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“The Refurbishing”: Reflections Upon Law and Justice Among the Stages of Life

RICHARD O. BROOKS†

“[T]hat there be a refurbishing of the ancient idea of life stages.”¹

INTRODUCTION

The United States Supreme Court, in a recent opinion, held that the execution of individuals under eighteen years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments.² The Court found juveniles lack maturity and responsibility, are vulnerable to outside influences, and have less control over their

† Thanks to Elizabeth Holder, Kathy Leonard, Laura Gillen, and Judy Hilts for typing drafts. These “reflections” are offered in two moods—the mood of lofty Stoic and Epicurean acceptance of the inevitability of the stages of life, see PIERRE HADOT, *THE INNER CITADEL: THE MEDITATIONS OF MARCUS AURELIUS* 59, 148 Michael Chase trans., Harvard Univ. Press 1998), and the mood of irritated feelings of admittedly increasing slight discrimination, paternalism and irrelevance, and guilt at securing the benefits of aging, all of which come with my own aging and society’s response to it. This work of reflection is, in part, a pay back to Brandeis University and Robert Morris, who helped to support my graduate studies with a grant pertaining to the law of aging many years ago (despite the fact that at the time, I was uninterested, indeed repelled at the prospect of aging and the study of it!). Additional thanks to Kaylea White, a Vermont Law School student, who helped with some of the research.

1. DANIEL CALLAHAN, *SETTING LIMITS: MEDICAL GOALS IN AN AGING SOCIETY* 37 (1987). A particularly apt quote along these lines is from Robert Garland’s study of the ancient Greek stages of life; the quote about his account of such stages is, “[W]hat we have been examining is the artificial insertion of high drama, with all its many exits and entrances, into the palpable obscure passage of time.” ROBERT GARLAND, *THE GREEK WAY OF LIFE* 290 (1990).

2. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

surroundings.³ The majority based these conclusions upon human development literature.⁴

The *Roper v. Simmons* majority opinion and the dissent raise several questions: is there a discernible "juvenile" stage of life? If so, what are its boundaries? Is this stage of life a social construct or does it have a biological basis? What capacities or incapacities does each stage have? Do all individuals fall within the stages of life? What is or should be the ethical significance of a stage of life? What is or should be the legal significance of such stages? As applied to the juvenile stage, these issues were discussed in the briefs, the oral argument, and the court opinions themselves.⁵ The designation of diminished responsibility for juveniles is an example of our legal system's provision of legal duties and immunities based upon stages of life. The stages of foetal development, birth, infancy and childhood, adolescence, marriage and family, old age and retirement, as well as impending and actual death all receive special treatment by the legislatures and the courts.⁶ Some stages, such as adolescence, marriage and family, and old age have

3. This succinct summary of the majority was offered by Sandra Day O'Connor in her dissent. *Id.* at 598 (O'Connor, J., dissenting).

4. *Id.* at 569-70. Among other citations used by the court, see, for example, Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339 (1992). Justice Scalia's dissent took issue with the material cited by the majority and its applicability in this case. See *Roper*, 543 U.S. at 617-19 (Scalia, J., dissenting).

5. See generally *Roper*, 543 U.S. 551 (opinions of Justices Kennedy, Stevens, O'Connor, and Scalia); Brief for Petitioner, *Roper*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 903158; Brief for Respondent, *Roper*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1947812; Transcript of Oral Argument, *Roper*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 2387647. Two specific briefs which contained developmental studies were the Amicus Curiae Brief for the American Psychological Association and the Missouri Psychological Association, and the Amicus Curiae Brief for the American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Association. See Brief for the Am. Psychol. Ass'n et al. as Amici Curiae Supporting Respondents, *Roper*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1633549; Brief for the Am. Med. Ass'n et al. as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1633549.

6. These stages and the laws pertaining to them will be described in more detail below.

entire legal regimes devoted to them;⁷ other stages, for example, non-family adulthood, are less explicitly recognized by the law. Each stage is identified by the law for one or another purpose, even if the stages are not seen as part of an entire "arc of life." I seek to explore the legal significance of these stages as part of an arc of life—an entire lifespan. In the words of Daniel Callahan, there needs to be "a refurbishing of the ancient idea of life stages."

Two legal approaches may be discerned in seeking to understand the stages of life. One legal approach—the dominant one in our society—is a liberal egalitarian approach, in which laws and legal decisions based upon appeals to stages of life are viewed as unjustified constraints upon the freedom to define ourselves and pursue a range of actions at any age. Such freedoms include, for example, older women who take advantage of new technology to bear children at ages beyond the "normal" child bearing years. Older men are countering their declining sexual prowess with the help of Viagra and other drugs.⁸ Older people can seek to rescue their sexual and reproductive functions or return to school to complete high school or college, but an adult cannot simply choose to sit in elementary school in order to truly benefit from it the second time around. Child marriages or basic social security payments to young adults seem inappropriate; prohibiting such early marriages or payments hardly seems to be an illegal constraint upon one's freedom or equality. These latter examples suggest the "intimation" of another legal approach to the stages of life—one which recognizes the "reality" of life stages and the need to design "life-stage" appropriate laws.

It is this second alternative that I wish to explore in this Essay. I wish to explore the legal relevance of an

7. By "legal regime," I mean a coupler of laws bearing upon or defined by a given stage.

8. For a general view of the biology of men, see HARRY FISCH WITH STEPHEN BRAUN, *THE MALE BIOLOGICAL CLOCK: THE STARTLING NEWS ABOUT AGING, SEXUALITY, AND FERTILITY IN MEN* (2005).

encumbered⁹ self—one which is located within a certain life stage. The question I seek to explore is: should the law recognize our stages of life and if so, how? In posing this question, some might ask: why should the law bother to focus upon stages of life?¹⁰ One answer simply is a descriptive one—the law *does* attend to the stages of life. Second, as the *Roper* opinion illustrates, the question arises as to whether such legally recognized stages are soundly based upon developmental studies which reveal a reality of biological and social development.¹¹

In this Essay, I briefly explore the notion of the arc of life, of which the stages of life are a part. These stages of life are often simply recognized as discrete stages of life without being viewed as part of an entire life. My argument in this initial section is that the stages of life must be recognized as part of a unity of life rather than simply handy categories for making some age-specific legal rules and decisions. Fortunately, some Supreme Court decisions, such as *Roper*, recognize how stages of life are part of a larger life.

After rescuing the classic notion of “a whole life” as an important consideration for the law, I turn to the developmental and ethical literature which suggests the proper basis for recognizing the content of these stages of life. The developmental and ethical literature that argues for a notion of stages of life may be both ancient and modern. Therefore, a third task is to determine the contributions which both ancient and modern ethical treatments can make to an understanding of the stages of life and their development. This literature reveals that the

9. The notion of an unencumbered and encumbered self has been advanced most recently by MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996).

10. The personal answer to this question lies in my 70th birthday and the dawning recognition that I am “an old man.” I personally was never aware of the stages of life until this period of my life, a period of inevitable retrospection.

11. I am painfully aware that a legal philosopher as great as Lon Fuller takes issue with the notion that the law can pursue ideals rather than mandate duties. See generally LON L. FULLER, *THE MORALITY OF LAW* (1964). There is, however, a substantial body of jurisprudential opinions which disagree with Fuller. See generally *ARISTOTLE AND MODERN LAW* (Richard O. Brooks & James Bernard Murphy eds., 2003).

stages of life can be spontaneous expressions of nature, or activities and norms articulated in custom rather than law.

In the fourth part of this Essay, I identify the functions which law can play in regard to the stages of life. By identifying such functions, I seek to justify why law, rather than nature or custom, is required for the recognition of stages of life in complex modern societies. In the final section of the Essay, I seek to spell out the way in which the law knits together the stages into our ethical and legal ideal of the arc of life. Justice among the stages of life is an important part of the social meaning of the arc of life. I suggest that one role of law is the bestowal of justice among the stages within an arc of life.

I. THE ARC OF LIFE AND ITS STAGES

The notion of stages of life rests upon the assumption that each individual faces an entire life underlying and framing the progression of stages.¹² Some ancient Greeks believed that whether or not one achieves happiness depends upon what happens during one's entire life. The ancient Greek historian Herodotus tells the story of the meeting between Solon and Croesus.¹³ Croesus, at the pinnacle of wealth and power, asked Solon if he, Croesus, was a happy man. Solon demurred, saying he could not answer until Croesus's life ended.¹⁴ The notion of viewing

12. Although the notion of "an entire life" is one which emerges especially strongly in ancient thought, see FRANCIS SPARSHOTT, *TAKING LIFE SERIOUSLY: A STUDY OF THE ARGUMENT OF THE NICHOMACHEAN ETHICS* 324-25 (1994), notions of an entire life have been set forth by modern philosophers and others, discussed below. There may be very different assumptions about the way in which a path of life should be conceived, just as there are radically different notions of the way history proceeds. In regard to the latter, see generally CHARLES VAN DOREN, *THE IDEA OF PROGRESS* (1967). Thus, a life may be viewed as an arrow of progress, a meaningless jumble, a series of disconnected challenges and responses, an arc of growth and decline, a cycle—e.g., from dust to dust—and perhaps many others. See RICHARD A. SETTERSTEN, JR., *LIVES IN TIME AND PLACE: THE PROBLEMS AND PROMISES OF DEVELOPMENTAL SCIENCE* 5-64 (1999).

13. HERODOTUS, *THE HISTORIES* 13-16 (Robin Waterfield trans., Oxford Univ. Press 1998).

14. *Id.* at 15. Aristotle deliberates about this story and appears to conclude that, except for many significant reversals of fortune, one might be happy if he

happiness as a matter of a whole life cuts against the pleasure-loving, "carpe diem" grain of many Americans. And yet, despite our modern beliefs, it may indeed be a whole life, and the recognition of the importance of a whole "arc of life,"¹⁵ that makes the most sense when assessing happiness.

If I take the long view of happiness as that which characterizes a whole life, and I think¹⁶ back upon my life as an example, it appears to be roughly divided into a series of rather traditional stages—birth and childhood, student days, marriage and family, middle age, and now old age with senescence in prospect. At the time I was in each stage, I did not experience these stages *as* stages of life; in retrospect these stages and my passage through them seems obvious.¹⁷ In this sense, acceptance of any theory of stages of life may depend upon retrospection as these stages wind down. Perhaps it is the jarring experience of entry into the stage of old age which now stimulates my remembrance of past stages.¹⁸ Perhaps the only other way of taking the stages of life seriously is through literature.

or she engages in appropriate activities in accordance with a virtuous character and necessary external goods at any time of life.

15. My figure of "arc of life" is chosen deliberately to acknowledge the growth, peak, and decline of powers in many lives. Jung adopts the phrase "curve of life." See *infra* note 161.

16. I am aware of the danger of relying upon the subjective experience of a white aging male. Indeed, those legal theorists who appeal to subjectivity might well reconsider when they witness such an appeal. For one of many subjective approaches to the law, see ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* 265, 290 (1993). Obviously, paths of life can be interrupted by accident and illness, and be affected by gender and culture. Many people do not have the luxury of ruminating about the stages of their lives. My appeals to stages of life will account for individual and social differences and acknowledge the problems of interrupting the progression of such stages.

17. The sense of stages of life, and their relationship to each other and to law, depends both upon personal reminiscence and civic memory. This memory will be discussed below.

18. The awareness of stages of life through memory raises profound questions about the relations of memory and law; in this case, the memory is not only my individual memory, but well may constitute a collective memory built in collective consciousness, tradition, politics, and law. See, e.g., BRUCE JAMES SMITH, *POLITICS & REMEMBRANCE: REPUBLICAN THEMES IN MACHIAVELLI, BURKE, AND TOCQUEVILLE* (1985).

Certainly the most famous literary treatment is Shakespeare's *Seven Ages of Man* in *As You Like It*.¹⁹

All the world's a stage,
 And all the men and women merely players.
 They have their exits and their entrances,
 And one man in his time plays many parts,
 His acts being seven ages. At first the infant,
 Mewling and puking in the nurse's arms.
 Then, the whining school-boy with his satchel
 And shining morning face, creeping like a snail
 Unwillingly to school. And then the lover,
 Sighing like furnace, with a woeful ballad
 Made to his mistress' eyebrow. Then, a soldier
 Full of strange oaths, and bearded like the pard,
 Jealous in honour, sudden, and quick in quarrel,
 Seeking the bubble reputation
 Even in the cannon's mouth. And then, the justice,
 In fair round belly, with good capon lined,
 With eyes severe, and beard of formal cut,
 Full of wise saws, and modern instances,
 And so he plays his part. The sixth age shifts
 Into the lean and slippered pantaloon,
 With spectacles on nose, and pouch on side,
 His youthful hose well saved, and world too wide
 For his shrunk shank, and his big manly voice,
 Turning again toward childish treble, pipes
 And whistles in his sound. Last scene of all,
 That ends this strange eventful history,
 Is second childishness and mere oblivion,
 Sans teeth, sans eyes, sans taste, sans everything.²⁰

19. WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 2, sc. 7 reprinted in *THE ARDEN SHAKESPEARE BOOK OF QUOTATIONS ON THE SEVEN AGES OF MAN* 5-6 (Jane Armstrong ed., 2001). Armstrong has assembled a small book of quotes from Shakespeare, which I shall draw upon. The number of stages, seven, will be discussed below.

20. *Id.* at 5-6. The history provided here by Shakespeare's character in *As You Like It* is in the context of demonstrating that the Duke shared his unhappiness with others who experience unhappiness at all stages of life. In my review of the literature of the stages of life, i.e., literature which explicitly treats stages of life, the stages of youth, early adulthood, and old age are well documented. On the other hand, adulthood and middle age are vast uncharted seas. I must confess that in this inquiry, I am stimulated by a number of elegant, recent books. See, e.g., TODD D. RAKOFF, *A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* (2002) (seeking to show how law allocates time in society—work time, school time, community and family time). Rakoff explores

As suggested above, the usual approach to the stages of our life is through the liberal spectacles of "age discrimination."²¹ Those concerned with age discrimination begin with an underlying assumption that the stages of our lives may, with some exceptions, be fungible units of time to be treated equally. Equal treatment and freedom from discrimination become the central moral and legal norm. The burden is placed upon those who treat people of various ages differently to justify that different treatment. That justification is to be not in terms of age itself, but some other justification, such as disability or lesser capacity. For

the legal disputes at the boundaries of time. He argues that there are collective rules governing the time of our lives and that more such rules may be needed to coordinate the times in our lives. The late Mortimer Adler, on the other hand, sees time as allocated within our lives, and our ethical choices, in part, guide that allocation. See MORTIMER ADLER, *THE TIME OF OUR LIVES: THE ETHICS OF COMMON SENSE* (1970). While Rakoff sees time as allocated by law in society, and Adler views time as being allocated within an individual's life, I view "the time of our lives" as allocated by law as well. Whereas Rakoff sees law as allocating time horizontally through society, I see law as allocating time vertically over the course of our lives. And whereas Adler sees the allocation of time within the static framework of an ethical life, I conclude that law helps to create or ratify the pre-existing biological and social stages of our lives as well as our ethical choices at different stages of life. Just as Rakoff finds that there are disputes over the legal allocation of time in our society, and Adler shows that there are ethical disputes about the allocation of the time of our lives, I seek to show that there are legal disputes over the allocation of time at and within the boundaries of the stages of our lives. These disputes, in part, may assume that each stage of life has its own social meaning and excellence. David Norton, as well as many others, has sought to define the excellences of these stages of life by arguing that not only does a life have its penultimate stage of excellence before old age, (yes, we do decline!) but each stage also has its individual stage of unique achievement. DAVID NORTON, *PERSONAL DESTINIES: A PHILOSOPHY OF ETHICAL INDIVIDUALISM* (1976).

21. The liberal approach seriously questions the notion of "stages of life." See SANDRA FREDMAN & SARAH SPENCER, *AGE AS AN EQUALITY ISSUE: LEGAL & POLICY PERSPECTIVES* (2003), for an excellent discussion of the liberal position. The liberal approach to the legal dispute over stages of life has been documented by Howard Eglit in his writings, including his voluminous three volume treatise on age discrimination. HOWARD C. EGLIT, *AGE DISCRIMINATION* (2d ed. 1994). This treatise reviews the myriad laws and cases which bear upon the use and abuse of age determinations by the law. Eglit's focus is upon how age determinations, especially discriminations of old age, may or may not violate statutes and constitutional provisions designed to protect us against inappropriate age discrimination. See generally EGLIT, *supra*. However, unlike Eglit, I am interested in age determinations as markers of the stages of life, and I seek to reflect upon the broader role of law in establishing these stages. Such a topic is not a standard legal topic and hence my reflections extend over a broad range of legal and non-legal subject matters.

example, one issue which arises in tort law is whether people of different ages have the capacity of committing intentional or negligent torts. In several cases, courts have found that children or the elderly may lack the capacity to commit intentional or negligent acts.²²

Such an "age blind" approach may seem especially appropriate as applied to the elderly when the aged are now living longer and maintaining their vigor. Such liberal flexibility seems appropriate to other stages of life as well, such as when middle aged people return to school or middle aged women bear children. Such events suggest that stages of life have no meaning in a modern world. The liberal approach, which may ignore the stages of life but which acknowledges differing capacities, is often extended to a radical liberal approach in which even capacities are ignored, and one is deemed free to determine (perhaps with the help of technology) who one is.

Not only does freedom²³ offer a modern rationale for ignoring the stages of life, but the ideal of equality may as well. Whether equality is treating like persons alike (and all ages are deemed alike), giving persons equal dignity (and all ages deserve equal respect), or recognizing equal needs (all ages have equal needs), the rationale is one of beginning with each stage of life treated equally.²⁴ There is something wrong with this liberal egalitarian approach to the stages of our lives. Like the color blind ignorance of the reality of the lives of other minorities, an age blind legal approach seems to fail to "recognize" the young as young, and the aged as aged. Such an approach seems at odds with my own subjective experience of age and the subtle but very real way in which I am treated increasingly as aged by my

22. For a review of the relationship of standards of negligence to children and their development, see Lisa Perrochet & Ugo Colella, *What a Difference a Day Makes: Age Presumptions, Child Psychology, and the Standard of Care Required of Children*, 24 PAC. L.J. 1323, 1376-97 (1993).

23. As I shall set forth below, freedom may be a rationale both in the sense of absence of societal or government constraints, and also realized through the economic market. Thus, government should not constrain our freedom by mandating stage of life requirements and/or the market should function to define the stages of our lives.

24. For a more general discussion of equality in relation to the stages of life, see Sandra Fredman, *The Age of Equality*, in AGE AS AN EQUALITY ISSUE: LEGAL AND POLICY PERSPECTIVES, *supra* note 21, at 21.

fellow workers, students, and citizens. (I am fully aware that some of my fellow older citizens do not "feel" old, nor believe that they are being treated as old. I believe they are wrong; indeed, they are "in denial" about the realities of aging.) Although I, unlike some modern legal scholars, do not believe that subjective feelings should determine how the law should be shaped or understood,²⁵ my subjective feelings of aging at least raise questions for me and others as to the validity of the legal views of those who deny their reality of the stages of our lives. It will remain to provide more objective arguments for recognizing the stages of life in law.

Consistent with my classical Greek bias,²⁶ I begin my analysis by looking at all of the stages of life. I compare the approach taken by the classical Greeks²⁷ to that taken by the liberal egalitarians and find the classical Greek approach a preferable one, albeit one that requires modification by the differences between classical Greek and modern life. One of many important conclusions of the classical Greeks is that law is intertwined with biology and social life, as well as with the law of the political community. Thus, for the Greeks, biology and social customs are conditions to which law must adapt. As Greeks pursued their goals in life, these goals reflect, and are reflected by, recognized stages of life.

The experience of the ancient Greeks suggests a different role for our modern law in dealing with the stages of life rather than simply the liberal role of rectifying discrimination. The law performs several distinct functions with regards to the stages of life. It establishes, creates, or ratifies the boundaries of the stages of life; it allocates goods within these boundaries, and it helps give meaning to the various stages (partly by defining the appropriate nature of time suited to each stage). It also establishes distinct legal regimes for selected stages of life, especially

25. For the subjective approach to the law, see generally DAVID GRANFIELD, *THE INNER EXPERIENCE OF LAW: A JURISPRUDENCE OF SUBJECTIVITY* (1988).

26. See ARISTOTLE AND MODERN LAW, *supra* note 11.

27. For an overview of the Greek view of the stages of life, see GARLAND, *supra* note 1. It is important, however, to realize that different Greeks had different views of the stages of life as evidenced in their philosophy and literature. The issue of pluralism and life stages will be discussed below.

youth and old age. It establishes links between and among the stages of life. Finally, the law helps to define the justice relevant to each stage and between the stages. Each of these six legal functions finds expression in legislation and court opinions. *In short, there is a law governing, and governed by, the stages of our lives.*

But even if the law does, in fact, mark the stages of our lives, the question may be asked: *should* law have anything to do with stages of life? Perhaps there should not be any societal recognition of stages of life or, if there are to be stages of life, they should be shaped by custom²⁸ or markets alone, and not by the law.

Both conservative market-oriented and liberal egalitarian theorists may ask such questions. They may suggest that by allocating boundaries, goods, and meanings to the stages of life, law plays an inappropriate activist role. That is, they may suggest that law should not play such a role in creating or allocating goods and meaning to the stages. This view is composed of both those who believe that a more efficient way of handling age is by means of individual choice in the marketplace, and those who believe that norms of civil freedom and equality should protect that choice. Such a view may depend upon some form of utilitarianism according to which what is important is not any stage of life, but rather, simply the realization of our desires at any and every stage. These desires may be facilitated by the absence of inegalitarian government regulations as well as the provision of market supports. Thus, for example, if technology provides a method by which old women might have children, one might leave it to market demand as to whether or not such children are spawned. This view may appeal to one aspect of our self-fulfillment, which includes the notion that we should be able to achieve our desires.²⁹

28. Conservatives may take different views toward custom, seeing it as the operation of consent over time (without the role of law) or as intermingled with law. For a recent taxonomy of conservatism, see JOHN KEKES, *A CASE FOR CONSERVATISM* (1998). Since custom does recognize stages of life, the latter conservative may have little difficulty with stage of life laws.

29. The notion of self-fulfillment is set forth and analyzed by Alan Gewirth. See ALAN GEWIRTH, *SELF-FULFILLMENT* (1998). Gewirth argues that part of fulfillment is the realization of our deepest desires. The criteria for "deepest" desires come from developing a notion of our capacities. Thus fulfillment

One answer to the liberal view of the law of the stages of life is that the law *does* in fact define stages of life and takes an especially activist role in regard to youth, adolescence, and old age, creating a dense legal regime for the young, the juvenile, and the elderly.³⁰ Since social practice and its laws recognize stages, perhaps the existence of this practice is sufficient. Certainly it appeared as if the Greeks believed that a descriptive account of the biology and conventions of society was relevant to the justification of the moral and legal norms they followed.

A deeper response to the liberal view is possible. This response draws upon Michael Sandel's critique of the liberal assumption of "the unencumbered self."³¹ Sandel's critique suggests that the liberal perspective ignores the extent to which our identities are thickly constituted, that is, "encumbered" by our connections to our community. Extending this notion, I would argue that the self is not a machine of timeless desires, but a character subjected to the stages of life determined in part by nature and society, in part by habit and choice, and recovered by remembrance, reminiscence and commemoration.³² The law does not

ultimately is a combination of achieving our deepest aspirations and realizing our capacities. Thus, pursuing our desires, whether through the market or elsewhere, is not enough. See *generally id.* Modern philosophers, either through revamped theories of the virtues or by appeal to capabilities, have extended the notion of capacities. See, e.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000); *THE QUALITY OF LIFE* (Martha Nussbaum & Amartya Sen eds., 1993). For a sympathetic critique, see DAVID A. CROCKER, *Consumption, Well-Being, and Capability, in ETHICS OF CONSUMPTION: THE GOOD LIFE, JUSTICE, AND GLOBAL STEWARDSHIP* 366-85 (David A. Crocker & Toby Linden eds., 1998). Human development literature seeks to document the changing human capabilities at different stages of life. See LAURA E. BERK, *DEVELOPMENT THROUGH THE LIFE SPAN* (1998). The notion of self-fulfillment may still have room for different views of the path of life as described above. See *supra* notes 23-26 and accompanying text.

30. I am painfully aware that what *is* the case need not determine what *should be* the case. Thus, the fact that stages of life are recognized in law need not determine that they should be. However, the reality of that recognition should invite us to explore the principles or "intimations" which may be tacitly found within these laws. See MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983) for an example of such an effort.

31. SANDEL, *supra* note 9, at 11; *LIBERALISM AND ITS CRITICS* (Michael Sandel ed., 1984). A comparable term is "thick" self.

32. For a discussion of the "thick" self, made up in part from the kinds of remembering, see EDWARD S. CASEY, *REMEMBERING: A PHENOMENOLOGICAL STUDY* (2d ed. 2000).

merely ratify stages of life, their boundaries, and their social meaning as given, but does so, or at least should do so, as a vehicle for the self-fulfillment of citizens. Law promotes that self-fulfillment based, in part, upon our changing capacities at different stages of our lives. Self-fulfillment is the development of these capacities and the accommodation of our lives as these capacities wax or wane. The definition of the meaning of each stage of life, the goods appropriate to it, and the justice it deserves, i.e., the incremental specification of social responsibilities and rights, are defined in terms of the changes in our self-fulfillment based upon our changing capacities throughout life.³³ As the law helps to define the boundaries and meanings of the stages of life and the obligations to and from children, adolescents, parents, and the elderly, the law also helps to define these stages of life.³⁴ Thus, a portrait of the legal treatment of the stages of life is only drawn after tracing a series of specific decisions about the boundaries, social meanings, and obligations or rights pertaining to each stage of life. I shall sketch this portrait of the law of the stages of life in this Essay.

Thus, I share the classical Greek belief that law does, and indeed should, play an important role in the steps of our self-development. This jurisprudence of self-development, that is, the assumption that law can support or promote self-development, is one which has been vigorously opposed by a wide range of pragmatic, positivist, and liberal legal philosophers.³⁵ In this modest Essay, I do not seek to refute

33. These changing capacities are partly descriptive, found both through observation and reflection. However, there may be a pluralism of capacities, especially from culture to culture, and there is the possibility of serious doubts about one's capacities. These doubts may only be resolved through inquiry and choice; action may be required to test whether such a capacity exists.

34. It is important to distinguish between obligations between generations, the frequent subject of ethical and legal inquiry, and obligations between persons at different stages of life. The former category focuses upon our obligations to persons who may live beyond us; the respective stages of their lives are less relevant. See JUSTICE BETWEEN AGE GROUPS AND GENERATIONS (Peter Laslett & James S. Fishkin eds., 1992). The latter focuses on the obligation of persons at one stage of life to others at different stages of life.

35. One of the most eloquent is Lon Fuller, who argues for a law pertaining to duty, not to self-perfection ("a morality of aspiration"). See FULLER, *supra* note 11, at 5; see also JOHN RAWLS, A THEORY OF JUSTICE (1971) (also rejecting a

directly the assumptions of these philosophers, although I hope my discussion of the law of the stages of life will begin to offer a refutation of the impoverished view of law that ignores its role in self-fulfillment.

II. THE SOURCES OF THE STAGES OF LIFE

“Youth like summer morn, age like winter weather;
Youth like summer brave, age like winter bare.”³⁶

Shakespeare's accounts of the ages of our lives appear closely related to the objective movements of nature. But, in fact, a certain indefiniteness surrounds any effort to recognize and define the stages of life, partly because the sources of the stages are multiple and intermixed with one another. The beginning source of the stages is biology.³⁷ It is this biology which underlies our human capacities.³⁸ However, the extent to which stages of life are based upon biological considerations is much debated. In *Roper*, the majority opinion and the amicus briefs of the American Psychological Association and the American Medical Association cited recent brain studies of juveniles suggesting differences from adult brains. Others have argued that the stage embracing the juvenile years is merely a social construct.³⁹ They suggest that natural capacities are developed and impeded by culture, custom, choice, and markets, as well as the law itself. All of these factors operate to promote or impede the development of human capacities and their accompanying activities. Aristotle recognized these sources in the formation and

jurisprudence of self-development). See his restatement in JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT 18-24* (Erin Kelly ed., 2001).

36. WILLIAM SHAKESPEARE, *PASSIONATE PILGRIM*, reprinted in *THE ARDEN SHAKESPEARE BOOK OF QUOTATIONS ON THE SEVEN AGES OF MAN*, *supra* note 19, at 12.

37. It is perhaps no accident that the most recent book entitled *Time of Our Lives* is Tom Kirkwood's book on the science of human aging. See TOM KIRKWOOD, *TIME OF OUR LIVES: THE SCIENCE OF HUMAN AGING* (1999).

38. Much of the human development literature focuses upon the biology and psychology of the aging process through life. See KATHLEEN STASSEN BERGER, *THE DEVELOPING PERSON THROUGH THE LIFE SPAN* (5th ed. 2001).

39. See Julia Fionda, *Legal Concepts of Childhood: An Introduction*, in *LEGAL CONCEPTS OF CHILDHOOD 3* (Julia Fionda ed., 2001).

operation of ethical life and political society.⁴⁰ He also recognized that they were intertwined, each with the other, so that social practices had dimensions of nature, custom, choice, and law.⁴¹ Since Aristotle, the history of thought has provided an elaboration of the account of each of these sources of life's stages, although, in recent times, the study of the contribution of each of these sources is subdivided into numerous disciplines.⁴² Let me describe briefly the biological, cultural, market, and legal sources of life's stages.

A. *Nature and the Stages of Life*⁴³

There is a sense in which we regard all time as natural, and our moving through time as a natural process.⁴⁴

40. Such a background exists in many of Aristotle's treatises, including *De Anima*. For an updated discussion of Aristotle's psychology, see MARTHA C. NUSSBAUM & AMELIE OKSENBERG RORTY, *ESSAYS ON ARISTOTLE'S DE ANIMA* (1999). My favorite effort to "translate" Aristotle into modern terms is Mortimer Adler's early work *What Man Has Made of Man*. See MORTIMER J. ADLER, *WHAT MAN HAS MADE OF MAN: A STUDY OF THE CONSEQUENCES OF PLATONISM AND POSITIVISM IN PSYCHOLOGY* (Longmans, Green & Co. 1937).

41. For a particularly careful account of the relationship of the dimensions of political and economic life, see JAMES BERNARD MURPHY, *THE MORAL ECONOMY OF LABOR: ARISTOTELIAN THEMES IN ECONOMIC THEORY* (1993).

42. See SETTERSTEN, *supra* note 12, at 193-234.

43. Below, I shall treat the stages of life like a ladder of life, with the primary focus upon each rung of the ladder. But the stages of life are cumulative within one life and part of one life. See *id.* at 139-91. This cumulative effect takes place because of the human capacity to choose and act in the present from the habit and character acquired in the past and confirmed by present choices, and the capacity to imagine, wish, and plan, in regard to future stages of life. In regard to the past, our characters reflect our past and we are capable of remembrance, celebration, and regret regarding the past stages of our lives. In regard to the future, our current activities reflect the present directions of our lives into the future; we or our parents may consciously undertake education in our youth with a view to middle aged work responsibilities, or undertake savings and pension during middle age for future old age. Or, for example, we may make wills while imagining our future stage of death. For a discussion of the way in which our future death informs our present life, see HERBERT FINGARETTE, *DEATH: PHILOSOPHICAL SOUNDINGS* (1996). For the way law enables us to cope with our own death in the future, see THOMAS L. SHAFFER, *DEATH, PROPERTY, AND LAWYERS: A BEHAVIORAL APPROACH* (1970). Below, I discuss death and dying as possible stages of life. In all of these activities, we knit the stages of our lives (and death) together. Nevertheless, it is useful to explore each stage on its own. To do so, however, we must first disaggregate the intertwined sources of these stages.

Certain stages of life—childhood, adolescence, child bearing, and aging—are viewed as reflecting basic biological processes. A myriad of works in human development may be found that seek to define the relationship of biology to the human stages of life. These works regard nature as the bedrock of the stages of our lives. To the extent that law attends to the stages of life, such a biological basis for the stages of life offers a kind of objective “natural law” to guide us.⁴⁵

Although there are biological realities which shape some of the stages of life, these realities cannot offer a sufficient explanation of the nature and scope of these stages for several reasons. First, the biological understanding is incomplete; we do not have a complete understanding of growth and/or decline that would yield a firm and specific biological basis for understanding the stages of life. Second, what knowledge we do have about the biology of our lives does not appear to dictate, except within

44. I discuss briefly some of the different views of time in the Conclusion. It is important, however, at this point to point out that although stages of life may be compatible with all views of time, a time which is measured by natural motions (whether of season, life cycles etc.) is perhaps the kind of time most “suited” to the notion of stages of life. Stages of life may be viewed as analogous to stages of history and hence the inquiry into the different kinds of possible patterns of history may be particularly relevant; for example, do these stages constitute no pattern, a pattern of regress, cycle, or progress? And if the stages of life mark “progress” though life, what kind of progress? For a discussion and categorization of the kinds of progress, see CHARLES VAN DOREN, *THE IDEA OF PROGRESS* 26-32 (1967).

45. The notion is that we should do “age-appropriate” things. For those who see a sharp separation between a description of nature and our ethical lives, such a “natural law” of the stages of our lives is unconvincing. Some from this latter point of view suggest that we should fight our age, and obey Dylan Thomas’s injunction: “Do not go gentle into that good night.” See Dylan Thomas, *Do Not Go Gentle into that Good Night*, in *THE POEMS OF DYLAN THOMAS* 239 (Daniel Jones ed., New Directions Books 2003) (1971). Although Aquinas does not base his natural law upon stages of human development, he does specifically relate them to stages of biological development beginning with all substances, then extending to all mammals, and finally finding a series of general obligations in human social life. Much to the annoyance of modern jurisprudential thought, these natural laws are formulated in very general language. See THOMAS AQUINAS, *Treatise on Law*, in *THE SUMMA THEOLOGICA OF SAINT THOMAS AQUINAS* 205-336 (Fathers of the English Dominican Province trans., Daniel J. Sullivan ed., Encyclopedia Britannica, Inc., 1952) (focusing on Part I of the Second Part, Questions 90-108, especially Question 94). For a modern interpretation of Aquinas, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

broad ranges, any specific behavioral patterns to be adopted. Third, as a consequence of this flexibility of nature, the elements of culture, choice, and law can operate upon biology to significantly shape the stages of life. The various cultures, choices, and laws result in somewhat different definitions of the stages. Most recently, culture and choice may intervene, resulting in the manipulation of biology, changing it in key ways.⁴⁶ The administration of growth hormones, contraceptive pills, Viagra, and Botox treatments all represent human interventions into the biological stages of our lives. (Custom and markets may be the sources of such interventions and one indirect way in which the law may intervene into the stages of our lives is to seek to regulate these customary interventions into biology.) Finally, the deep desires we may have and hold onto may not correspond with our biological capacities and hence the fulfillment of those desires as an object of ethical life cannot be defined by biology alone.⁴⁷

B. *Custom and Cultural Sources of the Stages of Our Lives*

In *Roper*, both the oral argument and the opinion discussed how different states and different nations treated the capital punishment of juveniles.⁴⁸ Although there was no explicit discussion of whether there were different underlying customs as to how juveniles should be treated and consequently different social perceptions about what it meant to be "a juvenile," the Court's recognition of differences seemed to suggest that the definition of a "juvenile" was at least partly the product of different

46. Although modern manipulation is the most obvious effort to rearrange biology, more ancient mechanisms, whether through magic or religious practices, may have altered biology as well.

47. This, of course, is very controversial in light of the recent flood of naturalistic ethics positions, some of which have emerged out of environmentalism. Although it is neither possible nor desirable to canvass these positions, one good example is PAUL W. TAYLOR, *RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS* (1986). These theories, however, must address the question of Hume and Moore's "naturalist fallacy," i.e., deriving an "ought" from the "is" of nature.

48. See generally *supra* note 5.

customs. Aristotle and Aquinas⁴⁹ were acutely aware of the role of custom and differences in custom in the definition of the ways of our community. Comparative anthropology and sociology are the modern sciences of the study of comparative cultures. Famous anthropologists such as Margaret Mead were particularly interested in the impact of culture upon personality development, and Ruth Benedict viewed cultures themselves as having unique "personalities."⁵⁰ Recent anthropology approaches these matters through the lens of multiculturalism and identity. These interests reflect the recent rise of the ideal of diversity as a social and political ideal. Legal theory continues to struggle with articulating the appropriate role of law with regard to culture and, consequently, one would expect that this struggle would be reflected in any effort to define law's role with regard to the cultural definition of the stages of life. Given our modern knowledge of diverse cultures, we may conclude that there are many ladders of life within the multiple cultures of the world's societies.

The problems which lie in any cultural approach to the topic of stages of life is that political, ethical, and legal life may lay claim to universal obligations and rights applied to social and cultural practices. Thus, the law, at least the Western law, may prohibit the practice of the Suttee within Indian communities in the United States. This practice applies to the stage of widowhood in which the widow hurls herself upon her dead husband's funeral pyre. It may be suggested that to endorse such a stage of life violates certain universal rights of equal freedom of the widow and fails to recognize important duties to surviving children; hence it may be deemed inconsistent with universal rights of modern life, as well as being inconsistent in societies in which widows may have economic independence. To be sure, such cultural practices as the Suttee are changing in India, due to the forces of modernization and the migration of ideas, and these practices may be "mixed" with other, incompatible practices, due to the admittedly imperfect workings of modern "melting pots." The modern awareness

49. See DAVID VANDRUNEN, *LAW & CUSTOM: THE THOUGHT OF THOMAS AQUINAS AND THE FUTURE OF THE COMMON LAW* (2003).

50. See, e.g., MARGARET MEAD, *COMING OF AGE IN SAMOA* (1928); RUTH BENEDICT, *PATTERNS OF CULTURE* (1934).

of the variety of cultures has led to *both* the respect of different cultures, but also to the recognition that such cultures may be better or less fitted to more universal norms which meet the demands of modern society.⁵¹

The issue of the relationship between universal obligations growing out of the stages of life and the fact that different cultures have different stages with different obligations is well illustrated in the case of *Wisconsin v. Yoder*.⁵² The U.S. Supreme Court upheld the lower court's voiding of a criminal conviction of Amish parents who refused to send their children to school under Pennsylvania's compulsory education law. The Court based its ruling upon the constitutional freedom of exercise of religion.⁵³ Many in the modern world would regard a completed secondary education as a universal good to be secured at a certain stage of life in the modern world. Yet the Court permitted the parents to let their children leave before completing this education, finding that to compel them to complete such an education was not justified in light of the kind of life they sought to live and the vocational education they would receive outside of school to prepare for their lives.⁵⁴

This case not only illustrates the clash of two cultures with somewhat different boundaries for the stages of life, but also poses the question as to whether the culturally defined stages of life match the realities of modern society, and whether such stages meet the requirements of universal rights and obligations. The Court rested its decision on the conclusion that the Amish mode of education would serve the young people in their Amish way of life, and that a way of life may seek the freedom of religious protection in a dominant society.⁵⁵ The dissent raised the question as to whether such a judicially carved exception to compulsory secondary education did not violate the students' right to a secondary education needed in a modern world. The majority avoided that issue and, in so

51. For an excellent overview of these issues, see NUSSBAUM, *supra* note 29.

52. 406 U.S. 205 (1972).

53. *See generally id.*

54. *See id.* at 222.

55. *See id.* at 215.

doing, avoided the question of whether there was indeed a more universal “right to an education.”

C. *Individual Choice and Markets*

The notion of a uniform set of stages of life appears to contradict our notions of an individualized life with its own stages, oft celebrated in biographies or memoirs. This sense of our own and others’ lives may find any scheme of stages of life irrelevant to the developments in one’s own life. In any one life, there may be stages missing—no marriage, no raising of children, or death at early age cutting off the stage of old age. Alternatively, there may be repeated stages—i.e., divorce, remarriage, and a new set of children. The stages may not follow in lock step, e.g., a person may remain always a child or be old before his time. And, the stages of life, even if they exist for a person, may be defined in an entirely different way.

In *Roper*, Justice Scalia argued that even if there is a juvenile stage of life, there was no guarantee that the accused individual in the case fit within that stage of life and should be treated as a juvenile.⁵⁶ For Scalia, the vagueness of the definitions of the juvenile stage and the consequent question as to whether an individual fit within the stage argued against treating him as a juvenile.⁵⁷

These observations may lead one to conclude that the “standard” stages of life are at most background features of individual lives. The individual narratives of our lives have a much more vivid meaning to us, whether these lives are lives which follow standard stages or not. Stages of life appear as merely the expressions of poetry or the product of “scientific generalizations” of outside observers drawing up averages of individually unique lives. The proposal to treat generic stages of life as important may seem not only to falsify our individual lives but also limit our sense of freedom from any constraints mandated by the “normal” stages we must traverse. Thus, we may respond like Ibsen’s Nora,⁵⁸ who rebels against her stage of marriage and

56. *Roper v. Simmons*, 543 U.S. 551, 617-20 (2005) (Scalia, J., dissenting).

57. *Id.*

58. See generally HENRIK IBSEN, *THE DOLL’S HOUSE* (1909).

motherhood. Hence, we may wish to fight against any notion of stages of life, let alone a law based upon such stages, with the spirit of the Spanish anarchist who said: "if they give you ruled paper, write the other way."

Such a reaction may lead us to ask: to what extent do we freely choose the stages of our lives and the content of these lives? Different people choose to respond differently to childhood and adolescence, often extending or foreshortening these periods. Creation of families and child raising is increasingly the product of a choice enabled both by new technology and new social institutions. How one responds to old age appears to differ from person to person. It is, perhaps, no accident that an existentialist, Simone de Beauvoir, who places emphasis upon freedom of choice, wrote a book about old age in which the role of choice of activity within old age is emphasized.⁵⁹ Or that J.S. Mill, with his emphasis upon freedom leading to individuality, suggested protection of the freedom to engage in polygamy as part of the definition of the life stage of marriage and child raising.⁶⁰ For these authors, individual freedom becomes the animating ideal in approaching the stages of life, and the role of law becomes one of protecting that freedom, in part through the protection of freedom of choice. Such freedom is illustrated by those presently arguing for same-sex marriages by appealing to the notion of the equal freedom to select the gender of one's marriage partner, or those who argue for the autonomy of assisted suicide—i.e., the right to set one's own boundaries to the stage of old age.

Although neither de Beauvoir nor Mill emphasized the market place, part of the choice of the stages of our lives, and the content of those lives may take place within the economic realm through the market place. The market place is very sensitive to the stage of life of its customers. Television stations keep track of "the demographics." In fact, stages of life may be partially created by the market. Our purchase of insurance, retirement packages, and housing may all be responses to a market that offers choices

59. See SIMONE DE BEAUVOIR, *THE COMING OF AGE* (Patrick O'Brian trans., G.P. Putnam's Sons 1972).

60. JOHN STUART MILL, *ON LIBERTY* 154 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

of how we will define the stage of old age.⁶¹ The law plays a role here, enabling through contract and property law the possibility of choosing through the market the stages of our lives. If we find that objectionable, it may be that we object to the "commodification" of the stages of our lives, feeling that we should experience these stages in a manner different from the purchase of a product or assessing it in terms of costs and benefits.⁶² One need not adopt a radical liberal position in which stages of life are shaped *only* by choice in order to recognize the truth that our choices, *to some extent*, shape the stages of our lives.

D. *The Law and Stages of our Lives*

In addition to biology, culture, history, human institutions, and choice, the law appears to play a major role in the stages of our lives. The law sets age requirements for many societal activities, including school entry and exit, driving, drinking, military service, marriage, and retirement. These legal age requirements illustrate the law marking the stages of our lives. We must be careful, however, in interpreting this law. There may be no comprehensive legal view of the stages of our lives; these laws may be merely pragmatic markers at various stages of life, adopted in part out of custom, in part for various public purposes. These legal markers may be unrelated to any conscious public effort to define stages of our lives. Thus, when the law sets ages for school entry or exit, marriage, military service, driving, or retirement, these age markers may be the product of pragmatic concerns as much as any customary notion of the stages of life. The legal age of school entry and exit, or retirement, may be dictated as much or more by economic considerations as by any notion

61. See RICHARD A. POSNER, *AGING AND OLD AGE* (1995). Posner sets forth the extent to which the economics of behavior apply to different stages of life, paying special attention to old age. Posner treats old age through the lens of economic choices to be made in regard to (and in) this period of our lives.

62. This does not mean that Posner's economic discussion of old age is not valuable. Quite the contrary; it is filled with insights, in part due to Posner's own creativity.

of what childhood or old age are.⁶³ Thus, the appearance of law establishing the stages of our lives may be simply the product of our creative interpretation of the markers as part of a larger life-cycle.

Perhaps here, the distinction which Robert Merton makes between manifest and latent functions is useful.⁶⁴ The manifest function of the law is its explicit social meaning, which may be simply a pragmatic purpose. For example, the age of selective service may explicitly apply to persons who are sufficiently strong and energetic to fulfill certain functions of military service. The latent function may be to establish a "legitimate time of life" for the selection of a discrete population group who have completed their primary and secondary education and have not yet entered their employment careers. By selecting them as eligible to be members of the armed services suited to defend our nation, the state can establish a "natural" period for recruiting its defenders without interrupting the educational preparation of its citizens nor interfering with the needs of the private market place. Moreover the state can channel the energies of its young and potentially dangerous⁶⁵ youth into the "constructive purposes" of the military.

If the law does indeed contribute to the latent and manifest functions of defining and shaping the stages of our lives, it may do so in two ways. First, the law may depend upon already defined stages of life—stages defined by nature, custom and choice—in which the law seeks merely to facilitate the operation of these forces in shaping the period of our lives. Thus, as stated above, the law may restrict the manipulation of nature to unduly expand the otherwise customary stages of life. The law may support "preexisting"⁶⁶ cultural practices, and facilitate choices and markets which define stages of life. Second, the law may

63. Thus, as discussed above in the *Yoder* case, the court viewed the age set for school exit to be based upon the need to protect against child labor. See *Wisconsin v. Yoder*, 406 U.S. 205, 226-29 (1972).

64. ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 19-84 (1963).

65. By "dangerous" I refer both to socially dangerous (high crime rate), and politically dangerous (possessing the potential for political revolt).

66. Since these practices might have historically been intermixed with the law, it may be pushing things to say "preexisting."

operate more directly upon the stages of life, seeking for normative reasons to establish such stages in our political society.

III. THE STAGES OF LIFE: CLASSICAL & MODERN VIEWS

“For everything there is a season”⁶⁷

A. *The Classical Perspective*

In *Roper v. Simmons*, the majority argued that the biological and psychological characteristics of juveniles meant that they lack maturity and responsibility, are more vulnerable to outside influences, and therefore have less self-control. Thus, the majority was willing to draw conclusions about the ethical character of the juvenile that differed in key ways from adults.⁶⁸

A general recognition of the stages of life as part of a life-cycle does not indicate in any explicit way what the ethical implications of these stages might be. The authors of ancient Greece set forth the underlying ethical assumptions of a law of such stages of life. Five assumptions governed the Greeks: (1) lives unfold biologically and socially, and that such an unfolding could be understood objectively;⁶⁹ (2) this unfolding may be understood in terms of discrete stages; (3) there are a series of goods of life and these are realized in the unfolding of character; (4) these goods are distributed by the political community to the various stages of life; and (5) law plays a major role in the political community's distribution of these goods.

67. *Ecclesiastes* 3:1.

68. *Roper v. Simmons*, 543 US. 551, 569-70 (2005).

69. This objectivity is yielded through disciplines, especially biology. See PHILOSOPHICAL ISSUES IN ARISTOTLE'S BIOLOGY (Allan Gotthelf & James G. Lennox eds., 1987) (providing critical views of Aristotle's work in the field of biology). The most relevant treatises are ARISTOTLE, DE ANIMA (R. D. Hicks trans., Adolf M. Hakkert 1965) (1907); ARISTOTLE, DE GENERATIONE ET CORRUPTIONE (C.J.F. Williams trans., Clarendon Press 1982); ARISTOTLE, HISTORY OF ANIMALS (D.M. Balme ed. & trans., Harvard Univ. Press 1991); ARISTOTLE, PARTS OF ANIMALS (A. L. Peck trans., Harvard Univ. Press 1968). See generally THE BASIC WORKS OF ARISTOTLE (Richard McKeon ed., Random House 1941).

Human biological and social development was assumed in ancient Greece. That development might take place through education complementing a biological unfolding of human potential and enhanced by choices made, resulting in the shaping of character. Development was perhaps best described by the Greek concept of *paideia*,⁷⁰ which assumed progression toward an excellence of character as a consequence of the stages which precede it.

The specific stages of human development were often simply assumed. Thus, portraits of old age in Greek drama, especially tragedy, were frequent. In his *Ethics*, Aristotle characterized youth as not ready for moral lectures. In his *Politics*, he carved out a realm of the household and family life. He drew quick portraits of the stages of life in his *Rhetoric*, finding audience sensitivity to different emotional appeals of rhetoric depending upon the stages of life of the audience. Thus, certain stages of life are indeed assumed in the writings of the Greeks and Romans.

Not only did the Greeks believe in human development to excellence, they also believed in goods of life—internal goods including temperament and moral and intellectual virtues, and external goods such as health, possessions, and opportunities for leisure.⁷¹ For Aristotle, these goods facilitated the virtuous activities of humans. For Nussbaum, these goods are capacities of humans, but at least some of them are, or involve, external goods. In either case, whether internal or external goods, for the Greeks, such goods possess an objectivity and universality. Different goods or amounts of goods would be relevant to different stages of life; thus, the magnanimous adult should have sufficient goods to share with others. The adult engaged in the leisure of political or philosophic activity must have sufficient goods to support such activity.

70. *Paedeia* is the shaping of the ancient Greek character, embodying the notion of an ideal of excellence. See generally WERNER JAEGER, *PAIDEIA: THE IDEALS OF GREEK CULTURE* (Gilbert Highet trans., Oxford 1945) (defining *paedeia* at length throughout).

71. A modern Greek scholar, Martha Nussbaum has listed these goods to include life, bodily health, bodily integrity, senses, imagination and thought, emotions, practical reason, affiliation, concern for other species, play, and control over one's environment. See generally NUSSBAUM, *supra* note 29.

The Greeks were comfortable with the notion that the political community would provide opportunities for receiving some of these goods through education and moral practice, while other goods might be distributed by the community or exchanged in the market. A just allocation of goods would follow from the establishment of the goals of the political regime; such goals would then guide the distribution of those goods.⁷² (This allocation was not explicitly age related, but rather in accordance with need or merit, or, in the case of exchange, in accordance with supply).

72. An excellent modern discussion of distributive justice in largely Aristotelian terms is WILLIAM A. GALSTON, *JUSTICE AND THE HUMAN GOOD* (1980). To my knowledge, there is no treatment of distributive justice pertaining to stages of life; however, both need and merit, which may differ at different stages of life, are treated as possible criteria for determining fair distributions.

The law had a role in the distribution of these goods and their exchange. This law may also have been closely identified with custom (at least at some stages of Greek history), and, if so, it was designated as "*nomos*."⁷³ The close link between law and custom meant that the law was reflective of the character of the law maker and the persons to which the law applied. But the law also measured distribution according to merit or need, corrective justice according to the rectification of selfish deeds, and exchange justice according to the market.⁷⁴ This means that any effort to determine the stages of life and then distribute goods appropriate to those stages would have to take place by determining what the need or merit was of each stage of life.⁷⁵

B. Modern Modifications of Greek Wisdom

Modernity may be viewed as posing a fundamental challenge to all of the classical assumptions. This challenge has forced those of us who wish to "rescue" the classical contributions (as an element of truth) to rethink each of the classical premises. Despite that rethinking, I believe that the notion of distribution of the goods of life in accordance with the stages of our lives can be salvaged in some form. But before undertaking such a salvage operation, I wish to sketch the dominant modern position.

73. For a discussion of *nomos*, see NOMOS: ESSAYS IN ATHENIAN LAW, POLITICS AND SOCIETY (Paul Cartledge et al. eds., 1990); MARTIN OSTWALD, NOMOS AND THE BEGINNINGS OF ATHENIAN DEMOCRACY (1969). A history of the concept of *nomos* through Western civilization is set forth by DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION (1990). The importance of *nomos* to the law of stages of life lies in the way in which *nomos* unifies custom and law within one concept. This notion of *nomos* seems to fit many of the laws dealing with the stages of life.

74. For a recent selection of articles that take an Aristotelian view of the law, along with a detailed bibliography, see ARISTOTLE AND MODERN LAW, *supra* note 11.

75. The concept of determining the need and merit of each stage of life is found in Plato's *Republic* with education occupying childhood, military service in early adulthood, philosophy in middle age, and political leadership in old age, all designed to achieve justice both within man and the republic. See PLATO, THE REPUBLIC (Richard W. Sterling & William C. Scott trans., W. W. Norton & Co. 1985).

The first classical assumption to be challenged by modernism is the development assumption itself. This challenge may take the form of a fundamental attack upon the notion of "potentials" to be "realized," claiming that such an assertion of human potential rests upon outdated biological essentialism. The challenge may suggest that there is no human nature (or no consensus upon what human nature is), and hence, all decisions are made in absolute freedom. At the other extreme from this position is the adoption of a natural and psychological determinism that does not make room for developmental change due to choice over a life span. These proponents adopt the position that an early determinism fixes character, foreclosing all possibility of significant development through choice.

The second assumption to be challenged is the assertion of stages of development. This challenge may seek to demonstrate that development is continuous and that stages are merely arbitrary categories for conveniently grouping the continuity. Or, the challenge may seek to attack the assumption of generic stages applicable to all humans, maintaining instead that all stages are a matter of individual biography rather than generic biological or social development. Postmodern thought may challenge the assumption of a unitary set of stages. A survey of modern and ancient thought reveals a variety of conceptions of stages—biological, religious, ethical, philosophical—all differently formulated and suggesting a welter of pluralistic conceptions of the stages of life.⁷⁶

A challenge to the third assumption may be the modern argument that generic and universal goods do not exist. Instead, the most we can say is that activities, states of character, and objects are relative to the tastes or preferences of individuals and groups and cannot be necessarily categorized as suited to a certain stage of human development.

Fourth, some modern philosophers have challenged the assumption that the political community can or should act as a distributor of goods.⁷⁷ This assumption, they suggest,

76. For one particularly good critical discussion of the stages of life, see JOSEPH L. ESPOSITO, *THE OBSOLETE SELF: PHILOSOPHICAL DIMENSIONS OF AGING* 80-99 (1987).

77. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 149-232 (1974).

depends upon the notion of a central "objective" distributor, when, in fact, the distribution of goods in our society reflects, and should reflect, dispersed agreements, customs, and ways of life among its members. From this point of view, what is important is that goods be distributed in respect to the freedom of the individuals in society—a freedom reflected either in agreements over the basic democratic political institutions or in the market freedom of contracting parties on a day-to-day basis.

As a consequence of this modern "liberal perspective," the important role of law is not to assign goods based upon stages of life, but rather to enable citizens to freely choose the activities, capacities, and objects they prefer at any and every time in their lives. In some ways, such a modern view is exhilarating. It appears to offer a marvelous sense of freedom not only from heavy judgments about what is good and bad, but also a freedom from a kind of time—a time which, through its dictates, determines what goods we should have and when. One finds this liberal perspective in the views of old age as a golden period of new creativity.

A certain regime of law follows from this liberal perspective. This liberal regime, to the extent that it focuses upon age at all, does not focus upon it as a path of life composed of stages. Rather, the liberal regime is composed of laws adopted in accordance with the principles of welfare, equality, and freedom. The primary concern of modern welfare laws is to ensure the satisfaction of basic needs, especially of the dependant young and the helpless old. The primary concern of age-related modern regulation is to ensure that age groups, especially the old, are not discriminated against.

But such welfare and liberal concern does not reflect any sense of the continuity and cumulativeness of growth and decay of life processes, resulting in stages of these processes. As stated above, the liberal law treats us as "unencumbered selves" without biological maturation. Nor does the law set forth a vision of the educational processes which are part of, and which contribute to, the various stages of life. By ignoring biology and the community, the law can ignore the staged development of capacities over time, instead seeking to freeze a momentary equality and freedom.

C. A Reconciliation of Classic and Modern

Not all modern thought has sloughed off the classic view of the pathway of our lives. Two kinds of thinkers have resisted such a radical liberalism. One group of thinkers seeks to recreate classical ethical and political thought in modern terms, reinterpreting thinkers such as Aristotle to make him palatable in modern dress. Alan Gewirth and David Norton exemplify this approach to classical ethics and the stages of our lives, although the works of many other theorists may be cited.⁷⁸ For the most part, the work of this group is one of philosophical reflection, not scientific study. Nevertheless, it expresses the views of many people. Most Americans believe in some form of an ethic of self-development.⁷⁹ Alan Gewirth, in his recent book, *Self-Fulfillment*, seeks to justify this ethic and reformulate it to answer the modern criticisms.⁸⁰ Gewirth distinguishes two forms of self fulfillment: *aspiration fulfillment* and *capacity realization*.⁸¹ In the former, we seek to realize our deepest desires. In the latter, we seek to develop our capacities. In aspiration fulfillment, in order to choose among or evaluate which deep desires to follow, we must refer to our capacities.⁸² (In this sense, human capacities give us the criteria to evaluate our own and others' desires. These capacities, however, are not defined by "essential" biological characteristics). Applied to stages of life, our aspiration fulfillment would require us to ask the question: what are the deepest desires *for* the stages of our lives and what are the deepest desires *within* those stages?

Unlike Aristotle, Gewirth's "capacities" are very general. They include the capacity to follow rules that apply impartially to ourselves and others, such as respecting equal freedom and well-being ("universalist"); the capacity

78. Martha Nussbaum, especially in her more recent writings, has emphasized the importance of linking freedom to her classically derived list of goods.

79. For one effort to document this empirically, see CHARLES MORRIS, *PATHS OF LIFE: PREFACE TO A WORLD RELIGION* (Harper & Bros. 1956) (1942); CHARLES MORRIS, *VARIETIES OF HUMAN VALUE* (1956).

80. GEWIRTH, *supra* note 29, at 107-59.

81. *See id.*

82. *See id.*

to pursue our own freedom and well-being ("personalist"); the capacity to realize ourselves in particular relationships of family, friendship, community, and politics ("particularism"). Gewirth spells out the complex interactions between the efforts to develop these capacities.⁸³

What relevance do these modern philosophers have to an understanding of the stages of life? At a universalist level, our development through the stages of life may be perceived as the stages of acquisition of a universalist morality. Thus, Kohlberg's study of the stages of moral reasoning may illustrate such an approach.⁸⁴ At the personalist level, we may ask how stages of life contribute to the development (or unraveling) of our intellectual, emotional, aesthetic, and practical capabilities. Martha Nussbaum describes such capacities in her work on human development.⁸⁵ At the particularist level, we seek to determine how our particular community defines and promotes the specific relationships of our moral lives throughout the stages of life. Gewirth argues that ultimately, a particularist morality must be evaluated in light of personal and universal moral standards.⁸⁶ The recent effort of the U.N. to develop a human development index by which the human development promoted by particular countries is assessed exemplifies one approach to such an evaluation.⁸⁷

A second group of thinkers seeks to extrapolate from the modern works of Freud and others pertaining to the stages of child development as well as the recent empirical

83. *See id.*

84. *See generally* LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981). Kohlberg's work has been subjected to criticism especially by feminists. *See, e.g.,* CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (2d ed. 1993). The application of stages of reasoning in moral development to legal education is discussed in Paul T. Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 *TUL. L. REV.* 1237 (1988).

85. NUSSBAUM, *supra* note 29, at 4-11.

86. GEWIRTH, *supra* note 29, at 107-59.

87. *See, e.g.,* United Nations Development Programme, Arab Fund for Economic & Social Development, Arab Human Development Report 2002: Creating Opportunities for Future Generations.

work of gerontology. By starting at both ends of the life span, they seek to reassert the classical notion of the stages of life and to recreate a modern interdisciplinary field of human development with its sources in biology, psychology, psychoanalysis and psychiatry, history, literature and the social sciences. Since this work is dependent, at least in part, upon ongoing empirical study, its conclusions are more tentative. Erik Erikson's well-known work exemplifies this approach, offering a particularly rich and stimulating theory of the stages of the life span.⁸⁸ The court in *Roper v. Simmons* relied, in part, upon an appeal to Erickson's view of the stages of life.⁸⁹

Erickson, in the course of his writings over half a century, developed an elaborate developmental theory. This theory, based initially in the work of Freud and the post-Freudian literature in ego development, begins its analysis with psychosocial development in childhood, and gradually expands to embrace the stages of life extending into old age. Erickson viewed his account as a process of biological, psychological and social/historical development which was "epigenetic" in the sense that a ground floor plan of a potential personality was increasingly articulated through stages. These stages are unique in that each is a response to an encounter of the previous stage—an encounter which led to a crisis, a change of perspective and a radical adjustment of personality. The crisis may be physiological, psychological and environmental. These stages are expressed as ways of behaving, subject to conscious experience as well as unconscious inner states. Insofar as the crises leading to each stage are not satisfactorily resolved, compensatory mechanisms result at the next stages of life.

Preceding these identified stages is the beginning of life, either at conception, viability or birth. At the time of conception, the law has identified relevant periods of the life of the foetus based, in part, upon the biological development of the foetus. The laws governing abortion, infanticide, and tort liability take into account the stages of foetal development. And hence, one might argue that crucial stages of life are "legalized" before birth. The history

88. See, e.g., ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* (2d ed. 1963).

89. See *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

of the law pertaining to these early stages of life indicates some of the difficulties in defining the stages and determining appropriate responses to each stage.

After birth, based upon this theory of development, Erikson projects eight stages of life: infancy, early childhood, play age, school age, adolescence, young adult, adulthood, and mature age. (Late in life, he and his wife suggest two stages within the earlier "mature age" stage.)⁹⁰ Each stage, according to the Eriksons, has its unique conflict: radius of significant relations, principles of social order, psycho-social modalities, and psychosexual stages.

Erikson's theory has been immensely influential; however, it has been preceded by, accompanied with, and followed by a large variety of psychological, sociological and philosophical theories which have offered different or modified views of development and its stages.⁹¹ One such theory is David Norton's *Personal Destinies*, which was written at the time of Erikson's first writings.⁹² I have chosen Norton's theory because it seeks to discuss many of the philosophical questions raised by Erikson's theory and in so doing, offers a link between the modern approaches of thinkers like Erikson, and classical view set forth above.

90. For a summary statement by Erik Erikson and Joan Mowat, see ERIK H. ERIKSON, *THE LIFE CYCLE COMPLETED* (W. W. Norton & Co. 1997) (1982). The number and nature of the stages have changed over the course of their work.

91. The works of Freud, Jung, Levinson, Valiant, Lidz, Neugarten, and many others are relevant. For an excellent overview of the theories, see generally *DEVELOPMENTAL THEORIES THROUGH THE LIFE CYCLE* (Sonia G. Austrian ed., 2002).

92. NORTON, *supra* note 20.

Table 1. Erikson's Eight Stages

	Psychosocial Crisis	Radius of Significant Relations	Related Elements of Social Order	Psychosocial Modality	Psychosexual Stages
I	Trust vs. Mistrust	Maternal Person	Cosmic Order	To Get To Give in Return	Oral-Respiratory Sensory-Kinesthetic (Incorporative Modes)
II	Autonomy vs. Shame, Doubt	Parental Persons	"Law and Order"	To hold (on) To let (go)	Anal-Urethral Muscular (Retentive- Eliminative)
III	Initiative vs. Guilt	Basic Family	Ideal Prototypes	To make (=going after) To "make like" (=playing)	Infantile-Genital, Locomotor (Intrusive, Inclusive)
IV	Industry vs. Inferiority	"Neighborhood ," School	Technological Elements	To make things (=completing) To make things together	"Latency"
V	Identity and Repudiation vs. Identity Diffusion	Peer Groups and Outgroups; Models of Leadership	Ideological Perspectives	To be oneself (or not to be) To share being oneself	Puberty
VI	Intimacy and Solidarity vs. Isolation	Partners in Friendship Sex, Competition, Cooperation	Patterns of Cooperation and Competition	To lose and find oneself in another	Genitality
VII	Generativity vs. Self- absorption	Divided Labor and Shared Household	Currents of Education and Tradition	To make be To take care of	
VIII	Integrity vs. Despair	"Mankind" "My Kind"	Wisdom	To be, through having been To face not being	

Source: ERIK ERIKSON, *THE LIFE CYCLE COMPLETED*

Although Erikson's theory is tinged with ethical implications, Erikson was primarily seeking to develop a descriptive theory of human development. Yet for David Norton, the theory of stages of life raises a series of fundamental ethical questions. He believes these questions

can usefully be explored within the context of the classical theory of ethical self actualization in which the good life is realized in deliberately chosen actions which are the product of a gradually developed ethical personality. Such a view, however, raises many questions including: if development takes place in stages which are significantly different from each other, how is the good determined in each stage? Are the early stages of life simply rationales for some final terminal point in our lives? Or can the good life be achieved in terms of each stage? What yields the continuity of each individual's personality and character if it is fragmented into different stages? What determines the nature of each stage of life? How do changes take place between each stage? Are the stages universal characteristics, culturally determined or individually conditioned? What is the relationship between bodily changes, personality changes, and societal conditioning? Identifying and answering these questions is important because only their resolution will yield an appropriate basis for any law based upon stages of life.

Norton answers these questions by appealing to the self-actualizing ethical theory of the Greeks, which he argues is not an ancient relic, but has been reinstated by British idealists such as Green and Bosanquet in the early 1900s, and the existential philosophers such as Sartre in the mid-twentieth century.⁹³ Norton advances an ethical individualism in which the individual and her ethical development are a fundamental reality. This reality of the individual, however, can share in conceptions of a more general humanity and can reflect more specific community influences. The individual's development takes place in accordance with a continuity of stages, each incommensurable in meaning with one another. These stages include childhood, adolescence, adulthood and old age. Each stage has its own principles which give meaning to the interests, habits, choices, and activities of that stage. The meaning of childhood is dependency; adolescence is the discovery of autonomy and the confrontation of choice, adulthood is the recognition of the need to achieve within the limitations of life, and old age is the recognition of the

93. Norton wrote before the recent renaissance of Greek ethical thought and the works of Bernard Williams and Alasdair McIntyre.

absence of a future and the importance of the past. Within each stage a certain excellence can be achieved in accordance with the principles of that stage,⁹⁴ but the fundamental satisfactions lie in the moment to moment realization of this excellence within every stage. According to Norton, the quality of one's life in the stage of maturity and after lies in the developed consciousness of one's unique destiny. Self-knowledge of that destiny leads to intimate knowledge of others, as well as friendship and love based upon a concern for the self-fulfillment of others. A conception of justice and democracy (which Norton sets forth in a later book⁹⁵) is based upon the community's need to foster appropriate development of an individual self-actualization at each stage. Thus, Norton offers an attractive blend of classical self-actualization theories joined with a modern adoption of a theory of stages of development of the individual.

The conclusion I reach in reviewing these two views of the stages of our lives and the efforts to reconcile them is not that the views identified and their modern reconciliation offer knockdown convincing arguments for the legal recognition of stages of life, but rather that they offer tantalizing hypotheses which appear to emerge out of the experience of life's stages while leaving empirical as well as philosophical questions. These ethicists and psychologists offer at least the background support for belief in the stages of life with each stage having its own meaning. This conclusion makes it necessary to think more deeply about the way in which law allocates or should allocate the goods of our lives into the stages of our lives.⁹⁶

94. For strong disagreement with this view as it pertains to old age, see JEAN AMERY, *ON AGING: REVOLT AND RESIGNATION* (John D. Barlow trans., Ind. Univ. Press 1994) (1968). Amery states a contrary position arguing that aging marks the limits of self realization accompanied by the sense of time running down and out. See generally *id.*

95. DAVID L. NORTON, *DEMOCRACY AND MORAL DEVELOPMENT* (1991).

96. It is my contention that the law can best make use of the contributions of psychoanalytic theory and the social sciences of development theory indirectly though explicitly or implicitly adopting the ethical insights which emerge from these theories. For a comprehensive overview of social science theories, see SETTERSTEN, *supra* note 12. The work also offers an excellent bibliography. *Id.* at 257-96.

IV. LAW AND THE STAGES OF LIFE

"Now the law . . . can be . . . framed to operate with regard to any or all of the four facets of time. . . . [It allocates] time to rest. . . . establishes a weekly rhythm of rest. . . . coordinates, indeed synchronizes, the time off and creates a texture of time that incorporates a symbolic statement"⁹⁷

Not only can law allocate the societal facets of time within our lives, but it can also operate to structure the phases of our lives. In *Roper v. Simmons*, the Court not only recognized the juvenile stage of life and accorded it an ethical significance, but also drew legal implications from that recognition. Specifically, the *Roper* court concluded that juvenile immaturity argued for mitigating the retributive punishment of the youth and emphasizing the possibility for future reform of the offender under the criminal laws.⁹⁸ The role of law, however, is complex in its definition of the stages of our lives.

A. *The Legal Recognition of Stages of Life*

The law marks the stages of our lives. Law establishes all stages including the stage of foetus in vitro.⁹⁹ Common law, statutes and the Constitution all recognize the importance of one or another age for determining the legal rights and duties of a person. For example, in the past thirty years, the Supreme Court has articulated the foetal stage. The resulting steps mark not only the development of the foetus itself, but the respective obligations of others to the foetus.¹⁰⁰ Courts have recognized birth as the beginning of the autonomy of the infant and legislatures have

97. TODD D. RAKOFF, A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE 8-9 (2002). Rakoff seeks to show how law allocates time in society. My argument is an extension of Rakoff's, as I seek to explore how law alleviates goods in their stages of time in an individual's life.

98. See *Roper v. Simmons*, 543 U.S. 551, 570-71 (2005).

99. The developmental map has altered over time as modern technology appears to make viability of the foetus possible at an earlier stage. For a first person account of foetal and early infancy, see LAURENCE STERNE, THE LIFE AND OPINIONS OF TRISTRAM SHANDY, GENTLEMAN (Ian Campbell Ross ed., Clarendon Press, Oxford 1983).

100. See *Roe v. Wade*, 410 U.S. 113 (1973).

determined the day of birth to be legally significant. The beginning of childhood is marked by federal and state education laws which determine eligibility and requirements for day care and education. Adolescence is recognized in laws governing the trial, treatment and rehabilitation of juveniles. The beginning of adulthood may be measured by laws pertaining to the drinking of alcoholic beverages, the eligibility for military service, and for voting in state and federal elections. Minimum ages may be fixed for marriage and the raising of children. Developmental stages of parents are at least taken into consideration when determinations are made regarding the termination of parental rights.¹⁰¹ Developmental considerations may enter into consideration when courts determine custody, whether under the best interests of the child standard, or other standards.¹⁰² The determination of dates for retirement from public service, for eligibility for social security, and the protection of people over a certain age from discrimination all tacitly or explicitly recognize the onset of old age.

Similar stages are legally relevant to the making of decisions at the time of death, including, but not limited to, determination of competency and the stage of "terminality" in the making of end of life decisions.¹⁰³ Let me give examples of stage related issues in common law, statutory and constitutional law. In common law tort situations, the issue arises as to whether the child involved in either a case of negligence or intentional tort is of the requisite age to be "negligent" or capable of forming the requisite intent. For example, in *Ruiz v. Faulkner*, an eight year old boy darted onto a street to recover a ball and was hit by the defendant. The court permitted the trier of fact to decide whether an eight year old boy can be capable of contributory negligence, based upon his age, intelligence, knowledge and

101. See, e.g., *In re Guardianship of S.C.*, 587 A.2d 1299 (N.J. Super. Ct. App. Div 1991).

102. See Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL. PUB. POL'Y & L. 843 (2000).

103. For a particularly thoughtful discussion, see RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993).

experience.¹⁰⁴ Similar issues about the capacities of persons at different ages arise in criminal and contract law as well.

In statutory criminal law, the issue arises as to whether juveniles should be treated differently from adults. Juvenile and family courts have assumed jurisdiction over juveniles to administer a set of rehabilitative remedies different than those applied to adult offenders. A frequent legal issue which has arisen is when it is appropriate to try a juvenile as an adult offender. Legal scholars have studied the implications of development theory to such issues of juvenile justice.¹⁰⁵ The recent Supreme Court opinion in *Roper v. Simmons* illustrates this issue.

Another statutory requirement of a life stage is the stage of marriage and the family. This stage is governed by laws which regulate premarriage procedures, the marriage, spousal relations in the marriage, parental rights and duties, and termination of the marriage.¹⁰⁶

In constitutional law, another stage of life may be involved in the issue of mandatory retirement. In the Vermont case of *Aronstam v. Cashman*, the Vermont Supreme Court upheld the constitutionally mandated retirement of judges at age seventy against the challenge that such mandated retirement violated the Equal Protection Clause. The court found such a provision to be justified by the likely prospect that some judges would not be qualified to remain on the bench after seventy, and mandatory retirement was a method of preventing such an occurrence.¹⁰⁷

The stages of life discussed above do not mention death. Death may be perceived as either the arbitrary end of the stages of life, or the natural end of those stages of life—an end which informs the previous stages, and, in fact, a stage

104. *Ruiz v. Faulkner*, 470 P.2d 500, 500-03 (Ariz. Ct. App. 1970). For a recent discussion of this stage of life, see FIONDA, *supra* note 39.

105. See MARGARET ROSENHEIM ET AL., *A CENTURY OF JUVENILE JUSTICE* (2002) (in which these developments are laid out). For a particularly relevant essay, see Elizabeth S. Scott, *The Legal Construction of Childhood*, 29 HOFSTRA U. L. REV. 541 (2000).

106. For an overview, see generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW & FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989).

107. *Aronstam v. Cashman*, 325 A.2d 361 (Vt. 1974).

of life itself, i.e., dying. Although many moderns regard death as an unwelcome intrusion into the life processes, the ancients and at least some moderns viewed death (at least death in old age) as a natural process. Some, such as Leon Kass, have argued that such natural processes should be respected and not interfered with by needless efforts to prolong life.¹⁰⁸ Others, such as Ronald Dworkin, have suggested that the end of life and the way in which one dies allows expression of one's character.¹⁰⁹ Leonid Andreyev has written a marvelous story, *The Seven Who Were Hanged*, which profiles the different ways in which seven convicted persons express their character as they meet their death.¹¹⁰ Thus, when death is seen as part of the living process, it may be seen as expressive of the person's character and personality, an essential part of the self or others' narrative of one's life. Moreover, the stage of dying itself has been neatly dissected into stages by the law.

Just as the laws touch upon and explicitly identify one or another stage of life as relevant to the substance of the law, legal scholarship does as well. Thus, books and articles deal with such subjects as the law related to abortion and foetal rights, infant mortality and infant and maternal care, children's rights and child abuse, juvenile justice, pregnancy and abortion in adolescence and the meaning of marriage. There appears to be little work dealing with the legal problems of the stage of middle age. Finally, there is emerging an entire field of elder law embracing but not limited to social security law and laws dealing with age discrimination.

Despite the fact that laws and legal scholarship touch upon the stages of, there is no general legal perception of the stage in question as being part of a continuous *series* of stages of life bound together in a whole life or life cycle. Thus, each stage has its own principles and meanings, yet each stage is not treated an arc of life. With some exceptions, the law views the stages of life as simply creating unique problems for a law to resolve. In short, the

108. LEON R. KASS, TOWARD A MORE NATURAL SCIENCE: BIOLOGY AND HUMAN AFFAIRS 299-318 (1985).

109. DWORKIN, *supra* note 103.

110. LEONID ANDREYEV, THE SEVEN WHO WERE HANGED (Herman Bernstein, trans., 1st World Library 2004) (1908).

classical vision of *stages of a path or cycle of life* (even if described by modern developmental psychology and perennially described by biographies) does not appear to explicitly animate modern American law.

Yet, I suggest that if one looks at all of the ways which the law deals with these stages of life, a plausible argument can be made that modern law, perhaps *unknowingly*, has expressed or created the semblance of a disconnected law of life stages. Just as awareness of such a coherent set of stages of life may only be initially available to an individual who has traversed these stages and, through reflective memory, recovers the stages and the laws pertaining to them, society may have to engage in some forms of political recollection. But even if such a self-serving interpretation is rejected and the sum of the stages found in law is nothing more than a serial display of each of the parts, nevertheless, it is useful to regard these laws in a somewhat classical fashion in order to construct the vision of a progressive series of stages of life, each with its own unique moral meaning.

B. *The Specific Functions of Law in the Stages of Life*

“[T]o state the function of [a law] is to refer it to the attainment of valuable goals”¹¹¹

A more pragmatic view of law's functions in relation to the stages of life might bring the subject down to earth.¹¹² The law performs six related major functions:

- (1) The establishment of the boundaries of the stages and the facilitation of transition from one stage to another so that there may be . . .
- (2) The allocation of goods to the various stages, including the establishment of autonomies and rights in accordance with . . .
- (3) The articulation of the meaning of each stage of life, which provides criteria which guide . . .

111. JEROME HALL, *COMPARATIVE LAW AND SOCIAL THEORY* 107 (1963).

112. Unfortunately, “bringing something down to earth” in legal discussion suggests ignoring the ethical and normative political dimensions of the subject. I do not propose to do that.

- (4) The formation of a legal regime for each stage of life requiring . . .
- (5) The establishment of linkages between and among the stages of life . . .
- (6) With the articulation of a notion of justice among and between the stages of life.

Each of these functions are expressed or implied in the law; taken together, they may be properly labeled: "The law of the stages of life." In this section, I shall discuss the first three functions of the law. In the next section, I shall set forth the notion of a legal regime of a stage of life and discuss how it establishes a regime of law applicable to the stage of old age. Then, I shall turn to the consideration of how the law establishes links among the stages of life. In the final section I shall discuss the difficult question of the justice of the law of the stages of life.

1. *Setting the Legal Boundaries of Stages and Transition Between Stages.* In the *Roper v. Simmons* oral argument, the court debated over the proper boundary of the juvenile stage. Scalia argued that states chose different ages for different capacities; hence, there was no fixed boundary for the juvenile stage. Other members of the court seemed clearly less concerned about the fuzzy boundary of the juvenile stage.

The legal *recording* of key dates marks the boundaries of the stages of our lives. Legal dates are established applicable to conception and viability, birth, entry into school, exit from school, eligibility for work, operating motor vehicles, drinking alcoholic beverages, voting, contracting, entering into the armed forces, marriage, retirement, eligibility for social security, and death. Whether reflecting societal custom or serving a variety of pragmatic purposes, these dates may also become important symbolic markers in our biographies.¹¹³

113. The symbolic functions of the laws are often ignored. Perhaps the best known discussion in law was THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935). A more sensitive inquiry may be found in MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1985). Legal scholarship which explores the role of symbols in the law include such articles as Eric Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 *J. LEGAL STUD.* 765 (1998). An earlier

Although these recordation laws mark the boundaries of the stages of our lives, they do not do so with any precision. Drinking, driving, voting, and armed service eligibility dates may not coincide; hence the boundary of entry into early adulthood may be a fuzzy boundary, resulting in societal debates about the proper age for these activities permitted or prohibited in relation to the boundaries. These boundaries may be fuzzy for several reasons. First, there may be societal disagreement about the stages of mental and physical development necessary to enter these stages. When is a person ready to drive, vote, fight, and drink? It may be that as one turns to specific activities, such as driving or voting, the dates for readiness may differ. This difference may depend as much upon educational and cultural as biological forces, but may also depend upon individual differences; consequently any uniform boundary may seem arbitrary. The differences in dates may reflect history; at one period of our history, it may have made sense that drinking or marriage ages would be different than now. Also, the different cultures of our nation—south and north, rural and urban—may have customs which suggest different times for such stages as marriage and child raising.

Recordation laws may serve to be written reminders, but they serve other functions as well, including those of reminiscing and commemorating. Reminiscing may involve wistful story-telling of the past which we often share with others. In commemorating, we engage in an intensified eulogistic remembrance, often with rituals of solemnization and celebration. The days chosen may mark anniversaries of key beginnings or completions of stages of our lives, such as first communions, bar and bat mitzvahs, graduations, wedding anniversaries, and retirement ceremonies. Such days may anchor both our characters and our societies, providing markers for the narrative of our lives and our communities' history.¹¹⁴

Closely related to these laws may be laws pertaining to *transition* between stages of life. These transitions may be

religiously oriented culture recognized the symbolic importance of dates, such as saints' days, and our society still marks key celebration dates.

114. For an evocative account of the roles of remembering, see CASEY, *supra* note 32.

changes pertaining to the stages of life. Such "passages of life" have occupied the attention of psychologists, anthropologists, religious thinkers and popular writers.¹¹⁵ They seek to identify and describe the movements from one stage to another, and help the person to make the transition successfully. Thus, such transitions may be part of individual choices, cultures, and markets.

Laws, such as those enabling learning permits for driving prior to full fledged driving permits, illustrate such transition laws. At one time, there were literacy laws for voting eligibility which introduced the notion of being educated prior to making the transition to citizenship. Some have suggested an education period prior to and in preparation for entering marriage. A proposal for legally required retirement counseling offers another example. Actual and proposed laws of this sort suggest the need for legally supported societal preparation of the person as he moves towards a new stage of life.

Such legal requirements for establishing the boundaries of stages of life and mandating preparations for transition constrain the freedom of those seeking to enter the next stage of their lives based upon their own choice and their own level of preparation. One set of legal controversies illustrate the battle between a legally required date for a stage of life and the claimed freedom of the individual and the specific group to which he belongs. There are a myriad of cases illustrating such a controversy.

Take, for example, the case of *Massachusetts Board of Retirement v. Murgia*.¹¹⁶ A policeman was involuntarily retired from the police force. A Massachusetts law mandated such a retirement. Although the policeman was

115. The psychological transitions are well documented in the psychological literature dealing with stages of life, including the works of Freud, Jung, Levinson, and Erikson. Anthropologists study such transitions in their study of rites of passage, which recognize that such transitions involve changed relationships in society. See generally MIRCEA ELIADE, RITES AND SYMBOLS OF INITIATION: THE MYSTERIES OF BIRTH AND REBIRTH (Willard R. Trask trans., Harper & Row 1975) (1958). The analogous notion of religious transition is set forth in, for example, a study of the sacraments. See, e.g., BERT GHEZZI, SACRED PASSAGES (2003). Well known popular writers include WILLIAM BRIDGES, TRANSITIONS: MAKING SENSE OF LIFE'S CHANGES (1980) and GAIL SHEEHY, PASSAGES: PREDICTABLE CRISES OF ADULT LIFE (1976).

116. 427 U.S. 307 (1976).

in good health, the law was based upon a recognition of the general decline of physical health in late middle age and the need for vigorous good health in the duties of the police. The court found that age grouping was not a "suspect class" and that the regulation in question met the requirement of rationality.

The age distinction in *Murgia* does not correspond with our customary notion of old age. In fact, various laws set a range of age boundaries of old age beginning at fifty and extending to seventy. Although the boundaries are flexible, the message is not. The notion is that by age fifty or later, society must begin to attend to basic biological decay. And the individual is "invited" to define himself in light of this new condition of life. To be sure, the boundary is not defined as a stage of life. Instead, it is merely a marker of a biological process of decay—a decay which may interfere with some social functioning, i.e., policing, judging, etc. Rather than explicitly define a stage of life, the law identifies age as a stage of presumptive disability.

This approach is not uncommon. In one negligence case, the court found the elderly plaintiff who tripped on a sidewalk not to be eligible for a specifically lowered standard in terms of age for purposes of assessing contributory negligence.¹¹⁷ The court adopted a disability standard and found no evidence of disability. Thus, the notion of "age" disappeared behind the label of "disability." The explicit legal treatment of age is obliterated.¹¹⁸ The lesson appears to be that if you are old and in good shape, the law can see you as "not disabled" with age being irrelevant. Aside from this interesting result, the focus upon boundaries may deliver two messages, namely, that if you are a certain age, the law may assume you are disabled by statute, but may inquire whether you are on a case-by-case basis in common law. A "stage of life" may be tacitly identified, but disability becomes its principal marker!

117. *LaCava v. City of New Orleans*, 159 So.2d 362 (1964).

118. For a case rejecting the notion that old age standing alone should be taken into account, see *O'Connor & Raque Co. v. Bill*, 474 S.W.2d 344 (Ky. 1971). For a discussion urging a relaxed standard, see Charles V. Barrett, III, *Negligence and the Elderly: A Proposal for a Relaxed Standard of Care*, 17 MARSHALL L. REV. 873 (1984).

The approach to the legal establishment of age boundaries might be one in which a society grants the freedom to the individual to the maximum extent possible to define his or her own stage of life. Suppose, for example, that a child wishes to enter the army or marry, a middle aged man wishes to go to grammar school, or an old man or woman wishes to marry and have children. We might believe that such choices are imprudent, but, along with John Stuart Mill, we may decide that if these choices don't result in specific harm to us or others, they should be permitted. From this point of view, the only markers of stages of life there should be would be those which serve to prevent harm to society. Any or all of the above might be prevented, not on the basis of the appeal to stages of life, but rather on appeal to the possible harms to society resulting from such transgressions. Thus, a young child entering the army or an adolescent entering marriage might be a lousy soldier or parent respectively. A middle aged man might learn differently from children in grammar school and be disruptive in a class of grammar school children. The prospect of old people who are permitted to have young children with new young spouses raises the eventuality of their offspring being orphaned. Like the Massachusetts statute in *Murgia*, these judgments of harm may be based upon assumption of development stages themselves and their relationship to various social harms.

While the liberal approach simply identifies age related probabilities of harm, the classical view is more willing to posit stages of life directly. The liberal would argue that it is preferable to begin with the notion of the individual freedom to resist or ignore age categories and to permit the individual to choose to define one's own narrative of life, placing the burden upon the state to prove that certain activities at a certain stage of life are harmful. The classicist might respond that there is a certain comfort for the individual to reflect upon his participation in natural processes of growth and decline, that there may be other advantages to the social support of the recognition of stages of life, and that boundaries should be set for these reasons.

2. *Legal Allocation of Goods of Life to the Stages.* Goods are activities in accordance with capacities—capacities to engage in friendship, plan one's life, enjoy beauty, play, contemplate, and so forth. Such a formulation

of the goods of life makes it evident that in our society, there must be opportunities to develop and exercise a variety of capacities. Nature, choice, societal relationships (such as family and markets), and the political community may all be sources of these opportunities. Only some of these resources can be distributed by the political community. Some kinds of income, services (e.g., remedial health services), and basic necessities such as food, shelter, and clothing may be distributed by the political community either indirectly or directly. Direct distribution is best illustrated through such legal activities as the distribution of welfare benefits or remedial health services. Indirect distribution takes place when law helps to shape or reinforce families or markets. Most kinds of distributions are focused upon one or another stage of life. Goods, such as education (at least certain kinds of education), may be uniquely suited to certain stages of life and, when allocated, will be colored by those stages.¹¹⁹

There are goods which may not be readily distributed among the stages of life, since such a recognition reveals a limitation upon viewing government as simply a paymaster who doles out fungible commodities to the young, middle aged and old. These goods may not be divisible, and hence, not allocable among age groups. Such goods include the condition of our larger environment. These goods may be commonly available because they are part of organized systems, such as ecosystems which are not readily disassembled. Common access to such shared goods may operate to join people of different stages of life together. Certain goods, such as friendship, may be divisible but not readily controllable by the public. All goods, even money, usually have to be used by the recipient to be good; certain goods, such as health, are partly the consequence of the character, habit, and choices of the individual, and hence are not readily achieved simply through the act of distribution. Certain goods, like education, may be cumulative in the sense that when received, they may depend upon prior distributions and generate further goods on their own. And finally, certain goods may not be

119. One may argue that goods themselves are not fungible but are only good relative to a stage of life.

objectively scarce, but may be easily accessible to all if so desired.¹²⁰

These limits upon the distribution of goods create a significant limit upon the notion of distributive justice in which various goods are distributed according to some criterion. Nevertheless, there are divisible and fungible scarce goods which not only include wealth, but also, perhaps more importantly, access to education, health services, and a variety of other societal goods. Therefore, it is useful to think about how these goods might be properly distributed among the stages of our lives.¹²¹ The classical philosophers, especially Aristotle, as well as some modern philosophers, recognize that the distribution of goods by the political community may reflect certain distributive criteria depending upon the nature of the political community. Need, freedom, merit or wealth may be the distributive criteria for democracies, aristocracies, and oligarchies. Such criteria may indirectly reflect the stages of life. For example, need may be determined, at least in part, by the stage of development. Merit may be based upon the

120. For a discussion of the nature of various goods, see GEORG HENRIK VON WRIGHT, *THE VARIETIES OF GOODNESS* (1963). The recognition of the limits upon conceiving goods as fungible items to be distributed and the recognition that there is no central "distributor" of goods in society has led some philosophers to reject the notion of distributive justice completely. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

121. I have chosen to look at the question of the stages of life as a problem of distribution of goods to the various stages of life. An alternative way of looking at the problem is to view the law as structuring *the time* of our lives. The marking of boundaries of stages and the distribution of goods to those stages may be seen in a more abstract manner as the distribution of times of our lives. Following the words of Ecclesiastes and the popular song, the law states that there is a time for every purpose under heaven. To view the stages of life in terms of "the times" of life would enable me to draw a parallel to Rakoff's fine work in which he explores the allocation of time to activities in society. Just as the law distributes time horizontally in society, it also may allocate it vertically within the history of society and the lives of its members. Linking the stages of life to "the times of life" encourages an inquiry into the nature of time. Is time defined in terms of the natural processes of our development? Is it simply the mechanical measurement in equal units of the course of our lives? Is it a cumulative process, expressed in the subjective notion of duration or the objective notions of a measurable development process? Is it cyclical? All of these questions may be raised by viewing the law as allocating time of our lives. I have chosen not to follow this approach in this Essay. I will, however, return to the theme of time and its social role in my discussion of the social meaning of the stages of life below and in a brief conclusion.

recognition of certain acquired excellences likely to come in the middle stages of life. And accumulated wealth, unless inherited, might also come later in life through economic activity. Thus, these criteria for distribution may reflect, at least in part, underlying stages of development. Perhaps, if knowledge were available, a more refined set of criteria for distribution according to need, freedom and merit reflecting the stages of development might be desirable. Alternatively, one might seek to create a contextual set of distributive criteria based directly upon stages of life. To develop such criteria will require an initial effort to define the social meaning of each stage of life; such an effort will be discussed in the next section.

If the meaning of the stages of life can be determined and criteria can be developed for such stages, insofar as the political community allocates goods, it may adopt legal means to do so. The law allocates goods by *the establishment of autonomies for certain ages, and the provision of protective regimes*. These may be thought of as the distribution of freedoms. For example, autonomy may be offered after viability in the womb, and certain protections may be offered to children or older adults who appear vulnerable due to their stage of development. Laws may be *enabling* laws, enabling persons at certain stages to participate in the societal (e.g., driver's license, drinking age eligibility) and civic life (e.g., draft and voting ages). The enabling law may offer the opportunity to develop certain moral and political virtues, but, because the law is permissive, it leaves the choice up to the individual. In the cases of laws requiring military service, school attendance or parental obligations, the laws serve *to define and implement social duties*. Similarly, tort law may determine social duties based upon role-related determinations of negligence. Laws may *offer negative or positive incentives* at certain stages of life. Thus, laws permitting the one time sale of one's home without capital gains tax may seek to encourage the elderly to abandon their family home, freeing it up for larger families. And finally, laws may serve *welfare functions*, such as social security laws which distribute welfare to families with children and old persons, thereby facilitating the meeting of basic needs at these stages of life.

A myriad disputes surround each of these functions of laws. The legal and political debates surrounding the distribution of goods based upon the stages of life may be

classified as follows. First, the question is raised as to whether these laws are really targeted at stages of life, or whether the stage of life aspect of the law in question is incidental to some other public purpose. Are marriage, drinking, and driving laws all related to defining the stage of adolescence or are they incidental unrelated laws bearing upon a series of different and unique public problems? This suggests a second question: does it make sense to target laws to particular stages of life? For example, should Aid to Families With Dependent Children be limited to families with children of a certain age? A third and closely related question is whether the political community should look to generic stages of life or whether a more individualized approach should be adopted. Thus, as suggested by the *Murgia* decision above, should eligibility for access to police jobs be distributed according to an age-related or an individual fitness criterion? A fourth question is whether or not the political community should determine the distribution of goods at all, or if it should instead be left to nature, custom or the marketplace. A fifth question is whether the distribution should be determined by individual choice and markets rather than by the political or economic community.

In terms of the first question: is the law which seems to recognize stages of life really concerned with such stages as stages of development or is the stage-of-life aspect simply incidental? In situations where the law pays specific attention to the capacity of individuals, for example, their responsibility in tort and criminal law, it appears clear that stages of life are an important consideration. The importance of stages of life may also apply to laws pertaining to eligibility for certain activities, such as drinking or driving, or certain social duties, like military service. The underlying assumption of these laws may be that a person can only conduct these activities at a certain stage of life. Protective and welfare laws may apply to the status of vulnerability, rather than stage of life itself; it must happen that at certain stages, persons may be more vulnerable. Whether this vulnerability is necessarily related to a stage of development is a more tenuous question.

A second issue is that whether it makes sense to "target" laws to stages of life may depend upon the reason for targeting. One may target stages of life because one

believes there is a set of stages of development which people do and should go through. Alternatively, one may simply focus upon stages of life because the stage is related to some public purpose. Thus, draft age may relate to the notion that physical courage and effectiveness take place at a certain stage of life and this courage and effectiveness are what is needed in our fighting forces. Most people would agree that focusing upon stages of life should be for specific public purposes. But it would be less agreed upon that the law should somehow help to guide the individual through the stages of life. Yet, it is this classical notion which is more interesting. In order to defend such a classical view, it may be necessary to demonstrate that each stage of life has its own essential meaning or meanings which should be "realized" by each individual. In the next section, I shall explore the "meanings" of stages of life argument.

Third, if there are generic stages of life, and they have meanings, it still is necessary to explore whether each individual shares in these stages. There may be an individual variance in relation to the stage of life and there may be individuals who "break the mold." This issue of individualism is especially important in our nation where individualism is given pride of place. This is related to the fifth question identified above, i.e., what is the role of individual choice in the allocation of goods to different stages of life? Again, it may be best to explore this question in more detail after a discussion of the meanings of the stages, because if there is a meaning to the stages of life, one would have to weigh the issue as to whether individuals must share in that meaning.

The fourth question, i.e., the role of the political community vis-à-vis markets and nature in the allocation of goods to the stages of life may depend upon whether we can determine if there is an appropriate allocation of goods based upon the stages, and whether nature and custom can make that allocation without the help of the political community. Thus, as Aristotle and others have recognized, a specific approach to the common good may determine the nature of the proper allocation.

The fifth question—who should allocate the goods—is a question not unique to stages of life, but applies to the distribution of goods in society more generally. What is the justice of such allocations and can only the political

community achieve this justice? Does an awareness of the stages of life affect general conclusions about proper distribution of goods in society?

3. *Establishing the Meanings of the Stages of Life.* The Greeks believed that a whole life had meaning and its stages were given meaning by the whole lifespan. Similarly, the modern "meaning of life" consists of lives which are not dominated by worthless, trivial, pointless or futile activities, viewed as absurd.¹²² This meaningful life is composed of projects with which we identify because we believe our engagement in them will satisfy us by making our lives better. This satisfaction is, in turn, based upon objective conditions of the natural world, the given conditions of the social world, and our own and our society's choices and beliefs. The law contributes to the articulation and promotion of the social conditions of that meaning.

As we have seen above, Erikson and others have identified a series of stages, based in part upon natural development processes, accompanied by cognitive, psychological, and (for some) moral development. For Erikson, each successful stage of life results in the resolution of crises which yields the components of a healthy personality—basic trust, autonomy, initiative, industry, identity, intimacy, generativity, and integrity. The meaning of life is achieved by the resolution of these crises at each stage and the attainment of a "healthy personality." Aristotle might have added that it is the activity of functioning in accordance with that healthy personality which constitutes a meaningful life.

The Eriksonian components of a healthy personality, in turn, have been subjected to a variety of developmental studies, leading to confirmations, refutations and elaborations. Philosophers have either critiqued such constructions of "healthy personalities" or elaborated upon these constructions, offering their own reflective account of the stages of lives.¹²³ The result of modern inquiry has been a pluralism of views concerning the meaning of the stages

122. For a discussion of the pluralism of views pertaining to the meanings of life, see generally JOHN KEKES, *THE MORALITY OF PLURALISM* (1993).

123. I have summarized above the conclusions of one such philosophical account, that of David Norton.

of life, the definition of these stages, and their applicability to different population groups. These stages of life have also been found to change over time, both with technological changes and accompanying societal changes. Finally, development theorists have conceded that any generic stage-of-life format is subject to significant individual variances and, at least in the middle stages of life, the possibility of individual choice. In short, the fundamental conclusion of modern developmental science and philosophical pluralism is that there is no agreement pertaining to the meaning of life or its stages.¹²⁴

Despite the uncertainties which affect the entire field of development science, common sense suggests that society does "define" stages of our lives, and contributes or ratifies social meanings to those stages. Childhood, adolescence, young adulthood, marriage and family stages, late adulthood, and retirement are broadly recognized stages and both laws and institutions correspond with these stages, even if the natural and social development and individual choices of some individuals diverge from this broad set of categories.¹²⁵ Thus, although it may not be possible to ground the meanings of the stages of life in some agreed upon scientific account of the natural and psychological stages of life or their philosophical interpretation, it is possible to recognize that these stages and their meanings do exist and are, in part, constructed by our society and its laws. This construction may be acknowledged when laws are treated as part of our expressions of culture, narratives, norms, or simply social meanings.

The recognition of the social construction of meaning is important. "Meaning" is the symbolic processes by which we understand the world in which we live, and, more specifically, the legitimation of the social institutions which

124. For an overview, see DEVELOPMENTAL THEORIES THROUGH THE LIFE CYCLE, *supra* note 91.

125. There is a deeper underlying assumption to my discussion of the discrete meaning of stages of life, namely, a metaphysical "essentialism" according to which each stage of life has its "essential meaning" (whether created by society or naturally "real"). A discussion of this assumption would take us far afield. For a discussion of "essentialism" in relation to other principles of reality, see generally WALTER WATSON, THE ARCHITECTONICS OF MEANING: THE FOUNDATIONS OF A NEW PLURALISM (1985).

are part of that world. In the words of Peter Berger and Thomas Luckmann,

The symbolic universe also makes possible the ordering of the different phases of biography. . . . The periodization of biography is symbolized at each stage with reference to the totality of human meanings. To be a child, to be an adult, and so forth—each of these biographical phases is legitimated as mode of being in a symbolic universe A modern psychological theory of personality development can fulfill the same function. In both cases, the individual passing from one biographical phase to another can view himself as repeating a sequence that is given in the “nature of things” or in his own “nature.” That is, he can reassure himself that he is living “correctly.”¹²⁶

One recent study of the social meanings of life is the study of the nature of generations, the twenty year periods of population cohorts. This study suggests that for the same cohort, the meaning of life does not change. Each generation is indelibly shaped by political and social events (among other pressures) such as depression and war, as well as demographic events, such as the baby boom. These generations are examples of groups of our population which are fashioned by principal events in our history.¹²⁷ These events, however, give a stability of outlook to the generation throughout its different stages of life rather than, as I and others suggest, the social meaning changing for individuals as they move through stages.

Not only does society shape the meanings of the stages of life, but it also shapes the very nature of the time according to which these stages should be measured.¹²⁸

126. PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 92 (1966).

127. WILLIAM STRAUSS & NEIL HOWE, *GENERATIONS: THE HISTORY OF AMERICA'S FUTURE, 1584-2069* (1991).

128. For some of the many discussions of the different kinds of time, see ROBERT LEVINE, *A GEOGRAPHY OF TIME* (1997); JEREMY RIFKIN, *TIME WARS: THE PRIMARY CONFLICT IN HUMAN HISTORY* (1987); EVIATAR ZERUBAVEL, *HIDDEN RHYTHMS: SCHEDULES AND CALENDARS IN SOCIAL LIFE* (1985). As for discussions of time and law, in addition to Rakoff's work, see CAROL J. GREENHOUSE, *A MOMENT'S NOTICE: TIME POLITICS ACROSS CULTURES* (1996); CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* (1987); David M. Engel, *Law, Time, and Community*, 21 L. & SOC'Y REV. 605 (1987); Rebecca R. French, *Time in the Law*, 72 U. COLO. L. REV. 663 (2001); Carol J. Greenhouse, *Just in*

Although there have been many efforts to construct schemas for the different natures of time, let me (somewhat arbitrarily) distinguish three kinds of time which may correspond to stages of life. The first kind of time is developmental time, in which society and its young participants pass through their stages of life measured by their own natural and social development and their acquisition of competencies and maturity. The second stage of life, the vast middle segment of our days on earth, is dominated by mechanical time—a time measured uniformly by the clocks of science and industry. The third stage of life, cyclical time, is best recognized by or created for an old age which recognizes the cycles of nature, lives and generations.

The legitimation of the stages of life, including their different notions of history and time, may be found in the social norms and narratives which are part of social meanings.¹²⁹ These norms, in turn, are embodied in, and articulated by statutes and legal opinions, some of which have been identified above. Legal commentators have identified and discussed the important role of law in the construction or modification of social meanings. What is the law's role in this creation of meaning? On the one hand, where there is consensus on meanings, legislation and court opinions may simply articulate this consensus. For example, in the words of a Supreme Court case:

Time: Temporality and the Cultural Legitimation of Law, 98 YALE L.J. 1631 (1989).

Rebecca French has provided a remarkable overview of the ways in which the different senses of time enter the law and legal practice. The following paragraphs were inspired by the much more thorough discussion of these topics by French. See French, *supra*.

One person recognizing the different views of time depending upon the stage of development is James K. Feibleman. See, e.g., JAMES K. FEIBLEMAN, *THE STAGES OF LIFE* 231 (1975). In another sense, a deeper view of time at different stages of life is indirectly offered by Feibleman, who argues that different philosophers and their philosophies appear to reflect and express different stages of life. In so far as these philosophies embody radically different views of time, one would then find different times to be appropriate to different stages. See generally FEIBLEMAN, *supra*.

129. I am suggesting an approach to social meanings of laws which moves from the diffuse meanings within our culture, to social norms and rules, to specific legal rules. The causal direction of this continuum is more complex than the unidirectional movement suggested here.

The line between childhood and adulthood is drawn in different ways by various States. There is, however, complete or near unanimity among all 50 states and the District of Columbia in treating a person under 16 as a minor for several important purposes. [These include driving, marriage, jury membership, gambling, purchase of pornographic materials.] All of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year old is not prepared to assume the full responsibilities of an adult.¹³⁰

On the other hand, the law may have to settle conflicts over the meaning of the stages of life. Recently, the Vermont Supreme Court faced the issue of defining the symbolic meaning of marriage when a same-sex couple claimed the constitutional (and statutory) right to marry.¹³¹ The court rejected the defendant's argument that the marriage stage was indissolubly linked to child raising. From the court's point of view, marriage or at least civil union was a permanent stage of intimacy rather than a prelude to child raising. Thus, a stage of life was defined or redefined!

Obviously, the court's acting as an arbiter of the social meanings of stages of life raises fundamental questions about the role of law in general and the courts in particular as creators rather than mere supporters of symbolic meanings. The proper role of courts in the articulation of these meanings of the stages of life is a topic, a full discussion of which is beyond the scope of this introductory Essay.¹³²

IV. ELDER LAW: THE LEGAL REGIME OF THE STAGE OF OLD AGE

"I hate the men who would prolong their lives by food and drink and charms of magic art perverting nature's course to keep off death they ought, when they no longer

130. *Thompson v. Oklahoma*, 487 U.S. 815, 824 (1988).

131. *See Baker v. State*, 744 A.2d 864 (Vt. 1999).

132. The discussion of the Supreme Court's role in specifically setting forth the stages of foetal development in *Roe v. Wade* may be related to such an inquiry. *See generally* 410 U.S. 113 (1973).

serve the land, to quit this life, and clear the way for youth."¹³³

The fourth function of the law of stages of life is the creation of a more comprehensive legal regime around those stages. Probably the most developed legal regime of any stage of life is the array of laws bearing upon the stage of old age. This has given rise to the notion of a specialized field of law called "elder law." This field embraces, but is not limited to, laws pertaining to health care decision-making, Medicare, Medicaid, Medigap, long-term care insurance, the regulation of nursing homes, housing alternatives, guardianship and alternatives to guardianship, social security, protection of pension plans, and the prohibitions of age discrimination and neglect. (Although estate planning and the making of testamentary and living wills are not necessarily reserved to the elderly, much will-making and will-revision takes place at that age, a fact which sheds much light upon an understanding of the meaning of the state of old age). The special "density" of laws as applied to old age offers a particularly good example of a regime of law applied to a stage of life.

To treat old age or any stage as having a legal regime is not to assume that old age is the equivalent to a separate life. Posner suggests treating old age as equivalent to a separate life. Such a suggestion ignores the fact that each stage fits into our lives as part of one integrated person. It is this integrated person that is described so well in Edward Casey's *Remembering: A Phenomenological Study*. In Casey's words, a person has "thick autonomy," which "means possessing a depth not easily penetrable by . . . consciousness . . . resistant to conceptual understanding . . . ; [being] sedimented in layers . . . ; and having 'historical depth'" ¹³⁴

To view the array of laws applying to one stage of life as a "legal regime" suggests that a stage of life be treated as a "commons of years" which is governed by a cluster of laws and institutions applicable to "the age commons," analogous to the way in which legal regimes govern common natural

133. Euripides, *The Suppliants*, in 1 THE COMPLETE GREEK DRAMA 919 (Whitney J. Oates & Eugene O'Neil Jr. eds., E. P. Coleridge trans., Random House 1938).

134. See CASEY, *supra* note 32, at 265.

resources.¹³⁵ By viewing elder law as the establishment of a legal regime for the aging stage of life, one can begin to view the complex cluster of rules bearing upon this stage as a whole, and then ask questions about the actual and desirable role of such a legal regime as a whole.

The many kinds of roles of law pertaining to all stages of life as described above are part of the legal regime of old age. Thus, recordation laws set the chronological times for the stages of life (in effect, setting its boundaries in time); within these boundaries, the legal regime determines eligibility for allocating resources, such as social security, pensions, and access to nursing homes. The legal regime of old age establishes the rights and protections of that age, i.e., the age at which guardianship applies and the age at which discrimination laws apply. Thus, recordation laws establish the lower boundaries, (death may establish the upper boundaries!) in which the legal regime of old age operates. The questions to ask about the establishment of borders of the stages of life might be similar to the questions to be asked about geographical borders of a natural commons. Should the markers for the boundaries all be the same, applying equally to all persons?

It is important to recognize that the legal regime of aging operates to enable the distribution of a wide variety of goods to the elderly within their stage of life: income, housing, medical care, and respect (or at least freedom from disrespect), are some of the major goods distributed. That distribution may be based upon age-related merit (e.g., veterans benefits) or need (e.g., Medicare). The law may enable or protect contributions to public and private pensions at earlier stages of life for later use in old age, thus linking the earlier stages of life to the stage of old age. The law may play a variety of more specific roles in the distribution of goods, including defining the nature and amount of public welfare goods to be received or through protection of pension contracts for the receipt of goods.

135. See ORAN R. YOUNG, *RESOURCE REGIMES: NATURAL RESOURCES AND SOCIAL INSTITUTIONS* (1982).

The legal regime may articulate the meaning of the stage of life, i.e., old age.¹³⁶ Here is an example from legislation in Maine:

This declaration of a people shall serve as a credo of the elderly offering a philosophy that serves as a general state of policy and basic tenets to guide the administration and implementation of this Act. The declaration of a people:

We older Americans place great emphasis on leading a life of value to our nation, states, communities, friends, families and to ourselves. America's elderly want to and are able to contribute to the good of our fellow human beings, even if such contribution lies outside the traditional realms of employment and productivity. We want to help improve the quality of life of each citizen of the United States regardless of his age. Our personal experiences, knowledge and skills are our qualifications. We are a strong, vital segment of society. We possess the power of a people.

We older Americans believe that attaining the status of senior citizen is merely beginning another stage in the life of each man and is not a signal to withdraw from life. Each person ages from birth to death. We are all aging men.

While our particular page in the history of mankind is the choice of our Creator, it is our place in history which surrounds us with the consequences of American society. Aging men have been transformed by the events of American society. America's elderly now gain sustenance and meet social needs outside our homes, and have no family under our roof. Once we were dependent on our family, now we are dependent on impersonal organizations, systems and our society as a whole. America's exiling of us as the unwanted generation is its loss—its economic, its human, its moral, its spiritual loss.

We do not want to be taken from the mainstream of life, away from the everyday activities of society, and put on the shelf. We do not want a dole, but rather help in our times of crisis. We wish to live with minimum dependence on other people and government.

136. For another somewhat different view of the meaning of old age, see generally AMERY, *supra* note 94. Amery argues that the characteristics of aging are the progressive view of time as the essence of one's existence, the growing alienation from one's self and body, the increased realization that is no longer possible to live according to one's potential abilities, the gradual loss of the ability to understand new developments in the arts and the changing values of society, and the gradual feeling that we have arrived at the time of life when death is within us. See generally *id.* For a very different perspective, see ESPOSITO, *supra* note 76, at 80. These somewhat different views of aging raise the question as to whether any one meaning of old age or any other stage of life can be confidently asserted.

To achieve this credo, we older Americans believe the United States must provide us a full and equal opportunity for meeting sustenance and social needs—the same opportunity that is enjoyed by our fellow citizens. To continue fulfilling our role in history, to continue helping our fellow human beings and to enrich our society; the elderly must be provided an opportunity to attain the basic essentials of life¹³⁷

Although the Maine law is somewhat unique, the full meaning of old age is not grasped by the Maine law. Despite the laudable effort to reintegrate their elderly into everyday life, the old age stage of life should also be defined by its proximity to decay and death. That proximity to death forces the stage of old age to cope with its inevitable decay of selected vital powers to be exercised in the present, resulting in the elderly's "natural turn" of attention to the past both because of its extensive experience of the past and its limited biographical future. In the words of the poet Kelly Cherry, "[i]t is the loss of possibility that claims you bit by bit."¹³⁸

Most of the laws in the traditional field of elder law appear to be laws protecting the elderly as vulnerable, and providing resources for the final stages of life. Such a focus, the outgrowth of the welfare state, views the elderly as vulnerable, and old age as one of vulnerability.¹³⁹ Such laws capture one aspect of the meaning of aging, i.e., the gradual diminishment of physical and often mental capacities during old age. The set of laws dealing with decay and vulnerability may seek to prevent or delay such decay, or keep it from impeding other vital functions of living. What is important here is the message which accompanies the legal response to the vulnerabilities of old age, a message which may disempower the elderly.

137. ME. REV. STAT. ANN. tit. 22, § 5102 (West 2004).

138. KELLY CHERRY, *Lines Written on the Eve of a Birthday*, in NATURAL THEOLOGY 41 (1988).

139. Although we are all vulnerable, some are more vulnerable than others. The stage of old age can operate to join old people with other people of all ages who are vulnerable. An ethical and political "philosophy of vulnerability" becomes relevant. See generally ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES (1985); STEVEN LUPER, INVULNERABILITY: ON SECURING HAPPINESS (1996).

A second meaning of old age involves its presumed unique awareness of, and sensitivity to, future generations. Since old age's future is necessarily limited by death, only religious beliefs in future immortality or a secular focus upon the welfare of future generations can inform old age's struggle with the meaning of death.¹⁴⁰ The field of estate law offers the elderly, if they have property, an opportunity to define their relations to those generations. Few legal scholars have captured the importance of wills as a vehicle of old age's confrontation with death; the recent study of ancient wills and the recovery of the Jewish tradition of "ethical wills" is an effort to treat testamentary law as something more than the transfer of wealth.¹⁴¹ These laws can create a means by which the old can devote their wisdom and resources to future generations; hence the old can embrace and affect the future course of the world, nation and local community. Like wills, political, civic, and intellectual commitment of the old to a better future can be an especially important part of the life of old age.¹⁴²

Wills may perform another function, i.e., an opportunity for the early confrontation with death, which is a third dimension of aging. On the one hand, death is often treated as a matter of religion, perhaps to be confined to a non-governmental realm by the constitutional wall of separation. On the other hand, "living wills" and laws establishing humane ways of dying offer legal opportunities for the old to confront death, and in so doing, assist the elderly to confront the end of their own lives.

A final meaning accorded to old age is its concern with the past: "But that is part of their plan. To strip you of your

140. This definition is based upon reflections on my own early old age and the discussions of others. For a delightful collection of materials, see WAYNE BOOTH, *THE ART OF GROWING OLDER: WRITERS ON LIVING AND AGING* (1992). I am aware that many see early modern old age as a new period of leisure and creativity or as the extended rich continuation of one's middle aged vocation. Even if such creativity and continuation takes place, it does so in the shadow of the end of life and for many, an awareness of that end.

141. See Judith Frank, *The Human Legacy: Using Ethical Wills to Enhance Estate Planning*, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 65, 65-66, 70-71 (2003).

142. Obviously, there can be some conflict between a state of flagging energies and the need for energetic civic or political commitments. Voting can be a weak substitute for such active commitment.

future and put the past in its place.”¹⁴³ If youth focuses upon ambitions for the future, and middle aged adults focus upon their present cares and responsibility, old age is often an age in which the past increasingly looms in importance. Perhaps this is because the past is all that old age has—despite concerns for future generations, the future is very limited for the old and the present may be or seem less practically urgent. It may appear as if concern for the past in old age is not captured in any law, but the law is permeated with concern for the past as exemplified in a common law which reaches into past precedents,¹⁴⁴ a constitution which stands a monument of the past,¹⁴⁵ and a legal culture which may be properly labeled a legal tradition,¹⁴⁶ embracing the past. Law not only reflects the past, but also enables our practices of reminiscence and commemoration of the past, whether of the past important events of our community, or the past lives of now deceased friends and heroes. In terms of reminiscence, the legally recorded and structured stages of life offer a framework of “reminiscentia,” by which the old can engage in the shared wistful reliving of the past (wistful because the memory is accompanied by knowledge that the past cannot be fully relived). Although reminiscence functions primarily to strengthen links between family and friends, commemoration serves a more public function, solemnized in ceremony and honoring events and people in a way which strengthens the communities’ values.¹⁴⁷ A recent literature of historical memory and commemoration has suggested that there is an individual ethics and community politics of

143. CHERRY, *supra* note 138, at 41.

144. For the law as tradition, see Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

145. See generally PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 10-24 (1982) (discussing various historical arguments that can be made about the Constitution); CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 15 (1996) (“Constitutionalism typically requires obedience to the historical Constitution . . .”).

146. See H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 6 (2000).

147. See CASEY, *supra* note 32, at 216.

memory and that law and society may shape, express, and preserve in significant ways our common memories.¹⁴⁸

V. THE IDEAL OF THE ARC OF LIFE

A. *The Knitting of the Stages*

"[L]iving together . . . means that the individual's life-stages are 'interliving,' cogwheeling with the stages of others . . ." ¹⁴⁹

In *Roper v. Simmons*, the majority argued that its recognition of the juvenile status of an offender at the time of the offense had relevance to the past and future of the offender's life. The court recognized past events in the offender's life—events which suggested his maturity and hence, his status as a juvenile. On the other hand, the court recognized the future of the offender and considered his capacity for being reformed in the future. In so doing, the court was knitting together the stages of the offender's life; the court recognized that the stages of life are part of "a life"—they are not discrete steps in a ladder to nowhere.

Life is a continuity, established by biological persistence, habit, and psychological awareness creating linkages between and among the stages, yielding a "thick" social and religious identity. In fact, it has been argued that any notions of stages of life are merely a set of arbitrary categories imposed upon that continuity. According to such an argument, continuity is basic; stages are secondary. The sense of continuity is captured in Bergson's sense of time as

148. For a particularly excellent, detailed study of one kind of commemoration, see NICOLE LORAUX, *THE INVENTION OF ATHENS: THE FUNERAL ORATION IN THE CLASSICAL CITY* (Alan Sheridan trans., 1986).

There is another way in which the law is involved in the past—a way to which old age can attend, if it chooses to do so. Since law itself embodies the past, not only in the continuity of our legally established political community, but also in the very operation of our common law system which looks to the past in the fashioning of common law rules, interpretations of past history of statutes and the meanings of the constitution, an old age which is sensitive to such a past offers a unique vantage point for looking at the workings of the law. While memory and legal skills remain intact, some of the old can study and report on the history of our law as part of our civic memory.

149. ERIK H. ERIKSON, *INSIGHT AND RESPONSIBILITY* 114 (1964).

"duration." In Bergson's words, "[p]ure duration is the form which the succession of our conscious states assumes when our ego lets itself *live*, when it refrains from separating its present state from its former states."¹⁵⁰

Nevertheless, stages do exist, and they are tied together,¹⁵¹ not only by the basic continuity of our lives, but by the law itself. The law requires one stage of life to take account of or consciously deny and forget another stage. The simplest example is education laws. These laws impose upon the youthful stage of life to serve the following states. Education laws take play or work time away from children and youth in order to "prepare" them for other stages of life. A second "knitting" law may be marriage and child protection laws. These laws require that married persons with children limit any free swinging life in order to care for their children and their children's welfare. A third law which knits the stages of our lives are public pension laws. These laws may encourage or require persons who work to save for their old age rather than spend all their money on themselves at an earlier stage of life. All of these laws operate to knit together the time of our lives from childhood to old age by requiring an earlier stage to take into account a later stage of life. As I indicated in my discussion of recordation, reminiscence and commemoration, our laws may require, or at least encourage, later stages of life to remember earlier stages.

Laws also may enable the denial of stages of our lives. For example, the expunging of past criminal records operates to permit the individual and society to deny past stages. Statutes of limitation are forgetting devices as well. Various kinds of lustration laws permit reparation, reconciliation, and moving on from past crimes and wars. Even bankruptcy may be viewed as an economic denial of the past. These examples, however, do not simply deny the past, but accommodate it in some way, such as through "sealed records," reparations, reconciliation, or ruined credit.

150. HENRI BERGSON, *TIME AND FREE WILL* 100 (F. L. Pogson trans., Harper Torchbook 1960) (1910).

151. For a discussion of how stages might fit into an entire life, see SETTERSTEN, *supra* note 12.

There are several questions we might ask about these laws. We might ask how adequately they assist in knitting our lives together. Is the education we receive adequate to serve the needs of a future life? Are we required or encouraged to save adequately for our old age? Do we offer the appropriate institutional support for adolescents confronting their life choices? Do we provide the appropriate education and preparation for parenthood? In asking these questions, we are, of course, implicitly assuming that the law should serve the ethical function of supporting the good life—i.e., a fulfilling career, a happy old age, effective parenthood. Many might question whether such an ethical function is suitable to the law.¹⁵² Hence, the role of law in knitting the stages of life together again raises the issue of freedom.

The issue is stated in terms of paternalism and justice. Paternalism suggests that society and its representatives know what is best for the individual and hence, by means of law, will encourage, provide incentives, or coerce individuals to undertake activities at one stage of their lives for the benefit of another stage.¹⁵³ Such paternalism might be easy to justify in the case of children and even young adults, but it becomes more questionable when applied to adults. Nevertheless, legislatures have adopted and the courts have upheld measures such as social security and child protection laws, although primarily based upon a liberal rationale that such laws prevent harms to others. The risk of harms to others at a future time operates to justify the laws, which then engage in the forging of ethical lives for individuals by requiring them to undertake activities at one stage which serve another stage.

The issue of justice arises when the law seeks to knit the stages of life. To the extent that the law requires an individual to make sacrifices at one stage of her life to prepare for another stage of her life or others' lives, the law is allocating goods between the stages of the person's own life (a kind of internal justice), or between the stages of one

152. Of course one might defend the role of law here as simply the liberal preventing of harms, such as the prevention of destitution in old age or the social cost of inadequate parenthood.

153. For a discussion of paternalism in relation to aging, see ESPOSITO, *supra* note 76, at 154.

person's life and another's (social and political justice). Certain leisure or resources are taken away at one stage of life, requiring work to serve another stage. Is this just? Resources are given via taxes to provide for ourselves and others in a social security system. Are these taxes just? Taxes are paid for education and health services which serve people at different stages of life than our own. What is the criterion of justice for making such an allocation? Is there a justice to be achieved between the stages of a person's own life? Can I be unfair to my earlier or later self? Can a young person be unjust to himself in his own old age by not saving enough at an earlier stage of life in order to enable a later comfortable old age?¹⁵⁴ Is there a justice of saving? Similar questions might be raised about contributions of one person for another person at a different stage of life. And, if justice does not obtain either within the stages of our lives or between our stage of life and the stages of others' lives, should the law try to fix what the degree of injustice might be and should the law enforce it? These questions lead us to the more general topic of justice within ourselves and between groups of people at different stages of life.

B. *The Stages of Life and Justice*

"Why dost thou not give thanks as at a plenteous feast,
[c]ramm'd to the throat with life, and rise and take thy
rest?"¹⁵⁵

The stages of life, viewed either organically or socially, cannot be defined in themselves. Each stage incorporates a relationship to groups at other stages. The stage of childhood refers to a stage of dependence upon others living at other stages of life. The stage of adolescence is the movement from childhood to the world of adulthood. The stage of parenthood defines the stage of responsibility for another stage of life, i.e., childhood. And the stage of old age implicates both dependence upon those who are younger and, perhaps, duties to the young of this and future

154. It is this question which has led Posner to divide the self into two: a young and old self. See POSNER, *supra* note 61, at 56.

155. Lucretius, *On the Nature of Things*, bk III, reprinted in 1 WORLD MASTERPIECES 558, 561 (Maynard Mack ed., John Dryden, trans., 1973).

generations. Since each stage of life is necessarily involved in relations with other stages, each is subject to definition, at least in part, in terms of the justice of its relationship to the other stages. Thus, the stages of parenthood and old age are defined, in part, as stages which participate in the duties from and to other generations. To be "old" implies relationships and consequent duties to and rights from younger persons. To be "a parent" involves duties to and obligations from one's children.

When we speak of justice among the stages of life, we may be talking about justice between generations, both living and future. At this point, there is an intersection between the notion of stages of life and generations. As a consequence, the concern for justice between stages of life can draw upon the substantial literature of justice between generations.¹⁵⁶

As we have seen above, the law directly or indirectly distributes or enables (e.g., through the market, family or other institutions) the distribution of goods among the stages of life. This distribution should take place in accordance with fair rules of distribution. This fair distribution must take into account the unique needs and merits of each generation, but these needs and merits are partly defined by the obligations which each generation has to other generations. Thus, the program for the distribution of welfare aid to families with dependent children may distribute public welfare funds to a parent who, in turn, has the duty to care for needy children. Veterans' benefits may be a distribution to another generation based upon the merit of members of that generation. Thus, the distribution of goods to each stage of life is determined not only by the needs of each stage, but the just responsibilities of each stage of life to other stages.

The justice of the allocation of goods among the stages of life may result in debates as to what is fair between the stages of life. Recently, for example, a vigorous debate has

156. See, e.g., NORMAN DANIELS, *AM I MY PARENTS' KEEPER? AN ESSAY ON JUSTICE BETWEEN YOUNG AND OLD* (1988); NANCY FONER, *AGES IN CONFLICT: A CROSS-CULTURAL PERSPECTIVE ON INEQUALITY BETWEEN OLD AND YOUNG* (1984); DAVID LEE, *GENERATIONS AND THE CHALLENGE OF JUSTICE* (1996); *JUSTICE BETWEEN AGE GROUPS AND GENERATIONS* (Peter Laslett & James S. Fishkin eds., 1992); *OBLIGATIONS TO FUTURE GENERATIONS* (R. I. Sikora & Brian Barry eds., 1978).

taken place pertaining to the allocation of health care between the young and old. The old use a large portion of the scarce health services available to the population. Some claim that a part of these resources should fairly be reallocated to the young. Some have argued for limits on the provision of health services to the elderly. Some argue that the elderly should recognize these essential limits of their lives, and accept those limits. Such an acceptance might include accepting the limits of certain kinds of health care after a certain age. Such acceptance of limited health care would free up resources for younger persons.¹⁵⁷

Similar sacrifices between people in different stages of life might be made in terms of the fixed retirement ages which may permit younger people to occupy employment positions. Or older persons may be encouraged to leave their larger homes to be occupied by younger families. Thus, just as youth may be asked to risk their lives in defense of the country and parents are expected to devote their lives to the proper care of their children, the elderly may be asked to "suck it up" and cease absorbing more than their fair share of the resources of jobs, housing, and health care.

The ultimate issue of distribution comes at the final stage of life: death and dying. Recent attention has been paid to the question of who should live or die in the allocation of scarce bodily replacement parts and the expenditure of funds for end of life treatment.¹⁵⁸ In deciding who should receive scarce and expensive medical treatment, the age of the patient is an important consideration, and surveys indicate that the length of benefit derived from the transplant and the age of the recipient are considered to be important criteria. Such age related concerns are buried within a range of criteria¹⁵⁹ which apply to living and dying

157. See Howard Eglit, *Health Care Allocation for the Elderly: Age Discrimination by Another Name?*, 26 HOUS. L. REV. 813 (1989).

158. See JOHN F. KILNER, WHO LIVES? WHO DIES? ETHICAL CRITERIA IN PATIENT SELECTION (1990).

159. One recent effort to establish criteria for public health care is the "Oregon Plan." See RATIONING AMERICA'S MEDICAL CARE: THE OREGON PLAN AND BEYOND 3 (Martin A. Strosberg et al., eds., 1992).

Along with a number of ethicists, legal scholar Howard Eglit, in an essay on the allocation of health care among the generations, has recognized the possible

of every age, hence not explicitly labeled as stage of life considerations.

I would suggest that both needs and merit are based, at least in part, upon stages of life. The needs and merits are defined in light of the requirements of goods necessary for self-development according to the social meaning of the stages of life. Thus, it may be argued that given scarce resources for health services, less resources might be legitimately allocated to the elderly, given the limited time they (we) face and the limited use for such health resources in an age of limited possibilities. Similar analyses can be applied to health, housing and educational services.

These "stage of life" criteria of justice for the allocation of goods to different stages of life carry a message which, along with other laws, help to define the meaning of the stages. In this way, the law determines the meaning of the stages of childhood and old age by assessing their respective levels of need and their obligation to those in other stages of life. Without explicitly seeking to define the identity of the stage of life, the law may indirectly do so by defining the legal responsibilities or rights of that stage of life. In determining the justice between generations, the law is indeed participating in the creation of the identity of each stage of life.

Legal conflicts emerge in situations in which each person in a given stage of life refuses to accept the responsibilities which are assigned to it by law.¹⁶⁰ In so doing, the person may reject all or part of the identity given to him or her by the law. As we have seen above, pushy parents may urge that their children are no longer "infants," but rather are "children ready for kindergarten." Adolescents may argue that they are adults eligible to drive, marry, and drink. Young people may reject duties to

conflict among persons at different stages of life over the amounts of health care.

He suggests that there has been preferential treatment of the elderly in the past over the distribution of health care, but suggests that preference to be waning. Perhaps what emerges most clearly from his scholarship is that the statutory and program complexity in health programming and law, combined with the difficulty of determining commensurate needs for each stage of life makes any definitive conclusions impossible. See Eglit, *supra* note 157.

160. For a discussion of the conflict between generations, see LEE, *supra* note 156.

support their older parents. Old people may refuse to retire and make way for younger people. The demands and consequent conflicts may lead to lawsuits. The legal claims which emerge from these rejections may be treated in terms of the liberal doctrines of equal protection, but in the course of making these decisions the court may set forth their own view of the stages of life itself and whether the claimant is correct in claiming the benefits of a certain stage or refusing to accept the responsibility (and consequent identity) imposed by that stage of life.

CONCLUSION

“The curve of life is like the parabola . . . which, disturbed from its initial state of rest, rises and then returns to a state of repose.”¹⁶¹

What conclusions may we draw from this admittedly meditative review of the law of the stages of our lives? First, I believe we can conclude that the law does ratify or create “stages of life,” albeit in a rough-hewn manner. The law may set the boundaries of the stages, allocate the goods to these stages, and even help to assign social meanings to them. On the other hand, the law does not establish bright line boundaries, clear statements regarding the meanings of each stage, nor a sense of what goods are properly allocated to each stage. Perhaps more attention to the law and its relationship to life’s stages might yield a clearer view of the law of stages of life.

At the same time, it does not appear that these stages of life are viewed either by the underlying culture or the law as parts of an arc of a whole life. Many of us do not view ourselves as players on Shakespeare’s stage, marching through the seven ages of man, nor do we view the law as establishing or reinforcing those stages of life as part of a whole. And yet, it might be desirable to view the law as either reinforcing or establishing the arc of life. The arc of life is simply a temporal perspective of the ethics of self-

161. CARL G. JUNG, *The Structure and Dynamics of the Psyche*, in 8 THE COLLECTED WORKS OF C. G. JUNG 406 (Sir Herbert Read et al. eds., 2d ed. 1978). This is merely one of many theories about the trajectory of life. See SETTERSTEN, *supra* note 12, at 137-91.

fulfillment. This fulfillment may be intimately related to the natural stages of human development, and hence, the growing science of human development and ethical reflection offer a basis for reexamining the workings of the law. There have been sensitive examinations of the role of law in relation to the individual stages of life: foetal, infancy and childhood, youth, adulthood, aging and death. Now, perhaps what is needed is putting the life stages together in order to better understand how law facilitates and impedes self-fulfillment.¹⁶²

Second, although these stages may be legally defined by the law in response to some specific short term objective, the stages are also imbued by the law with a larger social meaning which may serve what Merton has called the "latent functions of the law." Thus, until recently, the law of old age may latently create a protective cocoon for the assumed vulnerability of the elderly, thus delivering a message of what old age is all about. Once we are sensitive to the underlying assumptions of the law of life stages, we may begin to critique both our cultural views of the stages of life and the role which the law presently plays in regard to these stages.

Of course, even if one accepts the ethical view of self-development and recognizes that stages of life presently exist, one might still seek to promote a form of societal organization which ignores the stages. A liberal permission offers maximum freedom of individuals to choose their own stage of life. According to this view, the appropriate public policy might be either a liberal position or an "age integrated" one.¹⁶³ The proponents of an "age integrated" policy argue that our stages of life reflect erroneously age differentiated activities. Instead, what we require are age integrated institutions in which leisure, work and education

162. For a discussion of the ideal of a "flexible life span" which seeks to remove institution and obstacles to the access to leisure, work, and education, see SETTERSTEN, *supra* note 12, at 33-64.

163. For example, Howard Eglit traces the extent to which old age, once viewed as vulnerable to discrimination, is now receiving more than its share of social goods. Whatever the specific conclusion in regard to this matter, Howard Eglit is correctly raising the question as to the justice between generations. See Eglit, *supra* note 157.

take place at all stages of life.¹⁶⁴ Each approach implies a reform agenda in which, *inter alia*, laws pertaining to employer pensions, social security, tuition subsidies, and age biases, would be revamped to support a life stage, and a liberal or an integrated age structure.¹⁶⁵

Third, we have seen that the stages of life defined by the law are partly defined by the rights and duties which the stages have to each other. If the concept of stages is accepted, the role of law is not only to set the boundaries of stages, help allocate goods, and express the meanings of the stages, but also to define what the rights and duties of the stages of life are. In the process of fixing these rights and duties, the law further defines the stages themselves and the justice among them. We have seen above that there are profound questions within the law pertaining to the justice between the generations.¹⁶⁶ Insofar as we envisage law as instrument of justice, we might examine the role of law in promoting or impeding the justice of the allocation of goods among the stages of life.

As we have seen above, it is surprising the extent to which the law is already increasingly defining the stages of our lives. The increased movement towards government supervision of child development including early childhood development; the debate over compulsory primary and secondary education and its appropriate role in the preparation for later stages of life; the increased attention to adolescence and the recommendations for government programs for transition into adulthood through national service programs; the placing of legal obligations upon married adults in the proper care and support of their children; the gradually increased support for change of employment and careers during the adult years through retraining programs tied to the receipt of welfare; the myriad of programs for the elderly, and even the legal

164. See AGE AND STRUCTURAL LAG: SOCIETY'S FAILURE TO PROVIDE MEANINGFUL OPPORTUNITIES IN WORK, FAMILY AND LEISURE (Matilda White Riley et al. eds., 1994).

165. See generally SETTERSTEN, *supra* note 12, at 42-64. Settersten offers a reform program of new time budgets, work possibilities in the last third of life, alternative times and routes to retirement, erosion of lifetime work models, flextime work, and growth in adult education.

166. See generally Eglit, *supra* note 157.

regulation of dying suggest that we are moving towards a kind of government regulated and supported ladder in the stages of our lives. Although, as we have seen above, such programs serve specific public policies, they may also be viewed as requiring a kind of justice among the stages of our individual lives.

Fourth, if legal coercion requiring recomputation of life stages is offensive to some, the public facilitation (rather than coercion) of the recognition of these stages may not be. Thus, in school, the teaching of biography—the subject of lives taken as a whole and in stages—may be a legitimate part of learning some minimal explicit ethical perspectives of whole lives.¹⁶⁷ Perhaps the study of literature in general and biography in particular, as well as the psychology of human development, would be especially appropriate subjects for revealing the stages of the arc of our and others' lives. At the stage of adolescence, the exposure of students to alternative ways of life through national service programs seems advisable and persuasive cases have been made for such service. Similarly, counseling, which includes the opportunity for the youth to explore the implications of alternative occupations for the rest of the counseled student's life, would be desirable. Recommendations have already been made for required secular counseling in preparation for marriage to parallel the counseling now provided by some religious groups. This counseling might include not only an exploration of the meaning of marriage itself, but also a discussion of the rights and duties of the stage of parenthood.

Turning to the stage of adulthood, the meaning and requirements of adulthood have been articulated by religious faiths and ethical systems. The classical ethical system identifies a series of moral virtues (which has been modified throughout the centuries) and a series of capacities most recently listed in modern terms by Martha Nussbaum, as discussed above. Perhaps it is the role of adult education and therapy to remind people of these capacities and the important roles which activities in accordance with these capacities play in our lives. Such adult education and therapy may include preparation for

167. Certainly poetry appears particularly able to capture the meanings of the stages of our lives. See BOOTH, *supra* note 140.

old age and retirement. *Preparation for old age includes the acceptance of the arc of life.* In old age, social institutions might support both the recognition and acceptance of the growing vulnerability of age along with new opportunities in leisure to make sense of the entire arc of one's life.