BOOK REVIEW

THE LAW AND ECONOMICS OF AGING AND THE AGED*

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In his most recent book, Judge Richard A. Posner turns his own formidable intellect and the powerful tools of law and economics on a series of timely problems concerning aging and old age. Here, as elsewhere,[1] it turns out that economic analysis has much to offer. It is an elegant method demonstrating insights that conform to experience and common sense. For those with a minimum of economic training, Judge Posner's presentation flows smoothly. For others, the formulas and vocabulary can make for tough sledding — despite Judge Posner's delightfully crisp writing style. However, the conclusions are ultimately convincing and the insights are powerful.

I will attempt to pass along only three of the insights, two of general interest and one that is more parochial. The issues of general interest are physician-assisted suicide and the failure of the baby boom generation to save sufficiently for retirement. A more specialized interest, one that, for obvious reasons, I share with Judge Posner, is the effect of the elimination of mandatory retirement on the faculties of American law schools.

PHYSICIAN-ASSISTED SUICIDE

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* Review of AGING AND OLD AGE, by Richard A. Posner. RICHARD A. POSNER, AGING AND OLD AGE (1995).

** Associate Professor of Law, Stetson University College of Law. I should disclose that Judge Posner was one of my professors in law school. I write this review not merely to give *him* a grade for once but primarily out of admiration for his work.

1. For a survey of legal issues to which economics has made significant contributions, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992).

Judge Posner's analysis has profound implications for the issue of assisted suicide. Should a terminally ill person be permitted to call upon others to assist with his or her suicide? This issue has spawned much recent judicial and legislative activity.[2] Judge Posner offers insight from the perspective of a hypothetical aging individual who faces a potentially lethal disease. He expresses these insights in formulaic terms, and estimates values for the individual's utility. It turns out that legalizing physician-assisted suicide can alter the utility-maximizing decisions of very ill people resulting in fewer, or postponed suicides, a desirable result even for those who find suicide morally objectionable. However, Judge Posner's point can be made another way.

Garrison Keillor tells a story entitled, "Storm Home."[3] In that story, a small boy from the country begins school in Lake Wobegon, a mythical Minnesota town. Because he lives outside of town, the boy and other children from the surrounding countryside are likely to be stranded in town by snow storms that winter will bring. To ensure that each child will be well cared for, the school assigns them to a family in town, a "storm home" to which they can go if a blizzard strands them. The boy finds great comfort in the prospect of his storm home and often walks by it and imagines what it would be like to go inside and be welcomed warmly as the cherished "storm child" of his assigned family. He would be brought inside, comforted, given a cookie and some milk. The boy thinks about going to his storm home even if there is no blizzard, for as Mr. Keillor says, "storms are not the only or even the worst things that can happen to a child."[4] Alas, that school year brings only "convenient," weekend blizzards, so the boy never actually goes to his storm home. Yet the knowledge of its existence had brought him great comfort at a time of gnawing anxiety.

As we approach the last stages of life, we have reason to be anxious. We have seen the road traveled by others, and it is a fearsome prospect. For Judge Posner, the greatest fear seems to be the senility that affected his mother at the very end of her life. For oth-

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2. *See, e.g.*, Compassion in Dying v. Washington, 85 F.3d 1440 (9th Cir. 1996), *cert. granted sub nom.* Washington v. Glucksberg, 117 S. Ct. 37 (1996).

3. GARRISON KEILLOR, NEWS FROM LAKE WOBEGON DAYS (Minnesota Public Radio 1985).

4. *Id.*

ers, it will be the physical decline, and the accompanying loss of freedom, that they have witnessed in their parents and others. For those with a major illness, it may be the wracking pain or fruitless invasive treatments that are almost inevitably nothing but a ghastly and terrifying passage to death. All of us have reason to fear. We all need a "storm home" to contemplate; a place, where, if we have to, we can go to find protection and comfort from what is scaring us.

Comfort for many comes from the care of a loving spouse, a dutiful child, or a faithful friend who will be there to care for us if we become helpless. That care may well take the form of letting us die when hope of recovery is gone. The durable health care power of attorney gives our protector the legal authority to act on our behalf if we cannot.[5] A man may hope that his power of attorney is never used, yet find comfort in the knowledge that it is in his wife's desk drawer. Others will find comfort in unshakable faith. To believe that God is with you as you "walk through the valley of the shadow of death" is powerful comfort. For those who are blessed with this belief, their faith will make even the prospect of terminal illness bearable.[6] God provides a mighty fortress of a storm home. We all need comforting as the end of life approaches, and it may come from many sources.

It is in this vein that Judge Posner makes his case for legalizing assisted suicide. A person may find comfort in the knowledge that, if things get too bad, at least suicide is an alternative. As one member of my own family recently said to me, "when I get to that state [of being confined permanently in a nursing home], I just hope I have

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5. *See* Rebecca Morgan, *Florida Law and Feeding Tubes — The Right of Removal*, 17 STETSON L. REV. 109 (1987).

6. The phrase "valley of the shadow of death" comes of course from the twenty-third psalm, which reads in its entirety:

> The Lord is my shepherd; I shall not want.
> He maketh me to lie down in green pastures: he leadeth me beside the still waters.
> He restoreth my soul: he leadeth me in the paths of righteousness for his name's sake.
> Yea, though I walk through the valley of the shadow of death, I will fear no evil: for thou art with me; thy rod and thy staff they comfort me.
> Thou preparest a table before me in the presence of mine enemies: thou anointest my head with oil; my cup runneth over.
> Surely goodness and mercy shall follow me all the days of my life: and I will dwell in the house of the LORD forever.

Psalms 23, *The Shepherd Psalm* (King James).

the strength to put the gun to my head." Suppose a person is diagnosed with a terminal illness. He wants to live but knows that, if the doctor is correct, he eventually will become helpless and unable to commit suicide. He would greatly prefer death to this fate but is unsure of the diagnosis and would like more information. If assisted suicide is not an alternative, then this person may make a rational decision to commit suicide now rather than risk a horrible fate on the outside chance that the doctor is wrong. The knowledge that doctor-assisted suicide is available, however, may prevent our patient from panicking. He can wait, comforted by the knowledge that, if things get too bad, there is always Dr. Kevorkian.

By legalizing doctor-assistance, fewer and later suicides may occur. More to the point, the patient endures this horrible time with the assurance that he can end the suffering at any time. That knowledge itself makes the experience more bearable and comforts the patient.

One can prefer that people find comfort other than in self destruction. I personally find more comfort in the love and judgment of my wife. However, unless one is prepared to deny to others the storm home of their choosing, Judge Posner's argument is irrefutable. In a society where personal liberty is still highly valued, it is a powerful case for the liberalization of physician-assisted suicide.

RETIREMENT PLANNING OF THE BARBIE AND KEN GENERATION

Judge Posner turns more philosophical in addressing problems in old age that result from decisions made earlier in life. Recent studies indicate strongly that the "baby-boomer" generation is saving far less than it needs to in order to finance comfortable retirements in the 21st century.[7] Why would a rational utility-maximizing individual short-change himself later in life? Judge Posner's answer is that in useful respects we should treat the youthful person as a different person that the one he or she will become decades later. He calls this mode of analysis "multiple-selves analysis."[8] The youthful person may well prefer his or her own consumption over the con-

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7. *See* Nicholas D. Kristoff, *Aging World, New Wrinkles*, N.Y. TIMES, Sept. 22, 1996, § 4-1.

8. RICHARD A. POSNER, AGING AND OLD AGE (1995), at 85.

sumption of his or her contingent (on survival that long) future self and thus choose to consume rather than to save, thereby condemning the future self to a penurious dotage. This analysis confirms what we observe on a regular basis: older people often regret the consequences of decisions they made when they were young.[9]

I have another, less-formal, name for what Judge Posner calls multiple-selves analysis: the irresponsibility of youth.[10] My nine-year old refuses to save his lawn-mowing money even though he knows that his "future contingent self" would thoroughly enjoy greater consumption next week. He, like every other self-respecting pre-adolescent, cannot resist the temptation to spend himself back to the starting line each week. Young people are irresponsible about many things. They believe that nothing bad will ever happen to them (doesn't every sixteen-year-old behind the wheel of a car believe himself to be immortal?), that they will never get old, that they will never die. To state the problem so bluntly is not to denigrate Judge Posner's far more elegant presentation. It is merely to say that his conclusions are in accord with our everyday experience. That makes them more powerful, not less.

The implications of the multiple-selves analysis, like the assumption that young people are irresponsible, can be troublesome. If a "young" person of thirty-five is able to save for retirement but does not do so because he is too irresponsible, what are we as a society to do about it? In Judge Posner's terms, if that person is insufficiently concerned with his hypothetical future self, why should we be? As Judge Posner correctly observes, the real problem is that we do not believe that our society will permit the old self to be cast aside, condemned to starve because, as a youth, he committed a folly. We know that society will take at least some minimal care of him.

But the responsible among us are contingently outraged at the prospect of being punished for our foresight.[11] So we create incentives to save through tax laws (like Individual Retirement Accounts

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9. Mickey Mantle: "If I had known I was going to live this long, I would have taken better care of myself." John S. Sergent, *Helping to Keep the Body Free from Cancer*, TENNESSEAN, Nov. 19, 1996, at 7A.

10. Early in his book, Judge Posner reveals that he wrote it at the age of 55. Given the tone of the phrase "irresponsibility of youth," I feel obliged to reveal that I am only 39 years old but, as the father of two, feel entitled to such a curmudgeonly turn of phrase.

11. Kristoff, *supra* note 7.

and 401(k) retirement savings plans) hoping to make saving attractive to our reckless contemporaries. We mandate social security contributions on the theory that we will force them to make at least minimal provision for their future. The power of Judge Posner's analysis is that it clarifies the necessity of collective action. If we are not all reliable trustees for our future contingent selves, as our common sense and the savings rate tell us, something must be done. The nuts for the winter will not collect themselves.

The implications of this analysis also apply, in troublesome ways, to health care. The elderly in our society consume a large percentage of our health care budget.[12] Some of those costs, no doubt, result from hedonistic decisions made early in life, such as the decision to smoke cigarettes, or drink alcohol, or eat rich, fatty food. Even an economist can understand why such high living might be perfectly rational. Since death is inevitable, and old age is almost always a time of diminished ability and opportunity to indulge oneself, it is rational to make hay while the sun shines.[13] The economist would say that hedonism today brings more marginal utility than forbearance will bring in a future doomed to be fairly bleak anyway.

The problem is again that, as a society, we know that we will not permit our elderly to do without medical care. Should we, therefore, require people to follow a healthy lifestyle in order to minimize, or at least delay, the onset of disease?[14] The uncomfortable economic answer may be yes. It is an uncomfortable one because it restricts individual liberty. Yet the answer might be yes because otherwise hedonistic youth can force part of the cost of their indulgence onto others. An alternative is to force younger people to make provision for their own heath care later in life, as we do with mandatory contributions to the Medicare program.[15] Legislatures could also create tax incentives, such as Individual Medical Accounts, to encourage

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12. Judge Posner reports that 13% of the population over the age of 65 account for more than one-third of all health care expenditures in the United States. *See* POSNER, *supra* note 8, at 36 (citing Daniel R. Waldo et al., *Health Expenditures by Age Group, 1977 and 1987*, HEALTH CARE FINANCING REV. at 111 (Summer 1989); U.S. Senate Special Comm. on Aging et al., *Aging America: Trends and Projections* at 133 (1991 ed.).

13. ROBERT HERRICK, TO THE VIRGINS TO MAKE MUCH OF TIME (1648).

14. *See* Analysis Regarding the Food and Drug Administration's Jurisdiction Over Nicotine-Containing Cigarettes and Smokeless Tobacco Products, 60 Fed. Reg. 41,453 (1995).

15. *See, e.g.*, 26 U.S.C. § 1401(b) (Supp. 1996) (medicare taxes on self-employed).

savings.[16] The economic analysis highlights the need to make policy choices and supports some type of collective response. It cannot, of course, provide a full answer to which choice we should make, but the knowledge that policy today must make provision for tomorrow — because the baby boomers won't do it for themselves — is an important realization.

MANDATORY RETIREMENT AND THE LEGAL ACADEMY

Near the end of his book, Judge Posner discusses the implications of economic analysis and the Age Discrimination in Employment Act as they apply to professors. Under the ADEA, it is now illegal to impose a mandatory retirement age except for certain professions.[17] Teaching law school is not among the exceptions. Judge Posner apologizes, as a former professor, for devoting attention to a profession to which he once belonged. No apology is necessary, for his analysis has profound implications for the future of legal education and especially the institution of tenure among academic lawyers.

As Judge Posner points out, the inability to force retirement at a certain age is unimportant in most occupations because eventually the boredom of work, combined with the stress of having to put forth ever more effort to do a minimally competent job, will induce workers voluntarily to retire. In economic terms, the marginal utility of continuing to work (measured in monetary compensation and job satisfaction) eventually is exceeded by the marginal utility of leisure. As expressed by Johnny Paycheck, it is eventually a rational economic decision to tell the employer to "take this job and shove it."[18] Furthermore, in most occupations, employers still have the option to make individual assessments of productivity and weed out unproductive workers. With or without a mandatory retirement age, most people over the age of sixty-five in our society will be voluntarily retired.

The problem is that law teaching is not the kind of job that one is anxious to quit. It is not boring: the legal academic has enormous freedom about how to teach his or her classes and what research

16. ARIZ. REV. STAT. § 43-1028 (1996).
17. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–633 (1967).
18. JOHNNY PAYCHECK, *Take this Job and Shove It* (Epic Records 1977).

interests to pursue, if any. It need not be particularly stressful, and there are enormous nonpecuniary compensations to the job.[19] The marginal utility of continuing to work will be quite high. There is almost no incentive, therefore, to retire voluntarily in the absence of serious disability. Furthermore, it is almost impossible for law schools to terminate elderly professors, regardless of job performance, because they have tenure. It is not enough to be an incompetent teacher and an unproductive scholar; a tenured professor must be a rogue or a lunatic to justify revocation of tenure. Although there is no formal impediment to the reduction of salary of law professors, the culture is such that reductions in absolute terms rarely occur. Most law professors of any age do their jobs responsibly and diligently. To the extent, however, that any succumb to the temptation to stay past their time, law schools face the grim prospect of aging, unproductive faculties about which they can do nothing.

Judge Posner suggests that the solution is to buy out the faculty members with "early retirement" benefits. The buyouts would be financed, in the long run, by paying lower salaries to professors over the course of their careers. The economic equations in this analysis work, but the practicalities are otherwise. The average full professor at an American law school makes over $90,000 per year.[20] Professors who are over-staying their welcome probably will be making more than the average. Even at the average figure, however, a buyout may be prohibitively expensive for the current generation of older faculty, who presumably did not "pay" for their own early retirement benefits by accepting lower salaries throughout their careers. If a full professor at age sixty-five foresees ten more years of working, the present value of that income stream is well over $700,000.[21] Professors are unlikely to discount this figure much by the value of leisure because they can choose to have quite a bit of leisure while remaining full-time members of the faculty.[22] A buyout of this mag-

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19. JOHN GRISHAM, THE PELICAN BRIEF (Doubleday 1992) (describing law professors as being minor gods to their students).

20. *1995–96 SALT Salary Survey*, THE SALT EQUALIZER (Society of American Law Teachers, Fort Lauderdale, Florida), July 1996.

21. This calculation assumes a discount rate of 4%. For a description of how present values are calculated, see JACK HIRSCHLEIFER, PRICE THEORY AND APPLICATIONS 423–25 (1976).

22. The accreditation standards for law schools state that the average teaching load per semester is six hours. A law professor who is doing his or her job responsibly, however, will spend many more hours than that on the job. Preparing for class, meeting

nitude would constitute a significant portion of a typical law school's yearly budget. Even if in the long run early retirements can be made to pay for themselves, there must be serious doubt in the short run that they are economically feasible, at least at schools without large endowments.

The short run solutions would be much more emphasis on merit pay and the abolition of tenure.[23] There are measures of academic productivity that can be used to set salaries. Publications of significant research, student evaluations, and peer review are among the possibilities. If termination is not to be an option for unproductive tenured faculty, then the prospect of drastically reduced compensation will be needed to either keep them on duty or to persuade them that the time for retirement has come. In the alternative, or perhaps in combination with a more incentive-based compensation structure, moves inevitably will be made to abolish tenure.[24] Interestingly, if it becomes acceptable to reduce salaries, or possible to terminate older faculty members for a lack of productivity, then the short run solutions become the long run solutions. There is no longer a need for self-financed early retirements if law schools as employers can encourage productive older faculty to stay, and unproductive ones to retire, without the expense of the buyouts.

Regardless of one's views on how these issues will play out, Judge Posner has performed a valuable service for law schools by his powerful analysis of the incentives of aging faculty members. The one thing that is clear is that the interaction between the older law professor and his or her law school will change significantly in the near future.

CONCLUSION

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with students, assisting with the governance of the law school and the University, participating in bar association activities, and conducting scholarship are just a few of the duties that keep law professors working happily for more than forty hours per week.

23. James Harper, *College Regents' Reforms Keep the Spirit of Tenure*, ST. PETERSBURG TIMES, Sept. 28, 1996, at B1.

24. Denise K. Magner, *Minnesota Regents' Proposals Would Effectively Abolish Tenure, Faculty Leaders Say*, THE CHRON. OF HIGHER EDUC., Sept. 20, 1996, at A10; Marc L. Kesselman, Comment, *Putting the Professor to Bed: Mandatory Retirement of Tenured University Faculty in the United States and Canada*, 17 COMP. LAB. L. 206 (Fall 1995).

I have attempted to do nothing more than to provide a sampler of the issues that Judge Posner's book addresses. There are many others.[25] The issues are important and timely. His analysis is robust. Anyone with an interest in issues affecting the elderly should read this book. Judge Posner himself concludes the book by describing it as "an embarkation, or . . . a glimpse of the promise of multidisciplinary inquiry guided by economics."[26] I can conclude only by saying that as an embarkation the book is a huge step toward understanding issues of old age and aging, and the glimpse it provides of the power of economic analysis is a very promising one.

25. Among the additional issues discussed are the productivity of older judges (chapter 8), the treatment of elderly tortfeasors, tort victims, offenders, and prisoners (chapter 12), and age discrimination in employment (chapter 13).

26. POSNER, *supra* note 8, at 363.