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# Book Review

## AN OLD(ER) MASTER STANDS ON THE SHOULDERS OF AGEISM TO STAKE ANOTHER CLAIM FOR LAW AND ECONOMICS\*

PAUL H. BRIETZKE AND LINDA S. WHITTON\*\*

Richard A. Posner, *AGING AND OLD AGE*  
Chicago: University of Chicago Press, 1995. pp. vii + 375. \$29.95.

The "Old" Master, a veteran of the academic and judicial wars, is at it again. Asked what he thought of Judge Posner's scholarship, an even Older Master, Nobel laureate in economics Ronald Coase, replied: "I don't know; he writes faster than I can read."<sup>1</sup> It was perhaps inevitable that Judge Posner would turn his penetrating, provocative, and restless intellect from literature,<sup>2</sup> jurisprudence,<sup>3</sup> judging,<sup>4</sup> and sex<sup>5</sup> to old age.<sup>6</sup> As befits someone growing older—Posner is hardly "old" at 56—the new book is more personalized, with stories about the Judge's aging relatives and his cats, and (perhaps) more modest<sup>7</sup> than some of his earlier works. Although when one considers his hypothesis, "that economics can do a better job of explaining the behavior and attitudes associated with aging, and of solving the policy problems that aging

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1. Ronald Coase, After-dinner speech at the American Law and Economics Association Conference, New Haven, Connecticut (May 15, 1992) (response to question from audience, as heard by Brietzke).

2. See RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).

3. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); RICHARD A. POSNER, *OVERCOMING LAW* (1995).

4. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985); RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990) [hereinafter *CARDOZO*]; RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

5. See RICHARD A. POSNER, *SEX AND REASON* (1992).

6. See RICHARD A. POSNER, *AGING AND OLD AGE* (1995) [hereinafter *AGING*].

7. See, e.g., *id.* at 363 (commenting that the old are a vast and rapidly changing topic, "and my own limitations of knowledge, technique, and time have caused my reach to exceed my grasp").

presents, than biology, psychology, sociology, philosophy, or any other single field of natural or social science,"<sup>8</sup> such modesty is taken to task.

To provide a more interesting travelogue of Posner's ambitious journey, this review is divided into two sections, each with decidedly different scenery. The first, Law and Economics—Modifications and Applications, evaluates the impact of *Aging and Old Age* (hereinafter *Aging*) on human capital theory, as well as the broader field of law and economics. The second, Law and Aging—Stereotypes and Implications, critiques the underlying premises of *Aging* and their significance for contemporary treatment of the aging and aged in our society.

## I. LAW AND ECONOMICS—MODIFICATIONS AND APPLICATIONS

### A. Modifications

Judge Posner is concerned about matters of reputation,<sup>9</sup> and he is surely aware that his own reputation most securely rests on his systematizing of the standard (Chicago School,<sup>10</sup> neoclassical and arguably neoconservative) version of law and economics. Over the years, he has capably revised this standard version to take account of his critics<sup>11</sup> and to deal with an ever-widening list of topics. Such revisions are prominent in *Aging* and, while many of these occur at the "margin" and are thus of interest mainly to economists, four seem worth mentioning here. While these modifications are introduced to enrich the "human capital" theory<sup>12</sup> that helped Chicagoan Gary Becker win the 1992

8. AGING, *supra* note 6, at 1-2.

9. See generally CARDOZO, *supra* note 4.

10. See *Nobel Savages*, THE ECONOMIST, Mar. 30, 1996, at 72 (noting that the nine Chicago School Nobel Prizes in Economics since 1974, and the five since 1990, can be attributed to "a fondness for dissent, an anti-establishment culture and a distaste for public-policy research" which merely confirms existing theories). All of this "is geared towards the slaying of sacred cows," *id.*, a Judge Posner specialty.

11. See, e.g., Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981); Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). Returning to the topic of utilitarianism in AGING, Posner argues: "All the hard knocks that utilitarianism has taken from philosophers have not much diminished the importance that the average person, and indeed the above-average and even the philosophical person, attaches to happiness." AGING, *supra* note 6, at 362. This is certainly true, but it does not reach the important question of how this "happiness" is to be defined. Many philosophers properly (from their perspectives) reject Posner's market-based, and now age-graded, definition.

12. AGING, *supra* note 6, at 51-65. Owing the "greatest debt of all" to Becker, *id.* at 13, Posner cites GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION (3d ed. 1993), AGING, *supra* note 6, at 51 n.1. In brief, investments in human capital include income foregone during education and on-the-job training. *Id.*

Nobel Prize in Economics, they are quickly folded into a broader law and economics. Becker stresses that individuals and their employers "invest" in new knowledge, skills, and relationships so as to obtain a stream of earnings in the future, and that such investments decline with age because the payoff period has gotten shorter.<sup>13</sup>

Judge Posner's first modification involves an attempt to build an economic psychology of old age, to counter the taking of "values, preferences, and attitudes for granted"<sup>14</sup> in the standard version of law and economics. Finding but few studies of aging in modern psychology, studies which are "not persuasive" because they hold that aging has no significant effect on personality, the Judge has recourse to an Aristotle who is politically incorrect when he stereotypes the subject.<sup>15</sup> This exercise is largely successful for Posner's purposes since, like much of philosophy and psychology, economics frequently stereotypes "normal" behavior, so as to deal with it more easily and in the aggregate. Lawyers *qua* lawyers might be uncomfortable with this tactic—many of us are dis-aggregators by profession, having been exposed to the wonderful but bewildering diversity of human experience while reading so many weird cases.

From Aristotle we learn that the elderly are cynical and small-minded because they have often been fooled and otherwise humbled, they lack confidence in the future and are reluctant to take risks or support reformist schemes for largely the same reasons, and their "fluid" intelligence (imagination) declines while their inflexible "crystallized" intelligence (experience) increases.<sup>16</sup> In more specifically economic terms, the old are self-centered because they have entered the "last period" of life; "their own survival and happiness . . . [are] the only goods of certain goodness to them."<sup>17</sup> Posner argues that the foregoing are "fundamental attributes of being old,"<sup>18</sup> and builds them into subsequent analyses of specific topics. Posner's tack is thus to

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at 52. If this capital is "job-specific" and thus cannot be used if the employee switches employers, the employer is more willing to invest and the employee is less willing. *Id.* Human capital depreciates over time, owing to changing work environments and a loss of memory or dexterity. *Id.* at 53. Part of human capital is "relational": marriage, friendship, and business links, *id.* at 61, or what some call "networking."

13. See generally BECKER, *supra* note 12.

14. AGING, *supra* note 6, at 99. See *id.* at 99-121.

15. *Id.* at 101-02. See *id.* at 101 (Aristotle's *Rhetoric* "minces no words" and is "frankly stereotypical," but it contains "an important part of the truth.").

16. *Id.* at 6, 70, 102-04, 106-07.

17. *Id.* at 107-08. But if one good stereotype deserves another, some of the elderly are more altruistic and caring than are "yuppies," due to their formative enculturation during the New Deal and the Great Society rather than during the Reagan Revolution—or the Boesky-Millken era.

18. *Id.* at 99.

model the psychology of the old, in his words, “as a consequence rather than foundation of rational choice.”<sup>19</sup>

The second and most interesting modification of the standard version treats a hitherto-integrated economic man (perhaps a sexist concept) as a succession of competing and selfish selves, selves who are “time-sharing” the same body.<sup>20</sup> In part because of the prolonging of life, different selves reach increasingly different decisions in increasingly different ways.<sup>21</sup> This shows the “limitations of expected-utility maximizing as a normative tool,”<sup>22</sup> but the analysis turns rather murky when Judge Posner considers the extent to which the interests of future selves should be taken into account by ethics and law: “The young self will not be permitted fully to control the old one,” who finds a greater utility in the money the two are (hypothetically) quarreling over.<sup>23</sup> Based on an analogy to the life tenant’s liability for waste, rather than on a governmental paternalism, there is “a limited fiduciary duty on the young self” not to commit the older self to penury.<sup>24</sup> The Judge raises, but does not resolve, the even thornier issue of the older self’s claim on governmental resources; he concludes that “perhaps we can do no better than to allow the political process to arbitrate the competing claims of successive selves.”<sup>25</sup>

These successive selves are a shaky basis for governmental subsidies or for legally-enforceable rights and duties, and these selves also do violence to the Chicago School enterprise. Such governmental interventions in marketplace decisions (decisions made by younger selves are replaced by subsidies and new duties) are anathemas for Chicagoans, and Judge Posner could be understood to

19. *Id.*

20. *Id.* at 84-91. To adopt a unitary view, one must imagine a master self drawing up a single, integrated life plan. *See id.* at 66-71, 84-88. *See also id.* at 267 (“[D]econstructing’ the self is the sort of thing philosophers like to do.”).

21. *See generally id.* at 84-95, 255-56, 263, 269, 280-81, 284, 358, 362.

22. *Id.* at 93. *See also id.* at 84, 362.

23. *Id.* at 269 (“[B]ecause there is no satisfactory or acceptable analytical procedure for balancing the claims of the young and of the old self, the current old, in effect as proxies for the future old selves of the current young, struggle with the current young in the political marketplace for the allocation of consumption over the life cycle.”).

24. *Id.* at 263. We would add that this fiduciary duty helps to eliminate generational “free riders”: younger persons who make no provision for their older selves, in the hope that government will care for them later. Circumstances permit the younger self to “cheat” the older one, and a fiduciary duty minimizes this cheating by requiring the younger self to do what the older one would require—if she could. *See generally* Alison Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738 (1978).

25. AGING, *supra* note 6, at 264. *See id.* at 281 (“[m]ultiple-selves analysis—that normative mischief maker—” shows how difficult are questions of the elderly’s claims to governmental resources); *see also infra* note 32 and accompanying text. It is unclear how this political arbitration could succeed in the real world, since (by definition) all of the relevant successive selves are not in existence at any given time.

say that markets have failed our older selves—except that Chicagoans hate to admit any instance of market failure. Also, their beloved and unitary economic man has suddenly become schizophrenic. Derek Parfit shows how, in philosophical terms, a personal identity which changes over time makes incommensurability into even more of a problem.<sup>26</sup> Neoclassical (including Chicago School) economists have long insisted on the impossibility of *interpersonal* comparisons of utility (satisfactions); Posner and Parfit would make *intrapersonal* comparisons impossible as well.<sup>27</sup> A schizophrenia of selves may explain why we are not anywhere near as worried about environmental spoliation or governmental budget deficits as we say we are in public opinion polls, etc., but this road arguably leads to an analytical paralysis. It is hard to see how Judge Posner's revisions represent much of an advance over the standard version: the young discount future costs and benefits heavily, but the discount rate declines as these same people grow older.<sup>28</sup>

Judge Posner's third and fourth modifications are applications of standard moves in Chicago School economics: discovering equilibria between the young and the old, and coming close to defining the elderly as a special interest group. Neoclassical economists like Judge Posner sometimes fall prey to a naturalistic fallacy in logic—that the kind of equilibria seen in biology, chemistry, and physics necessarily governs human relationships as well: "There is a natural though not necessarily an optimal equilibrium between the demands of the old for support and the willingness of the young to supply that demand."<sup>29</sup> Another "equilibrium involving support for the elderly by both the state and the family may therefore be precarious, if state support leads to smaller families, which in turn increases the cost to families of supporting their elderly members."<sup>30</sup> Such social science equilibria are in the eyes of the beholder, and much of Judge Posner's complex narrative is arguably more consistent with the

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26. DEREK PARFIT, *REASONS AND PERSONS* (1984), cited in AGING, *supra* note 6, at 84 n.34, 313 n.26.

27. *But see* AGING, *supra* note 6, at 255 (citing to Thomas Schelling). An unrealistic example of an irrevocable obligation to commit suicide at a future time certain illustrates the "problem of picking the authentic self . . . . Perhaps the game theorists can help us, by modeling the outcome of bargaining between one's current and one's future self." *Id.* Suicide kills future selves and, if these are indeed different persons, government can prohibit suicide without fear of a paternalistic interference with the liberty of the younger self. *Id.* at 255-56. Posner uses J.S. Mill's definition of liberty here. *Id.* at 238 (voluntary acts by competent adults can be prohibited only if they create "tangible harms, as distinct from . . . disapproval or even revulsion"). Posner clearly implies that the "authentic self" can be discovered through "bargaining," without saying why and how.

28. *See id.* at 71, 358 (while age-divided selves are in conflict, they are also "connected by bonds of altruism and personal identity far closer" than those of groups divided by race, gender or sexual orientation).

29. *Id.* at 360. *See id.* at 289 ("There is thus a natural, though not necessarily an optimal, political equilibrium in the struggle between young and old selves.").

30. *Id.* at 221.

notion that governments try, imperfectly and half-heartedly, to fix persistent disequilibria between reluctant younger people (or selves) and powerful older people (or selves). But this would contradict the tendency in neoclassical economics to find equilibria (almost) everywhere.

The power of older people comes very close to making them into a special interest group for Judge Posner, a characterization of deep significance in Chicago School economics.<sup>31</sup> The Judge sees democracy as a “cheap” method for registering power, especially for “naturally weak groups” like the elderly, but the process is “subject to deformation by pressure from interest groups.”<sup>32</sup> The Judge presumes that there has never “been a society in which old people as a whole have been as politically influential, as materially well-off, and, probably, as happy as they are in modern American society, although they are not revered.”<sup>33</sup> The interests of the elderly are seen to have a focus and homogeneity borrowed from Aristotle’s analyses. They vote at a rate of 180% of the youngest eligible group, but voting is more consumption than investment as an activity—individual voters know that they cannot swing an election unaided.<sup>34</sup> It became fashionable during the Reagan Administration to use

31. *Id.* at 288, 290-91 (“excessive redistribution to the old . . . can be checked at less political cost than many other redistributions extracted by interest groups”—by limiting transfers to the old in advance, as when a 1983 law postponed full entitlement to social security from 65 to 67 in the year 2023). See William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-78 (1975). See also Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1359 (1988) (citations omitted):

Special interest groups frequently obtain government help in extracting money from the general public as taxpayers or consumers . . . . [Special interest groups] are relatively easy to organize because they are small and their members have much to gain. . . . [T]he public finds it difficult to protect itself: members . . . have small, individual stakes in any piece of legislation, and the large number of people affected makes organization difficult . . . . Most legislation, then, will really involve some rip-off of the public, even if it purports to serve the public interest.

*Id.* The elderly are plausibly members of the public, rather than a special interest group. The efforts of the AARP notwithstanding, their numbers are too large and their interests too diverse to be organized effectively. For example, the elderly clearly lack the Petroleum Institute’s and even the Sierra Club’s financial and organizational resources for influencing elections and policies in a meaningful way.

32. AGING, *supra* note 6, at 213, 220. See *supra* note 25 and accompanying text. Things are not really so “cheap” under the elaborate American separation of powers and checks and balances that are arguably designed to increase the transaction costs of power.

33. AGING, *supra* note 6, at 204. See *id.* at 288 (one source of the power of the elderly is receiving public subsidies and making voluntary gifts and bequests); *Id.* at 292 (another source is the valued contribution the elderly make to a political stability); *Id.* at 360 (the improved health and wealth of the elderly makes them “less appealing objects of charity and solicitude,” and they have “more political power than other age groups”).

34. *Id.* at 118, 148-49, 288. See *id.* at 118 (We might expect the elderly to be selfish, single-issue voters—“most people are convinced that what is good for themselves is good, period.”). See also *id.* at 223 (stating that the power of the elderly is a source of resentment by the young).

“special interest group” to describe those with whom you disagree. Judge Posner more or less avoids this kind of labeling, but he does seem to overstate the political power and the uniformity of interest among the elderly.

### B. Applications

Much of the force of Judge Posner’s arguments lies in the details, so that even a review of this length cannot do them full justice. The territory covered by *Aging* is broad, and the side trips numerous. The Judge variously applies his revised standard version of Chicago School analysis to work and leisure, residence, voting, sex, driving, tortious and criminal matters, suicide and euthanasia, pensions, age discrimination in employment, the special problems and potentials of elderly judges and academics, and the aging of organizations. Some of his well-supported, Chicago School conclusions are that the Employee Retirement Income Security Act (ERISA) is a “response to largely nonexistent problems,” where modest costs of administration “appear to buy no benefits,” and that “[t]he Age Discrimination in Employment Act is a particularly misbegotten venture in tilting at the windmills of ageism . . . .”<sup>35</sup> Even if ageism and employer speculation of pensions are really no problem, as the Judge argues,<sup>36</sup> his reluctance to leave these matters to the political wars between generations is still a bit puzzling.<sup>37</sup>

One other excursion in *Aging*’s extensive tour deserves special mention—Judge Posner’s adroit treatment of that premier “geriatric occupation”<sup>38</sup>—judging. Set against the foundation of Part One, where Posner delivers the bad news that we all will suffer inevitable mental and physical decline,<sup>39</sup> and the limited good news that most jobs do not require the maximum capabilities of youth anyway,<sup>40</sup> Posner delivers the even better news for judges: that aging has only a slight effect on the quality of judicial opinions,<sup>41</sup> as measured by the number of subsequent citations<sup>42</sup> (citations

35. *Id.* at 361.

36. *Id.* at 20, 204, 301-04, 320, 346-47, 351, 359.

37. *See id.* at 264 (“perhaps we can do no better than to allow the political process to arbitrate the competing claims of successive selves”). Presumably, an excess of costs over benefits makes the ERISA and especially the ADEA inefficient, from the Chicago perspective on resource allocation. But these Acts are all about resource *distribution*, and many of Posner’s arguments suggest that markets (admittedly efficient allocative devices) have failed adequately to distribute wealth to some or many of the elderly.

38. *Id.* at 180, 352. *See id.* at 180-96, 352-54.

39. *Id.* at 18.

40. *Id.* at 74-77.

41. *Id.* at 106, 184. *See id.* at 180-81 (“As a consequence of the incompletely theorized nature of law . . . experience plays a larger role in successful lawyering than abstract reasoning does.”). In fact, Posner argues that many elderly lawyers and judges would see an age-related decline in abstract reasoning as a favorable description of themselves. *Id.* (quoting D. B. Bromley: “The old



often by, we would add, other elderly judges). Although Posner acknowledges his own premise that fluid intelligence (an Aristotelian creativity) declines with age, he argues that much of judging involves the practical reason of reasoning by analogy, a moving from particular to particular without the interposition of the abstract reason at which the young excel.<sup>43</sup> Perhaps this is so, but perhaps only in matters of the common law; continental European judges (who tend to retire earlier) make more and arguably better use of an abstract reason. In any event, analogy is the weakest form of argument in logic,<sup>44</sup> and it may be used so extensively in America because it suits judges who are older and less creative—a very real source of “gray power” over an influential profession which the creative Judge Posner overlooks.<sup>45</sup>

The Judge presumably rejects such arguments because of

the backward-looking character of the judicial process. . . . [I]f society swings to the left of where it was when the judges were young they will want to tug it right, and if it swings to the right . . . they will want to tug it left. . . . Although the adventurism of the Court during the chief justiceship of Earl Warren may seem a dramatic counterinstance, it is arguable that the liberal justices . . . were enacting the values they had acquired in their youth—which for many of them coincided with the New Deal.<sup>46</sup>

Along these lines, some or much of what is now going on judicially is indeed a “dramatic counterinstance”: an implementation of “Reagan Revolution” values which have not otherwise been current in this country since the mid-

person is more literal, more concrete, more concerned with tangible and immediate impressions, less able to detach himself from the particular example and consider the general class or principle, less able to ignore the individual fact in order to think in hypothetical terms.”) *See also id.* at 193 (elderly judges have a desirable background knowledge of practices and usages within which case facts arise); *Id.* at 194 (experience and disinterest are valuable in a vague judicial “wisdom”).

42. *Id.* at 182-84.

43. *Id.* at 192.

44. Paul Brietzke, *Public Policy: Contract, Abortion, and the CIA*, 18 VAL. U. L. REV. 741, 758-59 (1984) (and sources cited therein). The central problem with argument by analogy is the open texture of classification categories: “Everything in the world is like and unlike everything else . . . .” *Id.* at 758 (quoting Malcolm Sharp on analogies in contract law). A jumble of cases or other authorities which do not support an abstract reasoning are nonetheless made amenable to arguments by analogy by tailoring, omitting or assuming away inconvenient facts, rules or policies. *Id.* at 758-59.

45. Elderly partners in elite law firms, who dominate litigation strategies in major corporate and commercial cases, know how to appeal to their age-mates on the Bench, with a relational human capital and with formalistic arguments that were tested in the law schools of long ago.

46. AGING, *supra* note 6, at 194-96. *See id.* at 195 (discussing the judges’ “balance-wheel function . . . of reducing the amplitude of swings in public policy”).

1920s, when very few of today's judges were even alive let alone young. Furthermore, Judge Posner assumes that his "backward-looking" judges place a great deal of "emphasis on adherence to precedent,"<sup>47</sup> a tendency not much in evidence on several courts today—including the Judge's Seventh Circuit.<sup>48</sup>

Judge Posner characterizes his approach to aging both as "interdisciplinary" and as one in which "economics wields the baton of [his] multidisciplinary orchestra."<sup>49</sup> The latter characterization is much more accurate: evolutionary biology, history, literature, a quasi-anthropology of "primitive" societies, and psychology are all consulted briefly, and philosophy (Aristotle's and John Stuart Mill's) is discussed in more detail, but there is almost no interpenetration among these disciplines. Many valuable but isolated insights are gleaned and then quickly folded into the Judge's economics, so that the enterprise turns on the relevance of this economics as a perspective on aging. We have seen that Posner's succession of selves<sup>50</sup> creates a muddle in economic analysis. Most troubling is the impact of this schizophrenia of selves on the pivotal concept of economic rationality. There is no logical limit to the number of successive selves who emerge as we grow older, and no logical way to tell if one self stops before another begins. The hitherto-relentlessly logical economic man must now be sometimes or often divided or conflicted cruelly: the question of whether to brush our teeth, perhaps so that our older selves have fewer cavities and more companionship, begins to take on dimensions of the "Three Faces of Eve." We risk becoming as paralyzed as those who would analyze our behavior, since a rational and integrated self has now become an unrealistic (and imaginary) master self who draws up a single life plan which is enforceable somehow.<sup>51</sup> The Judge hopes to return to his rational utility maximizing model "once the

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47. *Id.*

48. See Brietzke, *supra* note 44, at 758-59. An example from antitrust is instructive, all the more so because Judge Posner did not participate in the decision. *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), is unsatisfactory in several respects, including a specious attempt, *see id.* at 828, to distinguish *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985). *Blackburn* should rather have overruled *Polk Bros.* because Judge Easterbrook there ignores a controlling and clearly contradictory Supreme Court precedent: *United States v. Topco Associates*, 405 U.S. 596 (1972). Any doubts about the continued vitality of *Topco* were definitively laid to rest, before *Blackburn* was decided, in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990). The *Blackburn* Court, correctly applies *Topco* and *Palmer*, but it seems unwilling to let *Polk Bros.* go—perhaps because of a desire to conserve a relational human capital on the Seventh Circuit. See *Blackburn*, 53 F.3d at 827.

49. AGING, *supra* note 6, at 1.

50. See *supra* notes 20-28 and accompanying text.

51. See AGING, *supra* note 6, at 89, n.47 (quoting John Rawls: "Rationality implies an impartial concern for all parts of our life [so that] pure time preference is irrational . . ."). But see also *id.* at 93 ("[E]xcessive' discounting of unpleasant future states, such as death or a bleak old age, is consistent with, even implied by, rationality.").

fundamental attributes of being old are understood,"<sup>52</sup> but he may find the model thrown out of the analytical window by his successive selves.

## II. LAW AND AGING—STEREOTYPES AND IMPLICATIONS

### A. Stereotypes

To support his economic psychology of old age, Judge Posner asks us to accept the following "fundamental attributes of being old":<sup>53</sup>

1. "[T]here is such a thing as normal aging,"<sup>54</sup> and it is "a process one element of which is an inexorable decline across a broad range of bodily (including both physical and mental) capabilities."<sup>55</sup>
2. In addition to normal cognitive decline,<sup>56</sup> aging causes a shift from fluid intelligence (imagination) to crystallized intelligence (experience),<sup>57</sup> and this "relation is one of substitution," rather than "merely additive."<sup>58</sup>
3. There is a "difference between one's young and one's old self [which] may be so profound that the two selves are more fruitfully viewed as two persons rather than as one."<sup>59</sup>
4. "[O]ld people are . . . on average . . . worse listeners and less considerate speakers than young people,"<sup>60</sup> as well as more "pessimistic," "self-centered," and "shameless."<sup>61</sup>

52. *Id.* at 99. *See id.* at 135 (depression causes some suicides but, unless we give it a circular definition, depression is difficult to distinguish from rational perceptions of a reduced quality and prospects of life). *See also id.* at 272 (failing to give research "priority to life-threatening diseases of the young would signify an inefficient allocation of resources"). *But see supra* note 22 and accompanying text.

53. AGING, *supra* note 6, at 99.

54. *Id.* at 19 ("Resistance to the fact that there is such a thing as normal aging has become common in our culture of heightened sensitivity.").

55. *Id.* at 18.

56. *Id.* at 20 ("Almost all elderly people experience a cognitive decline the symptoms of which are difficult to distinguish from the earliest manifestations of dementia; yet in most the condition does not progress to dementia.").

57. *Id.* at 67-68. *See also id.* at 6, 17, 18, 22-23, 67-71, 104, 112, 194.

58. *Id.* at 67. *See also id.* at 115.

59. *Id.* at 8-9. *See also supra* text accompanying notes 20-28.

60. *Id.* at 9. *See also id.* at 57, 108, 120, 175.

61. *Id.* at 104.

The Judge is careful to intersperse this stereotypical portrayal of the aging and aged with soft qualifiers,<sup>62</sup> but his clever economic explanations for the foregoing “fundamental attributes” depend on the reader’s willingness to accept such attributes as representative of the “central tendencies”<sup>63</sup> or “average”<sup>64</sup> qualities of the elderly.

Posner walks a delicate tightrope with respect to his stereotypes. He dismisses modern psychological studies as “not persuasive,”<sup>65</sup> concluding that “Aristotle’s psychology of aging has not been superseded.”<sup>66</sup> While most gerontologists and psychologists would agree that at present there is no integrative theory by which to assimilate the rapidly growing gerontological research data,<sup>67</sup> the inability to articulate one superior integrative theory of aging seems an inadequate basis for wholesale dismissal of the wealth of presently available information on aging.<sup>68</sup>

Despite a growing recognition among gerontologists that the “fundamental epistemological problems” associated with modern gerontology “cannot be resolved by methodological fiat, by improved positivistic ‘rigor,’ or by some

62. See, e.g., *id.* at 9 (“I argue, for example, that old people are (on average—always an important qualification in dealing with large and amorphous social aggregates such as “the elderly”) worse listeners and less considerate speakers than young people.”); *Id.* at 20 (“But that there is increasing variability within age cohorts and overlap between persons in different age cohorts does not refute the existence of normal aging; it assumes it.”) (citation omitted). *Id.* at 23 (“Despite my reference to ‘inexorable’ decline, symptoms of aging sometimes appear suddenly . . . and may plateau rather than continue to grow worse.”).

63. *Id.* at 101-02 (describing these “central tendencies” as “not the complete truth about the old, but . . . an important part of the truth . . . the part that tends nowadays to be suppressed because we live in an era of heightened sensitivity to any suggestion that any group defined by an unalterable characteristic . . . might be inferior to some other group . . .”).

64. See, e.g., *id.* at 9.

65. *Id.* at 102.

66. *Id.*

67. See, e.g., James E. Birren & Johannes J.F. Schroots, *History, Concepts, and Theory in the Psychology of Aging*, in HANDBOOK OF THE PSYCHOLOGY OF AGING 6 (James E. Birren & K. Warner Schaie eds., 4th ed. 1996) (noting the “profusion of research findings and the lack of integrative theory in the psychology of aging”); Thomas R. Cole, *Preface to VOICES AND VISIONS OF AGING: TOWARD A CRITICAL GERONTOLOGY* vii (Thomas R. Cole et al. eds., 1993) (observing that “gerontology’s vast and rapidly growing accumulation of empirical data cannot be assimilated to existing theories or to any single, unified theory of aging”).

68. In 1988, K. Warner Schaie observed:

There has been an explosion of knowledge in gerontology in general and in the psychology of aging in particular. The publication rate of research relevant to the psychology of adult development and aging has grown to more than 1000 articles and chapters per year, and the novice entrant into the field may need some help and guidance in a thoughtful effort at becoming oriented.

K. Warner Schaie, *Ageism in Psychological Research*, 43 AM. PSYCHOL. 179, 179 (1988) (citation omitted).

form of physical, social, or psychological reductionism,"<sup>69</sup> Judge Posner clings unreflectively to the stereotypes of aging and old age for which Aristotle is his sole source of authority.<sup>70</sup> Avoiding the complexity of psychological research on cognitive functioning and personality in old age may be necessary to the cohesiveness of Posner's economic psychology of aging, but ultimately such convenient indifference undermines the credibility of *Aging's* promise to increase our understanding of the behavior and attitudes associated with aging.<sup>71</sup>

A complete review of modern gerontological research is beyond the scope of this essay, but several conclusions, about which there is increasing consensus, are worth mentioning: (1) the degree and rate of aging varies among individuals without regard to chronological age; (2) physiological and cognitive changes tend to occur at different rates within the same individual; and (3) the elderly, when defined as a group chronologically, are more heterogeneous than homogeneous.<sup>72</sup> Furthermore, there is increasing support for the theory that cognitive decline is not integrally related to aging processes, but is instead a function of close proximity to death.<sup>73</sup> Posner pays lip service to these

69. Cole, *supra* note 67, at vii (quoting Harry R. Moody, and observing that epistemological problems are inherent "where technical rationality generally ignores what cannot be reduced to quantitative methodology even as it conceals value commitments and forms of domination").

70. See AGING, *supra* note 6, at 102.

71. *Id.* at 1-2.

72. See Birren & Schroots, *supra* note 67, at 10 (summarizing conclusions drawn from longitudinal studies that "aging is at least in part an individualized process that differs among individuals and among functions"); *Id.* at 17 ("Chronological age is an initially appealing false lover who tells you everything and nothing."); Fred L. Bookstein & W. Andrew Achenbaum, *Aging as Explanation: How Scientific Measurement Can Advance Critical Gerontology*, in VOICES AND VISIONS OF AGING: TOWARD A CRITICAL GERONTOLOGY 20, 28-39 (Thomas R. Cole et al. eds., 1993) (noting that "processes of aging do not proceed evenly with respect to the calendar," and arguing for a new measure of "gerontological age" that would incorporate the "differential rates in the dynamic processes of aging"). See also Meredith Minkler, *Aging and Disability: Behind and Beyond the Stereotypes*, 4 J. AGING STUD. 246 (1990), reprinted in PERSPECTIVES IN SOCIAL GERONTOLOGY 11, 12 (Robert B. Enright, Jr., ed., 1994) (noting the "substantive heterogeneity" of the aging population, Minkler observed: "[W]hile 'downwardly sloping lines' may accurately be drawn for aggregate population groups on such dimensions as vital capacity, there is in fact considerably less clustering around the mean for older people than there is for their younger counterparts."); Robert N. Butler, WHY SURVIVE?: BEING OLD IN AMERICA 7 (1975). Butler debunks the myth of chronological aging by stating the following:

[T]here are great differences in the rates of physiological, chronological, psychological and social aging within the person and from person to person. In fact, physiological indicators show a greater range from the mean in old age than in any other age group, and this is true of personality as well. Older people actually become more diverse rather than more similar with advancing years.

*Id.*

73. See generally Stig Berg, *Aging, Behavior, and Terminal Decline*, in HANDBOOK OF THE PSYCHOLOGY OF AGING 323 (James E. Birren & K. Warner Schaie eds., 4th ed. 1996). See also Minkler, *supra* note 72, at 11-12 ("[L]ongitudinal studies . . . have demonstrated that, contrary to

conclusions (which have little to do with the “last period” problem in economics),<sup>74</sup> but never squares them with his assertions of the “central tendencies” and “average” qualities of the aging and aged. If, as the more recent studies appear to indicate, physiological and psychological aging happen at very individualized rates both intrapersonally and interpersonally, then defining “normal aging” by “central tendencies” is uninformative and statistically indefensible.

Likewise, the “knowledge shift” from “fluid” to “crystallized” intelligence, identified by Judge Posner as a fundamental attribute of old age, is also suspect. He states: “If, as psychologists believe with considerable evidence, fluid intelligence declines with age much faster than crystallized intelligence does, the effect is to accentuate what I am calling the knowledge shift.”<sup>75</sup> However, the Judge fails to provide citation for this “considerable” body of psychological “evidence,”<sup>76</sup> and instead gives us only his implication based upon an assumption he shares with Aristotle:

If the relation of experience to imagination were merely additive, the accrual of experience with age could only enhance performance unless, as I have yet to consider, age brings about a deterioration in imaginative power. I am assuming with Aristotle, that the relation is one of substitution, that experience displaces imagination. This implies that imaginative power does in fact deteriorate with age, although Aristotle himself . . . apparently did not notice this implication.<sup>77</sup>

Adding to the mystique of this “knowledge shift,” Posner’s definitions of “fluid” and “crystallized” are also simplistic and ambiguous.<sup>78</sup> Without the benefit of more objective substantiation or precise definition, the reader must be willing to accept the “knowledge shift” on blind faith in order to accompany Posner on his travels through *Aging*.

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myth, no significant decline in intellectual functioning occurs with aging for the majority of older people, with the exception of the ‘terminal drop’ in cognitive ability that frequently occurs just prior to death.”) (citations omitted); Paul B. Baltes & K. Warner Schaie, *Aging and IQ: The Myth of the Twilight Years*, *PSYCHOL. TODAY*, Mar. 1974, at 35, 36-37 (describing research results supporting the “terminal drop” theory).

74. See, e.g., *AGING*, *supra* note 6, at 18 (noting the increasing proximity of death as a nonsomatic element in the “inexorable” decline in capabilities); *Id.* at 20 (acknowledging “increasing variability within age cohorts”); *Id.* at 23 (observing that “symptoms of old age do not all appear at the same time or progress at the same rate”). See also *supra* note 17 and accompanying text.

75. *Id.* at 69.

76. *Id.* See also *infra* note 102 and accompanying text.

77. *AGING*, *supra* note 6, at 67-68.

78. *Id.* at 68-69.

Although a meaningful critique of the knowledge shift paradigm is not possible without more information about its underlying premises, observations from current psychological studies of intellectual development in adulthood can provide at least a counterbalance for the pilgrim of faith on the *Aging* journey. Most current literature rejects the “decline and loss paradigm of normal aging”<sup>79</sup> and concludes that for the majority of persons, age-related change in cognitive abilities is a very slow process with only minimal declines of insignificant functional consequence.<sup>80</sup> Longitudinal studies (which are performed with the same group of individuals over a long period of time) have found that “substantial intellectual changes within individuals occur only late in life and tend to occur for abilities that were less central to the individuals’ life experiences and thus perhaps less practiced.”<sup>81</sup> An interesting hypothesis raised by such research is that intellectual decline may not be normative, but rather a consequence of disuse<sup>82</sup> (which offers an alternative explanation for why many elderly judges retain their frequently exercised intellectual powers). Other issues that researchers continue to consider are whether the factorial structure of tests used to measure cognitive functioning remain invariant across age and time,<sup>83</sup> and whether testing methodologies can be adjusted to neutralize inherent biases related to cohort differences.<sup>84</sup>

### B. Implications

If the Judge’s fundamental attributes of old age are overstated, does it really matter? Especially if they happen to hold true for even some, rather than the majority, of the elderly? At the risk of being labelled overly-sentimental,<sup>85</sup> we

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79. See Minkler, *supra* note 72, at 11-12. See also K. Warner Schaie, *Intellectual Development in Adulthood*, in HANDBOOK OF THE PSYCHOLOGY OF AGING 266, 273 (James E. Birren & K. Warner Schaie eds., 4th ed. 1996) (describing results from the Seattle Longitudinal Study conducted over 35 years: “Although by age 60 virtually every subject had declined on one ability, few individuals showed global decline. Virtually no one showed universal decline on all abilities monitored, even by the 80s.”).

80. See Schaie, *supra* note 79, at 270-71; Minkler, *supra* note 72, at 11-12. See also Schaie, *supra* note 68, at 181-82 (discussing the importance of distinguishing between cognitive changes that are only statistically significant, and those that are significant in terms of magnitude).

81. Schaie, *supra* note 79, at 270.

82. See *id.* at 279-80 (discussing reversibility of intellectual deficit through cognitive training).

83. *Id.* at 269.

84. *Id.* at 273-74. See also Schaie, *supra* note 68, at 180-81 (discussing selection of age and cohort boundaries); Baltes & Schaie, *supra* note 73, at 36 (noting the importance of distinguishing between changes in measured intelligence that are due to generational differences rather than chronological age).

85. See AGING, *supra* note 6, at 359: “In many fields of endeavor, especially highly creative fields, where fluid intelligence is more important to success than crystallized intelligence, the declension of ability with age is very steep. It is *sentimental* to pretend otherwise, or to treat rare exceptions as stating the rule.” (emphasis added).

think the answer must be yes. Robert Butler, who originally coined the term "ageism" in 1968, wrote that "systematic stereotyping" of the old "allows the younger generation to see older people as different from themselves . . ." and to "subtly cease to identify with their elders as human beings."<sup>86</sup> Although Judge Posner assures us that old age "may be a more serious personal problem than it is a social, an economic, or a political one,"<sup>87</sup> the labelling of aging or the elderly as a "problem," and the tendency to scapegoat at their expense, is increasingly prevalent.<sup>88</sup> Not only do Posner's negative stereotypes have the potential to fuel the fires of ageism; one must also consider the alienating potential, both intrapersonally and interpersonally, of the multiple-self concept, if taken too literally or seriously. Ageism has been described as a "vicious cycle" because once the elderly are negatively stereotyped, people become more reluctant to affiliate with them, thereby increasing the phenomena of avoidance and alienation.<sup>89</sup>

We also cannot casually ignore the fact that it is a *judge in Aging* who is affirming stereotypic views of the elderly. Perhaps because the law is viewed by some as a weapon against ageism, the legal profession has been slow to self-reflect upon the impact of our individual and collective attitudes about age on the ways that lawyers practice law, legislators formulate public policy, and judges make decisions. A survey of guardianship statutes and adult-protective statutes, for example, reveals an alarming number of jurisdictions that still condone mere "old" or "advanced age" as an independent basis for terminating personal and legal autonomy through institution of guardianship<sup>90</sup> or

86. Robert N. Butler, *Dispelling Ageism: The Cross-Cutting Intervention*, ANNUALS AM. ACAD. POL. & SOC. SCI., May 1989, at 138-39.

87. AGING, *supra* note 6, at 50.

88. *See, e.g.*, Butler, *supra* note 86, at 140-41 (observing that current manifestations of ageism include both envy and resentment of the elderly—envy of affluent elderly for their economic successes, and resentment of the poor elderly for their ostensible burden on public benefits and tax expenditures). Dr. Butler concludes that there is universal fear of the increasing older population based on notions that such a population "will become unaffordable, lead to stagnation of the society's productive and economic growth, and generate intergenerational conflict." *Id.* at 142. *See also* Harold L. Sheppard, *Damaging Stereotypes About Aging Are Taking Hold: How to Counter Them?*, PERSP. ON AGING, Jan.-Feb. 1990, at 4; Robert H. Binstock, *The Aged as Scapegoat*, 23 GERONTOLOGIST 136 (1983).

89. *See* Gordon D. Jensen & Fredericka B. Oakley, *Ageism Across Cultures and in Perspective of Sociobiologic and Psychodynamic Theories*, INT'L J. AGING & HUM. DEV., 1982-83, at 17, 25.

90. ALA. CODE § 26-2A-130(c)(1992) (listing "physical or mental infirmities accompanying advanced age" as a basis for appointment of a conservator or other protective order); MISS. CODE ANN. § 93-13-251 (1994) (permitting appointment of a conservator "if a person by reason of advanced age . . . is incapable of managing his own estate"); MONT. CODE ANN. § 72-5-409(2)(a) (1995) (permitting conservatorship if "person is unable to manage his property and affairs effectively for reasons such as . . . advanced age"); NEV. REV. STAT. ANN. § 159.019 (Michie 1993) ("'Incompetent' includes any person who, by reason of . . . advanced age . . . is unable, without assistance, properly to manage and take care of himself or his property."); N.D. CENT. CODE §



involuntary submission to protective services.<sup>91</sup> And, case law confirms that there are still judges who are willing to reinforce such notions through adjudication.<sup>92</sup> At what point does a stereotype, a “central tendency,” become a rebuttable presumption against which the elderly must defend themselves to maintain the same rights and privileges in society as the non-elderly?

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30.1-29-01(2)(a) (1976) (appointment of conservator permitted if court determines that person “is unable to manage [his] property and affairs effectively for reasons such as . . . advanced age”); R.I. GEN. LAWS § 33-16-2(3) (1995) (definition of conservator in veterans’ guardianship statute “shall mean any person acting as a fiduciary for the estate of any ‘ward’ who by reason of advanced age or mental weakness is unable to properly care for his or her estate”); S.C. CODE ANN. § 62-5-101(1) (Law Co-op. Supp. 1995) (“‘Incapacitated person’ means any person who is impaired by reason of . . . advanced age. . . .”); TENN. CODE ANN. § 34-11-101(7) (Supp. 1995) (“‘Disabled person’ means any person . . . determined by the court to be in need of partial or full supervision, protection and assistance by reason of . . . advanced age.”); WIS. STAT. ANN. § 880.01(4) (West 1991 & Supp. 1995) (“‘Incompetent’ means a person adjudged by a court of record to be substantially incapable of managing his or her property or caring for himself or herself by reason of infirmities of aging . . . .”); WYO. STAT. ANN. § 3-1-101(a)(vii) (Michie 1985 & Supp. 1995) (“‘Incompetent person’ means an individual who is unable unassisted to properly manage and take care of himself or his property as a result of the infirmities of advanced age. . . .”).

91. ALA. CODE §§ 38-9B-1(a)(1), -2(11) (1975 & Supp. 1994) (family trust board of trustees statutes which include “age” among the causal bases of impairment); ARIZ. REV. STAT. ANN. § 46-451(A)(5) (West 1956 & Supp. 1995) (adult protection statute including in the definition of incapacity “an impairment by reason of . . . advanced age”); 750 ILL. COMP. STAT. ANN. 60/103(4) (West 1993 & Supp. 1996) (“‘Elder adult with disabilities’ means an adult prevented by advanced age from taking appropriate action to protect himself or herself from abuse by a family or household member.”); IND. CODE ANN. § 12-10-3-2(a)(2) (West 1994) (“incapable by reason of . . . old age”); MD. CODE ANN., FAM. LAW § 13-101(c)(2) (1991) (a “destitute parent” is one who “cannot be self-supporting, due to old age . . . .”); MICH. COMP. LAWS ANN. § 750.145m(u)(i) (West 1991 & Supp. 1996-1997) (“‘Vulnerable adult’ means . . . [a]n individual . . . who, because of age . . . requires supervision or personal care or lacks the personal and social skills required to live independently.”); OHIO REV. CODE ANN. § 5101.60(B) (Banks-Baldwin 1994) (containing slightly ageist language in the definition of “Adult”: “any person sixty years of age or older within this state who is handicapped by the infirmities of aging . . . .”); OKLA. STAT. ANN. tit. 43A, § 10-103(5) (West 1990 & Supp. 1996) (“‘Incapacitated person’ means any person . . . who is impaired by reason of . . . advanced age . . . .”); S.C. CODE ANN. § 43-35-10(11) (Law Co-op. 1976 & Supp. 1995) (“‘Vulnerable adult’ . . . includes a person who is impaired in the ability to adequately provide for the person’s own care or protection because of the infirmities of aging including, but not limited to . . . advanced age . . . .”); TENN. CODE ANN. § 71-6-102(2) (1995) (“‘Adult’ means a person . . . who because of . . . advanced age is unable to manage such person’s own resources . . . .”); VA. CODE ANN. § 63.1-55.2 (Michie 1995) (“‘Incapacitated person’ means any adult who is impaired by reason of . . . advanced age . . . .”); WIS. STAT. ANN. § 55.01(3) (West 1987 & Supp. 1995) (“‘Infirmities of aging’ means organic brain damage caused by advanced age . . . .”).

92. For examples of cases where mere advanced age was the only basis reported for imposition of guardianship, see *In re Estate of Clark*, 772 P.2d 299, 300-01 (Mont. 1989); *In re Kriche*, No. 49012, 1985 WL 9038 at \*1, 3 (Ohio Ct. App. May 23, 1985); *First Nat’l Bank of Pulaski v. Estate of Bedford*, No. 01-A-019007CH00236, 1991 WL 139715 at \*1 (Tenn. Ct. App. July 31, 1991). For examples of cases where old age was one of the factors considered in determining undue influence in will and trust contest cases, see *Montoya v. Torres*, 823 P.2d 905, 909-10 (N.M. 1991); *In re Estate of Maheras v. Cook*, 897 P.2d 268, 273 (Okla. 1995); *Cale v. Napier*, 412 S.E.2d 242, 245 (W. Va. 1991).

Lastly, the most significant and serious impact of sanctioned negative age stereotypes may not be upon intergenerational relationships, but upon the self-concept of elders. Negative stereotypes can and do become self-fulfilling prophecies.<sup>93</sup> To the extent that we will all become old if we are lucky, these stereotypes are really messages about our own value and the meaning of our later life.<sup>94</sup> Judge Posner may be the first in the field of law and economics to capitalize on "oldness," but he must stand in a long line of others who (perhaps for even laudatory or paternalistic reasons) have used negative stereotypes of old age in self-serving ways to gain support for research grants, new programs, or their livelihoods.<sup>95</sup> As a society, we are only beginning to see the costs of such self-serving benefits.

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93. See Robert N. Butler, *Ageism, ACROSS THE BOARD*, Nov. 1980, at 31, 32 (observing that "people can convince themselves to act according to stereotype—to think of themselves as unproductive, decrepit, and passive"); BETTY FRIEDAN, *THE FOUNTAIN OF AGE* 101 (1993) (quoting Vern Bengston's characterization of the relationship between intellectual functioning and aging as a feedback loop: "Once begun, this loop initiates a cycle of self-fulfilling prophecies that is buttressed by mythologies and stereotypes surrounding socially held views of "normal" aging."); Glenda Laws, *Understanding Ageism: Lessons from Feminism and Postmodernism*, 35 *GERONTOLOGIST* 112, 113 (1995) (noting that "oppressed groups for a variety of reasons—conscious and unconscious, strategic and intuitive—often choose to adopt a particular identity"); William C. Thomas, Jr., *The Expectation Gap and the Stereotype of the Stereotype: Images of Old People*, 21 *GERONTOLOGIST* 402, 404 (1981) (highlighting the role of "congruence between what is expected as appropriate and what the person doing the expecting perceives as happening" in the concept of well-being).

94. See Butler, *supra* note 93, at 31.

95. See JOHN MCKNIGHT, *THE CARELESS SOCIETY: COMMUNITY AND ITS COUNTERFEITS* (1995). McKnight argues that our society's need for more service income has encouraged the "commodification of age." *Id.* at 32. He describes the phenomenon as follows:

The economic use of classifying "oldhood" as a problem serves two purposes. The first is that it produces more service jobs by classifying old people as problems. Second, by the very act of classification it also defines old people as less productive or nonproductive and diminishes their capacity to compete for jobs. Thus, we create more jobs for one class by diminishing the job capacity of another. Indeed, one might say that what has happened in the United States since World War II is that those people of middle years have needed "problems" called old and young in order to create more "needs" while diminishing the number of people eligible to meet the needs.

*Id.* at 31. See also FRIEDAN, *supra* note 93, at 58, who quotes from a letter received from a nurse/social worker stating:

So many of these programs are really ageist and work toward increased dependence of the elderly and increased segregation as opposed to working toward integration and independence. I worry sometimes about the giant network that has been established to help with "problems" of the aged, i.e., senior centers, nutrition meal sites, etc. It seems to me they have added to the problem and now work toward securing enough resources to keep themselves and their programs funded.

*Id.* at 58. Friedan also quotes David Gutmann, a geropsychologist, for the proposition that "the science of gerontology has shared, worked within, and perpetuated the conventional American view of 'aging as catastrophe, aging as wasteland.'" *Id.* at 71 (citing DAVID GUTMANN, *RECLAIMED POWERS* 2, 7 (1987)).

## III. CONCLUSION

Although Judge Posner has argued impressively that at least one group of older selves, judges, is able to dictate canons of rationality,<sup>96</sup> if the old are not as powerful as Judge Posner suggests, younger selves will often determine the content of rationality in a market economy. Collectively, the young have the resources (money, labor-power, and creativity) to define and determine market outcomes, ceding only a few “niches” to the elderly, and the advertising and media images we are supposed to emulate are mostly young, as well as thin and (except for Michael Jordan) with a full head of hair.<sup>97</sup> Judge Posner discusses an “*Altersstil* (old-age style), toward boldness, clarity, and directness, and away from artifice.”<sup>98</sup> This style is more praised by (often elderly) critics than it is rewarded by markets, however, since it is mostly indifferent to the fashions and audience expectations that are defined primarily by the young. Like that of “homemakers,” the value of work done by the elderly (their productivity) tends to be underestimated because much more of it is nonmarket and nonpecuniary. To say that this work is directed to the satisfaction of the elderly is vacuous, since all of work has this function in economics; even the “production” of leisure is a source of wealth.<sup>99</sup> Some of the means and ends of the elderly are radically different from those of the young, and the elderly will appear irrational-by-definition if they are evaluated under young people’s criteria. Judge Posner, or someone else, may have to purge a pivotal economic rationality of ageist biases before it can serve as a neutral analytical tool.

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96. See *supra* notes 38-48 and accompanying text.

97. See FRIEDAN, *supra* note 93, at 35-39 (summarizing studies of prime-time television dramas, commercials, magazines, and advertisements that reveal very few images of older people). See also RICHARD A. LEE, AGEISM IN ADVERTISING: A STUDY OF ADVERTISING AGENCY ATTITUDES TOWARDS MATURING AND MATURE CONSUMERS 12-13, 29 (1995) (report presented at the American Society on Aging National Convention in March 1995) (concluding that the majority of advertising agency professionals are young adults who regard older consumers as “a lot of poor people with little consumer potential”).

98. AGING, *supra* note 6, at 174.

99. See *id.* at 44 (“retirement” is ill-specified, since many retirees take up other “jobs” which are nonmarket or voluntary); *Id.* at 49 (the shift of many from feeling old to less-old, because of an upward adjustment in the perceived onset of old age, represents a massive shift of utility, to themselves and their families); *Id.* at 225 (the Darwinian notion that the world is progressing contradicts elders’ perceptions of a regression and favors the optimistic and forward-looking young). *But see id.* at 103 (discussing Aristotle’s perceptions of the young as hot-tempered, fickle, preoccupied with honor, naively optimistic, easily cheated, and know-it-all). Judge Posner may draw a distinction without a relevant difference. *Id.* at 348 (The ADEA has “reduced the average retirement age, inducing an inefficient substitution of leisure for work.”). Leisure and work both generate wealth (satisfaction), but only work receives compensation in the marketplace. While the market may thus *seem* to make this substitution inefficient, the employer’s and the older person’s satisfaction may both be increased by a combination of enhanced leisure and a “golden handshake” for retiring earlier.

This is not to say that an economics perspective on aging lacks distinct advantages, especially as an “economics of information.” The Judge notes that “[w]e are acutely conscious of the costs of the aging of the American population and tend to overlook the benefits.”<sup>100</sup> Public policies about the elderly will thus tend to be irrational, assuming that they actually turn on under-informed cost-benefit analyses rather than on plays in naked power politics. Posner finds that we try to make up for our informational shortfalls by “stereotyping”—by attributing to all old people the average characteristics of the group.<sup>101</sup> Based on this stereotyped “information” and the “explanatory and predictive theory of old age” which he sets out in Parts One and Two of *Aging*, Judge Posner endeavors in the remainder of the book to discuss normative issues.<sup>102</sup> While there may be no dominant paradigm for the study of aging as of yet,<sup>103</sup> the absence of a genuinely interdisciplinary approach in *Aging* arguably leaves four of the Judge’s crucial and controversial “normative” statements unsupported by their surrounding analyses.

The first such freestanding statement is that “[h]owever much benefits are cut, our society is not going to allow elderly people to be abandoned. It will defray the costs of their medical care and basic life needs by hook or by crook . . . .”<sup>104</sup> How so, when “our society” is not altruistic or caring; the homeless and ghetto youth have been more or less “abandoned” already. The

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100. *Id.* at 50.

101. *Id.* at 322, 359. See *id.* at 360 (stating that the costs of information about people leads to an underestimation or overestimation of their qualities). A 1986 decision by Judge Posner arguably demonstrates the prevalence of such informational stereotypes about the elderly. See *United States v. Wolf*, 787 F.2d 1094 (7th Cir. 1986). In the course of reversing Wolf’s Mann Act conviction, Judge Posner observed that “Miss Or . . . had a history of serious physical and mental illness, and some of her testimony, in particular that Wolf had had sexual intercourse with her every night for two consecutive weeks, was sufficiently improbable to raise doubts about her credibility.” *Id.* at 1099. Dissenting on this and other grounds, Senior District Judge Campbell (appointed by President Roosevelt in 1940) stressed the “high-level hair-splitting analysis of the majority,” *id.* at 1105, and the majority’s doubt that

it was physically possible for defendant Wolf, a 67-year-old man, to maintain an erection every night for a two-week period. Yet the majority’s “scholarly factual findings” in this area are unsubstantiated and in need of expert certification. I see no cite from Masters & Johnson, Dr. David Reuben, Dr. Ruth Westheimer, or another authority in support of the majority’s improper self-impeachment of Ms. Or’s testimony; testimony the jury believed.

*Id.* at 1102.

102. AGING, *supra* note 6, at 235.

103. See *supra* note 67 and accompanying text.

104. AGING, *supra* note 6, at 44. See *id.* at 293 (“[I]t is not politically feasible either to deny the elderly medical care . . . or to abandon them should they need home care.” Society “will pay in one way or another unless people are forced to save more for their old age.”). Judge Posner purports to separate out normative issues in his analyses, *id.* at 235-97, but his classification seems unpersuasive.

homeless may be thought crazy or otherwise unattractive to many, but the Judge says that we seem “genetically programmed to feel protective toward children”<sup>105</sup> but not toward the elderly. The elderly have an economic and political power which the homeless and ghetto youth lack, of course, but it is possible to imagine a governing political coalition which excludes most of the elderly (especially the impoverished ones) and their interests.

A second normative statement is in disguise and holds that “most young people become old people, so in a sense they are transferring money to themselves.”<sup>106</sup> This is close to a *non sequitur*, since transfers to oneself are markedly inadequate in the aggregate. This is indeed why we have (as of this writing) Social Security, Medicare, Medicaid, and other programs which involve younger taxpayers in a partial support of elders who are not relatives. These partial subsidies will work only so long as the “social contract” is not ruptured, so long as the young have the economist’s “rational expectation” that they will also be supported when they become old, by those who are currently even younger.<sup>107</sup> The minuet recently danced by Congress suggests that this social contract is coming apart, a fact certainly not lost on younger Americans.

Third, the Judge tells us: “I set to one side religious objections to suicide, not because I consider them unanswerable, but because they belong to the domain of individual choice rather than to that of social policy.”<sup>108</sup> We might think of good, First Amendment reasons why this is so, and Posner gives us John Stuart Mill’s reasons.<sup>109</sup> Such reasons are unlikely to stop today’s politicians or Supreme Court, however, especially as Judge Posner himself gives the reasons little credence while recommending a state-level political action over euthanasia.<sup>110</sup>

Saving the best for last, the Judge states “my assumption, heretofore tacit, [is] that there is some mechanism by which policies that are beneficial to a

105. *Id.* at 202.

106. *Id.* at 48.

107. *See id.* at 208-09 (In a “primitive” society, an inculcated filial piety “takes the place of legal enforcement . . . of the implicit . . . intergenerational contract in which parents support children when young in exchange for support by the children in the parents’ old age.”); *Id.* at 284, 288 (citing to Gary Becker with respect to an “intergenerational contract” in which the old lend to the young who can then obtain human capital through the public school system, and the old are then possibly over-repaid by the young when they retire); *Id.* at 361 (government subsidies replace voluntary transfers from younger to older selves, and socialize the costs of supporting one’s elder parents).

108. *Id.* at 238.

109. *Id.* (Voluntary acts by competent adults can be prohibited only if they create “tangible harms, as distinct from . . . disapproval or even revulsion.”).

110. *See id.* at 260-61.

society are adopted by it.”<sup>111</sup> Such a *deus ex machina*, the socio-legal equivalent of the Philosopher’s Stone which perhaps amounts to a tautology or a can opener,<sup>112</sup> makes the book and this review superfluous; rest assured that everything will be all right, at least in the long run.

These four normative statements are so freestanding, so divorced from the rest of the analysis, because neoclassical or Chicago School economics is so relentlessly positivist an enterprise. Judge Posner inadvertently illustrates David Hume’s dictum on the impossibility of deriving an “ought” (a normative statement) from an “is” (a positive statement). To the extent we want to deal with aging in a normative fashion, then, Chicago School economics may not be the best overall perspective to adopt. As Thomas Cole so eloquently noted in *The Journey of Life*: “Recent critiques of aging in the modern life course have . . . reflected a dawning awareness that aging is much more than a problem to be solved. In some quarters, it is becoming clear that accumulating health and wealth through the rationalized control of time and the body is an impoverished vision of what it means to live a life.”<sup>113</sup>

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111. *Id.* at 212-13.

112. See the “joke” about a physicist, an engineer, and an economist shipwrecked on a desert island. A crate of canned goods is washed ashore, and the physicist tries to burn open a can by focusing the sun on it with his eyeglass lenses. The scheme fails, and the engineer’s system of rocks and levers fails to crush the top of a can. The economist then suggests that they “solve the problem the way an economist would: assume a can opener.”

113. THOMAS R. COLE, *THE JOURNEY OF LIFE: A CULTURAL HISTORY OF AGING IN AMERICA* 241 (1992).

