Marquette Elder's Advisor

Volume 7
Issue 1 *Fall*

Article 4

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SOCIAL VALUES AND OLDER PERSONS: THE ROLE OF THE LAW

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For better or worse, the law and legal processes, as powerful reflections, protectors, and shapers of social values, play a central role in the lives of older persons and those who care for and about them. This article explores that role and focuses on the question of whether, in formulating, interpreting, and enforcing the law, chronological age ought to be treated by legislatures, regulators, and the judiciary as a material, indeed an important, or even determinative, consideration, or by contrast, as a factor that should best be rejected and ignored as irrelevant or even harmful.

THE LAW AND SOCIAL VALUES

We must begin by distinguishing law from the related areas of public policy and ethics. To a large extent, this distinction is artificial. Almost two centuries ago, Alexis de Tocqueville, the great French observer of American society, declared after traveling through this country that "[t]here is hardly a political question in the United States that does not sooner or later turn into a judicial one."[1]

Nonetheless, and to grossly oversimplify, in a public policy assessment we are asking whether a possible government action, according to a variety of measures, is a good or bad idea, and whether it is something that society would be wise to do. Ethics pose normative questions about what we ought to do from the

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1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed., Harper & Row 1969) (1835).

perspective of moral rightness and wrongness. This article does not present a discussion of public policy or social ethics *per se*. Instead, the concentration is specifically on law (in the form of federal, state, and local constitutional provisions; statutes; administrative rules and regulations; and common law judicial precedent) as the instrument through which we establish the boundaries or parameters within which meaningful discussions about public policy and ethics may take place and then be carried out in a principled manner.

In examining law as a boundary setter or guidepost for the consideration of policy initiatives and ethical dilemmas, there are three key questions. First, what affirmative, positive duties or responsibilities do we impose and enforce on government and/or private actors? When do we *require* that someone act in a particular manner? Second, when there is no legal *duty* to act, what *powers* do we nonetheless afford government and private actors to act if they *choose* to act? What kinds of actions do we *permit*? Finally, and perhaps most significantly, what legal *restraints* or limits does the law place on the powers of governmental and private actors in order to protect the liberty and property interests of the individuals who are affected by the actions of governmental or private actors? How do we legally balance and mediate the conflict that sometimes emerges between public power, on one hand, and private rights, on the other?

Some matters of good public policy and ethical consensus, such as assuring adequate health care for everyone regardless of age or personal financial means, are not embodied in the law. Conversely, some legal provisions are not totally consistent with wise social policy or the prevailing ethical consensus. According to the judge for whom this article's author clerked right after law school graduation, "The law is just common sense and sound judgment unless a legislature or appellate court has changed it."[2] This author certainly has never been hesitant to criticize ill-conceived or even anti-therapeutic laws affecting older persons;[3] indeed, a lot of curriculum vitae space has been filled up doing exactly that.

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2. Personal conversation with Dyer Justice Taylor, Associate Judge of the District of Columbia Superior Court, in Washington, D.C. (1975).

3. *See* MARSHALL B. KAPP, THE LAW AND OLDER PERSONS: IS GERIATRIC JURISPRUDENCE THERAPEUTIC? (Carolina Academic Press 2003).

Most of the time, however, in a functioning democracy, the law *does* embody sound, morally defensible public policy choices. Many readers are familiar with, and probably on more than one occasion have quoted, the famous line in Shakespeare's play, *Henry VI,* "The first thing we do, let's kill all the lawyers."[4] What most readers do not know is the context of that line. It is spoken by one of the rabble-rousers fomenting the revolution. Shakespeare treats the speaker as a very unsympathetic character whose threat against lawyers is painted negatively as a harmful attack against order and justice in the kingdom.[5] The villains understand that it is impossible to have a peaceful, stable, civilized society without respect for the rule of law.[6] Indeed, elsewhere Shakespeare wrote, "When law can do no right, Let it be lawful that law bar no wrong [!]"[7]

Similarly, in his book, *The Future of Freedom,* author Fareed Zakaria persuasively argues that in the successful building of new democratic societies, the development of a legal climate perceived to be fair and predictable must come about even before the holding of popular elections.[8] Otherwise, the free exercise of voting rights in an environment of social and political chaos and instability is a mere cosmetic exercise doomed to long-term failure. "The 'Western model of government,'" Zakaria writes, "is best symbolized not by the mass plebiscite but the impartial judge."[9] In a lighter vein, a cartoon appeared in *The New Yorker* in which a family is seated around the dinner table and the parents tell their three scowling offspring, "Because this family isn't ready to hold democratic elections–that's why!"[10]

A paradox of freedom is that its protection and

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4. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2, l. 63 (Michael Hattaway ed., Cambridge University Press 1991) (1564).

5. *See* CATHERINE CRIER, THE CASE AGAINST LAWYERS 180 (Broadway Books 2002). ("We applaud this suggestion [killing all the lawyers] today but for reasons he [Shakespeare] didn't intend. Originally lawyers were perceived to be educated soldiers in defense of freedom. A tyrant would do well to destroy these men.")

6. *Id.*

7. WILLIAM SHAKESPEARE, KING JOHN act 3, sc. 1, ll. 185-86, in THE WORKS OF SHAKESPEARE (John Dover Wilson ed., Cambridge University Press 1936) (1564).

8. FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 18-19 (W.W. Norton & Co. 2003).

9. *Id.* at 20.

10. Danny Shanahan, *Spring Break,* 80 THE NEW YORKER, Apr. 19 & 26, 2004, (Cartoon), at 14.

perpetuation depend on the shared security provided by a strong, functional legal system and a populace committed to it. True freedom depends on our ability to rely on the legal system for protecting the right to contract with others, safeguarding of personal liberties and property interests, delineating clearly the relationship between individual and social responsibilities, and punishing wrongdoers in order to incapacitate and deter them from future misdeeds. These functions of the legal system all affect the well-being of older persons and, not incidentally, comprise the basic content of the required first-year curriculum in every American law school.

In performing its role of civilizing society, the law reflects, promotes, and helps to shape social norms or values. First, the law *reflects* and embodies prevailing social attitudes by codifying or enshrining them with a formal, official, and enforceable status. Medicare, for example, exists because Congress has enshrined the prevailing social consensus about the value of health security for older persons in a detailed set of obligations, powers, and entitlements.[11] Some people get impatient with the law when it lags behind the solidification of social and ethical consensus on a particular issue. Stem cell research and cloning are good examples; both are areas where many commentators have expressed concern that we presently do not have adequate laws in place to deal comprehensively with rapidly-changing and controversial scientific possibilities.[12] However, the very fact that both the science and accompanying social attitudes about the conduct and use of that science are in a highly dynamic state argue for caution in rushing to enact law in these and similar areas before a firm social consensus on the basic value questions has been achieved.

Second, the law *promotes* social values by enforcing its provisions, ultimately through the use of force if necessary. If one decides to disobey the law, he or she does so at peril to his or her own physical and economic well-being. The availability of enforceable sanctions is one of the law's distinguishing characteristics; philosophers may try to convince us to behave in certain ways, but ultimately they cannot fine or put us in jail.

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11. DAVID J. ROTHMAN, BEGINNINGS COUNT: THE TECHNOLOGICAL IMPERATIVE IN AMERICAN HEALTH CARE 68-86 (Oxford University Press 1997).

12. *See, e.g.*, Susan Okie, *Stem-Cell Research – Signposts and Roadblocks*, 353 N. ENG. J. MED. 1 (2005); Frederick Grinnell, *Defining Embryo Death Would Permit Important Research*, CHRON. HIGHER EDUC., May 16, 2003, at B13.

This is precisely why it is the legal system to which we turn in those unfortunate circumstances when less intrusive alternatives fail and push necessarily comes to shove.

Third, the law helps to *shape* social values by acting as a grand educator-albeit not infrequently one with a heavy and intrusive fist. Sometimes people who are forced, under penalty of law, to behave in particular ways undergo a reluctant attitude transformation as a result; in spite of themselves, they internalize the norms undergirding a specific law. For instance, the Omnibus Budget Reconciliation Act of 1987 (OBRA) implemented regulations forcing nursing homes to radically change their practices regarding the use of physical and chemical restraints on their residents.[13] In the early days of OBRA, great consternation and teeth-gnashing prevailed throughout the nursing home industry about the anticipated disastrous impact of this law on facilities and unrestrained residents.[14] In fact, although early compliance often was begrudging, clinical practice regarding the use of restraints has changed enormously for the better,[15] and nursing home professionals have learned that, when properly done, the reduction or elimination of restraints in most cases can and should be accomplished to benefit everyone concerned.[16] Hospitals, in turn, have learned from the long-term care experience and altered their restraint practices as well.[17]

THE CONTENT OF THE LAW AND THE ROLE OF AGE

The discussion thus far has dealt chiefly with the *functions* or *jobs* of the law. To fulfill these multiple functions, laws require *content.* Laws need to be *about* something. One fundamental issue is how, if at all, the law's content ought to reflect the phenomenon of age. In shaping and enforcing laws, to what

13. 42 U.S.C.A. § 1320c-5 (West 2003). *See* Marshall B. Kapp, *Nursing Home Restraints and Legal Liability: Merging the Standard of Care and Industry Practice*, 13 J. LEGAL MED. 1 (1992) (discussing the changes in use of restraints in nursing homes).

14. *E.g.*, Yvonne K. Scherer et al., *The Nursing Dilemma of Restraints*, 17 J. GERONT. NURSING 14 (1991).

15. *See* Xinzhi Zhang & David C. Grabowski, *Nursing Home Staffing and Quality Under the Nursing Home Reform Act*, 44 GERONTOLOGIST 13 (2004) (elaborating on the direct association between positive changes in the nursing home industry and these regulations).

16. *Id.*

17. *JCAHO Issues Revised Restraint Standards*, 25 HOSP. PEER REV. 73 (2000).

extent is age *material*; that is, potentially making a meaningful difference in the outcome? To what extent may we object that age is irrelevant? The easy response to this question, as to all legal queries, is an accurate but not very useful: "Well, it depends." Law schools teach with the Socratic method in which every answer is followed up with another question. The obvious follow-up question in this instance is, "On what does it all depend?"

The answer to that follow-up question about the proper relevance of age in shaping law's content turns on society's generally schizophrenic attitudes toward aging and older persons. Sometimes we believe, and our laws reflect, embody, and shape this concept that age and aging are irrelevant and that older persons are robust and self-reliant just like the rest of the population. Therefore, the law's content should focus on assuring older individuals equal treatment and protection against unfair discrimination.[18] This philosophy results in the enunciation of liberty or negative rights; that is, the right of the independent, autonomous older individual to be protected against unwanted and external interference or unequal treatment. Conversely, sometimes we think of older persons as an identifiable group that is unique in some pertinent manner and that justifies special or preferential treatment as compared with everyone else.[19] The outcome of this position is the legislative creation or judicial recognition of entitlements, or claims for the provision of specific benefits that may be enforced by an individual–solely by virtue of his or her membership in a specific age category–against public officials or private actors. At times, advocates for older persons have made, and lawmakers have responded to, both sorts of arguments depending on the particular issue under consideration.

The principle of equality, dictating non-discriminatory treatment that judges each person as an individual, is reflected in many civil rights laws that affect various facets of older persons' lives. Prominent examples of federal law include: Age

18. *See, e.g.*, AARP, THE AGE DISCRIMINATION IN EMPLOYMENT ACT GUARANTEES YOU CERTAIN RIGHTS, PW 3665/1(491)•D12386 (1991) (attributing age discrimination to stereotypes rather than facts).

19. *See* HARRY R. MOODY, AGING: CONCEPTS AND CONTROVERSIES 189-210 (Pine Forge Press 3rd ed. 1994); ROBERT B. HUDSON ed., THE FUTURE OF AGE-BASED PUBLIC POLICY (The Johns Hopkins University Press 1997).

Discrimination Act,[20] Age Discrimination in Employment Act,[21] Americans With Disabilities Act,[22] Fair Housing Act Amendments,[23] the state and local counterparts to these federal statutes,[24] federal and state constitutional provisions that prohibit health care rationing schemes based on age,[25] and the removal of references to age in most state guardianship statutes as automatic grounds for finding persons incompetent to make their own personal and financial decisions.

The 1975 Age Discrimination Act[26] is the most straightforward illustration of a law in this category.[27] This Act provides that "no person in the United States shall, on the basis of age be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[28]

Building on the focus of racial equality in the 1964 Civil Rights Act,[29] Congress enacted the Age Discrimination in Employment Act (ADEA) in 1967[30] to protect people over age forty against discrimination in the workplace based exclusively on their age.[31] The ADEA, as subsequently amended several times, imposes on most private employers, employment agencies, and labor unions nondiscrimination obligations; that is, the responsibility to treat everyone equally regardless of age concerning hiring, termination, promotion, training, and other terms and conditions of employment or retirement.[32] Older persons who have been unfairly discriminated against may have their rights enforced through a complaint to the Equal Employment Opportunity Commission and, ultimately, through

20. 42 U.S.C.A. §§ 6101-6107 (West 2005).

21. 29 U.S.C.A. §§ 621-634 (West 2005).

22. 42 U.S.C.A. §§ 12101-12300 (West 2005).

23. 42 U.S.C.A. §§ 3601-3619, 3631 (West 2005).

24. *E.g.*, ALASKA STAT. § 18.80.050 (2004).

25. *See* Marshall B. Kapp, *De Facto Health Care Rationing by Age: The Law Has No Remedy*, 19 J. LEG. MED. 323 (1998) (discussing possible legal objections to health care rationing schemes explicitly based on patients' chronological age).

26. 42 U.S.C.A. § 6101-6107 (West 2005).

27. *See* Peter Schuck, *The Graying of Civil Rights Law*, 89 YALE L.J. 27 (1979) (analyzing the Age Discrimination Act and its current role in the statutory protections of aged persons).

28. 42 U.S.C.A. § 6102 (West 2005).

29. 42 U.S.C.A. § 2000a (West 2005).

30. 29 U.S.C.A. § 621-634 (West 2005).

31. 29 U.S.C.A. § 631 (West 2005).

32. 29 U.S.C.A. § 621 et seq. (West 2005).

a civil lawsuit for monetary damages and equitable relief, such as job reinstatement, in federal court.[33]

In 2004, the U.S. Supreme Court cleared up any ambiguity about who the ADEA is intended to protect. In *General Dynamics Land Systems v. Cline*,[34] a group of present and former employees between the ages of forty and forty-nine years sued the employer under the ADEA. They alleged that a collective bargaining agreement between the employer and the union, which eliminated the employer's retiree benefits health insurance coverage for workers then under age fifty, impermissibly discriminated against *younger* workers.[35] The Supreme Court held that the employer, by eliminating health insurance benefits for workers under fifty years of age but retaining coverage for workers over fifty years of age, did *not* violate the ADEA because discrimination against the relatively young is outside the ADEA's protection.[36] The majority opinion, in examining the issue of legislative intent, held:

> Congress used the phrase "discriminat[ion]. . .because of [an] individual's age" the same way that ordinary people in common usage might speak of age discrimination any day of the week. One commonplace conception of American society in recent decades is its character as a "youth culture," and in a world where younger is better, talk about discrimination because of age is naturally understood to refer to discrimination against the *older*.
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> This same, idiomatic sense of the statutory phrase is confirmed by the statute's restriction of the protected class to those 40 and above. If Congress had been worrying about protecting the younger against the older, it would not likely have ignored everyone under 40. The youthful deficiencies of inexperience and unsteadiness invite stereotypical and discriminatory thinking about those a lot younger than 40, and prejudice suffered by a 40-year old is not typically owing to youth, as 40-year olds sadly tend to find out. The enemy of 40 is 30, not 50.[37]

33. 29 U.S.C.A. § 626 (West 2005).
34. 540 U.S. 581 (2004).
35. *Id.* at 584.
36. *Id.* at 585-86.
37. *Id.* at 591.

The Supreme Court had sounded a very different note four years earlier in its analysis of workplace ageism. In *Kimel v. Florida Board of Regents*,[38] the issue presented was whether the nondiscrimination provisions of the ADEA applied to state and local public sector employers.[39] The precise, complicated legal issue concerned the authority of Congress under the Fourteenth Amendment's Equal Protection clause to enact an exception to the Eleventh Amendment's prohibition of lawsuits being initiated against the states by private citizens. In essence the outcome of the case revolved around proof to the extent older persons in this country *historically* had or had not been subjected to workplace discrimination by states and localities.[40] In finding that the historical record of age discrimination by public sector employers was *not* sufficient to justify abrogating the Eleventh Amendment's sovereign immunity protections, the Court held:

> Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a "history of purposeful unequal treatment." Old age does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it.[41]

At the very same time that laws against nondiscrimination aimed at individuals on the basis of age or age-related disability have been proliferating. The elderly, as members of a group, also have been perceived as significantly different from, and presumptively more dependent and vulnerable than, their younger counterparts.[42] Under this sensitive or paternalistic conceptualization of the aged as real or potential victims of neglect or exploitation, a creation of laws has been pushed that provide special, preferential benefits to persons eligible solely, or at least in large part, by virtue of having stayed alive for a set

38. 528 U.S. 62 (2000).

39. *Id.* at 66-67.

40. *Id.* at 91.

41. *Id.* at 83.

42. Judith G. Gonyea, *Age-Based Policies and the Oldest-Old*, XIX GENERATIONS 25 (Fall 1995).

chronological period of time.[43]

One form of state-sponsored discrimination in favor of older persons *qua* older persons is the legal creation of public benefit programs that use chronological age as the criterion, or at least one very important criterion, for eligibility predicated on the presumption of unique needs due to old age.[44] The legislative and regulatory adoption of age as at least a partial proxy for demonstrated need, and therefore program entitlement, may be seen in such government programs as the Social Security[45] retirement system and other public pension programs, Medicare,[46] Supplemental Security Income,[47] services under the Older Americans Act,[48] and public housing subsidies for the elderly.[49] Other forms of preference provided by the law are predicated on a perception that all or most older persons automatically belonging to a group characterized by particular vulnerability and an inability of its members to protect themselves. A number of jurisdictions include these forms of preference: expedited hearings, such as priority scheduling for older parties in civil litigation; increased penalties for criminals whose victims have exceeded a specified chronological age threshold; alternatives, such as closed-circuit television in place of live testimony for older witnesses in criminal trials; reduced sentences or early release for older convicted criminals; and adult protective services statutes classifying the acts or omissions of formal caregivers, family members, and others as forms of elder mistreatment (abuse or neglect) solely on the basis of a victim's age.[50]

IS GERIATRIC JURISPRUDENCE THERAPEUTIC?

Although we seldom put it in these terms, society creates laws and administers legal processes pertaining to older persons. We assume these laws and legal processes exert a positive,

43. *See* MOODY, *supra* note 20.

44. MARILYN MOON & JANEMARIE MULVEY, ENTITLEMENTS AND THE ELDERLY (The Urban Institute 1995).

45. 42 U.S.C.A. §§ 401-433 (West 2005).

46. 42 U.S.C.A. § 1395 (West 2005).

47. 42 U.S.C.A. §§ 1381-1385 (West 2005).

48. 42 U.S.C.A. § 3001 (West 2005).

49. 42 U.S.C.A. § 1437 (West 2005).

50. *E.g.*, NEV. REV. STAT. § 200.5099 (2005).

therapeutic impact on the lives of older persons by providing special protections or privileges based solely on their age. There are a few exceptions to this rule, such as laws that impose extra testing requirements on older applicants for a driver's license,[51] but such statutes intentionally disadvantaging the aged are rare and possibly vulnerable to constitutional Due Process and Equal Protection attack.[52] Although normally we make an assumption about the law's positive therapeutic efficacy, we seldom actually go back and empirically test the validity of that assumption after a law has been in place for a while.

We should be much more vigorous and rigorous in asking whether, in specific contexts, legal involvement and intervention in the lives of older persons is a good thing; that is, a therapeutic experience for the intended beneficiaries, specific others such as family members, and society as a whole.[53] Put differently, do the products of legislative, regulatory, and judicial endeavors really work in practice to achieve their promised salutary results? Or, does the law sometimes exert counter-productive or even negative effects? Legal advocacy in its myriad forms ought to be a continuous, incremental process for which improvement in content and procedure depends–or ought to depend–on credible, informed feedback in response to this kind of question.

The law is not an end in itself; rather, it serves as a necessary instrument to move us toward desired goals. The exact nature and extent of the regulatory and litigation environment intended to protect and promote the rights and well-being of older persons should be designed and repeatedly reexamined in light of reliable evidence about the real effects of different official interventions on older individuals and other intended beneficiaries like families. This environment should not be a response to political demagoguery, administrative inertia, or the economic interests of regulated parties, regulators, or litigators. The ultimate objective must be to carefully match particular regulatory requirements with desired outcomes while permitting everyone involved optimal flexibility to pursue the

51. David C. Grabowski et al., *Elderly Licensure Laws and Motor Vehicle Fatalities*, 291 J. AM. MED. ASSN. 2840 (2004) ("State governments have a variety of methods for increasing the stringency of the licensure process for elderly individuals, including the adoption of in-person renewal requirements, vision tests, road tests, and the implementation of a shorter renewal period.").

52. U.S. CONST. amend. XIV, § 1.

53. KAPP, *supra* note 3.

public good according to their own means and capacities.

CONCLUSION: LAW IS NOT ENOUGH

This article has reflected on the role of law and the legal system in protecting and promoting the rights and well-being of older persons. Despite its definite doctrinal and practical limits, that role is expansive and absolutely central. Law alone, however, always will be insufficient to accomplish the important ends that we all seek on behalf of older persons.[54] For instance, as a Supreme Court decision noted cogently, "Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source."[55]

Although law, public policy, and ethics are not synonymous, they do need to work in a complementary and synergistic fashion rather than a mutually exclusive or adversarial one. In his address to the 1978 Harvard graduating class, Nobel Prize writer Alexander Solzhenitsyn said:

> I have spent all my life under a Communist regime, and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale is not quite worthy of man either. A society that is based on the letter of the law and never reaches any higher is taking very small advantage of the high level of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relations, there is an atmosphere of moral mediocrity, paralyzing man's noblest impulses.
>
> And it will be, simply, impossible to stand through the trials of this threatening century with only the support of a legalistic structure.[56]

When Solzhenitsyn spoke in 1978, he was talking about the challenges to be faced by "The Exhausted West," the title of his commencement address, in the latter part of the *twentieth*

54. *See* PETER H. SCHUCK, THE LIMITS OF THE LAW: ESSAYS ON DEMOCRATIC GOVERNANCE (Westview Press 2000) (regarding the limits of the law).

55. *Meacham v. Fano*, 427 U.S. 215, 230 (Stevens, J., dissenting).

56. Alexander Solzhenitsyn, *The Exhausted West*, HARV. MAG. 21, 22 (July/Aug. 1978).

century. As we now make our way through the early part of the *twenty-first* century, we encounter a constellation of continuing and new challenges, both globally and domestically. As victims of our own success, many of the challenges and opportunities we now confront relate to how we, both as a society and as individual, personal and professional actors, can and should better care for, and about, a burgeoning older population. As we work toward fulfilling the mission of improving elders' quality of life and enunciating and enforcing the rights and responsibilities that this pursuit entails, it is imperative that we do so in a stable, fair, and secure social and political environment. That environment depends not just on the existence of a well-functioning legal system, as essential as that is, but also on the complementary moral aspirations and energies that will enable the rule of law, not to paralyze man's noblest impulses as Solzhenitsyn feared, but instead to embrace and advance them.

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