

Developing an Anti-Ageist Approach to the Law



The Advocacy Center for the Elderly, Canadian Center for Elderly Law Studies and Ontario Law Commission:

Agree Ageism is a Social Problem.

Jointly ask several questions, two of which I will focus on:

- 1. Is Law the most appropriate response to this social problem?**
 - 2. What would an anti-ageist approach to law look like?**
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- Want to know what the template and principles will be?**
 - How to bring coherence to the project?**

First used by Robert Butler in 1968.

- **A process of systematic stereotyping and discrimination against people because they are old, just as racism and sexism accomplish this for skin color and gender.**
- **Ageism is a social attitude/problem embedded in the law, not created by the law.**

Butler also used the phrases “life review” and “productive aging” first.

Why is Law Reform Necessary?



Margaret Hall: Material Exploitation and the Autonomy Ideal: The Role of Equity Theory in Adult Protection Legislation.

Are our existing laws adequate in terms of both the kinds of harms they can address and the responses they can provide with respect to Ageism?

Necessary and Sufficient?



Is Law a necessary and sufficient condition of social change?

➤ ***Robin Stryker: Sociology & Law Professor, 2007: Suggests no: proposes that joint work by law and social science-savvy reformers is required for successful law reform.***

➤ **An interdisciplinary approach is needed.**

How Does Law Facilitate Social Change/Law Reform?



By assisting with a four-stage process of movement building that draws its “sustenance from legality”:

- 1. Generate a process of cognitive transformation so that grievances are seen as legitimate, as rights requiring consciousness raising;**
- 2. Use litigation to negotiate concessions generating pressures against opponents;**
- 3. Gain compliance with court decisions making the decisions consequential and,**
- 4. Help support the legacy of transformative consequences of empowerment and consciousness raising**

Cause Lawyers and Social Movements: Sarat & Scheingold, 2006

Developing an Anti-Ageist Approach to Law will Require:



A Focus on Four Issues:

- 1. Review philosophical basis/key concepts in current Law**
- 2. Consciousness Raising/Cognitive Transformation**
- 3. Intersection/Interaction between Law/Social Movements/Politics**
- 4. Timely Incorporation of New Knowledge**

A Key Strength of Canadian Legal System



The constitutional power of the courts, criticized by some as undemocratic, represents in my view a fundamentally democratic choice, that of articulating the constraints under which the majority can impose its will, and the limits to its potential override of protected interests.

(The Charter at 25: Section 15)

Louise Arbour, April 12, 2007:

But Don't Overlook Role of Politics



...law and politics are inextricably intertwined and in this combination politics is the senior partner.

Robin Stryker, professor of law and sociology

...this book underscores the primacy of the political.

Sarat & Scheingold; Cause Lawyers and Social Movements (2006)

Philosophical Issues In Overcoming Ageism



Four Key Issues:

1. **Personhood**
2. **Autonomy, Dependency and Vulnerability**
3. **Respect**
4. **Social Contract**

If we are to account for the many different ways in which we grow old...we need to widen our vision.

Martha Holstein, Medical Humanist and Ethicist.

Kant

- Kant's "Categorical Imperative" claims that all persons are owed respect because they are free rational beings. Respect is the acknowledgment in attitude and conduct of the dignity of persons as ends in themselves.
- Liberal personhood includes as essential the ideas of autonomy, independence and rationality.

The Autonomy Myth.

Our current system has been built upon myths of autonomy and independence and thus fails to reflect the vulnerable as well as dependent nature of the human condition...

- *Understand vulnerability, in its individual universality, to be similar but not identical to inevitable dependency.*
- *Both are universal, but only vulnerability is constant; inevitable dependency is episodic, sporadic and largely development in nature...*
- *Under our current ideology of autonomy, both dependency and vulnerability are dealt with as private matters with which the state has no legitimate concern.*

Frontiers of Justice

As the life span increases, the relative independence that many people sometimes enjoy looks more and more like a temporary condition, a phase of life that we move into gradually and all too quickly begin to leave.

Respect:

Three distinct meanings of respect in the last 30 years:

- It is a highly substantive term, inclusive of all human beings, simultaneously promoting autonomy and protecting the vulnerable
- Autonomous and non-autonomous persons are decoupled and respect applies only to the former. Respect for persons becomes respect for autonomy.
- Respect is decoupled from persons and becomes a free-floating, essentially meaningless term

The Social Contract



- **Modern states exist because independent individuals, free by nature, join together to create an agency to act on their mutual behalf, governed by law.**
- **Purpose of the social contract is justice (the fair distribution of advantages, assets and benefits among all members of a society) and mutual advantage.**
- **Participation in contract creation requires rationality and independence (Kant)**
- **It is participation that confers dignity, respect and equality as a citizen/person.**
- **Core ideas are mutual advantage, “rough equality,” reciprocity, independence, respect and personhood**
- **Contract participants “pay their own way,” non-participants are “parasites.”**
- **Kant is clear ongoing dependency rightly disbars one from most political rights**
- **The SCT’s of Kant, Locke and Rawl’s imply that moral duties to non-participants (women, elderly, disabled) are “marginal” cases of justice.**

“What do we owe to non-participants?”

Martha Nussbaum.

- **We need a new way of thinking about who is a citizen and what the purpose of social cooperation is**
- **CA is a fresh start premised on idea of dignity of each individual**
- **Substantive rights based approach to social justice**
- **Equality is the ground of CA**
- **Postulates 10 core human entitlements and guarantees a minimum threshold level of access**
- **Attempts to address both civil/political and social/economic rights**

What is each person able to do and be?

A New Vision of Social Justice



Louise Arbour, April 12, 2007

In Canada, social and economic rights have not been appropriately recognized as rights, and continue, in my view, to be inadequately protected...this accounts for the inequities that are incompatible with the level of social justice that is within our reach.

*Louise Arbour, Former Justice of the Supreme Court of Canada,
Former UN High Commissioner For Human Rights and Chief
Prosecutor at The Hague.*

Consciousness Raising/Cognitive Transformation



Robin West: Yale Journal of Law and the Humanities:

... law “constitutes” people...and laws affect the subjectivity of the lives of many....

Ernest W. Huffcutt “The Literature of Law.” (1982)

[It is] a fact too often forgotten – that law touches at some point every conceivable human interest, and that its study is, perhaps above all others, precisely the one which leads straight to the humanities.

Cultivating Humanity.

What must be invigorated is the narrative imagination which means “the ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person’s story, and to understand the emotions and wishes and desires that someone so placed might have.

Hindsight: The Promise and Peril of Looking Backward.

The phenomenon of aging, particularly in modern western culture, readily comes to mind in this context: with prescribed narratives of decline well in place, there frequently appears little choice among the aged but to reconcile themselves to their narrative fate....

The Stone Diaries.

I wanted to write about a women's whole life, from birth until her nineties, and I wanted a chapter for each decade. My thought was to cut in about every ten years to see what was happening to her. But I got to the middle of the book and she was already old. I had thought, Here's your life, and here's this little old age bit at the end, so that was surprise to me, to find out how long someone spends being old. I had to think what I could do with that so it wouldn't just slide straight downhill.

Stephen G. Breyer: US Supreme Court Judge



Judiciary Committee Hearings on his Nomination.

Each of those stories involves a man, a woman, children, families, work, lives – and you get that sense out of the book. And so sometimes I've found literature very helpful as a way out of the tower.

- **1852 Harriet Beecher Stowe: Uncle Tom's Cabin, and the abolitionist cause.**
- **1962 Rachel Carson: published Silent Spring which is widely credited with helping launch the environmental movement.**
- **1962 Ken Kesey's One Flew Over the Cuckoo's Nest: has been credited with contributing to significant reforms in the anti-psychiatry movement and mental health reform act.**
- **1963 Betty Friedan's The Feminine Mystique: helped launch the beginning of the modern women's movement.**

Robert Butler: 1927 - 2010



No individual has done more, here in the US - or throughout the world - to raise awareness of the challenges and opportunities, the fears and hopes of our longer lives. Serving as both physician and philosopher, Dr. Butler has brilliantly charted the landscape of an increasingly longer-lived world.

Why Survive: Being Old in America

1976 Pulitzer Prize Winner

Utilizing New Knowledge



Lifecycle Development

Jean Piaget: Childhood Cognitive Development

Erik Erikson: Adolescent/Adult Psycho-Social Development

Laura Carstensten: Life-Span Development/Socioemotional Selectivity Theory

The Secret Life of the Grown up Brain: Results from last 15 years.

Developmental gains in later life

- **1998: Neurogenesis: (birth of neurons)**
- **Consistently better control of negative emotions**
- **“Positivity Effect”**
- **Enhanced Pattern Recognition**
- **Equipped for Overload**
- **Neuroplasticity/Bilateralization**
- **Mirror neurons, morality and sociability**
- **Power of exercise, nutrition and cognitive stimulation**

Butler’s “life review” and “productive aging.”

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Anti-Ageist Approach to the Law:

- **Acknowledge law not yet capable of addressing harms caused by ageism**
- **Interdisciplinary approach – social science savviness, law & literature, philosophy, ethics, humanities**
- **Cognitive transformation from interdisciplinary approach**
- **Move from SCT to CA: what do we owe non-participants to what can this person do and be**
- **Legal acknowledgement of autonomy, dependency and vulnerability as human conditions worthy of respect**
- **Substantive focus on social and economic rights, not just civil and political**

Mary Robinson: President of Ireland UN Commissioner Human Rights



A Voice For Human Rights.

True equality puts an end to our tendency to perceive “flaws” in the individual and moves our attention to the deficiencies in social and economic mechanisms that do not accommodate differences.

The Creative Age

The new juncture we have reached is one in which we move beyond studies of what aging is to what is possible with aging...there is no denying the problems that accompany aging. But what has been universally denied is the potential.

A Wider Vision



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Martha Holstein, Medical Humanist and Ethicist.