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# LAW AND THE AGED

## FOREWORD: LIFE, LIBERTY, AND PROPERTY RIGHTS FOR THE ELDERLY

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> Grow old along with me!
> The best is yet to be,
> The last of life for which the first was made.
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> Robert Browning[1]

Browning was a hopeless romantic. Huxley was more accurate when in *Brave New World* he had society cheerfully carting off the old to the neighborhood crematorium.[2] As a practical matter, the old are a minority group, probably the least militant minority group in the country, although they have more to be militant about than many others. Their superior claim to being disgruntled is related to their entry into the group. For most minority group members entry is both instantaneous and permanent. One is born Black, Chicano, illegitimate. Whatever societal disadvantage is visited on those minorities arrives early and is continuous. The hope for escape is virtually nonexistent. Indeed, a useful way of defining a minority group in need of special legal protection is by examining the immutability of its membership;[3] the more

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1. *Rabbi Ben Ezra*, in 4 WORKS OF ROBERT BROWNING 261 (Cambridge ed. 1966).
2. A. HUXLEY, BRAVE NEW WORLD 237-48 (1946).
3. *See* Kahn v. Shevin, 416 U.S. 351, 357 (1973) (Brennan, J., dissenting); Fron-

immutable, the more the need for protection. Old people come by their second-class status late in life and it is at once more shocking and more terrible because it is unaccustomed.

So great is the fear of aging in this youth culture that psychological barriers are created against the recognition that we grow old. As packing the dying off to hospitals allows others to avoid a recognition of their own mortality,[4] so thinking of the old as "them" sustains an illusion of eternal youth. The unfortunate result of this self-delusion, however, is a basic rejection of those excluded.[5] The youth focus, however, is not entirely to blame for the social mistreatment that accelerates with age. Two other catastrophic events play a major part. The first is a conjunction of galloping inflation and accelerated taxation of income and inheritance. Those forces together guarantee that most people will have to live from income rather than from their own savings, let alone the savings of prior generations. Yet, income is routinely diminished as age increases. The second event, of equal importance, is the shrinkage of the family. While in other societies the extended cohabiting family may range through several generations, in our culture one does not live with parents much beyond puberty. Cut off from income by loss of employment, taxed and inflated out of the value of their savings, with children whose autonomy demands that they approach even the institution of marriage with great suspicion, the old are simply catapulted into another world.

That world, familiar to other disadvantaged groups, is one of poverty, food stamps obtained after filling out voluminous questionaires, welfare payments given out in endless lines and on rude conditions, obtrusive social workers, and often institutionalization. It is the managed society. As one can in time become accustomed to virtually any societal conditions—there is in fact a generation of governmentally created welfare clients—one can expect to find a number of people who have learned to live with and appreciate the security of being public charges. Some merely continue this status through old age. Most of the old, however, the *nouveau pauvre*, lack this "education." For them it is the first time in a food stamp line, the first time on welfare, the first time in a public institution. Most old persons join the managed state only after a lifetime of freedom. The price for entry

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tiero v. Richardson, 411 U.S. 677, 686 (1972); *cf.* Graham v. Richardson, 403 U.S. 365, 372 (1971); United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

4. *Cf.* M. HEIDEGGER, BEING AND TIME ¶ 51 (J. Macquarrie & E. Robinson ed. 1962).

5. *See generally* S. DEBEAUVIOR, THE COMING OF AGE 216 (1972), *reviewed*, Murphy, 17 ARIZ. L. REV. 546 (1975).

is high—life, liberty, and property. Let me comment briefly on that price.

*Life*

The managed state, of course, never publicly concedes that its ministrations might adversely affect the health, let alone the life of any of its wards. Since the state spends a substantial portion of its resources on the "welfare" of wards, the only question it chooses to ask is how well it has enhanced life, liberty, and the pursuit of happiness. Two groups, the Community Services Society of New York and the Benjamin Rose Institute, had the temerity to check more fundamental premises. Their first report on the success of services intended to enhance the life expectancy for the aged in New York is instructive:

> According to [the] criterion [for measuring the effectiveness of the program] two events have to occur in combination for the service to be considered successful: a) more of the service participants and controls had to survive, and b) among the survivors, the service participants had to be more contented. *Because the first event did not occur, the criterion could not be met regardless of what* the showing might have been on the second.
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> One must conclude on the basis of data gathered . . . [that] the project . . . was *not effective in preventing death* nor was it effective in slowing down deterioration in *physical functioning*—two major reasons frequently given for intervening in a protective case . . . .[6]

*Liberty*

One of the significant features of the Rose protective program was placement. Thirty percent of the individuals in the study group lived in institutions.[7] The report indicates a recognition that among the aged, institutionalization, wryly described by its victims as "being planted," is a very unpopular solution to their problem. The project's legal counsel, who provided legal services in eight guardianship cases, made these observations:

> Each case presented a problem which could only be solved by the appointment of a guardian. In each instance the appointment by the court was completely routine. No one at the court ever questioned anyone about the reasons for the guardianship nor was any investigation ever made. Neither Judge ____ nor Judge ____ participated in any of the proceedings . . . . I say these things

6. BENJAMIN ROSE INSTITUTE, PROGRESS REPORT ON PROTECTIVE SERVICES FOR OLDER PEOPLE 68-69 (1967).
7. *Id.* at 25-26.

> not by way of criticism of our probate court, but only so you can understand the tremendously impersonal manner in which matters of this kind are handled in the court.[8]

The results of a study a colleague and I made in upstate New York completely support these observations,[9] and similar confirmation comes from a study of California conservatorship provisions by the ENKI Research Group. In discussing geriatric services the ENKI group noted:

> Some mentally disordered patients were placed involuntarily in locked facilities under the diagnosis of chronic brain syndrome and were not provided the opportunity for judicial review of the involuntary hold. Locked facilities licensed by the state were generally used to provide care for the geriatric, senile patient who would otherwise wander out into the community, and needed a protective setting to prevent harm from coming to him because of his condition of incompetency. The diagnosis of chronic brain syndrome was considered to be an irreversible condition from which a patient would not "clear" or improve. A number of professional persons were concerned that the mentally disordered were being placed in locked facilities and forgotten rather than being placed in a protective, but not locked, facility, such as a board-and-care home.[10]

Though some of the provisions of the mental health laws were designed to protect society or to protect persons from themselves, the conservatorship provisions were intended only to assist the gravely disabled. That being true, the fact that the law results in cavalier invasions of their rights is particularly objectionable.[11]

It is unfortunate that statutes are drafted so as to allow medical discretion[12] and that medical discretion is very often exercised by deal-

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8. *Id.* at 37.

9. *See* G. ALEXANDER & T. LEWIN, THE AGED AND THE NEED FOR SURROGATE MANAGEMENT (1972); Alexander, Deutsch, Kovner & Levine, *Surrogate Management of the Property of the Aged*, 21 SYRACUSE L. REV. 87 (1969).

10. ENKI RESEARCH INSTITUTE, A STUDY OF CALIFORNIA'S NEW MENTAL HEALTH LAW 159 (1972).

11. *See* O'Connor v. Donaldson, 95 S. Ct. 2486, 2490 (1975).

12. *E.g.*, ARIZ. REV. STAT. ANN. § 14-5401 (Spec. Pamphlet 1974), provides:

> Upon petition . . . the court may appoint a conservator or make other protective order for cause as follows:
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> . . . .
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> 2. Appointment of a conservator . . . may be made in relation to the estate and affairs of a person if the court determines that both
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> (a) The person is unable to manage his property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age . . . .
>
> (b) The person has property which will be wasted or dissipated unless proper management is provided . . . .

For discussion of some of the problems of medical and psychiatric testimony in incompetency proceedings, see G. ALEXANDER & T. LEWIN, *supra* note 9, at 15-27; Comment, *Appointment of Guardians for the Mentally Incompetent*, 1964 DUKE L.J. 341 (1964); Leifer, *The Competence of the Psychiatrist to Assist in the Determination of Incompe-*

ing with the physical management of the ward rather than his or her needs. Yet, the deprivation of liberty that accompanies entry into the managed state is not limited to the grossest invasions occasioned by physical restraint. The price exacted of a person who becomes dependent on the state after a lifetime of productivity includes personal dignity—the requirement that he or she conform to the lifestyle selected by the government. One element of that lifestyle is idleness. Since the earliest decisions which attempted to define the parameters of the "liberty" protected by the fifth and 14th amendments, the right to work, to pursue one's livelihood, has been recognized as an essential component of that liberty.[13] The right to work, however, is not extended to the aged. First, the protection of the Age Discrimination in Employment Act of 1967[14] evaporates as soon as the worker reaches 65.[15] This cutoff date, however, is harmonious with the more insidious enforcement of idleness under the social security laws.[16] The so-called retirement test punishes the social security recipient who resists idleness by reducing the benefits he receives if he earns more than $2,400 per year.[17] The result of the retirement test is simultaneously to devalue an older person's labor and make it more difficult for him or her to augment social security payments in order to obtain a higher standard of living.

Deprivation of the liberty to pursue one's calling is but a part of a larger pattern of life-style control which is triggered upon entry into the managed state. The classic example is found in *Wilkie v. O'Connor*.[18] Dissatisfied with the living arrangements of Mr. Wilkie,[19] an old age assistance recipient, the local welfare commissioner discontinued payments to him. The language of the court, responding to Mr. Wilkie's claim that how he lived was none of the commissioner's business, is reflective of the extreme deprivations of liberty common in the managed state:

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*tency: A Sceptical Inquiry into the Courtroom Functions of Psychiatrists*, 14 SYRACUSE L. REV. 564 (1963).

13. *E.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 97 (1872) (Field, J., dissenting); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870); Stockton Laundry Case, 26 F. 611, 613 (C.C.D. Cal. 1886). Although this line of cases construed the privileges and immunities clauses, these rights have been found to be within the protection of the due process clauses. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Board of Regents v. Roth, 408 U.S. 564, 572 (1972), recently reaffirmed that the right to work is included within the concept of liberty.

14. 29 U.S.C. §§ 621-634 (1970), *as amended*, (Supp. III, 1973), 29 U.S.C.A. §§ 630(b), 634 (1975). For further discussion of this Act, see Note, *Proving Discrimination Under the Age Discrimination in Employment Act*, 17 ARIZ. L. REV. 495 (1975).

15. 29 U.S.C. § 631 (1970).

16. 42 U.S.C. §§ 401-431 (1970), *as amended*, (Supp. II, 1972, Supp. III, 1973).

17. 42 U.S.C. §§ 403(f)-(g) (1970), *as amended*, (Supp. III, 1973).

18. 261 App. Div. 373, 25 N.Y.S.2d 617 (App. Div. 1941).

19. Concededly, Mr. Wilkie's habits were somewhat peculiar. He slept "under an old barn, in a nest of rags to which he [had] to crawl on his hands and knees." *Id.* at 374, 25 N.Y.S.2d at 618.

> Appellant . . . argues that he has a right to live as he pleases while being supported by public charity. One would admire his independence if he were not so dependent, but he has no right to defy the standards and conventions of civilized society while being supported at public expense. This is true even though some of those conventions may be somewhat artificial. . . . It is true, as appellant argues, that the hardy pioneers of our country slept in beds not [*sic*] better than the one he has chosen. But, unlike the appellant, . . . they did not call upon the public to support them, while doing it.[20]

*Property*

A final deprivation is the loss by a number of old people of the right to manage their property. Since surrogate management of one's property is a normal price for living in the managed state, the fact should come as no surprise. What is surprising is that it applies to many people whose funds would otherwise suffice to keep them independent. Stripping old people of their wealth must, of course, be justified in some way since it would otherwise appear harsh. The approved method is to claim that the individual involved is no longer properly able to manage his property, and the state, with earnest solicitude, provides a substitute who can manage it better.[21]

One need not go back far in our history to find even more cavalier treatment. Then, one simply lumped old people with those accused of mental illness under statutes generally applying to lunatics.[22] In other instances, the aged might be placed in mental institutions simply because there were no other available facilities. A number of states have now changed the provisions by which the aged are deprived of their property from lunacy proceedings to conservatorship proceedings.[23] That prevents labeling the ward crazy—and still provides an

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20. *Id.* at 375, 25 N.Y.S.2d at 619.

21. The most common statutory standard is simply inability of the potential ward to manage his property adequately without assistance. *E.g.*, ARIZ. REV. STAT. ANN. § 14-5401 (Spec. Pamphlet 1974); CAL. PROB. CODE §§ 1460, 1751 (West Supp. 1975); UNIFORM PROBATE CODE § 5-401(2). There is considerable disagreement as to what constitutes such disability, but courts have held that it is not necessary to show that the alleged incompetent has performed acts which have dissipated his estate; it is sufficient that he evidence conduct which would indicate the likelihood of such results. *In re* Guardianship of Tyrrell, 28 Ohio Op. 2d 337, 92 Ohio L. Abs. 253 (P. Ct.), *aff'd*, No. 42 (Ohio Ct. App., Oct. 31, 1962), *appeal dismissed mem.*, 174 Ohio St. 552, 190 N.E. 2d 687 (1963). *See generally* Comment, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, 73 YALE L.J. 676 (1964).

22. See Otwell v. Haskins, 25 Ga. App. 219, 102 S.E. 839 (1919); BEREZEN & STROTSKY, THE GERIATRIC PATIENT IN THE PRACTICE OF COMMUNITY MENTAL HEALTH 220 (1970).

23. *E.g.*, ARIZ. REV. STAT. ANN. §§ 14-5101, -5303 (Spec. Pamphlet 1974); CAL. PROB. CODE §§ 1460, 1701, 1751 (West Supp. 1975); ILL. ANN. STAT. ch. 3, §§ 112-113 (Supp. 1975); TENN. CODE ANN. § 34-1008 (Supp. 1974).

efficient means for passing the property out of the ward's hands. Inherent in the change of statutory language is recognition of the often devastating impact of labeling persons insane. Quite aside from the stigmatizing effect of such a label and its consequent dehumanizing of the person labeled, the characterization tends to carry with it certain inevitable consequences wholly unrelated to the goals of surrogate management of the property of the aged, the most horrendous of which is institutionalization. It should suffice to note with relief the movement away from the use of the concept of mental illness in providing surrogate management of the property of the aged.[24] This trend does not negate the other consequences of conservatorship, however.

The principal question in any conservatorship or guardianship proceeding is whether it is in the best interest of the ward. However benevolent the intention of those who would seek a substitute decisionmaker for the aged, persons deprived of the right to decide for themselves will, of course, have lost a fairly basic attribute of citizenship—the right to manage their property. Our political and societal institutions take money very seriously. It is not an accident that the threshold invasion of individual liberty is the right to manage property, always on the theory that what is being done is in the interest of the individual. The right question, however, is not how one can maximize the financial benefit to the potential ward; it is how one can reduce to a minimum the invasion of his property rights. And that question is rarely asked.

Once the problem has been framed in this way, one is compelled to inquire whose interest is really being served by appointment of a surrogate manager for the property of the aged. There is, of course, one sense in which imposing a surrogate on an aged person is in that person's interest. Certainly, courts can find professional property managers capable of handling an individual's financial affairs in a superior manner. But this is merely a specific application of a general rule: one can always find people of greater skill and capacity in any given specialization. Is our legal process so unerring that decisions of this nature should be entrusted to it? Is such paternalistic supervision truly desirable? Let us not forget that if a person feels that he needs a manager for his property nothing prevents him from contracting for these services.[25] But when that surrogate is involuntarily imposed, I for one am quite skeptical of the advantages to the potential ward. Al-

24. *See generally* Effland, *Caring for the Elderly Under the Uniform Probate Code*, 17 ARIZ. L. REV. 373 (1975).

25. A number of states have statutes providing for court appointment of a guardian or conservator on voluntary request by an aged person. *E.g.*, CAL. PROB. CODE § 1751 (West Supp. 1975); IOWA CODE ANN. § 633.572 (Supp. 1975-76); KAN. STAT. ANN. § 59-3007 (Supp. 1973); OKLA. STAT. ANN. tit. 58, § 890.1 (Supp. 1974-75).

though his wealth may increase, unless he retains the power to spend his money to maximize his own enjoyment, the ward is not likely to perceive his solvency as a benefit of any great magnitude.

*Conclusion*

The aged, like all other persons, have a right to life, liberty, and property. I suggest that they should be allowed continued management of their own property—a right that necessarily includes mismanagement. Additionally, state assistance, which has been earned by a long life of citizenship, should not be obtained at the price of manipulation by the managed state. In short, the state should allow the old the luxury of simply getting their retirement income and otherwise being left alone.