

GROWING OLD WITH JUDGE POSNER

by Robert D. Rachlin

Grow old along with me!

The best is yet to be, . . .

Therefore I summon age

To grant youth's heritage

BROWNING, *RABBI BEN EZRA*

“Le utility del chose excusera le noisomeness del stink.” (Earliest known judicial exposition of law and economics, quoted without citation in SIR JAMES FITZJAMES STEPHEN, *A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 106 (1890))

The literary output of Richard A. Posner is staggering. As a wonder of the world, it ranks with the pyramids and the hanging gardens of Babylon. As far as I can determine, he has authored, co-authored, or edited about forty books and four hundred learned articles,¹ many, if not most, generated while serving as Chief Judge of the Seventh Circuit Court of Appeals and senior lecturer at the University of Chicago Law School, where he is currently delivering courses in antitrust, evidence, and legal pragmatics. How does he do it? Where does he find the time? Nobel Laureate and fellow Chicago economist Ronald Coase was asked his opinion of Posner’s scholarship: “I don’t know. He writes faster than I can read.”²

Judge Posner’s focus is economics and the law. He has written the definitive textbook on the subject, which has had six editions.³ His style, while not devoid of wit, is tight, requiring close and thoughtful reading. Compared with other jurisprudes, Posner lacks the playful sparkle of Llewellyn⁴ and the lapidary diction of Holmes. His paragraphs must be slowly masticated and swallowed in small doses, not gulped down whole. Plainly one of the public intellectuals about which he himself has written,⁵ Posner’s field of interest ranges widely – comprising, *inter alia*, 19th century German theories of property,⁶ sex laws,⁷ the impeachment of President Clinton,⁸

literature,⁹ and aging.¹⁰ Rarely, his writing lapses into the turgid. I found *Law and Literature* almost unreadable. It is Posner's work on old age and aging on which I will gradually focus.

Posner and "Law and Economics"

The "law and economics" movement appears to have raised its head in this country in the early twentieth century. It did not acquire its sea legs until the 1950s, when Aaron Director appeared at the University of Chicago Law School. I remember Director from my days at Chicago: a shadowy figure serving a function at the law school obscure to most of us. In fact, Aaron Director's participation in the law school curriculum was a logical product of Chicago's preoccupation with multidisciplinary education, pioneered by Robert Maynard Hutchins. Always a seedbed of innovative thought, the University of Chicago was the true home of the contemporary law and economics movement, and was the venue of a famous around-the-table conversation with Nobel Laureate Ronald Coase, where the Coase Theorem of transactional costs was first revealed to the world.¹¹

Posner's Great Principle is that the common law tends naturally to promote economic efficiency and its corollaries "utility maximization" and "value maximization." These ideas are, of course, not novel. David Hume and Adam Smith, close friends and pillars of the Scottish Enlightenment, were exploring these notions in the seventeenth century. The theoretical origins of the law and economics movement can be traced to Hume's essay "On Justice,"¹² where the fount of justice and law is said to be, simply, usefulness. Law is a useful tool for dealing with what John Locke referred to as the "inconveniences"¹³ of human freedom. Social reformers from Karl Marx to Theodore Roosevelt to Jesse Jackson, either explicitly or implicitly, raised the question "useful to whom?" For Posner, the referent of usefulness appears to be "society." This

begs a key question. What, exactly, is that “society” to whom law is useful? As the common law process constructs norms, i.e., principles of law, beneficial to “society,” the question is always open: does the common good always translate into maximum utility to the greatest number?

The Shifting Referent

Reformers tend to deconstruct society by fractionalizing it into one or more components. For Marx and his progeny, the components are essentially capital and labor. For Theodore Roosevelt, it was big business and everyone else. For Jesse Jackson, it was whites and blacks, or more currently, the broad classes of the powerful and the powerless. These taxonomies are vulnerable to the same deconstruction as the idea of society itself: that is, each of these broad fractions is itself subject to smaller discrete elements. The final reduction, I suppose, is the single family or even, arguably, the individual.¹⁴

Thus, the hazard in applying law and economics criteria uncritically. The approach is benign only insofar as its referent is clearly understood. If we are speaking of the body politic as a whole, one set of rules may be “useful.” As that body is broken down into its smaller and smaller components, different rules may apply. Do they, in fact, exist? Assuredly, yes. If law is conceived as a set of norms regulating the interactions among people, we can see that every social grouping, down to two kids playing one-on-one basketball on a sandlot court, operate under norms that can broadly be termed “law.” These different norm-sets differ only in the quality and quantity of coercion enforcing them. The norms of the state are enforceable by all the might of the state, including the police and the National Guard.¹⁵ The norms of the sandlot are enforced by the player who can take his ball and go home. Family norms are enforced by the

need of family members for affection and regard by other members. I hesitate to put words in Posner's mouth, as I would hesitate to drive north on Fifth Avenue. I will suggest, however, that Posner, or Hume for that matter, would tell us that the norms or "law" enforced by subsets of society also serve a utilitarian function. If the kids in the sandlot do not observe certain interactional norms, there will not be a game. The game is, to those kids, utility maximizing. The concept of the common law as an instrument for optimizing utility and maximizing wealth is a useful template for measuring rules and legislation as long as it is understood (1) for what social unit they are useful and (2) what it means to be useful. "Utility," to classical economists, applies to what satisfies a want. These wants can be monetary or non-monetary. Posner clearly recognizes both. As societies evolve and, one hopes, grow in wisdom and stature and favor with God and man, the concept of utility is correspondingly broadened. The continued prosperity of the horned owl and the snail darter do not translate into dollar-wealth. Do they embody aesthetic wealth?

Law can be seen as deductive (i.e., top down), as nineteenth century legal thinkers such as von Savigny conceived it,¹⁶ or inductive (i.e., bottom up), as it was viewed by German,¹⁷ then American, legal realists, such as Holmes¹⁸ and Pound.¹⁹ The law and economics approach can be viewed both ways. It is both descriptive (or positive, to use Posner's term) and normative. As descriptive, it tends to be bottom up: such and such is what is useful to the optimization of social utility. This leads to the normative: the law ought to promote it. The common law, as a matter of history according to Posner, has in fact taken hold of the Invisible Hand²⁰ and fashioned itself in ways that promote utility maximization. This is descriptive.

For Posner, normative judgments should be preceded by scientific inquiry. This is not entirely a notion of recent origin. Holmes said, over a hundred years ago, that the lawyer "of the

future is the man of statistics and the master of economics.’’²¹ I say “not entirely” because the idea, although birthed long ago, did not begin to sprint until the 1950s. Posner’s exploration of the social sciences is relevant to his jurisprudence – both as judge and as scholar – because the social sciences deal with the breadth of human interactions, which, in turn, are the stuff of the law itself.²² Lawyers indifferent to the social sciences and, for that matter, every other field of human endeavor, including the arts, might be likened to a carpenter who knows everything about chisels and nothing about wood. While no lawyer can be a master of all subjects, he or she dare not be *indifferent* to any. Which brings us to Posner on aging.²³

Human Capital and Separate Identities

The task is to use the tools of social science to understand what happens as people age and how these phenomena affect job performance, economic productivity, and skill sets. Posner draws heavily on Gary Becker’s²⁴ concept of “human capital” – the “investment” in education, health, and good character that yields economic dividends. Capital investments, human or otherwise, are made with a prospect to, and assessment of, the payout period. When we are young, we can “afford” to make substantial investments in our human capital: the payout period is long and the accumulated dividends considerable. As we age, the payout period decreases; incentive for investment decreases as well. In consequence, human capital investments decrease with age. We sink less of our effort and material resources into acquiring knowledge and skills: what’s the point? The payback will be an income stream reduced to a trickle. Cicero wrote: “Can there be anything more absurd than to seek increased travel money to defray the cost of a shorter journey?”²⁵

At least, that is the model. Like so much economic modeling, paradigms of this sort serve admirably as templates with which to make predictions about large populations. They are apt for social planning and large-scale policy assessment. So what does economics say to the individual drafting a blueprint for her life? Economics as a model of human behavior is necessarily concerned with model people, not with the aberrant individual. The problem is that every individual is aberrant. That large numbers of older people, taken as a class, will likely, again as a class, invest less and less in their human capital as they age says nothing about you or me as individuals. Nor does Posner (pumping out high-octane intellectual goods daily at age 64) argue otherwise. He does not purport to model the individual, because modeling individuals is not the stuff of economics.

Economic models are reminiscent of the law's "reasonable man." No such creature has ever existed, and if he did, he would be a dreadful bore at a cocktail party. Such fictional constructs are necessary tools in understanding how things work. Seen as a prism through which to view human interaction, *homo oeconomicus* is a useful guide to prediction. Useful, as long as we acknowledge that the construct is fictional.

Fictions are fruitful and multiply. Posner, pondering the aging process, offers another: the young and old person as *separate identities*.²⁶ He takes as his starting point Aristotle's three age-based human models:²⁷ the impetuous, hot-blooded, imaginative young man; the calculating, cautious, experience-laden old man; and the representative of the golden mean, i.e., the man in his prime, whose character combines the best of the young and the old in salubrious moderation. Posner translates the two extremes in intellectual terms. The young person's mind is dominated by the imagination, what psychologists call "fluid intelligence." The old person's intellect focuses on memory and experience, "crystallized intelligence." Thus, says Posner, the old are

less likely to undertake creative projects. They are less inclined to invest in job skills, both because their mind-sets are less enterprising and because the payback horizon for the enhanced human capital looms close. Such stick-drawings of the human being are prerequisite to the generalizations of neoclassical economics. Such mock-ups are not always responsive to reality.²⁸

If he sees young John and old John as *separate identities*, Posner can describe decisions made by the young person about his or her old “self” as though they were indeed two people. The value that young John puts on the life situation of old John depends on the discount rate young John assumes for future benefits. If young John has little empathy for the situation of old John, the discount rate will be high, and he will invest correspondingly little in his distant incarnation. And the converse. Safety net programs such as Social Security are a partial response to the common tendency of the young to discount future wealth highly. The high discount bias is common, precisely because the Aristotelian young self is typically optimistic, but inexperienced.

Posner’s progression from the hypothetical separate identities to high discounting may be placing the cart on the wrong end of the horse. It seems more accurate to say that the rate at which future benefits are discounted *creates* the degree of discontinuity between the young and the old self. This may be a semantic distinction without a difference, but it has the virtue of allowing for the differences in rate discounting among individuals and, hence, the degree to which the young self identifies with, or disassociates from, the old self.

Aging and Job Aptitude

The Aristotelian shift in the relative strength of fluid and crystallized intelligence yields a curve of job aptitude. Posner’s curve plots job aptitude against the minimum job requirements.

Here, Posner distinguishes among job types. Low paid, labor-intensive jobs tend to depend almost exclusively on physical condition. The human capital investment is slight, except for the investment in health. Because physical prowess ordinarily declines markedly beyond a certain age, retirement ages for such jobs tend to be lower than for those jobs that depend chiefly on intellectual capital.²⁹ In terms of the curve, participants in labor-intensive jobs meet minimum job requirements at a younger age than do those in intellect-intensive jobs, but also decline below the minimum earlier. Some intellectual jobs, such as scientific research, have a curve that peaks early, then slowly declines, as the participant's mix of fluid (creative) and crystallized (experiential) intelligence changes in favor of the latter. A similar, but more elongated, pattern is seen in academic jobs, where the decline may result less from a predominance of crystallized intelligence than from the reluctance of the older scholar to make the continuing investment in human capital needed to stay abreast of the field. Tenure compensates the jobholder, at the expense of the rest of the academic community, for the decreased marketability that results from this reluctance. Tenure also reduces the incentive to remain competitive by further investment in the holder's human capital.

Posner's calculus leads me to reflect that the same disincentive to invest in human capital often afflicts older lawyers, who may see little payback for the time and effort expended in keeping current. Firms that compensate lawyers based on seniority make the same distributive choices as colleges granting tenure and societies enacting social security. Firms that disregard age and compensate based on productivity and other value-laden services to the firm, offer tax-deferred savings plans, which permit the younger lawyer to provide against his or her decreased value and compensation in later years. Each scheme has its downside. The seniority-based compensation scheme allows the young lawyer to disassociate from his or her older "self" and

assume a high discount rate for future wealth – but at the expense of the other members of the firm. The value-based scheme works for the individual whose discount rate is low enough for him to value future wealth highly, but is perilous for the spend-and-hope-for-the-best mentality that Aristotle suggests is the more usual mind-set among the young.

Judges and Aging

The applicability of the age-aptitude curve to judges, not surprisingly, consumes a full chapter of Judge Posner's book. The tacit syllogism lurking behind Posner's analysis is this:

Major premise: Judging calls more on crystallized (experiential) than on fluid (imaginative) intelligence.

Minor premise: Older judges have greater crystallized than fluid intelligence.

Conclusion: Judges improve with age.

Is this a case of special pleading? Posner sets out tables showing the citation pattern applicable to the opinions of older judges on the Second Circuit Court of Appeals. Focusing on Learned Hand, Posner argues that there is an age-related decline in judicial ability, but that its onset is at “an unusually advanced age.”³⁰ Aside from the objection that Posner's sample is suspiciously small, one could reproach him with some selection bias. The Second Circuit during the Swan/Clark/L. Hand/A. Hand/Medina/Frank era to which he refers is arguably the greatest judicial panel in our history. Would the same conclusion flow from an analysis of, say, the Mississippi Supreme Court of 1933? Posner would have a response. Once again, recklessly driving north on Fifth Avenue, I will venture to put words in his mouth. Posner would, I think, reply that the selection bias is neutralized by a comparison of citations to opinions of the young illuminati with citations to opinions of their older selves. If his model holds true, the same elongated upward curve, followed by a short decline, should prevail. The supporting data,

however, are lacking. With the single example of the Hand Second Circuit, the objection of selection bias remains.

Granted his (supposed) reply, Posner's analysis still begs his Aristotelian hypothesis that aging judges become fitter for the job as the balance of their intelligence shifts toward the experiential. It also creates tension with his avowed judicial pragmatism.³¹ William James, described pragmatism this way: "ideas (which themselves are but parts of our experience) become true just in so far as they help us to get into satisfactory relation with other parts of our experience."³² The task of the pragmatic judge becomes, therefore, the continual rational adjustment of outcomes and the rules they generate to the ever-changing canvas of human activity, needs, and aspirations. Pragmatism must account for shifting moral notions informing the relevant population. The judge faced with a new moral paradigm must consider it as one of the elements that potentially enter into the decision of a particular case that may implicate that paradigm. The majority opinion in *Baker v. State of Vermont*,³³ however one views the outcome or the ratiocinative processes that led to it, was surely a bold example of judicial pragmatism, an effort to bring the law "into satisfactory relation with other parts of our experience," as viewed by the Court. Such decisions necessarily reflect something more than a mere trenching into the judge's experience. Indeed, most appeals comprise facts that are in one or more respects different from what went before. Were that not so, there would be little need for counsel to oppose one another, each with rational arguments pressing for this or that result, arguments each *based* on that which went before. The very act of bringing the particular case's result "into satisfactory relation with other parts of . . . experience" calls upon the judge's ability to analogize, see relationships between concepts, reason logically toward an outcome that comports with common notions of fairness – what Llewellyn called horse sense.

True, the mean age of the Vermont Supreme Court when *Baker* was decided – 54.4 – would not qualify the panel as elderly. In contrast, the mean age of the panel that unanimously decided *Brown v. Board of Education*³⁴ was 63.3. The mean age of the *Roe v. Wade*³⁵ court was 62.1. These few statistics prove nothing, but they challenge the corollary of Posner’s Aristotelian model of older versus younger intelligence, i.e., that older judges are less imaginative and, by implication, less prepared to render decisions with far-reaching social consequences.

The Calculus of Suicide

Posner’s treatment of the young and old person as separate entities³⁶ persists in his treatment of suicide, euthanasia, and geronticide.³⁷ Posner is not insensitive to the inherent moral issues; they are simply not relevant to his economics-based analysis. Still, one blanches at his mathematical calculus in aid of deciding when one should commit suicide or dispatch an old man. For example: a hypothetical person will commit suicide if

$$pU_d > (1 - p)U_h + c$$

or “if the expected utility of death now, which is to say the disutility averted by death now, exceeds the expected utility of life plus the cost of suicide.”³⁸ This formulation, despite one’s initial urge to giggle, concisely reflects the norms of some weighty cultures, e.g., the Roman and the Japanese. Judæo-Christian morality condemns suicide, and the condemnation reaches into modern Western thinking. Posner shakes off ideology in favor of economics. But is economics itself an ideology? Put more generally: is it possible to be value-free? Utilitarianism crouches behind the redoubt of economic analysis, which leads to my initial query: “useful to whom?”

Posner's analysis of suicide/euthanasia/geronticide appears to focus on utility to the individual concerned. Behind it, one suspects, lies a concern about usefulness to the greater society. Of what use to society is a person for whom continued life has lost all value? Posner recognizes the extrapolation of his analysis: he sees a distinction between "personhood" and "identity." For Posner, "personhood" requires "some degree of mentation, not merely a functioning brain stem."³⁹ It follows that a person lacking mentation "may not be entitled to any protection." Posner backs away from the precipice: "I am not comfortable with this argument."⁴⁰ He ascribes his retreat to "unshakable moral intuitions" and "genetic programming."⁴¹

Conclusion

Resort to these concepts reveals more than the author may have intended. Notions of utility are meaningful only insofar as "utility" has content. No norm, such as utility, can exist apart from a context, and the context is fluid – ranging from the individual conscience to the common moral freight of mankind and of all definable subgroups in between. The law seeks to enforce norms, but law is a blunt tool. No formulation that aims at a "common good" can drill down to every facet of the individual moral context. To argue otherwise makes a case for Raskolnikov. As a matter of practical necessity, the law must reach for norms that mediate between irreducible individual moral notions and the need for cohesion of the society the law purports to govern.

Law and economics is a useful template for measuring the efficacy of statutes, rules, and court decisions, where the social unit to be served is defined or understood. How a society calibrates the individual as against the community will determine how society and its lawgivers derive rights and obligations. The calibration is not fixed. It evolves and mutates, as our

constitutional history shows. This fluid modulation of rights and obligations is characteristic of the common-law system, which tends to define justice *ex post*. It differs from the civilian schema, which tends to define justice *ex ante*.

Judge Posner, who recoils from infanticide and geronticide on the strength of “unshakable moral intuitions,” does not tender economics as a straitjacket constricting individual choice. If he did, he would stop using his fluid intelligence – which by now, at age 64, should have largely evaporated – and write no more books and articles. He would, as a fearless seeker after truth, boldly advocate extinction of the socially useless. That he does not shows the limitations of economics as a guide to social engineering, except in an Orwellian society where the calibration of the individual and society has been firmly fixed at one extreme.

As we grow old along with Judge Posner, we see his template as a useful tool for judges and legislators, charged with creating incentives and disincentives to promote the general health, safety, and happiness. We also recognize that lawgivers remain burdened with an ongoing puzzle: defining that group whose good is to be promoted and defining the good itself. Like the tortoise and Achilles, racing in Zeno’s paradox, the goal is never reached. Justice consists in the race itself.

¹ It is prudent not to presume accuracy about this. Like the national debt display in Manhattan, the numbers tend to increase faster than they can be recorded.

² Reported in Paul H. Brietzke & Linda S. Whitton, *An Old(er) Master Stands on the Shoulders of Ageism to Stake Another Claim for Law and Economics*, 31 VAL. U. L. REV. 89, 89 (1996).

³ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (1973, 1977, 1986, 1992, 1998, 2002).

⁴ The Talmud (Tractate MEGILLA, 15a) counsels us to take care always to attribute quotations to the author. The lovely term “jurisprude” was (to the best of my knowledge) coined by my teacher, Karl Llewellyn.

⁵ RICHARD A. POSNER, *PUBLIC INTELLECTUALS: A STUDY OF DECLINE* (2001).

⁶ E.g., Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535 (2000).

⁷ E.g., RICHARD A. POSNER, *SEX AND REASON* (1992).

⁸ RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* (1999).

⁹ RICHARD A. POSNER, *LAW AND LITERATURE* (1988, 1998).

¹⁰ RICHARD A. POSNER, *AGING AND OLD AGE* (1995).

¹¹ For the Holy Writ on this subject, see Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1-44 (1960).

¹² DAVID HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS*, III. 1.

¹³ JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, ch. 8, sec. 101: “it is not at all to be wondered, that history gives us but a very little account of men, that lived together in the state of nature. The inconveniences of that condition, and the love and want of society, no sooner brought any number of them together, but they presently united and incorporated, if they designed to continue together.”

¹⁴ Reduction of justice with the individual as the referent is essentially the “original position” of John Rawls in his THEORY OF JUSTICE (1971). In contrast, group-focused theories of justice have clustered around the sobriquet “communitarianism.”

¹⁵ “[I]n societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees.” OLIVER WENDELL HOLMES, JR., *The Path of the Law*, 10 HARV. L. REV. 61, 61 (1897).

¹⁶ FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (1840).

¹⁷ E.g., RUDOLPH VON JHERING, DER KAMPF UMS RECHT (1872) (available in English as THE STRUGGLE FOR LAW, tr. John J. Lalor (1991)).

¹⁸ “The life of the law has not been logic: it has been experience . . . The substance of the law at any given time pretty nearly corresponds, as far as it goes, with what is then understood to be convenient” OLIVER WENDELL HOLMES, JR., THE COMMON LAW, 1-2 (1881).

¹⁹ See ROSCOE POUND, SOCIAL CONTROL THROUGH LAW (1997 ed.), 39, where law is said to be “no more than what . . . officials do.” See also, KARL N. LLEWELLYN, THE BRAMBLE BUSH 3 (1960 ed.): “The doing something about disputes . . . is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself*” (Emphasis in original). Compare Holmes: “The prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the Law.” *The Path of the Law*, *supra* note 15, at 461.

²⁰ This useful concept originated with ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776), book 4, ch. 2: “[Every individual] intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.”

²¹ *The Path of the Law*, *supra* note 15, at 469.

²² Boswell, remarking on Dr. Johnson’s breadth of knowledge, compared it with that of lawyers: “. . . what we often observe in lawyers, who, as *Quicquid agunt homines* in the matter of law-suits, are sometimes obliged to pick up a temporary knowledge of an art or science, of which they understood nothing till their brief was delivered, and appear to be much masters of it. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON (1759).

²³ *Supra* note 10.

²⁴ GARY S. BECKER, HUMAN CAPITAL (1975)

²⁵ From his DE SENECTUTE, XVIII: “[P]otest enim quicquam esse absurdius quam, quo viae minus restet, eo plus viatici quaerere?” The rendering in English is mine.

²⁶ AGING, *supra* note 10, ch. 4.

²⁷ RHETORIC 1389a-1390b

²⁸ See, for example, a thoughtful and methodical critique of neoclassical economic premises as applied to present-day experience with “rogue” financiers in Charles R. P. Pouncy, *The Rational Rogue: Neoclassical Economic Ideology in the Regulation of the Financial Professional*, 26 Vt. L. Rev. 263-380 (2002).

²⁹ Aristotle tells us that the body is in its prime from thirty to thirty-five, the mind at about forty-nine. RHETORIC 1390b. Adjustment for increased longevity over twenty-three centuries doesn’t blunt the essential point: intellectual decline usually begins later than physical.

³⁰ AGING, *supra* note 10, at 188.

³¹ See, e.g., Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653-1670 (1989-1990).

³² WILLIAM JAMES, WHAT IS PRAGMATISM, Lecture II (1904).

³³ 170 Vt. 194 (1999).

³⁴ 347 U.S. 483 (1954).

³⁵ 410 U.S. 113 (1973)

³⁶ Underscored by the front cover reproduction of Leonardo’s *Old Man and Youth*.

³⁷ AGING, *supra* note 10, ch. 10.

³⁸ *Id.* at 246.

³⁹ *Id.* at 256.

⁴⁰ *Id.*

⁴¹ *Id.* at 257.



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