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INTRODUCTION

James W. Fox, Jr.[1]
Rebecca Morgan[**]
Janice Kay McClendon[***]

Stetson University College of Law and AARP are pleased to present Volume 2 of the Journal of International Aging, Law & Policy ("Journal"). The Journal is dedicated to providing an international forum to discuss emerging issues in the elder law area. The Journal promotes understanding of elder law issues by: providing a forum for scholars and practitioners in different countries to share information about law, law reform and significant case law developments; and inspiring lawyers and other advocates representing aging citizens to work within their countries' existing legal frameworks, as well as advocate legal reforms, to improve the lives of their elderly clients. It is also the editors' hope that the Journal can help these groups come together as a global community, not only sharing ideas and information but also building on their shared work, knowledge and energy to foster dialogue and cooperation of action. In particular, the editors hope that this Journal can help educate an emerging international community of elder law attorneys and advocates.

The purpose of this volume, comprised of articles written by professors and lecturers from Canada, Israel, United Kingdom and the United States, has been to further the Journal's mission of providing education in the elder law area by proving a global perspective of the development of elder law. The volume contains four articles and a bibliography of international elder law research. All four articles describe the development of elder law in the context of demographic, social, political and legal frameworks within the authors' respective countries. Concluding this volume is an exhaustive bibliography of international elder law resources in both online and print formats.

Please enjoy Volume 2 of the Journal of International Aging, Law & Policy.

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A SOFTLY GREYING NATION: LAW, AGEING AND POLICY IN CANADA

Charmaine Spencer and Ann Soden[*]

I. INTRODUCTION

In the past half century, Canadian society has undergone substantial transformation, becoming more culturally heterogeneous, shifting from rural to urban economies, and witnessing large numbers of people living to be old. While in the 1960s and 1970s the country focussed on achieving social justice across broad populations, in the 1980s and 1990s, Canada began to awaken to a need for a special place for older adults within "A society for all ages", taking several first steps to achieve this goal. Today, the capacity of the country to recognize and respond appropriately to the social as well as legal needs and interests of older adults is continually being reshaped and tested.

A. Legal Background

Canada operates under two legal regimes: common law which is utilized in nine provinces and three territories; and a codified system of civil law, which applies within the province of Québec.[1] Since 1996, aboriginal communities have also begun to take a role in the administration of justice in a manner in accordance with their culture.

In Canada, the federal and provincial or territorial governments have specific areas of law and services over which they have constitutional responsibility. For example, the federal government is responsible for the *Canada Health Act*,[2] but provinces and territories are responsible for the administration of health care coverage. Criminal law comes under federal jurisdiction, while each province is responsible for the administration of justice.[3] Many areas of law affecting older adults, including family relations, marriage, property rights, adult protection,

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[1] Canada e-Book, *Canada's legal system,* http://142.206.72.67/04/04b/04b_005_e.htm (Dec. 2, 2003).

[2] R.S., c. C-6 (1985). *See also* Health Canada, *Canada Health Act Overview*, http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/2002/2002_care-soinsbk4_e.html (Nov. 25, 2002).

[3] Criminal Code of Canada, R.S.C., c. C-46 (1985).

health consent, human rights, and employment laws fall within provincial or territorial responsibility, leading to considerable variation across the thirteen jurisdictions. The federal government, on the other hand, is responsible for income tax laws, old age security, employment insurance, standards for certain labour sectors, and the administration of the Canada Pension Plan. The federally enacted *Canadian Charter of Rights and Freedoms*[4] ("the Charter") affirms that every citizen is guaranteed certain rights and liberties consistently applied across the land, vis à vis "government" actions.

B. General Background on Demographic-Ageing

Canada has been fortunate to witness the burgeoning growth of older adults in the population over the past century. The percentage of people living to be 65 years old or older grew from 5 percent in 1901 to 7.6 percent in 1961, and to 13.3 percent in 2006. The percentage of older adults is expected to further increase to 21.4 percent by 2026 and to 24.5 percent by 2036.[5] Nonetheless, there is considerable diversity across the country in the percentage, distribution and life circumstances of older adults. For example, they represent a much smaller percentage in some groups such as aboriginal seniors.[6]

The average Canadian lifespan at birth for women grew from 65.3 years in 1931 to 82.8 years in 2001, and from 62.2 years in 1931 to 78.0 years in 2001 for men. [7] As is the case for almost every other developed nation in the world, Canada's median age has been increasing for decades, but again with important variations among groups. As of July 1, 2006, the median age of the Canadian population as a whole reached a record high of 38.8 years,[8] but was only 24.7 years within the aboriginal population.[9]

Canadian men and women also enjoy one of the longest life expectancies in the industrialized world. In 2003, Canadian men could expect to live an average of 17.4 years and Canadian women 20.8 years beyond the age of 65, an increase of 4.1 years and 5.0 years, respectively,

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[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 (U.K.), being Schedule B to the *Canada Act 1982* (U.K.), 1982.

[5] Martin Turcotte & Grant Schellenberg, *Statistics Canada, A Portrait of Seniors in Canada 2006*, 11, http://www.statcan.ca/english/freepub/89-519-XIE/89-519-XIE2006001.pdf (Feb. 2007); Andrew Wister et al., *Factbook on Aging in British Columbia* 2 (4th ed., Gerontology Research Centre Simon Fraser University 2006).

[6] Statistics Canada, *Canada's Aboriginal Population in 2017*, http://www.statcan.ca/Daily/English/050628/d050628d.htm (June 28, 2005).

[7] Wister et al., *supra* n. 5, at 11.

[8] Statistics Canada, *The Daily, Canada's Population By Age And Sex,* http://www.statcan.ca/Daily/English/061026/d061026b.htm (Oct. 26, 2006).

[9] Turcotte & Schellenberg, *supra* n. 5, at 221-69.

since 1950. Average life expectancy at 85 years is also increasing (it was 5.8 additional years for men and 7.1 years for women in 2003).[10] In marked contrast, aboriginal people's life expectancy has been about seven years less on average for men and five years less for aboriginal women than for non-aboriginals. [11]

(i) Key Demographic Trends

From 1946 to 1964, Canada saw a large growth in its population. This "baby boomer" cohort now accounts for one third of the country's population,[12] leaving important social legacies for their children. Canada has witnessed decreasing family size for half a century, as women married later, had children later and entered and remained in the work force. Between 1950 and 2003, the average number of children in Canadian families decreased from 3.73 to 1.53 children.[13] While there have been political efforts during the past two decades to "offset" the potential population "imbalance " through immigration from Asia, the Caribbean, and Central or South America, immigration has been recognized as unlikely to be useful by itself in achieving population growth in Canada in the future.[14]

Although the country's success of having large numbers of persons living to be old should be considered a significant achievement, there has been a trend among governments in several parts of Canada to characterize the changing demography and indicators, such as increasing dependency ratio of the older adults to working age adults, as evidence of an impending crisis likely to cause a burden on health care and social systems. On the other hand, prominent demographers point out that while the population structure is changing, the total dependency rates of young and old combined is relatively steady and that an aging population is only one small factor in any emerging cost changes being experienced.[15]

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[10] Statistics Canada, *Report on the Demographic Situation in Canada 2003 and 2004* 38, http://www.statcan.ca/english/freepub/91-209-XIE/91-209-XIE2003000.pdf (June 2006).

[11] Statistics Canada, *Aboriginal peoples of Canada*, http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/canada.cfm (last accessed May 3, 2007).

[12] David K. Foot, Richard A. Loreto, & Thomas W. McCormack, *Canada in the 21st Century* 4-6, http://strategis.ic.gc.ca/pics/ra/4foolo-e.pdf (Nov. 1998).

[13] Statistics Canada, *Report on the Demographic Situation in Canada 2003 and 2004* 31, http://www.statcan.ca/english/freepub/91-209-XIE/91-209-XIE2003000.pdf (June 2006).

[14] Statistics Canada, *The Daily, Canada's Population by Age and Sex,* http://www.statcan.ca/Daily/English/061026/d061026b.htm (Oct. 26, 2006).

[15] *See e.g., The Overselling of Population Aging: Apocalyptic Demography, Intergenerational Challenges, and Social Policy* (Ellen Gee & Gloria Gutman eds., Oxford University Press 2000); *see also* Monica Townson, *Status of Women Canada, Reducing Poverty Among Older Women: The Potential of Retirement Incomes Policies,* http://www.swc-cfc.gc.ca/pubs/pubspr/0662659271/index_e.html (Aug. 2000).

(ii) Politics and Participation of the Older Population

In Canada, the influence of "grey power" (the ability of older adults to shape the public discourse of ageing) is currently modest at best, at least in relation to the numbers of older persons. Indices such as attending public meetings, following news and current affairs, or voting appear to suggest that seniors in Canada are more politically engaged than younger persons. In 2003, one in five seniors reported attending a public meeting in the past year; nine in ten said they followed the news and current affairs daily. Almost 90 percent of seniors voted in the 2000 federal election.[16]

However, Canadian seniors rank well below other age groups in their participation in common political activities, such as: contacting newspapers or politicians; signing petitions; and boycotting products or participating in a demonstration.[17] Moreover, there is considerable heterogeneity of interests among seniors in Canada reflective of socio-economic, cultural, regional, gender and age cohort differences. This means that there are often competing views among older adults about what their pressing needs and priorities are, and how those goals should be achieved.

The general capacity of seniors and seniors' organizations to "have the ear of government" and promote political change or to promote their interests may be modest at the provincial or federal level.[18] Seniors' organizations face a number of significant challenges, including very restrictive tax law rules regarding political advocacy by registered charitable organizations.[19] As many seniors' organizations are registered charities, that legal status limits their ability to be strong social or political advocates. Similarly, there has been very little representation of older adults' interests (*e.g.* through intervener status) in many types of legal cases on issues that affect the lives of older adults, including prominent end of life decisions and human rights cases.[20]

Provincial government decision-making structures have shifted in recent years in many jurisdictions. There is often increased distance between policymakers and the public, and, in many cases, this distance has led to less transparency of the decision-making systems. This may

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[16] National Advisory Council on Aging, *Seniors in Canada - 2006 Report Card* 51, Chart 5.2, Minister of Public Works and Government Services Canada (2006).

[17] *Id.* at 58.

[18] Charmaine Spencer, *Grey Power in Canada (Part 1)* 5-8, 19 GRC News 2 (2000), http://www.sfu.ca/grc/grcn_pdfs/vol19no2.pdf.

[19] *Id.*

[20] Marie Beaulieu & Charmaine Spencer, *Older Adults' Personal Relationships and the Law in Canada: Legal, Psycho-Social and Ethical Aspects* (Law Commission of Canada 1999).

make it much harder for seniors and others who support them to negotiate through systems, set or shift the political agenda in any meaningful way.

On the other hand, there is often an optimistic belief among some baby boomers that they will be able to substantially effect systematic change by virtue of their numbers, and that any previous "failure" of other generations has simply been a lack of effort. However, in reality, boomer activism has not been borne out at other points in their lifespan, except for very limited consumer purposes.[21] Late life activism tends to reflect early life involvement at a community level or in political activity or unions.

In terms of available formal structures to assure older adults' interests are advanced, one half of Canadian provinces have an advisory council on aging, including Alberta, British Columbia, Newfoundland and Labrador, and New Brunswick.[22] Others have established special seniors' secretariat (Prince Edward Island, Nova Scotia, Ontario, and Manitoba) or, as is recently the case in Québec and New Brunswick, a minister that is responsible for seniors. Typically, these only provide consultative or coordination information to other departments.[23] If department budgets are indicative of political power, the secretariats tend to have modest power at best.

The federal government established a Secretary of State (Seniors) in 2006, a position that is assigned to assist federal Cabinet ministers. In March 2007, the federal government also established a National Seniors Council to advise the Government on seniors' issues of national importance.[24] This Council replaced the National Advisory Council on Aging (Conseil consultatif national sur le troisième âge), which had been in operation since 1980, and was operationally supported by a team of federal public service employees. Its function was to assist and advise the federal Minister of Health on all matters related to the aging of the Canadian population and the quality of life of seniors.

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[21] Charmaine Spencer, *Grey Power in Canada (Part Two)* 1-5, 22 GRC News 2 (2003), http://www.sfu.ca/grc/grcn_pdfs/vol22no2.pdf.

[22] Office of the Premier, Ministry of Community Services, *Premiers council on seniors and aging issues*, http://www2.news.gov.bc.ca/news_releases_2005-2009/2005OTP0117-000884-Attachment1.htm (Oct. 3, 2005).

[23] *See e.g., Ontario Seniors' Secretariat,* http://peel.cioc.ca/details.asp?RSN=16440 (last accessed May 3, 2007); *see also* Senior's Secretariat, *Giving Nova Scotia Seniors a Voice*, http://www.gov.ns.ca/scs/ (last accessed May 3, 2007) (In Nova Scotia, for example, the secretariat is described as the provincial government agency responsible for coordinating the planning and development of policies, programs and services for seniors).

[24] Human Resources and Social Development Canada, News Release, *Canada's New Government takes major steps to support seniors*, http://www.ccnmatthews.com/news/releases/show.jsp?action=showRelease&searchText=false&showText=all&actionFor=638726 (Mar. 5, 2007).

(iii) Gender Considerations

Gender has an important influence on aging in Canada. Because of factors such as distinctive roles and responsibilities, longevity, chronic health differences, socio and economic circumstances, as well as cumulative challenges and inequalities, older women and older men are likely to be affected by different social and legal issues. Canada has only slowly begun to explicitly recognize that undifferentiated analyses of ageing and policy can hide important differences among women and men in later life.

Canada signed the *Convention to Eliminate all Forms of Discrimination Against Women* 25 years ago. However, in broad social terms, the needs of older women have been largely under-represented in efforts to promote the rights and interests of women. While there have been some efforts to apply a "gender lens" to federal programs and policies in order to understand potential differential impacts that specific policies may have on men and women, the intersection of aging and gender is much less well recognized at the policy level.

Gender analysis needs to consider the short and long-term impact of policies and social trends across the lifespan, the cumulative impact of discrete government policies, as well as the differential impact of policies on older couples and unattached older persons (widowed, divorced, separated, ever single and living alone). For example, while the poverty rate among older couples in 2003 was relatively low at 5.1 percent, the poverty rate among unattached older women is much higher at 40.9 percent (and is approximately ten percentage points higher than among unattached older men).[25] Within a province, it is not uncommon to see the poverty rate among older women as double that of older men.[26]

For over three decades, the federal government has had a special office and program (Status of Women Canada) to promote the social, economic and political equality of women.[27] Recently, just as issues affecting the security of older women were starting to be raised, the scope of the Office changed, along with the reduced resources for promoting equality. There is a concern that this will represent retrenchment, and that future government directions may focus largely

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[25] National Council on Welfare, *Poverty Profile 2002 and 2003* 39, http://www.ncwcnbes.net/documents/researchpublications/ResearchProjects/PovertyProfile/2002-03Report_Summer2006/ReportENG.pdf (Summer 2006).

[26] *Id.*

[27] Andree Coté, *History of the Status of Women's Canada: Women's Program and Why It Matters,* http://www.fafia-afai.org/files/Backgrounder%20on%20SWC%20Womens%20Program%20and%20Why%20It%20Matters%20Sept%2014%202006.pdf (Sept. 2006).

on formal equality, not substantive equality for women, a result which can have significant negative implications for older women. There have also been some beginning efforts at the grassroots level in recent years to build the knowledge of middle aged and older women about the feminization of poverty and the key issues affecting their income security in later life.

II. THE PLACE OF ELDER LAW

Elder law is a relatively new development in law and policy in Canada. Since the 1980's, a number of legal issues that form part of the field and practice of elder law have been offered at some Canadian universities within gerontology, criminology, and health sciences courses. These have typically focused on mental capacity, guardianship and end of life issues. While traditional fields of legal practice such as Wills and Estates have a long history of serving predominantly older clients, the legal field in Canada has only relatively recently begun thinking about law and aging as a special field of practice, or to consider aging as another important lens to understand the law and its effects.

In May 2007, the Supreme Court of Canada held that there is no overall constitutional right to legal counsel, although a right to counsel may be recognized in specific and varied situations under the *Charter.*[28] This recent decision has important implications for older adults. Legal services are largely beyond the financial capacity of many older adults, leaving many without access to justice or to rely on "self help." Within the last few years, some provincial public legal education organizations began offering basic legal information for older adults. These written materials typically focus on provincial or federal benefits and services for seniors, or on victimization issues, and may be available in several languages in some jurisdictions.[29] Public legal education in Canada tends to remain a passive system, where older adults must know where to seek information. Legal information on the Internet remains marginally accessible to most seniors, even if one assumes some are in contact with people who will have access to this technology.[30] With the possible

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[28] *British Columbia (Attorney General) v, Christie,* 2007 S.C.C. 21 (May 25, 2007).

[29] *See e.g.*, Legal Services Society, *When I'm 64: A Guide to Benefits and Services for People Aged 60 and Over,* http://www.lss.bc.ca/assets/resources/pubs_w/wi64.pdf (Jan. 2006).

[30] For a discussion of public legal education's potential in meeting the needs of low income persons through Internet presence, *see* Lois Gander, Lecture, *The role of public legal education in poverty law services,*

http://www.legalresourcecentre.ca/docs/povjun03.doc (June 2003); *see also* Lois Gander, Lecture, *The role of the internet in providing public legal education services to disadvantaged individuals and communities,* http://www3.extension.ualberta.ca/lsp/povjun03.doc (last accessed May 3, 2007). And, for an illustration of the type of information available, *see* Older Adults

exception of poverty lawyers working in some jurisdictions, legal aid in Canada has not covered many of the legal issues commonly affecting older adults. Moreover, older adults' incomes may be slightly over financial thresholds for legal aid eligibility. Legal aid typically focuses on family law and defense of criminal charges. The Advocacy Center for the Elderly ("ACE") is the one notable exception to this general lack of legal aid services.[31] Serving the City of Toronto in Ontario, ACE began providing the first specialized legal aid services to older adults in 1985 and is still unique within the country.[32] ACE has helped develop promising practice approaches, critical thinking and systemic advocacy in a number of key areas, including housing issues affecting older adults, abuse and neglect issues, and care facility rights.

The national development of elder law skyrocketed after 2002, when the Canadian Bar Association ("CBA") first recognized it as new area of legal practice. CBA's formation of the National Elder Law Section ("NELS") led to significantly more opportunities for private and public sector lawyers and their support staff to become informed and sensitized to legal and related issues of aging. They now have access to online and in person courses,[33] provincial and national conferences, as well as national exchanges such as "Elder Member Listserv." The NELS has now grown to over 1000 members. Also, for the first time, Canadian lawyers became engaged as an association with provincial and federal governments to consider, advocate, and elaborate on new laws, policies and law reform, sometimes joining with colleagues in other professions such as medicine, social work, and gerontology, many of whom had long been involved in these issues.

Unlike the development of the elder law practice in the United States, which was given impetus in the early 1980's and financial viability by assisting older clients with later life planning, Medicaid eligibility and private guardian/conservatorship services, Canada's subsidized health care system, its system of public guardians or public trustees (and in Québec Public Curator), along with the absence of a culture or industry of lawyers acting as private guardians or trustees, may explain, in part, the later start to the development of elder law as a

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Knowledge Network's focus on abuse, http://www.oak-net.org/index.html (last accessed May 3, 2007).

[31] *See* Advocacy Ctr. For the Elderly, http://www.advocacycentreelderly.org (accessed June 1, 2007).

[32] Legal aid clinics exist in some form in all provinces. These are subsidized by provincial government funding for persons with revenues and/or assets under a certain threshold, usually the poverty line. *See* Advocacy Ctr. For the Elderly, *About ACE,* http://www.advocacycentreelderly.org/nav/about.htm (accessed June 1, 2007).

[33] E.g., Legal Education Society of Alberta (LESA), available at http://www.lesa.org (accessed June 1, 2007).

special practice area in Canada. Canada, however, has been quickly catching up.

Although it is too early to determine, the private practice of elder law would likely challenge most lawyers to market and sustain financially as a stand alone practice. That may change for some in time as the aging population grows and elder law becomes better known. In the meantime, elder law is being marketed and practiced in conjunction with, or as a complement to, other specializations, notably wills, estates and trusts and health law, as a way to provide a more complete, holistic, package of services to a growing older clientele.

To help meet that knowledge demand among lawyers and other professionals, the first national comparative law text was published in 2005 on basic issues of elder law.[34] Selected issues of law and aging (which were previously taught as occasional courses or course sections in health or gerontology within faculties of medicine or social work) are now beginning to be taught as comprehensive courses of law. This new trend started first at McGill University's Faculty of Law in 2005 with a national comparative law course. Courses soon followed in three other provinces (Saskatchewan, Alberta and British Columbia). The first elder law course for provincial, territorial and federal judges was offered through the National Judicial Institute in Ottawa in 2005.

While at least one university has been giving some of its law students experience with older adults through law clinics for several years, the first comprehensive clinical course in Elder Law was introduced in the spring of 2007 at McGill's Faculty of Law through the Centre for Legal Information on Aging/Centre légale d'information pour les aînés ("CLIA"). This *pro bono* clinic will be supported by students and senior lawyers and notaries, and is an initiative of the National Institute of Law, Policy and Aging/Institut national du droit de la politique et du vieillissement ("NILPA"), in alliance with the Faculties of Medicine and Social Work at McGill University, and the Institut universitaire de gériatrie de Montréal.

Research on legal issues has also increased at universities and within governments as the urgency of addressing the complex set of needs, rights and benefits of older Canadians and the impact of aging on society is given greater priority and receiving more government and institutional funding. In this regard, two specialized legal centers dedicated to research, education and advocacy, have been established -- the Canadian Centre for Elder Law Studies, which is affiliated with the British Columbia Law Institute, and NILPA, based in Montreal.

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[34] Ann Soden, *Advising the Older Client* (1st ed., LexisNexis Canada 2005).

III. THE ELDER LAW LANDSCAPE IN CANADA

A. The Right to Social Security

Unlike some countries, Canada has not entrenched a "right to social security" in law *per se*.[35] However, Canada has established a relatively robust three-tier retirement system comprised of: (a) a contributory employment-based pension (Canada Pension Plan (CPP)/ Québec Pension Plan (QPP)); (b) a basic social security program (Old Age Security/Guaranteed Income Supplement); and (c) where available, workplace pensions and self contribution retirement savings. The maturation of public pensions, in particular, has helped to significantly reduce the poverty rate of Canadian seniors in the past quarter century.[36] Nonetheless, the income gap between men and women in later life remains very evident and reflective of life long disparities. For example, in 2004, the mean *before-tax* income of women over 65 was 67 percent of that of men.[37]

(i) Canada Pension Plan (CPP)

First developed in 1966,[38] this employment-based pension plan provides a monthly income, a lump sum death benefit, survivor benefits and disability benefits in cases of "permanent disability."[39] The province of Québec provides an equivalent Québec Pension Plan (QPP) for its residents.[40] The CPP/QPP is funded by contributions by employees and employers, not by general tax revenues.

The pension amount received starts after a person applies (normally at age 65). However, a person can apply as early as 60 (and will receive a permanently reduced amount), and as late as age 70 for an enhanced amount. Low income people aged 60 and over who receive social assistance are typically required by provincial law to apply for CPP benefits early, but with the permanently reduced amounts.[41] The CPP is recognized for having a number of important benefits over

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[35] *See e.g.,* International Covenant on Economic, Social and Cultural Rights, Art. 9.

[36] Turcotte & Schellenberg, *supra* n. 5, at 66.

[37] The constant before-tax income difference between men and women in 2004 was $10,800 ($21,400 vs. $32,500), virtually unchanged from 2000, Turcotte & Schellenberg, *supra* n. 5, at 29.

[38] Human Resources Development Canada, *Pension Timeline,* http://www.civilization.ca/hist/pensions/cpp-timeline_e.html (last accessed May 3, 2007).

[39] Canada Pension Plan, R.S.C., c. C-8 (1985).

[40] Régie des rentes Québec, *A retirement pension under the Québec Pension Plan*, http://www.rrq.gouv.qc.ca/en/retraite/rrq (last accessed May 24, 2007).

[41] Lillian Zimmerman & Charmaine Spencer, *Bismarck meets the Boomers: Does mandatory retirement have a future* (Gerontology Research Centre, Simon Fraser University forthcoming).

workplace pensions: it covers all sectors of the economy; is completely portable; covers part-time and self-employed workers; and accommodates family responsibilities to some degree.[42]

The CPP is intended to replace about 25 percent of the person's income.[43] The average CPP pension for women in October of 2005 was approximately $334 (or 63 percent of the average $527 received by males). Couples can split their CPP benefits to reduce the payable tax, if they desire. The pension credits may also be divided upon marriage dissolution.

(ii) Old Age Security (OAS)

This is a federally administered public pension program enacted by the *Old Age Security Act.*[44] It provides older adults with a modest monthly pension at age 65 if they have lived in Canada for at least 10 years, and a partial pension for immigrants once they have met the 10-year requirement.[45] The OAS is fully indexed to annual cost of living. The program is financed from federal general tax revenues. Although often considered a "universal benefit," it is gradually "clawed back" at higher levels of income.[46]

Low income seniors (predominantly older women and immigrants) [47] who receive the Old Age Security may also be eligible for the Guaranteed Income Supplement (GIS). Close to one half of women aged 80 and older depend on the GIS. This may, however, under represent the level of need. As a result of lack of awareness of the GIS benefit and the cumbersome annual renewal process, persons aged 80 and over are the group of older adults most likely to not receive the GIS even though they are eligible. In some jurisdictions, more than 60 percent of seniors received GIS, and this rises to 80 percent of women aged 80 and older.[48] OAS and GIS benefits amount to a total of about

[42] Townson, *supra* n. 15.

[43] National Council on Welfare, *A Pension Primer 1999,* http://www.ncwcnbes.net/documents/researchpublications/OtherPublications/1999Report-PensionPrimer/ReportENG.htm (last accessed May 26, 2007).

[44] R.S., c. O-9 (1985).

[45] Human Resources Development Canada, *Overview of the Old Age Security program,* http://www.hrsdc.gc.ca/asp/gateway.asp?hr=/en/isp/oas/oastoc.shtml&hs=ozs (last accessed May 3, 2007).

[46] *Id.*

[47] National Advisory Council on Aging, *supra* n.16, at 33.

[48] National Advisory Council on Aging. *supra* n.16, at 34.

$28 billion per year—14 percent of the federal government's total yearly spending.[49]

Receipt of the GIS is often a springboard for other provincial or territorial government benefits. There is also an Allowance for 60 to 64 year-old spouses or common-law partners of pensioners who receive GIS, as well as a survivors' Allowance payable to 60 to 64 year-old widowed spouses or common-law partners.[50] Canada has international social security agreements with a number of countries to enable people who have lived or worked in another country to be eligible for benefits in Canada or in that other country.[51]

While this public pension system of OAS/GIS has improved the poverty situation of seniors in Canada, seniors' organizations have recommended a number of needed improvements. These focus on: coordinating programs; improving adequacy to meet at least basic poverty lines such as Low Income Cutoffs;[52]and redressing the punitive nature by which the GIS is "clawed back" from seniors who have small amounts of income above the identified income thresholds.[53]

Many recently immigrated seniors are more likely to have low incomes, reflective of the 10-year residency requirement before they can apply for Old Age Security and the GIS.[54] As a result, they must manage without these and other important government benefits throughout that period.[55] When a family member or other person sponsors an older adult to come to Canada, that individual is fully responsible for that person's needs. If the sponsorship breaks down, and the older person becomes in need of social assistance, the social assistance payments by government now become a debt that the sponsor must repay.

There has been little litigation on the public pension system. However, in 1995, the Supreme Court of Canada heard *Egan v. Canada* ("*Egan*"),[56] an equality rights case involving federal legislation that denied old age security benefits to persons in same-sex relationships. In *Egan,* the Court found that federal legislation violated Section 15 (discrimination based on sexual orientation) of the *Charter*, but upheld

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[49] Office of the Auditor General of Canada, *Old Age Security-Human Resources and Social Development Canada and Service Canada,* http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20061106ce.html (Nov. 28, 2006).

[50] Human Resources and Social Development Canada, *Income Security Programs*, http://www.hrsdc.gc.ca/en/gateways/nav/top_nav/program/isp.shtml (accessed May 3, 2007).

[51] Service Canada, *International Benefits,* http://www.hrsdc.gc.ca/asp/gateway.asp?hr=en/isp/ibfa/intlben.shtml&hs=sya (last accessed May 3, 2007).

[52] National Advisory Council on Aging, *supra* n.16, at 18.

[53] *Id.*

[54] *Id.* at 33.

[55] *Id.* at 33.

[56] [1995] 2 S.C.R. 513.

the specific measure under consideration as a reasonable limit in Canadian society. This case was the first time where a majority of the Supreme Court recognized that sexual orientation is a prohibited ground of discrimination under Section 15. Over the next five years, however, the federal government made changes to pension eligibility to the Old Age Security program and the Canada Pension Plan to include common law relationships and people in same-sex relationships, subject to having lived together for a specified time.

(iii) Workplace (Employment, Occupational) Pensions Plans

Less than 50 percent of seniors receive monies from a private (workplace) pension plan, directly or through survivor benefits.[57] Historically, there have been important differences for men and women in the Canadian labour force, both in terms of having access to workplace pensions and the adequacy of those pensions. In 2001, over 60 percent of women in the workforce did not have access to workplace pensions.[58] The majority of women continue to work in sectors that have lower rates of workplace pensions and women's work trajectory is often different with more time spent out of the workforce. On average, women working fulltime earn only 71 cents for every $1 men earn,[59] reflecting significant structural inequities.[60] These economic realities have long-term implications for them in later life. Immigrants are also much less likely to have private (workplace) pension plans than non-immigrants.

In 2003, workplace plans represented 41 percent of older men's incomes but only 26 percent of older women's, with the remainder being made up of OAS/GIS, CPP, or savings. Only 12 percent of immigrants aged 60 or older in 2003 had any private pension income; and this pension money accounted for only 13 percent of their total income. While divorced or separated women have been legally entitled since the 1970s to claim a portion of their former spouse's workplace pension as a divisible family asset, most still do not, which may increase their risk of poverty in later life.

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[57] National Advisory Council on Aging, *Aging in Poverty in Canada 2005,* 13, http://dsp-psd.pwgsc.gc/Collection/H88-5-5-2005E.p-df.

[58] *Id.* at 11.

[59] Statistics Canada, The Daily, *Women in Canada,* Mar. 7, 2006, http://www.statcan.ca/Daily/English/060307/d060307a.htm.

[60] Some of the challenges of trying to achieve and legally enforce pay equity can be seen in the Supreme Court of Canada decision in *Newfoundland (Treasury Board) v. N.A.P.E.,* [2004] 3 S.C.R. 381, 2004 SCC 66.

B. Personal Retirement Savings

Since the mid 1970s, the federal government has promoted individual saving for retirement by providing an income tax deduction for retirement savings registered in special plans. These plans largely benefit higher income individuals, reducing their marginal taxes more. Unlike workplace pension vehicles, these retirement savings are not a "pension plan." The policy has been criticized on several fronts: as abdicating public responsibility; as a major tax diversion that reduces taxes to government to the detriment of funding for social programs for low income persons;[61] and for being promoted to low income earners who actually risk losing benefits in later life by having these savings.

C. The Right to Health Care

(i) Receiving Health Care

Canada has a universal Medicare program under the *Canada Health Act.*[62] Passed in 1984, the *Act* serves as a foundation for the provision of health care services in the country. It set out two major categories of health care services: (1) Insured Health Services (these traditional health services are defined as medically necessary hospital services, physician services and surgery-dental services provided to an insured person); and (2) Extended Health Care Services, which include nursing or long-term residential care, home care, and ambulatory health care services.

Provinces have assumed responsibility for the extended health care services. Each jurisdiction has individually determined the types and level of services they will provide. This contributes to the variability among provinces in terms of regulations, range and extent of services available, models of service delivery and funding models and user charges.[63] Each province sets priorities and sets up its own health system in different ways.

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[61] *See e.g.* Claire F.L. Young, Status of Women Canada, *Women, Tax and Social Programs: The Gendered Impact of Funding Social Programs Through the Tax System,* 42-43, http://www.swc-cfc.gc.ca/pubs/pubspr/066265028X/200010_066265028X_e.pdf (Oct. 2000).

[62] R.S., c. C-6 (1985).

[63] *See* Marcus Hollander et al., The Identification and Analysis of Incentives and Disincentives and Cost-Effectiveness of Various Funding Approaches for Continuing Care (Technical Report No. 1), http://www.hollanderanalytical.com/downloads/id-tech-1.pdf (May 2000); *see also* Marcus Hollander, *Unfinished Business: The Case for Chronic Home Care Services, A Policy Paper,* http://www.hollanderanalytical.com/downloads/unfinished_business.pdf (Aug. 2003);

Karen Parent et al., *Analysis of Interfaces Along the Continuum of Care, Technical Report No. 2*, http://www.hollanderanalytical.com/downloads/continuum-tech-2.pdf (Feb. 2002).

Reflective of the universal Medicare system, 95 percent of seniors in Canada have access to a regular family doctor.[64] Only a small percentage of seniors (6.6 percent) report unmet health needs, mainly attributable to long waiting times or accessing specialized services for a newly-diagnosed medical condition.[65] However, the country has been experiencing a "health care gap" between need and appropriate resources across age groups and the population. A high median age among health care professionals, significant lack of physicians and nurses who specialize in geriatrics and a growing trend to substitute nursing care with less formally skilled practitioners in institutional settings can significantly affect older adults' ability to receive appropriate and good quality care, and may increase the likelihood of some to experience medical neglect. [66]

During the past decade, there has been pressure at the political level to allow a greater level of privatization into the health care system, a move which has met significant public resistance. In 2005, the Supreme Court of Canada considered a case involving a provincial government's prohibition of private insurance for health care procedures covered under provincial Medicare.[67] In that case, the Court ruled that a province could not prohibit persons from obtaining this type of private insurance, and identified the problem of health service delays. Although the specific issue involved in the case was fairly narrow, it has been politically characterized in some quarters as "evidence" to legally permit increased health care privatization.

(ii) Discrimination in Health Care

Older adults' medical care can be negatively affected by direct and indirect discrimination. Although each province and territory has human rights legislation that prohibits discrimination in terms of "services ordinarily available to the public," at least one province does not offer age discrimination protection in the area.[68] There have been few, if any, human rights cases put forward by older adults to help shape the understanding of what this term means in the context of health care.

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[64] Charmaine Spencer, *A Way Forward: Abuse Prevention in Institutional Settings - National Snapshot* (University of Toronto: Institute for Life Course and Aging forthcoming).

[65] *Id.*

[66] *Id.*

[67] *Chaoulli v. Québec (Attorney General)* [2005] 1 S.C.R. 791, 2005 SC 35.

[68] *See e.g.* Alberta's *Human Rights, Citizenship and Multiculturalism Act*, [RSA].1980 c, H-14, § 4; British Columbia's *Human Rights Code,* [RSBC 1996] c.210, s. 8(1); Saskatchewan *Human Rights Code,* SS 1979, c. S-24.1 (includes "age " as a protected category, but defines it as only including persons aged 18 to 65).

Older adults in many jurisdictions may experience forms of individual or systemic discrimination in terms of accessing appropriate health services (for example, limits on number of health conditions to be discussed in an appointment; physicians discharging patients with multiple health problems to manage their workloads, or discharging smokers from their patient list). Older adults are generally disadvantaged in equality cases, as litigation of human rights cases does not survive the person.

(iii) Advance Care Planning and Living Wills

The right of the capable individual to consent or refuse treatment is well established in Canadian common law. Included is the right to identify in advance what types of care the individual might want or not want in the event of incapacity. For over a quarter century, Canadian common law has stood by the legal principle that a doctor is not free to disregard a patient's advance instructions.[69] Across the country, there are a wide range of legal tools that have been created to aid personal decision-making in the context of health care, personal care and end of life care. Each province and territory has its own structure and systems for these decisions. Depending on jurisdiction, these may include: statutorily recognized temporary substitute decisionmakers; use of personal care directives; instructional directives (without or without also naming a proxy); and the choice of nominating someone to speak on the behalf of the person who is now unable to communicate his or her own wishes. As a result, these legal instruments now play important roles in planning for incapacity.[70] All Canadian provinces and territories have legislation dealing with advance health care directives except Nunavut, which provides for powers of attorney for property and financial matters only. Most advance directives cover health care and personal care, such as hygiene, nutrition and where the person will live or receive treatment.

There is concern among some legal practitioners that acute care and long-term care staff often misunderstand the purpose of advance care planning instruments and there is a real risk of their misuse.[71] The matter

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[69] *See Malette v. Schulman* (1990) 72 O.R. (2d) 417 (C.A.); *Fleming v. Reid* (1991) 4 O.R. (3d) 74 (C.A.).

[70] *Advising the Older Client, supra* n. 34, at 109 (contributor Gerald Robertson's article, *Enduring Powers of Attorney and Health Care Directives*).

[71] Jane E. Meadus, Judith A. Wahl, & Pauline Rosenbaum, *Written Submission to the Standing Committee on Social Policy on Bill 140, An Act respecting long-term care homes* 2, http://www.advocacycentreelderly.org/pubs/Nursing/Submission.pdf (Jan. 17, 2007). "A 2004 research study of advance directive policies in long term care homes in Ontario found that "policies regarding advance directives in long-term care centres in Ontario generally do not comply with the spirit or the letter of the applicable laws". *Id.* at 53. *See also* Judith Wahl, *Testimony to the Special*

of *requiring* advance care planning by seniors, especially as a condition for receiving services, has been receiving increased attention in Canada at a policy level. This may be driven less out of respect for personal autonomy in making decisions, and more by the mistaken belief that advance directives will help reduce health care costs.

(iv) Euthanasia

In Canada, active euthanasia is prohibited under the Criminal Code of Canada ("the Criminal Code").[72] Those who help hasten a person's death risk being charged with: aiding or abetting a person to commit suicide;[73] failing to provide the necessaries of life;[74] or second degree murder (manslaughter).[75] The legal issues of euthanasia and assisted suicide were subjected to considerable public discussion at the Senate level in Canada in the mid-1990s, following a *Charter* case.[76] The case involved a woman with a severe disability (Lou Gehrig's Disease) who was seeking medical assistance to end her life at a future point. Any physician who aided her would have risked being charged under section 241 (b) of the Criminal Code. The Court concluded that although the Criminal Code effectively denied her right to security of the person (as the law did not permit her personal autonomy to control how long and how she lived), this denial was considered in accordance with the Canadian principles of fundamental justice.

Subsequent to the case, the country installed a Special Senate Committee on Euthanasia and Assisted Suicide, leading to important hearings on end of life care.[77] As a result of those deliberations, Canada developed a special Secretariat on Palliative and End of Life Care and a national palliative care strategy.[78] Since then, there has been private

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Senate Committee on Aging, May 28, 2007, http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/agei-e/44655-e.htm?Language=E&Parl=39&Ses=1&comm_id=600.

[72] R.S.C., c. C-46 (1985).

[73] Criminal Code of Canada*,* R.S.C., c. C-46, § 241(b) (1985) (aids or abets a person to commit suicide).

[74]Criminal Code of Canada*,* R.S.C., c. C-46, § 215 (1985) (duty of persons to provide necessaries).

[75] *See e.g., R. v. Latimer,* 2001 SCC 1 (2001), a case involving active euthanasia by a father against his disabled child. Robert Latimer was charged with second degree murder.

[76] *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519.

[77] Parliament of Canada, Special Senate Committee on Euthanasia and Assisted Suicide, *Of life and death - Final report,* http://www.parl.gc.ca/35/1/parlbus/commbus/senate/Com-e/euth-e/rep-e/LAD-TC-E.HTM#Tablepercent20ofpercent20Contents (June 1995).

[78] *See* Health Canada, *Canadian Strategy on Palliative and End-Of-Life Care*, http://www.hc-sc.gc.ca/hcs-sss/alt_formats/hpb-dgps/pdf/pubs/2005-strateg-palliat/2005-strateg-palliat_e.pdf (last accessed June 2, 2007).

member bills put forward to amend the Criminal Code to legalize active euthanasia, but these have not been put to a vote.

D. The Right to Adult Protection

(i) Abuse and Neglect Protections

Abuse and neglect of older adults is a complex social and legal issue, with multiple dimensions and a diverse typology.[79] In community settings, the perpetrators may be the person's spouse, one or more family members, paid care providers, or casual acquaintances. The abuse may be recent or long standing (having begun earlier in a relationship and continued into later life). While some abuse or neglect cases involve older persons who may have limited or deteriorating mental capacity, the vast majority do not. As a result, the response to preventing or addressing abuse and neglect in later life does not easily fit within one type of legal or social approach.

Most Canadian jurisdictions integrate the protection and legal interventions for abused or neglected older persons through the use of: (a) family violence protection laws (restraining orders, peace bonds); (b) mental health, adult guardianship and substitute decision-making laws (to aid mentally incapable adults); (c) public guardian and trustee law (for cases involving financial abuse and mental incapability); and (d) in the case of Québec, into its human rights law.[80] Regional networks as well as a national network have developed in Canada to help communities work together to better understand and address the underlying causes of abuse and neglect of older adults in appropriate ways.[81]

Many of these provincial or territorial laws use criteria other than older age as the threshold for protection and government intervention.

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[79] Some Canadian academics have drawn a conceptual distinction between frauds or other criminal matters where older adults are victimized by strangers as distinct from "abuse" and "neglect" by persons in positions of trust, power or authority. *See e.g.* Canadian Network for the Prevention of Elder Abuse, *What is senior abuse, http://www.cnpea.ca/what_is_abuse.htm.*

[80] Québec Charter of Human Rights and Freedoms, R.S.Q. 2006 c. C-12, Part I, Chapter IV, § 48, http://www.cdpdj.qc.ca/en/commun/docs/charter.pdf (Apr. 19, 2006) ("Every aged person and every handicapped person has a right to protection against any form of exploitation. Such a person also has a right to the protection and security that must be provided to him by his family or the persons acting in their stead.").

[81] *See e.g.,* Canadian Network for the Prevention of Elder Abuse, http://www.cnpea.ca (accessed June 2, 2007); The Ontario Network for the Prevention of Elder Abuse, http://www.onpea.org/en/Home.htm (accessed June 2, 2007); Réseau québécois pour contrer les abus envers les aînés, http://www.rqcaa.org/accueil.php?lang=en (accessed June 2, 2007).

Unlike the United States, but similar to England,[82] most Canadian jurisdictions have steered clear of requiring mandatory reporting for abuse or neglect of adults in the community. Moreover, special adult protection laws geared to addressing some aspect of abuse, neglect or self neglect among "vulnerable adults" exist in five provinces and one territory and vary in definition and scope.[83] These special statutes first developed in the 1970s.

Although there have been private members bills put forward from time to time, there is no specific criminal charge of "elder abuse" in Canada. This reflects a belief that the existing criminal law provisions are sufficient, a recognition of the underlying paternalism of a criminal offence premised on the assumption that older adults are necessarily vulnerable,[84] and the lack of concrete evidence from other jurisdictions that special criminal laws for abuse in later life reduce the likelihood of harms occurring or effectively remedy the harms. Under the Criminal Code, the court may consider a number of circumstances in determining the appropriate sentence for theft, assault, manslaughter or any other criminal matter. Special circumstances may include whether the crime involved abuse of a spouse or partner,[85] a relationship of trust or authority,[86] or whether it was motivated by prejudice, bias or hatred of an individual or group, based on a number of listed factors, including age and disability.

The country has made major efforts since the mid 1990s to better understand and address the underlying causes of abuse and neglect of older adults. The overall development of services and resources for abused or neglected older adults is improving but still lags significantly behind other areas of family violence prevention. In 2004, in the case of *Nova Scotia (Minister of Health) v. J.J.,*[87] the Supreme Court of Canada considered the role of the provincial courts in scrutinizing services being provided to vulnerable adults under adult protection laws.[88] In *Re: J.J.,* the Family Court judge declined to authorize a plan to transfer the protected adult to a facility out of the region. The Supreme Court of

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[82] *See* Rachel Filinson, *"No Secrets" and Beyond: Recent Elder Abuse Policy in England*, 18 J. of Elder Abuse & Neglect 1 (2007).

[83] These are Yukon, British Columbia, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador.

[84] For a general discussion on assumptions about age, capacity and vulnerability across the lifespan, *see e.g.,* Law Commission of Canada, *Does age matter? Law and relationships between the generations* (Feb. 2004).

[85] Criminal Code of Canada*,* R.S.C., c. C-46, § 718.2 (ii) (1985) ("Other sentencing principles").

[86] Criminal Code of Canada*,* R.S.C., c. C-46, § 718. 2 (iii) (1985) (arguably, this would include professionals and paid caregivers).

[87] [2005] 1 S.C.R. 177.

[88] *Nova Scotia (Minister of Health) v. J.J.* [2005] 1 S.C.R. 177, 2005 SCC 12.

Canada determined that the courts were not limited to accepting or vetoing care plans put before them by the adult protection services; judges also had a responsibility to determine whether the plan was consistent with the best interests and welfare of the protected person.

To reduce barriers within the justice system and better aid older adults who have been victimized by family or others, there have been efforts in some jurisdictions to build the knowledge of police, victim services, Crown Prosecutors and the judiciary, especially to actively avoid the stereotyping of older adults as incapable, mistaken or unreliable persons. These educational efforts also often focus on nurturing a sound understanding of the dynamics of abuse or neglect in later life, both in community and institutional settings, as well as its impact on the individual, family and communities.

The availability of new technology such as video recording to tape victims statements have helped police efforts in some municipalities to improve the likelihood of securing a conviction in the event the older adult subsequently becomes ill or becomes mentally incapable. The recent Supreme Court of Canada case *R. v. Khelawon*,[89] an assault case involving hearsay evidence of a deceased resident of a care home, highlights the real risk of perpetrators simply outliving their older victims.

"Elder neglect" is uncommon in Canada as a criminal matter. However, when extreme neglect occurs, it may lead to a charge as failing to provide necessaries of life where one person is physically or otherwise dependent on another, or, as happened in a recent case, indirect contributions to the person's death may be raised to manslaughter.[90]

With regard to abuse in care facilities, most provinces have enacted or incorporated policies to deal with abuse in institutional settings such as *licensed* care facilities. However, there are far fewer safeguards for unregulated collective settings such as retirement homes or personal care homes, or assisted living, and these types of facilities increasingly comprise the bulk of units where physically or mentally frail older adults will receive care and support in later life.[91]

In licensed care, these safeguards include general quality of care standards, mandatory reporting for abuse, some type of inspection process or general oversight process. Depending on jurisdiction, these may or may not be incorporated into statutes or regulations. A few provinces have enacted special recognition (bill of rights) for residents in

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[89] [2006] S.C.R. 57.

[90] Peter Brieger, *National Post, Son guilty of manslaughter for neglect of elderly mom*, http://www.canada.com/nationalpost/news/story.html?id=edcc6f00-4413-4a74-9320-ad2c6558906b (Feb. 8, 2007).

[91] Spencer, *supra* n. 64.

the care facilities, along with residents', users' or family councils.[92] Two jurisdictions (Alberta and Manitoba) have enacted special laws for the protection of persons in care, and have established a special office to oversee this.[93] However, the legal thresholds for abuse and neglect under these laws result in two thirds of the cases being deemed "unsubstantiated."[94]

(ii) Guardianship

Canada uses a wide terminology for guardianship, which can include trusteeship, committeeship, guardianship, and protective supervision. The procedure for obtaining guardianship of the physical person and or the estate (property, assets and financial affairs) of a mentally incapable person is set out in provincial and territorial "mental incompetency" and adult guardianship laws and related legislation.[95] The field of guardianship and substitute decision-making has undergone considerable change in the past 25 years.[96]

All provinces except one provide some form of statutory guardianship that uses certificates declaring the person as mentally incapable.[97] The advantage of these tools is ease of use; but there is considerable difficulty for the person to later regain control over finances. The statutory guardianship orders may contravene the *Charter* as not meeting basic principles of fundamental justice. [98]

Court-ordered guardianship is intended to be used as a last resort. Legislation in several jurisdictions requires that less restrictive and intrusive alternatives to court-ordered guardianship be explored.[99] Alternatives to guardianship now include: adult protection legislation for short-term intervention by health and social services personnel; health care consent legislation codifying the common law of consent; and enshrining the use of an adult's spouse, near relatives or friends as substitute decisionmakers. In some cases, imaginative and innovative use of the law of trusts, particularly the creation of income and discretionary trusts, may provide for the financial needs of the incapable adults. These are usually created for aging intellectually disabled persons by their

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[92] For an overview of the legislative and regulatory schemes within Canada, *see* Spencer, *supra* n. 64.

[93] *Id.*

[94] *Id.*

[95] Soden, *Advising the Older Client, supra* n. 34, at 82-107 (contributor Robert M. Gordon, *Guardianship of the Person and Estate*).

[96] *Id*. at 105.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 86-91.

parents.[100] Enduring powers of attorney are seen as valuable for their ease of use and not requiring judicial intervention, but are also recognized as open to abuse.[101] Some provinces have put legal safeguards in place to reduce these potential risks.

Canada has made significant efforts to use guardianship as a last resort, and to find less intrusive but as effective means of meeting older adults' needs. There have also been efforts to tailor the guardianship so that it only covers specific needs, such as over finances or the person. The Civil Code of Québec[102] provides several protective measures that offer legal protection to older persons who become unable to take care of themselves or their property. These take the form of mandate, curatorship, tutorship or advisership.[103] Guardianship by government representatives has been largely actively avoided at a policy level because of the cost to the public coffers. However, the approach is sometimes criticized as creating the risk of accepting almost anyone as a guardian, including unscrupulous persons.

E. The Right to Institutional Long-Term Care

In 2001, 7.4 percent of Canadian seniors and 32 percent of those aged 85 and over lived in facilities that provided health care as well as personal support or assistance.[104] Access to publicly funded long-term care (skilled nursing) facilities is typically controlled by health and social services that utilize an assessment process. Increasingly, in many parts of the country, only the frailest and medically compromised are being admitted to the licensed skilled care facilities.

As previously mentioned, provinces tend to draw a legal distinction between skilled nursing care facilities and other congregate environments such as assisted living or other supportive care environments. The former tend to have certain minimum standards, and the latter tend to operate in a relatively non-regulated environment.[105] In several Canadian jurisdictions, assisted living and supportive housing for seniors is specifically excluded from basic landlord tenant law protections, leaving residents to rely on operator drafted adhesion contracts.[106] Quebec and Ontario are two notable exceptions.[107]

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[100] *Id.* at 105.

[101] Robertson, *supra* n. 70, at 113.

[102] S.Q. 191, c. 64.

[103] Soden, *Advising the Older Client, supra* n. 34, at 186-196 (contributor Pierre Deschamps, *General Planning for the Older Client (Part III - Québec)*).

[104] National Advisory Council on Aging, *supra* n. 16, at 10.

[105] Spencer, *supra* n. 64.

[106] Soden, *Advising the Older Client, supra* n. 34, at 317 (contributors Margaret Hall and Charmaine Spencer's article, *Assisted Living*).

There are currently significant systemic legal issues arising in long-term care that may undermine older adults' rights and harm their care. Among these are: inappropriate admission to care; inappropriate terms in admission contracts; failure to obtain proper health care consent; abuse of residents (including rights violations); resident neglect; inappropriate use of physical and chemical restraints or improper use of "secure units"; and misuse of advance care planning documents.[108] In the past decade, there have been increasing concerns about the quality of the care in the facilities, the staffing levels and training, and the lack of qualified dementia care across the care and housing continuum.[109]

F. The Right to Community Based Long-term Care

(i) Home Care

As previously mentioned, home care falls under provincial jurisdiction as extended health care under the Canada Health Act.[110] Provinces and territorial governments largely operate under the policy assumption that formal government services only act as a default safety net for persons without any family support. While provincial governments' spending on home care has increased significantly within the past decade, a smaller proportion of seniors now receive government subsidized home care, and those receiving home care can still have important unmet needs.[111]

Over 80 percent of care is provided by family (usually the aging spouse); and at a policy level, this has largely been treated as "cost free" care.[112] This ignores the heavy costs to middle aged and older women who are predominantly the caregivers.[113] In particular, it has been noted

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[107] Residential Tenancies Act, 2006, S.O. 2006, c. 17, Part IX (Care Homes); Civil Code of Quebec, Q.S.Q. 191, c. 64, arts. 1892 to 1978. Note, however, the Quebec Civil Code provisions do not include any room "situate in a health or social services institution."

[108] Meadus, Wahl, & Rosenbaum, *supra* n. 71, at 2.

[109] Spencer, *supra* n. 64.

[110] R.S.C., c. C-6.

[111] Gisèle Carrière, *Statistics Canada, Seniors' Use of Home Care*, 17(4) Health Report, 43-50, http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/82-003-XIE/82-003-XIE2005004.pdf (2006).

[112] Janet Fast, Deanna L. Williamson & Norah Keating, *Hidden costs of informal elder care 1999,* J. of Family and Economic Issues, Vol. 20(3), 301-326, 322, Sept. 1999. For a general discussion on the economic impact of elder care in Canada, *see also* Janet Fast, Jacquie Eales & Norah Keating, *Economic Impact of Health, Income Security and Labour Policies on Informal Caregivers of Frail Seniors*, March 2001, http://www.swc-cfc.gc.ca/pubs/pubspr/0662654765/200103_0662654765_2_e.html (accessed May 3, 2007).

[113] Marika Morris et al., Canadian Research Institute for the Advancement of Women (CRIAW), *The Changing Nature of Home Care and Its Impact on Women's Vulnerability to Poverty*, http://www.swc-cfc.gc.ca/pubs/pubspr/0662280857/199911_0662280857_1_e.pdf (Nov. 1999); *see also* Janet Fast et al., *Status of Women Canada, Economic Impact of Health, Income Security and*

that employed women, those who have concurrent child-care responsibilities, those who live at a moderate distance from their care receiver, and family caregivers are served the least well by existing policy approaches to informal caregivers.[114]

(ii) Filial Responsibilities

The old age security system is seen as the primary financial support to older adults. However, each provincial and territorial jurisdiction has a form of law that requires some degree of filial financial responsibility to parents.[115] There has been very little litigation in this area and the laws may be considered as vestigial to the 1930s Depression, when governments had difficulty providing for older members of the population.

The courts have interpreted an adult's responsibility to his or her parents as secondary to the adult's responsibility to support his or her children and spouse. Courts avoid judging the quality of the family relationship in childhood to determine how "deserving" older adults might be for financial support, and some analysts note use of these laws can destroy already fragile ties between family members.[116] Recently, after a review of the function and application of the financial responsibility provisions of the law, one provincial law reform body called for its repeal.[117]

Section 215 (1) of the Criminal Code of Canada also imposes a duty on certain persons to provide the necessaries of life to another who is "unable by reason of detention, age, illness, mental disorder or other cause to withdraw self from that charge and is unable to provide self the necessaries of life."[118] The person may be subject to a criminal charge if he or she fails in that duty and the failure endangers the life of the person or is likely to permanently endanger the health of the other person. These charges are rarely laid.

Labour Policies on Informal Caregivers of Frail Seniors, http://www.swc-cfc.gc.ca/pubs/pubspr/0662654765/200103_0662654765_e.pdf (Mar. 2001).

[114] Fast et al., *supra* n. 113.

[115] Soden, *Advising the Older Client*, *supra* n. 34, at 380 (contributors Nicholas Bala et al., *Family Law for the Canadian*).

[116] Christa Bracci, *Ties that bind: Ontario's Filial Responsibility Act*, 17 Canadian J. on Fam. L. 455-500 (2000).

[117] British Columbia Law Institute, *Parental Support Obligation in Section 90 of the Family Relations Act*, BCLI Report No. 48, at 42 (Mar. 2007), http://www.bcli.org/pages/projects/parentalsupport/Parental_Support_FRA_section_90_Report.pdf (accessed June 2, 2007).

[118] Criminal Code of Canada, R.S.C, c. C-46, § 215 (1) (1985).

(iii) Support of Family Care (End of Life)

In January 2004, the federal government enacted changes to employment insurance law to permit eligible workers to receive compassionate care (employment insurance) benefits. The benefits are only paid for a maximum of six weeks to a person who has to be absent from work to provide care or support to a gravely ill family member at risk of dying within the next 26 weeks.[119] The policy requires family to obtain a medical certificate of impending death from the physician. The definition of "family member" was expanded in 2006.[120] However, the scope and other eligibility criteria such as substantial diminution of weekly income significantly limit its use by family.[121] On the other hand, almost every province permits some *unpaid* compassionate care leave in its employment standards,[122] as does the federal government under the Canada Labour Code in its standards for federally regulated employees.[123]

G. The Right to Labour

Labour is a shared federal-provincial responsibility, with each government regulating those sectors for which it has constitutional responsibility.[124] Canada has provided a number of protections for workers in employment laws and human rights laws to safeguard them from discrimination in the workplace. In some provinces, such as British

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[119] Service Canada, *Employment Insurance (EI) Compassionate Care Benefits*, http://www1.servicecanada.gc.ca/en/ei/types/compassionate_care.shtml (May 8, 2007).

[120] Service Canada, *Employment Insurance Compassionate Care Benefits - who is considered a family member?,* http://www1.servicecanada.gc.ca/en/ei/types/compassionate_care.shtml#family (accessed May 26, 2007).

[121] Katie Osborne & Naomi Margo, Health Council of Canada, *Compassionate Care Benefit: Analysis and Evaluation*, 20, 28, http://www.healthcouncilcanada.ca/docs/papers/2005/Compassionate_Care_BenefitsEN.pdf (accessed May 30, 2007) (while the government estimated that there might be up to 270,000 compassionate care claimants a year, in 2004/5, only 7,150 claim benefits were paid across the country).

[122] *See e.g.*, Laws of Manitoba, The Employment Standards Code Amendment Act, http://web2.gov.mb.ca/laws/statutes/2003/c00703e.php (accessed June 2, 2007); Legislative Assembly of British Columbia, *Employment Standards (Compassionate Care Leave) Amendment Act*, 2006, http://qp.gov.bc.ca/38th2nd/1st_read/gov08-1.htm.

[123] Canada Labour Code, R.S.C., c. L-2, § 209.2 (1985); *see generally* Yosie Saint-Cyr, *Compassionate Care EI Benefits-A Reminder*, http://www.hrinfodesk.com/Articles/compassionatecarebenefitsandleave.htm (accessed June 2, 2007).

[124] Michel Fourzly & Marc Gervais, *Human Resources and Social Development Canada, Collective Agreements and Older Workers in Canada* (Human Resources and Social Development Canada Labour Program 2002), 6, http://www.hrsdc.gc.ca/en/lp/spila/wlb/pdf/caowc-dftaccc-en.pdf (2002).

Columbia, this protection only goes to age 65.[125] Even with age-based equality rights, older adults who work are in a vulnerable position in hiring and employment, as well as in work conditions. Sponsored older immigrants who tend to have low education and lack English or French language skills may be particularly vulnerable to labour exploitation.

More than 22 percent of recent retirees return to some paid work after a "first retirement," and for over one third of them, it is for financial reasons.[126] The "official" unemployment rate among seniors is low compared to other age groups, but is growing.[127]

(i) Mandatory Retirement

No Canadian law specifically endorses mandatory retirement. However, a combination of lack of human rights protections or employment standards against age discrimination in some jurisdictions and high court judicial interpretations created a legal environment in the late 1980s and early 1990s that effectively permitted mandatory retirement as reasonably justified across many occupations. During that period, the Supreme Court of Canada heard a series of legal challenges under the *Charter* to mandatory retirement policies in union and university contracts, with significant differences in views evidenced among the judiciary. Mandatory retirement policies have increasingly been recognized as having a differential negative impact on women and recent immigrants, as both groups tend not to have the traditional work force trajectory of men.

In 2006, Ontario removed the upper age limit in its human rights law, effectively abolishing a significant proportion of mandatory retirement in that jurisdiction.[128] Mandatory retirement was already banned in several provinces and territories, including Alberta, Manitoba, Quebec, Prince Edward Island, Nunavut, the Yukon and the Northwest Territories. However, today, even where age protection exists, older employees may be required to retire in some occupations if it is deemed a *bona fide* occupational requirement.

It has been suggested that the driving force for changes to mandatory retirement in Canada will be business economics, not human rights considerations.[129] In 2002, about 14.5 percent (one in seven) of

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[125] Human Rights Code, R.S.B.C., c. 210, § 1 (1996); *see also* Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, § 2 (1).

[126] National Advisory Council on Aging, *supra* n. 16, at 53-54.

[127] National Advisory Council on Aging, *supra* n. 16, at 53-54.

[128] Human Rights Code R.S.O., c. 19, § 10 (1990) (as amended).

[129] Soden, *Advising the Older Client*, *supra* n. 34, at 251-304 (contributor Charmaine Spencer, *Discrimination- the law and older adults* in *Advising the Older Client*).

seniors "indicated they were forced into retirement because of mandatory retirement policies."[130] An additional 25 percent "involuntarily" retire for health reasons, or because of job disruptions such as layoffs or restructuring.[131] Older workers' knowledge and skills often do not match current business needs, impeding potential re-employment. Although this has been recognized for almost two decades,[132] at a policy level, there have been relatively weak efforts in the federal and provincial employment training schemes or within private industry to effectively retain or retrain older workers.[133] Moreover, there has been little if any legal discussion of the inequity underlying this omission.

(ii) Early Retirement

Until recently, the trend in Canada has been towards early retirement (i.e., before the age of 65), particularly among people who had pensionable benefits.[134] Early retirement was often encouraged during periods of high unemployment, particularly among older workers, in the hope of creating more job openings for younger workers. The proportion of older workers receiving unemployment benefits includes many who have not been able to find employment, and for all intents and purposes, are involuntarily "retired."[135] This is often the case for manual workers for whom demand is low and who are often in poor health.[136]

(iii) Phased Retirement

The Income Tax Regulations[137] regarding employees accruing pension benefits under a defined benefit Registered Pension Plan (RPP)

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[130] National Advisory Council on Aging, *supra* n. 16, 52.

[131] National Advisory Council on Aging, *supra* n. 16, 53-54.

[132] *See e.g.* Mary Trueman, *Training of Older Workers in Canada, Training Discussion Paper No. 22* (ILO Publications 1989).

[133] Marjorie Armstrong-Stassen & Andrew Templer, *Adapting Training for Older Employees: the Canadian Response to an Aging Workforce*, 24 J. of Mgt. Dev. 57 (2005).

[134] *See* Patrick Kieran, *Early retirement trends, Perspectives on Labour and Income, 2* (9), Statistics Canada Cat. No. 75- 001-XIE, 7-13, http://www.statcan.ca/english/studies/75-001/archive/2001/pear2001013004s4a01.pdf (accessed May 29, 2007).

[135] Geoff Rowe & Huan Nguyen, *Older workers and the labour market, Perspectives on Labour and Income*, 3 (12), Statistics Canada Cat. No. 75- 001-XIE, 23-26 (2002), http://www.statcan.ca/english/freepub/75-001-XIE/0120275-001-XIE.pdf (accessed May 29, 2007). *See also* Wendy Pyper & Philip Giles, *Approaching retirement, Perspectives on Labour and Income*, *3* (9), Statistics Canada Cat. No. 75- 001-XIE, 5-12 (2002), http://www.statcan.ca/english/freepub/75-001-XIE/0090275-001-XIE.pdf (accessed May 29, 2007).

[136] Wendy Pyper, *Aging, health and work, Perspectives on Labour and Income*, *7* (2), Statistics Canada Cat. No. 75- 001-XIE, 5-15 (2006), http://www.statcan.ca/english/freepub/75-001-XIE/10206/art-1.pdf (accessed May 29, 2007).

[137] C.R.C., c. 945 (enabled by Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)).

currently prevent employers from offering phased retirement programs that would permit older workers to continue working part-time, while at the same time receiving a partial pension. Amendments to the Income Tax Regulations were proposed in 2007 to allow an employee to receive pension benefits from a defined benefit RPP and simultaneously accrue further benefits, subject to certain constraints. These changes will be in effect for the first time in 2008.

H. Income Tax Law

Income tax policy and the laws supporting it carry a number of special provisions for older adults. In addition to the basic "personal tax credit," seniors benefit from an "age credit" to help reduce the amount of taxes owing.[138] Some may also be eligible for disability credits in case of permanent disability, and deductions for out of pocket medical expenses.[139] On a spouse's death, registered retirement benefits can be "rolled over" to the surviving spouse without triggering tax consequences.[140] Very recently, changes to income tax regulations have begun permitting income splitting for seniors.[141]

IV. FUTURE TRENDS

Several needs related to older adults are beginning to be recognized and addressed in Canada. There is a substantial and growing need for continuing education on issues of law and aging available for the legal profession and professionals in other disciplines who represent or serve older people. There is a pressing need to better inform/educate the general public about issues affecting older adults and families or others who may be helping them. This begins with raising public awareness about rights, obligations, benefits, and resources relevant to the lives of older adults. This can occur in many different ways, including consumer guides and handbooks, internet sites, group presentations and individual counselling through specialized legal information clinics. While 'self-help' tools and resources available at no

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[138] *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.). For general description, *see* Canada Revenue Agency, "What you can deduct," http://www.cra-arc.gc.ca/tax/individuals/topics/income-tax/return/completing/deductions/menu-e.html (accessed May 29, 2007).

[139] *Id.*

[140] Canada Revenue Agency Income Tax Interpretation Bulletin, IT 500 R, "Registered Retirement Savings Plans -- Death of an Annuitant", § 27-28 (Dec. 18, 1996), http://www.cra-arc.gc.ca/E/pub/tp/it500r/it500r-e.html (accessed May 29, 2007).

[141] Department of Finance Canada, "Tax relief for seniors", http://www.fin.gc.ca/pensioncalc/factsheet_e.html (accessed May 29, 2007).

or a nominal cost will be an increasingly valuable aid to many older adults, these courses depend on the individual's ability to access and utilize the tools. In recent years, a number of Canadian guides have been under development by non-profit associations to aid the understanding of older adults, family caregivers and persons working with older adults of general legal and ethical issues related to care giving, end of life, filial support, and substitute decision making.[142]

There is an ongoing need to improve access to justice for older Canadians. Older adults on fixed incomes often have their legal needs overlooked, and can find access to legal remedies highly problematic. They often have little or no means to afford legal assistance for relatively simple, but sometimes time-consuming, legal matters. Many older adults may experience difficulties communicating in English or French, or may lack basic literacy, let alone the capacity to achieve good legal literacy to understand and enforce their rights. At present, general purpose legal aid clinics, where they exist, are not set up to address the types of issues or to meet the often complex set of needs of older adults in a multidisciplinary and holistic manner. As a result, there is a pressing need for specialized government-subsidized legal aid clinics in each province to provide formal legal advice and representation for older adults on individual matters, as well as advocacy on systemic issues, drawing on proven models such as that of the Advocacy Centre for the Elderly.

There is strong need for critical legal analysis in the areas of law affecting older adults, whether that is a feminist analysis that looks beyond middle age or other critical approaches. Among other things, this analysis will need to examine the intersection of aging, gender, ability, race and other statuses in the context of social policy and law. The law is seldom neutral or objective in its application to the lives of older adults, and aging is a highly gendered issue.

The practice of elder law in Canada is likely to continue, in large part, in conjunction with other fields of law. Although it is an approach which has not yet been widely adopted in the country, future elder law practice may need to draw on multiple disciplines. There are several different models to consider, including case management approaches to addressing client files that present a combination of legal, accounting, tax, health and social issues. For example, a lawyer may act as the primary "point person" for the coordination of service delivery by a

[142] *E.g.* guides produced by the Canadian Palliative Care Association, http://www.chpca.net/home.htm (accessed June 2, 2007); Caregivers Coalition, http://www.ccc-ccan.ca/ (accessed June 2, 2007).

variety of professionals whose services are independently engaged by the client. Some practitioners may consider opening professional multidisciplinary practices comprised of lawyers, accountants and others such as social workers. Future practice might include the sale of ancillary products such as long-term care insurance and financial investments for the delivery of a one-stop, full service to older clients. However, all of these options will need to be carefully considered for their practicality and adherence to provincial codes of conduct, the ethical implications, and potential liability for representations made by other professionals to one's clients.

Canada has begun to see important legal and practice research unfold in recent years. This research will affect older adults and practitioners. For a decade, the country has been implementing promising practices for addressing abuse and neglect of older adults in the community and institutional settings, and may be starting to consider some national strategies in the area. Capacity assessment guides for lawyers, judges, physicians and social workers that are adaptable to the laws of each jurisdiction are likely to become more commonplace. The Western provinces have been considering the development of uniform power of attorney legislation for the common law provinces of Canada.[143] There are slowly developing efforts to raise understanding about advance care planning, along with its underlying laws and ethical principles, among lawyers, doctors and social workers. Over time, the country will likely see the development of best professional practices in the advising and drafting of legal instruments in the planning for incapability.

Several new issues are being explored and identified, including: the legal needs and matters affecting special populations of older adults, including older women, older sponsored immigrants and ethnic seniors; older adults in the penal system; older Inuit and First Nations persons; older adults with developmental disabilities; and older adults who are gay, lesbian, bisexual or transsexual. Increasingly, older adults and others are seeking information and advice from a variety of professionals on the wide range of supportive housing and long-term care facility matters, and a specialized practice in long-term care law is likely to develop over time. Many traditional areas of contract and administrative law well may be reviewed, using an aging lens in the future.

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[143] Western Canada Law Reform Agencies, *Enduring Powers of Attorney: Areas for Reform, Consultation Paper #1* (June 2004), http://www.law.ualberta.ca/alri/docs/wclraCP1.pdf (accessed May 29, 2007).

There are some existing and potential areas of conflict among professions when it comes to legal issues and the respective scope of practice will need to be clarified over time. For example, practitioners find that real estate agents, social workers and other housing and care professionals, as well as gerontological consultants, sometimes offer what may appear to be legal advice to clients, or practice illegally within the fields of other professions, but without the requisite education, licensing or recognition of potential liability.

Various Canadian stakeholders such as the Canadian Bar Association, Canadian Centre for Elder Law Studies, and the National Institute on Law, Policy and Aging have a variety of comparative law studies in various stages of planning or development. They are also beginning to examine matters on a cross-jurisdictional or an inter-provincial level. In addition, they have begun working internationally with bodies such as the Commission of Law and Aging in Washington D.C. and the faculties of law at Wake Forest University and Stetson University's Centre for Excellence in Elder Law.

V. CONCLUSION

Canada has witnessed a number of significant changes in social policy and law during the past four decades. One of the important bright notes is the reality that life is more financially secure for many older adults, as a result of the maturation of the Canada Pension Plan and enhancements to the public pension system. Yet, inequities remain for subgroups of older adults, including many older women and minorities. Retrenchment in the area of public pensions continues to loom, creating the prospect of a much less secure future for many.

There has been progress made in recent years to better recognize the diversity of relationships among adults, with expansion of policy definitions of 'spouse' and 'family'. However, these policy changes have often been reactive -- reflecting of the efforts of interested individuals pushing for change, rather than proactive direction in social policy planning. Further, many of these changes maintain the *status quo,* leaving the bulk of social responsibility for caregiving resting on individuals and family, and not treated as a collective (state) responsibility. While there have been significant advancements in individual rights in areas of substitute decision making and alternatives to guardianship, collective rights to affordable and appropriate housing and adequate health care have lagged across the lifespan.

Other areas such as protection of older adults' human rights in key areas of employment, accommodation, health care and other services

have also lagged significantly, and with very little discourse in these areas as to how to balance interests. Ageism is still manifest in the country, although hidden from view. Mechanisms to engage the public discourse on what the future of aging and intergenerational relationships *might look like* and *should look like* are at continued risk. It is in this mixed environment that the capacity of the country to recognize and respond appropriately to the social as well as legal needs and interests of older adults will continue to evolve.

While law and aging policy in Canada may face many challenges and more transitions in the future, the future of elder law in Canada looks very encouraging as the country softly greys.

LAW AND AGEING IN ISRAEL: THE DEVELOPMENT OF A NEW FIELD OF LAW

*Israel Doron**

I. INTRODUCTION

In Israel, as in the rest of the world, society is undergoing a process of ageing. In 1948, when the State of Israel was established, its population was relatively young. Some 85,000 of its citizens, less than 5 percent of the population, were over the age of 65. At the beginning of the twenty-first century, however, over 640,000 Israeli citizens, almost 10 percent of the population, were over 65.[1] Moreover, while the overall population of the state grew by about 3.5 percent during this period, the aged population grew by approximately 7 percent. Another indication of the ageing of the Israeli population is the rate of growth of the number of 'old old' – those aged 75 and above. Whereas the number aged 65 and over doubled between 1970 and 1990, the number of over-75s tripled, and the sector which grew most quickly during this period was the over-80s.[2]

These trends are connected, among other things, with a significant rise in life expectancy in Israel. Whereas in 1965 the life expectancy was 70.5 years for males and 73.2 years for females, by the year 2002, life expectancy had risen by almost 10 percent, reaching 77.9 and 81.9, respectively.[3] The difference between the life expectancy of men and women is indicative of another important dimension of the ageing of the population: that of gender. In the population aged 65 and above, women constitute a majority, and between 1970 and 2003 the proportion of this sector grew from 51 percent to 57.5 percent. Among the 'old old' it is even greater, with 60.5 percent of those above 80 being women.[4]

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[1] *See* Jenny Brodsky, Yitschak Shoor & Shmuel Be'er, *The Elderly in Israel: Statistical Abstract 2004* 4 (Eshell 2005) (hereinafter "The Eldelry in Isreal").

[2] *Id.* at 16.

[3] *Id.* at 76.

[4] *Id.* at 19.

The ageing of the Israel society may also be viewed from another angle – the Elder Support Ratio: the number of people above the age of 65 to every hundred people of working age. In the 1960s, the Elder Support Ratio in was about 10. By 2003 it had almost doubled. There were 19 old people to every hundred of working age.[5] Looking to the future, the population is expected to continue to age, and it is forecast that by 2025 the proportion of old people will reach 14 percent. In addition, there will be a further increase in the life expectancy and the birth-rate will continue to fall.[6] Thus, the State of is clearly undergoing a dramatic change in the number and proportion of old people in the population, and this change has deeply significant social implications.

Israeli law was not blind to this significant social and demographic change. Throughout the years, legislation and court-rulings, have addressed the new legal needs that have arisen with the ageing of the Israeli society. This article will describe the diverse ways in which the field of law and aging has developed in Israel, and the challenges it still faces.

II. ELDER LAW IN ISRAEL

A. General Outline of the Development of the Field

Until the end of the 1990s, the field of elder law was not recognized as such in law. It is true that, as will be shown below, there existed a variety of legal arrangements dealing with the rights of the old, but there was no awareness of the existence of a special branch of law concerning the rights of the old. This was expressed in several contexts. There were virtually no academic articles or books on the subject. There were no non-governmental organizations dealing with the promotion of the rights of the old. There were no courses in the faculties of law in which the subject was taught as such. There were no private-bar or law-firms that openly declared themselves as "elder law attorneys." And, there were virtually no scholars who focused their research on the subject.

This was also true at the level of national and local politics. Until the early 1990s, activities of organizations or other bodies concentrating on the rights of the old, as such, were extremely

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[5] *See* Jenny Brodsky & Brenda Morginstein, *Balance of Familial and State Responsibility for the Elderly and their Caregivers in Israell,* in *Work and Caring for the Elderly: International Perspectives* 68-69 (V.M. Lechner & M.B. Neal eds., Brunner/Mazel 1999).

[6] *The Elderly in Israel*, *supra* n. 1, at 257.

restricted.[7] Legislative activity concerning the rights of the old at the parliamentary level (the *Knesset*) was also very limited.[8] And, finally, the Israeli Bar Association, the professional union of all lawyers, had not set up a committee, or taken any special action, to deal with elder rights, and there was very little awareness of the economic and commercial potential of old people as a category of clients.[9]

From the beginning of the 1990s, there began a significant change in this state of affairs – a change which is still in progress. First, at the academic level, articles and research projects on the subject of elder law, some of which will be discussed below, began to be published. Second, several non-governmental organizations were founded for the promotion of the rights of the old.[10] Third, a number of law faculties created academic courses for LL.B. students on the subject of old age and the law.[11] And, fourth, several books were published, which, for the first time, included a broad overview of the field of elder law in the legal library.[12]

Moreover, in the sphere of the academic development of elder law, a theoretical model was developed that attempts to present a multi-dimensional model of the whole field of elder law in the context. This model has been described in detail elsewhere.[13] In brief, it comprises a number of dimensions, each of which attempts to satisfy the different requirements and aspects of the complex of social issues concerning old age that need to be dealt with by the law. The core of the model is based on the fundamental constitutional and legal principles of the existing legal system by means of which the rights of the old can be defended and grounded in law, even though they contain no specifically age-related provisions. The protective dimension aims at protecting the elderly population against abuse and injury. The family support dimension strengthens informal social reinforcement networks. The planning and

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[7] Ester Iecovich, *Pensioners' Political Parties in Israel,* in 12(3) J. of Aging and Soc.Policy 87-107 (The Haworth Press, 2001).

[8] *See* Israel Doron, *The Rise and Fall of Israel's Senior Citizens Act* (submitted for publication) (copy on file with author).

[9] *See* Israel Doron, *How Would the Aging of Israeli Society Influence the Legal Profession*, 26 Law. 52, 53 (2001).

[10] The Association of Law in the Service of the Elderly,http://www.elderlaw.org.il/english.asp (accessed March 28, 2007).

[11] For example, within the Faculty of Law in the University of Haifa, and the Faculty of Law in the Ramat-Gan Academic College of Law, courses in Law and Ageing were added during the early 2000s.

[12] *See* Israel Doron, *The Right to Die at Home* (Eshel 2002); Israel Doran, *The Fifth Commandment – Elder Law in Israel* (Dorat 2002); Ben-Israel Ruth & Ben-Israel Gideon, *Who is Afraid from the Third Age* (Eshel 2005).

[13] Israel Doron, *A Multi-Dimensional Model of Elder Law: An Israeli Example,* 28(3) Ageing Intl. 242, 244 (2003).

preventive dimension attempts to put into practice the principle of the individual freedom of the aged individual, and to enable them to realize their desires and aspirations even when they are no longer competent or in control of their faculties. And, finally, the empowerment dimension includes techniques of education, explanation and representation without which old people are incapable of exercising their legal rights.

The most dramatic change in the field of elder law, however, took place in the political sphere. It began at the local level, where, from the mid-1990s, in a number of local authorities, including Tel Aviv-Jaffa (the biggest city in), pensioners' political lists began to compete successfully in the local elections, and to bring about changes in public policy with regard to the old in the local authorities. This trend came to its peak, and created a world-wide precedent, in the national elections of March 2006, when seven members of a pensioners' party (*GIL*) were elected among the 120-member Knesset. They have joined the coalition led by Ehud Olmert, and one of the members of this list has been appointed Health Minister while the other was appointed as the Minister for Pensioners' Affairs. This is an unprecedented political achievement, which has aroused great expectations in for the development and expansion of elder legislation. However, this development is still too young to assess.

B. Elder Law & the Right to Social Security in Israel

1. Poverty and Social Security in Old Age in General

Old people constitute one of the most substantial sectors of the poor society.[14] Many older people are forced to contend day by day with problems of economic survival and social security. Historically, the system of social security for the old was one of the earliest achievements of the modern Israeli welfare state. In general, the aims of the social security system were threefold.[15] First, on the universal level, the system is aimed at preventing poverty and distress among the old by ensuring a minimum income which will afford every old person a minimum standard of living, regardless of his/her living standard before reaching old age. Second, on the particular level, the system aims at ensuring that the old person will continue to enjoy his/her former status, and prevent a sharp decline in standards of living with the coming of age by

[14] In 2003, 22.3% of families headed by an older person in Israel were under the poverty line (after taxes and governmental payments/tranfers). Prior to taxes and governmental payments the figure was 59.3%. *See The Elderly in Israel, supra* n. 1, at 183.

[15] Abraham Doron & Ralph M. Kramer, *The Welfare State in Israel* 85 (1st ed., Boulder Westview 1991).

guaranteeing a reasonable relationship between income before and after the retirement from the work-force. Third, on the individual level, which will not be discussed in this section, the system is aimed at making it possible for everybody to continue to earn a living, provide for him/herself individually, and enjoy the fruits of his/her labor in old age.

2. The Social Security Pension Level

One of the earliest social insurance programs, adopted by virtue of the National Insurance Law, was the right to an old age pension.[16] Old age pensions, as defined in law as early as the beginning of the 1950s, are based on the principle of universal coverage. They are also based on legally established objective criteria, and are not conditional on proof of financial need. The conditions of eligibility were defined by law. The first legal requirement was the age of entitlement: men are entitled to a pension at the age of 70, and women at the age of 67; but men aged 67 and women aged 64 are entitled to a pension if their income is not greater than a 'maximum income' as defined by the National Insurance Law and the relevant regulations (and, in fact, the vast majority of older Israelis receive their old age pensions at the ages 67 and 64, respectively).[17] The second requirement concerns residence: as in other rights connected with social security, residence (as distinct from citizenship) is sufficient for the allocation of pensions based on a universal criterion. The definition of the concept 'resident' occasionally raises issues of legal interpretation, particularly concerning the time when a person begins to be a resident as the result of migration, and when the older person ceases to be a resident as the result of long-term residence outside the country (*e.g.*, joining their son's family in the US).[18] The third requirement concerns a 'benefit build-up period': the right to a pension is conditional on payments made over the years by the insured person and/or his/her employer to the National Insurance Institute. The National Insurance Law lays down that the payment of an old age pension is conditional on the insured person's having contributed during a 'benefit build-up period,' which, as a rule, consists of a minimum 60-month period (not necessarily continuous) during which the person was insured in the course of the ten years before reaching pensionable age. Alternatively, a person is entitled to a pension on condition that [s]he was insured for 144 months (not necessarily

[16] For an historical overview, *see* Doron and Kramer, *id.* at 73.

[17] Social Security Regulations (Income Decisions in Old Age), 1976, 3608, art. 1.

[18] *See* Menachem Goldberg, *The Social Security Reference Book* 161 (20th ed., Tel Aviv 2000). *See also* Israel Doron & Tal Golan, *Ageing, Globalization, and the Legal Construction of "Residence": The Case of Old Age Pensions in Israel,* The Elder Law J. (in press).

continuous), or for not less than 60 months in special circumstances.[19] The fact that the legal requirements - residence, age, and build-up period - are so minimal has created a state of affairs in which virtually all old people in Israel are entitled to social pensions.

However, the preliminary requirements for entitlement to an old age pension constitute only one dimension of the legal arrangement. One of the most important aspects of old age pensions is their financial value. This has two components: its absolute level – the amount which the individual receives every month; and its relative level – its level relative to the standard of living of the general population. The level of the old age pension was originally fixed during the 1950s at 15 *lirot* for an unmarried pensioner. At that time, this amount was equivalent to about 25 percent of the average wage in the market, and it was intended to make it possible to live in dignity without any additional income. As time went on, the relative value of the pension eroded since it was linked to the index of retail prices rather than the average wage. Therefore, during the 1960s and 1970s, the real value of the pension decreased by more than 50 percent, falling to 10 percent of the average wage. As a result, the law was amended, and during the 1970s the pension was linked to the average wage, but at a considerably lower proportion than in the original rate: only 16 percent of the average wage in the market for an unmarried person, and 24 percent for a couple with only one wage-earner. It should be pointed out that the law permits these basic allocations to be increased on the grounds of long-term insurance payments so that in practice the pension can be 50 percent higher than the basic rate, *i.e.*, 25 percent of the average wage for an unmarried person, and about 36 percent for a couple.[20]

Finally, during the early 2000s, in the wake of the bursting of the Internet bubble and the outbreak of the second *Intifada* (the Palestinian uprise), Israel was hit by a serious economic depression. As a result, social pensions were temporarily cut by 4 percent, and their real level frozen for four years.[21] These measures came to an end in 2006; but the most serious amendment to the law was the change in the linkage of the pensions, from the average wage to the Consumer Price Index.[22] The effect of this change was to erode the real value of the pension, and make

[19] Israel's National Insurance Law, 1995, art. 246.

[20] *Id.* at art. 248.

[21] *See* The Emergency Economic Plan Act (Legislative Amendments for the Achievement of the 2002 and 2003 Economic Policy), 2002, Law of Statutes 1850.

[22] *See* The Economic Recovery Plan Act (Legislative Amendments for the Achievement of the 2003 and 2004 Economic Policy), 2003, Law of Statutes 1892.

many old people dependent on the selective support system provided by the Supplementary Support Income Law,[23] which is discussed below.

In practice, many old people in Israel cannot lead a dignified existence relying only on their social security pension, and often are not entitled to the increased rate because they have not contributed for a long enough period. These old people, whose income from their social pension is insufficient and who have no other financial resources, are liable to find themselves below the poverty line. law has recognized the existence of such dire situations, and has established a system of supplementary social protection for those in such a state. This system of complementary social protection was based on the payment of social benefits, and later on the Supplementary Support Income Law of 1980 (hereinafter, the Supplementary Income Law).[24]

Unlike the social security old age pensions, the system of supplementary income is based not on the principle of universality, but on that of individual need. Only those old people to whom the financial criteria detailed in the law apply are entitled to receive the additional monetary benefit.[25] In general, the purpose of the Supplementary Income Law in the present connection is to supplement the minimal income of old people, who exist only on their social old age pension, by paying them a pension at a maximum of 25 percent of the average wage for an unmarried person and 37.5 percent of the average wage for a couple. Thus, the combination of social security old age pensions with supplemental payments made under the Supplementary Income Law is intended to improve the economic situation of these old people, to ensure that they have minimum means of existence, and to bring them up above the poverty line.

The social pensions schemes described above have succeeded in guaranteeing uniform and egalitarian pensions to the elderly population of .[26] This system is reinforced by supplementary payments in the Supplement Income Law. Together with the old age pension, this ensures that all the elderly population in Israel has a minimum standard of living, and is delivered from life below the poverty line. As a result, the proportion of families headed by an old person whose financial resources leave them below the poverty line has been reduced from 59.3 percent to

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[23] *See* The National Insurance Institute, *The Consequences of the Israeli Economic Recovery Plan on the National Insurance Insitute* (Jurusaleme 2003).

[24] Book of Statutes, 1417.

[25] The law is based on "needs testing," thus the regulations impose various financial texts to be examined prior to being eligible to the supplementary finnancial support. Income Maintenance Regulations, 1982, 4309.

[26] Old age pension are actually progressive: the exchange rate (income prior to retirement devided to old age pension after retirement) is higher for lower income elders. *See* Israel Doron, *Law Morality and Old Age*, 103, at 127, in *Poverty and Aging* (Yitzhak Brick ed., Eshel 2005).

22.3 percent.[27] On the other hand, the protection afforded by this system is so basic, and its level so low, that in practice many old people are forced to live close to the poverty line, in conditions unworthy of a democratic welfare state.[28] Thus, the universal system of social security, as it stands at present in Israel, fails the elder population in that it ensures them an existence which cannot be called an existence with dignity. Finally, when, in 2002, an attempt was made to challenge the constitutionality of the cuts in the old age pension, it was rejected by the Supreme Court on the grounds that it did not detract from the constitutional standard of 'human dignity;' and, further, that if it infringed the constitutional right of property, the infringement was not serious enough to violate the 'principle of proportionality.'[29]

3. The Occupational Pensions Level

The second sphere of financial security for old people is that of occupational pensions. This level is very closely bound up in law with the *Histadrut* – the Israeli Labour Union Association. The legal conception, which was the historical consequence of the alignment of political forces at the time of the establishment of the state, held that the state was responsible only for the social security level. The second level, that of occupational pensions, was the concern of the labor union, *i.e.*, the *Histadrut.*[30] It is to the credit of the *Histadrut* that over the years it established a comprehensive system of collective labor agreements which guaranteed a generous occupational pension scheme for the majority of the organized hired working force. For this purpose, central pension funds for different branches of employment were established, and for many years they guaranteed adequate pensions to their members on retirement.

Since the arrangements for this type of pension were left in the hands of the *Histadrut* rather than the state, legal arrangements at this level were not made by primary legislation. Therefore, there is still no legislative arrangement regarding occupational pensions in the State of

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[27] *See The Elderly in Israel*, *supra* n. 1, at 183.

[28] A specific weak group within the older population in Israel are lonely older women, of whom 30% are under the poverty line. Another weak group in the Israeli older population are the new immigrants, who were not able to accumulate rights within the social security system, thus receive only the minimal pension. *See The Elderly in Israel*, *supra* n. 1, at 154-5.

[29] *See* C.A. 5578/20002, *Manor v. The Miniter of Finance,* Supreme Court of Justice Rulings (Piskei-Din) 59, 729. For a general overview of Israel's constitutional law, *see* David Kretzmer, *Constitutional Law*, in Amos Shapira, Keren C. Dewitt-Arar, *Introduction to The Law of Israel* 39-58 (Kluwer 1995).

[30] *See* Doron & Kramer, *supra* n. 15, at 85. The only exception was that of government emplyees, whose right to an occupational pension was ensured by specific legislation.

and there is no mandatory occupational pension law. Thus, at the time of writing, law has not recognized the socio-economic right to an occupational pension.[31] In this sense, there is a basic defect in law, in that the entitlement of every worker – indeed, every citizen – to an occupational pension is dependent on the individual or his/her employer (by virtue of an individual or collective labor agreement), and his/her awareness and foresight.

As a result of this legal situation, it is estimated that, since there is no comprehensive legal arrangement, in the year 2000, about half of the labor force had no occupational pension insurance,[32] and that at the beginning of the twenty-first century only about a third of 's elderly population received an occupational pension.[33] This partial coverage seriously impairs the social security of the old, and exposes a significant number to poverty and a drastic reduction in their standard of life on retirement. But the economic security even of those who do receive a pension is not guaranteed, as a result of legal uncertainty and ambiguity of a wide range of concepts included in the pension system. For example, the way in which the 'exchange ratio' or the 'determining wage' is calculated has a direct and dramatic influence on the level of payment to which the pensioner is entitled in practice.[34]

policy-makers were aware of these complex problems. As early as the 1960s, a number of suggestions for the reform of the pension market, as well as proposals for a National Insurance Law, began to be mooted.[35] In addition, from the 1980s onwards, the fact that the *Histadrut* pension funds had amassed considerable actuarial deficits, and that the state was committed to the payment of huge sums for occupational pensions, was well known and was on the public agenda.[36]

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[31] While there is no one, specific piece of legislation to regulate the occupational pensions schemes, there is a wide variety of references to legal aspects of this field in various laws of other fields (income tax; labor compensation; social security; and more). For a broad overview of the various legal references in Israeli law to the field of occupational pensions, *see* Menachem Golberg, *Insuring Emplyees in Pension Funds – Legal Aspects,* L. Lab. Annual Publication 95, 96 (1992).

[32] *See* Allen Zifkin & Brenda Morginstin, *Income Rates and Pension Coverage Rates in Older Persons in Israel,* 35 Soc. Sec. 45 (1990).

[33] Miriam Shmeltzer, Brenda Morginstin & Ramsis Gara, *The Income of Older Persons in Israel* 3 (The National Insurance Institute 2002).

[34] Exchange rate is the ratio between the income prior to retirement and the income after retirement. Traditionally, under Israel's occupational pension scheme, every year in the working force, the employee accumulated 2% of pension rights, so that after 34 years, the employee reached the maximum exchange rate of 70% of his or her income.

[35] John Gal & Reuven Pesach, *The Development of Old Age Social Security in Israel*, 62 Soc. Sec. 114, 125 (2002).

[36] According to one estimate, as of 1997, the actuary debt of the state to its workers for pension rights was about 185 milliars NIS (New Israel Shekes, which is approximately, $37 milliard). *See* C. Bi'or, M. Basok & S. Peretz, *From Retirement Stage to Security Satey Net* (Haaretz 1999). *See also* Gil Luria, *Pension Crisis in an International Perspective,* 24 Tax. Q. 39, 42 (1997).

These increasing cumulative deficits were the result of a series of developments which included the rise in life expectancy, changes in the composition of the labor force in various branches, administrative problems, and the granting of special privileges to certain sectors. These deficits raised doubts as to whether the pension funds would be able to fulfil their obligations, and created deep uncertainty about the future of the occupational social security of many old people in.

As a result of this instability, several public committees were set up, and their recommendations led to the reforms of the 1990s, which brought about considerable changes in the occupational pension market.[37] These legal changes included: the 'closing' of the *Histadrut's* old pension funds and prohibiting recruitment of new members; the opening of the pension market to competition; authorization of the creation of new pension funds which would be based on full actuarial balance and giving less favorable conditions to their members than the previously existing funds; a gradual change of public sector insurance from a "pay as you go" system to personally cumulative pensions; a change in the calculation of cumulative pensions from the system of defined benefits to that of defined contributions; a reduction of the proportional yield guaranteed to investments in pensions; and greater flexibility of choice and the right to move from one scheme to another.[38] These massive legal changes reached their peak in , again in the course of the years 2003 and 2004, when, following the laws prompted by the economic emergency, all the *Histadrut* pension funds were 'nationalized,' and all their internal regulations were replaced by a uniform regulatory scheme, which, in effect, reduced the financial benefits of the insured, but gave legal guarantees of financial support by the government in order to prevent their financial collapse and ensure that they would be able to fulfil their obligations to the insured.

The significant legal reforms of the mid 1990s and early 2000s in the field of occupational pensions totally changed the legal landscape. However, although the occupational pension constitutes an important means of protecting the social security of the greater part of the elder population of , there is still no primary legislation which fully encompasses and regulates this subject. Moreover, the claim to an occupational pension has not yet been recognized as a universal

[37] In 1993, a governmental commission was appointed to examine the pension reality in Israel (a commission known in Israel as the Fogel Commission). Later on, in 1996, another commission was established to examine the capital market in Israel. This commission, known in Israel as the Brodet commission, also made recommendations regarding the pension field. For these reports and more, *see* Yoram Margaliot, *Discrimination in the Pension Schemes and a Proposed Solution*, 31(3) Mishpatim 529, 540 (2001).

[38] Margaliot, *id.* at 552.

economic or social right under Israeli law. An economic analysis of the reasons for the failure of the i social security system to deal with the economic plight of old people shows clearly that the weakest link in the system is the fact that most old people do not receive an occupational pension.[39] It seems, therefore, that the real challenge in this field is to base the social and economic right to an occupational pension on primary legislation, in such a way as to safeguard the social security of the majority of the old people of .

C. The Law, Old Age, and the Right to Health Care in

1. Health and Old Age in General

Old people are the most important clients of the i health services.[40] In many respects, this sector of the population is affected in the most fundamental way by anything connected with the definition and demarcation of the right to health. The influence of the right to health on the phenomenon of old age is complex and multi-dimensional, and paradoxical in many respects. On the one hand, the marked improvement in the health services and in medical science, and the achievement of the right to health, have led to an increase in life expectancy, so that today old people live longer and better than in previous times. On the other hand, as a result of the lengthening of the expectation of life the "new' elderly are today exposed far more to long-term chronic diseases and to illnesses such as Alzheimer's, and require medication to an extent quite unknown in the past. This paradox also has an economic aspect: the higher the standard of health, and the more successfully disease and death at an early age are prevented, the higher the expenditure on health care at later stages of life.[41] As a result of this paradox, national expenditure, private and public, on health and nursing care in in 1999, was, according to one estimate, no less than NS 9.5 billion.[42]

Two important legal developments during the 1990s had a dramatic influence on the right of the old in to health care services: the

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[39] Gal and Pesach, *supra* n. 35, at 138.

[40] In 1996, 22% of all visits to family doctors and 19% of visits to expert doctors were made by elderly persons (compared to 10% of their weight in the general population). *See* Amir Shmueli & Yoram Levi, *The Use of Health Services in Israel According to Age*, 47 Soc. Sec. 146, 147 (1997).

[41] This paradox was called "The Modern Catch", *see* Hava Golander & Nili Tabak , *Under Watching Eye: The Health Market in Old Age in Israel – Economy and Failure,* in *The Politics of Old Age* 142, 144 (Yitzhak Brick ed., Eshel 2002).

[42] Jochanan Stessman, Yoram Maaravi & Aharon Cohen, *Reform of Health Services for the Aged,* 27(1) Gerontology 69, 76 (2000).

enactment of the National Health Insurance Act, 1994;[43] and the passing of the Patients' Rights Act, in 1996.[44] The Patients' Rights Act is a comprehensive law which defines the fundamental human rights of all sick people in , including basic rights such as the right to receive information, the prohibition of treatment not knowingly agreed to, the duty of medical staff to preserve confidentiality, and much more. This law deals primarily with 'negative' rights, such as 'freedom," which are not specific to the elderly, and will not be discussed in detail here. As against this, the Health Insurance Act has had a decisive influence on the socio-economic right to health in general, and for old people in particular, and will be discussed below.

2. The Elder Population and the National Health Care Insurance Act

At the beginning of 1995 the right to health in underwent a dramatic change, when the Health Insurance Act was enacted.[45] For the first time in Israeli history, an overall universal system granted all the residents of the state the right to enjoy a universal basket of health care services, as a matter of legal right. The law is financed mainly by the insured persons who pay regular fees for health care insurance and participate in various services.[46] The law establishes the mandatory provision of health services included in the 'basket' `at a reasonable standard, at a reasonable time, and at a reasonable distance from the insured person's place of residence as a legal right. The law defines the way in which health insurance fees are to be levied through the National Insurance Institute, and lays down that membership of a health management organization (HMO) through which health services are provided is obligatory. By virtue of this law, all older people, like the rest of the population, are entitled to receive health services and choose the HMO through which they will receive these services.

The National Health Insurance Act legalized the right to health services in general, and also related specifically to the elderly population in a number of connections. One of these concerns the price which old people have to pay for medications, which is less than that charged to the

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[43] Book of Statutes, 1469.

[44] Book of Statutes, 1591.

[45] *See The Report of the National Commission to the Examination of the Health Care System in Israel* 35 (Governmental Press 1990).

[46] *See* Revital Gross, Baruch Rosen & Aryeh Shirom, *The Israeli Health Care System after the National Health Insurance Law,* 54 Soc. Sec. 11, 14 (1999).

general population.[47] Another is the prohibition of the practice whereby HMOs refuse to accept old people as members, the cost of whose health care is greater than that of the young and healthy. The law forbids discrimination on grounds of age, and also incorporates the principle of progressive taxation, since the formula for calculating the funding given to the HMOs for treatment of old people takes into account the age of the insured.[48]

It appears, therefore, that the Health Insurance Law was intended to improve the status and importance of old people's right to health. The law afforded universal health care insurance coverage to all the old people of Israel on a universal coverage scheme, and eliminated the possibility of an old person's being completely without health insurance or unable to obtain treatment for ill health. Moreover, the matters covered by the law include long-term hospitalization of patients with complicated maladies, rehabilitation of long-term patients (though in this case there is not full coverage, and the patient has to pay some of the cost). The law confirmed the freedom of choice and the freedom to transfer from one HMO to another for the elderly, as for the rest of the population.[49] Moreover, it was the intention of the law to consolidate health services for the old, and transfer the responsibility for institutional geriatric services from the state to the HMOs (although this intention has not yet been put into practice). [50] The overall improvement in old people's right to health as a result of the enactment of the Health Insurance Law was confirmed in a 1997 research project which examined the degree of accessibility, quality of treatment and satisfaction of old people following the enactment of the law. This study showed an improvement in old people's satisfaction both with the service provided by the HMOs and with the degree of accessibility. In general, more than a quarter of those interviewed considered that health services had improved as a result of the operation of the law.[51]

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[47] In general, health taxes paid by the poor elderly are a minimum set by law (approximately $20 a month). National Health Insurance Act, art. 14.

[48] This is determined by a capitation formula, which takes into account the number of older members in each HMO. The financial weight of older members is 4 times higher than non-elder adult member. Golander and Tabak, *supra* n. 41, at 156.

[49] This is compared to the situation that existed prior to the law, in which some HMOs prevented older persons to join in in old age. *Id.* at 156.

[50] Articles 6 and 7 to the law state that geriatric medicine and geriatric nursing are included in the basic health care services which should be provided by the HMOs. However, article 67 to the law allowed to temporarily keep the existing reality, in which institutional long term care was the state's responsibility and not the HMO's responsibility. This "temporary" situtation has not changed yet. National Health Insurance Act, 1994, arts. 6 &7.

[51] *See* Netta Bentur, Revital Gross & David Chinitz, *National Health Insurance Law and the Elderly: Accessibility to Services, Quality and Satisfaction,* 54 Soc. Sec. 76, 85 (1999).

Nonetheless, even after the enactment of the National Health Insurance Law old people's right to health is still flawed. The main defect is in the content of the 'basket of health care services.' This basket is not complete, and does not entirely cover the treatments and medical requirements of the older population. Complete areas of health care which are particularly important to the old are excluded from the 'basket.' For instance, the financing of long-term care of old people in institutions such as geriatric hospitals is not included in the `basket', and the support given to these people by the Ministry of Health is conditional on a means test which in practice imposes a heavy financial burden on the old people and their families.[52] Since there is no legal obligation to fully subsidize the cost of long-term hospitalization of the old, with its many ramifications, old people are in danger of finding that they have no access to treatment which is essential for the preservation of their health and their lives.[53] A further example is the whole field of palliative treatment, including home hospices and systematic action to deal with environmental aspects of incurable diseases. This, too, is not included in the 'health basket,' and is currently dealt with in Israel on a voluntary basis, or sporadically, according to the judgment of the various HMOs.[54] Nor is dental care, which is an important factor in the quality of life of the old, included in the 'health basket'.[55]

Moreover, the effects of the financial pressure to save money and increase efficiency exerted on the HMOs by the Finance Ministry is now beginning to have an effect on the level and quality of the services provided for the old. Up to date research executed in the past few years indicates a setback in the degree of old people's satisfaction with the national health insurance system; they have recently begun to feel that their situation has deteriorated.[56] Recent interviews with old people show that they feel that economic efficiency has been attained at the expense of their health. Research focusing on health care workers (doctors, nurses, and health-care teams) has shown that economic pressure to increase what is called 'efficiency,' as well as reductions in manpower norms, have adversely affected the treatment of old people.[57] The 1999 research project also showed that, despite the institution of a system of budgetary calculations that took the age of the insured into

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[52] *See* Golander and Tabak, *supra* n. 41, at 164.

[53] *Id*.

[54] *See* Israel Doron, *From Negative to Positive Right to Die at Home*, 6(1) Care Mgt. J. 22, 27 (2005).

[55] *See* Anzalem Langer, *Pathological and Epidemiological Aspects of the Ageing of the Mouth,* in Beno Chabut & Albert Hart *Selected Issues in Geriatric Medicine* (Eshel 1994).

[56] Golander & Tabak, *supra* n. 41, at 157.

[57] *Id.*

account and was intended to provide a financial incentive for improving services for the old, the change did not prompt the HMOs to try to attract chronic and aged clients, or to improve their services to such people. It became apparent that, in practice, the HMOs still prefer young and healthy clients, and emphasize the marketing of services suitable to them.[58]

Thus, the situation in regard to old people's right to health is complex, dynamic, and only partly open to scrutiny. Despite the important contribution of the National Health Insurance Act to old people's right to health, there are today reasons for concern about the future. In a situation in which there is heavy economic pressure to increase efficiency and reduce costs, in a political atmosphere which encourages a decrease in the commitment of the government to underwrite the cost of the health services and where there exists no political force capable of satisfactorily defending the rights of the old, there is cause for concern that, instead of the Health Insurance Act's being the beginning of a leap forward in the improvement of the right of the old in to health, it may prove to be the beginning of the erosion and deterioration of that right. [59]

D. Old Age, the Law, and the Right to Long-term Care

1. Long-Term Care of the Old in General

The term 'long-term care' refers to a wide range of means of aid and support to disabled old people who find it difficult to function independently in their daily lives.[60] The measure of disability is generally considered to be the degree to which a person can function independently and perform the activities of daily living which include eating, getting dressed, washing, moving, etc., as well as the instrumental activities of daily living, which include preparing meals, shopping, using the telephone, taking medication, etc.[61] In Israel the proportion of old people who suffer from disabilities is quite considerable. At the end of 2003, the number of disabled old people was estimated at about 16 percent of all the elder population; of these, about 76 percent were living

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[58] Gross, Rosen and Shirom, *supra* n. 46, at 30.

[59] *See generally* Danieal Filk, *The Neo-Liberal Project and Privatization in the Health Care System*, in M. Mauntner *Distributive Justice in Israel* (Tel Aviv: Ramot – Tel Aviv University Press 2001).

[60] Long Term Care (LTC) involved persons in all ages and not only older persons. In this article, the reference is for LTC for older persons in the context of an ageing society.

[61] *See* L.F. Feinberg, American Society of Aging, *Options for Supporting Informal and Family Caregiving: A Policy Paper,* http://www.asaging.org/pew/feinberg/feinberg.html (1997).

in the community, and 24 percent in various kinds of institutions.[62] The combination of the ageing of the general population and the growth in the number of disabled old people has increased the awareness of the need for long-term care as an important social right of the old in Israel and in the world.

In practice, old people obtain long-term care through a wide range of health, community and other services. Any attempt to divide this subject into sub-groups or 'categories' is essentially artificial, since all its elements are inter-connected. In our discussion, in order to present the issues on the fundamental level, and because of the unique Israeli statutory framework, we shall distinguish between community-based long-term care and institutional long-term care.

2. Community-based Long-term Care

One of the areas in which Israeli law can congratulate itself on legal innovation in the field of elder law is the development of a legal framework which establishes the right to community-based long-term care as a social right. This was done by the addition of a section on community-based long-term care to the National Insurance Act in 1986.[63] This addition, among the first of its kind in the world, sprang from recognition of the fact that it is preferable to care for the elder population at home and in the community rather than in the institutionalized framework. Within the framework of overall legislation for social insurance in Israel, the law establishes the right to long-term care at home and in the community, in such a manner as will enable the old person to continue to live an independent life despite his/her physical disability.[64]

This right is implemented by providing long-term care for old people in their homes or in day centers provided by the community. The extent and content of the treatment is decided on an individual basis after testing the extent of the old person's disability in his/her home. The law has a selective dimension, in that treatment is conditional on a means test, and those with an income above a certain level are not entitled to care. Care is given at home, and is terminated when the old person enters an institution. The individual receives treatment, not money, and this treatment includes the daily services of a home helper up to a maximum of 15.5 hours per week and/or care in a day center and/or

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[62] *The Elderly in Israel*, *supra* n. 1, at 109.

[63] *See* Israel's National Insurance Law, ch. 10, arts. 223-237 .

[64] *See* Allan Borowski and Hillel Schmid, *Israel's long term care insurance law after a decade of implementation,* 12(1) J. Aging and Soc. Policy 49, 51 (2000).

laundry services and /or the provision of disposable bandages and/or a distress button. The care is provided by private companies or voluntary societies, and payment is made directly to the suppliers of the services. Thus, the insured person receives the services, but does not pay for them directly.

The law is intended to provide treatment through service providers who are not members of the client's family, with the express intent of freeing the family of the burden of care or lightening it, and transferring it to professional carers by the employment of companies and voluntary associations. Thus, the law does not only free (at least partially) the old person's family of the burden of care; it also reduces the tensions within the family caused by the burden of care, and prevents the deterioration of family relationships based on economic considerations alone. Apart from establishing general principles, the law makes detailed provisions for an administrative system to investigate eligibility for long-term care by means of an objective assessment of the ability to perform everyday tasks, with the right to appeal against decisions regarding the right to care and its extent.[65]

Since the law was first implemented in 1988, the extent of the care granted under its provisions has expanded greatly, and gone well beyond the amount that was expected before its enactment.[66] This has led to a considerable financial deficit. True, the sharp rise in the amount of long-term care required was proof of the law's success, and of the real need for its existence. But, on the other hand, this situation created a series of economic pressures, and those responsible for its implementation are caught in a financial trap which does not enable them to fulfil all the aged population's requirements for long-term care; and from its inception the law only provided for the partial satisfaction of these needs. Moreover, the application of the test for eligibility for long-term care – a test which examines the older person's ability to carry out daily activities such as dressing – is said to be humiliating or that it fails older people who do their best to show that they are still independent.[67] Nor does the quality of the assistance given by the service providers, particularly private companies, always reach the required professional and humane standards.[68] The very fact that care is provided by private profit-making companies means that they will attempt to reduce their costs and economize on the provision of services; and, further, this

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[65] *See* Hillel Schmid & Allan Borowski, *Selected Issues in the Delivery of Homecare Services to the Elderly a Decade after Implementing Israel's Long-Term Care Insurance Law,* 57 Soc. 59, 61 (2000).

[66] *Id.* at 64.

[67] *Id*. at 73

68 *Id*.

arrangement may well lead to the exploitation of the company's employees, and to insufficient investment or professional training of the carers, and to lack of adequate supervision of the quality and content of the care provided.

Nonetheless, the overall assessment is that, despite the weak points which have been revealed since the enactment of the law, Israel's community-based long-term care law constitutes a significant milestone in the legal endorsement of the social rights of the old in . It is an important legal development, and efforts should be made to improve it, to broaden its field of application, and to strengthen its economic basis.

3. Institutional Long-Term Care

For many years institutionalization was considered to be the appropriate solution to the problem of prolonged care of the old. Old people who suffered from chronic health problems or a decline in their functional capacity were put into specialized institutions that were supposed to supply all their needs. In , too, the consequences of this approach are still felt, and today more than 4 percent of the aged population – about 30,000 old people – are living in some 400 institutions.[69] At the legislative level, i law has regularized control over institutions providing prolonged care for the old by means of two main legal frameworks: hostels for independent but feeble old people, under the supervision of the Ministry of Labor and Welfare, were given legal status by the Law of Supervision of Hostels, 1965,[70] and the ordinances issued under it; and Geriatric hospitals and nursing homes, which were put under the supervision of the Ministry of Health, were given legal status by the Public Health Ordinance 1940,[71] and various other laws concerning health.[72]

Institutionalization of old people raises a number of moral, economic and social issues.[73] The main problem of the institutional solution, in relation to economic and social rights, is that in institutionalization has never been considered part of the legal right to health; nor has it ever been provided for old people as part of the general system of health or welfare services. The state has provided prolonged institutional care for old people only on the basis of assessment of

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[69] *See The Elderly in Israel, supra* n. 1, at 278.

[70] Book of Statutes, 444.

[71] Book of Statutes, 1065.

[72] *See* Jenny Brodsky & Nira Shamai, *The Long Term Care for the Elderly: Organizational and Economic Perspectives* 1 (Eshel 1999).

[73] *See* Ariela Lowenstein & Ester Iecovits, *The Older Persons, The Family and the Institutional Setting* 5 (Jeruslame: Magnes 1996).

individual needs, and only then within the stringent budgetary limits of the ministries concerned.[74] Moreover, by applying the principle of family responsibility, as defined in the Family Law Statute (Alimony), 1959,[75] when the old people themselves are unable to afford the cost of institutional living the state has shifted the burden onto the shoulders of their family whenever it is able to pay the price.

The result is that the burden of institutional long term care falls mainly on the old people themselves or on their families, (unless they are exempted as the result of a very strict means test). The economic burden is not equal as between different families, since those with higher incomes pay a relatively smaller proportion of their income for the same service. That part of the cost which is nonetheless financed out of the state budget does not cover all the clients' needs, in view of budgetary limitations, and so even those who are deemed eligible for a place in an institution often have to wait for a long time until a budgetary allocation is available, or, having no alternative, are forced to choose an unauthorized old age home, which is less expensive. Finally, the statutory division between the different authorities dealing with prolonged institutional care, and the division between them and the general national health service leads to bureaucratic complications and administrative failures which reduce the ability of old people to achieve their rights. The results of these failures are severe. The waiting period for long-term care can be as long as a year or more, and this involves difficult conditions, a great deal of suffering, and an intolerable quality of life.[76] The defects of the arrangements for finding places for old people in institutions are well known, and have been noted by the State Comptroller on several occasions.[77] But nobody has yet found the social or political power to bring about a real reform in this area, and old people's right to prolonged institutional care has not been recognized as an economic and social right.

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[74] Israel Doron, *Old age and social and economic rights,* in *Economic, Social and Cultural Rights in Israel* 893, 920 (Yoram Rabin & Yuval Shany, eds., Tel Aviv: Ramot 2004).

[75] Book of Statutes, 256.

[76] Israel Doron, *supra* n. 74, at 922.

[77] State of Israel Comptroller's Reprt, 1998, No. 48, pages 449, 472 (Jerusalem; The Office of the State Comptroller).

E. Old Age, Law, and the Right to Housing in Israel

1. Housing in Old Age in General

The connection between the human environment in which old people live and their quality of life has long been recognized.[78] The degree of suitability of the apartment, the dwelling-place, the district and the town to the limitations which accompany old age directly influence old people's ease of access to essential locations and their ability to continue to control their lives independently and with dignity. It must be added, however, that a discussion of the right to housing which is not connected with a discussion of the economic and medical condition of the old people concerned is bound to be artificial, since at the time of old age all these factors are interconnected.[79] In this sense, the specific 'right to housing' of the elder population means far more than the right to 'a roof over one's head' under which one may live a dignified life. Here we shall describe two legal issues concerning the right to housing which have arisen in Israel.

2. Ageing in Place: The Right to Grow Old in the Community

One aspect of the approach to the question of housing in old age is the right of the old to continue to spend the final period of their lives in their own homes, within the community, despite disabilities or sickness. This approach is known as "ageing in place." Its proponents have evidenced fierce opposition to the institutional approach, considering that enabling people to grow old without detaching them from their natural home environment, depriving them of their personal freedom, or making them suffer the trauma of moving to a total institutional framework, is of prime importance. This goal has been achieved by encouraging networks of informal support and developing formal support systems in the community, and, simultaneously, creating alternative housing complexes within the community which preserve independence and autonomy in old age, and provide support services in accordance with the wishes of the old people themselves. These varied methods make it possible to ensure the quality of life and fulfilment of the rights of old people in the best

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[78] *See* Mark Rosenberg & John Everitt, *Planning for Aging Populations: Inside or Outside the Walls,* 56(3) Progress Plan. 119, 119.

[79] *See e.g.* Gary V. Engelhardt, Jonathan Gruber & Cynthia D. Perry, *Social Security and Elderly Living Arrangments,* http://www.papers.nber.org/papers/w8911 (2002).

possible manner, prevent their exclusion from social activities, and enable them to remain integrated in a multi-generational community.[80]

Israeli law relates in part to this issue, in the Planning and Building Law, 1965[81] (hereinafter, Planning and Building Law), and in the Law for the Equality of Rights of the Disabled, 1998.[82] These two laws establish a legal foundation for the basic right to continue to live in one's own home within the community, even if physically or mentally disabled. Thus, for instance, as a result of the existence of legal obstacles to the establishment of old age homes in residential areas, in the 1990s the Planning and Building Law was amended to state that it is permitted to establish an old age home in a residential area, and that this is not a 'deviant use' which requires a special permit. This amendment deprived neighbours of the right to oppose the establishment of old age homes in their district, and paved the way to the building of old people's housing in residential districts. Another amendment to the Planning and Building Law, passed in the early 2000s, requires local and public authorities to adapt public buildings and make them accessible to the disabled, the old, and those who need assistance in order to attain mobility.

A full account of the other provisions of these laws is beyond the limits of this article, but their underlying rationale, in the context of elder concerns, is important: it is their application and enforcement that enables many disabled old people to continue to live active lives in regular accommodation despite their disability. It is these laws which enable them to continue to live 'normal' lives, and not to move into an institution. But, as is the case with other issues discussed here, the problem is that the legal arrangements are limited. For instance, the state does not subsidize the financial outlay or the equipment involved in adapting a house to various physical disabilities. Thus, the burden involved in adapting the personal environment in a private house or apartment is still borne by the old person him/herself, and not by the state.[83]

Moreover, providing housing in the community necessitates positive initiatives on the part of official bodies in order to build apartments and buildings suitable for old people from the point of view

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[80] *See* Leon A. Pastalan, *Preface in Aging in Place: The Role of Housing and Social Support* (Leon A. Pastalan ed., The Haworth Press 1990).

[81] *See* Israel Doron & Assaf Davidi , *Homes for the Aged and Residential Zoning: Can legislation make a difference?,* 20 J. Hous. Elderly 97, 100 (2006).

[82] Ariela Offir & Dan Horenstein, *Equal Rights for People With Disablitlies Act 1998: Emancipation at the End of the 20th Century* (A. Barak et. al eds., Tel Aviv 2002).

[83] Along the years, various experimental projects have been conducted in Israel regarding housing solutions for elderly. One such example was the attempt to create a multi-generational neighborhood or supportive neighborhoods. These projects, despite their local success, were never adopted at the national level.

of their location (accessibility and proximity to centers of activity and services), of their physical structure (elevators, accessibility, etc.) and their cost (prices suited to old people's incomes). The Israeli government is scarcely involved in such initiatives at all, and there is only a very limited degree of activity in the field of government-supported building aimed at creating housing adapted to old people's needs.

3. The Right to Assisted Living

The ageing of Israeli society, changes in the structure of the family, the high cost of accommodation in old age homes and hospitalization in geriatric hospitals, and the search for alternatives to traditional arrangements for institutional care – all of these have led over the past two decades in to a considerable increase in the number of independent forms of accommodation which also provide services for the care of the old.[84] The innovative notion of supportive housing for old people, often designated 'assisted living,' has been added to the vocabulary of building entrepreneurs, public bodies and policy-makers to mean a combination of a type of accommodation, a cluster of services and a philosophy of treatment of the old. It presents a model of a type of long-term accommodation which serves as an alternative to the classical institutional model, while preserving the autonomy and independence of old people in the framework of the community.[85]

Since the early 1980s, assisted living in Israel has expanded considerably, and changed its character significantly. Originally dominated by the volunteer sector, with no participation by private elements, it has turned into an area primarily controlled by private entrepreneurs and public or governmental organizations.[86] In 2003, Israel had 167 schemes for assisted living, housing 19,976 old people.[87] The standards and quality of these schemes is extremely varied; they range from clusters of minimal accommodation with a limited range of services

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[84] *See* Thomas D. Begley, Jr. et. al., NAELA Public Policy Committee, *White Paper on Assisted Living,* http://www.naela.com/pdffiles/whitepaper2001.pdf (2001). *See also* Miriam Shtarkshall, *Aging in Place and the Public Sheltered Housing in Israel: A Special Focus on Age Integration* 114, 116 (Leonard F. Heumann & Duncan P. Boldy eds., Praeger 1993).

[85] *See* Rosemary Chapin & Debra Dobbs-Kepper , *Aging in Place in Assisted Living: Philosophy Versus Policy*, 41(1) *Gerontologist* 43, 48 (2001); Victor Regnier, Jennifer Hamilton & Suzie Yates, *Ass*sisted *Living for the Aged and Frail: Innovations in Design, Management, and Financing* (Colum. U. Press 1995).

[86] *See* Israel Doron & Ernie Lightman, *Assisted-Living in Israel: Market Control or Government Regulation?,* 23 Ageing Socy. 779, 782 (2003).

[87] *The Elderly in Israel*, *supra* n. 1, at 274.

to elegant and exclusive complexes with a wide variety of services, social and cultural activities, sports, etc.

From the economic and legal point of view, assisted living in Israel has never been subsidized by the welfare services. In general, apart from exceptional cases, those who choose to live in such frameworks have had to bear the financial burden themselves, and have sometimes had to enter into contracts containing inequitable financial terms.[88] This results in an absurd situation, whereby old people from the lower classes are forced to live in institutional frameworks (which are financed on the basis of means tests set by the authorities), since there are no schemes of financial assistance to enable them to have the benefit of assisted living, which would enable them to continue to live active lives in the community with assistance to help them cope with illness or disability. The situation in this area in Israel cries out for the formulation of a clear legal policy, which at the moment does not exist on the national level.[89]

F. The Right to Work

1. The Right of the Old to Work in General

Work is an essential element in the life of every human being, whether economically, as a source of income, psychologically, as a source of status, purpose, and self-respect, or socially, as a source of interaction between people, self-expression, and a manifestation of success and standing. Clearly, therefore, the right to work is linked directly to the status and social rights of the old. The legal and social situation whereby old people are, in practice, denied the right to find employment and forced to cease working and accept the status of 'pensioners' is a natural reflection of stereotypic views of the old, and forces them to pay a high economic and social price. Moreover, in Israel, those old people who nonetheless attempt to keep on working suffer from discrimination both in finding employment and in wages and working conditions.[90] Here, we shall discuss the way in which a number of basic issues are expressed in Israel law.

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[88] *See e.g.* C.A. 5017/1998, *Gloden Tower v. The Attorney General,Online,* http://www.nevo.co.il/Psika_word/mechozi/m98005017-5.doc (accessed 18/4/2007).

[89] *See* I. King & M. Shtarkshal, *The Governmental Assisted Living Programs: Characteristics and Needs of Tenants, and Organizational Characteristics* (1997).

[90] *See generally* Dan Shnit, *Age Discrimination in Employment,* 4 Tel Aviv U. Stud. L. 168 (1979); Sharon Rabin Margaliot, *Distinction, Discrimination and Age: A Game of Power Relationships in the Labor Force*, 32(1) Mishpatim 131, 132 (2002).

2. Mandatory retirement

Historically, the establishment of a 'mandatory retirement age' and the statutory requirement to retire, were viewed as social achievements, and served as protection against exploitation and the infringement of basic human rights.[91] In Israel, too, compulsory retirement was considered to be a means of social protection, and was adopted from the early days of the state. However, until 2004, the age of compulsory retirement was fixed in collective and individual labor contracts, and not by statutory legislation (except for state employees and certain special groups of workers). This situation remained unchanged until the early years of the twenty-first century, when, in the framework of the emergency economic regulations, the Retirement Law, 2004,[92] was enacted. This law raised and standardized the age of compulsory retirement for both women and men to 67; the age of entitlement to a pension (*i.e.*, the age at which one had the right to retire voluntarily and receive an employment pension) was fixed at 64 for women (as against 60 until then) and 67 for men (as against 65). It is important to note in this connection that the main reason for the raising of the retirement age was economic: the desire to improve the actuarial state of the pension funds, and to reduce the economic burden of pension payments.[93]

The most palpable element in the matter of retirement in Israeli law was the difference in the retirement ages of men and women; men retired at 65, and women at 60. Historically, just as in the matter of compulsory retirement, the difference was the result of the aspiration to protect women and recognize the fact that, in view of the extra burden of housework and child care, they should be 'liberated' from labor at an earlier age.[94] In the reality of the modern age, discrimination in the matter of retirement age has become yet another stumbling block in the way of the advancement of women: it has seriously impaired their economic status, and has been another means of perpetuating their inferior social status.[95] One of the mileposts in the revolution in this sphere in Israeli law was an appeal to the Supreme Court by Dr. Naomi Nevo, a sociologist employed by the Jewish Agency. According to the labor agreement of the Jewish Agency, which fixed the retirement age of

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[91] For the distinction between "Mandatory Retirment Age" (when an employer can mandate an empoyee to retire) compared to "Minimun Pension Age" (which is the minimum age for an employee to start receiving occupational pension), *see* The Retirment Age Law, 2004.

[92] Book of Statutes, 1919.

[93] Ministry of Finance, *Retirment Age: Report of the Netanyahu Committee* 9 (Jerusalem 2000).

[94] See C.A. 104/1987, *Dr. Naomi Nevo v. The National Labor Court*, Supreme Court Rulings (Piskei Din) 44(4), 749

[95] *Id.* at 755

men as 65 and of women as 60, she was obliged to retire at the age of 60.[96] The Israeli Supreme Court decided that, under these circumstances, discrimination between the retirement age of men and women was illegitimate and illegal.[97] At the same time as this judgment was handed down, a statutory initiative led to the enactment of the Equal Retirement for Men and Women Law of 1987,[98] which laid down that wherever there was an ordinance fixing different retirement ages for men and women, the woman had the right to choose whether to retire at the age laid down by the law for women, or at the age fixed for men, or at any age between the two. This law abolished the possibility to force women to retire earlier than men, while maintaining the perception that women should be allowed, under their own discretion, to retire earlier than men.

As noted above, historically speaking, the starting-point of Israeli law was that the establishment of a compulsory retirement age was a just action. However, of recent years, doubts have arisen as to the social and legal justification of such an arrangement. Why should one compel workers to terminate their employment at the age of 65, when it is quite clear that no physiological or psychological 'miracle' takes place at that age? Automatic imposition of compulsory retirement at a standard age, and the adoption of a chronological criterion with no relationship to the nature of the work, the physical and mental demands of the job, or the physical and professional state of the worker, is seen to be an infringement of the basic principles of justice, and irrational from the professional point of view. It would seem that a flexible functional system, which takes into account the individual state of the worker, the degree to which he or she is essential and suitable, could be a more just alternative to that which exists in Israeli law.[99] On the other hand, it has been maintained that complete abolition of retirement age would lead to even more serious infringements of basic rights of the old, as a result of their having to undergo humiliating tests in order to keep their positions of employment.[100] The bottom line is that from the legal point of view, mandatory retirement is still valid and obligatory in Israel, and its constitutionality has not yet been tested in the Supreme Court.

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[96] *Id.* at 753.

[97] *Id.* at 761

[98] Book of Statutes, 1208.

[99] *See* Yitzhak Brick, *Politics and Ageing in The Politics of Old Age* 19 (Y. Brick ed., Eshel and the Kubutz Hameuchad 2004).

[100] The main pressure in Israel to raise the retirment age is not a concern for the human rights of older persons, but rather to the financial stability of the pension system. *See* the Netanyahu Report, *supra* n. 93.

3. Age Discrimination in Employment

While the mandatory retirement age is considered legal in Israel, in all other work-related matters age discrimination is forbidden.[101] The legal prohibition of discrimination against the old on account of their age is based on the principle of equality. Apart from the general legal justification of the principle of equality, of recent years there have been several legal and constitutional developments relating to the possibility of infringement of old peoples' right to employment and age-related discrimination. One central development is the enactment of two new basic laws: Basic Law: Human Dignity and Freedom;[102] and Basic Law: Freedom of Occupation.[103] These two basic laws give constitutional backing to the right of every person in Israel to work in an occupation of his/her choosing, and in accordance with his/her abilities, and prohibit any discrimination or violation of a person's self-respect.

However, the most important development in this sphere took place in 1995, with the amendment of the Law for Equality of Employment Opportunities, 1988 (hereinafter: Equality of Employment Opportunities Law).[104] The amendment to this law, which originally contained no mention of age discrimination, added to its provisions the prohibition of age discrimination within the compass of labor relationships.[105] The prohibition of age discrimination was applied not only to the right to be accepted for employment, but to all matters relating to economic rights during the period of employment and at its conclusion: for instance, salary, labor conditions, career advancement, leave for professional training, cases of dismissal, compensation for dismissal, and even bonuses and payments related to the cessation of employment. All of these wide dimensions of occupation were included within the broad prohibition of age discrimination.

It should be emphasized that the Equality of Employment Opportunities Law is of particular importance for the elder population of Israel, since it contains a number of legal innovations which make it a particularly useful instrument in the struggle against age discrimination in the field of employment. For instance, it applies to all employers, both private and public. It gives the Labor Court authority to grant monetary compensation to a claimant even if [s]he has not suffered financial loss. In a situation where the old person has fulfilled all the demands of the job and has nonetheless not received the appointment, it permits the

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[101] *See* Israel Doron, *supra* n. 74, at 931.
[102] Book of Statutes, 1391.
[103] Book of Statutes, 1451.
[104] Book of Statutes, 1240.
[105] Book of Statues, 1528.

transfer of the burden of proof to the employer. And, it allows public and representative bodies to make a claim in place of the worker (subject to his/her agreement).

Unfortunately, the elder population has not yet afforded this law the recognition it deserves. So far, although eight years have passed since the amendment prohibiting age discrimination was passed, no body of judicial decisions in the matter has yet accumulated, and the law has not succeeded in bringing about a social transformation in this sphere.[106] Israeli reality still reflects the stereotypic image according to which employers, in defiance of the law, prefer to employ young people. In a sense, this law exemplifies the fact that a formal change in the law is not sufficient to alter the realities of life for the old in Israel. A number of other things are also needed: education, legal aid, and financial resources which will enable old people to appreciate their legal rights and acquire tools for activating them; for they should both know of their rights and be able to put them into practice.

G. Some More Legal Points

1. The Right to Meaningful Citizenship in Old Age

In the modern age, old age leads to exclusion in many senses: built-in exclusion from social activities, lack of accessibility to centers of power and influence, and systematic disregard of the older population in cultural and media events.[107] The reasons for this state of affairs, and the methods used to bring it about, are many and varied. One central factor should, however, be emphasized: the phenomenon of ageism. This is a complex and controversial concept, and has been given a great many definitions. Under almost all definitions, it is clear that ageism creates a reality in which the older population is excluded and alienated.

One way to combat ageism is to recognize that the inviolable rights of the old include the right to continue to enjoy culture and art, to play an active part in society, and to continue to acquire education and knowledge. These rights are a part of what it means to be a citizen in the Israeli democracy. This recognition leads to the understanding that the state has an obligation to assist and encourage old people to realize their citizenship.[108] The Israeli legislator was not blind to this aspect, as is shown by the Senior Citizens' Law, 1989 (hereinafter: Senior Citizens'

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[106] For an analysis of the failure of this law in Israel, *see* Sharon Rabin Margaliot, *The Slippery Case of Age Discrimination – How Does One Prove Its Existence?*, 44(3) Advoc. 529, 537 (2000).

[107] *See* Israel Doron, *supra* n. 74, at 933.

[108] *See* Jeffrey A. Burr, Francis G. Caro & Jennifer Moorhead, *Productive Aging and Civic Participation,* 16 J. Aging Stud. 87, 88 (2002).

Law).[109] This law enjoins the creation of a Senior Citizens' Council, whose function is to advise the Minister of Welfare on the formulation of policy with regard to senior citizens; it also states that senior citizens should receive certain financial benefits, primarily in the form of reductions of property tax, payment for public transport, admission to cultural events, etc.[110]

The accepted view is that the Senior Citizens' Law is an 'economic law,' whose purpose is to lighten the economic burdens of the old. However, it is a very important law which confers social rights on the old people of Israel, and enables them to continue to enjoy an active social and cultural life. This it does, among other things, by affording financial concessions to cultural events and reduced fares on public transport, through which they have easy access to social events. The high cost of public transport is not 'only' an economic burden; for senior citizens who are dependent on public transport for their mobility it can be a social barrier, seriously impairing their active citizenship. The problem that arises in this connection is, of course, the limited degree to which this matter is addressed by legislation; in its present form it does not make it possible to apply the legislative rationale fully in this connection. Moreover, the public is not yet fully aware of the character of this law. Therefore, in its short legislative history, it has always been easy to curtail and cancel its provisions whenever it has been necessary to cut public expenditure.[111]

2. The Right to Family Life and to Aid for Social Relationships

The network of social support which old people enjoy is an important component of their ability to grow old with dignity. Relatives, friends, colleagues, neighbours and others can give them aid and support, and represent them when needed. Historically, such networks have been a part of the culture and customs of society. But in modern society, in which traditional social frameworks are falling apart, the existence of isolated old people without family or friends is becoming more frequent, and legal intervention is required to support and assist the continued existence of these social networks. Of recent years several legal tools have been developed to this end. One such case, in the Israeli context, is the Law of Sick Pay (Absence Because of a Parent's Illness) 1993,[112] which was enacted with the express objective of dealing directly with the

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[109] Book of Statutes, 1295.
[110] *See* Israel Doron, *The Rise and Fall of Israel's Senior Citizens Act*, *supra* n. 8, at 11.
[111] *Id.*
[112] Book of Statutes, 1442.

issue of legal backing for the social support networks of old people in Israel.

The law allows workers to take six days' leave of absence per year as the result of the sickness of a parent or partner's parent over the age of 65, on account of his/her accumulated days of sick leave, on condition that his/her partner works and is not absent from work by reason of this entitlement.[113] Despite the limitations of this law, its basic rationale reflects a fundamental approach which aims to strengthen the network of family support for the old.[114]

In this connection we may also mention other innovative trends, such as: payment to people who provide informal care for old relatives; tax reductions for expenses incurred in caring for aged relatives; and the recognition, in the framework of a number of laws, of the legal status of such people as friends, colleagues or those with other close relationships in proceedings such as guardianship or as surrogate decision-makers in matters of medical treatment or care when the patient is incompetent to decide.[115] Finally, the development of the recognition that grandparents should be given special legal status with regard to their grandchildren is an expression of the same trend.[116] All of these spheres are currently only at an early stage of development in Israeli law, and it is to be hoped that they will be developed with all due speed in the years to come.

3. Elder Abuse and Neglect

Until the end of the 1980s, there was in Israel no real consciousness of the existence of elder abuse and neglect. When it was referred to, it was discussed only in general and sketchy terms, with no reference to the social context or its special characteristics.[117] Empirical research on the subject was carried out only towards the end of the 1980s and in the mid-1990s.[118] In the last few years several more studies have

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[113] *Id.* at art. 1.

[114] *See* Israel Doron & Galia Linchitz, *The Work Versus ElderCare Dilemma and the Law: An Israeli Example,* 10 Ethics, L. Aging Rev. 109, 113 (2004).

[115] *Id.* at 118-120.

[116] *See generally* Anne Marie Jackson, *The Coming of Age of Grandparent Visitation Rights,* 43 Am. U.L. Rev. 563, 566 (1994).

[117] *See* Dan Shnit, *Protection of the Elderly in Israeli Law*, 7 Gerontology 6, 10 (1976).

[118] Mati Ronen & Shimshon Neikrog, *The Perception of Elder Abuse in Israel,* 14(1) Socy Welfare 17, 20 (1993); S. Zuabi, *Elder Abuse in the Arab Sector: Myth or Reality?* (Masters Thesis, Hebrew U. 1994); Ariela Lowenstein & Pnina Ron, *Elder Abuse by Family Members Who Care for Them* (Ctr. Ageing Stud. Research Haifa U. 1995); Ariela Lowenstein & Pnina Ron, *Elder Abuse in a Domestic Context in Israel: Victims' Typology and Abuse Etiology,* 20(2) Socy. Welfare 175, 176 (2000).

been carried out.[119] The most recent data came out in December 2004, when Eisikovits, Winterstein and Lowenstein published the findings of Israel's first national survey on elder abuse and neglect. A full description of these findings is beyond the scope of this article. However, in general, the survey exposed relatively high rates of abuse and neglect of the older population in Israel: 18.4 percent of the elderly were exposed to at least one kind of abuse (the rates were similar among Jews and Arabs); and 25 percent were subject to neglect.[120]

Analyzing the legislative developments in relation to elder abuse and neglect shows that Israeli law has undergone historical and ideological developments. More specifically, four "legislative generations" can be clearly discerned:[121]

The First Generation - Paternalism and Social Intervention

The first generation of laws relating to elderly people at risk was enacted for the most part in the first two decades of the existence of the State of Israel (i.e. the 1950s and 1960s). Two central laws, which are still in force and used for dealing with elder abuse and neglect, were enacted at the time: the Law of Legal Competence and Guardianship, 1962;[122] and the Law for the Defense of Protected Persons, 1966.[123] The social credo on which these laws are based is that professionals, including social workers, will be capable of recognizing cases in which older people are incapable of dealing with their own affairs, and take care of them through the nomination of legal guardians or through compulsory injunctions given by the courts.

The Second Generation - Criminal Law and Mandatory Reporting

Although it did not result directly from the existence of elder abuse and neglect, Amendment 26 to the Criminal Code, 1989[124] created a new legal initiative in this area. In effect, this legislative amendment

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[119] Samir Zuabi, *Structural and Interactional Characters of Older Israeli Arabs Suffering from Abuse* (doctoral thesis, Hebrew U. 2000); Beth Katsman & Howard Litwin, *Protecting the Elderly and Preventing Violence Against Them,* Jerusalem: Natl. Ins. Inst. Center of Research (2002); Sarah Alon, *Social Workers' Intentions to Employ Legal or Treatment Interventions in Cases of Elder Abuse* (doctoral thesis, Haifa U. 2004).

[120] Zvi Eisikovits, Tora Winterstein & Ariela Lowenstein, *The National Survey on Elder Abuse and Neglect in Israel* 32 (Haifa U. & Eshel 2004).

[121] This analysis is based on Israel Doron, Sarah Alon & Offir Nissim, *Time for Policy: Legislative response to elder abuse and neglect in Israel*, 16(4) J. Elder Abuse & Neglect 63, 66 (2005).

[122] Book of Statutes, 380.

[123] Book of Statues, 480.

[124] Book of Statutes, 390.

included the addition of a new chapter to Israeli criminal code; the section entitled "injury to the helpless." There were two principal aspects of this amendment to the Criminal Code. The first was the explicit assertion that physical, mental or sexual abuse, by omission or commission, of "helpless persons" was a criminal offence, and subject to severe punishment.[125] The second central aspect of the amendment was the obligation to report any act of abuse.[126]

The Third Generation - Protection and Therapy Within Family Violence

Three years after the Amendment to the Criminal Code, a completely new law was enacted: the Law for the Prevention of Violence in the Family, 1991.[127] This legislation was enacted as a result of the report of a committee on violence in the family.[128] The legislative innovation of the third generation was the adoption of a legal instrument that rested on civil law and could be set in operation quickly and independently by the victim or a relative. Moreover, the types of relief given in the law are mainly of two kinds: the physical removal or distancing of the aggressive person(s) from the threatened victim; and compelling the aggressor to undergo treatment as a means of reaching a solution to the violent situation.[129]

The Emergence of the Fourth Generation – Empowerment

This new legal development in Israeli law is still very young and in its preliminary stages. Its characteristic is that it adopts an empowering approach and tries to be more focused on the elderly. For instance, in 2002, the Law for the Prevention of Family Violence was amended.[130] For the first time, Israeli law added the duty of professionals and service providers to supply information to victims of abuse and neglect (as opposed to establishing a duty to report or to intervene) in order to enable them to apply for and receive assistance and treatment – if they choose to do so.

In sum, Israeli law in the field of elder abuse and neglect seems to be at a crossroads. On the one hand, after going through four stages of development, it has reached a relatively mature stage. On the other hand,

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[125] *Id.* at art. 368(c) (the maximum punishment is 8 years in prison for elder abuse or neglect).
[126] *Id.* at art. 368(d).
[127] Book of Statutes, 1352.
[128] Judith Karp, *Report on Domestic Violence,* in *The Status of Women in Society and Law* 280 *(*Frances Raday, Carmel Shalev & Michal Liban-Kobi eds., Shoken 1995).
[129] *Id.* at 307.
[130] Book of Statutes, 1817.

Israeli law in this area has not yet achieved its final form. Moreover, for the most part, it does not yet relate at the legislative level to the phenomenon of elder abuse, as distinct from other acts of violence or other social groups of abused persons (such as children or women). Thus, it seems that the main legal issue today is not the existence of legal tools, but the lack of a holistic, coherent and rational legal policy towards elder abuse and neglect.

III. CONCLUSIONS

The overall picture of the state of elder law in Israel, as described above, displays an interesting dynamic; it is undergoing processes of formation and maturation. Because it is still developing, it is hard to make even approximate generalizations about the subject at this stage. The picture is complex and neither black nor white, and it is changing rapidly at this very time.

There is no doubt that in certain respects old people in Israel enjoy some of the most advanced legal arrangements in the world. Important developments in the spheres of national health insurance, insurance for community based long-term care, the Senior Citizens' Law, and the right to paid sick leave because of a parent's illness definitely indicate recognition of the importance of economic and social rights in general, and the rights of the old in particular. Moreover, the dramatic achievement of the Pensioners' Party in the recent elections ensures that in the near future there will be far-reaching changes in various legal arrangements affecting the rights of the old in Israel.

On the other hand, in various legal areas Israel still lags behind other Western and developed states. As shown above, many legal rights are flawed, and suffer from difficulties and limitations. Thus, if we take a broad view and attempt to make an overall assessment of the state of old people's social rights in Israel, we can point out a number of challenges which Israel law should confront in the future. First, there needs to be a heightened sense of awareness and consciousness to the developing field of elder law. As shown, one of the central problems in the sphere of elder law in general, and of the social and economic rights of the old in particular, is the lack of awareness of these rights' independent existence in the world of law and social policy. Leading bodies in the world of law, such as the *Knesset,* the Israeli Lawyers' Bureau, the law faculties of the universities, the Ministry of Justice and the State Advocacy are still at a preliminary stage in developing awareness to the field of elder law as an independent and important subject in the development of social policy for the senior citizens of Israel.

Second, we need to protect the existing legal achievements. It is important to preserve what has been achieved despite the neo-liberal atmosphere and the current economic 'hysteria' concerning the implications of the ageing of the Israeli population. One of the trends which can be seen in Israel in the sphere of old people's economic and social rights is the constant attempt to erode them and reduce their scope. Prominent examples are the continuous effort to reduce old age pensions, the attempts to cut down the expenditure occasioned by the National Community-Based Long-Term Care Insurance Law, the opposition to the enactment of a national pension scheme, and the attempts to impair the National Health Insurance Law and to revoke the rights granted by the Senior Citizens' Law.

There are many reasons for these ongoing attempts to erode elder rights. But in a broader perspective, it chimes well with two main trends. The first is ideological: the increasing support in Israeli society for neo-liberal tendencies, which favor the reduction of government involvement with and support for the underprivileged.[131] The second, which is indirectly linked to the first, is the tendency to create 'panic' and 'hysteria' as a result of the socio-economic implications of the increase in the elder population. Prophets of doom proclaim that if immediate steps are not taken the ageing of the Israeli population will lead to the collapse of the social security system, as a result of the financial burden which this population will impose on the state budget.[132] It is important to recall that these prophecies are generally unfounded, in that there are solutions at the policy level to most of the dangers they describe which do not impinge of the rights of the old. Nonetheless, one of the challenges of the coming years is clearly the need to keep watch and fight against attempts to diminish the already existing social rights of the elder population.

Third, we need to protect the connection between social rights and old age. It is vital to be aware of the importance of the socio-economic rights of the old as a means of preventing exclusion and preserving active citizenship. One of the unique social aspects of old age in modern times is the phenomenon of 'ageism,' discussed above. The exclusion of old people from active social life is part of a broader social context in which modernism and post-modernism vie to create the illusion that there are no old people, and no need for people to be old. According to modern approaches, there is no need for old people, since

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[131] *See* Dani Filc, *Model 2000 of the State of Israel: Post-Fordism and Neoliberlism,* in *The Power of Property: Israeli Society in the Global Age* 34 (Dani Filc and Uri Ram ed., Van-Leer Institute 2004).

[132] *See* Richard Disney, *Can We Afford to Grow Older?* (Cambridge MIT Press 1996).

when they are old they make no contribution to the progress of mankind; and, according to post-modern approaches, a person's age is no longer relevant to the definition of his or her place in society.[133] Unfortunately, the result of these approaches is that in practice many old people are excluded from the sphere of social activity, and experience a difficult life of exclusion, discrimination and neglect in which they are denied the true liberty of choosing 'not to be old.' Social rights in the fields of health, housing, employment, etc. are able to give the old the ability and the strength to resist, and to wage an effective struggle for the position they deserve as an integrated, active and substantial sector of Israeli society.

Fourth, there needs to be a holistic approach, an overall socio-legal policy, as distinct from the adoption of the perspective of 'atomistic rights.' The legal world in general, and the world of rights in particular, is accustomed to weigh up complex issues in the context of specific 'rights.' It is methodologically convenient to consider legal issues under the category of 'the right to education,' 'the right to housing,' or any other specific label. But, when considering the social rights of the elderly population, the distinction between various social rights is completely artificial. Moreover, spreading the discussion over various concrete rights may, in practice, do damage to the rights of the old. Thus, it may well be that when the rights of the old are under discussion it is important not to lose sight of the broad picture, and to try to find a suitable all-embracing social policy for the older population in Israel

[133] See Haim Hazan, Getting Older in a Global Village, in The Politics of Aging 30 (Yitzhak Brick ed., Eshel 2002).

LAW, AGEING AND POLICY IN THE UNITED KINGDOM

*Helen Meenan and Graeme Broadbent**

INTRODUCTION

At the precise moment of writing, early 2006, there is no age discrimination law in the United Kingdom nor is there a taught subject known as elder law in Higher Education. Many law practitioners (other than solicitors specialising in work for the elderly) could at best guess at the meaning, importance and impact of elder law. However, this picture is not complete and the purpose of this article is to give as true an account as possible of the state of these two fields. This article will explore the social, demographic and legal background in the UK to reveal that we are on the cusp of the introduction of detailed age discrimination laws driven by a European Directive and shaped partially by British contexts. Moreover, despite considerable fragmentation, particularly from the perspective of the older client, the UK has a large body of law dealing with capacity, mental illness and related issues such as property management.

This article will also reveal that the incoming age discrimination law is being subsumed within a broader, more inclusive equality and human rights regime. This process seems wise for our diverse society and the overlapping nature of age with other grounds of discrimination. By contrast, the constituent elements of what may be unofficially termed *Elder Law,* though more established, do need to be streamlined into a more cohesive whole, to be truly accessible to the citizen and his legal adviser. The authors are unaware of any movement in this regard and suggest that in the end demographic and related social pressures may well provide the necessary momentum.

Politics and law-making

For purposes of this article, the United Kingdom may be broadly characterised by a robust parliamentary democracy with a deeply rooted social welfare system,[1] providing many benefits including free

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healthcare for all citizens.[2] It has a common-law legal system and a vigorous media, which has been important in highlighting the implications of population ageing for the citizen. One of the most newsworthy aspects of ageing Britain is the so-called pensions' crisis. This refers to the inability of near future working generations to support their retirees and old age pensioners and the need for older workers to work for longer than today to help finance their own extra years. Some elements of the British press have portrayed any real need to raise the state pension age, in terms of being forced to "work till you drop." However, the message that we are living longer in this country has gained prominence in public awareness in very recent years and is now helping to shape responses to the pensions' crisis. Ageing and older people are also emerging as more prominent issues in British politics in general, with an All-Party Parliamentary Group on Ageing and Older People with a membership of two hundred parliamentarians in the English Parliament.[3] This group is concerned with a wide range of political and legislative issues before Parliament, concerning older people and the ageing process.

The European Context

It is important when considering law and policy in the UK to keep one eye to its membership in the European Union. In demographic terms, the ageing and shrinking of the British working age population mirrors that of the EU as a whole;[4] but, certain features, for example migration flows, play a particular and positive role in the UK. In terms of law making, the UK participated in adopting European hard law in the form of the Employment Framework Directive,[5] which, for the first time,

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[1] Sir William Beveridge, Beveridge Report, *Social Insurance and Allied Services*, available at http://www.sochealth.co.uk/history/beveridge.htm.

[2] The NHS was established in 1948 and provides free healthcare well beyond hospital and general practitioner services. *See* http://www.nhs.uk/England/aboutTheNHS/history/default.cmsx.

[3] The Secretariat for this group is provided by Age Concern England, http://www.ageconcern.org.uk/AgeConcern/4AF1BF26F5574A47BB4771B0852CD3BC.asp. The European Parliament also has a cross parting group, the Inter-group on Ageing, which aims to ensure the prominence of ageing in the European Parliament and to mainstream ageing issues into all policy areas.

[4] Commn. European Communities, Commun. Commn., *Green Paper Confronting demographic change: a new solidarity between the generations,* 3 COM (Brussels 2005) 94 final, http://ec.europa.eu/employment_social/news/2005/mar/comm2005-94_en.pdf.

[5] Off. J. European Communities, Council Directive 2000/78/EC (Nov. 27, 2000) (establishing a general framework for equal treatment in employment and occupation), http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_303/l_30320001202en00160022.pdf. This Directive lays down a general framework for combating discrimination on grounds of religion or belief, disability, age and sexual orientation.

outlaws age discrimination in employment in the UK and most other EU member states.[6]

The UK must also honour softer law measures, such as the annual European Employment Guidelines. These are an important component of the European Employment Strategy (EES), which sets key goals for implementation by Member States through national action plans, which aim at convergence for target groups throughout the EU. The EES is a crucial tool for raising overall participation rates in employment in the EU to 70 percent and the participation of older workers to 50 percent by 2010, in line with the Lisbon Strategy. The Lisbon European Council in 2000 set the goal for the EU to become "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion."[7] The promotion of lifelong learning and active ageing are two ongoing guidelines adopted in the streamlined EES in 2003, though others are also of relevance for older workers.[8]

The UK, along with the other Member States, is both a shaper of and is shaped by hard, softer and soft law measures at the EU level.[9] Some areas of law and policy of concern to older people and their carers, strictly speaking, fall outside the EU's hard law remit such as housing and public health.[10] However, many such issues fall within the broad category of EU social policy and may be susceptible to soft law aims and approaches within limits in the EU framework.[11]

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[6] At time of writing, there are 25 EU Member States; the older ones are France, Germany, Italy, Belgium, Luxembourg, the Netherlands, the United Kingdom, Ireland, Denmark, Greece, Portugal, Spain, Austria, Sweden and Finland. Ten new Member States joined the EU in 2004, they are Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia and Malta. *See* http://eur-lex.europa.eu/en/droit_communautaire/droit_communautaire.htm#3.3.

[7] Lisbon European Council, *Presidency Conclusions* 5 (Mar. 23-24, 2000), http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm.

[8] European Commn., Commn. Staff Working Paper Spring European Council, *Choosing to Grow: Knowledge, innovation and jobs in a cohesive society*, (Mar. 21, 2003), http://ec.europa.eu/growthandjobs/pdf/SEC_2003_25_EN.pdf.

[9] The UK has recently exceeded employment rate targets for women and older workers though it has some ongoing problems, for example, it has been asked to "take urgent action to tackle the causes of the gender pay gap," Commn. European Communities, Commun. Commn., *Strengthening the implementation of the European Employment Strategy*, 23, 24 COM (2004) 239 final, http://ec.europa.eu/employment_social/employment_strategy/prop_2004/com_2004_0239_en.pdf.

[10] The EU can adopt certain actions which complement Member State actions in the field of public health and incentive measures designed to improve public health. *See* Treaty Establishing the European Community, Art. 152 (March 25, 1957), http://eur-lex.europa.eu/en/treaties/dat/11997E/htm/11997E.html#0173010078.

[11] *See generally* Tamara Hervey, *European Social Law and Policy* (London, Longman 1998).

Demographic ageing

The UK population is ageing mainly as a result of increased longevity, which is now at the highest level ever.[12] Recent statistical data indicates that a 65-year-old man in the UK can now expect to live until 82 and a 65-year-old woman can now expect to live until 85[13] However, women in the UK can soon expect to reach 90 years of age.[14] The gap between women and men, however, will narrow, which reflects similar trends at the global level.[15] Life expectancy at birth also varies by nature of job and by region in the UK, with professional males in England and Wales expected to live 7.4 years longer than unskilled or manual male groups for the period 1979 to 1999.[16] A difference of 10 years has been found in life expectancy at birth in the period 1999 to 2001, for males in Glasgow, Scotland which has the lowest level (69 years) compared with males in North Dorset, Southern England with the highest level (79 years).[17]

Other factors also contribute to an ageing population. The number of under 16-year-olds has fallen from 25 percent in 1971 to 19 percent of the population in 2005.[18] In addition, women are having fewer children at later ages and the number of women in England and Wales who are childless at the end of their fertile years has doubled compared with women born in the mid-1940s.[19] The percentage of people aged 65 and over has grown from 13 percent in 1971 to 16 percent in 2003 and is predicted to rise to 23 percent in 2031.[20] The net effect of these changes is that the median age of the population rose from 34.1 years in 1971, reached 38.4 years in 2003 and is predicted to reach 43.3 years in 2031.[21]

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[12] NationalStatistics, Life expectancy, Life expectancy at 65 reaches record levels, http://www.statistics.gov.uk/cci/nugget.asp?id=168.

[13] *Id.*

[14] Julian Knight, BBC News Analysis, *Ageing process may mean working longer*, http://news.bbc.co.uk/1/hi/business/4450450.stm.

[15] According to the UN, the average of 71 men per 100 women is expected to increase to 78 per hundred in developed countries. *See* World Conference, *Report of the Second World Assembly on Ageing*, U.N. Doc. A/CONF.197/9 at 6 (U.N. Madrid, Spain, April 8-12, 2002).

[16] U.K. Natl. Statistics, Soc. Inequalities, Health, *manual workers die earlier than others,* http://www.statistics.gov.uk/cci/nugget_print.asp?ID=1007.

[17] *Id*.

[18] U.K. Natl. Statistics, Population, Ageing, *16% of UK population are aged 65 or over,* http://www.statistics.gov.uk/cci/nugget_print.asp?ID=949.

[19] Len Cook & Jean Martin, *35 years of social change, Overview,* 35 Soc. Trends, 4 (2005), http://www.statistics.gov.uk/downloads/theme_social/Social_Trends35/Social_Trends_35_Overview.pdf.

[20] U.K. Natl. Statistics, People & Migration, Age structure, *Average age rose to 38.4 years in 2003,* http://www.statistics.gov.uk/cci/nugget_print.asp?ID=763.

[21] *Id.*

The UK population has also grown steadily and now approaches 60 million; it is predicted to continue growing until 2050 when it will begin to fall.[22] Since the mid-1990s, international migration to the UK has played an important role in sustaining population growth, against the background of a declining number of births.[23] Inward migration has resulted in an increasingly multi-cultural society with a non-white ethnic minority, representing 8 percent of the population.[24] Some features of immigrant movements are particularly noteworthy: nearly half of immigrants arriving in the UK leave within five years and a much higher proportion of migrants leaving the UK were aged between 45 and state pension age compared with those arriving.[25] Moreover, approximately half of all migrants moving to and leaving the UK was aged between 25 and 45, with a net inflow of people aged 15 to 24.[26] These features may help to mark the UK out as a destination for work seekers, and the departure of a greater number of migrants between 45 and state pension age may indicate that they do not currently represent a large-scale threat to public resources in old age.

However, some migrants remain and while the ethnic minority population is younger than the majority population, it is also beginning to age.[27] There will be over 1.7 million ethnic minority people over 65 years of age in the UK by 2030.[28] There is growing awareness of the need to ensure that all black and ethnic minority elders (BME) are visible within older cohorts and have their particular needs met, particularly in accessing services, where language may be one of a number of issues that make this difficult.[29] Elderly Asians in the UK have experienced problems in receiving the care they need due to the breakdown of traditional family structures.[30] This is said to be compounded by local

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[22] *See* Cook & Martin, *supra* note 19, at 3.

[23] *See* U.K. Natl. Statistics, Focus on People and Migration, http://www.statistics.gov.uk/focuson/migration/default_print.asp; U.K. Natl. Statistics, People & Migration, *International Migration, Rose in last decade*, http://www.statistics.gov.uk/cci/nugget_print.asp?ID=766.

[24] *See* Cook & Martin, *supra* note 19, at 3.

[25] U.K. Natl. Statistics, People & Migration, http://www.statistics.gov.uk/cci/nugget_print.asp?ID=766.

[26] *Id.*

[27] Policy Research Institute on Ageing and Ethnicity, *Policy Response, Equality and non-discrimination in an enlarged European union – Green Paper,* 5, 5-6 (Aug. 2004), http://ec.europa.eu/employment_social/fundamental_rights/pdf/greencon/priae.pdf.

[28] *Channel 4 News,* "Asian Elderly in Crisis Care Lacking for Asian Elderly in the UK" (United Kingdom Feb. 22, 2005) (tv broadcast).

[29]Helen Barnard & Nick Pettigrew, Age Concern, Black and Minority Ethnic Elders Links, *Delivery benefits and services for black and minority ethnic older people,* http://www.ageconcern.org.uk/AgeConcern/black_minority_ethnic_links.asp.

[30] *Channel 4 News,* "Asian Elderly in Crisis Care Lacking for Asian Elderly in the UK" (United Kingdom Feb. 22, 2005) (tv broadcast).

authority assumptions that this care is still provided by their families.[31] Across the EU as a whole, the situation of ethnic immigrant women is gradually receiving more attention as a group that often finds itself poor in old age and faces particular barriers before reaching that point.[32] This together with the fear that being an older migrant woman is a combination that increases disadvantage beyond the mere addition of age, gender and ethnicity has also led to calls for older migrant women to acquire the status of a target group on their own.[33]

Social Britain

The UK's position as one of the world's wealthiest countries belies inequalities in income and in the distribution of wealth.[34] The situation of women provides an interesting snap shot. Despite having strong and long-standing legislation against sex discrimination, including equal pay, the situation of women in the workplace is not nearly as secure or well-paid as it ought to be. Employment gaps between women and men remain and women dominate part-time working.[35] This may partly be influenced by child-care provision, which has only recently attracted solid support from the Government.[36] Sadly, despite regular Government inspections, the quality of nursery care in the UK is mixed. Despite these facts, from 1970 to 2003, the participation rate of women grew from 56 percent to nearly 70 percent.[37] But the gender pay gap remains a feature of UK working life with women earning less than men, despite a recent narrowing in the gap.[38] In December 2005, the Minister

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[31] *Id.*

[32] Closing Conference AGE+, *Poor, Poorer, Poorest? A focus on the socio-economic situation for older migrant women in Europe,* (Amsterdam Sept 22-23, 2005), http://www.ageplus.nl/downloads/OlderMigrantwomenNLSept_2_rev.pdf.

[33] MERI Consortium, *Age + Gender + Ethnicity Results on the social position of migrant women 40+ in: Austria, Germany, Italy and The Netherlands*, 1, 24 (2005), http://www.ageplus.nl/downloads/meri_final.pdf.

[34] Cook & Martin, *supra* note 19, at 2; U.K. Natl. Statistics, Focus on Soc. Inequalities, http://www.statistics.gov.uk/focuson/socialinequalities/default_print.asp.

[35] Cook & Martin, *supra* note 19, at 5.

[36] The Childcare Bill 2005, when enacted, will place a duty on local authorities to improve the quality of childcare for all children under the age of 5. Families on a low income can claim a child tax credit for children and young people who are in full-time education, with an extra allowance for any child under one or a disabled child, *see* Child Tax Credit, http://www.direct.gov.uk/en/MoneyTaxAndBenefits/BenefitsTaxCreditsAndOtherSupport/TaxCredits/DG_4015478.

[37] U.K. Natl. Statistics, Soc. Inequalities, Work, *Employment grows for the disadvantaged*, http://www.statistics.gov.uk/cci/nugget_print.asp?ID=1004.

[38] In 2003, women's hourly pay was 82% of men's, representing the closest it had been since records began, U.K. Natl. Statistics, Gender-archived, Oct. 2006, Personal Finances, *Women's hourly pay is 82% of men's,* http://www.statistics.gov.uk/CCI/nugget.asp?ID=437&POS=3&ColRank=2&Rank=192.

for Women, Tessa Jowell, opined that despite recent progress "the gender pay gap may never be closed completely."[39] Many factors go toward influencing the weaker position of women in the labour market, which in turn is one factor in their poor economic situation in old age, as they have not built up sufficient non-state pensions and savings. In the EU, prior to enlargement, British women were particularly vulnerable to poverty in old age with one in four single older women living in poverty.[40]

Today, estimates of all British pensioners who are predicted to live in poverty after retirement vary between one in ten and four in ten.[41] Over two million older people are currently living below the official poverty level.[42] The social exclusion of all older people in the UK is beginning to receive more attention from the Government.[43] So is the position of the 5 million unpaid carers in the UK whose contribution is vital to British society.[44] As the population ages, caring obligations will increase for many people and will have a particularly heavy impact on those trying to combine caring with work.

Responses to the pensions' deficit and demographic ageing

The year 2005 saw significant developments aimed at resolving numerous issues around old age and employment. On November 30, 2005, the Pensions Commission led by Lord Turner produced a report aimed at reforming state pensions in the UK, which are currently payable at age 65 for men and at age 60 for women.[45] The interim Pensions Commission Report issued in 2004 found that more than 12 million

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The gender pay gap was an EU wide phenomenon in EU 15, with women's average earnings 16 percent below men's in 2003. The EU Member States were asked in the Employment Guidelines of 2003 to substantially reduce the gender pay gap by 2010, *see* European Commission Staff Working Paper, *Gender pay gaps in European labour markets – Measurement, analysis and policy implications*, SEC (2003) 937, 3-5 (Brussels, 2003).

[39] *Gender pay gap 'may never go,* The Times 16 (London) (Dec. 5, 2005)

[40] Age Concern England (2003) *One in Four – A quarter of single women pensioners live in poverty: this scandal must end*, available at http://www.fawcettsociety.org.uk/documents/1infour_000.pdf.

[41] Alexandra Frean, *Retirement poverty trap faces middle-aged*, The Times 16 (London) (Oct. 12, 2005).

[42] *Id.*

[43] Office of the Deputy Prime Minister, *Excluded Older People Social Exclusion Unit Interim Report*, (Great Britain, 2005).

[44] Here referring to carers in general who look after a relative or friend, not just those involved in elder care, Commn. for Soc. Care Inspection (CSCI), *The state of social care in England 2004-05 A summary,* 8 (CSCI, Dec. 2005) and CSCI *Big Picture reveals gaps in social care*, 2 (Dec.13 2005), http://www.csci.org.uk/about_csci/news/state_social_care_2005.htm.

[45] These are due to be equalised at age 65 in April 2010, following European case law.

people over the age of 25 were not saving enough for their retirement.[46] Lord Turner now proposes that the state pension age be raised gradually for women and men to 66 by 2030, to 67 by 2040 and to 68 by 2050 (in line with increases in life expectancy). Women have fared well in the reform plans.[47] It is proposed that everyone will receive the state pension at 75 based on their residency in the UK, rather than the size of their contributions. Fewer than 20 percent of women in the UK currently qualify for the state pension of £ 82 per week as they have not worked for long enough, compared to 8 percent of men. Women will also benefit from compulsory savings plans where the employer and employee will each contribute a small percentage of after-tax salary to a new National Pension Saving Scheme. Lord Turner proposes that women will not suffer if they take time out for family reasons. There are also plans to make the state pension more generous from 2010 by linking increases to average wages, and recommendations to help people stay in work for longer such as applying age discrimination legislation to the over 65s, a strong occupational health policy and education and training opportunities for older workers. The Chancellor of the Exchequer has cast doubt on the overall affordability of the package of reforms, so we can expect a slightly turbulent time in the implementation process.

Elder Law in the UK

There is no generic subject known as elder law in legal education in the UK however some elements of this broad subject are taught in a very small number of universities.[48] There are, however, numerous organisations that promote and protect elderly. Solicitors for the Elderly (SFE) is a national organisation in its eighth year of operation at the time of writing, whose membership is drawn principally from solicitors, barristers and legal executives.[49] Its aims include developing expertise in areas of public and private law relevant to older people "where there is at present a skills shortage."[50] It also aims to provide high-quality training and facilitate networking with NGOs and other interested parties. Membership of SFE depends upon having spent a significant amount of

[46] BBC News, *State pension age to rise to 68,* http://news.bbc.co.uk/1/hi/business/5015928.stm.

[47] *See* Philip Webster, Rosemary Bennett & Christine Selb, *Women are winners in pension shake-up*, The Times (London) (Dec. 1, 2005).

[48] The University of Hertfordshire is believed to cover some aspects in its degree course. Traditional fields of relevance for elder law, such as wills, may no longer be a compulsory area of a solicitors' training, resulting in a knowledge and recruitment deficit in young solicitors. E-mail contact with Jayne Wall, SFE Administration (Dec. 29, 2005) (on file with author).

[49] Solicitors for the Elderly, http://www.solicitorsfortheelderly.com.

[50] *Id.*

time working for elderly clients, and members must follow the SFE code of practice. A short examination was introduced for new members in 2004.[51] SFE has more than 780 members and is run from one main office with twenty-two regional offices, including one in Northern Ireland.[52] The National Academy of Elder Law Attorneys (NAELA) in the USA and SFE have representative members in each others' associations. SFE does not operate in a vacuum, in that the Law Society of England and Wales (the Law Society) will enable a member of the public to find a solicitor who specialises in dealing with older people and provides some binding guidance for solicitors who deal with older peoples' issues.[53] The Law Society has a Probate Section that anyone can join and a Mental Health and Disability Committee with a diverse membership that reviews areas of mental health disability and 'elderly' law and makes recommendations for change. The Society of Trusts and Estates Practitioners is also of interest to, but is not confined to, elder law practitioners. From time to time, the House of Commons, the lower house of Parliament will set up a committee to report on issues of importance for older people as will the Law Commission.[54] The SFE sits on many committees and enjoys a good working relationship with the Court of Protection, the Public Guardianship Office and Department of Constitutional Affairs.[55] It responds to many government consultations in an effort to highlight legal issues affecting older people and works closely with older peoples' major charities, providing *pro bono* advice when requested.[56]

The list of specialisms of SFE members spans areas that are roughly comparable with those practised by NAELA members in the USA. These are estate planning, powers of attorney, Court of Protection, probate and administration of the deceased's estate, trust administration, estate planning, tax planning, living wills, gifts, home care, preserving assets for those in long stay residential care, residential and nursing home contracts, advice on funding for long-term care, state retirement and widows pensions, long-term care insurance, welfare benefits, home equity release plans, capacity, mental health law, health and social care

[51] *See* Wall, *supra* note 48.

[52] *Id.* Note: there is no similar body in the Republic of Ireland.

[53] *Enduring Power of Attorney Guidelines and Gifts of Property Guidelines*, http://www.lawsociety.org.uk/areasoflaw/view+areasoflawdetails.law?AREAOFLAW.

[54] *See, e.g.,* Law Commn. Rep. No. 231 on Mental Incapacity 1995, available from the British Government's Stationery Office (TSO).

[55] *See* Wall, *supra* note 48.

[56] *Id.*

issues and elder abuse.[57] Some of these subjects have long established roots in English law such as probate, administration of estates, wills and trust administration, and may be introduced during the course of a law degree. They were traditionally taught at a more practical level during the professional educational stage of training to be a solicitor or barrister but are not believed to be compulsory subjects anymore. Others are of far more recent origin. The appointment of the Court of Protection to manage a person's affairs and drawing up an enduring powers of attorney to authorise another person to manage a person's affairs after mental incapacity were made possible by the Mental Health Act 1983 and the Enduring Power of Attorney Act 1985, respectively. Sadly of all the listed fields, elder abuse remains a very underdeveloped area and a recent Government report found that there are half a million abused elders.[58] The problem is that there is no particular legal framework for reporting or prosecuting elder abuse much less a legal definition of what it is.

The NGO movement for age

The NGO movement for age is quite well organised and long established in the UK. It comprises a wide range of bodies that can loosely be seen as falling into two categories. They are those concerned primarily with the general welfare of older people and those concerned primarily with age discrimination and the working lives of older people, who are often understood as the over 50s for both types of organisation. As well as providing important information and services, older peoples' organisations campaign for improved legislation, services and rights for their members and constituents.

A recent trend has seen a major convergence of the chief age organisations on the issue of age discrimination in employment with leading organisations in both categories forming the Age Advisory Group (AAG). The AAG was set up in 2001 to advise the British Government on how to implement the age strand of the Employment Equality Directive and the impact age discrimination legislation would have on employers. [59] Its members include three prominent age organisations but the non-age members of the AAG are in the majority

[57] *See* the SFE website http://www.solicitorsfortheelderly.com; Jayne Wall, *supra* note 48; Caroline *Elderly Client Handbook*, (Bielanska and Martin Terrell eds., 3d ed., Law Society 2004) (published in association with SFE).

[58] U.K. House of Commons, *Half a million elderly people are abused in the UK*, http://www.paramedic.org.uk/news_archive/2004/04/News_Item.2004-04-20.2831/view.

[59] Eironline, Government consults over legislation to combat age discrimination, http://www.eurofound.europa.eu/eiro/2002/01/feature/uk0201170f.html.

with nine members, mostly representing business and enterprise, for example, the Confederation of British Industry (CBI) and British Chambers of Commerce (BCC). Very importantly, the National Council of Training Organisations is also a member. The Employment Directive seeks to combat discrimination in vocational training as well as employment. This is an important contrast with the ADEA, which only covers employment.

This article will look briefly at those age organisations that are part of the Age Advisory Group. It will also look at Help the Aged, which was not part of this group but is a sponsor of one of the members and a major national organisation concerned with all aspects of the welfare of older people. AAG members included Age Concern, a national organisation with national offices in Wales, Scotland and Northern Ireland and many local branches throughout the UK.[60] This organisation is now 65 years old and provides much valuable information, tailor made for older people, and a number of services including house, motor and travel insurance, a postal will-writing service and funeral plans. Importantly, it provides a wealth of information on issues such as concessions for older people and on help with adaptations and repairs. It also provides preliminary information on financial matters such as equity release schemes whereby older people can use their homes to provide an income or a lump sum.[61] Its local charities provide activities such as exercise classes, IT tuition and lunch clubs. Help the Aged works to reduce disadvantages experienced by older people such as poverty, isolation and neglect.[62] It is involved in a variety of campaigns, including one to stop elder abuse, and has carried out research into ageing for 30 years, which is either by means of commissioned research or providing major biomedical research grants. It provides core funding to the Oxford Institute on Ageing at Oxford University. In the social policy field, Help the Aged commissions five to six research projects a year. Help the Aged produced a research report in 2002, *Age Discrimination in Public Policy: A Review of Evidence*, which found evidence of age discrimination across seven areas of public policy: education, employment, health, social care, social security, transport and citizenship. It has sponsored a two-year research project, which will conclude during 2006, into how age discrimination is experienced by and affects older people. It will explore developing tools and strategies for confronting ageist behaviour and "promote a more age-inclusive

[60] *See generally* Age Concern, http://www.age.org.uk.
[61] It does, however, advise older people to seek independent legal and financial advice.
[62] *See* http://www.helptheaged.org.uk.

society."[63] This research will undoubtedly prove valuable for individuals and firms alike especially when the age regulations come into force in 2006. The Third Age Employment Network (TAEN) is a leading organisation dealing with employment, age discrimination and older workers and is a member of the AAG. It consists of a network of member organisations from the public and private sectors and is sponsored and supported institutionally by Help the Aged. It is interested in the intersection of age, employment and training policies. TAEN acts as a voice for older workers and works with the media to tell their story. It also provides information to firms and older workers alike. The Employers Forum on Age was also a member of the AAG and differs from the other organisations in that it is a network made up entirely of employers and has a membership of 250 employer organisations, including many major UK employers.[64] Another important difference is that it is age neutral and campaigns for age diversity, with an interest in employees of all ages not just the over 45s or over 50s. It arranges workshops and events for members to bring them up to date on the latest law and policy developments in areas relating to age and work.

The British Government conducted a number of public consultations prior to issuing the draft *Employment Equality (Age) Regulations, 2006*, (draft Regulations) in 2005. They enabled NGOs, business or any member of the public to give feedback on proposals for legislation. The members of the AAG also made independent submissions as part of this process. One of the most exciting features of the NGO and equality movement in the UK has been the establishment of the Equality and Diversity Forum (EDF) in 2002.[65] It was founded by the age organisation TAEN and represents all grounds protected from discrimination under the Employment Directive thus securing a valuable place for grounds that are new to European and national law alike such as age, at the heart of equality and human rights debates and developments. The forum aims to ensure that proposals for legislation dealing with the separate grounds of discrimination honour the cross-cutting nature of equality issues. It has built consensus among its member organisations that jointly support a number of important ideas such as a Single Equality Act for Great Britain, which would replace an unwieldy plethora of equality legislation- including 35 acts and 16 European Directives. The EDF also campaigns for a positive duty for all

[63] *See* Help the Aged Social Policy, http://www.research.helptheaged.org.uk/_research/SocialPolicy/_default.htm.

[64] *See* http://www.efa.org.uk.

[65] *See* http://www.edf.org.uk. Note that Help the Aged is a Member of the forum and the Employers Forum on age has observer status. For the rest EDF has 29 full members including a major trade union, the Discrimination Law Association and NGOs representing all equality grounds.

public bodies to promote equality for every ground, not just race, and the extension of protection from discrimination in goods, facilities and services to age, sexual orientation, religion and belief. This protection already exists for race, disability and sex in the UK. Thus, without it, there will remain a divide between the old and new anti-discrimination grounds that is artificial given the multiple and overlapping identities of every person.

One of the hottest issues in recent times has been the question of a public body for the promotion of age equality. *Directive 2004/113/EC implementing the principle of equal treatment between women and men in the access to and supply of goods and services* requires the EU Member States to designate a specialised body for the promotion of gender equality not just in access to and supply of goods and services.[66] The Directive confirms that such a body may form part of a national body concerned with the defence of human rights or individual rights. This reflects the emergence of single equality bodies concerned with promoting equality and/or supporting victims for all grounds legally protected from discrimination such as the Equality Commission in Northern Ireland. Prior to the adoption of the Employment, Race and Gender Equality in goods and services Directives, the UK had long-standing sex and race equality legislation and more recently disability legislation and has three independent bodies to promote equality and support victims of discrimination on these grounds. These bodies are the Equal Opportunities Commission (EOC), the Commission for Racial Equality and the Disability Rights Commission which is of much more recent origin, having been established in 2000. However, following a review of equality institutions in Great Britain and a public consultation, the Government announced its plans in 2003 to establish a single Commission for Equality and Human Rights (CEHR).

In 2004, the Government produced a White Paper with proposals for the CEHR, which were implemented by the Equality Act 2006 and are now scheduled to come into operation fully in autumn 2007.[67] The CEHR will act as a single commission representing sex, race, disability and the other grounds of discrimination in the Employment Directive-age, religion or belief, sexual orientation which have not had their own national bodies for the promotion of equality in this country. This body will also provide institutional support for human rights. This development settles the debate of how to support the new grounds of discrimination. The most prominent ideas ranged from providing no

[66] *See* Off. J. European Union, Council Directive 2004/113/EC, Article 12 (Dec. 13, 2004).

[67] Dept. Trade & Indus., *Fairness for all: a New Commission for Equality and Human Rights* 90 (Cm 6185) (The Stationery Office, 2004); *see also* http://www.cehr.org.uk/content/contact.rhtm.

institutional support for these grounds, dividing them up between the existing commissions with the less than perfect possibility that age might be brought within the Disability Rights Commission, for example, to the forthcoming situation of a single unified body that represents all anti-discrimination grounds and human rights. The advantages of the CEHR are said to include a cross cutting approach to tackle obstacles affecting several groups, the ability to better deal with discrimination on multiple grounds, a single access point for individuals and being well placed to promote good relations among different communities.[68] Pending establishment of the CEHR, the Government plans to make appropriate arrangements for institutional support for age, religion or belief and sexual orientation.

The ultimate inclusion of age in a single commission is both a positive and a necessary development. Age discrimination more than discrimination on any other ground, even gender, can arguably affect anyone and there is enormous diversity represented by all persons of the same age or in the same age group. One of the most appealing aspects of the CEHR is that it promises to benefit children and young people as well as older people.[69] This is especially welcome as the age organisations tend to focus on people in mid or later life.[70] The CEHR will enforce legislation and promote *equality for people of different ages*.[71] This mirrors the Employment Directive (and UK age regulations) that does not have upper and lower age limits for protection from age discrimination.[72] The CEHR's mandate will contrast sharply with the work of the EEOC in the USA, where workers are only protected by age discrimination legislation from the age of 40.

Age Discrimination in the United Kingdom

Prior to the Employment Directive, there was no age discrimination legislation of any kind in the UK. However, it was sometimes possible to establish that an age requirement for a job amounted to indirect sex or race discrimination.[73] Many age organisations, in addition to those mentioned above, campaigned actively

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[68] *Id*. at 17.

[69] *Id.* at 128.

[70] The Children's Society, established in 1881 has a long history of helping vulnerable children, http://www.the-childrens-society.org.uk.

[71] Dept. Trade & Indus., *Fairness for all, supra* note 67.

[72] However, the Regulations will establish a national default retirement age of 65 when enacted. The Employment Equality (Age) Regulations 2006, Statutory Instrument 2006 No. 1031 (2006) [hereinafter Regulation].

[73] For a brief discussion of this approach, *see* Helen Meenan, *Age Discrimination in the United Kingdom,* 3 Intl. J. of Discrimination & the L., 227, 241-242 (1999).

for age discrimination laws, particularly for the over 50s. Some key themes at that time included the cost of age discrimination to the individual and to the British economy. On the other hand, business leaders worried about the cost of age discrimination legislation to business and being forced to keep ageing workers forever. Two opposing positions were represented by the age movement that wanted mandatory retirement to be abolished and business, which wanted to retain it. This debate has been settled for the moment by the Regulations, as we shall see below.

The Employment Equality (Age) Regulations 2006, prohibiting age discrimination in employment and training come into force on 1 October 2006,[74] in line with a three-year extension period permitted by the Directive. As with all European Directives, Member States are allowed to treat the Directives' provisions as minimum requirements and go beyond them.[75] There are also provisions that allow the Member states to legislate for genuine occupational qualifications and to choose not to apply the Directive in relation to some fields for age and some other grounds. There is also a unique provision that allows justification of direct age discrimination only, which will be discussed further below. Just as with the Employment Directive itself, the UK does not define age. However, the kind of justifications allowed in the Directive referring to minimum or maximum ages, for example, imply that a chronological rather than a social or physiological meaning is the meaning of age envisaged by the Directive. It will be interesting to see if case law or any future legislation will allow more creative approaches to the concept of age that may more accurately reflect the reality of our longevity and health.

The Regulations provide that direct discrimination is where a person discriminates against another "on grounds of" their age and treats them less favourably than he treats or would treat another, permitting the use of a hypothetical comparator where an actual one cannot be located.[76] This wording is significant. It appears to encompass less favourable treatment on grounds of perceived age as well as actual chronological age. The Regulations confirm that the reference to a person's age includes their apparent age,[77] which may cover those who are discriminated against because they look older or younger than their

[74] SI No 2006/1031.

[75] For analysis of age discrimination and the Employment Directive, *see generally* Helen Meenan, *Age Equality after the Employment Directive,* 10 Maastricht J. European and Comp. L., 9, 9-28 (1, 2003) and Colm O'Cinneide for the European Commn., *Age Discrimination and European Law* (Belgium, 2005).

[76] Regulation 3(1)(a).

[77] Regulation 3(3)(b).

chronological age. At this stage, it is unknown to what extent "on grounds of" age deals with those who specifically, because of the ageing process (a highly individualised experience), may suffer physical impairments sooner or more severely than others might. It is also unknown to what extent such age-related physical problems fall under the classification of disability and any consequent discrimination ought to be treated as disability discrimination. These questions help to highlight the need for an equality system that deals with multiple discrimination in both preventive and enforcement terms. They also help to emphasise the unique impact of the ageing process on each individual and foretell challenges for courts and parties in discrimination litigation. The UK is currently undergoing two changes that may create a better environment for tackling multiple discrimination and promoting equality on all grounds of discrimination. The first is the creation of the Commission for Equality and Human Rights (CEHR) discussed above, which will come into operation in 2007 and as a single organisation promises to be better placed to deal with an individual's multiple identities and thereby better placed to "tackle discrimination on multiple grounds."[78] The second is a major government-led review of "the causes of persistent discrimination and inequality in British Society."[79] One purpose of the review is to inform the modernisation of British equality legislation with a view to adoption of a Single Equality Act to replace many separate equality laws spanning some 30 years.[80]

Article 6 of the Directive allows EU Member states to justify direct age discrimination only. However, this is built around them permitting differences of treatment on grounds of age "if, within the context of national law, they are objectively and reasonably justified by a legitimate aim including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."[81] The UK's Regulations have taken advantage of this possibility and give examples of treatment that an employment tribunal or court "may find to be a proportionate means of achieving a legitimate aim."[82] They are the setting of age requirements to ensure the protection or promote the vocational integration of people of a particular age group; the fixing of a minimum age to qualify for certain

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[78] Dept. Trade & Indus., *Fairness for all, supra* note 67.

[79] Joint DTI and Cabinet Off., Press Release, *Review of Causes of Discrimination Announced* (Feb. 25, 2005), http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=148053&NewsAreaID=2&Navigate;

The Equalities Review ,*Fairness and Freedom: The Final Report of the Equalities Review* (The Crown, February, 2007), http://www.the equalitiesreview.org.uk

[80] Press release, *id.*

[81] Article 6.1, Employment Directive.

[82] Regulation 8(2)(a)-(c).

advantages linked to employment or occupation in order to recruit or retain older people; and, setting a maximum age for recruitment or promotion which is based on the training requirements of the post in question or the need for a reasonable period in post before retirement.[83] Thus, the legislature has chosen not to name specifically those sectors where minimum or maximum recruitment ages and so forth may apply. Leaving this matter in the hands of employers and training providers who must assess for themselves, in the first place, the legitimacy of their aims and the proportionality of the means they use to achieve them. It is interesting that Part 2 of the Regulations spells out the scope of age discrimination against a person, which refers *inter alia* to offers of employment, terms of employment and refusing to or not offering employment. It confirms that discrimination in arrangements for offers of employment and refusing to offer employment do not apply where a person has reached 65 years of age. While Regulation 30 in Part 4 confirms that dismissal at or over age 65 for reasons of retirement is not unlawful. Thus, age 65 would appear to provide a reference point for maximum recruitment ages.

Regulation 8 provides an exception from discrimination on grounds of age for genuine occupational requirement (GOR), where "having regard to the nature of the employment or the context in which it is carried out-

(a) possessing a characteristic related to age is a genuine and determining occupational requirement;
(b) it is proportionate to apply that requirement in the particular case; and
(c) either-
    (i) the person to whom that requirement is applied does not meet it, or
    (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it."

This provision does not specify the occupations where GORs are permissible, leaving it as a matter for employers and ultimately courts and tribunals to test. The Consultation that immediately preceded the draft Employment Equality (Age) Regulations 2006 stated that this approach was adopted as the Government considered that age would only be a GOR in very few cases and gave acting jobs as an example.[84] The draft regulations specifically mention Barristers and Advocates and make

[83] *Id.*

[84] Dept. Trade & Indus., Equality & Diversity Coming of Age, Report on the Consultation on the Draft Employment Equality (Age) Regulations 2006, 4.11 at 8 (March 2006).

it unlawful for them to discriminate against a person in offering pupillage or training and when they are in employment: in terms, benefits and opportunities and dismissal.[85] These are interesting inclusions as both limbs of the legal profession in the UK involve a lengthy period of education and training and would usually involve a contractual retirement age. They are therefore likely candidates for the application of maximum recruitment ages. This approach seemingly sends a strong signal to the legal profession that any such practises will be illegal unless objectively justified under Part 1 of the regulations discussed above. The regulations also stipulate clearly how they apply to discrimination by providers of vocational training and also state that "It is unlawful for a training provider, in relation to a person seeking or undergoing training, to subject him to harassment."[86] They also clarify that the term training provider does not include "an employer in relation to training for persons employed by him."[87] However, Regulation 7(2)(b) includes opportunities for training among the areas in which an employer must not discriminate against an employee. Institutions of further and higher education, including universities, are specifically addressed by the regulations in very clear terms, as are employment agencies, trade organisations and qualifications bodies. Thus, the legislature has taken the precaution of specifically providing for these bodies when it might have been obvious that at least some of them were automatically covered by a Directive that prohibits discrimination in employment and training. The regulations also outlaw discrimination and harassment where a relevant relationship has come to an end. Part 3 of the regulations renders employers and principals liable for discriminatory acts carried out by their employees and agents unless they can prove that they "took such steps as were reasonably practicable to prevent the employee from doing that act…" It also makes it an offence to aid unlawful acts and treats such a person as doing the unlawful act.

Discrimination by way of victimisation is also covered by these regulations and is quite broad.[88] It includes, for example, victimisation because a person intends to bring proceedings and victimisation because a person suspects that another person has brought or intends to bring proceedings. Harassment on grounds of age is prohibited and is characterised as "where, on grounds of age, A engages in unwanted conduct which has the purpose or effect of- violating B's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive

[85] Regulations 15 and 16, respectively.
[86] Regulation 20(2).
[87] Regulation 20(4).
[88] Regulation 4. Note that instructions to discriminate are also prohibited under Regulation 5.

environment for B."[89] However, the harassment provision is tempered by the following rider: "Conduct shall be regarded as having the effect specified in paragraph 1 (a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect."[90] The full scope of this rider will probably be established through the course of litigation. In the meantime, the words *including in particular the perception of B* ought to serve as a warning against age-related jokes, language and culture in the working environment, as they may feed into B's perceptions. Taken altogether the perceptions of B form only part of the total picture and it seems that a delicate balancing exercise will be required between B's subjective perceptions and an objective assessment of the effect of the conduct in question with regard to all the circumstances (including B's perceptions) in each case.

Indirect discrimination, like direct discrimination, is modelled on the recent sexual orientation and religion or belief regulations in the UK. It is slightly cumbersome, involving a number of elements whereby a person applies a provision, criterion or practice to a person which he applies or would apply equally to another person "not of the same age" as that other person, but puts or would put persons of the same age as that person at a particular disadvantage compared with other persons and which does put B at that disadvantage.[91] An added element is the possibility of objective justification. A cannot show the treatment of B or the provision, criterion or practice to be a proportionate means of achieving a legitimate aim. Indirect discrimination was an important concept in English anti-discrimination law long before adoption of the Employment Directive. It is also one of the common concepts legally applicable to all grounds of discrimination protected by this Directive, the Race Directive[92] and European equality provisions relating to the gender ground and has been applied in other areas in European law.[93]

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[89] Regulation 6(1).

[90] Regulation 6(2).

[91] Regulation 3(1)(b).

[92] Council Directive 2000/43/EC, Off. J. European Communities L 180 at 22 (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin which combats discrimination in goods and services as well as employment and training).

[93] For example, with regard to sex, Directive 2002/73/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions OJ 2002 L269/15. Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ (2004) L373 p. 37. Also note the concept of indirect discrimination used by the European Court of Justice in relation to free movement of workers and non-discrimination on grounds of nationality for example in *O'Flynn v Adjudication Officer,* Case C-237/94 [1996] ECR I-2617.

The Regulations stipulate jurisdiction for both employment tribunals and county or sheriff courts. Claims must be presented to an employment tribunal within three months of the discriminatory act, or within six months of the discriminatory act in the case of a county or sheriff court.[94] However, each may consider a complaint "which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so."[95] The employment tribunal's jurisdiction comprises discrimination and harassment under Part 2 of the Regulations, except, where the act concerns a relationship which has come to an end, discriminatory acts carried out by institutions of further and higher education and under certain circumstances, discriminatory acts of qualification bodies.[96] The latter two fall within the jurisdiction of the county or sheriff courts.[97] An employment tribunal has the power to award three principal types of remedy: (a) an order declaring the rights of the complainant and the respondent; (b) an order requiring the respondent to pay compensation to the complainant; and (c) "a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination or harassment to which the complaint relates."[98] The Regulations confirm that a county or sheriff court may include compensation for injury to feelings in any award of damages.[99]

Of the remaining Regulations, two more noteworthy aspects are the dis- application of the regulations to service in the state naval, military or air forces, which is permitted by the Directive for age (and disability)[100] and its treatment of retirement. Recital 14 of the Preamble to the Employment Directive states, "This Directive shall be without prejudice to national provisions laying down retirement ages." The full meaning of this recital has been the subject of comment and speculation. At the minimum, it would seem to mean that those EU Member States with national retirement ages are unaffected by the Directive and can maintain that position without change on implementation of the Directive. However, the UK did not have national retirement ages but most contracts of employment contain a retirement age that is often set at the same age as that at which the state pension becomes payable. In

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[94] Regulations 42(1) and (2), respectively.
[95] Regulation 42(3).
[96] Regulation 36(2).
[97] Regulation 39(4).
[98] Regulation 38(1).
[99] Regulation 39.
[100] Council Dir. 2000/78/EC, Art. 3.4. OJ [2000] L303, p.16 (European Communities, Nov. 27, 2000).

2003, Sir Bob Hepple wrote that, as the UK had no national retirement age, mandatory retirement ages would have to be justified under Article 6.1 of the Directive.[101] In the meantime, the UK proposed a national default retirement age of 65 in conjunction with a right for an employee to request not to retire and a duty for an employer to consider such a request. These are contained in Schedule 6 of the regulations and will work as follows. In a workplace with no normal or contractual retirement age, the age of 65 would be the default retirement age. Any mandatory retirement age below the age of 65 will have to be objectively justified by an employer. Dismissal on the planned retirement age (for reasons of retirement) if above or below 65 or at the default age of 65 must be communicated to the employee with at least six months written notice.[102] Schedule 6 deals with the duty to consider working beyond retirement.[103] In addition to the intention to dismiss for reasons of retirement, the employer must notify the employee of the right to make a request and must continue to notify the employee up to the 14th day prior to the dismissal. An employee is entitled to make only one request not to retire and this must be made in writing not more than six months before the intended date of retirement.[104] Where a duty to consider a request arises, the employer must act in good faith and a meeting must take place between the employer and the employee, and the employer must notify his decision to the employee within 14 days of the meeting. However, the employer can consider the request without a meeting if it is not reasonably practicable to hold the meeting within two months of the request and this is not due to a failure of the employer, so long as representations made by the employee are considered. The employee is entitled to make an appeal in writing against the employer's decision within 14 days of notice of the employer's decision. This necessitates a further meeting and the employer is obliged to give his decision within 14 days after the date of the meeting. The only remedy available in this respect is compensation for failure to notify the employee of his right to make a request and the date of his retirement.[105] Where retirement is the sole reason for dismissal at or over the age of 65, the dismissal shall not be unlawful.[106] However, prior to these regulations, employees who were aged at or above the normal retirement age or 65 in the case of a business without a NRA could not claim either unfair dismissal compensation or redundancy payments. The Regulations remove these upper age limits so

[101] Fredman & Spencer, *Age as an Equality Issue*, 89 (Hart Publishing, Oxford, 2003).
[102] Regulation, Sched. 6, ¶ 2(1).
[103] Regulation, Sched. 6.
[104] Regulation, Sched. 6, ¶ 5(3)(4)(5).
[105] Regulation, Sched. 7, ¶ 8.
[106] Regulation 30.

that individuals who successfully request the right to work beyond the NRA or age 65, as the case may be, will be protected by unfair dismissal legislation.[107]

The UK's default retirement age is a creative solution in an environment where employers and age organisations wanted different things. British age organisations favoured voluntary or flexible approaches to retirement.[108] However, the government has already promised to review its decision to have a default retirement age in 2011 and to abolish it if it is not necessary.[109] Two factors will influence its decision, whether it remains appropriate and necessary for workforce planning and to avoid negative effects on pensions and employment benefits and "the influence of any other social policy objectives."[110] The government will look *inter alia* at evidence on longevity and the employment patterns of older people in reaching its decision.[111]

Education

One of the key drivers of policy at both national and international levels has been the impact of globalisation and the creation of the knowledge or learning society.[112] This, in turn, has promoted a focus on the promotion of learning, whether in a formal educational setting (real or virtual) or otherwise as a necessary condition for participation in this society.[113] The notion of lifelong learning has been one manifestation of this.[114] Taken literally, this should encourage the idea of learning across the lifespan, which ought to be for the benefit of older people, of whom there will be increasing numbers as the 21st century progresses. However, behind the rhetoric lies the reality, which is that, in Britain, the thrust of official lifelong learning policy is confined to promotion of particular types of education for the economically active, thereby downgrading, for example, social or

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[107] *See* Council on Tribunals, Comment: Age Discrimination, Oct. 2006, http://www.council-on-tribunals.gov.uk/adjust/item/comment_age.htm (commenting on Schedule 8, amendments to unfair dismissal legislation).

[108] Helen Meenan, Maastricht Journal, *supra* note 75, at 15.

[109] Consultation, *supra* note 84, at 71.

[110] *Id.*

[111] *Id.* at 72.

[112] *See*, *e.g.,* M. Castells, *The Rise of the Network Society* (2d ed., 2000); R. Reich, *The Work of Nations* (1991).

[113] *See generally* the discussion in Ruth Levitas *The Inclusive Society?* (1998); *see also* Off. Dep. Prime Minister, *Excluded Older People,* Social Exclusion Unit Interim Report (2005).

[114] A succinct account of recent developments appears in, Andy Green, *The many faces of lifelong learning: recent education policy trends in Europe*, Journal of Education Policy 17(6) 611 (2002). A more extensive account is, Organisation for Economic Co-operation and Development (OECD), *Lifelong Learning for All* (1996).

leisured learning and excluding those beyond working age.[115] The right to education in the European Convention on Human Rights[116] does not, it seems, extend to post-compulsory education: the right is negative in character and has been interpreted as only requiring states not to deny access to education.[117] However, there is a strong case for reform of national education policy here on at least two grounds. First, if there is an increasing demand for education from older people, then, in order to promote social inclusion, the UK will need to recognise indicators of worth for education other than the purely economic.[118] Second, current policy and practice ignore the benefits to the health of the older population from engagement with education and the attendant indirect economic benefits this brings.[119] The development of policies to promote activity in old age would thus, it is suggested, bring both individual and collective benefits to the UK. A further imperative derives from changes in the way legal services are being delivered. Greater use of on-line methods of obtaining legal advice[120] or resolving disputes[121] will demand enhanced skills in the use of ICT. This is particularly significant with regard to the population now entering its 60s, which has not grown up with computers and may need help to enable them to participate fully in the legal system and indeed elsewhere.

Capacity

The promotion of autonomy across the population, regardless of age, is dependent on notions of capacity.[122] While lack of capacity is most readily identifiable with regard to individuals such as minors and the mentally ill or disabled, it is more problematic with regard to older people, depending in the first instance on, for example, legal advisers recognising when a question of capacity needs to be raised. Questions of

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[115] *See* Malcolm Tight, *'Bridging the 'learning divide': the nature and politics of participation,* Studies in the Education of Adults 30(2) 110 (1998).

[116] Article 2, First Protocol, European Convention on Human Rights.

[117] *See Belgian Linguistic Case (No. 2)* (1968) 1 EHRR 252; *X v United Kingdom* (1980) 23 DR 228; Richard Clayton & Hugh Tomlinson, *The Law of Human Rights* (2000) Vol. 1 ch.19.

[118] OECD, *op. cit*., *supra* n.114 at .31.

[119] *See, e.g.,* Cathie Hammond, *Learning to be Healthy* (2002).

[120] Indeed, Richard Susskind argues that face to face transactions between lawyers and clients will become a thing of the past and be replaced with on-line interfaces. Richard Susskind, *Transforming the Law* (2000). The development of websites such as www.tescolegalstore.com is a further example of the trend in this direction.

[121] This is beginning to happen in some forms of civil dispute in the UK and is seen as a longer-term solution: Lord Justice Brooke, *Court modernisation and the crisis facing our civil courts*, http://www.dca.gov.uk/judicial/speeches/ljb241104.

[122] For official discussions of the issues, *see Who Decides? Making Decisions on Behalf of Mentally Incapacitated Adults* Cm 3803 (1997) and *Making Decisions* Cm 4465 (1999). *See also* Law Commission *Mental Incapacity* (Report No. 231, 1995).

capacity are subject to a general test which is applied to individuals regardless of age. Capacity is a legal concept and relates to the particular issue in question. It is thus possible that a person has capacity in relation to one matter but not in relation to another. It is not synonymous with mental illness: a person who is mentally disordered is not automatically denuded of all autonomy.[123] Against a background of a presumption of capacity, the test is one of the ability of the individual to understand the matter in question;[124] it follows that a person is regarded as lacking capacity where (s)he is incapable of taking a particular decision or engaging in a particular activity. Where a person has full capacity, then it not only confers power on that person to make decisions and act autonomously, but it also attaches to that person's duties and responsibilities. The test is one of understanding, not wisdom; it therefore follows that where a person has capacity, that person's decision-making powers cannot be impugned, even if a decision is made that other people might regard as bizarre, unwise or immoral.[125] With regard to older people, this creates, potentially at least, something of a clash between the law's role in promoting personal autonomy and protecting those who might be vulnerable. The decision whether a person does or does not have capacity thus takes on considerable significance, especially with regard to such matters as consent to medical treatment and dispositions of property.

Recent legislation[126] has created a statutory framework which will be implemented in stages. It now creates a new general rule that anything done for a person without capacity should be done in the best interests of that individual.[127] The notion of best interests is problematic, given that it can be viewed from a number of standpoints.

Planning for future loss of capacity is facilitated by means of powers of attorney and advance decisions to refuse treatment.[128] For the purposes of English law, a power of attorney is "a formal arrangement

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[123] This is clear from the Mental Health Act 1983, under which some of the provisions are premised on the existence of capacity to act autonomously. Examples would be § 131, which allows for the admission to hospital or mental nursing home of informal patients (*e.g.,* those not subject to compulsory detention); *but see R* v *Bournewood Community and Mental Health NHS Trust ex p. L* [1999] 1 A.C. 458); § 57, which provides for specified treatments to be given only with the consent of the patient and § 58 which provides for consent to be one basis for specified treatments. *See also* P. Fennell, *Inscribing Paternalism in the Law: Consent to Treatment and Mental Disorder,* 17 J. L. & Socy. 29 (1990).

[124] Mental Capacity Act 2005, § 2 (2005) (Eng.).

[125] *See, e.g., St. George's Healthcare NHS Trust v S* [1998] 3 All E.R. 673; *cf Re C* [1994] 1 All E.R. 819.

[126] Mental Capacity Act 2005 (2005).

[127] *Id.* at 4.

[128] Governed by Mental Capacity Act 2005, §§ 9-14 & §§ 24-26 (2005). The provisions on advance decisions being implemented progressively during 2007.

created by a deed in which one person ('the donor') gives another person ('the attorney') authority to act in his name and on his behalf."[129] This, potentially, enables a person who has capacity at the time of executing the instrument to make provision for a time when she may lack capacity. However, a weakness in the original scheme under the Powers of Attorney Act 1971[130]was that the power of attorney was only valid where the donor retained capacity. This shortcoming was remedied by the Enduring Powers of Attorney Act 1985, which created a new form of power of attorney that survives the donor's subsequent incapacity. The advantages of the revised system were summarised by Vinelott J:[131]

> The 1985 Act made a very remarkable change in the law. It created a regime for the administration of the affairs of somebody who becomes incapable of managing their affairs which is supplemental to that provided by the Mental Health Act 1983. In effect, the Act permits a person, while capable of managing his or her affairs, to select somebody who will be responsible for managing his or her affairs if there is a supervening incapacity, so avoiding the expense and (I think, possibly, in the minds of some) the embarrassment of invoking the full jurisdiction of the Court of Protection.

This allusion to the Court of Protection is to a body whose name, as Vinelott J hints, perhaps evokes Dickensian images. It has jurisdiction to supervise the affairs of those subject to its jurisdiction and to adjudicate over any disputes that may arise with regard to the management of the property of an incapacitated person.[132] The jurisdiction of the Court of Protection and the operation of powers of attorney and their allied regime under the 1985 Act were restricted to the management of property, in the event of actual or future incapacity respectively, and were not able to deal with matters to do with the person such as decisions regarding medical treatment.[133] This has now been remedied by the Mental Capacity Act 2005, which creates a new legal

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[129] Denzil Lush, *Cretney & Lush on Enduring Powers of Attorney* (5th ed., Jordan Publ'g Ltd. 2002).

[130] Powers of Attorney Act, 1971, c. 27 (Eng.), discussed in Lush, op. cit., ch.1.

[131] Re R [1990] 2 All E.R. 893 at 895; *see also* Re K, Re F [1988] 1 All E.R. 358 at 359-360 (per Hoffmann J.).

[132] *See* Mental Capacity Act 2005, c. 9, pt. 2.

[133] *See* Re F [1990] 2 A.C. 1 at 58-60 (Lord Brandon).

regime whereby a person may now make a lasting power of attorney, which, like its predecessors, must be completed in an authorised form and is subject to registration with the Public Guardian.[134] However, a person may also make an advance decision to refuse treatment under sections 24-26 of the Act, to which any power of attorney is subject[135]. The unified regime under the 2005 Act represents an improvement on the previously diffuse system.

Disposition of property following death depends on whether a person has made a will, which must be made by a person with capacity. Where this is so, property devolves in accordance with the testator's wishes as expressed in the will, subject only to statutory provisions designed to secure the position of dependants.[136] Where there is no will, then the estate devolves by operation of law according to the principles of intestate succession.[137]

Mental illness

Turning from questions of capacity to questions of mental illness, the law again does not differentiate between individuals on grounds of age but rather provides for a number of conditions, broadly described,[138] which trigger powers that may be exercised by health and other professionals. However, the way in which the conditions to which the Act applies are defined and understood means that including, say, dementia may be problematic, as it may not be regarded as a mental illness.[139]

In terms of community help, mental illness provides one possible ground on which a local authority may intervene. The system of providing what are called community care services is administered via local government.[140] The law in this area is, in the words of one commentator,[141] "beyond peradventure, in a mess." It is fragmented, with a division of responsibilities between social services authorities,

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[134] *See* Mental Capacity Act 2005, § 9, sched. 1, §§ 9-14, 58.

[135] *Id.* at §.11.

[136] *See generally* John Barlow, Lesley King & Anthony King, *Wills, Administration and Taxation: A Practical Guide* (8th ed., Sweet and Maxwell Ltd. 2003).

[137] *Id.*

[138] The term covers "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind," Mental Health Act 1983, c. 20, § 1(2) (Eng.).

[139] *See generally* Richard Jones, *Mental Health Act Manual* (9th ed., Sweet & Maxwell Ltd. 2004).

[140] *See generally Caring for People,* 1989, Cm. 849; *Modernising Social Services,* 1998, Cm. 4169; Luke Clements, *Community Care & The Law* (3d ed., Legal Action Group 2004) (providing a practical guide to the law relating to community care).

[141] Luke Clements, *Community Care: Towards a Workable Statute,* XIX Liverpool L. Rev. No. 2, 181 (1997).

health authorities, housing authorities and other bodies. It is characterised by cross referencing, a range of criteria and patchy enforcement mechanisms.[142]

The system (though system might be a misdescription of something that is anything but systematic) requires a local social services authority, usually coterminous with a local authority for other purposes, to publish plans of the services it provides and to find out numbers of persons in its area falling within section 29 National Assistance Act 1948 and to assess their individual needs. Section 29, a measure drafted in the immediate post WW II era and reflecting its concerns and terminology, refers to the blind and partially sighted; the deaf and hard of hearing; persons suffering from mental disorder; and others who are substantially or permanently handicapped by illness, injury or congenital deformity. Once it has identified such persons, though the Act does not say how it does this, the authority is under a general duty to promote the welfare of such persons. There is no requirement placed on the local authority to be pro-active here; being reactive would be entirely lawful within the statutory scheme. A separate duty exists under section 46 National Health Service and Community Care Act 1990 to consult with relevant bodies, specified in the Act, and then, having done so, to publish a plan for the provision of community care services in its area. It will be noticed that we have moved from a general duty of promoting the welfare of those identified under section 29 to a general duty to publish plans of the availability of services as a freestanding obligation, not linked or even connected conceptually to the duty under the 1948 Act. The term "community care services" is also defined in a very specific way. It means services under Part III National Assistance Act 1948 (essentially services involving the provision of housing, which can include residential homes for the elderly), section 45 Health Services and Public Health Act 1968 (particularly relevant in the present context as it enables local authorities to "make arrangements for promoting the welfare of old people"); and section 21 and Schedule 8 National Health Service Act 1977, which, among others, provides for the provision of services to help

[142] Piecing together the law involves consideration of a number of disparate statutes and it may be as well to collect them here before looking at their interrelationships in the main body of the text. The principal pieces of legislation are: National Assistance Act 1948; Health Services and Public Health Act 1968; Chronically Sick and Disabled Persons Act 1970; Local Authority Social Services Act 1970; National Health Service Act 1977; Health and Social Services and Social Security Adjudications Act 1983; Mental Health Act 1983; Disabled Persons (Services, Consultation and Representation) Act 1986; National Health Service and Community Care Act 1990; Carers (Recognition and Services) Act 1995; Community Care (Direct Payments) Act 1996; Health Act 1999; Care Standards Act 2000; Carers and Disabled Children Act 2000; Health and Social Care Act 2001; Community Care (Delayed Discharges) Act 2003; Health and Social Care (Community Health and Standards) Act 2003; Carers (Equal Opportunities) Act 2004.

in the prevention of illness and to support those who are suffering from illness(such help may include home help and help with laundry etc.). Finally, services under section 117 Mental Health Act 1983 also fall within this referential definition of community care services. Services under section 117 are, however, only available to those who have been detained compulsorily in a hospital under the Mental Health Act and provides for assistance following discharge, and, as such, are for older people and of limited relevance.

Having identified what such services are, a local authority is required to carry out an assessment of need where it appears to the authority that a person might have a need for such services. Again, the authority does not have to be proactive and go out and seek those in its area who may need such services, but more usually responds to information provided to it, often by a member of the person's family or via some other statutory agency. Once the authority has become aware that a person may need such services, it is under a legal duty to assess whether the person does indeed need such services. The criteria for assessment are couched in general terms by means of guidance from the Secretary of State,[143] together with any local frameworks that may be established by social services authorities. The legislation itself provides no such guidance leaving the matter at large. Inevitably, in practice, standards vary across the country; in its report for 2004-5, the Commission for Social Care Inspection concluded that, while there had been welcome improvements in standards, further improvements in service delivery were still needed.[144] It is clear, however, that any assessment should, not only as a matter of good practice but as a matter of law, be carried out in collaboration with the applicant and should take account of (though not necessarily give effect to) any preferences expressed by her.[145] It should also take into account the needs of any carer, who may, in any event request a separate assessment of her own needs.[146] If, in the course of making an assessment of need for community care services, it appears that the person being assessed is a

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[143] *See* Dept. of Health, *Fair Access to Care Services: Guidance on Eligibility Criteria for Adult Social Care,* LAC (2002) 13 (Dept. of Health 2002); Dept. of Health, *The Community Care Assessment Directions 2004,* LAC (2004) 24 (Dept. of Health 2004); Local Authorities Social Services Act, 1970, § 7 (Eng.) (requiring local authorities to work under the general guidance of the Secretary of State).

[144] Commn. for Soc. Care Inspec., *The State of Social Care in England 2004-05 (2005),* http://www.csci.org.uk/PDF/state_social_care_a.pdf.

[145] *See Fair Access to Care Service: Guidance on Eligibility Criteria for Adult Social Care, supra* note 143; *The Community Care Assessment Directions 2004, supra* note 143.

[146] *See* Disabled Persons (Services Representation and Consultation) Act 1986, c. 33, § 8 (Eng.); Carers (Recognition and Services) Act 1995, c. 12, § 1 (Eng,); Carers and Disabled Children Act 2000, c. 16, § 1. (Eng.); Carers (Equal Opportunities) Act 2004, c. 15, § 1 (Eng.); Dept. of Health, The Community Care Assessment Directions 2004, LAC (2004) 24.

disabled person, then the authority must make a separate assessment to decide whether the needs of the disabled person call for the provision by the authority of any services under section 2 Chronically Sick and Disabled Persons Act 1970. The services available under section 2 include many that would be relevant to older people: provision of practical assistance at home; provision of or assistance in obtaining wireless, television, library or similar recreational facilities; provision of, or help in enjoying, lectures, games outings to other recreational faculties outside the home; provision of travel to participate in any services provided under section 29 National Assistance Act; provision of assistance in adapting the home or providing additional faculties for greater safety, comfort or convenience; facilitating holidays; provision of meals; provision of assistance in obtaining telephone and equipment necessary to enable a person to use it. Many of these descriptions of what can be made available have an archaic ring to them. One notable feature of this legislation is the emphasis on the services being provided either by the authority or by another provider;[147] the local authority is thus not just cast into the role of provider but also of facilitator, a matrix that has been expanded under the Health and Social Care Act 2001 to the point of the authority discharging its duties in some cases by the provision of money to facilitate the purchase of the appropriate services or equipment. While this has arguably increased the choice available to the recipient of such services, it runs the concomitant risk of fragmentation and time-consuming searches to find the best provider.

A further feature of the 1970 Act is the absence of a specific budget to accompany it. During the passage of the Bill through Parliament, members of both Houses expressed broad support for the legislation,[148] which always seems to be the case with supportive social welfare legislation. Members seem almost afraid to raise dissenting voices when legislation is proposed to help, in this case, the disabled. A few voices pointed out that this was likely to involve considerable expenditure and that, as the legislation appeared needs led, thought had to be given to the question of how to finance the scheme.[149] Such voices were a small minority of those speaking and their concerns were largely ignored. While local authority finance was in a relatively healthy state

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[147] *See* Community Care (Direct Payments) Act 1996, c. 30 § 1 (Eng.); Health and Social Care Act 2001, c. 15, § 57 (Eng.).

[148] *See e.g.* H.C. Debs. vol. 792, cols. 1851- 1863, De. 5, 1969 (these remarks, by the sponsor of the Bill, Mr. Alf Morris M.P., were echoed throughout the debates); H.C. Debs. vol.798 col. 911ff, (further remarks of Mr. Morris in the House of Commons); Alf Morris*, The disabled have their Act, now they need the action,* The Times 10 (London) (May 26, 1982).

[149] *See, e.g.,* H.C. Debs. Vol. 792 cols. 1914-1915, Dec. 5, 1969 (remarks by Dr. John Dunwoody); H.L. Debs, vol 309 col. 256, Mar. 15, 1970 (remarks by Baroness Serota); *id.* at cols. 1157-1159, Apr. 30, 1970 (exchange between Baroness Serota and Lord Sandford).

and limited demands were made on it, this was not a serious issue. What has become clear in more recent years is that the strains on local authority finance have led authorities to consider not only what people might need but also what the local authority could afford. Matters came to a head, in a legal sense at least, when the House of Lords had to consider a challenge brought by an 81-year-old infirm man, Mr. Barry, against the withdrawal of services he had previously been assessed as needing, on the ground that the local authority in question could no longer continue to afford to provide them.[150] Two issues in particular were raised, of importance for the operation of the scheme of assistance to the disabled and by implication elsewhere in the system. First, could an authority withdraw services in circumstances that it had previously assessed a person as needing? It was held, at any early stage in the proceedings and not challenged on appeal, that the authority was acting unlawfully in behaving in this way.[151] The only way services previously assessed as being needed could be withdrawn was following a new assessment on the invidious concerned. Mr Barry's success on this point turned out to be a pyrrhic victory. The local authority reassessed his needs and he was found not to need the services he had previously been assessed as needing.[152] Indeed, this aspect of the judgment, linked to the second point taken on appeal, led local authorities to institute rolling programmes of reassessment in order to avoid resource problems. The second issue raised in the case was whether a local authority could take account of its resources when assessing for need. The House of Lords held that it could.[153] The judges in the majority felt that it could not be right that authorities could not take account of their resources when assessing need. The dissentient minority, relying on a more literal reading of the provision in question, held that resources were absent from consideration. The consequence of this decision was that authorities could match their provision of assistance to their spending power, a result the government may well have desired but not what was stated in the Act. The decision also marked a significant power swing away from potential service users and toward local authorities, which not only seemed to go against the spirit of the legalisation as conceived (correctly it is suggested) by the minority but also against modern notions of social care which emphasise the empowerment of the individual.[154] The authority was thus left with considerable power not only as to how to

[150] R v. Gloucestershire County Council *ex parte* Barry, [1997] A.C. 584.
[151] *Id.* at 596 (*per* Lord Lloyd).
[152] *Id.* at 597.
[153] By a majority of 3 (Lords Nicholls, Hoffmann and Clyde) to 2 (Lords Lloyd and Steyn): [1997] A.C. 584.
[154] *Supra* note 32.

carry out the assessment and in the determination of what provision should be made in any individual case (something remaining unaffected by the *Barry* judgment), but also with regard to the factors to be taken into account, and the weight to be given to them, when reaching a determination in an assessment and the ability to control what provision is ultimately made.[155] The financial equation is further complicated by the fact that local authorities can charge a reasonable sum[156] – a sum *it* considers reasonable- for any services it provides by virtue of section 29 National Assistance Act 1948 or section 2 Chronically Sick and Disabled Persons Act 1970.

The idea of community care is that, as far as is possible, those in need of services should be enabled to stay at home. Legislation has underpinned this notion by encouraging, with financial inducements in some cases, a situation whereby as far as possible people should receive any care they need at home. A particular problem that has dogged this area has been the fact that health care and social care have been the responsibility of different authorities operating on an area basis. Thus, there has been the unseemly spectacle of authorities arguing that a particular person is the responsibility of either a neighbouring authority or of, say, a health as opposed to social services authority,[157] and this despite the duty under section 22 of the National Health Service Act 1977 on health and local authorities to cooperate to advance health and welfare.[158] The dividing line between health and social care needs is not, however, easy to draw in practice. Part of the undertow of this is the continued and continuing financial constraints affecting both local authorities and health care providers. If demands for services did not exceed the capacity of authorities to supply them, the problem would be less acute. But there has been a general and ongoing shortage of resource in this area.

To enable persons needing care, so far as possible, to remain at home, the position of carers has been increasingly recognised not simply as an adjunct to the needs of the individual but in their own right[159]. The encouragement of the care provided by others, often family members (and of those often women), has been seen as a better way of providing

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[155] Commn. for Soc. Care Inspec., *The State of Social Care in England 2004-05* (Dec. 2005), http://www.csci.org.uk/PDF/state_social_care_a.pdf.

[156] *See* Health and Social Services and Social Security Adjudications Act 1983, § 17 (Eng.) (as amended).

[157] *See, e.g.,* Avon County Council v Hooper, [1997] 1 WLR 1605.

[158] *See also* Health Act 1999; Health and Social Care Act 2001; Community Care (Delayed Discharges) Act 2003.

[159] *See generally* Disabled Persons (Services Representation and Consultation) Act 1986; Carers (Recognition and Services) Act 1995; Carers and Disabled Children Act 2000; Carers (Equal Opportunities) Act 2004; Dept. of Health, The Community Care Assessment Directions 2004.

care for those who do not need full time professional care. However, once the focus goes beyond the function of the carer in providing care, there is little by way of legal regulation enabling carers to enjoy support other than financial or respite care. Despite government policy predicated on the notion of family friendly employment practices, there is little by way of tangible support for this: the matter largely resolves itself on negation between individual employees and employers. This has been one of the reasons why, where such care is provided, it has tended to be provided by women. Where residential care is needed, this may be provided by public authorities or, increasingly, by the private sector. Standards are monitored by means of a system of licensing backed up by an inspectorate.[160] Financial support remains an issue here also.

The matter is exacerbated by the complex and multifarious mechanisms for challenging community care and allied decisions.[161] There is no dedicated tribunal with jurisdiction to resolve all community care disputes. Formal mechanisms include a complaints procedure,[162] which is internal to the local authority in question, and recourse to law by means of an application for judicial review. Application may also be made to the local government ombudsman, whose jurisdiction is based on maladministration and only covers failings in delivery of services falling short of a breach of law.[163] Other mechanisms include invoking help from a Member of Parliament[164] or the Secretary of State. The latter may, by use of a variety of powers affect an unsatisfactory situation in a number of ways. The Secretary of State may issue directions to a particular local authority requiring it to exercise its social service functions in particular ways or to issue guidance to require all authorities to act in accordance with a centrally dictated requirement.[165] In the last resort, the Secretary of State may take over the functions of a failing local authority and run them centrally.[166] The lack of coherent scheme of remedies means that a person seeking to challenge or query a local

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[160] National Assistance Act 1948, 11 & 12 Geo. 6, c. 29, pt. III (Eng.); Care Standards Act, 2000, c. 14, pt. III (Eng.).

[161] See Clements, op. cit., *supra* n.140, ch. X; *see generally* Norman Lewis & Patrick Birkinshaw, *When Citizens Complain: Reforming Justice and Administration* (Open Univ. Press 1993).

[162] Health and Social Care (Community Health and Standards) Act, 2003, c. 43, § 114 (Eng.) (providing that the Secretary of State may make regulations establishing mechanisms for dealing with complaints relating to social services). This has been implemented by The Local Authority Social Services Complaints (England) Regulations 2006 (S.I. 2006 No.1681) and Department of Health guidance *Learning from Complaints* (DH 2006).

[163] Established under the Local Government Act 1974.

[164] *See, e.g.*, Richard Rawlings, *The MP's Complaints Service,* 53 M.L.R., Mar, 1999 22-42 and 149-169.

[165] Local Authority Social Services Act 1970, c. 42, §§ 7-7A (Eng.).

[166] *Id.* at 7D.

authority decision is faced with a bewildering array of possibilities and needs to think carefully about which is the most appropriate and likely to be the most effective in any given case. Going to court is enormously expensive and takes a great deal of motivation and tenacity. Invoking any form of remedy requires some impetus and it is entirely likely that many decisions go unchallenged because those whom they affect are unable or unwilling to do so.

Older people and the criminal law

The protective function of the criminal law perhaps traditionally finds expression most readily by conceptualising older people as potential victims. The concept of elder abuse has not formed the subject matter of legislation as such, leaving the matter to be dealt with in a fragmented way by, largely, the existing legal and administrative frameworks.[167] Both words are problematic, with the literature disclosing no agreed definitions which could be translated into legislative form.[168] As a result, as with other areas of English law, there simply exists general legislation into which older victims might be fitted. Various forms of elder abuse, such as causing physical, psychological and financial harm can ordinarily be accommodated within laws creating fatal and non-fatal offences against the person[169] or theft and fraud.[170] The concepts created by the definitions of the various offences are sufficiently broad to cover the major categories of harm likely to be perpetrated. The courts have, on occasion, recognised that age may be a factor that is relevant to a determination of criminal responsibility. *R v Watson*[171] serves as an example. This was a case of manslaughter where the victim, an 87 year old man, suffered a fatal heart attack precipitated

[167] *See* Alison Brammer, *The Law, Social Work Practice and Elder Abuse,* in THE LAW AND SOCIAL WORK 163, 163-174 *(* Lesley-Anne Cull and Jeremy Roche eds., 2001).

[168] *See generally,, e.g.*, Rosalie S. Wolf & Karl A. Pillemer, *Helping Elderly Victims: The Reality of Elder Abuse*, 19 CONTEM. SOC. 710 (Sept. 1990); Action on Elder Abuse, Dep't of Health, Rep. on Project to Establish a Monitoring and reporting Process for Adult Prot. Referrals Made In Accordance With 'No Secrets,' http://www.dh.gov.uk/assetRoot/04/11/41/14/04114114.pdf (defining "elder abuse"); Gerald C. Bennett, Paul Kingston & Bridget Penhale, *The Dimensions of Elder Abuse: Perspective for Practitioners,* (Macmillan 1997); Alison Brammer & Simon Biggs, Defining Elder Abuse, 20 J. Soc. Welfare & Family L. 285, (1998).

[169] *See* Offences Against the Person Act 1861, 24 & 25 Vict., c. 100, § 18, 20, 47 (Eng.); Sexual Offences Act 2003, c. 42, § 1-3 (Eng.); Also, at common law for offences of murder, assault and battery.

[170] Under the Theft Act 1968, c. 60, § 1(Eng.), Fraud Act 2006, c. 35, § 1-5(Eng.).

[171] [1989] 1 W.L.R. 684. The notion that a person takes his victim as he finds him would mean that if injuries inflicted on an older person were more severe then would be the case with a younger victim, for example because of frailty or brittle bones, the offender is liable for the full extent of the injuries caused even if they go beyond those intended; *see generally* R. v. Blaue [1975] 1 W.L.R. 1411.

by a burglary. The Court of Appeal recognised the effect of such an occurrence on a vulnerable person by holding the defendants liable on the basis that they could recognise the victim's vulnerability by reason of his advanced age and frailty. The relevance of such issues to liability is, however, limited and the law has not generally embraced age as a factor in criminal liability. Perhaps the creation of aggravated offences when committed against older people might send out a stronger signal of society's denunciation of crimes against the elderly.[172]

An area of particular current controversy relates to euthanasia. A person cannot consent to his or her death, and therefore assisted suicide is an offence of murder or manslaughter depending on the circumstances.[173] Under the little used Suicide Act 1961, killing in pursuance of a suicide pact is manslaughter rather than murder.[174] The reform of the law on mental capacity under the Mental Capacity Act 2005, discussed above, in giving effect to advance decisions to refuse treatment, has raised the controversy of the danger of influencing older people to agree to forego treatment, a fear not allayed by the recent reintroduction of a Bill[175] to legalise assisted suicide. Taken in tandem, these measures have created a regime not specifically directed to older people but capable of having a particular impact upon them and caused alarm in some quarters concerning the potential for abuse.

Greater difficulty, however, attaches to issues of evidence. Where the activities take place in a domestic setting, there may be a family relationship in which the older person is both financially and otherwise dependent on other members of the household. This may lead to reluctance on the part of the older victim to report abuse because of fear of the possible consequences for the victim herself or for other members of her family. Reporting sexual abuse may be particularly difficult, not to say distasteful, to the victim, perhaps even more so than with a younger victim. There is also the issue of credibility, especially

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[172] *Cf.* Offences Against the Person Act 1861, *supra* note 169 and Crime and Disorder Act 1998, c. 37, § 31 (Eng.) (comparing the range of aggravated assaults in the Offences Against the Person Act 1861, though a better model would be racially aggravated offences: Crime and Disorder Act 1998, § 31 designates certain offences as capable of being racially aggravated, the effect of this being that they attract a higher penalty.

[173] *R (on the Application of Pretty) v DPP,* [2002] 1 All E.R. 1 (affirmed in effect by the European Court of Human Rights on the basis that the right to life in Article 2 of the European Convention on Human Rights does not include the right to die), *aff'd, Pretty v United Kingdom* [2002] 2 F.L.R. 45.

[174] David Ormerod, *Smith and Hogan Criminal Law* 493-497 (11th ed. Oxford Univ. Press 2005) (discussing further this provision).

[175] Assisted Dying for the Terminally Ill Bill, 2005, Bill [36] (Gr. Brit.) (introduced as a private member's bill by Lord Joffe on November 9, 2005, which would allow the terminally ill to seek and obtain assistance to end their lives, subject to procedural safeguards to prevent abuse, especially in the form of coercion). At the time of writing, this had not been passed into law by Parliament.

where there are no other witnesses or corroborative evidence (as will often be the case with domestic incidents), any injuries are consistent with non-criminal activity or there is some doubt about the mental capacity of the victim. Criminal law in the UK is also based on principles of individual responsibility.[176] Thus, where there is more than one member of the household, identifying an individual perpetrator or perpetrators might be difficult. However, there are principled objections to aggregating liability where more than one person may have been involved. Recent legislation[177] has sought to address this particular difficulty by providing that, in cases of homicide, where it is clear that the death of a vulnerable adult has occurred and that the perpetrator must have been one or other members of the household, then a form of collective responsibility can be applied to hold each apparent perpetrator responsible.[178] While a very limited and not uncontroversial measure, it remains to be seen how this works in practice; it is as yet too early to tell. A further issue relates to the requirement that specific incidents must form the basis of any case brought. Again, in an attempt to address this, incidents may be taken selectively or aggregated where violence occurs, and again it remains to be seen how this new legislation will operate.

The discussion thus far has related to an older victim in a domestic setting. It is entirely possible that such criminality can occur in institutional settings. The safeguards are greater, for example, in the regulatory regimes of such residences and the vetting of staff which should reduce potential risks.[179] Nonetheless, the evidential points alluded to above apply with equal force here. Both scenarios are located in private space crime, and there is a danger of the discourse of the older victim being located primarily or totally in this setting, this neglecting the impact of public space crime on older people.[180]

Further, the concentration on older people as victims may deflect from the discussion of older people as perpetrators of crime and to address any particular considerations relating to them. This, it has been argued,[181] constructs older people as welfare victims rather than criminals, thus disguising the true nature of their behaviour. In terms of

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[176] *See generally* Ormerod, *op. cit*., *supra* note 174; William Wilson, *Central Issues in Criminal Theory* (Hart Publ'g Ltd. 2002).

[177] Domestic Violence, Crime and Victims Act 2004, c. 28, § 5 (Eng.); *see generally* Richard Ward & Roger Bird, *Domestice Violence, Crime and Victims Act 2004: A Practitioner's Guide* (Jordans Ltd. 2005).

[178] *See* Domestic Crime and Victims Act 2004, §§ 6 & 6.

[179] *See* Care Standards Act 2000, *supra* note 142; *see also* Commn. for Soc. Care Inspec., The State of Social Care in England 2004-05 (Dec. 2005), http://www.csci.org.uk/PDF/state_social_care_a.pdf.

[180] *See* generally Mike Brogden & Preet Nijhar, *Crime, Abuse and the Elderly* (Willan Publ'g 2000).

[181] *Id*. at 37.

criminal activity, while potentially there is no limit on the offences that may be committed by older people, in practice they are responsible for a smaller range of offences than their younger counterparts. Potential areas of growth have been in increasing incidences of neighbour disputes and regulatory offences, rather than in areas of traditional criminality.[182] There are also issues that may arise in relation to process. The legislation covering both the investigative and trial stages of the criminal process[183] make little specific mention of the position of older people, focusing instead on more generic features such as capacity, vulnerability and disability.[184] At the more punitive end of the post sentencing stage, there is an issue of the ability of prisons to cope with older inmates and of such inmates surviving in an environment designed essentially for younger and more able-bodied offenders.

Conclusion

The picture that emerges from the foregoing, admittedly selective, discussion is that there is no coherent body of law that can properly be described as elder law, nor is there a consistent policy with regard to older people at an official level. First, the law that does exist and is applicable to older people is fragmented. It derives from statutes and cases across the whole gamut of legal provision with very little targeted specifically with older people in mind. Rather, the law tends to be based on concepts into which older people might fit, but fit along with others. There is some evidence of a more focused approach in some emerging areas such as the forthcoming age discrimination Regulations which are due to come into force in late 2006 and are, in many respects, age neutral.[185] But, as we have seen, this is a limited development. Second, for the rest, the law is based on differing, and sometimes conflicting, premises. Thus, we have seen how, for example, the law seeks to promote autonomy while elsewhere creating dependency; it characterises older people as both actors and victims; or as producers and consumers of wealth. Resolving such tensions is a considerable task, but is one that, given the demographic changes highlighted at the outset, legislators cannot continue to ignore.

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[182] *Id.* at 125.

[183] Principally the Police and Criminal Evidence Act 1984, c. 60 (Eng.), (as amended) and the associated Codes of Practice.

[184] *See, e.g.*, *id.* at Code C, Part II (Code of Practice C: Detention, Treatment and Questioning of Persons by Police Officers), http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/PACECodeCH.pdf?view=Binary.

[185] The Employment Equality (Age) Regulations, 2006, 1031 (U.K.).

ELDER LAW IN THE UNITED STATES: THE INTERSECTION OF THE PRACTICE AND DEMOGRAPHICS[1]

Rebecca C. Morgan[2]

I. INTRODUCTION

Much has been written of late about the aging of America, and indeed of the world[3] as we are all living longer. In many cases, people may outlive their savings, or find that their pension plans will not provide the income and benefits they had when they retired.[4] Health care costs are increasing, and more of retirees' dollars are spent on health care.[5] Elder Americans are increasingly becoming the targets of scammers, and other who consider elder Americans to be vulnerable, preying on them, to financially exploit them or even physically abuse them.[6] Laws have been created specifically to deal with the legal

[1] The aging of the Baby Boomers and the increasing longevity of the population coupled with the complexity of many laws that impact elders, will have noticeable impact on the practice of elder law. The issues faced by elders as well as the population numbers will have significant policy implications for government at all levels in this country.

[2] Boston Asset Management Faculty Chair in Elder Law, and Director, Center for Excellence in Elder Law, Stetson University College of Law.

[3] Howard W. French, *As China Ages, A Shortage of Cheap Labor Looms,* N.Y. Times A1 (June 30, 2006).

[4] *Managing Retirement Assets: Ensuring Seniors Don't Outlive Their Savings,* United States Senate Special Committee on Aging, Aging Committee Hearings (June 21, 2006), http://aging.senate.gov/public/index.cfm?Fuseaction=Hearings.Detail&HearingID=180 (visited September 17, 2006). *Roadblocks to Retirement: A Report on What Happens When Living Life Today Gets in the Way of Financial Security Tomorrow*, Prudential's Four Pillars of Retirement Series (2005), http://www.prudential.com/media/managed/RoadblockStudysample.pdf (visited September 16, 2006); *Americans Lack Knowledge About How to Turn Retirement Savings Into Sustainable Income,* New York Life, http://www.newyorklife.com/cda/0,3254,15555,00.html (May 15, 2006) (accessed September 16, 2006).

[5] Richard W. Johnson & Rudolph G. Penner, *Will Health Care Costs Erode Retirement Security?,* 23 An Issue in Brief 1, Center for Retirement Research at Boston College (October 2004) http://www.bc.edu/centers/crr/issues/ib_23.pdf (accessed September 17, 2006). Their projections indicate that by 2030, when the youngest Baby Boomers are old enough to qualify for Medicare, older adults will devote implausibly large shares of income to health care. Future out-of-pocket spending will soar despite the introduction of costly new drug coverage for Medicare beneficiaries in 2006. As a result, many boomers may not be as well prepared for retirement as some studies suggest. The increased financial burden of health care costs will be particularly painful for low income adults who do not qualify for Medicaid. State governments may need to expand Medicaid coverage in the future to better protect vulnerable older adults, further increasing budgetary pressures.

Id. at 6.

[6] The catch-all phrase is "elder abuse" which includes physical abuse, psychological or mental abuse, sexual abuse, and financial exploitation. The National Center for Elder Abuse, www.elderabusecenter.org, recognizes seven types of elder abuse: physical abuse, sexual abuse,

problems faced by older Americans.[7] There is a label for this area of law–elder law. Elder law has grown from a speciality practice to a general area of practice within which an attorney may specialize.

This article will look at the demographics of America now and in the near future. It will examine the creation and growth of the elder law practice in the U.S. Specific laws pertaining to elder law will be reviewed. The article will conclude by examining the near future and coming developments in elder law in the United States.

II. THE AGING OF AMERICA

Who are these people anyway? The United States is not alone in this aging of its population, and other countries, including Italy, the U.K., Sweden, Japan, and Germany have high percentages of elders.[8] Boomers are expected to be better educated than seniors of the past, and, as a result, are expected to be more demanding, especially for health care.[9] Demographic data has been predicting a significant growth in the 65 and over population as the Boomers[10] hit retirement age. By 2030, twenty percent of the population will be sixty-five or older.[11]

The yet-unanswered question for all elders, current and future, is whether the increased life expectancy for U.S. citizens will be "good" or whether the elders will suffer from chronic and disabling conditions.[12] Although it is clear that there is a correlation between age and chronic health conditions,[13] generally it seems that people not only are living

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emotional or psychological abuse, neglect, abandonment, financial or material exploitation, and self-neglect. *See* http://www.elderabusecenter.org/default.cfm?p=basics.cfm (accessed July 1, 2006).

[7] Generally speaking, many of the laws are age-neutral. For example, guardianship or conservatorship statutes apply to every person who meets the statutory definition of incapacity. The laws governing nursing homes' residents apply to those who reside in nursing homes regardless of age. On the other hand, there are age-specific laws. For example, some laws governing elder abuse are applied to victims of a certain age and vulnerability. Medicare and Social Security laws are mainly age-based, but also include other covered groups such as spouses or dependents, or individuals with disabilities.

[8] *Id*.

[9] *Id*.

[10] Baby Boomer refers to the generation born during a particular span of years. Merriam-Webster OnLine defines baby boom as "a marked rise in birthrate (as in the United States immediately following the end of World Ward II) http://www.m-w.com/dictionary/baby%20boomer (accessed Mar. 22, 2007). Baby Boomers in the United States are generally considered as that generation of Americans born between 1946 and 1964. *See* http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006105.html.

[11] AGS Aging in the Know, *Trends in the Elderly Population*, http://www.healthinaging.org/aginginthenow/chapters_ch_trial.asp?ch=2#Increasing%20Numbers%20of%20Seniors.

[12] *Id*.

[13] Although the number of elders with disabilities is declining, at least eighty percent of elders have at least one chronic health condition, and fifty percent have two. HHS & U.S. Department of Commerce, *65+ In The United States: 2005*, http://www.census.gov/prod/2006pubs/p23-209.pdf, at

longer, but are living healthier lives.[14] Will the extra years be good years? Studies seem to suggest yes.[15]

Bottom line—there are significant numbers of elders in the U. S. and elsewhere and more are coming. Beyond that, the population can be broken down by sex, age, race, income, education, and more.[16] The sheer numbers will affect this country as never before—in the work force, in the provision of health care, in the economy, and in determining social policy.

III. ELDER LAW IN THE UNITED STATES–FROM A NICHE TO A GENERAL PRACTICE AREA

Elder law is the representation of elder Americans and their family members with legal problems. According to the National Academy of Elder Law Attorneys ("NAELA"),[17] elder law is defined by the client:

> Rather than being defined by technical legal distinctions, elder law is defined by the client to be served. In other words, the lawyer who practices elder law may handle a range of issues but has a specific type of clients--seniors.

58-63. (December 2005). This generalization may not hold true when the statistics for assistance with activities of daily living (ADL) are examined. *See id.* at 60.

[14] *Id.* at 1.

[15] There is a debate among the experts on how old we can live to be and what quality of life we will have during those extra years. *Id.* at 50 (citing to Manton and Gu, 2001; Freedman et al., 2002; Spillman and Lubitz, 2000). There is the possibility that people will live longer but with functional and cognitive impairments. *Id.*

One way to determine qualify of life is to use the "Active Life Expectancy" " to measure the number of years that people can expect to live on average without disability." Recent studies, from a variety of methods of analysis and measurement, show "that in addition to living longer, the current generation of older people are healthier and less disabled" when compared to their predecessors. *Id.* at 50 (citing to Manton et al., 1997; Freedman, 1998; Manton and Gu, 2001; Freedman et al., 2002).

[16] *Id.*

[17] The National Academy of Elder Law Attorneys (NAELA) is a membership organization of attorneys who practice elder law. According to the NAELA website, NAELA is a

professional association of attorneys who are dedicated to improving the quality of legal services provided to the elderly.

The primary focus of the Academy is education. The Academy sponsors continuing legal education programs on elder law for attorneys throughout the year, and provides publications and educational materials to its members on a wide range of elder law topics.

The Academy seeks to provide support to other organizations serving the elderly. NAELA also examines and advocates on public policy issues facing the elderly, but does not provide direct legal services.

See http://www.naela.com/public/whatisneala.htm (accessed July 1, 2006).

> Elder law attorneys focus on the legal needs of the elderly, and work with a variety of legal tools and techniques to meet the goals and objectives of the older client.
>
> Under this holistic approach, the elder law practitioner handles general estate planning issues and counsels clients about planning for incapacity with alternative decision making documents. The attorney would also assist the client in planning for possible long-term care needs, including nursing home care. Locating the appropriate type of care, coordinating private and public resources to finance the cost of care, and working to ensure the client's right to quality care are all part of the elder law practice.[18]

Elder law has now been a recognized practice area for almost thirty-five years,[19] although for private practitioners most of the growth has occurred in the past twenty years. Initially, "aging and the law" was the province of legal services attorneys, while private practitioners were practicing "traditional" estate planning.[20] Professor Larry Frolik[21] took the view that elder law came into being because of attorneys' interest in the area and the interest of academics in the field.[22] As noted by

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[18] *Id*.

[19] The National Senior Citizens Law Center (NSCLC) was established in 1972. NSCLC "advocates nationwide to promote the independence and well-being of low-income elderly individuals and persons with disabilities." .

The National Senior Citizens Law Center was created in 1972 when, Terry Hatter, then Director of the Western Center on Law and Poverty in Los Angeles and now a 12-year veteran of the federal district court, submitted an application to the Office of Economic Opportunity to create a nation(sic) "back-up center" for issues affecting the elderly poor.

See http://www.nsclc.org/about_nsclc.html; *see also* Gill DeFord, *Twenty Years of the National Senior Citizens Law Center: A Personal Recollection* 26 Clearinghouse Review 117 (Special Issue, 1992).

[20] Michael Gilfix, Esq., one of the founders of NAELA, started his career in elder law by founding the Senior Adults Legal Assistance (SALA), a legal aid program for seniors in Santa Clara County, California. On entering private practice with his wife, he "identified other attorneys across the nation with similar interests. . . ." including legal aid attorneys, estate planners, and "some . . . interested in the idea, and some . . . motivated exclusively by the profit motive." Michael Gilfix, *Creation And Evolution of Elder Law*, 12 NAELA Q. 7 (Winter 1999).

[21] Professor Frolik is a Professor of Law at the University of Pittsburgh School of Law. Considered one of the founders in the field of elder law, Professor Frolik is a prolific writer who has authored several treatises and a number of articles on subjects of elder law. Professor Frolik has written two articles tracing the development of the practice of elder law. Professor Frolik could be considered one of the Deans of elder law.

[22] "Elder law owes its existence to the convergence of two social and intellectual forces: the desire of lawyers to create legal practices which have come to be called elder law, and the simultaneous growth of academic interest in the topic of the elderly and the law", noting that "[t]he

Professor Frolik, the field of practice would exist even without the label "elder law."[23]

It took a while for the public to grasp the concept of elder law, in fact, comments were frequently made about the name of the practice area.[24] However, one thing that distinguished elder law from other areas of practice is the holistic nature of elder law. Although the practice area label tends to come from the tasks performed by lawyers,[25] elder law has come to be recognized not only by the legal tasks performed by the lawyers, but by the attorney's function as a counselor to the client and/or the client's family, the attorney's knowledge of the aging services network and the nature of the representation of the clients in the later years of their lives.[26]

Twenty-plus years later, an exact definition of elder law still tends to depend on whom one asks.[27] Elder law has evolved from a

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rise of elder law obviously is also depending upon the growth in the number and relative wealth of the elderly. . . . [Professor Frolik's] purpose [was] to consider the other, less obvious factors, that help explain the growth of elder law. . . . Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective,* 1 Elder Law J. 1 (Spring 1993).

[23] Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 Elder L. J. 1, 1-2 (Spring 1993). "Of course, elder law would exist even if not identified as such . . . [e]lder law exists whether or not it has a label. *Id.*

[24] Perhaps the confusion stemmed from the title "elder law" which, although descriptive, is at the same time ambiguous. The author would frequently hear remarks such as "elder law, that's law for old attorneys" or "you're too young to be practicing elder law."

Professor Frolik relates a conversation he had with an attorney who asked him about elder law, and when he described it, the attorney responded "[t]hat's what I do. I guess that I've been an elder attorney for years and never knew it." Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 Elder L. J. 1, n. 2 (Spring 1993). *See also* Lawrence A. Frolik, *The Developing Field of Elder Law Redux: Ten Years After*, 10 Elder L. J. 1 (2002) (noting ten years later that attorneys have at least heard of elder law, even if they don't have a good idea of what it involves).

Now elder law is a recognized practice area, but is not completely descriptive of the practice. In fact NAELA recently changed its tag line to include clients with special needs, recognizing that oftentimes elder law attorneys also represent clients with disabilities who do not fall into the category of elder. *See* www.naela.com.

[25] *The Developing Field of Elder Law, supra* n. 24, at 2.

[26] Professor Frolik focuses more on the legal tasks, noting that ". . . the term elder law bundles together a variety of legal work. The term, however, does not only aggregate a group of existing activities. It implies something more, a new kind of legal practice, a new way to perceive what the lawyer does. The term *elder law* is both a collective title for existing activity and a new category of legal work which creates new practice possibilities for lawyers." *The Developing Field of Elder Law, supra* n. 24, at 2.

[27] For example, Stu Zimring, a past president, fellow and member of CAP of NAELA describes his view of elder law as:

a broad, very holistic, communitarian approach, defining it in terms of assisting seniors and their families, primarily in helping them age in place whenever possible. I do not and have never restricted the definition to "public benefit planning". For those who do, the answer is Elder Law/public benefit planning is probably doomed since the opportunities to do this kind of planning will become increasingly difficult or (I should live so long) there will be a national healthcare system in place that makes such planning unnecessary. For those of us who define the field broadly, I see it as nothing but a growth area simply based on demographics –the boomers are becoming the next client wave and their parents are the current client wave. The parents are being driven (sometimes

specialized area into a general practice area within which attorneys may specialize.[28] Some perceive the practice as later-life planning[29] while others view it more as a combination of elder law and disability law.[30] The National Elder Law Foundation[31] has a comprehensive definition used to define the knowledge areas needed for certification as an elder law attorney.[32] Under this definition, elder law can be grouped into three

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literally) to our offices by their children–this generation would not necessarily have sought out legal assistance–their children are more savvy. Hence, one generation will drive two client generations through the door. Add to this the 1st cousin to elder law, [Special Needs Trusts] SNTs or disability planning in general, and the potential growth curve is even greater.

Email interview with Stu Zimring (August 27, 2006) (on file with author).

[28] For example, some attorneys specialize in guardianships while others may specialize in asset protection planning. There are areas of elder law where many elder law attorneys do not practice. For example, many elders have consumer problems, whether it be a contract issue or a consumer fraud yet many elder law attorneys do not take these cases and if they are involved, it may be in the context of a guardianship where the elder is a victim of a financial exploitation. *See, e.g.*, Lawrence A. Frolik, *The Developing Field of Elder Law Redux, supra* n. 24, at 3-4.

[29] *Id.* Professor Frolik defines late life legal planning by noting that the fact of growing old presents "a host of legal problems that can be bests addressed by . . . elder law attorney[s]." *Id.* at 4–8.

[30] In 2003, NAELA changed its mission statement to include clients with disabilities

The mission of the National Academy of Elder Law Attorneys is to establish NAELA members as the premier providers of legal advocacy, guidance and services to enhance the lives of people with special needs and people as they age.

Adopted by the NAELA Board of Directors, 2003. NAELA had 5145 members as of July 1, 2006. Email from Debbie Barnett, Managing Partner (July 13, 2006) (on file with the author).

[31] The National Elder Law Foundation, or NELF, is the organization that certifies attorneys in elder law.

[32] NELF defines elder law as:

2.1 "Elder Law" is the legal practice of counseling and representing older persons and their representatives about the legal aspects of health and long term care planning, public benefits, surrogate decision-making, older persons' legal capacity, the conservation, disposition and administration of older persons' estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.

2.2 In addition, attorneys certified in elder law must be capable of recognizing issues of concern that arise during counseling and representation of older persons, or their representatives, with respect to abuse, neglect, or exploitation of the older person, insurance, housing, long term care, employment, and retirement. The certified elder law attorney must also be familiar with professional and non-legal resources and services publically and privately available to meet the needs of the older persons, and be capable of recognizing the professional conduct and ethical issues that arise during representation.

All the experience, task, and examination requirements relate to these areas of law.

This definition of elder law is the result of a lengthy process, which began in 1988. It involved those who formed NAELA, NAELA board members during the years 1988 through 1993, the Fellows of NAELA, the membership of NAELA, the members of the board of certification, and the ABA Standing Committee on Specialization. NAELA and its members have been involved at every step in the process of defining this new and growing specialty.http://www.nelf.org/randregs.htm#howis (accessed July 12, 2006). As part of certification, an applicant has to have devoted a certain number of hours in tasks, which provide insight into how these categories are further defined:

5.1.4.2 Task Requirements. The applicant shall satisfy the following task requirements:

A. During the three-years immediately preceding the short form application, the applicant shall have provided legal services in at least sixty (60) elder law matters in the following categories:

areas: income protection, health care, and autonomy,[33] although some issues might fall in more than one grouping. Others would group differently, depending on their views and experiences. Income protection could include issues surrounding retirement income (pensions, Social Security, private savings), bankruptcy, asset preservation, estate and tax planning, etc. Health care includes, for example, paying for

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1. Health and Personal Care Planning, including giving advice regarding, and preparing, advance medical directives (medical powers of attorney, living wills, and health care declarations) and counseling older persons, attorneys-in-fact, and families about medical and life-sustaining choices, and related personal life choices.

2. Pre-Mortem Legal Planning, including giving advice and preparing documents regarding wills, trusts, durable general or financial powers of attorney, real estate, gifting, and the financial and tax implications of any proposed action.

3. Fiduciary Representation, including seeking the appointment of, giving advice to, representing, or serving as executor, personal representative, attorney-in-fact, trustee, guardian, conservator, representative payee, or other formal or informal fiduciary.

4. Legal Capacity Counseling, including advising how capacity is determined and the level of capacity required for various legal activities, and representing those who are or may be the subject of guardianship/conservatorship proceedings or other protective arrangements.

5. Public Benefits Advice, including planning for and assisting in obtaining Medicaid, Supplemental Security Income, and Veterans benefits.

6. Advice on Insurance Matters, including analyzing and explaining the types of insurance available, such as health, life, long term care, home care, COBRA, medigap, long term disability, dread disease, and burial/funeral policies.

7. Resident Rights Advocacy, including advising patients and residents of hospitals, nursing facilities, continuing care retirement communities, assisted living facilities, adult care facilities, and those cared for in their homes of their rights and appropriate remedies in matters such as admission, transfer and discharge policies, quality of care, and related issues.

8. Housing Counseling, including reviewing the options available and the financing of those options such as: mortgage alternatives, renovation loan programs, life care contracts, and home equity conversion.

9. Employment and Retirement Advice, including pensions, retiree health benefits, unemployment benefits, and other benefits.

10. Income, Estate, and Gift Tax Advice, including consequences of plans made and advice offered.

11. Public Benefits Advice, including planning for and assisting in obtaining Medicare, Social Security, and food stamps.

12. Counseling with regard to age and/or disability discrimination in employment and housing.

13. Litigation and Administrative Advocacy in connection with any of the above matters, including will contests, contested capacity issues, elder abuse (including financial or consumer fraud), fiduciary administration, public benefits, nursing home torts, and discrimination.

The NELF certification priorities the tasks by requiring a certain number of matters performed in the "core" categories:

B. Of the 60 elder law matters, 40 must be in categories listed in 5.1.4.2.A. 1 through 5, with at least five matters in each category.

C. Ten of the elder law matters must be in categories listed in 5.1.4.2.A. 6 through 13, with no more than five in any one category, and

D. The remaining 10 elder law matters may be in any category listed in 5.1.4.2.A. 1 through 13, and are not subject to the limitation contained in parts B. or C. of this subsection.

http://www.nelf.org/randregs.htm#howis (accessed July 12, 2006).

[33] Professor Frolik divided elder law "roughly" into two categories: income and asset protection and preservation and health law issues. *The Developing Field of Elder Law, supra* n. 24, at 3..

health care, long-term care,[34] and health care decision-making. Autonomy could include planning for incapacity, alternatives to guardianship and housing choices, anything designed to maximize a person's autonomy and independence while providing the needed help in the least restrictive setting possible.

Why the growth and evolution of elder law? One reason may be the demographics.[35] Another reason may be the attraction to a holistic law practice, a more problem-solving or helping practice area rather than the "typical" litigation model.[36] Others attribute the growth more to market forces or the complexity of the area of law.[37] Perhaps all of these reasons are true. But in addition, maybe elder law as a field has grown simply because of the satisfying nature of the practice[38]–an elder law attorney truly has the opportunity to make a difference in the lives of his or her clients, oftentimes during the final phase of the clients' lives and many times in a crisis. The elder law attorney has the opportunity to ensure the client has the most quality of life as possible during the last years of his or her life.

IV. SELECT LEGISLATION

Elder Law may be defined more by the client than the laws, but there are laws specifically designed for target groups of individuals, most often those target groups are elders and people with disabilities. In this

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[34] Some might put long-term care (including paying for long-term care) under income security.

[35] See *supra* n. 11.

[36] The public may think of lawyers as litigators, given the adversarial nature of the United States judicial system. Elder law attorneys tend to not be litigators (although some are) and instead deal more in "planning as problem-solving" approach to resolution.

Stu Zimring, a NAELA past president, fellow and CAP member views his practice as a holistic one: "I have always taken a broad, very holistic, communitarian approach, defining it in terms of assisting seniors and their families, primarily in helping them age in place whenever possible." Email interview with Stu Zimring (August 27, 2006) (copy on file with author).

[37] Professor Frolik attributed the growth of elder law to "the rapid growth in the number of lawyers, the influx of women into the profession, the growth and acceptance of professional specialization, and the growth both in the number of elderly and in the degree and complexity of their legal needs." *The Developing Field of Elder Law, supra* n. 24, at 4.

[38] Professor Frolik noted that one cause of the growth of elder law would be the Baby Boomer Lawyers–"[t]ouched intellectually by the radical idealism of the late 1960-s, often attracted to law as a perceived instrument of social change, the boomers, initially in law school and then in the "real world" met the reality of law, which was being transformed from a profession to a business. Far from being some sort of domestic Peace Corps, the practice of law revealed itself to be "nasty, brutish, and short." For some of these disillusioned lawyers, elder law appeared to offer a plausible mix of earning a living while doing good. . . . In short, the elder law attorney was on the side of the angels." *The Developing Field of Elder Law, supra* n. 24, at 11-12 (*citations omitted).* Professor Frolik also posits that elder law as a practice area might be attractive to women attorneys for various reasons, including women may be more effective at "reconciliation, counseling, and negotiation which are so essential for the elder law attorney." *Id.* at 12-13 (*citations omitted)*.

section, certain areas of law that pertain to elders will be summarized and discussed.

A. Elder Abuse and Neglect

Elder abuse is a catch-all phrase to describe various types of abuse, neglect or exploitation. Elder abuse is a growing problem in the United States, yet the extent of the problem is really not known.[39] In a 2004 national survey, state adult protective services agencies reported 565,747 cases of potential abuse in 2003, up from 482,913 reports in 2000, or a 15.6% increase in substantiated cases, and a 19.7% increase in the combined total of elder and vulnerable adult neglect and abuse reports since 2000.[40]

The National Center for Elder Abuse[41] has identified seven types of major abuse: physical abuse,[42] sexual abuse,[43] emotional or psychological abuse,[44] neglect,[45] abandonment,[46] financial or material exploitation,[47] and self-neglect.[48]

In the United States, governmental responses to dealing with elder abuse is where domestic violence responses were twenty years ago. That is, it is not unusual for elder abuse to be viewed as a "civil" matter, to be dealt with through the state's guardianship process. Elder abuse is primarily dealt with at the state level,[49] with the various states having

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[39] Elder Abuse is considered to be a seriously under-reported problem. There are a number of reasons why victims and others do not report, including fear of retaliation, fear of being placed in a long-term care facility such as a nursing home, isolation, lack of knowledge of the abuse, embarrassment, etc.

[40] NCEA, *2004 Survey of State Adult Protective Services (APS)*, Fact Sheet, http://www.elderabusecenter.org/pdf/2-14-06%20final%2060+report.pdf (visited July 12, 2006).

[41] The National Center for Elder Abuse, or NCEA, is "a national resource for elder rights, law enforcement and legal professionals, public policy leaders, researchers, and the public. The Center's mission is to promote understanding, knowledge sharing, and action on elder abuse, neglect, and exploitation . . . and "is administered under the auspices of the National Association of State Units on Aging." The NCEA " makes available news and resources, collaborates on research, provides consultation, education and training, identifies and provides information about promising practices and interventions, answers inquiries and requests for information, operates a listserv forum for professionals, and advises on program and policy development." http://www.elderabusecenter.org/default.cfm?p=aboutncea.cfm (accessed July 12, 2006).

[42] National Center on Elder Abuse, *The Basics: Major Types of Elder Abuse*, http://www.elderabusecenter.org/default.cfm?p=basics.cfm (last updated Sept. 28, 2006).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* There is some debate about whether self-neglect should be included in elder abuse, since self-neglect is "self-inflicted," whereas the other types of elder abuse are caused by another.

[49] The Older Americans Act, 42 U.S.C. § 3001 et seq., defines elder abuse and also provides for funding for NCEA and activities but does not fund adult protective services (APS) or victims' shelters. Am. Bar Assoc. Commn. on L. and Aging, *Information About Laws Related to Elder*

statutes that define elder abuse, provide for protective services and, increasingly, criminalize the offense. There is some variation amongst the states in the definitions of elder abuse, the acts that constitute elder abuse, and the scope of the statutes.[50] Many statutes cover both elders and people with disabilities.[51] Some may be age-based, with a threshold

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Abuse,
http://www.elderabusecenter.org/pdf/publication/InformationAboutLawsRelatedtoElderAbuse.pdf (visited July 12, 2006).

Abuse is defined as "the willful . . . (A) infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or

(B) deprivation by a person, including a caregiver, of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness." 42 U.S.C. § 3002(1)(a)-(b) (2006).

Elder abuse is defined as "abuse of an older individual. . . ." 42 U.S.C. § 3002(1), while exploitation is defined as "the illegal or improper act or process of an individual, including a caregiver, using the resources of an older individual for monetary or personal benefit, profit, or gain. . . ." 42 U.S.C. § 3002(18)(a) (2006).

Neglect is defined as " the failure of a caregiver . . . or fiduciary to provide the goods or services that are necessary to maintain the health or safety of an older individual; or self-neglect." 42 U.S.C. § 3002(38)(a)-(b) (2006). Physical harm is defined as " bodily injury, impairment, or disease." 42 U.S.C. § 3002(41) (2006).

The federal law defines an older individual as someone who is 60 or older. 42 U.S.C. § 3002(35).

[50] *See e.g.,* Am. Bar Assoc. Commn. on L. and Aging, *Information About Laws Related to Elder Abuse*,
http://www.elderabusecenter.org/pdf/publication/InformationAboutLawsRelatedtoElderAbuse.pdf (accessed July 12, 2006) and Am. Bar Assoc. Commn. on L. and Aging, *Citations to Adult Protective Services (APS), Institutional Abuse and Long Term Care Ombudsman Program (LTCOP) Laws*,
http://www.elderabusecenter.org/pdf/publication/CitationstoAPS_InstitutionalAbuseandLTCOmbudsmanProgramLaws.pdf (Aug. 2005) for a general discussion of the states' laws covering elder abuse and links to state statutes for adult protective services, institutional abuse, and the long-term care ombudsman programs.

The variation in definitions contributes to the difficulty in determining the number of cases of elder abuse in an examination of agency records. Erica F. Wood, *The Availability & Utility of Interdisciplinary Data on Elder Abuse: A White Paper for the National Center On Elder Abuse* 21-22, http://www.elderabusecenter.org/pdf/publication/WhitePaper060404.pdf (May 2006).

[51] For example, California's act, the Elder Abuse and Dependent Adult Civil Protection Act, covers both elders and adults who meet the statutory definition of "dependent". An elder is a resident of the state who is 65 years of age or older, Cal. Welf. & Inst. Code § 15610.27. A dependent adult is any resident between the ages of 18 and 64 "who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age". . . or . . . "is admitted as an inpatient to a 24-hour health facility. . . ." Cal. Welf. & Inst. Code § 15610.23.

Florida uses vulnerable adult, defining a vulnerable adult as someone who is "18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, long-term physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging." Fla. Stat.§ 415.102(26) (2007). Similarly, Colorado uses "at risk adult" to mean a person who is sixty or older or eighteen or older with a disability. Colo. Rev. Stat. § 18-6.5-102(1) (2006). For APS, Colorado defines an at-risk adult as a person, 18 or older, "susceptible to mistreatment . . . or self-neglect . . . because the individual is unable to perform or obtain services necessary for the individual's health, safety, or welfare or lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the individual's person or affairs." Colo. Rev. Stat. § 26-3.1-101(1) (2006). Arizona

age for coverage. For example, under federal law, the threshold age for an older person is 60.[52] Because of the lack of consensus in this country as to what is old, the age threshold may vary from state to state.

The primary methods used at this time to fight elder abuse are the states' adult protective services systems and mandatory reporting requirements. Statutorily-mandated reporting may cover everyone,[53] and specifies a variety of individuals and occupations, ranging from health care professionals to law enforcement to bank tellers.[54] Mandatory reporting of elder abuse is not without its critics and little effort seems to be made to prosecute those mandated reporters who fail to report.

The increased number of reported cases can thus be interpreted two ways: either elder abuse is on the rise, or more people are reporting abuse. Still because of the problems with the victim reporting, it is important that those who would likely be in a position to report the abuse do so.

Caregiver abuse is on the rise, and unfortunately, as people live longer, they may become more dependent on caregivers for help, leading to increasing numbers of cases of physical abuse, neglect, or financial

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uses vulnerable adult, meaning someone who is eighteen or older and "unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment." Az. Rev. Stat. § 46-451(A)(10) (2006).

For a summary of the requirements of all state statutes, see National Academies Press, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America,* http://www.nap.edu/books/0309084342/html/ (2002).

[52] 42 U.S.C. § 3002(40) (2007) (60 or older). At the time of enactment of the Older Americans Act in 1965, 60 was considered old. In 2006, with people living longer, 60 is no longer considered old, and in fact, is considered by many to be middle-aged.

[53] "Everyone" excludes attorneys (and their employees) who learn about the abuse in the context of representation, unless the client consents to the disclosure of the information. Attorneys who learn about the abuse outside of the client-attorney relationship would have a reporting requirement. See, e.g. Fla. Stat. § 415.1034 (2007), which provides for mandatory reporting:

(a) Any person, including, but not limited to, any:

1. Physician, osteopathic physician, medical examiner, chiropractic physician, nurse, paramedic, emergency medical technician, or hospital personnel engaged in the admission, examination, care, or treatment of vulnerable adults;

2. Health professional or mental health professional other than one listed in subparagraph 1.;

3. Practitioner who relies solely on spiritual means for healing;

4. Nursing home staff; assisted living facility staff; adult day care center staff; adult family-care home staff; social worker; or other professional adult care, residential, or institutional staff;

5. State, county, or municipal criminal justice employee or law enforcement officer;

6. An employee of the Department of Business and Professional Regulation conducting inspections of public lodging establishments under s. 509.0327.

7. Florida advocacy council member or long-term care ombudsman council member; or

8. Bank, savings and loan, or credit union officer, trustee, or employee, who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited shall immediately report such knowledge or suspicion to the central abuse hotline.

[54] For example, Florida includes "[b]ank, savings and loan, or credit union officer, trustee, or employee" as mandatory reporters. Fla. Stat. § 415.1034(1)(a)(8).

exploitation. More needs to be done to fight elder abuse, including greater education of first responders and criminalizing the acts. Enhanced penalties are being used in some states, where the victim is over a certain age, which can have some success in punishment, but is unlikely an effective deterrent when the causes of elder abuse are examined.[55] More can be done to develop protocols for identifying elder abuse. For example, autopsies may not often be performed on an elder who had a number of chronic conditions, any of which could have caused the elder's death. As a result, the medical examiner would not be looking for signs of elder abuse in performing an autopsy, if an autopsy is even performed.

B. Social Security, Pensions & Income Security

Retirement security has become a major concern in the United States. Elders are living longer than their savings will cover, Social Security is projected to run out of money, and employers are looking to shed their pension obligations. The concern about the stability of Social Security is driven in large part by demographics, as the Boomers reach retirement age and begin to draw Social Security benefits while the worker-to-retiree ratio shrinks.[56] America's retirees generally have three sources to fund their retirement: Social Security, pensions, and private savings. Often the metaphor of the three-legged stool[57] is used to

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[55] According to the NCEA website, in general the abusers tend to be impaired in some way and dependent on the victim. The victim may be isolated and suffered from conditions that make her more likely to be abused. National Center on Elder Abuse, *Risk Factors for Elder Abuse*, http://www.elderabusecenter.org/default.cfm?p=riskfactors.cfm (last updated Sept. 28, 2006); National center on Elder Abuse, *Domestic Abuse in Later Life,* http://www.elderabusecenter.org/pdf/research/abusers.pdf (Aug. 2002).

[56] The fundamentals of the financial status of Social Security . . . remain problematic under the intermediate economic and demographic assumptions. Social Security's current annual surpluses of tax income over expenditures will soon begin to decline, and will be followed by deficits that begin to grow rapidly toward the end of the next decade as the baby-boom generation retires. . . . The projected growing deficits . . . will exhaust . . . Social Security reserves in 2040, under current financing arrangements. . . . As Social Security . . . reserves are drawn down . . . , pressure on the Federal budget will intensify. We do not believe the currently projected long-run growth rates of Social Security . . . are sustainable under current financing arrangements.

Soc. Sec., *A Message to the Public* 1, http://www.ssa.gov/history/pdf/tr05summary.pdf.

In 2001, the President established a Commission to Strengthen Social Security "to study and report specific recommendations to preserve Social Security for seniors while building wealth for younger Americans." *See* http://www.csss.gov/index.html (visited July 14, 2006).

[57] According to the Social Security web site, the three-legged stool metaphor applied to Social Security. Larry DeWitt, SSA Historian's Office, *Agency History*, http://www.ssa.gov/history/stool.html (May 1996).

Social Security benefits are considered to be only one part of a complete approach to retirement planning. In contemporary parlance, Social Security benefits are described as the

"foundation" upon which individuals can build additional retirement security through company or personal pensions and through savings and investment.

For many years, an older metaphor was used to make this point. Social Security benefits were said to be one leg of a three-legged stool consisting of Social Security, private pensions and savings and investment. The metaphor was intended to convey the idea that all three approaches were needed to provide stable income security in retirement.

The question has been raised as to the origins of the three-legged stool model and whether President Roosevelt used this metaphor in his conception of Social Security.

The Origin of the Metaphor

President Franklin Roosevelt is not the source of this metaphor, nor was anyone else associated with the creation of the Social Security program in the 1934-35 period. The earliest use of this metaphor which we have been able to document was by Reinhard A. Hohaus, who was an actuary for the Metropolitan Life Insurance Company. Mr. Hohaus, who was an important private-sector authority on Social Security, used the image in a speech in 1949 at a forum on Social Security sponsored by the Ohio Chamber of Commerce. Hohaus, however, had a slightly different "stool" in mind than came to be understood in later years. His three-legged stool consisted of: private insurance; group insurance; and Social Security. In his 1949 speech Hohaus stated:

"The first in order of time is individual insurance . . . the second, a variety of employee benefit plans of which Group insurance is an outstanding American contribution; and the third, social security--designed by the government for the well-being of our fellow citizens . . . Each has its own function to perform and need not, and should not, be competitive with the others. When soundly conceived, each class of insurance can perform its role better because of the other two classes. Properly integrated, they may be looked upon as a three-legged stool affording solid and well-rounded protection for the citizen."

A Familiar Concept

Although Hohaus appears to be the creator of the three-legged stool metaphor, the basic concept which the metaphor expresses was clearly understood and widely shared by the creators of the Social Security program. In fact, in a 1942 speech before the 37th annual meeting of the American Life Convention in Chicago, Hohaus approvingly quoted Social Security Board Chairman Arthur Altmeyer as expressing the core idea: "A social insurance system does not and need not undertake to furnish complete protection to all whom it covers under all circumstances. The social insurance approach is to assure that the benefits would provide a minimum protection, leaving to the individuals the responsibility of buying additional protection from private sources through their private means."

Although President Roosevelt apparently never used the "three-legged stool" metaphor, he clearly had this concept in mind when he created the Social Security program, and he expressed the idea, in other words, several times over the years[:]

These three great objectives the security of the home, the security of livelihood, and the security of social insurance--are, it seems to me, a minimum of the promise that we can offer to the American people. They constitute a right which belongs to every individual and every family willing to work. . . . This seeking for a greater measure of welfare and happiness does not indicate a change in values. It is rather a return to values lost in the course of our economic development and expansion. Ample scope is left for the exercise of private initiative.

Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration [(]June 8,1934[)] . . . [announcing the President's intention to send a Social Security proposal to Congress.]

and

In the important field of security for our old people, it seems necessary to adopt three principles: First, non-contributory old-age pensions for those who are now too old to build up their own insurance. It is, of course, clear that for perhaps thirty years to come funds will have to be provided by the States and the Federal Government to meet these pensions. Second, compulsory contributory annuities which in time will establish a self-supporting system for those now young and for future generations. Third, voluntary contributory annuities by which individual initiative can increase the annual amounts received in old age. It is proposed that the Federal Government assume one-half of the cost of the old-age pension plan, which ought ultimately to be supplanted by self-supporting annuity plans.

describe funding retirement, today, using the three-legged stool metaphor, all three legs of the stool are wobbly, with the stool's stability increasingly at risk and, it seems, the stool is headed for certain collapse. Americans are not saving enough for retirement, or simply are living longer–outliving their savings.

Social Security–a Brief History and an Even Briefer Overview

When President Roosevelt[58] signed the Social Security Act into law, Social Security was designed as a safety net to provide a minimum level of income to retired workers. Coming on the heels of the Great Depression, it became obvious that American workers needed some way to secure a minimum amount of income upon retirement. Social Security was never intended to be the sole source of retirement income for American retirees, but many have come to depend on Social Security for just that.[59] Over the years, Social Security was expanded to provide benefits to groups other than retirees, including dependents (spouses and children, survivors) and individuals who are disabled.[60]

Retirement benefits for Social Security are based on a worker's earnings record. Generally speaking, to be fully insured, a worker must have 40 quarters of coverage, that is, have worked a certain amount during the forty quarters. Usually someone who works full-time for ten years is considered fully insured.[61] The amount an individual will draw in the form of a monthly Social Security check will depend on the individual's earnings record. A spouse is also eligible for Social Security, either on her own earnings record or her husband's, and gets the higher monthly amount.[62] In addition to eligibility based on quarters of coverage, Social Security retirement benefits are age-based, that is the worker must attain a specific age in addition to being fully insured, before the worker will draw a check.[63]

Message to Congress on Social Security . . . [(J]anuary 17,1935[)] . . . (transmitting Administration's legislative proposal).

Id.

[58] President Roosevelt served as the twenty-third president, serving from January 1933, until his death in 1945. He was perhaps best known for his leadership through the Great Depression, WWII and being disabled.

[59] *See generally*, Federal Inter-agency Forum on Aging-Related Statistics, *Older Americans Update 2006: Key Indicators of Well-Being: Economic Indicator* #9*, Sources of Income* 4*,* http://www.agingstats.gov/update2006/Economics.pdf.

[60] *See generally*, 42 U.S.C. §§ 401 (2007).

[61] *See e.g.*, Social Security, *How You Earn Credits*, http://www.ssa.gov/pubs/10072.html#number (Jan. 2007).

[62] Social Security, *Benefits for Your Spouse*, http://www.ssa.gov/retire2/yourspouse.htm (modified Jan. 12, 2007).

[63] Social Security, *Full Retirement Age*, http://www.ssa.gov/retire2/retirechart.htm (modified Jan. 12, 2007).

For many years the age of retirement for Social Security was 65.[64] Some years ago, concerns about the future viability of Social Security resulted in a decision to gradually raise the age of retirement to 67.[65] This increase in age is being phased in incrementally,[66] with 67 becoming the retirement age in the year 2027.[67] However, a fully-insured individual can take "early retirement" of Social Security benefits at age 62, but the amount of the Social Security benefits are permanently reduced throughout the worker's retirement lifetime.[68]

For most individuals who are fully insured, there are very few issues about eligibility for Social Security benefits. Some years ago, there were some difficulties proving a person's age, for those who might have been born at home, a family bible may have been the only birth record in areas where birth certificates were not routinely issued or where records might have been destroyed. The bigger issue today regarding eligibility for benefits are for those who seek Social Security Disability benefits.[69]

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[64] Social Security, *The Full Retirement Age is Increasing*, http://www.ssa.gov/pubs/ageincrease.htm (modified Jan. 12, 2007).

[65] Social Security, *Summary of P.L. 98-21, (H.R. 1900) Social Security Amendments of 1983- Signed on April 20, 1983*, http://www.ssa.gov/history/1983amend.html (prepared Nov. 26, 1984) (summarizing the 1983 amendments to the Social Security law "[r]aises the age of eligibility for unreduced retirement benefits in two stages to 67 by the year 2027. Workers born in 1938 will be the first group affected by the gradual increase. Benefits will still be available at age 62, but with greater reduction.").

[66] Social Security, *Age to Receive Full Social Security Retirement Benefits*, http://www.ssa.gov/pubs/retirechart.htm (modified Jan. 12, 2007).

Year of Birth	Full Retirement Age
1937 or earlier	65
1938	65 & 2 months
1939	65 & 4 months
1940	65 & 6 months
1941	65 & 8 months
1942	65 & 10 months
1943–1954	66
1955	66 & 2 months
1956	66 & 4 months
1957	66 & 6 months
1958	66 & 8 months
1959	66 &10 months
1960 & later	67

Id.

[67] Social Security, *Summary of P.L. 98-21, (H.R. 1900) Social Security Amendments of 1983- Signed on April 20, 1983*, http://www.ssa.gov/history/1983amend.html (prepared Nov. 26, 1984).

[68] Soc. Sec., *Retirement Planner*, http://www.ssa.gov/retire2/applying2.htm (last modified Jan. 12, 2007).

[69] Disability under Social Security is based on . . . inability to work. [You are] . . . consider[ed] . . . disabled under Social Security rules if you cannot do work that you did before and [SSA] . . . decide[s] that you cannot adjust to other work because of your medical condition(s). Your disability must also last or be expected to last for at least one year or to result in death.

Social Security is something of a "sacred cow"[70] and periodic attempts at reform often never got off the ground or were viewed as political suicide. Elders were not interested in any tinkering with their benefits, for various reasons. However, in his January 2005 State of the Union Address,[71] President Bush made reform a priority for his administration in 2005, traveling about the country to promote change.

This is a strict definition of disability. Social Security program rules assume that working families have access to other resources to provide support during periods of short-term disabilities, including workers' compensation, insurance, savings and investments.

Soc. Sec., *Disability Planner: What We Mean by Disability*, http://www.ssa.gov/dibplan/dqualify4.htm (Last modified Jan. 12, 2007).

In addition to meeting . . . [the] definition of disability, you must have worked long enough--and recently enough--under Social Security to qualify for disability benefits. . . . The number of work credits you need to qualify for disability benefits depends on your age when you become disabled. Generally, you need 40 credits, 20 of which were earned in the last 10 years ending with the year you become disabled.

Soc. Sec., *Disability Planner: How Much Word Do You Need?* http://www.ssa.gov/dibplan/dqualify2.htm (updated Jan. 11, 2007).

[70] A sacred cow is defined to include "[a]n idea, institution, etc., unreasonably held to be immune from questioning or criticism" (with reference to the respect of Hindus for the cow as a sacred animal). *The Oxford English Dictionary,* vol. XIV, 339 (2d ed., Clarendon Press Oxford 1989).

[71] White House, *Fact Sheet: The State of the Union*, http://www.whitehouse.gov/news/releases/2005/02/20050202-14.html (Feb. 2, 2005). The fact sheet on the State of the Union Address described the President's comments on reforming Social Security:

Saving Social Security for America's Future Generations

Fixing the Current Social Security System: The President wants to strengthen Social Security for the 21st century. His fiscally responsible plan calls for reforms that would keep Social Security's promises for today's seniors and those near retirement; solve the financial problems of Social Security once and for all; and give younger workers a chance to save in personal accounts for their own retirement.

By 2018, Social Security will owe more in annual benefits than the revenues it takes in, and when today's young workers begin to retire in 2042, the system will be exhausted and bankrupt. As currently structured, Social Security cannot afford to pay promised benefits to young workers. President Bush has laid out basic principles to guide reform:

We must make Social Security permanently sound;

We must guarantee no change for those 55 years or older (born before 1950);

We must not jeopardize our economic strength by raising payroll taxes;

We must ensure that lower-income Americans get the help they need to have dignity and peace of mind in their retirement;

We must make sure any changes in the system are gradual, so that younger workers have years to prepare and plan for their future; and

We must make Social Security a better deal for younger workers through voluntary personal retirement accounts.

The President laid out his vision for voluntary personal retirement accounts. Under his plan, personal retirement accounts would start gradually. Yearly contribution limits would be raised over time, eventually permitting all workers to set aside 4 percentage points of their payroll taxes in their accounts.

There will be careful guidelines for personal accounts to provide greater security in retirement, including a conservative mix of bonds and stock funds similar to those offered under the Federal employee retirement plan; protection from hidden fees; protection from sudden market swings on the eve of retirement; and a requirement of pay-outs over time to prevent a person from emptying his or her account all at once.

http://www.whitehouse.gov/news/releases/2005/02/20050202-14.html.

After Hurricane Katrina, and other more pressing issues, reform was put on the "back burner."[72]

C. Health Care–An Even Briefer Overview.[73]

Health care is a big issue for elders in the United States.[74] There are a number of components that fall under the rubric of health care: paying for health care, decision-making, end of life issues, long-term care, and regulation. Paying for health care is of course an enormous concern for elders. Among those who fall in the demographic of current elderly, recent Census reports show that disabilities among United States elders is declining. [75] Although the number of elders with disabilities is declining, at least eighty percent of elders have at least one chronic health condition, and fifty percent have two.[76] Because so many of America's elders have at least one chronic health condition,[77] it goes without saying that health care, in particular obtaining and paying for it, is one of the top issues facing elder Americans. The number of elders with some type of dementia or memory impairment may increase with

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[72] It appeared that reform was gaining no traction, and although the reasons promoted for reform continue to exist, the national priorities shifted in the aftermath of Katrina. *See, e.g.*, *President's Statement on 70th Anniversary of Social Security*

For 70 years, Social Security has been a vital program and helped millions of America's seniors in retirement. The Social Security system is sound for today's seniors, but there is a hole in the safety net for younger workers. On this 70th anniversary, we renew our commitment to save and strengthen Social Security for our children and grandchildren, and keep the promise of Social Security for future generations.

http://www.whitehouse.gov/news/releases/2005/08/20050814-2.html (August 14, 2005); Jonathan Weisman, *Social Security Legislation Could Be Shelved*, Wash. Post A5, http://www.washingtonpost.com/wp-dyn/content/article/2005/09/15/AR2005091502200.html (Sept. 16, 2005); Bob Cusack & Patrick O'Connor, *GOP Split on Social Security*, The Hill, http://www.hillnews.com/thehill/export/TheHill/News/Frontpage/092105/gop.html ((Sept. 21, 2005), Jonathan Weisman, *GOP Agenda in Congress May Be at Risk* Katrina's Costs, High Fuel Prices Working Against More Tax Cuts, Wash. Post A2,

http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090301065.html (Sept. 4, 2005).

[73] A thorough discussion of health care as it affects America's elders would be volumes, so anything other than a brief discussion of the issues is *way* beyond the scope of this article.

[74] This is a huge understatement, but needed to set the stage for this section of the article.

[75] *See supra* n. 13, at 58-63.

[76] *Id.* This generalization may not hold true when the statistics for assistance with activities of daily living (ADL) are examined. *See id.* at 60.

[77] *Id.* Heath disease, cancer, diabetes and stroke are the most common and costly of these conditions, and can have a negative impact on an elder's quality of life, leading to deterioration in functioning and independent living in the community. Arthritis, heart disease and high blood pressure rank high as the reported chronic conditions affecting elders. See generally, *Older Americans Update 2006: Key Indicators of Well-Being,* Federal Inter-Agency Forum on Aging-Related Statistics, Health Status Indicator #15, Chronic Health Conditions 4, http://www.agingstats.gov/update2006/Health_Status.pdf.

age, leaving individuals at risk for exploitation and candidates for guardianship and institutional care.[78]

Medicare[79] has been the primary health insurance for those retired Americans, with Medicare and Medicaid covering the more than three-quarters of health care expenditures.[80] Medicare currently can be divided into four parts: A-D. Generally speaking, A is hospital benefits, B is doctor and outpatient, C is managed care and D is prescription drug coverage.[81] Up until the passage of Part C in 1997,[82] Medicare was unique in its coverage, similar to a defined benefits program–every beneficiary had the same benefits. Now with Part C, managed care, not everyone has the same coverage any longer. Under Part C, managed care plans can offer various "extra" services to lure members. Much is said about the viability of Social Security, but only occasionally is the viability of Medicare mentioned, yet Medicare's stability is at risk, perhaps even more so than Social Security.[83] With the rising costs of

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[78] Low cognitive functioning is reported as a significant risk factor for nursing home placement. Federal Inter-Agency Forum on Aging-Related Statistics, *Older Americans Update 2006: Key Indicators of Well-Being: Health Status Indicator #17, Memory Impairments* 6, http://www.agingstats.gov/update2006/Health_Status.pdf.

[79] U.S. Dept. of HHS, *Historic Overview*, http://www.cms.hhs.gov/History/ (last modified July 7, 2005).

[80] *See supra* n. 13, at 83.

[81] Part A Hospital Insurance - Most people don't pay a premium for Part A because they or a spouse already paid for it through their payroll taxes while working. Medicare Part A (Hospital Insurance) helps cover inpatient care in hospitals, including critical access hospitals, and skilled nursing facilities (not custodial or long-term care). It also helps cover hospice care and some home health care. Beneficiaries must meet certain conditions to get these benefits.

Part B Medical Insurance - Most people pay a monthly premium for Part B. Medicare Part B (Medical Insurance) helps cover doctors' services and outpatient care. It also covers some other medical services that Part A doesn't cover, such as some of the services of physical and occupational therapists, and some home health care. Part B helps pay for these covered services and supplies when they are medically necessary.

Prescription Drug Coverage - Most people will pay a monthly premium for this coverage. Starting January 1, 2006, new Medicare prescription drug coverage will be available to everyone with Medicare. Everyone with Medicare can get this coverage that may help lower prescription drug costs and help protect against higher costs in the future. Medicare Prescription Drug Coverage is insurance. Private companies provide the coverage. Beneficiaries choose the drug plan and pay a monthly premium. Like other insurance, if a beneficiary decides not to enroll in a drug plan when they are first eligible, they may pay a penalty if they choose to join later.

U.S. Dept. of HHS, *Medicare Program- General Information*, http://www.cms.hhs.gov/MedicareGenInfo/ (modified Dec. 14, 2005).

[82] *Balanced Budget Act of 1997*, 42 U.S.C. § 1395w-21 (2007).

[83] John Palmer and Thomas Saving, *Summary Trust Fund Reports (2005)*, http://www.ssa.gov/history/pdf/tr05summary.pdf.

In sharp contrast, Medicare's financial outlook has deteriorated dramatically over the past five years and is now much worse than Social Security's. This is due primarily to a major change in the projected long-term growth rate of Medicare costs relative to that of the economy and, secondarily, to more rapid expenditure growth so far this decade than previously anticipated. In 2000 annual cash-flow deficits were projected to first appear for HI in 2010. But these deficits actually began last year, resulting in the projected exhaustion date for HI Trust Fund reserves moving forward from

health care[84] continuing for the foreseeable future, Medicare premiums will continue to rise, and Part A in particular may be vulnerable without changes in funding structures.[85]

Medicaid, which was also part of the Great Society programs, is a federal-state program designed to provide health care for the poor.[86] Because Medicaid covers what used to be called "custodial care" in

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2025 to 2020—at which time trust fund income would be sufficient to pay only 79 percent of HI costs. HI costs are expected to rise so rapidly thereafter that trust fund income will be adequate to cover only 27 percent of program costs by the end of the 75-year period.

The change in the outlook is equally stark for SMI, where Part B is now joined by the new Part D Prescription Drug Benefit. Annual income to the SMI Trust Fund is always projected to be sufficient to cover costs, since general revenue transfers and beneficiary premiums are automatically adjusted each year to achieve this outcome. But the required rate of growth of such revenues is far more than previously anticipated. With the retirement of the baby boom generation, SMI costs (as a percent of GDP) are now projected to nearly quadruple from 1.2 to 4.6 over the next 30 years and to continue to increase rapidly thereafter. As a result, total Medicare expenditures are now projected to increase from 2.6 to 5.7 percent of GDP by 2024, when Medicare expenses will first exceed those of Social Security. By the end of the 75-year period, the cost of Medicare is now expected to approach 14 percent of GDP. In contrast, in 2000 the cost was projected to be less than 4 percent of GDP in 2024 and to reach only 5.3 percent of GDP by the end of the 75-year period.

A notable addition to the Trustees Reports during our tenure has been the inclusion of new measures that summarize program finances for a period extending beyond the traditional 75 years and indicate whether those finances can be expected to improve in this extended time frame. These measures indicate that both Social Security and Medicare will be subject to increasing deficits into the indefinite future under current policies.

Two important observations follow from an examination of the 2000-2005 Trustees Reports projections. First, Medicare's costs are expected to grow at a much faster rate than those of Social Security. The impending retirement of the baby boom generation, continued lower birth rates, and further increases in life expectancy thereafter will cause the costs of both programs to grow faster than the economy. But Medicare's costs are also fueled by ever increasing scientific knowledge, medical technology incorporating that knowledge, and per capita utilization of the resulting health care capabilities. The second observation follows from the first: there is considerable inherent uncertainty in the future path of costs under current law for both programs, with projections for Medicare being a less reliable guide than those for Social Security the further out in time they go. In the balance of this message we briefly examine the reasons for the uncertainty inherent in these projections and the relevance to policy discussions.

Id. at 15-16.

See also Ben S. Bernanke, Chair, Federal Reserve Board, *The Coming Demographic Transition: Will We Treat Future Generations Fairly?* http://www.federalreserve.gov/boarddocs/speeches/2006/20061004/default.htm (Oct. 4, 2006).

The outlook for Medicare is particularly sobering because it reflects not only an increasing number of retirees but also the expectation that Medicare expenditures per beneficiary will continue to rise faster than per capita GDP. For example, the Medicare trustees' intermediate projections have Medicare spending growing from about 3 percent of GDP today to about 9 percent in 2050--a larger share of national output than is currently devoted to Social Security and Medicare together.

[84] *See e.g.,* Kaiser Family Foundation, *Snapshots: Health Care Costs Comparing Projected Growth in Health Care Expenditures and the Economy*, http://www.kff.org/insurance/snapshot/chcm050206oth2.cfm#2.

[85] John Palmer and Thomas Saving, *Summary Trust Fund Reports (2005)*, http://www.ssa.gov/history/pdf/tr05summary.pdf.

Id. at 15-16.

[86] U.S. Dept. of HHS, *Medicaid Program- General Information*, http://www.cms.hhs.gov/medicaidgeninfo/ (modified Apr. 25, 2006).

nursing homes,[87] a significant portion of state budgets goes to Medicaid,[88] and of that, thirty-five percent goes to long-term care.[89] The country has not really developed a viable policy on long-term care, instead relying on individuals to buy long-term care insurance, or to pay for long-term care through private savings, employer health care coverage, or through Medicaid planning to make themselves eligible for Medicaid coverage of nursing home care.

Another issue of health care is decision-making, both the ability to consent to the provision of health care and the refusal of health care, especially end of life decisionmaking and the removal of life-prolonging procedures.[90] Finally, another area of concern regarding health care is the insurance companies' role in deciding patient's treatment. Especially because of the proliferation of managed care, too often treatment decisions are based on whether the insurance company will cover the treatment. This idea has been picked up in the design of Medicare Part D, so depending on the prescription plan (whether under original Medicare or Medicare Advantage), some beneficiaries may not be able to obtain the drug prescribed by their doctors but instead may have to take "equivalents."[91]

D. Long-Term Care–a Quick Look at a Growing and Looming Issue.

Long-term care usually refers to nursing home care and community care for those elders in need of some level of care or assistance with activities of daily living or ADLs. Activities of daily living (ADLs) are defined as

> self-care activities that a person must perform every day (eg, (*sic)* eating, dressing, bathing, transferring between

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[87] Medicare only provides limited coverage for nursing home care—a maximum of 100 days of coverage following a hospital stay of at least three days for beneficiaries that need *skilled* care. Medicaid's requirements of coverage of nursing home care involve income and need for care–but does not require that the beneficiary need *skilled* care. 42 U.S.C. § 1395(d) (2007); 42 C.F.R. § 409.5 (2007).

[88] According to the National Governors' Association Center for Best Practices, "long term care costs [consume] 35% of all Medicaid spending by states [or (] $76.5 billion. . . ." Natl. Governors' Assoc. Center for Best Practices, *Long Term Care: Overview*, http://www.nga.org/portal/site/nga/menuitem.1f41d49be2d3d33eacdcbeeb501010a0/?vgnextoid=97d84bf37ebdff00VgnVCM1000001a01010aRCRD.

[89] *Id.*

[90] The body of law dealing with end of life decision-making has been developed over the past thirty years and a comprehensive discussion of that is beyond the scope of this article. Only a mention of the issue will be included in this article.

[91] *See e.g.* 42 U.S.C. § 1395w-102 (2007), 42 C.F.R. §§ 423.120, 423.566 (2007).

> the bed and a chair, using the toilet, controlling bladder and bowel).

ADLs are different than instrumental activities of daily living (IADLS), which are

> activities that enable a person to live independently in a house or apartment (eg, (*sic)* preparing meals, performing housework, taking drugs, going on errands, managing finances, using a telephone).[92]

Institutional long-term care, that is, care provided in nursing homes, is one of the most heavily regulated industries in the United States, with federal[93] and state laws and regulations applying to the industry.[94] There is also a substantial body of case law, primarily dealing with resident rights, focusing mainly on the quality of care provided to residents, in particular, falls, bed sores, and death.[95]

A more current issue involves long-term care provided in the community. Because neither Medicare[96] or Medicaid is set up to routinely cover community-based long-term care,[97] our history with this type of long-term care is still somewhat underdeveloped. Most people wish to remain in the community, preferably in their homes, and in many instances, care can be provided cheaper to elders in their homes than in a nursing home. A significant number of elder Americans in fact receive care in their homes.[98] Architects, builders and others are recognizing

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[92] The Merck Manual of Geriatrics, Sec 1, Ch. 4, Assessment Domains (3d ed.), http://www.merck.com/mrkshared/CVMHighLight?file=/mrkshared/mmg/sec1/ch4/ch4b.jsp%3Fregion%3Dmerckcom&word=activities%20of%20daily%20living&domain=www.merck.com#hl_anchor (accessed Mar. 22, 2007).

[93] *See e.g.*, 42 U.S.C. § 1395 (2007); 42 C.F.R. § 483.1 (2007).

[94] *See e.g.,* www.cms.hhs.gov for federal regulations, policy manuals, agency transmittals.

[95] Usually the reported cases are torts, including negligence and intentional torts or malpractice cases. A large number of cases deal with bed sores and deaths.

[96] *See supra* n. 13, at 81.

[97] *Id.* at 83.

[98] *See supra* n. 13, at 66 ("Home- and community-based care are the most common care arrangements for older Americans. About 70 percent to 80 percent of noninstitutionalized older people receive care from friends and family, often with help from supplementary paid helpers. . . .") (citing Stone et al., 1987; Miller et al., 1996); *id.* ("Over 65 percent of older noninstitutionalized people depend solely on unpaid help.") (citing Stone, 2000); *id.* ("For seniors who remain in the community, studies have shown an increase in the use of paid care, especially at higher levels of disability, when informal care was often supplemented by formal care.") (citing Noelker and Bass, 1989; Norgard and Rodgers, 1997; Liu et al., 2000; Spillman and Pezzin, 2000; Langa et al., 2001); *id.* (*"*Older people receiving paid care receive, on average, fewer hours of care per week.") (citing Feder et al., 2000); *id.* at 80 ("Among the nearly 70 percent of the oldest old who needed long-term care in 1995, nearly 70 percent lived in the community.").

that homes can be built, or retrofitted, in a way that allows people to maximize their independence in their homes as they age, allowing them to stay at home longer, and perhaps avoid the need for nursing home care.[99]

V. THE FUTURE–HOW THE U.S. WILL RESPOND [100] TO ISSUES FACING AMERICAN'S ELDERS

Perhaps more critical than where we have been or where we are is where we are going. Elder Law is at a crossroads of sorts, in part because of the enactment of the Deficit Reduction Act,[101] in part because of the aging of the Boomers, in part because of the changes in pension and estate tax laws, and in part because of the number of attorneys who include people with disabilities in their elder law client base. This section of the article will address the future of the law, the future of the practice, and the future of legal education on elder law.

The Future of the Law

Although without a working crystal ball, it is likely that there will be ongoing changes in certain areas of the law and more dramatic changes in others. Consumer law, for example, may take on more importance, as consumer scams continue to proliferate,[102] while Medicaid planning may become less prominent in the long-term care planning process.[103] The demographics of the United States may direct a shift in social programs. With fewer workers and more retirees, will we be able to sustain Social Security and Medicare at their current levels of

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[99] Various housing options for elders exist in the U.S., but more than a mention are beyond the scope of this article. One area of growing recognition is the concept of Universal Design, that is designing homes that work for all occupants, no matter the occupant's age or disability. *See* N.C. State U. College of Design, *Center for Universal Design: Environments and Products for All People*, http://www.design.ncsu.edu/cud/.

[100] Perhaps a better title for the section would be *The Future–How the U.S. Will Respond–or Not– to Issues Facing American's Elders*. There are many instances where no cohesive policy was developed and laws and "solutions" were simply developed piecemeal on an ad hoc basis, if at all. We are seeing some of this occurring now in the changes to Medicare and Medicaid. Rather than being driven by a desire to provide better benefits to elders, the changes are being driven by cost-cutting measures without much, if any, regard to the consequences and impact on America's elders.

[101] *Deficit Reduction Act of 2005*, Pub. L. 109-171 (Feb. 8, 2006).

[102] This generation, especially those referred to as *The Greatest Generation*, are generally referred to as growing up at a time when a person's word meant something, therefore they are considered to be more trusting of what someone tells them. The Boomers may not share that trait, which may come in handy in protecting themselves from consumer scams.

[103] The decline of the importance of Medicaid planning, or the need for more complicated plans to achieve Medicaid eligibility is driven in part by the Deficit Reduction Act. Because of the questions surrounding the passage of the Act, it is still not known whether the Act will ultimately be upheld as constitutional.

benefits and coverages, or will we as a nation have to change social policy?

A. Elder Abuse and Neglect

It is frequently said that elder abuse is where child abuse and domestic violence was twenty years ago–in terms of effectiveness in dealing with the problem, the laws, the response of courts, law enforcement, APS and other professionals, etc.[104] If that does hold true, then there will be significant improvements in the fight against elder abuse - as long as the federal and state governments devote sufficient funding to do so. Courts need to explore the idea of elder courts[105] to help combat elder abuse more effectively. Under-reporting of elder abuse still appears to be a significant problem, for a variety of reasons. Mandatory reporting, although understandable, does not appear to have been as effective as intended.[106] There has to be sufficient funding for training of law enforcement and other personnel. There needs to be more education of the public regarding why this is a serious crime. Law enforcement and prosecutors need to put as much emphasis on these cases as they do other felonies.

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[104] *See generally* David A. Wolfe, *Elder Abuse Intervention: Lessons from Child Abuse and Domestic Violence Initiatives*, Chapter 15 from ELDER MISTREATMENT: ABUSE, NEGLECT, & EXPLOITATION IN AN AGING AMERICA, The National Academies Press, Richard J. Bonnie and Robert B. Wallace, eds. (2002). "Efforts to understand and deal with abuse of the elderly by family members or other caregivers are reminiscent of where the study of child abuse and woman abuse was 20 years ago." *Id.* at 501. http://books.nap.edu/openbook.php?record_id=10406&page=501.

[105] The idea of elder court is similar to family court but with broader jurisdiction. The concept would create a division within the circuit courts of the state and all cases where one party is a specific age would be assigned to that division. The advantages of the elder court would be that judges and court personnel could be trained in special needs involving elders, could be schooled in appropriate intervention programs, and more effective punishments and sentencing (for example, if an Alzheimer's patient kills someone, does he get sent to prison or a facility that specializes in treatment of people with Alzheimer's?). It would also allow judges to more effectively track those times when one person is involved in multiple cases. For example, if a defendant is scamming a number of elderly people, the same judge (or judges in the division) would be assigned all those cases, so it would be known at sentencing that the defendant has multiple offenses against multiple victims. It would also allow a judge to know about an elder victim of a crime, such as elder abuse, who now is the subject of a guardianship proceeding, brought about in large part because of the abuse.

Although there are a number of speciality courts in existence (family court, domestic violence court, drug court to name a few), there does not seem to be much momentum for the establishment of an elder court division. The closest is the Elder Justice Centers in Hillsborough County and in Palm Beach County. These are not speciality courts, but the Centers work closely with the probate judges, providing, for example, case management or advice to the courts. See Thirteenth Judicial Circuit: Administrative Office of the Courts, *Elder Justice Center*, http://www.fljud13.org/ejc.htm (accessed Feb. 23, 2007) and Dept. of Pub. Safety, *Elder Justice*, http://www.co.palm-beach.fl.us/pubsafety/justice/ElderJustice.htm (last modified Oct. 6, 2004).

[106] Some mandatory reporters may have concerns regarding liability if the elder ever learns about the reporter's identity, despite the protections provided by the statutes.

B. Social Security, Pensions and Income Security – You Can't Take That to the Bank![107]

"*The sky is falling*"[108] or is it? For the past several years, the Bush administration has claimed that Social Security's solvency is at risk because of the number of Boomers who will soon be reaching retirement age. Numbers don't lie, but certainly can be manipulated. It is clear that the worker-to-retiree ratio will drastically drop as the Boomers retire, so at some point Social Security will run at a deficit without changes.[109] Privatization may not be the answer, but at least partial privatization is being offered as one of the solutions. With the passing of the mid-term elections, it is likely that either the Administration or Congress will take up the issue.

The chairman of the Federal Reserve has spoken on the issue of changes to Social Security and Medicare, and described the issues of their fiscal impact as one of "generational equity." Looked at broadly, to prepare for the aging of America, crucial changes may be necessary to our basic economic habits of savings, work, and consumption. How much of a change will hinge on the way the "burdens of aging" are spread over the generations. Spreading the costs of aging across the various age groups raises issues of "intergenerational equity" and "economic efficiency."[110] The choices offered by the Chair of the

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[107] The phrase "you can take that to the bank" was used to connote a sure thing–something you can bank on. According to the Random House Historical Dictionary of American Slang, the phrase "take to the bank" was made popular by the main character of the television series *Baretta* and means that is something one can "bank on" or "be absolutely assured of." Random House Historical Dictionary of American Slang, Vol. 1, A-G at 89 (J.E. Lighter, ed. 2004). The phrase has come to signify reliability or a guarantee, something you can count on.). Because of the precarious situation of the sources of retirement income, they are no longer a "sure" thing.

[108] Quote from "Chicken Little," "a character in a story who is hit on the head by an acorn and believes the sky is falling." Am. Heritage Dictionary of the English Language, *Chicken Little*, http://www.bartleby.com/61/72/C0287200.html (4th ed. 2000).

[109] John Palmer and Thomas saving, *Summary Trust Fund Reports (2005)*, http://www.ssa.gov/history/reports/trust/trustreports.html#summaries (accessed Feb. 23, 2007).

The fundamentals of the financial status of Social Security and Medicare remain problematic under the intermediate economic and demographic assumptions. Social Security's current annual cash surpluses will soon begin to decline and will be followed by deficits that begin to grow rapidly toward the end of the next decade as the baby boom generation retires.

[110] Ben S. Bernanke, Chair, Federal Reserve Board, *The Coming Demographic Transition: Will We Treat Future Generations Fairly?*, http://www.federalreserve.gov/boarddocs/speeches/2006/20061004/default.htm (Oct. 4, 2006).

[T]he broader perspective shows clearly that adequate preparation for the coming demographic transition may well involve significant adjustments in our patterns of consumption, work effort, and saving. Ultimately, the extent of these adjustments depends on how we choose--either explicitly or implicitly--to distribute the economic burdens of the aging of our population across generations. Inherent in that choice are questions of intergenerational equity and economic efficiency, questions

Federal Reserve are not happy ones–"[a]s the population ages, the nation will have to choose among higher taxes, less non-entitlement spending, a reduction in outlays for entitlement programs, a sharply higher budget deficit, or some combination thereof."[111]

Any reform is a hard sale.[112] Social Security is one of the sacred cows and politicians fear repercussions at the polls. Current retirees are unconcerned, because the proposals previously put forward by the Administration wouldn't affect them. The younger generations just entering the work force don't seem to care much, perhaps because of the number of years they have until retirement.[113] Those who need to be the most concerned about the Administration's proposals are the tail-end of the Boomer generation–those who might find their benefits lessened if a reform plan is adopted. Truth be told–we can't continue as we are and something needs to be done, but is a drastic overhaul of the program very likely?

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that are difficult to answer definitively but are nevertheless among the most critical that we face as a nation.

[111] *Id.*

Mr. Bernanke described the impact of his four options this way:

To get a sense of the magnitudes involved, suppose that we tried to finance projected entitlement spending entirely by revenue increases. In that case, the taxes collected by the federal government would have to rise from about 18 percent of GDP today to about 24 percent of GDP in 2030, an increase of one-third in the tax burden over the next twenty-five years, with more increases to follow. . . . Alternatively, financing the projected increase in entitlement spending entirely by reducing outlays in other areas would require that spending for programs other than Medicare and Social Security be cut by about half, relative to GDP, from its current value of 12 percent of GDP today to about 6 percent of GDP by 2030. In today's terms, this action would be equivalent to a budget cut of approximately $700 billion in non-entitlement spending.

Besides tax increases, spending cuts, or reform of the major entitlement programs, the fourth possible fiscal response to population aging is to accommodate a portion of rising entitlement obligations through increases in the federal budget deficit. The economic costs and risks posed by large deficits have been frequently discussed. . . . I will only observe that, among the possible effects, increases in the deficit (and, as a result, in the national debt) would shift the burden of paying for government spending from the present to the future. Consequently, the choices that fiscal policy makers make with respect to these programs will be a crucial determinant of the way the economic burden of an aging population is distributed between the current generation and the generations that will follow.

[112] The Federal Reserve Chairman described the need for reform as one of fairness in determining which generation should bear the costs of the population's aging. Ben S. Bernanke, Chair, Federal Reserve Board, *The Coming Demographic Transition: Will We Treat Future Generations Fairly?*, Remarks before The Washington Economic Club, Washington, D.C. (Oct. 4, 2006), http://www.federalreserve.gov/boarddocs/speeches/2006/20061004/default.htm ("At the heart of the choices our elected representatives will have to make regarding the distribution of these costs across generations will be an issue of fairness: What responsibility do we, who are alive today, have to future generations? What will constitute ethical and fair treatment of those generations, who are not present today to speak for themselves? . . . [I] suspect that many people would agree that a fair outcome should involve the current generation shouldering at least some of that burden, especially in light of the sacrifices that previous generations made to give us the prosperity we enjoy today.") *Id.*

[113] Or, perhaps, the lack of interest stems from their belief that Social Security won't be there for them.

Pensions will be different in the future. The shift is already underway, changing pensions from defined benefit plans to defined contribution plans.[114] Although new laws will hopefully shore up those underfunded pension plans, employees are going to need to rely less on employer plans to fund their retirements and will need to save more. Employers will continue to look at benefits packages for current and retired employees as a way to cut cost and maximize profits.

That leaves the third leg of the metaphorical three-legged stool– private savings, but that won't save the day. People are struggling with increasing costs of health care and daily living expenses. As the housing market skyrocketed, many homeowners found their home values increasing, along with their taxes and insurance. Although the housing market may have cooled off, homeowners are still facing increased taxes and property insurance rates.[115] There is just a finite amount of money and people may not be saving enough to fund their retirements[116] or are having to spend a significant amount on health care costs. Unless the future generations change their spending and savings ways,[117] we may

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[114] *Pension Protection Act of 2006*, Pub. L. 109-280 (Aug. 17, 2006) (generally, enacting more burdensome requirements for defined benefit plans, and providing incentives for defined contribution plan sponsorship).

[115] In Florida, for example, many homeowners' insurance companies are either drastically increasing premiums or pulling out, making it very difficult for homeowners to find insurance at all, and forget trying to find "affordable" insurance.

See generally Fed. Interagency Forum on Aging Related Statistics, *Older Americans Update 2006: Key Indicators of Well-Being: Economics* 10, http://www.agingstats.gov/update2006/Economics.pdf (accessed Feb. 23, 2007) discussing housing expenditures and noting that "[w]hen housing expenditures comprise a relatively high proportion of total expenditures, less money is available for health care, savings, and other vital goods and services."

[116] *See e.g.*, Helen Huntley, *Think You Have a Good Game Plan for Retirement Expenses? Think Again,* St. Petersburg Times (Sept. 3, 2006).

[117] One of the options put forth by the Federal Reserve Chairman was to increase individual savings. The Federal Reserve has looked at how to encourage personal savings but has yet to find the best way to make that happen:

> A broad-based increase in household saving would benefit both the economy and the millions of American families who currently hold very little wealth. Unfortunately, many years of concentrated attention on this issue by policymakers and economists have failed to uncover a silver bullet for increasing household saving. One promising area that deserves more attention is financial education. The Federal Reserve has actively supported such efforts, which may be useful in helping people understand the importance of saving and to learn about alternative saving vehicles. Psychologists have also studied how the framing of alternatives affects people's saving decisions. For example, studies suggest that employees are much more likely to participate in 401(k) retirement plans at work if they are enrolled automatically--with a choice to opt out-- rather than being required to actively choose to join. The pension bill recently passed by Congress and signed by the President included provisions to increase employers' incentives to adopt such opt-out rules; it will be interesting to see whether such rules are adopted and, if so, how effective they are in promoting employee saving.

Ben S. Bernanke, Chair, Federal Reserve Board, *The Coming Demographic Transition: Will We Treat Future Generations Fairly?*, http://www.federalreserve.gov/boarddocs/speeches/2006/20061004/default.htm (Oct. 4, 2006).

see some serious issues – whether people will be able to afford to retire[118] or whether they will have to work past the typical retirement age before retiring.[119] Usually, once an individual retires, the individual may experience a shift in income or savings.[120] The shift may be an upward shift or a downward shift, in large part dependent on cost of living, terms of retirement plans, and investment portfolio for savings. In cases where the costs of daily living outpace the increase in cash flow, over time, an individual will experience a decline in savings, and perhaps, income.

Decreases in income can best be illustrated by those current retirees who receive Social Security. The increases in the cost of health care, in particular, Medicare premiums and deductibles are greater than the annual cost of living adjustment ("COLA"), meaning that Social Security recipients are actually losing ground for every year that the health care costs increase more than the Social Security COLA. It stands to reason then, for at least some retirees, that their incomes and their savings will diminish with each passing year. There are variables that can

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[118] There is some evidence that people may have to continue working past "normal" retirement age in order to fund their retirement at the desired standard of living. *See*, Alicia H. Munnell and Pamela Perun, *Center for Retirement Research at Boston College, Issues in Brief: An Update on Private Pensions,* http://www.bc.edu/centers/crr/ib_50.shtml (Aug. 27, 2006).

The key finding is that total pension coverage has remained stagnant while the nature of coverage has continued to shift to 401(k) plans. These developments, coupled with declining levels of earnings replacement under Social Security, mean that future retirees will have to work longer if they want to maintain their pre-retirement standard of living in retirement.

Id.

[119] Alicia H. Munnell, Marric Buessing, Mauricio Soto, and Steven A. Sass, *Center for Retirement Research at Boston College, Issues in Brief: Will We Have to Work Forever?,* http://www.bc.edu/centers/crr/wob_4.shtml (Aug. 2006).

One powerful antidote to reductions in retirement income is to work longer. Working directly increases people's current income; it avoids the actuarial reduction in Social Security benefits; it allows their 401(k) plans to grow; and it postpones the day when they start drawing down their pension accumulations or other retirement saving. The question is how much longer people will need to work . . . and . . . delaying retirement by about two years can have a major impact on retirement security for those with significant 401(k) assets; households that depend solely on Social Security, however, would have to extend their work lives by more than three and a half years to achieve similar gains.

Id.

According to the MetLife Survey, Boomers are worried about outliving their assets:

When it comes to having enough money in retirement, aging Boomers (age 55-59) are the least confident of the bunch. About 44% are not confident they will have enough money to live comfortably past age 85. Those age 60-65 and 66-70 are considerably more confident (69%) on the issue of retirement security, although their confidence may be unfounded.

David DeLong & Assoc., Zogby Intl., MetLife Mature Mkt. Inst.®, *Living Longer, Working Longer: The Changing Landscape of the Aging Workforce – A MetLife Study Findings from a National Survey of Aging Workers Who Remain in – Or Return to - the Workplace, How They Fare, And Why* 18, http://www.metlife.com/WPSAssets/937035861011441762 43V1FLivingLonger.pdf (Apr. 2006).

[120] *See e.g.*, Barbara A. Butrica, *How Economic Security Changes During Retirement*, Center for Retirement Research at Boston College, CRR WP 2007-6 (Feb. 2007), http://www.bc.edu/crr.

drastically affect a retiree's financial well-being, not the least of which is a change in health status.[121] The impending retirement of the leading edge of the Boomers heralds a worsening problem, as the Boomers as a group are projected to have a drop in their post-retirement standard of living.[122] Of course, having some people work longer rather than retire has benefits for their income security and the economy.[123] Although some may benefit from continued working, others may not.[124]

C. Health Care

Medicaid planning has already been significantly affected by the passage of the Deficit Reduction Act.[125] That, coupled with the "repeal"

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[121] Barbara A. Butrica, *How Economic Security Changes During Retirement* 15, Center for Retirement Research at Boston College, CRR WP 2007-6 (Feb. 2007).

[122] Barbara A. Butrica, *How Economic Security Changes During Retirement* 9-10, Center for Retirement Research at Boston College, CRR WP 2007-6 (Feb. 2007). After retirement, the Boomers are predicted to only replace 93% of their earnings. *Id.* at 10.

[123] Ben S. Bernanke, Chair, Federal Reserve Board, *The Coming Demographic Transition: Will We Treat Future Generations Fairly?*, http://www.federalreserve.gov/boarddocs/speeches/2006/20061004/default.htm (Oct. 4, 2006).

Another response to population aging is to adopt measures that encourage participation in the labor force, particularly among older workers. In the near term, increases in labor force participation would raise income; some of this income would be saved and would thus be available to augment the capital stock. In the long run, higher rates of labor force participation, particularly by those who would otherwise be in retirement, could help to offset the negative effect of population aging on the share of the population that is working.

To some extent, increased labor force participation by older workers may happen naturally. Increased longevity and health will encourage greater numbers of older people to remain longer in the workforce. And slower growth in the labor force will motivate employers to retain or attract older workers--for example through higher wages, more flexibility in work schedules, increased training directed toward older workers, and changes in the retirement incentives provided by pension plans.

Id.

[124] Esteban Calvo, *Center for Retirement Research at Boston College, Work Opportunities for Older Americans, Issue Brief, Does Working Longer Make People Healthier and Happier?*, http://www.bc.edu/centers/crr/issues/wob_2.pdf (Feb. 2006).

While working longer seems beneficial for most people, it will likely have negative consequences for some. The type of job seems to be a critical factor. Undesirable jobs can wash out the potential favorable effects of work. Another critical factor is the opportunity to continue working. Older workers may be *willing* to prolong paid work, but, in order to find a job, they need to be *able* to work and have a real demand for their labor. Policymakers need to consider these factors when evaluating proposals to keep people in the labor force.

These findings suggest interesting areas for future research. For example, an increase in the early retirement age reduces the ability of people to voluntarily decide their labor force participation. Less control in the work/retirement decision could have an adverse impact on the well-being of older individuals. . . . Even though work at older ages seems beneficial for many, the benefits may decrease, or stop increasing, after a certain age or amount of time worked per year. (citations omitted).

Id.

[125] *Deficit Reduction Act of 2005*, Pub. L. No. 109-171 (Feb. 8, 2006). Because the House and Senate did not enact identical versions of the bill, several lawsuits were filed challenging the constitutionality of that law. States are moving forward with implementation of the DRA's

of the estate tax,[126] makes long-term planning less appealing to clients who may be less likely to seek services of elder law attorneys.

Medicare is changing as well. Part B premiums will be "means-tested," with those above a certain income paying more than those below that income level.[127] Although much is made about the long-term viability of Social Security, Medicare must not be forgotten.[128] Although Part B is more viable because of the correlation of expenses to costs and the ability to increase premiums each year, Part A is more vulnerable because of the way it is funded, but both programs are at serious risk.[129] Prescription costs continue to increase and Part D only provides a limited amount of coverage.[130]

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provisions, but a lot of uncertainty remains. How some provisions will be applied by the states remains to be seen. Many states have to pass implementing legislation, and their timetables for doing so are not uniform. It is also unclear which date will be the effective date in each state and whether the states will apply the five-year look-back period on the date of the passage of the law (February 8) or whether they will apply it effective on the passage of their implementing statutes (where needed).

In an opinion dismissing one challenge to the DRA was a statement that the House Clerk acknowledged that the House and Senate did not pass identical versions of the bill.

> the House leadership and Clerk of the House subsequently have acknowledged in letters and other statements that the vote was upon the engrossed bill containing the erroneous 36-month provision. . . . (*citations omitted)*.

Public Citizen v. Clerk, 451 F. Supp. 2d 109 (D.D.C. 2006).

[126] At this writing the repeal sunsets in 2011 absent action from Congress making the repeal permanent. There were efforts in this last Congress to do so, but those efforts failed, perhaps because it was an election year.

[127] For the first time, starting in 2007, Medicare beneficiaries will pay different amounts for their Part B premiums, based on their incomes. For those beneficiaries whose income is less than or equal to $80,000 (or file jointly, less than or equal to $160,000), the premium will be $93.50. The increased premiums for 2007 are $105.80 for those individuals filing a tax return with income greater than $80,000 and less than or equal to $100,000 (or jointly, greater than $160,000 and less than or equal to $200,000), $124.40 for those individuals filing a tax return with income greater than $100,000 and less than or equal to $150,000 (or jointly, greater than $200,000 and less than or equal to $300,000), $142.90 for those individuals filing a tax return with income greater than $150,000 and less than or equal to $200,000 (or jointly, greater than $300,000 and less than or equal to $400,000), and $161.40 for those individuals filing a tax return with income greater than $200,000 (or jointly, greater than $400,000). 71 Fed. Reg. 54,666 (Sept. 18, 2006); *corrected by* 71 Fed. Reg. 55,480 (Sept. 22, 2006).

[128] *See supra* n. 83.

[129] *Id.*

[130] John Palmer and Thomas Saving, *Summary Trust Fund Reports (2005)*, http://www.ssa.gov/history/pdf/tr05summary.pdf.

The change in the outlook is equally stark for SMI, where Part B is now joined by the new Part D Prescription Drug Benefit. Annual income to the SMI Trust Fund is always projected to be sufficient to cover costs, since general revenue transfers and beneficiary premiums are automatically adjusted each year to achieve this outcome. But the required rate of growth of such revenues is far more than previously anticipated. With the retirement of the baby boom generation, SMI costs (as a percent of GDP) are now projected to nearly quadruple from 1.2 to 4.6 over the next 30 years and to continue to increase rapidly thereafter. As a result, total Medicare expenditures are now projected to increase from 2.6 to 5.7 percent of GDP by 2024, when Medicare expenses will first exceed those of Social Security.

Id. at 16.

Both Social Security and Medicare are projected to be in poor fiscal shape, though Social Security poses a far more manageable problem—in analytic and dollar terms—than does Medicare.

With health care costs continuing to increase, there will be a growing problem with people paying for health care.[131] In fact, this may dictate how long people continue to work before retiring.[132] People may have to make choices between health care and other financial obligations.

The fiscal problems of both programs are driven by inexorable demographics and, in the case of Medicare, inexorable health care cost inflation, and are not likely to be ameliorated by economic growth or mere tinkering with program financing.

Trustees of the Social Security and Medicare Trust Funds, *A Summary of the 2006 Annual Social Security and Medicare Trust Funds Reports*, http://www.ssa.gov/OACT/TRSUM/tr06summary.pdf (2006).

One ignominious provision of Part D is the coverage gap, or the infamous "donut hole" where the beneficiaries continue to pay premiums but have no coverage for their prescriptions until they accumulate enough expenses to reach the other side of the "gap". Many elders are now in the gap, and are learning the hard way that "donut hole" is not just a snack food.

[131] A recent study from the Commonwealth Fund found that people are having increasing problems paying for health care. Cathy Schoen, Sabrina K. H. How, Ilana Weinbaum,

John E. Craig, Jr., and Karen Davis, Commission on a High Performance Health System, the Commonwealth Fund, *Public Views on Shaping the Future of the U.S. Health System,* http://www.cmwf.org/usr_doc/Schoen_publicviewsfuturehltsystem_948.pdf (Aug. 2006)

Affordability of care and insurance is of growing concern. In addition to concerns about costs, a high proportion of adults has serious problems getting timely care and reported spending time on paperwork and having disputes related to medical bills and insurance. . . .

• Nearly two of five adults (38%) reported serious problems paying for their own or their family's medical care. A similarly high proportion said it (*sic*) has had difficulty paying for health insurance.

. . .

• Overall, more than two-thirds of respondents (69%) noted that at least one of the aforementioned issues was a serious problem in the previous two years.

• Half of middle-income ($35,000–$49,999 annually) and lower-income (less than$35,000 annually) families said they have had serious problems paying for care in the past two years.

• With the median U.S. household income at $44,000, the findings indicate that more than half of all households are experiencing stress when paying for medical care.

• A similarly high proportion of middle- and lower-income adults reported difficulties paying for health insurance.

• Among these middle- and lower-income groups, more than one of four described cost concerns are "very serious."

• Affordability is a now a concern at even higher-income levels. One-third of adults with annual incomes between $50,000 and $74,999 reported serious problems in paying for care.

Id. at 13-15.

[132] Working longer could be looked at as an equation with three parts: the need, the desire and the ability to work longer. A person's health may negatively affect the person's ability and to some extent, desire, but not necessarily the person's need. In fact, for some poor health may be a reason the person needs to work longer—in order to have income to cover those costs not otherwise covered by health insurance or for the costs of health insurance. Although a need may exist, a person may no longer have the ability. See generally, Alicia H. Munnell & Jerilyn Libby, Center for Retirement Research at Boston College, *Issues in Brief: Will People Be Healthy Enough To Work Longer?* (Mar. 2007).

D. Long-Term Care

America has failed to have any effective policy on long-term care, instead dealing with the issue piecemeal. Medicare only pays for skilled care, while Medicaid pays for long-term care, but primarily that care is provided in a nursing home rather than in a community setting.[133] Nursing home care continues to be problematic, with quality and compliance spotty in many homes. Most Americans would prefer to remain in their homes and receive care there, but lack the resources and savings to pay for it. Although long-term care insurance is offered as the solution for paying for nursing home care, insufficient numbers of Americans have adequate long-term care coverage. That, coupled with the way the policies' premiums and coverages are determined, oftentimes leaves the insured with little needed coverage.[134] With the demographic data, sheer numbers, longevity and chronic health conditions, it is clear that the United States needs to take a hard look at how health care is funded and provided. Although rationing currently exists, subtly, through pre-existing condition exclusions, co-pays, and gatekeepers, to name a few, we may see this country headed soon to a time where health care is denied a person based on age *and* ability to pay. Although some advocate for more patient financial responsibility[135] that is not a path that can be taken overnight. People must be given notice of the financial responsibility and the opportunity to save for it.[136]

> The moral test of government is how that government treats those who are in the dawn of life, the children; those who are in

[133] Medicaid may cover care at home or in the community through a waiver program or demonstration project. Those are not without pitfalls, and may be put forth more as a way for a state to save money than to provide better care to the elder. For a commentary on the problem with home and community based care funded by Medicaid. *See* Edward C. King, Executive Director, National Senior Citizens Law Center, The Commonwealth Fund, *Rethinking Long-Term Care*, http://www.cmwf.org/publications/publications_show.htm?doc_id=331767 (Dec. 2005) (expressing concerns about the lack of quality oversight and the ability of the states to cover less services).

[134] *See e.g.*, Consumer Reports, *Do You Need Long-Term Care Insurance?*, http://www.consumerreports.org/cro/personal-finance/longterm-care-insurance-1103/overview/index.htm?resultPageIndex=1&resultIndex=1&searchTerm="long-term%20care" (Nov. 2003).

[135] *See e.g.,* John F. Derr, R.Ph., The Commonwealth Fund, *Financing Health Care for An Aging Population*, http://www.cmwf.org/publications/publications_show.htm?doc_id=331494 (Dec. 2005).

[136] A different course of action is not a solution unless it is viable. Given the problems that American elders currently have with saving and meeting ever-increasing expenses of daily living, shifting greater financial responsibility for the cost of health care onto the beneficiary will have a domino effect, with elders no longer able to afford needed health care, taxes and insurance on their homes, utilities, etc.

> the twilight of life, the elderly; and those who are in the shadows of life - the sick, the needy and the handicapped.[137]

Doesn't look like we're doing too good meeting this test.

The Future of the Practice

Over the years, the number of attorneys holding themselves out as elder law attorneys has grown steadily. NAELA[138] now has over 5,000 members[139] and the management of NAELA predicts continued growth. NAELA recently changed its mission statement, logo, and tag line to reflect the representation of people with special needs.[140] In an interview with the executive director[141] and managing director,[142] they were confident that NAELA and concomitantly, the elder law practice, would continue to grow, because they expect an increasing emphasis on issues affecting seniors, and an increasing focus on the numbers and needs of seniors.[143]

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[137] Hubert Horatio Humphrey, Vice President of the United States (1911-1978), *Eminently Quotable*, http://www.buzzflash.com/articles/perspectives/quotes (Aug. 23, 2006).

[138] *See supra* text accompanying n. 17.

[139] *See supra* n. 30.

[140] The NAELA "tag line" is "Leading the Way in Special Needs and Elder Law." National Academy of Elder Law Attorneys, *Leading the Way in Special Needs and Elder Law*, http://www.naela.org (visited August 27, 2006). *See supra* n. 24.

[141] Susan McMahon, Esq. is Executive Director for the National Academy of Elder Law Attorneys and Vice President of the Kellen Company in Tucson, Arizona. From 1992 to 2004 she was In-house Council and Director of Advocacy for Ray Graham Association for People with Disabilities. Starting in 1975, Susan directed Ray Graham Association in many managerial roles, including Vice President of Operations. She is a founding member, past president, and past director of the National Guardianship Association, the National Guardianship Foundation, and the Illinois Guardianship Association. She holds a J.D. from John Marshall Law School, Chicago, Illinois, and a B.S. from MacMurray College, Jacksonville, Illinois, with majors in Psychology and Special Education (EMH & TMH Certification).

[142] Deborah Barnett was Vice President of Management Plus, Ltd, a Tucson, Arizona based association management company since April 1, 1991. Management Plus was acquired by The Kellen Company in January 2004. Debbie began her career with Management Plus in 1986 and worked as both an employee and an independent contractor in the years leading up to her partnership with Laury Adsit Gelardi. At the time of the merger, Management Plus had 18 employees and 11 full-service client associations. Debbie serves as Managing Director for the National Academy of Elder Law Attorneys and Executive Director of the National Elder Law Foundation. She oversees client finances and budgets, web site development and implementation, and certification programs, as well as the day-to-day operations of the company. Prior to joining Management Plus, Debbie worked for the Tucson Board of Realtors as Director of the Multiple Listing Service; and Lawyers Title Agency of Arizona as an escrow officer and branch manager, and marketing representative. She has a Master's Degree in Business Administration from the University of Phoenix and a Bachelor of Arts Degree in Communications from the University of California, PA.

[143] Telephone interviews with Susan McMahon, Exec. Dir. for Natl. Acad. of Elder L. Attys. and Vice Pres. of Kellen Co., and Deborah Barnett, Managing Dir. for Natl. Acad. of Elder L. Attys. and Exec. Dir. of the Natl. Elder L. Found. (July 18, 2006).

The plan for NAELA is to expand its education.[144] The leadership believes that as NAELA moves more into the areas of special needs and disability law, more attorneys will join NAELA. NAELA has found that their web site's listing of member names is proving popular with consumers who are finding elder law attorneys through the NAELA web site.[145]

Elder law attorneys are going to need to learn more about issues surrounding health care because they are needed to help clients obtain and navigate the health care system.[146] Technology, not just in the law office, but in clients' homes, and in the provision of health care, may drive issues and make new options available to clients.[147] Technology

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[144] NAELA will offer three levels of programs: basic, intermediate and advanced, as well as staff programming. They expect that the basics programs will draw new attorney members. As well, NAELA is adding more telephone CLEs and has entered into a relationship with ALI-ABA. *Id.*

[145] Because more consumers are finding attorneys through the NAELA web site, management believes that as that word gets out (that consumers are using NAELA to find attorneys) more attorneys will join NAELA. NAELA has also rolled out a public relations and branding campaign. *Id.*

[146] Telephone interview with Charlie Robinson, Esq., Elder L. Atty. and nationally known futurist about the law practice. (July 18, 2006).

[147] *Id.* Mr. Robinson used the example of robotic in-home caregivers as an example of how technology might provide new options to clients.

The idea of robotic care-givers and other technological advances to provide care-giving is not that far away. *See* AARP Global Aging Program Idea Exchange Series, *Aging in the 21st Century – Emerging Technologies Around the World A Conversation with Russell Bodoff*, http://www.aarp.org/research/international/events/jan30_06_bodoff.html (Feb. 2006).

Russell Bodoff serves as the Executive Director of the Center for Aging Services Technologies (CAST), [and] spoke at AARP about the potentials of technology to improve lives and societies in an aging world, how it can be used to help older people live healthier, more independent and more active lives, and how it can help alleviate the costs of care to families, care systems and public finances. [He] . . . described CAST's work and highlighted best practices and examples from the United States and internationally for effectively using technology to help people age in place and to improve care facilities.

Mr. Bodoff foresees the use of technology to provide or augment in-home care.

Technology can be used to create "caregiver networks," that enable people to age in the comfort of their homes, safely and actively. Older people can be equipped with wireless health devices that consistently monitor vital signs, remind them to take medications, and record activity rates. The data collected can be networked to personal computers that store and send reports, signals and alerts to caregivers, physicians and families. The information creates important data logs that can be tracked and analyzed, providing "caregiver networks" with accurate and timely information about the health and safety of their patients and family members. Such systems can allow children of older parents to remain mobile, yet remain engaged with, and even more aware of the conditions of their parents. At the same time, these systems can allow older people to remain independent, mitigate concerns they may have of over burdening their caregivers, and provide crucial information to physicians that can help with early detection and prevention of physically and financially costly medical conditions.

In addition to improving life at home, new technologies are being tested and incorporated into care facilities. Devices can enable physicians to interact with and observe their patients in separate locations, sometimes thousands of miles away. Robotic nurses have been tested in long-term care facilities and have been greeted enthusiastically by residents. Technology has enormous potential to change the way health care is provided, as well as the way people manage their own care, having a positive impact on cost and quality of care.

has a role in various facets of aging beyond the provision and monitoring of health care. Innovations are being made in communications, working, driving and support for those with cognitive deficits.[148] But how will the clients pay for these new treatments if Medicare does not cover it, illustrating one matter complicating the practice, and clients' lives–the intersection between politics, social policy, and funding. Sometimes those are contradictory rather than complimentary, to the point of being ludicrous.[149]

In order for elder law to continue its growth trajectory, there needs to be a better uniform definition of what is meant by elder law.[150] Interestingly, some attorneys will define it by the direction in which their

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Mr. Bodoff believes the U.S. is lagging behind in developing this potential:

[M]any in the U.S. government are not focusing adequate attention on shaping regulations and strategies that foster its optimal implementation . . . [and] many U.S. policies were written post-technology and need revision if technology is to be used to its full potential. . . . [M]any countries are way ahead of the United States in research, pilot and market stages of high-tech care products. For example, a South Korean company is marketing a mobile phone, which doubles as a diabetic monitor. . . . A robotic teddy bear with a limited vocabulary is being tested in Japan to provide companionship and therapy to long-term care patients. Because the bear can converse with the patient, it can be designed transmit conversations back to caregivers, who can monitor voice patterns and cognitive skills of the patient. Japan is also testing a home-care robot . . . [w]ith an extensive vocabulary and built-in mobile phone and camera the robot provides companionship and allows people to age at home safely because family members can view the home and interact with the older person through the lens of the robot . . . [T]he Dutch . . . use . . . technology in care facilities, including extensive use of telehealth networks and electronic monitoring devices.

Id.

[148] An entire volume of *Generations* (the Journal of the American Society on Aging) was devoted to technological innovations and their applications to aging. The articles discuss using technology for health care at home, monitoring home health care, driving, working, communications and support for cognitively impaired elders. *Innovations in Technology and Aging,* Generations, J. Am. Socy. on Aging, 6-69 (Summer 2006), http://www.generationsjournal.org/generations/gen30-2/toc.cfm.

[149] Mr. Robinson used the example of the emphasis that conservative members of Congress and the Florida legislature put on the right to life, but they don't provide increasing funding. For example, many politicians voted for the state and federal variations of "Terri's [Schiavo] law" but are not proposing or voting for increased funding to provide care for patients on life-prolonging procedures. Telephone interview with Charlie Robinson, Esq., Elder L. Atty. and nationally known futurist about the law practice. (July 18, 2006).

[150] Email Interview with Stu Zimring, Esq. (Aug. 27, 2006) who describes his definition as

a broad, very holistic, communitarian approach, defining it in terms of assisting seniors and their families, primarily in helping them age in place whenever possible. I do not and have never restricted the definition to "public benefit planning". For those who do, the answer is Elder Law/public benefit planning is probably doomed since the opportunities to do this kind of planning will become increasingly difficult or (I should live so long) there will be a national healthcare system in place that makes such planning unnecessary. For those of us who define the field broadly, I see it as nothing but a growth area simply based on demographics –the boomers are becoming the next client wave and their parents are the current client wave. The parents are being driven (sometimes literally) to our offices by their children–this generation would not necessarily have sought out legal assistance–their children are more savvy. Hence, one generation will drive two client generations through the door. Add to this the 1st cousin to elder law, SNTs or disability planning in general, and the potential growth curve is even greater.

practices have grown and will focus the definition by the types of cases they handle.[151]

In reality, as states try to control costs, fewer Medicaid dollars will be available, waivers will limit the services covered, and the laws will be amended to foreclose more planning options.[152] However, people will still be people–will need to plan and will not always plan ahead. Clients will still need wills, advance directives, trusts, powers of attorney and tax planning. Although planning for public benefits eligibility may diminish, more sophisticated planning will be needed.[153] Those individuals with disabilities will need to be helped, as their parents-caregivers age and die.[154] People in need of long-term care will find it more challenging, because of the very demographics discussed earlier. There will be a need for more assistance in finding what benefits and assistance are available, and the need to navigate the application process.[155] Contributing to the need for representation will be the very characteristics of the Boomer generation.[156]

The quick and easy volume Medicaid planning practice is unlikely to continue to exist. Instead, there will be a greater need for the knowledge and expertise of elder law attorneys to customize the planning for the individual client's needs. "[E]lder law will expand in lawyers' (and the public's) consciousness to include more guardianship, more non-tax-driven estate planning, and more consultative practices helping seniors deal with a variety of stressors and difficulties in their lives--like dealing with grandchildren, spendthrift children, pets and property, or

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[151] For example, many attorneys who consider themselves elder law attorneys do almost exclusively Medicaid planning. Limiting the scope of their practices to such a narrow field leaves them vulnerable to the vagaries of practicing law in an area driven so heavily by politics and public policy. The enactment of the DRA is a clear example of the pitfall of doing so. As Mr. Zimring said in his email interview " I do not and have never restricted the definition to "public benefit planning". For those who do, the answer is Elder Law/public benefit planning is probably doomed since the opportunities to do this kind of planning will become increasingly difficult or (I should live so long) there will be a national healthcare system in place that makes such planning unnecessary."

Id.

[152] An example is the Deficit Reduction Act of 2005, Pub. L. 109-171.

[153] In Stu Zimring's view, "[p]lanning in advance through [long term care] insurance, annuities, proper document drafting (i.e. crafting the documents to deal with life time needs rather than simply tax sensitive generational shifting) will become more important." Email Interview with Stu Zimring (Aug. 27, 2006).

[154] "[T]here is a significant population of persons with disabilities who, for one reason or another, have never been on the radar screen before – they're taken care of at home by a parent(s) who is now aging or ill or both and planning to take care of them will be a significant new component of the planning process." *Id.*

[155] Email Interview with Robert Fleming (Aug. 30, 2006).

[156] Robert Fleming describes those characteristics as "[d]emographics–plus the impatience, sense of entitlement and relative procedural sophistication of the boomer generation." *Id.*

recovering from scams and exploitation, or navigating an increasingly fragmented and balkanized benefits system."[157]

The Future of Elder Law in Legal Education

There seems to be a finite number of law schools offering elder law, although the number may increase slightly from time to time.[158] The core legal education provided appears to be either through an elder law clinic or a basic elder law survey course. With the increasing number of elders, why aren't more law schools increasing their elder law offerings?

To answer that question, three law school deans were interviewed, one without an elder law program,[159] one with a current elder law program,[160] and a former Dean from University of Georgia School of Law and University of Utah School of Law.[161]

Dean Spurgeon found that two of his schools, Georgia and Utah, did not have an elder law program until he advocated for them. Even though he is no longer at those schools, they continue to offer some course on elder law.[162] Dean Spurgeon is now in the process of

[157] *Id.* Email interview with Robert Fleming (August 30, 2006) . As far as the future of long-term care planning, Mr. Fleming stated he thought that it "will continue to be hot, though the big, easy-money work may be replaced by a higher-volume practice with fewer high-income (for the lawyer) options available in each case." *Id.*

[158] See the listing of law schools offering elder law at http://www.law.stetson.edu/excellence/elderlaw/surveyoptions.asp.

[159] Dean I. Richard Gershon, Dean of Charleston, South Carolina Law School. Dean Gershon was also the Dean of Texas Wesleyan Law School which also did not have an elder law program. Dean Gershon is planning to offer a course in elder law at his law school, hopefully as early as Spring 2007. Dean Gershon did teach at Stetson Law School, the school of the author's elder law program, so he is familiar with elder law courses.

[160] Dean Darby Dickerson, Dean of Stetson University College of Law, the school of the author's elder law program.

[161] Dean Ned Spurgeon. Dean Spurgeon has been Dean of the law school at Georgia and Utah, and is now on the faculty at McGeorge Law School. Dean Spurgeon taught elder law at Georgia, and co-taught a course at Utah. He is now creating at new course at McGeorge that will cover elder law and health law (McGeorge had a traditional elder law course previously taught by Professor Jan Rein).

[162] Dean Spurgeon did note that he had the advantage of being Dean when he advocated for the addition of elder law courses to their curriculums. Neither school is using a regular faculty member to teach elder law. Since he left Georgia, they have used an adjunct to teach. First they continued to offer a survey course, but he believes they are now offering an elder law clinic through an adjunct. At Utah, the elder law course is offered every other year with an adjunct (Dean Spurgeon co-teaches if he's available). On the off-year, Utah offers a non-elder law seminar that includes a fundamental topic that affects elders, as well as other segments of the population. Telephone Interview with Dean Ned Spurgeon, faculty at McGeorge L. Sch. (July 25, 2006).

developing a health law and policy course that will combine the health law aspects of aging with a traditional health law curriculum.[163]

If there is such an increase in the number of people who fall into the classification of elderly, why aren't law schools following the demographic trend, and more offering elder law? Although the practicing bar perhaps has recognized the field is growing, the law school community may not. Dean Spurgeon's view is that Deans recognize it as a growth area,[164] but it has not achieved recognition as a "fully-respected academic discipline."[165] The fact that elder law really is not a separate field, but an aggregation of different subjects covered in other courses may contribute to the lack of urgency on the parts of law schools to add a stand-alone course.[166]

Dean Spurgeon concluded on an optimistic note about elder law in law schools. When looking back over the past fifteen years, the number of courses offered (and, of course, the number of faculty teaching them) has grown, as well as the number of students taking courses. He sees forward movement and remains optimistic about the continued growth of elder law in law schools.[167]

Dean Gershon's school does not yet have an elder law course but plans to add one in the near term. Dean Gershon views elder law as a highly relevant course because of demographics and the changing legal issues affecting elders. Dean Gershon has a refreshing look at the fact that elder law contains components of other courses. He sees it as "a great "cap" on a student's curriculum. It ties together courses they have had in their first two years of law school, and applies those courses (like Estate Planning, Torts, Healthcare Law, Insurance, Constitutional Law, and many more) to a particular specialty."[168] He, too, is optimistic about the future of elder law, but sees it more popular in certain areas of the country than others.[169]

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[163] Dean Spurgeon holds a chair in health law and policy at McGeorge for three years (one semester/year). Dean Spurgeon sees a"growing connection in curriculum and research thinking about elder law and health law." He plans to expand elder law into health law courses. *Id.*

[164] Dean Spurgeon observed that gives law schools an opportunity to provide a service to the community or the opportunity to raise money around the program. *Id.*

[165] Dean Spurgeon believes elder law is making inroads as an academic discipline, and although faculties generally do provide the same respect for elder law as an academic discipline other courses are given. Those in the discipline may need to do more to promote the importance of elder law. *Id.*

[166] *Id.*

[167] *Id.*

[168] Email interview with Dean Richard Gershon, dean of Charleston, S.C. L. Sch. (July 16, 2006).

[169] Dean Gershon described the "popularity" of elder law this way:

Elder Law will always be an important part of a law school curriculum. I think that it can be part of the school's skills program (externships, clinics, simulated skills classes) as well as its

Dean Dickerson views it as driven by the percentage of the population but also the special issues encompassed in elder law. It is a broader draw for reasons other than demographics and geography. Students have personal and family relationships that fuel their interests. The national trend in aging, as evidenced by specialized legislation affecting elders differently helps increase the interest of law students.[170]

It seems that it would be hard to grow an elder law program at a law school based solely on the use of adjuncts.[171] Whether a full-time faculty member will teach elder law will depend on the teaching interests of individual faculty.[172] Typically adjuncts tend to cost less than full-time faculty (in many ways) so in reality it is cheaper for law schools to offer one elder law course using an adjunct, unless there is a full-time faculty member with the interest and availability in her teaching load.[173]

The future of elder law in law schools, like any other speciality course, is driven by a variety of factors. These include the availability of a faculty member (full-time or adjunct) and the interest of students, as student demands can drive course offerings.[174]

Conclusion

Elder law in the United States is truly a growth industry, driven by the increasing population, the growing complexity of the issues, laws and policies, and the interest and recognition of elder law by the attorneys in the United States. The U. S. laws and policies certainly do not hold the only answers to the issues, and much can be learned from

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doctrinal classes. It will especially be important in areas like St. Pete or Charleston, with large retirement communities . . . it might be less relevant in some parts of the country.

Id.

[170] Interview with Dean Darby Dickerson, Vice President and Dean of Stetson University College of Law (Aug. 15, 2006).

[171] *Id.* This comment is not intended to disparage an adjunct professor in any way. But reality is–adjuncts generally have other jobs so their involvement in the life of the law school is limited.

[172] Dean Gershon gave examples of teaching interests among his faculty and ended with a sports analogy:

> The fulltime [sic] v. adjunct issue is really a matter of who you have on the faculty, and what their areas are. We have an expert in Maritime Law, so we have built a sequence of courses around him. We also have an expert in Environmental Law, so we have done the same with him. This year, we hired a BA teacher, who also happens to be an international lawyer, so we will have her teaching IBT. Had she not been on the faculty[,] IBT would have been adjuncted. It is like building a football team. If you draft great running backs, you have a running game.

Email interview with Dean Richard Gershon, Dean of Charleston, S.C. L. Sch. (July 16, 2006).

[173] Interview with Dean Darby Dickerson, Dean of Stetson University College of Law (and the author's boss). Dean Dickerson acknowledged that without the teaching interest of a full-time faculty member, there would probably be only one elder law course offered at Stetson and it would be taught by an adjunct. *Id.*

[174] *Id.*

collaborations with other attorneys and educators in other countries as we remind ourselves that aging is a global issue.

Elder law is not dependent on the existence of public benefits or other programs or any other factors that some commentators say will contribute to the diminishment of it as a practice area. Elder law is a growth industry–if only driven by demographics. The fact is that we are all aging and many of us are living longer. That itself means that there will be a continued, and increasing, need for attorneys trained in the laws and issues affecting those who are elders or near-elders.

The true strength and appeal of elder law attorneys is the holistic approach to clients' legal problems and the ability to listen, counsel and shape a solution.[175] The practice of elder law is a people-driven practice. Clients are drawn to elder law attorneys because of the way the attorneys treat them. One attorney said it best:

> [I] also know that the service I provide is not dependent on the technological methodology of how I accomplish a goal – it's still based on assisting people achieve their goals – counseling them, giving them a shoulder to cry on, a sympathetic ear, logical, dispassionate analyses and solutions. That's what it's really all about as far as I'm concerned.[176]

[175] In an email interview with Robert Fleming, he predicted the increase in "more consultative practices helping seniors deal with a variety of stressors and difficulties in their lives--like dealing with grandchildren, spendthrift children, pets and property, or recovering from scams and exploitation, or navigating an increasingly fragmented and balkanized benefits system." Email Interview with Robert Fleming (Aug. 30, 2006).

[176] Email Interview with Stu Zimring (Aug. 27, 2006).

INTERNATIONAL ELDER LAW RESEARCH: A BIBLIOGRAPHY

INTRODUCTION

This selective bibliography is a group effort[1] to present an overview of international elder law resources in both online and print formats. Elder law practitioners and policy makers are the anticipated audience for this bibliography, and it is hoped that this resource will be useful as an introduction to the growing body of international elder law resources. This bibliography focuses on materials published within the last ten years although some older, background materials are included. Most references are to English language materials, but these references may lead to sources in other languages.

Elder law, on an international field, encompasses differences in socio-legal systems, levels of development, and economic stability, all of which are reflected in a country's policy regarding issues related to aging. There are obvious, additional distinctions: Civil versus Common law; socialist versus capitalist economic systems; religious versus secular societies; and homogenous versus multi-cultural populations, which come together to determine underlying elder law policies.[2]

A wide variety of search terms may be used to locate international elder law resources including:

Aged - Legal Status
Elder Abuse
Elder Law or Elderlaw
Geriatrics
Gerontology
Guardians
Legal Assistance to the Aged
Long-term care (topics)
Nursing Homes
Older People
Retirement
Retirement Communities
Senior Law

[1] Pamela D. Burdett, M.A.L.I.S.; Wanita Scroggs, J.D., M.A.L.I.S.; Julieanne Stevens, J.D., M.L.S.; Rebecca S. Trammell, M.L.S., J.D., and Sally G. Waters, J.D. , M.L.S.

[2] These distinctions are borrowed, in part, from Israel Doran, *Elder Guardianship Kaleidoscope - A Comparative Perspective,* 16 Intl. J. L. Policy & Fam. 368 (2002).

In addition, search terms related to specific legal topics may also be useful in locating pertinent resources. For example:

Consumer Fraud	Health Care Reform	Reverse Mortgages
Estate Planning	Living Wills	Succession
Financial Planning	Probate Law	Wills

For country specific resources, add the name of the country to the search term, or use "international" with various search terms to locate more broadly focused materials.

Materials in this bibliography are arranged in the following categories:

Agencies and Organizations that focus on international elder law issues

Conventions, Documents and Reports relating to international elder law

Web Sites and Databases with a specific international elder law focus

Journals and Books provides references to articles and titles focusing on international elder law arranged in the following topics:

General Legal Issues
Economic Policy
Health and Quality of Life
Housing Policy
Social Policy

International Elder Law Journals is a list of the major journals with a primary focus on international elder law issues.

It should be noted that this is a selective bibliography, and no attempt has been made to include every agency, organization, convention, document, report, database, web site, article or book relating to international elder law. Given the tremendous growth in resources in the area of international elder law such an undertaking is beyond the scope of this bibliography. Rather this bibliography is intended to serve as an overview of materials published in this field during the last ten years, and to provide a starting point for further research in international elder law. The authors welcome your comments and suggestions regarding this project.

Agencies and Organizations

AARP (formerly American Association of Retired Persons)
http://www.aarp.org/

AARP is the leading nonprofit organization for people aged 50 and over in the United States; with over 35 million members, its aim is to provide information and advocacy to enhance the quality of life for all persons as they age. The AARP website provides links to much information on international aging issues. A number of the specific links are included in this section

AARP
601 E. Street NW
Washington DC 20049
1-888-OUR-AARP (1-888-687-2277)

AARP Global Aging
http://www.aarp.org/research/international/

Global Aging Program
Contact the Global Aging Program at intlaffairs@ aarp.org

AARP International Forum in Long-Term Care
http://www.aarp.org/research/longtermcare/trends/a2003-09-02-longtermcare.html

AARP International: Resources
http://www.aarp.org/research/international/resources/aging-organizations.html

International and Regional Organizations and Networks Concerned With Aging

AARP International: Resources
http://www.aarp.org/research/international/resources/Articles/a2002-08-05-orginternational.html

Organizations of Seniors around the world

AARP Public Policy Institute
http://www.aarp.org/research/ppi/

The AARP Public Policy Institute (AARP PPI) focuses on federal, state, and international policy research and analysis. Its aim is to foster public debate on issues involving the older population.

ADMINISTRATION ON AGING (UNITED STATES)
http://www.aoa.gov/

The Administration on Aging's website provides information about the agency itself, federal legislation on aging issues, and programs geared specifically to the older population and to caregivers. A section of the website deals specifically with international issues.

Administration on Aging
Washington, DC 20201
Phone: 202 619-0724

AGEING AND ETHNICITY Web
http://www.eng.aeweb.org/

The Ageing and Ethnicity site provides information on issues related to elder ethnic minority persons throughout the world.

ALZHEIMER EUROPE
http://www.alzheimer-europe.org/

Alzheimer Europe, which has as its goal advancing the care and treatment of patients, is a non-profit composed of 31 organizations from 26 countries.

CENTER FOR DEMOGRAPHY OF HEALTH AND AGING (CDHA)
http://www.ssc.wisc.edu/cdha/

The Center for Demography of Health and Aging (CDHA), at the University of Wisconsin - Madison, sponsors research in several areas of aging, including inequalities in health care and international comparisons of health and aging. The Center is itself sponsored by the National Institute on Aging.

Center for Demography of Health and Aging
University of Wisconsin - Madison

1180 Observatory Drive
Madison, WI 53706 USA

Phone: 608-262-4715
Fax: 608-262-8400
Email: **cdha@ssc.wisc.edu**

HASTINGS CENTER REPORT
http://www.thehastingscenter.org/publications/hcr/hcr.asp

The Hastings Center, founded in 1969, is a research institute devoted to the study of bioethics and health care. Much of its research centers on end-of-life issues, public health, and new technologies. The Center has a world-wide group of experts and researchers who examine current and breaking ethical and social issues in medical science.

The Hastings Center
21 Malcolm Gordon Road
Garrison NY 10524-4125
Telephone: (845) 424-4040
Fax: (845) 424-4545
Email: mail@thehastingscenter.org

HELPAGE INTERNATIONAL
http://www.helpage.org/Home

HelpAge International is a world-wide network putting together non-profit groups that work with disadvantaged older people throughout the world and seek to improve their quality of life.

PO Box 32832, London N1 9ZN, UK
Courier address
1st floor, York House, 207-221 Pentonville Road
London N1 9UZ, UK

Telephone
+44 20 7278 7778
Fax
+44 20 7713 7993

INTERNATIONAL ASSOCIATION OF GERONTOLOGY AND GERIATRICS
http://www.iagg.com.br/webforms/index.aspx

With membership of over 45,000 professionals worldwide, in over 64 countries, the IAGG and its member groups provide research and training in gerontology and related fields. It has consultative status with the United Nations.

The Secretariat Office address is:
Rua Hilário de Gouveia 66 / 1102 Copacabana, Rio de Janeiro, RJ 22040-020 Brazil
Phone/fax: 55 21 22351510
iagg@iagg.com.br

INTERNATIONAL FEDERATION ON AGEING
http://www.ifa-fiv.org/en/accueil.aspx

IFA is a network of groups and persons seeking to improve the lives of older persons throughout the world by changing policies and bringing public and private sectors together on social problems of the aging.

Contact Information
4398 Boul. Saint-Laurent, Suite 302
Montreal QC H2W 1Z5
CANADA

Telephone: 1-514-396-3358
Facsimile: 1-514-396-3378

INTERNATIONAL LABOUR ORGANIZATION (See UNITED NATIONS)

INTERNATIONAL LONGEVITY CENTER
http://www.ilcusa.org/who/world.htm

The non-profit International Longevity Center-USA has as its goal highlighting aging and longevity in positive ways, showing in its research and educational programs the contributions that the aging can make to the world.

International Longevity Center - USA
60 E. 86th Street
NY, NY 10028
Ph: 212-288-1468
Fax: 212-288-3132
info@ilcusa.org

ORGANIZATION FOR ECONOMIC C0-OPERATION AND DEVELOPMENT (OECD) AGEING SOCIETY
http://www.oecd.org/topic/0,2686,en_2649_37435_1_1_1_1_37435,00.html

More than 30 countries are members of the OECD, which issues publications and statistics regarding economic and social issues, including education, development, and science; the OECD also has relationships with over 70 other countries and groups. The OECD provides country surveys on major social and economic issues and helps policy-makers throughout the world decide on their positions and strategies. The OECD has specific information dealing with the implications of aging throughout the world.

Ageing Society Contact
Information and queries can be sent to:
olderworkers.contact@oecd.org

OECD
2, rue André Pascal
F-75775 Paris Cedex 16
France

UNITED NATIONS (Specific International Elder Law Programs are listed below)
http://www.un.org/

UN ECONOMIC AND SOCIAL DEVELOPMENT
http://www.un.org/esa/

Division for Social Policy and Development
http://www.un.org/esa/socdev/csd/csocd2007.htm

The U.N.'s Division for Social Policy and Development has as its goal the cooperation of countries worldwide in improving the quality of life for their aging and other possibly disadvantaged persons.

Department of Economic and Social Affairs, United Nations,
DC2-1320,
New York, NY 10017, USA

UN PROGRAMME ON AGEING
http://www.un.org/esa/socdev/ageing/index.html

Division for Social Policy and Development

Address:
United Nations
Division for Social Policy and Development
Department of Economic and Social Affairs, United Nations,
DC2-1320, New York, NY 10017,

INTERNATIONAL LABOUR ORGANIZATION
http://www.ilo.org/global/lang--en/index.htm

The International Labour Organization (ILO) of the U.N. brings governments, workers, employers and employees all together to promote labor and decent work practices throughout the world.

4 route des Morillons
CH-1211 Genève 22
Switzerland

Switchboard: +41 (0) 22 799 6111
Fax: +41 (0) 22 798 8685
Website: http://www.ilo.org
E-mail: ilo@ilo.org

WORLD HEALTH ORGANIZATION
http://www.who.int/en/

> The World Health Organization, United Nations agency for health, seeks to help all persons throughout the world attain the highest level possible of physical, mental and social well-being. The WHO sponsors programs and research aimed at all populations, including the aging.

WHO---Prevention of elder abuse
http://www.who.int/ageing/projects/elder_abuse/en/index.html

Conventions, Documents and Reports

CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS
http://www.fco.gov.uk/Files/kfile/CM5881.pdf

EUROPEAN CONVENTION ON SOCIAL SECURITY

http://www.itcilo.org/actrav/actrav-

english/telearn/global/ilo/law/coehr.htm

> International Labour Office
> CH-1211 Geneva 22
> Fax: +41 22 799 6570

HELSINKI CONFERENCE ON DISSEMINATION OF EUROPEAN RESEARCH RESULTS ON AGEING. 2006
http://cordis.europa.eu/life/src/conf-ageing.htm

ILO CONVENTION (C102) CONCERNING MINIMUM STANDARDS OF SOCIAL SECURITY.
http://www.ilo.org/ilolex/english/convdisp1.htm

ILO CONVENTION (C128) CONCERNING INVALIDITY, OLD AGE AND SURVIVORS' BENEFIT CONVENTION.
http://www.ilo.org/ilolex/english/convdisp1.htm

LOLEX—International Labour Office

http://www.ilo.org/ilolex/english/

> ILOLEX, a trilingual database, contains Conventions and Recommendations and other kinds of documents issued by the ILO.

UN ECONOMIC AND SOCIAL COUNCIL REPORT---Major Developments in the Area of Ageing since the Second World Assembly on Ageing
http://www.globalaging.org/agingwatch/events/CSD/2006/majordev.pdf

> Follow-up to the Second World Assembly on Ageing
> Report of the Secretary-General

UNITED NATIONS INTERNATIONAL CLASSIFICATION OF IMPAIRMENTS, DISABILITIES AND HANDICAPS
http://unstats.un.org/unsd/cr/family2.asp?Cl=220

UNITED NATIONS, INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
http://www.unhchr.ch/html/menu3/b/a_cescr.htm

UNITED NATIONS. Second World Assembly on Ageing, Madrid Spain, 8 – 12 April 2002.
http://www.un.org/esa/socdev/ageing/waa/

MADRID INTERNATIONAL PLAN OF ACTION ON AGEING
http://www.eldis.org/static/DOC10444.htm

> The Madrid Plan lists the objectives and recommendations determined by the Second World Assembly on Ageing 2002.

Websites and Databases

AARP AgeLine® DATABASE
http://www.aarp.org/research/agesource/

> AARP's AgeLine database, which is easily accessed via the Age Source web page, provides abstracts of research from medical and social science sources, and provides some consumer content

as well. Links are given for persons wanting to purchase the entire document. It can be searched at no cost.

AGE SOURCE WORLDWIDE
http://www.aarp.org/research/agesource/

Information sources available on AARP's Age Source database have a specific focus on aging and are easily available on the internet. Age Source is searchable by subject, country, language, or any combination of those.

AGEING POPULATIONS RESOURCE GUIDE
http://www.eldis.org

ELDIS GATEWAY TO DEVELOPMENT INFORMATION
http://www.eldis.org/ageing/index.htm

Eldis is one of a family of knowledge services from the Institute of Development Studies, Sussex

GLOBALHEALTH.GOV
http://www.globalhealth.gov/

The Office of Global Health Affairs, part of the U.S. Department of Health and Human Services, represents the Department to other governments on international and refugee health issues. The website offers links to country information, world health statistics, global health topics, and fact sheets.

TINTERNATIONAL AGING
http://www.aoa.gov/prof/international/resources/resources.asp

The AOA's International Ageing resources page gives information from the UN, WHO, and other federal and non-governmental sources.

INTERNATIONAL PROGRAMS (U.S. Social Security Administration)
http://www.ssa.gov/international/inter_intro.html

This site provides information about the United States program of international Social Security agreements, about receiving U.S. Social Security benefits outside the United States and about Social Security programs in other countries. Links to the text and

detailed description of the Social Security agreements and Social Security web pages of other countries are included.

Web Bibliographies

PENN STATE'S DICKINSON SCHOOL OF LAW INTERNATIONAL SOURCES ON AGING
http://www.dsl.psu.edu/clinic/international.htm
.
PACE LAW SCHOOL'S RESOURCES FOR RESEARCH IN ELDER LAW.
http://www.library.law.pace.edu/research/elderlaw.html#Research%20Guides

VIRTUAL CHASE
http://www.virtualchase.com/topics/elder_law.shtml

Useful source of web links to all areas of elder law.

Journals and Books

General Legal Issues

Journals

Bonnie Brandl, *Domestic Abuse in Later Life*, 8 Elder L.J. 337 (2000)

Roger Charlton & Roger McKinnon, *International Organizations, Pension System Reform and Alternative Agendas: Bringing Older People Back In?,* 14 J. Intl. Dev. 1175 (2002)

Nancy Coleman, Sally Hurme, John Kirkendall & Denzil Lush, *Cases that Cross Borders,* 1 J. Intl. Aging, L. & Policy 73 (2005)

Israel Doron, *Elder Guardianship Kaleidoscope: A Comparative Perspective*, 16 Intl. J.L., Policy & Fam. 368 (2002)

Israel Doron, *From National to International Elder Law*, 1 J. Intl. Aging, L. & Policy 45 (2005)

Burton D. Dunlop, *Elders and Criminal Justice: International Issues for the 21st Century*, 24 Intl. J.L. & Psych. 285 (2001)

Jonathan B. Forman et al., *State, Local and Foreign Pensions: Implications for Social Security and Pension Reform, Proceedings of the 2002 Annual Meeting, Association of American Law Schools, Section on Employee Benefits,* 6 Employee Rights & Empl. Policy J. 83 (2002)

Robert M. Gordon, *The Abuse and Neglect of the Elderly*, 24 Intl. J. Psych. 183 (2001)

Shereen Hussein & Jill Manthorpe, *An International Review of the Long-term Care Workforce Policies and Shortages*, 17 J. Aging & Soc. Policy 75 (2005)

Traci R. Little, *Protecting the Right to Live: International Comparison of Physician-Assisted Suicide Systems*, 7 Ind. Intl. & Comp. L. Rev. 433 (1997)

Helen Meenan, *The Future of Ageing and the Role of Age Discrimination in the Global Debate,* 1 J. Intl. Aging, L. & Policy 1 (2005)

Elias Mossialos & Willy Palm, *The European Court of Justice and the Free Movement of Patients in the European Union*, 56 Intl. Soc. Sec. Rev. 3 (2003)

Cynthia Sharp Myers, *Jurisdictional Issues in Interstate and International Guardianships*, Elder L. Rpt. 3 (Nov. 2003).

Bruce Porter, *Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights*, 15 J. L. & Soc. Policy 117 (2000)

Cynthia Jean Robertson, *Has the Age Discrimination in Employment Act Remained Effective in the United States as Well as Abroad in an Increasingly Globalized Economy?*, 6 Elder L.J. 323 (1998).

Diego Rodriguez-Pinzon & Claudia Martin, *Critical Essay: The International Human Rights Status of Elderly Persons*, 18 Am. U. Intl. L. Rev. 915 (2003).

Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Intl. L. 1103 (2000)

Kristen Walker, *International Law as a Tool of Constitutional Interpretation*, 28 Monash U. L. Rev. 87 (2003)

Books

Frederick L. Ahearn, (2001) *Issues in Global Aging* (Haworth Press 2001)

Stuart H. Altman & David Shactman, *Policies for an Aging Society* (Johns Hopkins Univ. 2002)

Robert H. Binstock, Linda K. George, Stephen J. Cutler, Jon Hendircks & James H. Schulz, *Handbook of Aging and the Social Sciences* (Elsevier 2006)

Alex Butler, *Emerging Issues for Australia in the Assessment of Older People: a Review of Recent International Literature* (La Trobe University 1998)

Robert N. Butler, *The Declaration of Human Rights of Older Persons: Prepared for the United Nations World Assembly on Ageing* (International Longevity Center 2002) (available at http://www.ilcusa.org/_lib/pdf/un-rightsdeclaration.pdf)

Global aging; the Challenge of the New Millennium (Center for Strategic and International Studies 2000)

Gloria M. Gutman, *Aging, Technology and Policy: An International Perspective* (Simon Fraser Univ. 1999)

Ryutaro Hashimoto, Walter F. Mondale, Karl Otto Pohl & Paul S. Hewitt, *Meeting the Challenge of Global Aging: a Report to World Leaders* (Center for Strategic and International Studies 2002)

HelpAge Intl., *State of the World's Older People 2002* (HelpAge International 2002)

Paul Hinchliff and Bo Priestley, *Making Our Voices Heard: Older People and Decision-making in East and Central Europe* (HelpAge International 2001)

Intl. Federation on Ageing, *Global Survey on Older Persons* (IFA 2000)

Malcolm Lewis Johnson, *The Cambridge Handbook of Age and Ageing* (Cambridge Univ. 2005)

United Nations, *Compilation of Non-Governmental Organizations (NGOs) of and for Older Persons: a Work in Progress* (UN 1999)

United Nations, *International Plan of Action on Ageing and United Nations Principles for Older Persons* (UN 1998)

United Nations Economic and Social Commission for Asia and the Pacific, *Source Book on Ageing: Information Materials for the International Year of Older Persons* (UN 1997)

United Nations Economic Commission for Europe, *Ageing Populations: Opportunities and Challenges for Europe and North America* (UN 2003)

Economic Policy

Books

Alan J. Auerbach & Heinz Herrmann, *Ageing, Financial Markets and Monetary Policy* (Springer 2002)

Daniel Boothby & Sciences and Humanities Research Council of Canada, *Labour Market Implications of an Aging Population* (Industry Canada 2003)

Han Emanuel, *Ageing and the Labour Market: Issues and Solutions, or Are There?* (Intersentia 2006)

Robert Stowe England, *The Fiscal Challenge of an Aging Industrial World* (Center for Strategic & International Studies 2002)

Viola M. Lechner, & Margaret B. Neal, *Work and Caring for the Elderly: International Perspectives* (Brunner/Mazel 1999)

Theodore R. Marmor & Phillip R. de Jong, *Ageing, Social Security and Affordability* (Ashgate 1998)

Leslie Mayhew, *Health and Elderly Care Expenditure in an Aging World* (International Institute for Applied Systems Analysis 2000)

Steven A. Nyce & Sylvester J. Schieber, *The Economic Implications of Aging Societies: the Costs of Living Happily Ever After* (Cambridge Univ. Press 2005).

Judith Randel, Tony German & Deborah Ewing for HelpAge Intl., *The Ageing and Development Report: Poverty, Independence and the World's Older People* (Earthscan 1999)

Health and Quality of Life Policy

Journals

Heather J. Aeschleman, *The White World of Nursing Homes: The Myriad Barriers to Access Facing Today's Elderly Minorities*, 8 Elder L.J. 367 (2000)

Jens Alber, *Residential Care for the Elderly (Comparative Health Policy),* 17 J. Health, Pol., Policy & L. 929 (1992)

A.M. Clarfield, H. Bergman & R. Kane, *Fragmentation of Care for Frail Older People – an International Problem, Experience from Three Countries: Israel, Canada and the United States*, 49 J. Am. Geriatrics Soc. 1714 (2001)

Bleddyn Davies, *Caring for the Frail Elderly: An International Perspective*, 17 Generations 51 (1993)

C. Glendinning et al., *Paying for Long-Term Domiciliary Care: A Comparative Perspective*, 17 Ageing & Soc. 123 (1997).

Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and the World ?,* 34 Ind. L. Rev. 1457 (2001)

Ruth Landau, *Ethical Dilemmas in Treating Cases of Abuse of Older People in the Family*, 12 Intl. J. L., Policy & Fam. 345 (1998)

International Symposium, *Long-term Care for Frail Older People: Reaching for the Ideal System*, 47 Keio J. Med. Supp. 2A (1998)

Calum Mackellar, *Laws and Practices Relating to Euthanasia and Assisted Suicide in 34 Countries of the Council of Europe and the USA*, 10 Eur. J. Health L. 63 (2003)

Pat Phillips, *Views of Assisted Suicide from Several Nations*, 278 JAMA 969 (1997)

Susan L. Waysdorf, *The Aging of the AIDS Epidemic: Emerging Legal and Public Health Issues for Elderly Persons Living with HIV/AIDS*, 10 Elder L.J. 47 (2002).

Books

Toni C. Antonucci, Corann Okorodudu & Hiroko Akiyama, *International Perspectives on the Well-being of Older Adults* (Blackwell 2003)

Bridget Campion & Leo Walsh, *Globalization and the Culture of Life; Care of the Frail Elderly and the Dying* (Canadian Catholic Bioethics institute 2005)

Phillip William Davidson, Vee P. Prasher & Matthew P. Janicki, *Mental Health, Intellectual Disabilities and the Aging Process* (Blackwell 2003)

Henriette Gardent & Council of Europe, *Use of the International Classification of Impairments, Disabilities and Handicaps in Relation to Elderly People* (Council of Europe 1997)

Stanley S. Herr & Germain Wevber, *Aging, Rights, and Quality of Life: Prospects for Older People with Developmental Disabilities* (Brookes 1999)
International Year of Older Persons, *Ageing: Exploding the Myths* (World Health Organization 1999)

Martin Lyon Levine, *The Elderly: Legal and Ethical Issues in Health Care Policy* (Ashgate 2001)

Barry S. Levy & Victor W. Sidel, *Social Injustice and Public Health* (Oxford Univ. Press 2006)

Charlotte Nusberg, *Health and Long-term Care for Older Persons: A Perspective from Industrialized Countries* (AARP 2000)

Cathy Schoen & International Health Policy Survey, *The Elderly's Experiences with Health Care in Five Nations: Finding from the Commonwealth Fund 1999 International Health Policy Survey* (The Fund 2000)

Linda Ward, *Innovations in Advocacy and Empowerment for People with Intellectual Disabilities* (Lisieux Hall 1998)

David N. Weisstub, *Aging: Culture, Health & Social Change* (Kluwer 2001)

Francis K. O. Yuen, *International Perspectives on Disability Services: the Same but Different* (Haworth 2003)

Housing Policy

Journals

Locknie Hsu, *The Law and the Elderly in Singapore --The Law on Income and Maintenance for the Elderly*, 2003 Sing. J. Leg. Stud. 398 (2003)

Books

S. Brink & International Federation on Ageing, *Housing Older People: an International Perspective* (Transaction 1998)

Maire Dwyer, Alison Gray & Margery Renwick, *Factors Affecting the Ability of Older People to Live Independently: a Report for the international Year of Older Persons* (New Zealand Ministry of Social Policy 2000).

Leon A. Pastalan, *Shelter and Service Issues for Aging Populations: International Perspectives* (Haworth 1997)

Graham D. Rowles & Habib Chaudhury, *Home and Identity in Late Life – International Perspectives* (Springer 2005)

Social Policy

Journals

Gráinne de Búrca, *Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the European Union*, 27 Fordham Intl. L. J. 679 (2004)

Aimee R. Fagan, *An Analysis of the Convention on the International Protection of Adults*, 10 Elder L.J. 329 (2002)

Russell King, Anthony M. Warnes & Allan M. Williams, *International Retirement Migration in Europe*, 4 Intl. J. Population Geography 91 (1998)

Peter Lloyd-Sherlock, *Formal Social Protection for Older People in Developing Countries: Three Different Approaches*, 31 J. Soc. Policy 695 (2002)

Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 Marq. L. Rev. 401 (2002)

Royce Bernstein Murray, *Sex for Food in a Refugee Economy: Human Rights Implications and Accountability*, 14 Geo. Immigr. L.J. 985 (2000)

Usha Narayanan, *The Government's Role in Fostering the Relationship Between Adult Children and Their Elder Parents: from Filial Responsibility Laws to . . . What? A Cross-cultural Perspective*, 4 Elder L.J. 369 (1996)

Dianne Otto & David Wiseman, *In Search of 'Effective Remedies': Applying the International Covenant on Economic, Social and Cultural Rights in Australia*, 7 Australian J. Human Rights 5 (2001)

Diego Rodr´iguez-Pinzon, The International Human Rights Status of Elderly Persons, 18 Amer. U. Intl. L. Rev. 915 (2003)

Eleanor Pallo Stoller & Charles F. Longino Jr., *"Going Home" or "Leaving Home"? The Impact of Person and Place Ties on Anticipated Counterstream Migration*, 41 Gerontologist 906 (2001)

Lwong-Leung Tang & Jik-Joen Lee, Global Social Justice for Older People: The Case for an International Convention on the Rights of Older People, 36 Brit. J. Soc. Work 1135 (2005)

Anthony M. Warnes, The International Dispersal of Pensioners from Affluent Countries, 7 Intl. J. Population Geography 373 (2001)

Books

Rachel Crasnow, *Addressing Age Barriers: an International Comparison of Legislation Against Age Discrimination in the Field of Goods, Facilities and Services* (Kuratonium Deutsche Altershilfe 2004)

Dan Emerine & Eric Feldman, *Active Living and Social Equity: Creating Healthy Communities for All Residents: a Guide for Local Governments* (International City/County Management Association 2005)

Saraccandra Damodara Gokhale, Nirmala Pandit, Michael Gonsalves & Community Aid and Sponsorship Programme, *Ageing in search of identify* (Aameya 2002)

Jonathan Gruber & David A. Wise, *An International Perspective on Policies for an Aging Society* (National Bureau of Economic Research 2001)

HelpAge International & United Nations Dept. of Economic and Social Affairs, *Sustainable Social Structures in a Society for All* Ages (UN 2002)

Peter Lloyd-Sherlock & United Nations Research Institute for Social Development, *Ageing, Development and Social Protection: Report of the UNRISD International Conference, 8-9 April 2002* (UN 2003)

Thomas W. Miller, Lane J. Veltkamp & Lenore E. Walker, *Clinical Handbook of Adult Exploitation and Abuse* (International Universities Press 1998)

United Nations Principles for Older Persons (UN 1998)

United Nations Dept. of Economic and Social Affairs, *The World Ageing Situation: Exploring a Society for All Ages* (UN 2001)

Andrew Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press 2004)

International Elder Law Journals

Hundreds of journals are directly dedicated to aging issues, and even more regularly publish articles focusing on elder law issues. The following list is by no means comprehensive, but rather is representative of the types of journals and law reviews available that focus on international elder law topics.

Abstracts in Social Gerontology. Sage Publications, in association with the National Council on Aging, quarterly. Staff reads and evaluates hundreds of books and journal articles each month from gerontological-related publications worldwide.

Ageing and Society. Journal of the international Federation on Ageing. Cambridge University Press, 6 times/year. Interdisciplinary and international, with extensive reviews, abstracts, and reports on research in specific areas.

American Journal of Alzheimer's Disease & Other Dementias. Drexel University College of Medicine, 6 times/year. For and by professionals on the frontlines, especially those who deal every day with patients having dementias and their families.

American University International Law Review. Washington College of Law's International Legal Studies Program, 6 times/year.

Arab Law Quarterly. published in the Netherlands, quarterly. Covers all aspects of Arab laws, both Shari´a and secular.

Boston College International and Comparative Law Review. bi-annual. One of approximately 30 law reviews in the United States that focus on international legal issues, and one of only two that publishes an annual survey of European Union law.

Canadian Journal on Aging. published in Ontario, quarterly. Covers biology, health sciences, psychology, social sciences, and social policy and practice.

Contemporary Gerontology. New York, quarterly. Emergng issues, reports from abroad and contemporary issue analysis.

Elder Law Journal. United States, bi-annual. Estate planning, living wills, arrangements for long-term nursing care, as well as social work, gerontology, ethics, and medicine.

European Journal of Health Law. The Netherlands, quarterly,

Generations, Journal of the American Society on Aging Research. United States, quarterly.

Gerontology International Journal of Experimental and Clinical Gerontology. Switzerland, bimonthly.

Global Ageing. International Federation on Ageing, Canada, 3 times/year.

Indian Journal of Gerontology. India, quarterly. Contains research papers, popular articles and allied studies on ageing.

International Journal of Aging and Human Development. United States, quarterly.

International Journal of Law & Psychiatry. United States, 6.times/year. Multi-disciplinary forum for exchange of ideas and information among professionals.

International Journal of Law, Policy and the Family. Oxford University Press, Great Britain, 3 times/year. Covers law which goes beyond the jurisdiction dealt with, or which is of a comparative nature, including literature specific to law and legal policy and in related disciplines (such as medicine, psychology, demography) of special relevance to law and the family,

International Journal of Population Geography. United States, 6 times/year. Promotes the exchange of views on what constitutes best practice in population research.

International Journal of Social Welfare. Stockholm, Sweden, quarterly. Focuses on global implications of the most pressing social welfare

issues, with an inter-disciplinary approach examining those issues from the various branches of the applied social sciences.

International Legal Practitioner. Great Britain, 3 times/year. Promotes the exchange of information amongst lawyers in general practice throughout the world, on the widest range of subjects, practices and procedures.

International Social Security Review. Switzerland, quarterly. The only international quarterly on social security, with articles on systems in different countries and in-depth discussions of topical questions; regularly has a comprehensive round-up of all the latest publications in the field. Quarterly.

Islamic Law and Society. United States, annual. Research in both classical and modern Islamic law in Muslim and non-Muslim countries.

Journal of Aging and Health. United States, bi-monthly.

Journal of Applied Gerontology. The Official Journal of the Southern Gerontological Society. United States, 5 times/year. International in scope, with information on the health, care and quality of life of older persons.

Journal of Elder Abuse and Neglect. United States, quarterly.

Journal of Geriatric Psychiatry and Neurology. United States, quarterly. Research, clinical reviews, and case reports on neuropsychiatric care of aging patients.

Journal of Health Care Law & Policy. University of Maryland Law School, United States, bi-annual.

Network News: Newsletter of the Global Link for Midlife and Older Women. AARP, Washington, DC, semi-annual.

Palliative Medicine: The Research Journal of the European Association for Palliative Care. Great Britain, 8 times/year. International, interdisciplinary journal dedicated to improving knowledge and clinical practice in the care of patients with far advanced disease.

Research on Aging: An International Bimonthly Journal. Duke University, Durham, NC, bi-monthly.

Tax Management International Journal. BNA, United States, bi-annual. Analysis by distinguished international tax practitioners on rulings, laws, regulations, treaties and other matters.

Yale Journal of Health Policy, Law, and Ethics. United States, bi-annual. Covers many interdisciplinary topics in health policy, health law, and biomedical ethics, for academicians, professionals, students and policy makers and legislators in health care.