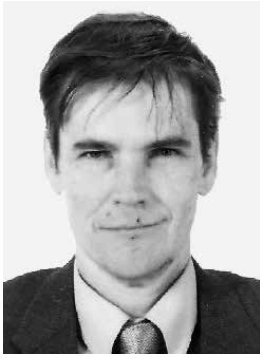
The Social Consequences of Aging and Elder Law in the United States

By John Thomas McGuire



John Thomas McGuire

A practicing attorney and an award-winning historian, John Thomas McGuire is a 1991 *cum laude* graduate of the State University of New York at Buffalo Law School.

His practice concentrates on elder law issues and criminal defense. He also served as a trial attorney for the United States Department of Justice Tax Division under the Attorney General's Honor Program.

After earning a doctorate in United States history at the State University of New York at Binghamton in 2001, Mr. McGuire wrote book reviews and articles for journals such as the *Journal of American History* and *The Journal of Southern History.* In October 2005 he received the Philip S. Klein *Pennsylvania History* Article Prize. He has also taught at a wide variety of state universities and community colleges in the upstate New York area.

Mr. McGuire is currently the president of the Albany, New York Torch Club, before which this article was first presented on January 6, 2014.

The author wishes to thank Jack Reilly and Patricia Fishbough for their editorial comments and assistance.

Social developments can occur very rapidly or, as is usually the case, slowly but steadily. The second type of development often involves changes that are less noticeable but more far-reaching, such as the aging of a substantial percentage of the United States population and the corresponding growth of elder law into a major legal field. Among the pressing questions arising from these developments are (1) the feasibility of meeting future retirement obligations and sustaining the employability of elderly persons in an extremely competitive job market and (2) the possibilities of mental or physical incapacitation as a person reaches elderly status, defined for purposes of this article as a person at least 65 years old.[1]

This national aging carries consequences far beyond the trend's obvious demographic influence.

Aging in the United States

Although Mark Twain once quipped that there were three types of lies—"lies, damned lies, and statistics"—a look at this nation's population statistics is an essential component of understanding the increasing aging of our citizenry.[2]

The United States' total population, according to the 2010 census, now officially stands at 308.7 million people, a 9.7 percent increase from the population of 281.4 million in the final 2000 census tabulations ("Population Distribution and Change"). The Census Bureau does not release figures based on generational parameters, but if we use commonly accepted generational definitions and extrapolate from percentages established in 2013, we can obtain a fairly accurate picture of the current population as divided by generations.

According to this author's calculations, twelve percent of the population in the United States, or 37 million, belonged to the "Silent Generation" (born between 1926 and 1945) or was born before 1926; twenty-four percent, or 74 million, belonged to the "Baby Boomer" generation (born between 1946 and 1964); sixteen percent, or 49 million, belonged to the "X" generation (born between 1965 and 1984); and forty-eight percent, or 148 million, belonged to the "Millennial" (born between 1985 and 2000) and "Z" generations (born between 2000 to 2013). Thus approximately 111 million people, or thirty-six percent of the United States population in 2010, were either elderly or would reach elderly status by 2030. Not surprisingly, the Census Bureau did note in one of its 2010 supplements that elderly persons comprise the United States' quickest-growing age group for the first time in our country's existence.[3]

This national aging carries consequences far beyond the trend's obvious

demographic influence. Although television and Internet commercials usually feature sleek young people driving the manufacturer's new automobiles, commercial fantasies do not reflect economic realities: elderly, or near-elderly Americans exert a formidable economic power. Recent reports estimate that the Baby-Boomer generation controls at least eighty percent of all personal financial assets and undertakes over fifty percent of all consumer spending in the United States. Persons between the ages of 50 and 68 also buy seventy-seven percent of all prescription drugs and sixty-one percent of over-the-counter drugs. Thus the aging of the United States carries considerable economic and social consequences (Halbert; "Aging Population").

The Development of Elder Law in the United States

The development and expansion of a legal field known as "elder law" is a predictable response to the market created by the "graying" of the United States, but the growth of this field reflects much more than commercial expediency. From 1954 through 1975, the United States underwent what most scholars now call a "rights revolution," where the individual rights of such groups as African Americans and women received unparalleled statutory and legal consideration. Legislation such as the 1964 Civil Rights Act and cases such as *Roe v. Wade* not only expanded these groups' rights, but made other citizens more aware of their constitutionally guaranteed rights. Elderly citizens quickly acted upon this new awareness. The Older Americans' Act (OAA) of 1965 established senior citizens' law programs, while the subsequent creations of the National Senior Citizens' Law Center and the establishment of the Commission on Law and Aging for the American Bar Association (ABA) increased awareness within the legal profession of the necessity to create practices specifically tailored to elderly citizens. By 2014 approximately thirty-nine state bar associations established elder law committees, and in 1988 the need for comprehensive standards prompted the formation of the National Academy of Elder Law Attorneys (Epp; Sabatino).

Recent reports estimate that the Baby-Boomer generation controls at least eighty percent of all personal financial assets and undertakes over fifty percent of all consumer spending in the United States.

Legal fields not only confront the problems of clients within the United States' court and administrative systems, but also try to resolve social consequences. That holds quite true for the field of elder law.

Meeting Financial Obligations and Maintaining Employability

Two questions become central when a person enters his or her seventh decade of life: how do I support myself during a retirement that may last more than twenty years, and if I need to or want to, how can I still find means of employment?

The increasing complexity of answers to the first question is well-documented in a 2013 Associated Press article entitled, "Global Crisis Is On The Horizon for Those Approaching Retirement." The headline readily captures the extent of the crisis, which began well before the 2008 financial near-meltdown and the ensuing "Great Recession," but worsened after these twin economic traumas.

The AP headline is unfortunately all the more applicable due to the changing nature of private retirement systems over the past forty years. In 1974 Congress passed the Employment Income Retirement Security Act (ERISA), which allowed the creation of "defined contribution" plans, where the employer and employee contribute agreed-upon monthly amounts to a retirement plan. Over the next thirty years, a substantial number of private corporations shifted away from "defined benefit" plans, or guaranteed corporate pension benefit arrangements, to newly created defined contribution plans, particularly the now common "401(k) plan" (Saglik; see also "Private Pensions").

The major disadvantage of such deferred contribution plans lies in the volatility of their assets. Instead of a guaranteed monthly pension benefit, the 401(k) plan's income depends on market investments. When such assets lose value, the 401(k) plan participant naturally suffers corresponding losses in his or her retirement portfolio. This is what occurred *in extremis* between 2007 and 2009, when retirees in the United States lost an estimated $2.8 trillion in their 401(k) plan assets due to the stock market's loss of over fifty percent of its value. Although stocks rebounded by early 2013, this only occurred, in the words of one study, after older workers experienced nearly six years of "no return on their equity investments" (Munnel and Rutledge 6).

Moreover, a worker's ability to receive a guaranteed retirement pension may be abrogated by his or her former corporate employee. As evidenced by the 2005 transfer of United Airlines' pension plans for its retired pilots and

stewardesses, the Pension Benefit Guaranty Corporation (PBGC) is becoming the recipient of a growing number corporations' defaulted defined benefit plans. The PBGC's ability to uphold the vested pension rights of approximately 44 million private corporate employees in the United States is in serious doubt; the federal agency's 2012 budget deficit of $34 billion remains unchanged today (Skertic; Fletcher).

Nor can prospective retirees securely look towards other, private financial alternatives to accruing interest on principal secured for such an eventuality. The interest rates of bank and credit union savings and Certificate of Deposit Accounts considerably decreased between 2007 and 2012, to the extent that present day interest rates for such accounts barely hover over one percent.

A third factor complicating the retirement situation facing elderly Americans is the increasing strain on the public infrastructure of retirement benefits in the United States. The 2014 report issued by the Medicare and Social Security program trustees bluntly states that neither program "can sustain projected long-run program costs in full under currently scheduled financing." The trustees cite declining monetary reserves for both programs and, ominously, a predicted expansion in cost "substantially in excess" of the estimated increase in the United States' Gross Domestic Product from 2014 through the 2030s. This is hardly a comforting development in the face of Medicare and Social Security retirement benefits accounting for forty-one percent of present-day federal governmental budget expenditures (Miller; Social Security Administration).

What is the general effect of all the combination of all these developments and forecasts? Simply put, the effect means that a worker will have to increase 401(k) investments, if possible; increase personal savings; work part-time even in retirement; and finally, as a last resort, delay retirement for at least a few years beyond age 65. Complicating this last resort is the difficulty of finding employment in one's sixties. While the passage of the Age Discrimination in Employment Act of 1978 represented a victory for opponents of mandatory retirement ages, legislative protection cannot totally eliminate economic realities. Companies now consider persons over the age of 50 as "damaged goods" for two reasons: they are commonly, if unfairly, perceived as being unfamiliar with new technologies, and in addition, younger workers receive lower compensation and benefits. Charges of age discrimination, moreover, meet with little sympathy among workers under 30 facing the worst job market for their group since the 1930s (O'Donnell; Tugend; Boyer).

While the passage of the Age Discrimination in Employment Act of 1978 represented a victory for opponents of mandatory retirement ages, legislative protection cannot totally eliminate economic realities.

In these complex circumstances, elder law practitioners must practice the utmost flexibility in reaching solutions to their clients' problems. In a 2012 article, Charles Sabatino, director of the ABA's Commission on Law and Aging, identified three areas that distinguish elder law from traditional legal practices: the field concentrates on issues that come from living a longer life, rather than just the circumstances surrounding one's death, as with trusts and estates law; the field integrates legal planning and problem solving into a larger mosaic of personal needs, ranging from housing to personal autonomy and quality of life; and finally, the specialty strives for an interdisciplinary planning perspective through the viewpoints of several different professionals, such as geriatric managers, case workers, health care practitioners, and financial planners. Elder law practitioners must take non-legal as well as legal factors into account when considering their clients' situations (Sabatino).

Incapacitation

Mental and physical incapacitation is the most painful issue faced by elder law. The rising incidence of Alzheimer's, which is predicted to increase by seventy percent in the next twenty-five years, means approximately ten percent of elderly Americans, or seven million people, may ultimately be affected by the disease (Alzheimer's Association). With no definite cure for such a condition apparently near fruition, any analysis of incapacitation has to address, first, the need for living assistance facilities or nursing homes, and second, the need to provide legal guardianships for incapacitated persons.

Studies estimate that one out of four elderly Americans will have to spend at least a year in a nursing home or assisted-living facility, and that one out of eleven will have to spend at least five years in such facilities. All in all, close to half—43 percent—of elderly persons in the United States will use a nursing home at least one time in their lives (Strauss and Lederman 41). In most cases, the financial costs of entering a nursing home become the primary factor in undertaking such an important step. Such facilities, ranging from

a semi-private room in a nursing home to a bedroom in an assisted living facility, can cost from $3,300 to $6,325 a month (Longtermcare.gov).

In the last twenty years, the Medicaid program has become critical to elderly persons' long-term care needs. This federal government resource, first established in 1965 to provide health insurance for under-65 persons who qualify under mandated income requirements, is now used by an estimated sixty percent of all nursing home and assisted living facility residents. But like its Social Security and Medicare counterparts, the Medicaid system faces increasing strain.

In the last twenty years, the Medicaid program has become critical to elderly persons' long-term care needs.

The program's spending rose between five and seven percent annually between 2007 and 2011 as the Great Recession's financial exigencies swelled recipient rolls. Although program spending finally leveled off in 2012, financially bereft state governments increasingly shifted more of the Medicaid costs shared with the federal government to counties and municipalities. County executives and municipal mayors began facing increasing agitation over subsequent steep increases in property and sales taxes partially prompted by the Medicaid quandary, yet avoided directly discussing the issue due to the formidable electoral and economic power of elderly constituents.

If current expenditures continue to increase at their current rate, Medicaid will expend $346 billion in elderly long-term care expenditures by 2040, as contrasted to a liability of nearly $208 billion in 2010. The current reactions of the political system to the growing problem do not bolster one's confidence in its ability to undertake even a partial solution.[4]

Even before these recent budgetary complexities, the spiraling costs of both private elderly facilities and Medicaid reimbursements prompted the United States Congress to take action in the Deficit Reduction Act of 2006. Applicants seeking reimbursement for their private elderly facility costs must now undertake a "look back" scrutiny of their asset transfers for the past five years. How does this rule work? To illustrate, imagine that a Mrs. X transferred $50,000 in money to her three children from May 4, 2009 to May 4, 2014 (which encompasses the period of five years dating back from the date of Mrs. X's application for Medicaid reimbursement.) Unfortunately, none of Mrs. X's children exchanged services or assets of equal value for the monies received. Medicaid officials would therefore take the $50,000, now defined as gifts, and divide the amount by the average cost of nursing home care in Mrs. X's state (say, $4,000 a month). The result, 12.5, would be the time period in months that Mrs. X could not receive any Medicaid reimbursement. Thus elderly people today must take steps with their elder law attorney to avoid such penalties, such as creating trusts or by not making any gifts (see Russell 92-93).

The necessity of a legal guardianship is another facet of the complexity of possible mental/physical incapacitations of elderly persons. Rules vary from state to state; in New York, this situation is covered by Article 81 of the New York Mental Hygiene Law, passed into law in 1992 as a successor to a system sometimes criticized for too easily allowing families to control the affairs of allegedly incapacitated person, especially with involuntary hospitalizations. A New York Surrogate Court judge considering the appointment of a legal guardian must now specifically consider the needs of the person who may be incapacitated. As the first subsection of Article 81 states, the statute is intended to address the needs of persons with diverse incapacities by providing flexibility to meet the needs of the person while at the same time allowing the incapacitated person "the greatest amount of self-determination and independence and participation in decisions affecting his or her life" ("New York Mental Hygiene Law"; see also Posner).

But as with legislation prohibiting age discrimination in employment, well-meant laws cannot totally remove all of life's vagaries. Article 81 does not resolve two important factors: the costs of establishing legal guardianships in the appropriate court system (currently $15,000 to $25,000, in the author's experience) and most important, the difficulties of aging caretakers. The author is familiar with a case in which a retiree became the direct caretaker of his mother, now in her nineties. Living on a fixed income, and being the only child, the caretaker became increasingly financially and emotionally straitened. The end result: the mother's lawyer arranged a personal services contract for the child/caretaker. This case again specifically demonstrates how elder law practitioners must look beyond the usual legal boundaries to find solutions for their clients.

Conclusion

An aging population and the development of a legal field specifically tailored for that reality gives rise to two important social issues: how elderly citizens in the United States can meet their retirement needs and, if necessary, maintain their employability, and how

such citizens can deal with the complex legal thicket surrounding their possible mental and/or physical incapacitation. This article barely touches the true depth of issues surrounding such factors (one could spend another ten pages discussing pharmacological issues), but affords a glimpse of the breadth and complexity of the questions facing a growing number of citizens in the United States.

Notes

1 I define the term "elderly" as encompassing persons age 65 or older for two reasons: this is the generally accepted age, at present, when persons in societies in the United States and Europe become eligible to receive full retirement benefits such as pensions and social security, and my definition also reflects the World Health Organization's decision to define 'elderly persons' as persons 60 years of age and older. See "Definition of An Older or Elderly Person," World Health Organization, accessed November 2, 2014, http://www.who.int/healthinfo/survey/ageingdefnolder/en/.

2 Mark Twain, *Autobiography, Volume I* (Berkeley, California, Los Angeles, and London, 2010), 228. He, however, attributes the quotation to the late British Prime Minister Benjamin Disraeli.

3 "Population Distribution in the United States by 2013, by Generation," accessed November 2, 2014 http://www.statista.com/statistics/296974/us-population-share-by-generation. The specific generational percentages and groups, as well as the overall population, come from numbers rounded to the nearest tenth. The generational definitions follow those established in Strauss and Howe, *Generations: The History of America's Future.* See also Introduction, Donald E. Heller and Madeleine B. d'Ambrosio, eds., *Generational Shockwaves and the Implications for Higher Education and "The Older Population: 2010" in 2010 Census Briefs.*

4 This discussion draws on "Policy Basics: Introduction to Medicaid," from the Center on Budget and Policy Priorities.com; Katherine Young, Lisa Clemens Cope, Emily Lawton, and John Holahan, "Medicaid Spending in the Great Recession and Its Aftermath, FY 2007-2012"; the Government Accounting Office report, "Medicaid Financing: States' Increased Reliance on Funds from Health Care Providers and Local Governments Warrant Improved CMS Data Collection"; "Local Government and School Accountability," from the Office of the New York State Comptroller; and the SCAN Foundation fact sheet, "Who Pays for Long-Term Care in the U.S.? (Updated)." Further details are in the entries under "Works Cited."

Works Cited

"Aging Population Means Changing Workforce Needs." HealthPartners.com. Web.

Alzheimer's Association. "Fact Sheet." Alz.org. Web.

Boyer, Dave. "Under-30 Unemployment Rate at 11.8 Percent." *Washington Times,* 5 October 2012. Web.

Center on Budget and Policy Priorities. "Policy Basics: Introduction to Medicaid." Cbpp.org. Web

Epp, Charles R. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective.* Chicago: University of Chicago Press, 1998. Print.

Fletcher, Michael A. "Pension Guaranty Benefit Corporation Running $34 Billion Deficit," *Washington Post,* 12 November 2012. Web.

_____. "Why More Companies Want Pensions Off Their Books." *Washington Post,* 21 July 2014. Web.

"Global Crisis Is On The Horizon For Those Approaching Retirement." Associated Press, 29 December 2013. Web.

Government Accounting Office. "Medicaid Financing: States' Increased Reliance on Funds from Health Care Providers and Local Governments Warrant Improved CMS Data Collection." Report 14-627 (July 2014). Web.

Halbert, Gary. "Will Baby Boomers Wreck the Market? A Sequel." *Forecast and Trends E-Letter.* Web.

Heller, Donald E. and d'Ambrosio, Madeleine B., eds. *Generational Shockwaves and the Implications for Higher Education.* Northampton, Mass.: Edward Elgar Publishing, 2008. Print.

Longtermcare.gov. "Costs of Care." United States Department of Health and Human Services. Web.

Miller, Mark. "Retirees: Have you checked bank CD rates lately?" Reuters.com. Web.

Munnel, Alicia H., and Rutledge, Matthew S. "The Effects of the Great Recession on the Retirement Security of Older Workers." *National Poverty Center Working Paper Series* #13=03 (March 2013) Web.

"New York Mental Hygiene Law Article 81: Proceedings For The Appointment Of A Guardian For Personal Needs Or Property Management." Nycourts.gov. Web.

O'Donnell, J.T. "Why Older Workers Should Expect Age Discrimination," *AOL Jobs Online.* 24 December 2013. Web.

Office of the [New York] State Comptroller. "Local Government and School Accountability." Web.

"The Older Population: 2010." *2010 Census Briefs.* Web

"Population Distribution and Change: 2000 to 2010." *2010 Census Briefs.* Web.

Posner, Neil B. "The End of *Parens Patriae* In New York: Guardianship Under The New Mental Hygiene Law Article 81." *Marquette Law Review* 79 (1996), 603-645.

"Private Pensions: Increased Reliance on 401(k) Plans Calls for Better Information on Fees." Washington, D.C.: General Accounting Office, 2007. Web.

Russell, Joan M. *The Complete Guide to Medicaid and Nursing Home Costs: How to Keep Your Family Assets Protected.* Ocala, Florida: Atlantic, 2008.

Sabatino, Charles. "The Longevity of Elder Law." *BiFocal: A Journal of the ABA Commission on Law and Aging,* 33:6 (August 2012). Web.

Saglik, Yildiz. *Corporate and Private Pension Plans in the United States: A General Abstract.* Hamburg: Diplomica, 2010. Print.

SCAN Foundation. "Who Pays for Long-Term Care in the U.S.? (Updated)." Scan Foundation Fact Sheet, January 2013. Web.

Skertic, Mark. "United Wins Approval To Dump Pension Plans." *Chicago Tribune,* 11 May 2005. Web.

Social Security Administration. "A Summary of the 2014 Annual Reports, Social Security and Medicare Boards of Trustees: A Message to the Public." Ssa.gov. Web.

Strauss, Peter J. and Lederman, Nancy. *The Complete Retirement Survival Guide: Everything You Need to Know to Safeguard Your Money, Your Health, and Your Independence.* New York: Facts on File, 2003. Print.

Strauss, William, and Howe, Neil. *Generations: The History of America's Future.* New York: William Murrow, 1991. Print.

Tugend, Alina. "Unemployed and Older, and Facing A Jobless Future." *The New York Times,* 26 July 2013. Web.

Young, Katherine, Lisa Clemens Cope, Emily Lawton, and John Holahan. "Medicaid Spending in the Great Recession and Its Aftermath, FY 2007-2012." The Kaiser Commission on Medicaid and the Uninsured (July 2014). Web.

The publication of this article is funded by The Torch Foundation