

# Introduction

This Introduction examines some of the fundamental questions that are explored in more specific contexts in the following chapters of this book, including what is “the law” and what does it have to do—both positively and negatively—with older Americans, their families, the professional health care and human service providers and institutions who care for older persons, and the public policymakers and advocates who establish the legal boundaries within which such care takes place?

## **LAW AS A SOCIAL TOOL (TABLE 1.1)**

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Law is a social process that embodies and symbolizes important public attitudes while at the same time influencing various actions by society. In light of these fundamental social roles, law and the legal system exert an enormous impact on the everyday lives of older persons and those who care for and about them.

### *Types of Law*

The “law” is not one monolithic entity but instead is composed of several distinguishable but interwoven strands. Constitutional law emanates from the written documents that serve as the basic blueprints for the national government and the various states and localities. A constitution, and judicial interpretations of its provisions, spells out the powers and limits of a government as it relates to its citizens. The federal Constitution’s Bill of Rights (the first 10 Amendments) and the Fourteenth Amendment, which extended most of those rights to the state level, explicitly protect

**Table 1.1** Types, Sources, and Functions of the Law

## Types of law

- Constitutional
- Statutory/legislative
- Regulatory/administrative
- Common law

## Sources of law

## Federal government

- Constitution Article I Taxing and Spending Power
- Constitution Article I Power to Regulate Interstate and Foreign Commerce

## State government

- Police power
- Parens patriae* power

## Functions of the law

- Delineate groups' relative social status
- Prevent or mitigate potentially harmful behavior
- Create and finance social programs
- Control production and distribution of resources
- Set and enforce minimum standards of quality
- Establish personal rights

individuals against unwanted official intrusions by limiting the authority of the federal and state governments in important respects. For example, the Fourteenth Amendment's guaranty of equal protection of the laws probably would prohibit a state from enforcing a law that attempted to single out only persons above a specified age for periodic driving reexaminations as a mandatory condition of licensure.

Statutory or legislative law consists of enactments by elected federal, state, and local legislatures operating under constitutional authority. Political ideology and pragmatic considerations greatly influence how elected officials use their constitutional powers to legislate social policy. Among the numerous federal statutes of direct significance to older persons are the Social Security Act provisions on retirement and disability, Medicare and Medicaid health insurance, the Older Americans Act (OAA), various Omnibus Budget Reconciliation Acts (OBRA's), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Age Discrimination Act, the Employee Retirement Income Security

Act, and the Patient Self-Determination Act. Relevant state statutes would include, among many others, those concerning guardianship, advance medical directives, and special treatment of property taxes for older landowners. Older persons are also more likely to be affected by local ordinances concerning fire safety in businesses and dwellings (including assisted living facilities and nursing homes) and minimum age restrictions on who may occupy units in particular types of rental communities.

Often, legislatures pass broadly written statutes (for instance, the creation of a prescription drug subsidy for older persons in the Medicare Modernization Act of 2003). The authority to fill in the crucial specific details pertaining to the implementation and enforcement of such a broad program usually is delegated to administrative (regulatory) agencies that are part of the executive branch of government, such as the federal Department of Health and Human Services or state health or welfare departments. Every public program benefitting older persons is governed pervasively by rules or regulations that have been promulgated as part of the formal administrative lawmaking process.

Finally, common law refers to principles developed by the courts, pursuant to an evolutionary process of case-by-case adjudication, to resolve disputes and guide future conduct in situations where there are no applicable constitutional, statutory, or regulatory provisions. Contemporary laws relating, for example, to medical malpractice mainly come from the common law (although both substantive and procedural principles may subsequently have been modified by, or codified in, statutes).

### *Sources of Legal Authority*

Congress' power to legislate (and, hence, federal administrative agencies' delegated authority to regulate) in areas affecting older persons emanates from two main provisions in Article I of the U.S. Constitution. One section grants Congress the power to collect revenues through taxation and to spend those revenues to promote the general welfare. The Social Security retirement and disability programs, Medicare, and Medicaid are illustrations of government's power to bestow benefits on a specific group while at the same time imposing binding legal obligations on both program beneficiaries and their service providers. The U.S. Supreme Court has specifically rejected legal attacks on Congress' authority to enact the Social Security Act, which is a form of tax (income withholding) program.

Another section of Article I empowers Congress to control interstate and foreign commerce. The ADA and ADEA, for instance, both impose legal duties on employers and service vendors who are engaged (and almost all of them today are so engaged) in some element of interstate commerce.

State legislatures and administrative agencies attain the authority to enact statutes and publish regulations affecting older persons through two inherent governmental powers: police and *parens patriae*. The police power is the state's innate authority to act to protect and promote the general health, safety, welfare, and morals of the community. Laws authorizing involuntary commitment of mentally ill individuals who pose a serious danger to others (e.g., a demented person who subjects his neighborhood to an imminent fire hazard by leaving his stove turned on constantly) are examples of the police power in action. By contrast, *parens patriae* (literally, "father of the country") is the state's innate authority to benevolently protect people who are unable, because of disability, to fend for themselves adequately; guardianship laws, for instance, are justified on this theory.

### *Functions of the Law*

The law as a social tool serves a number of important purposes. First, legal definitions that create distinct groups solely on the basis of their members' chronological age are a clear means of establishing and delineating relative social status. The law can affect the social status of the elderly, either positively or negatively, by requiring others to treat them either equally or preferentially.

Second, the law may seek to prevent or mitigate potentially harmful behavior, for example by requiring automobile seatbelt use or mandating periodic vision examinations for drivers. Similarly, federal regulations require local institutional review boards to evaluate and approve or disapprove (or order the modification of) risk-to-benefit ratios created within biomedical and behavioral research protocols involving human subjects exposed to an undue possibility of harm. An example of such a subject group would be persons with Alzheimer's disease whose desperate families may be willing to consent to almost any experimental intervention carrying even the most remote possibility of benefit.

Third, law is a tool for creating and financing social programs, many of which are either targeted intentionally toward older persons or incidentally

but disproportionately affect the elderly. Medicare and the various health and social services funded under the OAA are examples of this facet of the law.

Fourth, law is an instrument for controlling the production and distribution of particular resources; licensure statutes for professionals and businesses, as well as legislation establishing and funding specific professional education programs, illustrate this role. So, too, do certificate of need laws, which require a satisfactory prior demonstration of public need for a particular health facility (for instance, a nursing home) before the facility may be built or expanded.

Fifth, laws try to ensure that consumers receive services that satisfy minimum standards of quality. Quality control is one of the chief rationales for the professional liability or malpractice tort system currently in place. It is also a justification for licensure and certification laws, such as the parts of OBRA 1987 that set new minimum quality standards for nursing homes and home health agencies receiving federal dollars for their services. Political considerations frequently influence the ways in which quality assurance laws get (or fail to get) implemented and enforced in practice. This is illustrated both by the consistent cooperation between consumer advocacy organizations, federal and state enforcement agencies, and the plaintiffs' personal injury bar on one side and the aggressive political lobbying efforts of the health care industry, especially the nursing home trade associations, on the other.

Finally, law is an instrument for establishing personal rights. Legal rights may be of two general types. Liberties, or negative rights, consist of an individual's shield against unwanted external interference. For instance, a physician is legally prohibited from performing surgery without the informed consent of the patient (or the patient's surrogate) because the patient owns a liberty right or freedom concerning the integrity of her own body. OBRA 1987 and its implementing regulations contain entire sections devoted to the rights of nursing home residents (e.g., rights to privacy, religious practice, and communication) against unwanted intrusions by nursing facilities or their personnel. Conversely, positive rights, or claims, entitle an individual to demand some affirmative benefit from someone else. Social Security, Medicare, and Medicaid create entitlements for designated older persons. So, too, do provisions requiring reasonable accommodations (that is, affirmative action, not just equal

treatment) from employers or businesses serving disabled persons under the ADA.

## LEGAL STATUS OF OLDER PERSONS

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As noted earlier, one function of the law is to assign social status to individuals based on their membership in particular age groups. A major question confronting lawmakers, as the ones who are responsible for formulating and implementing specific public policy choices, is the extent to which laws and policies should differ for people of different ages. Should laws affecting older people reflect the philosophy that (1) the elderly are just like the rest of the population, so that they ought to be assured equal treatment and protection against discrimination, or, alternatively, the view that (2) the elderly as an identifiable group are unique in some relevant manner that compels, or at least justifies, special (i.e., preferential) treatment as compared with everyone else? Both advocates for older persons and lawmakers have been inconsistent on this matter, justifying their actions on both sets of arguments, depending on the particular issue context. The first model of aging and the law embraces liberty or negative rights: the right of the older individual to be protected against unwanted outside interference or unequal treatment. The latter position results in the legislative creation or judicial recognition of entitlements (claims) for the provision of specific benefits that may be enforced by the individual, solely because of his or her membership in a specific age category, against others in the public or private spheres.

### *Equality and Nondiscrimination*

The principles of equal or nondiscriminatory treatment are contained in many laws that may affect various aspects of older persons' lives. Prominent examples include the Age Discrimination Act, ADEA, ADA, state and local ordinances forbidding housing discrimination against the aged, and the removal of age references from most state guardianship statutes pertaining to adults.

The most straightforward illustration of law in this category is the federal Age Discrimination Act passed in 1975. This Act, codified at

42 U.S.C. § 6102, provides the following: “No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance.”

(The ADEA and ADA are discussed in Chapter 10.)

### *Special Needs and Preferential Treatment*

In contrast to the foregoing nondiscrimination laws pertaining to the elderly is a set of laws that, paradoxically, treat older persons collectively as a group that is significantly different from, and presumptively disadvantaged in comparison with, the younger portion of the population. These latter laws represent the development, through legal processes, of programs that provide special, preferential benefits to which older persons are entitled by virtue of achieving a specified chronological age, usually plus satisfying some other qualification such as having a specific work history or present financial need. The movement toward group claims or entitlements, predicated on the presumption of unique needs resulting from old age, has been quite successful. It is exemplified by laws establishing the Social Security retirement system and other public pension programs, Medicare, Supplemental Security Income, social services (including legal services) under the OAA, government housing subsidies for the elderly, and expedited hearings for older litigants in civil lawsuits.

Title 2 of the Social Security Act (42 U.S.C. §§ 401–433 2004), entitled Old Age, Survivors and Disability Insurance, establishes retirement benefit payments for retirees aged 62 and older (the benefit amount increases the longer one waits to claim the benefit) who contributed to the Social Security trust fund by way of Federal Insurance Contribution Act (FICA) payroll taxes during their years of employment. In the same vein are legislatively established public pension programs, using advanced years as one eligibility criterion, for railroad retirees, state and local government retirees, military retirees, and veterans.

Another example of Congress’ authority to collect revenues and then spend them to benefit the elderly as a group is Title 18 of the Social Security Act, created in 1965 as the Medicare program (42 U.S.C. §§ 1395 et seq.). Medicare has evolved through legislative amendment, most recently the 2003 Medicare Prescription Drug, Improvement, and

Modernization Act of 2003, Public Law No. 108–173. Medicare actually is a combination of several federal entitlements (Medicare Parts A, B, C, and D) that subsidize the cost of hospital, hospice, and physician services and outpatient prescription drugs, and to a much lesser extent nursing facility and home health care, rendered to persons aged 65 and older who either have worked and paid FICA taxes for at least 40 calendar quarters or are spouses of persons who have paid FICA taxes for at least 40 quarters. Services may be provided by private or public health care providers. The permanently and totally disabled who qualify for the Social Security Disability Insurance program and persons with end-stage renal disease also are eligible for Medicare.

Passage of the Medicare legislation as a centerpiece of President Lyndon Johnson's Great Society initiative was predicated on a congressional judgment (quite well founded at the time) that older persons, purely by virtue of membership in the elderly cohort, were likely to need public financial assistance to secure meaningful access to acceptable quality medical services. Put differently, advanced age was used in the Medicare legislation as a workable proxy for the inability of many older people to obtain group health insurance (and the lower rates thereby available) once they had terminated employment and were subject to be targeted for expensive individualized premiums, as well as extensive examinations for preexisting conditions. What really was created by Congress and President Johnson, as the recent politics of Medicare expansion has made undeniable, was a vast new middle class entitlement program. This result is not inconsistent with the intent of the original architects of Medicare to use the 1965 legislation as a strategic, incremental first step toward eventual national health insurance, although it is at this point incomplete.

Title 16 of the Social Security Act (42 U.S.C. § 1381) established the federal Supplemental Security Income (SSI) program in 1972, replacing a variety of "old age assistance" means-tested programs that were administered by the states under very minimal federal guidelines. Under the SSI legislation, monthly cash payments are provided to any eligible aged, blind, or disabled persons whose income and assets fall below predetermined amounts. To qualify as an aged person under SSI, an individual must be at least 65 years old.

The SSI program is an excellent illustration of the legal doctrine of federalism, or the appropriate distribution of authority between the federal

(national) government and the various states. The Tenth Amendment of the U.S. Constitution states the following: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” Welfare traditionally was a subject reserved for state action. SSI was an exercise of Congress’ taxing and spending authority to superimpose national welfare standards on the states by essentially paying states to adopt congressionally set standards, because preexisting state provisions and standards varied hugely among the states and were perceived by national policymakers to be deficient in many cases.

The OAA (42 U.S.C. § 3001), enacted in 1965 and subsequently amended during several reauthorization processes, provides federal funds to an extensive nationwide network of State Units on Aging and local Area Agencies on Aging. In turn, these state and local entities pass these funds on to a network of thousands of providers of a variety of social services to older persons, including legal and long-term care ombudsman counseling and representation. Eligibility for most OAA-funded social services is restricted to people aged 60 and older and their spouses, on the theory that membership in that age group can accurately and fairly serve as a substitute for assessing individual need. Consequently, OAA programs do not require participants to prove financial need on an individual basis. In harmony with this philosophy, federal OAA funds are distributed to State Units on Aging largely on the basis of each state’s proportion of the national population 60 years and older. Yet, numerous targeting requirements that do not directly affect an individual’s eligibility for services have been included in amendments to the OAA passed since the late 1970s. For example, intrastate funding formulas developed by each state, through which State Units on Aging distribute funds to Area Agencies on Aging, are required by the OAA to favor those local areas that are more heavily populated by low-income and minority elderly, as well as older persons with the greatest need for services. Similarly, providers of OAA-funded services must target low-income and minority elderly, as well as those with the greatest need for their services.

Lawmakers also have assumed that at least a portion of the elderly population requires direct public financial subsidization concerning housing arrangements. Hence, Congress has legislated a variety of rent subsidy and home-owner assistance programs that use age as one criterion

for eligibility. Furthermore, many federal and state housing assistance programs that are age neutral on their faces, in effect indirectly benefit older persons disproportionately because those persons meet financial means-tested eligibility criteria.

State statutes in some jurisdictions (e.g., California) afford older persons preferred status when they appear as plaintiffs in civil litigation by expediting their cases for trial on the court's docket. These statutes are predicated on the presumption that, absent special treatment, older persons as a group may be in danger of being disadvantaged by having their lawsuits outlive them. In many states the advanced age of a crime victim is considered an aggravating factor in determining the severity of the offense and the proper punishment.

The assumption in public benefits programs that age should be treated as an automatic proxy for negative characteristics such as poverty, dependency, vulnerability, illness, and disability has been questioned, both recently and decades ago. As noted by Robert Binstock, the "compassionate ageism" that undergirded the creation of today's age-based programs actually "set the stage for tabloid thinking about older persons by obscuring the individual and subgroup differences among them." Richard Kalish referred to the equation of old age with failure, and hence a need for public beneficence, as "the New Ageism." (Richard A. Kalish, "The New Ageism and the Failure Models—A Polemic," 19[4] *Gerontologist* 398–402 [1979])

## **DOES THE LAW ACCOMPLISH ITS GOALS?**

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A large body of law, which might be termed "geriatric jurisprudence," has been created with the praiseworthy intention of benefitting the older persons toward whose lives these laws are aimed. Insufficient follow-up attention, however, has been directed to investigating whether this intention is always satisfied in actual practice, that is, whether laws that are supposed to improve the quality of older persons' lives really work to achieve that goal. Only recently have scholars begun to use the analytic lens of therapeutic jurisprudence to explore the ways in which the law in practice (as opposed to theory) can exert positive or negative effects on real older people in a variety of tangible contexts, including long-term care regulation,

end-of-life medical care, protection of human research subjects, guardianship and other interventions for the mentally incapacitated aged, and others. Research to date on this question indicates that the effectiveness of the law in these areas is decidedly mixed. The research points to some successes, some failures, and many uncertainties.

To cite but one of many possible examples, most state guardianship statutes have been amended in the last two decades to ensure that proposed wards in guardianship proceedings are ensured the right of representation by legal counsel. Yet, elder law experts have noted a lack of any empirical evidence that appointment of counsel actually has increased the effectiveness of guardianship proceedings (however effectiveness may be measured).

## LOOKING TO THE FUTURE

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A variety of challenging legal questions relating to older persons and the social relevance of age and aging are likely to confront individuals, corporations, public and private agencies, and society as a whole in the coming years. Some of these questions undoubtedly will concern the impact of continued technological advances on medical decision making. Some will revolve around the continued dilemma of balancing the autonomy and safety concerns of older persons, especially as new kinds of acute and long-term care delivery settings keep developing and more people live to a point at which their own decisional capacity becomes impaired. Issues relating to the participation of older persons in the workplace and the consumer marketplace raise a panoply of possible legal concerns. Changing family roles—for example, increasing numbers of grandparents as primary caregivers for their grandchildren—will necessitate the development of innovative legal responses. Perhaps most profoundly, the growing consciousness among government, private entities, and the general public that financial and human resources to support the health care and retirement income needs of a rapidly aging population are finite, and in many senses shrinking, will challenge lawmakers and the legal system to satisfactorily balance the legitimate, but no doubt sometimes competing, interests of individual elders and other components of our society.

## DISCUSSION QUESTIONS

1. What characterization of the elderly should be reflected in the law? Should laws affecting older people reflect the philosophy that (1) the elderly are just like the rest of the population, so that they ought to be assured equal treatment and protection against discrimination, or, alternatively, the view that (2) the elderly as an identifiable group are unique in some relevant manner that compels, or at least justifies, special (i.e., preferential) treatment as compared with everyone else? See Marshall B. Kapp, Age-specific public programs, *Encyclopedia of Ageism* (pp. 30–32) (Erdman B. Palmore, Laurence Branch & Diana K. Harris, eds.), Binghamton, NY: Haworth Press (2005).
2. The text above discusses the constitutional principle of federalism. Should government concern and intervention regarding the health and welfare of older persons take place mainly at the national, state, or local level?
3. When “compassionate ageism” and the “new ageism” equate aging with failure and need, to what extent are these concepts accurate? In other words, to what extent are vulnerability and dependency real, serious problems for older persons, their caregivers, or society, such that these characteristics ought to be incorporated into public policy relating to the aged?

For better or worse, the law and legal processes, as powerful reflections, protectors, and shapers of social values, play a central role in the lives of older persons and those who care for and about them. A central question is whether in formulating, interpreting, and enforcing the law, chronological age ought to be treated by legislatures, regulators, and the judiciary as a material, indeed an important, or even determinative, consideration, or by contrast as a factor that should best be rejected and ignored as irrelevant or even harmful.

A good summary of the OAA is found at *The Basics: Older Americans Act*, National Health Policy Forum (Apr. 21, 2008), available at [www.nhpf.org/pdfs\\_basics/Basics\\_OlderAmericansAct\\_4-21-08.pdf](http://www.nhpf.org/pdfs_basics/Basics_OlderAmericansAct_4-21-08.pdf). For a description of the structure and functioning of the aging services “network” established by the OAA, see *The Aging Services Network: Accomplishments and Challenges in Serving a Growing Elderly Population*, National Health Policy Forum (Apr. 11, 2008), available at [www.nhpf.org/pdfs\\_bp/BP\\_AgingServicesNetwork\\_04-11-08.pdf](http://www.nhpf.org/pdfs_bp/BP_AgingServicesNetwork_04-11-08.pdf).

## THE LAW AND SOCIAL VALUES

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We must begin by distinguishing law from the related areas of public policy and ethics. To a large extent this distinction is artificial. Almost two centuries ago, Alexis de Tocqueville, the great French observer of American society, noted after traveling through this country that “[t]here is hardly a political question in the United States that does not sooner or later turn into a judicial one.”

Nevertheless, and to grossly oversimplify, in a public policy assessment we are asking whether a possible government action, according to a variety of measures, is a good or bad idea and whether it is something that society would be wise to do. Ethics pose normative questions about what we ought to do from the perspective of moral rightness and wrongness. Law (in the form of federal, state, and local constitutional provisions, statutes, administrative rules and regulations, and common law judicial precedent) is the instrument through which we establish the boundaries or parameters within which meaningful discussions about public policy and ethics may take place and then be carried out in a principled manner.

In examining law as a boundary setter or guidepost for the consideration of policy initiatives and ethical dilemmas, there are three key questions. First, what affirmative, positive duties or responsibilities do we impose and enforce on government and/or private actors? When do we *require* that someone act in a particular manner? Second, when there is no legal *duty* to act, what *powers* do we nonetheless afford government and private actors to act if they *choose* to act? Finally, and perhaps most significantly, what legal *restraints* or limits does the law place on the powers of governmental and private actors to protect the liberty and property interests of the individuals who are affected by the actions of governmental or private actors? How

do we legally balance and mediate the conflict that sometimes emerges between public power, on one hand, and private rights, on the other?

Some matters of good public policy and ethical consensus, such as ensuring adequate health care for everyone regardless of age or personal financial means, are not embodied in the law. Conversely, some legal provisions are not totally consistent with wise social policy or the prevailing ethical consensus. Most of the time, however, in a functioning democracy, the law *does* embody sound, morally defensible public policy choices.

A paradox of freedom is that its protection and perpetuation depend on the shared security provided by a strong, functional legal system and a populace committed to it. True freedom depends on our ability to rely on the legal system for protecting the right to contract with others, safeguarding of personal liberties and property interests, delineating clearly the relationship between individual and social responsibilities, and punishing wrongdoers to incapacitate and deter them from future misdeeds. These functions of the legal system all affect the well-being of older persons and, not incidentally, comprise the basic content of the required first-year curriculum in every American law school.

In performing its role of civilizing society, the law reflects, promotes, and helps to shape social norms or values. First, the law *reflects* and embodies prevailing social attitudes by codifying or enshrining them with a formal, official, and enforceable status. Medicare, for example, exists because Congress has enshrined the prevailing social consensus about the value of health security for older persons in a detailed set of obligations, powers, and entitlements. Some people get impatient with the law when it lags behind the solidification of social and ethical consensus on a particular issue. Stem cell research and cloning are good examples; both are areas where many commentators have expressed concern that we presently do not have adequate laws in place to deal comprehensively with rapidly changing and controversial scientific possibilities. However, the very fact that both the science and accompanying social attitudes about the conduct and use of that science are in a highly dynamic state argue for caution in rushing to enact law in these and similar areas before a firm social consensus on the basic value questions has been achieved.

Second, the law *promotes* social values by enforcing its provisions, ultimately through the use of force if necessary. If one decides to disobey

the law, he or she does so at peril to his or her own physical and economic well-being. The availability of enforceable sanctions is one of the law's distinguishing characteristics; philosophers may try to convince us to behave in certain ways, but ultimately they cannot fine or put us in jail. This is precisely why it is the legal system to which we turn in those unfortunate circumstances when less intrusive alternatives fail and push necessarily comes to shove.

Third, the law helps to *shape* social values by acting as a grand educator—albeit not infrequently one with a heavy and intrusive fist. Sometimes people who are forced, under penalty of law, to behave in particular ways undergo a reluctant attitude transformation as a result; in spite of themselves, they internalize the norms undergirding a specific law. For instance, the OBRA 1987 implemented regulations forcing nursing homes to radically change their practices regarding the use of physical and chemical restraints on their residents. In the early days of OBRA, great consternation and teeth-gnashing prevailed throughout the nursing home industry about the anticipated disastrous impact of this law on facilities and unrestrained residents. In fact, although early compliance often was begrudging, clinical practice regarding the use of restraints has changed enormously for the better, and nursing home professionals have learned that, when properly done, the reduction or elimination of restraints in most cases can and should be accomplished to benefit everyone concerned. Hospitals, in turn, have learned from the long-term care experience and altered their restraint practices as well.

## CONTENT OF THE LAW AND THE ROLE OF AGE

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The discussion thus far has dealt chiefly with the *functions* or *jobs* of the law. To fulfill these multiple functions, laws require *content*. Laws need to be *about* something. One fundamental issue is how, if at all, the law's content ought to reflect the phenomenon of age. In shaping and enforcing laws, to what extent is age *material*, that is, potentially making a meaningful difference in the outcome? To what extent may we object that age is irrelevant?

## DISCUSSION QUESTIONS

1. Do you believe that lawmakers, including judges, ought to take chronological age into consideration in making, interpreting, and enforcing the law? What relevant difference does age make for either an individual or a whole group? See Howard C. Eglit, *Elders on Trial: Age and Ageism in the American Legal System*, Gainesville, FL: University Press of Florida (2004).
2. Do you agree that, most of the time, the law embodies sound, ethically defensible public policy relating to older persons? Can you give examples of exceptions to this statement?
3. Can you give other examples (besides the one of restraint use in nursing homes) of situations in which the law has actually been able to change people's attitudes?

For older individuals and their families establishing a comfortable, ongoing working relationship with a qualified attorney—akin to the ideal relationship forged between patient and primary care physician—is essential. Elder law has become a recognized specialty. Among places to seek out recommendations for an appropriate attorney are one's physician (especially if the physician has a large geriatric practice), the social worker at health facilities or agencies with which the caregiver has contact, the local area agency on aging, local organizations such as the Alzheimer's or Parkinson's disease associations, and, most prominently, other caregivers who are in similar situations and have successfully found legal counsel. Most local bar associations operate lawyer referral services; if this resource is used, the caregiver should ask specifically for the names of attorneys who specialize in elder law. The National Academy of Elder Law Attorneys (NAELA) maintains a geographical roster of certified elder law specialists as well as state affiliates. Selecting an attorney who has achieved NAELA certification and membership in the state affiliate should be highly encouraged when a family caregiver is searching for legal counsel.

## DISCUSSION QUESTIONS

How will you prepare yourself to assist older patients/clients and their families to locate and secure the professional services of qualified legal counsel in their vicinity? For assistance, see National Academy of Elder Law Attorneys, [www.naela.org](http://www.naela.org); American Bar Association Commission on Law and Aging, [www.abanet.org/aging](http://www.abanet.org/aging); American Association of Retired Persons (AARP), [www.aarp.org/research/legal-advocacy](http://www.aarp.org/research/legal-advocacy); and National Senior Citizens Law Center, [www.nsclc.org](http://www.nsclc.org).

## NOTES

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