extension*, in AGING: BIOLOGY AND BEHAVIOR, *supra* note 24, at 99-109.

74. See *id.* at 112-14.

75. See *supra* note 69.

76. Owens, *Mediation as a Solution to the Problems of Aging*, in OLD AGE ON THE NEW SCENE 102, 102 (R. Kastenbaum ed. 1981).

disease after it has begun.⁷⁷ Another fundamental problem of the elderly is the fear of aging and death. Thus, one aspect of successful aging is how best to face the prospect of dying. Erikson defines the goal of a successful old age as wisdom, by which he means the detached and yet active "concern with life itself in the face of death itself."⁷⁸ He adds that wisdom maintains and conveys the integrity of experience, in spite of disdain over human failings and dread of ultimate nonbeing.⁷⁹

Some legal institutions have, in part, emblematic functions as attempts to symbolize the integrity of experience in the face of dread of death.⁸⁰ Among such institutions are the bodies of laws that allow the elderly to retain control of their property and to control to whom their property will go after death. These legal institutions are in apparent conflict with those laws that long permitted the loss of one's job through mandatory retirement.⁸¹

A basic issue in the law important to the aging individual, reflected in these seemingly contradictory laws, is the need to balance autonomy and paternalism. Existing practices of institutionalizing the elderly may excessively encourage dependency.⁸² Four out of the ten White House Conference recommendations most favored by the delegates were concerned with making available home-care alternatives to the institutionalization of the frail elderly.⁸³ The same concerns underlie the efforts to preserve the personal autonomy of those older persons who do live in institutions,⁸⁴ and are also reflected in the ongoing debates concerning the right to treatment, the right to refuse treatment,

77. See 1 WHITE HOUSE CONFERENCE, *supra* note 12, at 89-93.

78. Erikson, *Reflections on Dr. Borg's Life Cycle*, in ADULTHOOD 26 (E. Erikson ed. 1978). See also E. ERIKSON, LIFE CYCLE COMPLETED: A REVIEW 61-62 (1982) (characterization of old age as theme of hope and faith).

79. *Id.* See also E. BECKER, THE DENIAL OF DEATH 17 (1973) (fear of death present, but repressed).

80. See, e.g., T. SCHAFER, DEATH, PROPERTY, AND LAWYERS 75 (1970) (testamentary device may be felt to immortalize those who perceive their property as representing them). Nevertheless, the law provides procedures for establishing conservatorships and guardianships particularly for those who lose capacities as they approach death. See generally Alexander, *Shucking off the Rights of the Aged: Congressional Ambivalence and the Exceptions to the Age Discrimination Act of 1975*, 57 CHI.-KENT L. REV. 1009, 1015 (1981) (guardianship laws a common repository of age stereotyping).

81. See *Vance v. Bradley*, 440 U.S. 93, 99-101 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976).

82. See *supra* text accompanying note 54.

83. 3 WHITE HOUSE CONFERENCE, *supra* note 12, at 10, Table 4.

84. Cf. Gaylin, *supra* note 54, at 30 (expanding a person's sense of control increases his pride, self-esteem, and capacity for caring).

and the right to due process for guardianship proceedings.⁸⁵ The law seeks to preserve the integrity of the autonomy of elderly persons, to guarantee them fair procedures, and to promote their liberty, while it also seeks to protect them if their capacities should fade.

Similarly, the autonomy versus paternalism conflict is reflected in two different models of aging: pathology and self-reliance. Much of the past work in gerontology has reflected a "pathology model" of aging, in which older people have often been considered physically deteriorated and socially disengaged. Now, however, the elderly are increasingly perceived as being self-reliant.⁸⁶ Government programs can foster this self-reliance. For example, in part because Social Security benefits became linked to the cost-of-living index, in the last two decades the percentage of elderly below the official poverty line dropped from about thirty-five percent to about fifteen percent—a greater rate of improvement than that experienced by those under sixty-five.⁸⁷ With adequate income, many older persons can meet their own needs.

C. AN AGING SOCIETY

Other fundamental issues in law and aging concern society's response to the demographic changes. One primary question is the extent to which we are willing to provide for the elderly through government programs.

1. *The Primacy of Aging Legislation*

Legislation is central to society's response to gerontological problems. The legal provisions now existing that assist the elderly typically are embodied in legislation rather than in common law⁸⁸ and involve government programs rather than private rights.⁸⁹ They are typically carried out through administrative agencies rather than the courts,⁹⁰ and

85. See R. BROWN, *THE RIGHTS OF OLDER PERSONS* 277-342 (1979).

86. Kolker & Ahmed, *supra* note 9, at 33. See *supra* note 69. Cf. Shuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 *YALE L.J.* 27, 72 (1979) (important not to "ignore the value that society places upon individual self-determination and merit" in legislating age issues).

87. 1 *WHITE HOUSE CONFERENCE*, *supra* note 12, at 9.

88. These developments are not unique to the elderly but have been part of the larger trend of the "statutorification" of American law. See generally G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982) (in the last 50 to 80 years our legal system has gone from one dominated by the common law to one dominated by statutes).

89. Cf. Reich, *The New Property*, 73 *YALE L.J.* 733, 733 (1964) (emergence of government entitlement as a major source of wealth).

90. Levine, *supra* note 11, at 46.

provide a mass-production justice rather than an individualized one.

A recent overview of research in the broad area of psychosocial aging thus gave pride of place to the law. It began by noting legislative developments, highlighting their importance to the elderly: "Over the past 20 years, an extensive list of major legislation has been enacted: Medicare, the Older American's Act, the Age Discrimination in Employment Act, and the indexing of Social Security, to name a few of the most prominent."⁹¹ To that list can be added the ADEA 1978 amendments against mandatory retirement at age sixty-five,⁹² the Employee Retirement Income Security Act,⁹³ and the Age Discrimination Act.⁹⁴ There are over sixty federal laws concerning the elderly,⁹⁵ plus hundreds of state laws.

Government programs for the elderly deal with both cash transfers and in-kind assistance. They can be categorized in three substantive areas—income maintenance, physical and mental health, and access to basic goods and services.⁹⁶ This organization is adopted in the new bibliography.⁹⁷

a. *Income maintenance*: The underlying need of the elderly is for income, whether through continued work, pensions, government benefits, or savings. If the elderly had enough money, they could take care of most of their own needs themselves. The elderly's income problems are exacerbated by inflation, a particularly acute concern for those retired and living on fixed pensions.⁹⁸

91. Hess, *supra* note 51, at 1. See Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. IV 1980); Pub. L. No. 92-336, 86 Stat. 493 (codified at 42 U.S.C. § 415(i) (Supp. IV 1980) (indexing of Social Security); Medicare Act, 42 U.S.C. §§ 1395-1396 (1976 & Supp. IV 1980); Older Americans Act of 1965, 42 U.S.C. §§ 3001-3055 (1976 & Supp. IV 1980). The cost of indexing benefits has been estimated at \$6.6 billion for fiscal year 1978, \$8.5 billion for 1979, and \$18.2 billion for 1982. U.S. SENATE BUDGET COMM., 97TH CONG., 1ST SESS., INDEXATION OF FEDERAL PROGRAMS 15 (Comm. Print 1980).

92. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (codified at scattered sections of 5 U.S.C. & 29 U.S.C.).

93. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at scattered sections of titles 5, 18, 26, 31 & 42 U.S.C.).

94. Age Discrimination Act of 1975, Pub. L. No. 94-135, 89 Stat. 728 (codified at 42 U.S.C. §§ 6101-6107 (1976 & Supp. IV 1980)).

95. See R. HAROOTYAN, ANNOTATED INDEX OF FEDERAL LEGISLATION IMPACTING THE ELDERLY (1977).

96. Levine, *supra* note 66, at 165; Levine, *supra* note *, at 263-64.

97. See *infra* at 289.

98. The harsh impact of inflation upon the elderly has been lessened somewhat by the linking of Social Security benefits to the cost-of-living index. See *supra* text accompanying notes 87 & 91.

b. *Physical and mental health*: Health maintenance and care is another vital topic. Although the elderly do not have many acute illnesses, they do accumulate chronic diseases.⁹⁹ Programs for the hospitalization and institutionalization of the frail, infirm, and ill elderly are assuming increasing importance because of the rapid increase in numbers of the old old, for whom health care is a major concern.¹⁰⁰ Medicare alone now pays thirty-six billion dollars annually for personal health care of the elderly.¹⁰¹ Merely cutting government benefits would not necessarily lessen the cost of health care to society; if government were not meeting the needs of the elderly, they or their children would have to.

c. *Access to basic goods and services*: The remaining category of government programs includes those programs that try to provide access for the elderly to basic goods and services—such as housing, social services, transportation, and nutrition.¹⁰² Legal counseling, among its other values, is important to the elderly in providing access to their other rights and resources.¹⁰³

2. Taxes

One of the legal system's responses to the increased proportion of the elderly involves the other half of the "death and taxes" maxim. Throughout the memory of most of us, as that of our forefathers, taxes have been an increasing burden. Of course, now we have seen Proposition 13 in California,¹⁰⁴ Proposition 2 ½ in Massachusetts,¹⁰⁵ and President Reagan's Economic Recovery Tax Act.¹⁰⁶ We have learned that sometimes taxes can go down as well as up. But beyond these laws that provide some general relief from taxes, there has been widescale

99. Health has been said to be the "chief personal problem for the elderly population as a group" (even though two-thirds of those over 65 rate their own health as good or excellent). Havighurst, *supra* note 34, at 153.

100. Rice, *supra* note 59, at xi.

101. NATIONAL INSTITUTE ON AGING, CHANGES . . . RESEARCH ON AGING AND THE AGED 5 (1980); 1 WHITE HOUSE CONFERENCE, *supra* note 12, at 13.

102. Cf. EXECUTIVE SUMMARY OF TECHNICAL COMMITTEE ON THE PHYSICAL & SOCIAL ENVIRONMENT AND QUALITY OF LIFE, THE 1981 WHITE HOUSE CONFERENCE ON AGING 1-2 (1981) (six "critical areas" for the elderly, including transportation and housing).

103. THE 1981 WHITE HOUSE CONFERENCE ON AGING, REPORT OF THE MINI-CONFERENCE ON LEGAL SERVICES FOR THE ELDERLY 1 (1981) (Executive Summary, prepared by Martin Levine).

104. CAL. CONST., art. XIII § A.

105. Prop. 2 ½, added by Mass. St. 1980, c. 580, amended by Mass. St. 1981, c. 782 (codified as amended at various sections of MASS. GEN. LAWS ANN. ch. 53 (West Supp. 1982-1983)).

106. Economic Recovery Tax Act of 1981, P.L. 97-34, 95 Stat. 172.

tax relief specifically designed for the elderly. In a number of ways, governments in the modern era have acted to lighten the burden of taxes upon older persons.¹⁰⁷ The 1981 tax reform law goes even further. For example, persons over fifty-five have a larger tax exclusion if they sell their homes; a surviving spouse may inherit a home without paying a tax; people can take deductions for an IRA, even if they also are in a pension plan; and the estate tax, for most people, is close to being abolished.¹⁰⁸

3. *Spending for the Elderly*

Beyond the lowering of taxes for the elderly, there has also occurred what has been called the "graying of the budget." We do not exactly have a negative income tax for the elderly, but something similar exists. Many elderly no longer send tax checks to the government, but get checks from it. Social Security and Supplemental Security Income are mammoth cash transfer programs to the elderly—the former is considered to be social insurance, and the latter public assistance; Medicare and Medicaid are comparable giant in-kind programs for the elderly. According to the President, twenty-eight percent of the federal budget is spent for the elderly although they compose only about eleven percent of the population.¹⁰⁹ The estimated expenditures for federal programs for the elderly for fiscal year 1982 is \$195 billion.¹¹⁰ Real resources allocated to federal programs for those over age sixty-five have risen fourfold from 1960 to 1978. Some estimates suggest that by 2025 nearly half the federal budget, over ten percent of the gross national product, would go to support the aged.¹¹¹

One basic issue as to these social programs is the question of how much society can afford to pay for the elderly in total,¹¹² which in turn affects how we will finance these programs, the criteria of eligibility,

107. See 9 Palmore, *Advantages of Aging*, 19 GERONTOLOGIST 220, 222 (1979).

108. U.S. SENATE, SPECIAL COMMITTEE ON AGING, 97TH CONG., 1ST SESS., 1981 FEDERAL INCOME TAX LEGISLATION: HOW IT AFFECTS OLDER AMERICANS AND THOSE PLANNING FOR RETIREMENT 1-7 (Comm. Print 1981).

109. 2 WHITE HOUSE CONFERENCE, *supra* note 12, at 57.

110. 1 *id.* at 13. The total of federal outlays benefiting the elderly was over \$173 billion for fiscal year 1981, making up over 26% of the total federal budget. The largest items are OASDI (Social Security), \$97 billion; Medicare, approximately \$36 billion; and other retired, disabled, survivors, veterans benefits, and pension programs, approximately \$23 billion. The estimated total for fiscal year 1983 is about \$210 billion. *Id.*

111. *Id.* at 30-31; Califano, *The Aging of America: Questions for the Four-Generation Society*, 438 ANNALS 96, 99 (1978).

112. James Shultz phrased this issue as: "Have we done enough for the elderly?" E. KUTZA, THE BENEFITS OF OLD AGE: SOCIAL-WELFARE POLICY FOR THE ELDERLY 128 (1981).

and the level of benefits. This issue has assumed great importance because of the last element of the tetrad discussed above—the ratio of those of traditional working age to those who are older is unprecedentedly small.¹¹³ The dependency ratio seems to be getting worse—there are fewer workers producing wealth for each retired person who is a dependent.¹¹⁴ Moreover, there is a predicted decline in the labor force growth rate over the next twenty years.¹¹⁵

In fact, however, the dependency ratio may not be getting substantially worse: though there are more retired, there are also fewer children. The ratio of persons working to those not working would thus not vary substantially.¹¹⁶ Society can afford to support more nonworking older persons in a period when there are fewer nonworking younger persons.¹¹⁷

Under present patterns, major support for the elderly is through federal programs rather than through state programs, families, private pensions, or personal savings.¹¹⁸ This federalization of support for dependents has significant political, economic, and social ramifications: it poses a threat to our ideal of a decentralized, informal, and free society.

113. See *supra* text accompanying notes 63-64.

114. Fullerton, *The 1995 Labor Force: A First Look*, 103 MONTHLY LAB. REV. 11, 19 (Dec. 1980).

115. *Id.* at 12.

116. As the proportion of the young decreases and the proportion of the elderly increases, the proportion of those in the prime working years (20-64) will not vary more than a few points up or down from the present 57% until after the year 2020; by 2030 it will drop to 53.8%. 1 WHITE HOUSE CONFERENCE, *supra* note 12, at 14.

117. One estimate is that dependency costs will remain a constant share of the gross national product over the next 50 years, if one considers only Social Security, Aid to Families with Dependent Children (AFDC), and elementary and secondary education costs. Hogan, *The Implication of Population Stationarity for the Social Security System*, 55(1) Soc. Sci. Q. 151, 156 Table 2 (1974). These estimates, however, do not take account of recent increases in Social Security benefits. 1 WHITE HOUSE CONFERENCE, *supra* note 12, at 36 n.9.

A broader measure of public support costs concluded that government expenditures are three times as great for older dependents as for youth. Clark & Spengler, *supra* note 18, at 55. Studies have been conducted that compare the costs of raising a child to adulthood with the costs of supporting an older dependent until death. The results vary depending on whether the focus is on public or private expenditures. Findings indicate that the costs of supporting the dependent young are roughly the same as the costs of supporting the dependent old. A West German study concluded that the total costs of rearing a child to age 20 is one-fourth to one-third more than the total costs to support an older person from age 60 to death. Wander, *Zero Population Growth Now: The Lessons from Europe*, in THE ECONOMIC CONSEQUENCES OF SLOWING POPULATION GROWTH 41, 57, 58 (T. Espenshade & W. Serow eds. 1978). The study suggests that the dependency costs in America of a child from birth until he enters the workforce (sometimes in the mid-20's) may be at least similar to the costs for an adult from time of leaving the workforce (say, at 65) until death.

118. See Bixby, *Social Welfare Expenditures, Fiscal Year 1979*, 44 SOC. SECURITY BULL. 3, 9 (Nov. 1981).

4. *Bureaucratization of Life*

The national programs just mentioned not only assist the cohort of older persons, but also complicate the life of the individual. "[T]he great question," Max Weber said at the beginning of this century, is how to keep "mankind free from this parceling-out of the soul, from this supreme mastery of the bureaucratic way of life."¹¹⁹ We must face the issues posed by this increasing bureaucratization of life. As Senator Chiles remarked, "In this country, when you reach the age of 65, it often appears that one's whole life becomes dependent on the government—and paperwork"¹²⁰ He added, "Social security, SSI, Medicare . . . are but a few of the complicated matters which envelop the elderly with paperwork and red tape."¹²¹ There is a need to retain autonomy, control over one's own life, and dignity in the face of growing physical incapacity and social losses. These needs can perhaps be met with the help of informal, small, face-to-face, primary groups.¹²² The protections of fair procedures are also required.

D. AGEISM

The demographic facts also frame another basic puzzle of gerontology: the question of the relations between cohorts—between parents and children, grandparents and parents¹²³—between generations.

1. *The Concept of "Age Discrimination"*

Many laws and practices define the relationship between generations through rules explicitly based upon chronological age. We must decide whether it is desirable to plan policies in this way.¹²⁴ Chronological age in the range of sixty to seventy is an imperfect proxy for many relevant characteristics of functional age.¹²⁵ Its use has therefore been condemned as ageism.¹²⁶ Thus, one aspect of the age discrimination

119. M. Weber, *Debate at Verein fur Sozialpolitik* (1903), *quoted in* J. MAYER, *MAX WEBER AND GERMAN POLITICS* 97 (1943).

120. *Elderly Will Suffer if LSC is Abolished*, Chiles Says, 5(42) *OLDER AM. REP.* 5 (Oct. 21, 1981).

121. *Id.*

122. Ahmed, *Introduction to AGING*, *supra* note 9, at 2.

123. *See generally* REPORT OF TECHNICAL COMM. ON CREATING AN AGE INTEGRATED SOCIETY: IMPLICATIONS FOR THE FAMILY, THE 1981 WHITE HOUSE CONFERENCE ON AGING 15-36 (1981) (implications of changing demographics for family life).

124. "[O]ne of the most important questions to be faced is whether chronological age per se is a socially desirable, much less a morally relevant, criterion for distributing services and allocating roles in society." W. ACHENBAUM, *supra* note 9, at 168.

125. *See supra* text accompanying note 49.

126. *See supra* text accompanying notes 11-12.

problem is to decide the proper mix of social insurance policies that are age-based and welfare policies that are need-based.¹²⁷

In addition to rethinking the desirability of basing policies on age, we must also consider the propriety of the practice.¹²⁸ Some argue that the social and cultural phenomenon that they label "ageism" should be treated legally as "age discrimination" and thus forbidden.¹²⁹ The substantive aspect of the issue has been considered elsewhere.¹³⁰ As to its process aspect, an analogy may be made to the transition to adult status at age eighteen or twenty-one. Joseph Goldstein has pointed out the value of having the law grant the status of adulthood impersonally and automatically, on the basis of chronological age, thus freeing the decision from examinations, experts, and orthodoxies.¹³¹ Some would argue that there is also value in having the law mark the transition into "postadult" status by the same automatic, age-based test, and would support continuation of the use of chronological age as a standard.

2. *Images of an Aging Society*

Relations between cohorts in our aging society can also be considered, not only through the lens of age discrimination, but also through alternative images or ideal types of society.¹³² Three such images were considered by technical committees of the White House Conference.¹³³ An image of society characterized by age-irrelevance would perceive adulthood as indivisible. Policymakers would be blind to chronological age differences. A second pattern would redefine the boundary of old age,

127. Cf. Schuck, *supra* note 86, at 38-39 (discussion of models using or rejecting age as an allocative basis).

128. See generally Alexander, *supra* note 80 (criticizing the exceptions to the ADA which allow benefit decisions to be made on the basis of age); Schuck, *Age Discrimination Revisited*, 57 CHI.-KENT L. REV. 1029 (1981) (advocating more emphasis on need-based programs and less on age discrimination); Schuck, *supra* note 86 (criticizing the ADA as providing unnecessary protection for the aged).

129. See Levine, *supra* note 11, at 63.

130. See, e.g., Eglit, *Of Age and the Constitution*, 57 CHI.-KENT L. REV. 859 (1981); Levine, *Comments on the Constitutional Law of Age Discrimination*, 57 CHI.-KENT L. REV. 1081 (1981); Perry, *The Principle of Equal Protection*, 32 HASTINGS L. REV. 1133 (1981).

131. Goldstein, *On Being Adult and Being an Adult in Secular Law*, in ADULTHOOD 249, 252 (E. Erikson ed. 1978).

132. On the concept of "ideal type," see M. WEBER, *ECONOMY AND SOCIETY* 20-21 (G. Roth & C. Wittich eds. 1978).

133. THE 1981 WHITE HOUSE CONFERENCE ON AGING, REPORT OF TECHNICAL COMMITTEE ON CREATING AN AGE-INTEGRATED SOCIETY: IMPLICATIONS FOR SOCIAL INSTITUTIONS 604 (1981); D. Nelsou, *Observations on Current and Future Bases for Effective National Policy Advocacy on Behalf of Older People* (Sept. 15, 1980) (paper prepared for the Federal Council on Aging), discussed in Neugarten, *Age Distinctions and Their Social Functions*, 57 CHI.-KENT L. REV. 809, 819 n.30 (1981).

as seventy-five years instead of sixty-five, thereby fixing the boundary at an age more justifiable by gerontological research. A third possible pattern can be called veteranship, in which society recognizes older persons as having a special status. The elderly would be encouraged to remain contributing members of society through "age-equity" policies and affirmative action. Two additional patterns can be identified: age disqualification and age reciprocity. Age disqualification results in the denial of certain benefits to the elderly solely on the ground of chronological age. Age reciprocity is a pattern of exchange of benefits between different age groups. Each of these five patterns will now be briefly discussed.

a. *Old age as a qualification*: Age-grading and the definition of expectations based on chronological age are common in society.¹³⁴ Traditionally, chronological age was an important factor bearing on the treatment of an individual: it served as a qualification for the grant of valuable benefits. To be an elder usually meant that one was treated with respect, or at least one was supposed to be. In traditional societies, there were many reasons why the elders were respected. When there was little or no writing, only the elders had valuable knowledge of past events, and they had valuable skills. Also, the old patriarch may have owned the house and farm where his children and grandchildren worked and lived.¹³⁵ Previous generations believed that the aged were the fittest survivors, and that old age was a time when cares were gone.¹³⁶ Giving the elderly respect may have been easier before the modern tetrad of changes, since old age was comparatively rare.¹³⁷

Old age still brings advantages in modern society, such as qualification for Social Security, Medicare, and other government programs.¹³⁸ Age-based benefits may also be thought to be legitimate because age is taken to be, if not necessarily an honorific status, at least a useful proxy for need.

b. *Old age as a disqualification*: Today, however, many of the reasons the elderly used to receive respect are no longer valid. Old

134. Parsons, *Age and Sex in the Social Structure of the United States*, 7 AM. SOC. REV. 604, 604 (1942).

135. D. FISCHER, *GROWING OLD IN AMERICA* 52-56 (1977).

136. NATIONAL INSTITUTE ON AGING, *supra* note 101, at 7.

137. D. FISCHER, *supra* note 135, at 6.

138. See Palmore, *supra* note 107, at 221-22; T. ROSOW, *SOCIALIZATION TO OLD AGE* 150 (1974).

knowledge and skills may be outmoded because of the ramifications of the aging of society and of modernization and its concomitants of urbanization, industrialization, and increased mobility.¹³⁹ The young may possess more valuable knowledge than the old, may have moved away from their parents and obtained their economic security from their own work rather than from inheritance. In modern society, we seem to have less dependent and respectful relations between young and old than before.

Moreover, it is no longer as clear that age-based benefits are appropriate because the aged are in need. The Final Report of the White House Conference declared that "Negative stereotypes of the elderly as a population class that is impaired and deprived have been completely refuted, and the equating of age with need—which is the basis of so much Federal policy for the elderly—is losing its utility."¹⁴⁰

In the modern era, chronological age has often been used to impose a disqualification on the elderly. The most notable example of this practice is mandatory retirement. Old age is now often taken to mean that the person has many undesirable characteristics. A survey conducted for the National Council on Aging¹⁴¹ revealed that many people regard the elderly as sick, frail, and forgotten residents of institutions, who are spending their lives in unproductive leisure. For most of the elderly, these labels are inaccurate.¹⁴²

As suggested above, some people call such attitudes and practices ageism¹⁴³ and, along with Congressman Claude Pepper at the White House Conference, deem them "just as odious as sexism or racism."¹⁴⁴ Drawing explicit analogies with race discrimination,¹⁴⁵ they invoke the legal conclusion "age discrimination." The single most popular recommendation among White House Conference delegates was to reduce or eliminate all restrictions on older workers, including mandatory retirement and age discrimination.¹⁴⁶

Age disqualification can be analyzed in terms of several possible causes; a theory of four models has been identified.¹⁴⁷ The practice can

139. See *supra* note 9; NATIONAL INSTITUTE ON AGING, *supra* note 101, at 19.

140. 2 WHITE HOUSE CONFERENCE, *supra* note 12, at 8.

141. LOUIS HARRIS & ASSOC., AGING IN THE EIGHTIES: AMERICA IN TRANSITION (1981).

142. NATIONAL COUNCIL ON AGING, *supra* note 39, at vi.

143. Butler, *Age-ism: Another Form of Bigotry*, 9 GERONTOLOGIST 243, 243 (1969).

144. See 2 WHITE HOUSE CONFERENCE, *supra* note 12, at 48.

145. *Id.*

146. 3 *id.* at 10, 82 (Recommendation No. 1).

147. Levine, *Four Models for Age/Work Policy Research*, 20 GERONTOLOGIST 561 (1980).

stem from what has been called "rational," "efficient," or "statistical" discrimination.¹⁴⁸ It can be produced by competition between the generations, or by individual life cycle choices.¹⁴⁹ It can also be caused by attitudes, which may be the products of prejudice or ageism, but may also be the products of unconscious ambivalence or cultural expectations.¹⁵⁰

c. *Age integration*: Another possible pattern of relations between the generations—different from both age qualification and age disqualification—is the pattern of age integration. In an age-integrated society, chronological age would be ignored, and we would thus become "age blind."¹⁵¹ We would have neither age-based disabilities like mandatory retirement, nor age-based benefits like Social Security. Individual determination of capacity and need would replace the use of generalizations that use chronological age as a proxy.

d. *A new definition of old age*: An additional alternative is to change the definition of the age strata. For example, those seventy-five and older could be regarded as a group to be treated as elderly, while those younger than seventy-five would not be subject to special benefits or burdens. This fourth pattern would strike a compromise—chronological age would be ignored for the young old (those sixty-five to seventy or so), but would be used for the old old (those seventy-five or older).¹⁵²

Research data suggests that chronological age is not always a good proxy for the characteristics of those sixty-five or so,¹⁵³ but it is a better one for those seventy-five or older.¹⁵⁴ For example, severe limitation

148. See R. POSNER, *THE ECONOMICS OF JUSTICE* 351-63 (1981); R. THUROW, *GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE ECONOMY* 155-81 (1975).

149. Levine, *supra* note 147, at 566-68.

150. *Id.* at 569.

151. See Schuck, *supra* note 86, at 38-39. See also *supra* text accompanying note 49 (chronological age a poor proxy of certain characteristics of the young old).

152. See *supra* text accompanying note 50.

153. "[M]ere age ha[s] become a poor indicator of ability, behavior, and need." 2 WHITE HOUSE CONFERENCE, *supra* note 12, at 8. See *supra* text accompanying note 49.

154. Cf. Neugarten, *supra* note 50, at 191 (characterizing the old-old as those age 75 and older). One recent summary of research concludes that there are general declines in intellectual abilities after age 65, particularly in those abilities involving speed of response of nonverbal, perceptual-manipulative skills. Most of these declines among healthy older persons can be compensated for by a variety of techniques such as taking more time and cautious driving, and by aids such as eye-glasses and hearing aids. Palmore, *United States of America*, in *INTERNATIONAL HANDBOOK ON AGING: CONTEMPORARY DEVELOPMENTS AND RESEARCH* 434, 448 (E. Palmore ed. 1980).

on activity is highly prevalent among those over eighty-five who constitute only about eight percent of the older population, although for those from sixty to eighty-five, chronological aging does not necessarily diminish their activity.¹⁵⁵ It has been suggested that the young old generally have more in common with those in their mid-fifties.¹⁵⁶ Thus, the young old may be integrated into the larger society and may remain in productive roles in the workforce or as family care-providers. The social definition of old age may thus be shifted to designate the old old as those who are most at risk, and whose decrements typically are serious enough to warrant changes in social status, such as that from worker to retiree.¹⁵⁷

e. *Age reciprocity*: A final alternative is to view relations between age groups in terms of an ideal of reciprocity among age groups.¹⁵⁸ Adults supply children with resources, affection, education, and a host of values. A fundamental assumption may be that those children, when they are adults, will support their elderly parents.

If one considered the cost of child rearing to be a loan from the cohort of parents to the cohort of children, support of the elderly can be viewed as merely a return of that loan. The cost of support from sixty-five until death is probably less than the cost of support from birth to adulthood, even without counting interest on that imagined loan.¹⁵⁹

f. *Conclusion*: Choice among the five ideals is a selection of what relation we believe should exist between generations. The tetrad of changes in the natural frame poses a new situation in which there are advocates for each of these alternative views of our society. The view that permeates the culture will change the law, but the law can also be an independent source of change. The statutory use of an age discrimination concept, for example, may in turn promote a wider acceptance of the ideal of an age-integrated society.¹⁶⁰

155. 1 WHITE HOUSE CONFERENCE, *supra* note 12, at 9.

156. Sheppard, *supra* note 37, at xvi.

157. Thus, "[p]ublic programs will not easily become age-blind . . .," since a new chronological age test will be employed. Alternatively, nonchronological criteria may be used as the basis for the social definition of old age. Sheppard, *supra* note 37, at xvi.

158. See E. WYNNE, SOCIAL SECURITY: A RECIPROCITY SYSTEM UNDER PRESSURE 3 (1980).

159. See *supra* note 117.

160. Similarly, the school integration decisions are often spoken of as instances of the law leading, rather than lagging behind, the general culture. *But cf.* Bell, Book Review, 91 YALE L.J. 814, 817-19, 824-26 (1982) (judges cannot change the general cultural and social environment of the black minority, which must instead help itself).

III. THE INTERRELATIONSHIP OF LAW AND GERONTOLOGY

How significant is aging to the law? The problems of gerontology touch deep concerns of the individual, the society, even the race. Gerontology may not be a discipline in itself, but its important problems include the aging of the body, the individual, and society, as well as ageism. The received wisdom is no longer a satisfactory guide to these problems: death and taxes are not as certain as they once were, and the new realities of an aging population require us to rethink social institutions that have grown up over millenia.

How significant is law to the elderly? The law has a great deal to do with many of the basic problems of gerontology. The law is a major part of the context within which the individual grows old. Legislation is a basic tool with which society adjusts itself to the graying of the population. In particular, an important legal issue is whether to treat ageism as "age discrimination."

Gerontological scholarship has largely concerned itself with the individual rather than broader social, economic, and political matters.¹⁶¹ It would be a welcome change if gerontology promoted more of a people-orientation in the law.¹⁶² But legal scholars are also likely to make useful contributions to the broad policy issues of social gerontology.

Tools of scholarship are useful in helping legal thinkers to recognize and analyze new topics that deserve attention.¹⁶³ For this reason, the Asa V. Call Law Library at the University of Southern California agreed to my request to revise and update its bibliography on gerontology and the law. The *Southern California Law Review* has undertaken to make the bibliography available to the community of lawyers and scholars. We expect that periodic supplements will be published.

There is growing attention to the problems of law and aging. Legal scholarship in this era will be one of many forums through which our society works out responses to the changing frame of nature.

161. See *supra* note 69.

162. Levine, *A People-Oriented Law Confronts Problems of the Elderly*, 1 U.S.C. CITES 16, 16, 17, 20 (Fall 1980-Winter 1981).

163. Levine, *Legal Education and Curriculum Innovation: Law and Aging as a New Field of Law*, 65 MINN. L. REV. 267, 268 (1980).