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## Book Review: Elders on Trial: Age and Ageism in the American Legal System

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**REVIEW OF: ELDERS ON TRIAL: AGE AND AGEISM  
IN THE AMERICAN LEGAL SYSTEM, BY HOWARD  
EGLIT. UNIVERSITY PRESS OF FLORIDA (2004), 315  
PAGES, \$49.95 (HARD COVER).**

**Reviewed by Olivia M. Wong\***

**INTRODUCTION**

What makes *Elders on Trial*<sup>1</sup> unique is its uncompromising focus on the impact of an aging America on our legal system and its key players – plaintiffs, defendants, witnesses, jurors, as well as attorneys and judges.<sup>2</sup> Howard Eglit defines ageism as a “‘bias’: a skewing of attitudes and actions that typically (but not always) either works to the detriment of the subjects of those attitudes and actions or makes problematic ‘accurate’ treatment of oldsters . . .”<sup>3</sup> He asks provocative questions such as how ageism implicates problems and issues for our legal system in ways that we may not have heretofore seriously considered or acted on. Indeed, his broad thesis is that the growing elderly population will greatly increase the encounters of older people in the legal system.<sup>4</sup>

Professor Eglit's narrower thesis, but wider concern, is that the age factor can work to elders' disadvantage in the legal setting.<sup>5</sup> Throughout the book, Eglit raises important questions of fairness with utmost urgency since “there is little time left . . . to resolve the issues generated by a burgeoning population of older Americans intersecting with the pervasive American legal

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1. HOWARD EGLIT, *ELDERS ON TRIAL: AGE AND AGEISM IN THE AMERICAN LEGAL SYSTEM* (University Press of Florida 2004) [hereinafter *ELDERS ON TRIAL*].

2. *Id.* at 3.

3. *Id.* at 24.

4. *Id.* at 5.

5. *Id.*

enterprise."<sup>6</sup>

*Elders on Trial* is divided into two substantial, well-referenced sections. In the first section, chapters two through four, Eglit provides a useful review of the phenomenon of age in American society and the likely sources of age bias. In the second section, chapters five through nine, he specifically explores the role of age and the treatment of aging persons in the legal system.

### PART I: A REVIEW OF THE PHENOMENON OF AGE AND AGEISM IN AMERICAN SOCIETY

Professor Eglit begins by setting the stage and letting the demographics speak for themselves. Fifty years ago, 12.4 million men and women over the age of sixty-four constituted 8.1% of the United States population.<sup>7</sup> By mid-2004, the number of elders tripled to about 36 million.<sup>8</sup> By mid-2030, 70 million older adults or 20% of the projected population are estimated.<sup>9</sup> The demographic revolution we are experiencing has profound implications on our society. While impressive efforts have been made through legislation and judicial rulings, which have benefited the elderly, the progress made to date has not been enough nor has it been happening fast enough.<sup>10</sup> Looking forward, the first wave of "baby boomers turning sixty-five in 2011, promises to demand even more numerous and more intense responses from the American legal system . . ."<sup>11</sup>

### AGEISM IS DIFFERENT FROM OTHER -ISMS

When the wave of demographics and the forces of ageism converge, the effect is that "ageism . . . infects us all."<sup>12</sup> While positive notions of old age exist, "grimmer scenarios" of aging

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6. *Id.* at 3.

7. ELDERS ON TRIAL, *supra* note 1, at 1 (citing U.S. Bureau of the Census, *Projections of the Total Resident Population by 5-Year Age Groups, and Sex with Special Age Categories, Middle Series, 2001 to 2005* (Jan. 13, 2003)).

8. *Id.*

9. *Id.* at 1 (citing U.S. Bureau of the Census, *Projections of the Total Resident Population by 5-Year Age Groups, and Sex with Special Age Categories, Middle Series, 2025 to 2045* (Jan. 13, 2003)).

10. *Id.* at 2.

11. *Id.*

12. *Id.* at 13.

tend to dominate.<sup>13</sup> “[O]ld age is seen and experienced . . . as a stage of life devoid of quality, purpose, and meaning . . . .”<sup>14</sup> Pejorative terms like *old bag*, *fossil*, and *geezer* used to describe older adults, reinforce these negative stereotypes.<sup>15</sup> A more subtle, but no less demeaning, image of the elderly is the “infantilization” of the old.<sup>16</sup> Older people are portrayed as children who have tantrums and juvenile attributes such as crankiness, silliness, impulsiveness, and recklessness.<sup>17</sup> The damaging impact of such stereotyping lowers older adults’ social status, disempowers them, and can even lead to disastrous personal consequences such as inappropriate medication and unnecessary institutionalization.<sup>18</sup>

Eglit makes a strong point that ageism is a “distinct phenomenon” that is not comparable to racism or sexism.<sup>19</sup> From a non-legal viewpoint, we all experience age, “[u]nlike the white who will never be black . . . .”<sup>20</sup> From a legal standard, ageism is seen as “a less invidious and therefore a more acceptable basis for the allocations of rights, benefits, and responsibilities.”<sup>21</sup> Most notably, this “relaxed view” of age-based decision making is supported by the Supreme Court’s easily satisfied minimum rationality test for age classification under the United States Constitution.<sup>22</sup> In *Massachusetts Board of Retirement v. Murgia*, the Court upheld a mandatory retirement statute that applied to state police officers at age fifty.<sup>23</sup> The Court reasoned that the egregious stereotyping and social history of racial minorities in this country are absent in the case of the elderly.<sup>24</sup> The Court explained that lawmakers, in the

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13. ELDERS ON TRIAL, *supra* note 1, at 9.

14. *Id.*

15. *Id.* at 10.

16. *Id.* at 11 (citing Arnold Arluke & Jack Levin, *Another Stereotype: Old Age as a Second Childhood*, AGING 7, 8 (Aug./Sept. 1994)).

17. *Id.* at 11 (citing Arluke & Levin at 8-9).

18. *Id.* at 11-12 (citing Arluke & Levin at 10).

19. ELDERS ON TRIAL, *supra* note 1, at 22.

20. *Id.* at 54.

21. *Id.* at 15.

22. *Id.* at 17. *See, e.g.,* Smith v. City of Jackson, 125 S. Ct. 1536, (holding that older workers can sue in federal court over claims of “disparate impact” – the loss of wages or benefits enjoyed by younger employees – even if employers’ policies were not meant to be discriminatory).

23. ELDERS ON TRIAL, *supra* note 1, at 17 (citing *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976)).

24. *Id.* “[O]ld age does not define a ‘discrete and insular group,’ in need of ‘extraordinary protection from the majoritarian political process.’ Instead, it marks a stage

interests of protecting their own caring relationships with older people, are unlikely to single out older adults for harmful, differential treatment through discriminatory laws.<sup>25</sup>

But Eglit takes issue with the Court's reasoning because it is overly optimistic in its assessment of human nature.<sup>26</sup> First, the Court fails to consider the psychology of the non-old. While intellectually, youth and middle-aged persons know the inevitability of aging, they do not expect to grow old. Instead, the old are "them," and not "us."<sup>27</sup> Second, the Court's implicit assumption that a legislator makes a choice—to hurt the old or not—is naïve. Rather, many factors, beyond aging, go into the decision-making process.<sup>28</sup> Third, one cannot count on legislators to make laws based on their expectation of being old one day. For example, a legislator may vote for mandatory retirement of police officers because he himself is not, nor does he ever intend to be, an elderly police officer.<sup>29</sup>

While Eglit considers age "a less malignant basis" for differentiation than race or gender, he clarifies that it does not make "all age-based distinctions . . . benign," nor are the significance of such distinctions equal.<sup>30</sup> Under the Age Discrimination in Employment Act of 1967 (ADEA), employers with twenty or more employees are not allowed to use age as a basis for making employment decisions.<sup>31</sup> However, the ADEA contains exceptions that make age a factor after all.<sup>32</sup> Moreover, since the ADEA does not apply to employers with less than twenty employees, an inference can be made that age was a "decision-making criterion in smaller workplaces, of which there are millions."<sup>33</sup>

Eglit provides a number of scenarios in which consideration of the age factor is unavoidable. Suppose that sixty-five year old

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that each of us will reach if we live out our normal span." (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)).

25. *Id.* at 17-18.

26. *Id.* at 18.

27. *Id.* (citing Howard Eglit, *Of Age and the Constitution*, 57 CHI.-KENT L. REV. 859, at 890-91 (1981)).

28. *Id.*

29. ELDERS ON TRIAL, *supra* note 1, at 18.

30. *Id.* at 19.

31. *Id.* at 20 (citing 29 U.S.C. § 630(b)).

32. *Id.*

33. *Id.* (citing U.S. Bureau of the Census, *Statistics about Business Size (including Small Business) from the U.S. Census Bureau*, <http://www.census.gov/epcd/www/smallbus.html> (2002)) (last visited at Apr. 12, 2005).

Mr. Grayhead (so named because of his age) is offered a retirement incentive package by his employer, which he voluntarily accepts. He plans to move from his apartment because his rent is not tax deductible and buy a condominium financed with a thirty-year mortgage, the interest of which will be tax deductible. Is it permissible for a potential lender to take into account that actuarial tables predict that a sixty-five-year-old has a life expectancy of 15.9 years and, therefore, Grayhead may not live long enough to pay off his mortgage?<sup>34</sup> In this scenario, age is implicated in ways both positive and negative: Grayhead was offered an attractive retirement package not available to younger workers; yet, his financing option could be considered problematic from the lender's perspective.<sup>35</sup> Therefore, depending on how the age criterion is used in context, "age may be an acceptable factor . . . even a beneficial one[,] for . . . making decisions and imposing obligations."<sup>36</sup> However, Eglit repeatedly cautions us that while it is appropriate to acknowledge age differences in certain contexts, one needs to be aware of subtle biases that cross the line into "them" and "us" under the mask of fairness or accuracy.<sup>37</sup>

#### *MULTIPLE SOURCES OF AGEISM*

Eglit devotes a considerable amount of discussion to the historical sources of ageism as well as to cognitive, psychodynamic, and biological determinism theories to explain ageism.<sup>38</sup> He concludes that cultural conditioning is the most powerful factor because it "re-creates in each generation persistent ageist bias."<sup>39</sup> Eglit posits that potent forces keep ageism alive.<sup>40</sup> In an industrialized culture that stresses productivity, the elderly are seen as being unproductive, their skills are deemed outmoded, and their roles as carriers of tradition are devalued.<sup>41</sup> Older workers are treated as incompetents in the workplace.<sup>42</sup> Our culture also perpetuates

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34. *Id.* at 20.

35. ELDERS ON TRIAL, *supra* note 1, at 21-22.

36. *Id.* at 22.

37. *Id.* at 55.

38. *Id.* at 24-25, 28-42.

39. *Id.* at 27, 53.

40. *Id.* at 27.

41. ELDERS ON TRIAL, *supra* note 1, at 28.

42. *Id.* See, e.g., THE OLDER WORKER 1 (Michael E. Borus et al. eds., 1988).

the notion that older workers are *deadwood* – less creative, less ambitious, and less dedicated to their jobs than younger workers.<sup>43</sup> But Eglit convincingly argues that *deadwood* may be attributable to any age group and may actually be a function of long years in the same workplace.<sup>44</sup>

Another source of ageism derives from the resentment of the non-old towards the recent political and financial successes of the elderly in our country, particularly government entitlement programs like Medicaid, Medicare, and Social Security benefits.<sup>45</sup> Older adults are depicted as “selfishly hogging a disproportionate share of scarce federal dollars”; they are seen as a powerful constituency that controls politicians at the expense of “politically powerless children.”<sup>46</sup> Because it is inevitable that the needs of the elderly will still have to be met, Eglit responds that the real issue is not how much is being spent on them but the source of the money.<sup>47</sup> He argues that in the United States, the preferred source has always been the government as intermediary rather than direct transfers from individuals.<sup>48</sup> Eglit tries to put the resentment issue in perspective by demonstrating that statistics still show that the older one gets, the more likely one will end up in poverty.<sup>49</sup>

## PART II: THE AGE FACTOR WITHIN THE CONTEXT OF THE AMERICAN LEGAL SYSTEM

### *THE MAIN ACTORS: PLAINTIFFS, DEFENDANTS AND WITNESSES*

A growing number of elderly people are going to be involved with lawyers and the courts simply because there are going to be more of them.<sup>50</sup> Even so, Eglit predicts an upsurge in older litigants because the elderly person of today and tomorrow presents a different profile.<sup>51</sup> They are better

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43. ELDERS ON TRIAL, *supra* note 1, at 29.

44. *Id.*

45. *Id.* at 29-30.

46. *Id.* at 30-31. See Harris Meyer, *Senior Bashing*, HOSP. & HEALTH NETWORKS 29 (Dec. 5, 1996); Samuel Preston, *Children and the Elderly in the U.S.*, 251 SCI. AM. 44, 44 (Dec. 1984).

47. ELDERS ON TRIAL, *supra* note 1, at 31.

48. *Id.* at 31.

49. *Id.* at 32. See AMERICANS 55 & OLDER 126 (Sharon Yntema ed., 1999).

50. *Id.* at 70.

51. *Id.* at 62.

educated, more affluent, and more involved in their communities than their predecessors of thirty years ago.<sup>52</sup> They are accustomed to standing up for their rights. Having reached maturity during times of social and political upheaval in the 1960's, they were exposed to the civil rights movement and many were political and legal activists.<sup>53</sup> Chapter five, "The Main Actors: Plaintiffs, Defendants and Witnesses," explores the growing involvement of older people in the legal system by focusing on the litigating parties.<sup>54</sup>

#### LEGAL ISSUES OF PARTICULAR RELEVANCE TO THE ELDERLY

Eglit identifies four major areas in civil law where the older population's needs are likely to be manifested: discrimination, guardianships and elder abuse, asset transfer and reimbursement issues, and nursing home torts.<sup>55</sup> He sees age discrimination in the workplace as a continuing problem for workers and employers by the sheer magnitude of their numbers.<sup>56</sup> "[B]y 2005 over 56.7 million workers ages forty-five and older are expected to be in the labor work force—an increase of 16.7 million over the numbers for comparably aged workers in 1994."<sup>57</sup> Moreover, the growing trend of women in high-level, high-salaried jobs point to an increase in discrimination claims.<sup>58</sup> Unlike her peers thirty years ago, a woman in the workforce today has a lot more to lose if she is rejected for a job or denied a promotion because of her age. Thus, she is more likely to have the incentive and the resources to fight an alleged injustice.<sup>59</sup>

Eglit reports that "[t]he number of reported acts of violence

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52. *Id.*

53. ELDERS ON TRIAL, *supra* note 1, at 62.

54. *Id.* at 59.

55. *Id.* at 63:

The National Academy of Elder Law Attorneys, Inc., identifies the legal needs served by elder law attorneys as including the following: "durable powers of attorney; estate planning and probate; financing long-term medical care; guardianship and conservatorship; health care decisions; health care quality issues; independent living options; trusts; Medicare, Medicaid, and other public benefits; elder abuse, neglect, and exploitation; and age discrimination."

56. *Id.*

57. *Id.* (quoting Howard Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going*, 31 U. OF RICHMOND L. REV. 579, 666 (1997)).

58. *Id.* at 63.

59. ELDERS ON TRIAL, *supra* note 1, at 64.



against elderly men and women has been increasing steadily in recent years."<sup>60</sup> One study estimates that the prevalence of elder abuse victimization ranges from 4 to 6% of the American elderly population.<sup>61</sup> The unfortunate reality is that the group most vulnerable to increased instances of physical, emotional, and financial mistreatment are those most likely to experience a significant decline in their intellectual and physical faculties. This group is known as the old-old, those age eighty-five and older.<sup>62</sup> They are the fastest growing age segment of the elderly population, projected to make up nearly one quarter of the elderly population by 2050 when there will be about 68 million individuals age sixty-five and older.<sup>63</sup>

Although attorneys are generally legally exempt from reporting instances of elder abuse, Eglit urges attorneys to report their suspicions of abuse "in dire instances" to the appropriate authorities.<sup>64</sup> If a concern regarding breach of attorney-client confidentiality arises, Eglit asserts that the Model Rules of Professional Conduct insulate the lawyer from charges of misconduct.<sup>65</sup> "[S]tate elder abuse laws may provide immunity from civil or criminal liability for attorneys who, in good faith,

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60. *Id.* at 60. For a number of reasons, the exact number of elderly persons who fall within the broad definition of abuse is unknown: (1) not all elder abuse cases are reported; (2) variations in state law definitions affect the number of cases reported; and (3) state data collection practices may vary (citing Vicki Gottlich, *Beyond Granny Bashing: Elder Abuse in the 1990s*, CLEARINGHOUSE REV. SPECIAL ISSUE 371, 372 (1994)).

61. *Id.* at 65. See Rosalie S. Wolf, *Elders as Victims of Crime, Abuse, Neglect and Exploitation*, in *ELDERS, CRIME AND THE CRIMINAL JUSTICE SYSTEM* 19, 24 (Max B. Rothman et al. eds., 2000). Elder abuse can be manifested in a number of ways, including physical abuse, psychological abuse, neglect, self-neglect, and financial exploitation. *Id.* at 64-65.

62. *ELDERS ON TRIAL*, *supra* note 1, at 64.

63. *Id.* (citing U.S. General Accounting Office, Report to the Honorable William S. Cohen, Special Committee on Aging, U.S. Senate, *Long-term Care—Projected Needs of the Aging Baby Boom Generation 2*, GAO/HRD-91-86 (1991) [hereinafter *Long-term Care—Projected Needs*]). Of note is the notion that older persons are likely to be victims of crime and the fear it engenders in older persons. Eglit concludes that fear is a popular misconception. Based on studies, the elderly are no more fearful of being the victims of crime than younger people. In fact, over the last fifteen years, there has been a decline in the crime victimization rates for the elderly regarding violent crimes, personal theft, and household crimes. *Id.* at 60.

64. *Id.* at 66: "While typically state mandatory reporting laws impose a legal obligation upon doctors, nurses, social worker, law enforcement officers, and/or clergy to report instances of suspected abuse, attorneys generally are exempt from this obligation."

65. *Id.* "Clearly, the matter of deciding to report or not can raise significant issues for the conscientious attorney. An elderly person who appears to be the possible victim of abuse may not want that abuse reported, and there is no basic reason why her autonomy should not be respected." *Id.* at 220 n.72.

report incidents of suspected or actual abuse."<sup>66</sup> In addition, the attorney may employ a number of legal mechanisms to protect a victim from abuse, including: "a power of attorney designating a trusted . . . person to . . . administer [the] assets [of the victim], . . . a court-ordered protective order barring the abuser from coming into contact with the victim," and "prosecution . . . of alleged abusers under state statutes [for] . . . physical, emotional, and financial abuse."<sup>67</sup>

A potential area for increased litigation is nursing home torts.<sup>68</sup> A number of reasons may explain this likelihood. First, incidences of improper care of residents are not unusual. Second, because primarily older adults live in long-term care facilities, and their population is expected to grow to about four million by 2018, one might expect to see a much larger percentage of older people than younger adults as tort victims.<sup>69</sup>

Interestingly enough, however, Eligit reports that nursing home litigation is still not common today.<sup>70</sup> He provides several explanations. First, if the main form of redress is damages, it is usually based on past and future lost earnings. But because nursing home residents, in general, do not participate in the workforce, they have no earnings upon which to base this element of damages. Furthermore, their lack of earnings capacity is a deterrent to contingent fee attorneys to who take a percentage of the award.<sup>71</sup> Second, "the likelihood of securing two other common elements of damages, that is, for future pain and suffering and for the cost of continuing medical care . . .,"<sup>72</sup> is outweighed by the reality that nursing home residents' life expectancies are shorter. In sum, the financial incentive is lacking.<sup>73</sup> Third, many persons in nursing homes are "totally isolated" and helpless. Their friends and family are gone, and they do not have access to an advocate to act on their behalf. Thus, there is no accountability built into the system.<sup>74</sup> Fourth, caregivers at the nursing home may be all such elderly persons have to care for them and they do not want to jeopardize their

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66. *Id.* at 66. *See, e.g.*, Elder Abuse and Neglect Act, 320 Ill. Comp. Stat. 20/1 et. seq.

67. ELDERS ON TRIAL, *supra* note 1, at 66.

68. *Id.* at 67.

69. *Id.* at 62 (citing *Long-term Care—Projected Needs*, *supra* note 63, at 8).

70. *Id.*

71. *Id.*

72. *Id.* at 67.

73. ELDERS ON TRIAL, *supra* note 1, at 62.

74. *Id.*

status quo, lest the quality of their care be diminished. Here, a fear of loss prevents the older person from seeking redress for perceived wrongs.<sup>75</sup>

Yet although some issues that older people bring to court will be confined to the elderly as a special constituency as discussed before, Eglit cautions that the large majority of legal problems will be similar to those of the non-old.<sup>76</sup> In general, he foresees the big non-old issues for state courts to be relational issues such as marriage dissolutions and breach of contract suits, personal injury cases, estate planning (in particular, asset transfers to qualify the older property holder for Medicaid) and criminal matters as more elderly victims testify about their victimization. Eglit even predicts that the high costs of litigation will encourage dispute resolution as an alternative.<sup>77</sup>

### OLDER WITNESSES

Eglit admits that the data is inconclusive as to whether older witnesses are less reliable than younger adult witnesses.<sup>78</sup> He cites a number of conflicting research studies and reports of how older witnesses are perceived by others as well as how they actually perform as witnesses.<sup>79</sup> Since witnesses must rely on memory when they are called upon to testify as to what happened, their recollection of events and of sources of information and their recognition of the perpetrator is a critical factor.<sup>80</sup> In general, although not always, the studies have established that "there is an age-related decline, such that older witnesses are less reliable than younger adults."<sup>81</sup> However, there are caveats and exceptions. "[N]one of the[ ] studies tested the accuracy of the memories of witnesses memories who were involved in real events, such as automobile accidents . . ."<sup>82</sup> In some studies, elderly witnesses were as accurate as young adults in recognizing a criminal suspect in a photo lineup or in remembering the details of an event if they were asked to

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75. *Id.* (citing *Long-term Care—Projected Needs*, *supra* note 63, at 8).

76. *Id.* at 68.

77. *Id.*

78. *Id.* at 78.

79. *ELDERS ON TRIAL*, *supra* note 1, at 71, 74.

80. *Id.* at 74.

81. *Id.*

82. *Id.*

recognize rather than freely recall them.<sup>83</sup>

Eglit reviews the research on suggestibility, that is, whether older adults' "accuracy of their recall" is "impaired by misleading post event information received in the interval between witnessing the event and subsequently recalling it."<sup>84</sup> The results were mixed. Eglit cites one study in which the investigators found that the elderly were much more likely to be misled by false testimony than younger persons, even though the elderly were confident they were correct.<sup>85</sup> The investigators warned that these findings "should be taken into account when the credibility of elderly witnesses is being assessed in the legal context."<sup>86</sup>

Still, Eglit asserts that the testimony of elderly witnesses may be discredited because of "unjustified bias."<sup>87</sup> Thus, if one stereotypes an older witness as inept, then what may be merely the older witness's apprehensive manner of speaking and uneasy delivery will confirm one's negative image of older adults as witnesses.<sup>88</sup> In contrast, similar faltering by a young witness may not raise doubt as to that person's trustworthiness or competence.<sup>89</sup>

### LAWYERS AND CLIENTS

Of particular relevance to attorneys are the legal and ethical issues, which dominate chapter six, "Lawyers and Clients." Most notably, the discussions on the impaired attorney who insists on continuing to practice past his intellectual prime and the tension between attorney paternalism and client autonomy should be interesting to legal practitioners.<sup>90</sup>

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81. *Id.* at 74-75. See also Brian H. Bornstein, *Memory Processes in Elderly Eyewitnesses: What We Know and What We Don't Know*, 13 BEHAV. SCI. & LAW 337 (1995).

84. ELDERS ON TRIAL, *supra* note 1, at 77.

85. *Id.* See Daniel L. Schacter et al., *The Relation Between the Source Memory and Aging*, 6 PSYCHOL. & AGING 559 (1991).

86. ELDERS ON TRIAL, *supra* note 1, at 77 (quoting Schacter et al., *The Relation Between Source Memory and Aging*, 6 PSYCHOL. & AGING 559 (1991)).

87. *Id.* at 79.

88. *Id.* "Studies have established that a witness's hesitancy, stumbling, and lack of confidence are regarded as signaling lack of credibility, but in fact these factors do not correlate with inaccurate testimony." *Id.* at 227 n.130.

89. *Id.* See A. Daniel Yarney, *The Older Eyewitness*, in ELDERS, CRIME, AND THE CRIMINAL JUSTICE SYSTEM 127, 128 (Max B. Rothman et al. eds., 2000).

90. ELDERS ON TRIAL, *supra* note 1, at 91.

The Model Rules of Professional Conduct ["Model Rules"] formally govern an attorney's conduct in these situations.<sup>91</sup> However, there are other enforcement mechanisms such as the authority of judges to police and take appropriate action if the attorney misbehaves in the court room and local governance codes which prohibit the attorney from manifesting bias or prejudice based on age, among other attributes.<sup>92</sup>

Model Rule 1.16 prohibits an attorney from "undertaking to represent, . . . a client if the attorney's mental impairment materially impairs his or her ability to provide competent representation."<sup>93</sup> The cause of the attorney's mental decline may be substance abuse or adverse aspects of the aging process.<sup>94</sup> Little research exists as to how aging attorneys with declining abilities are dealt with, nor are there ethics opinions on the duty of a lawyer who suspects another lawyer is incompetent to practice law.<sup>95</sup>

Eglit says that state rules governing attorneys apply.<sup>96</sup> However, a major difficulty in making a state regulatory body aware of the problem is who the reporting third party should be.<sup>97</sup> While a family member, client, or friend has no legal obligation to report his concern, fellow attorneys may face ethical restraints.<sup>98</sup>

Rule 5.1(a) of the Model Rules requires partners and managing attorneys to "make 'reasonable efforts' to establish internal policies and procedures aimed at anchoring 'reasonable assurance' that all the attorneys . . . fulfill the Model Rules' requirements."<sup>99</sup> In 2003, the American Bar Association's Standing Committee on Ethics and Professional Responsibility warned that "[t]he firm's paramount obligation is to . . . protect the interests of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist

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91. *Id.*

92. *Id.* at 92.

93. *Id.*

94. *Id.* at 93.

95. *Id.* See Peter H. Geraghty, *Ask Ethicsearch*, 9 No. 2 PROF. LAW 22 (Feb. 1998).

96. In Illinois, the state's Attorney Registration and Disciplinary Commission can make a final determination if the attorney is disabled, and, if it finds that he is, the commission can transfer him to inactive status and bar him from practicing law or permit him to continue practicing subject to conditions imposed by the court. ELDERS ON TRIAL, *supra* note 1, at 93 (citing Illinois Supreme Court Rule 758(c), (e) (2001)).

97. ELDERS ON TRIAL, *supra* note 1, at 93-94.

98. *Id.* at 94.

99. *Id.*

upon steps to assure that clients are represented appropriately . . . ."<sup>100</sup>

If an attorney's "honesty, trustworthiness, or fitness" is questioned, then reporting is required, according to the Model Rules.<sup>101</sup> But if the firm works with the impaired attorney to correct his behavior, then no reporting is required.<sup>102</sup>

When an impaired lawyer leaves the firm, the American Bar Association opinion unequivocally states that "[t]he firm has no obligation . . . to inform former clients who already have shifted their relationship to the departed lawyer that it believes the . . . lawyer is impaired."<sup>103</sup> Moreover, if the impairment does not violate the Model Rules, the firm has no obligation to inform the disciplinary authority, although it may voluntarily report its concern to authorities.<sup>104</sup>

### THE ATTORNEY'S RELATIONSHIP WITH OLDER CLIENTS

In dealing with older clients, Eglit urges attorneys to be sensitive (but not patronizing) to their clients' possible frailties and take steps to lessen their impact.<sup>105</sup> Eye contact, expressive speaking, and short and simple sentences may help the frail client.<sup>106</sup> Attorneys should also take note of the "psychological orientations and vulnerabilities" of the older client such as reclusiveness, reticence about seeking legal assistance and disclosing private matters, self esteem issues, and fragility to the effects of an unstable environment.<sup>107</sup> The attorney should

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100. *Id.* (quoting ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-429 (2003)). Other steps may include urging the impaired attorney to accept assistance or limiting his ability to handle legal matters. Furthermore, neither the partners nor the managing attorneys are responsible for the impaired attorney's violations unless they knew of the conduct at a time when the consequences could have been avoided but still failed to take action. *Id.* at 94-95.

101. *Id.* at 95.

102. *Id.*

103. ELDERS ON TRIAL, *supra* note 1, at 97 (quoting ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 03-429 (2003)). "While Rule 1.4 [of the Model Rules] requires the firm to advise existing clients of the facts surrounding the withdrawal to the extent . . . necessary . . .[,] . . . the firm must be careful to limit any statements made to ones for which there is a reasonable factual foundation." *Id.* at 96.

104. *Id.*

105. *Id.* at 100. "In serving the client, the attorney is to act 'with reasonable diligence and promptness' and with undivided loyalty, as long as she is not called upon to violate the law." *Id.* at 97.

106. *Id.*

107. *Id.* at 100-01.

respond by being supportive to the reluctant client even if it means taking a less productive course of action.<sup>108</sup>

A key issue for an attorney with older clients is the tension between the autonomy of the client and the paternalism of the attorney.<sup>109</sup> Within this context, Eglit devotes considerable discussion to the issues arising out of the question of capacity:<sup>110</sup>

Is the client capable of retaining an attorney? Is he or she capable of understanding the attorney's explanations and advice? Is the client capable of executing enforceable documents? Who, for that matter, is the client: is it the possibly disabled oldster or the family member who brings the elderly mom or dad to the lawyer's office and who may even be paying the lawyer's bill?<sup>111</sup>

Obviously, the question of capacity can be challenging. There is no one useful definition of capacity to help the attorney determine if a client has the capacity for the task at hand.<sup>112</sup> Yet, if the attorney errs, he or she may be a party to a contested will or worse, be the subject of a lawsuit.<sup>113</sup> As clarification, the Comments in the Model Rules provide guidelines when assessing capacity, such as the client's ability to articulate the reasoning behind a decision and to appreciate the consequences of a decision consistent with the client's values.<sup>114</sup>

Eglit lays out three possible remedies for the attorney to consider in responding to a client suffering from diminished intellectual capacity. First, the attorney can assume the role of

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108. ELDERS ON TRIAL, *supra* note 1, at 101 (citing Howard Gelt, *Psychological Considerations in Representing the Aged Client*, 17 ARIZ. L. REV. 293, 296-98 (1975)).

109. *Id.* at 97.

110. *Id.* at 98.

111. *Id.*

112. *Id.* at 103. "'Incapacitated person' means an individual who, for reasons other than age, is unable to receive and evaluate the information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance." *Id.* at 102-03 (quoting National Conference of Commissioners of Uniform State Laws, Uniform Guardianship and Protective Proceedings Act (1997)).

113. *Id.* at 103.

114. ELDERS ON TRIAL, *supra* note 1, at 104 (citing American Bar Association, *Model Rules of Professional Conduct*, Rule 1.14, Comment [6] (Feb. 27, 2002), reprinted in *ABA/BNA Lawyers' Manual on Professional Conduct* 1201:143 (1984)). In addition, there are a number of tests lawyers may employ such as the outcome test, the status test, the functional approach, and the five steps test, which seeks to overcome the drawbacks in the previously mentioned tests. *Id.* at 104-06.

*defacto guardian* if the client does not have a guardian or legal representative. Experts caution that although *defacto guardianship* "permits an immediate response to prevent irreparable harm," there is no way to monitor the relationship between the attorney and the client.<sup>115</sup> Second, if the "lawyer believes that a legal representative is needed, yet no such person exists, . . ." a *guardian ad litem* (GAL) can be appointed. Here, the risk is the GAL's potential paternalism.<sup>116</sup> Rule 1.16 of the Model Rules offers the option of *withdrawal* from representing the client.<sup>117</sup> Yet the client who is unwilling to cooperate because of dementia is the very one who needs representation. And if the Model Rules require "that withdrawal not have a material adverse effect on the client," then the attorney is "unlikely to actually be able to withdraw."<sup>118</sup>

However, Eglit is emphatic that capacity is generally "not an issue" and that "most older people are fully able to manage their affairs and to make decisions."<sup>119</sup> He says that needless attention on capacity problems is simply misleading. Eglit warns that, here again, ageism is at play. "[T]he stereotype of the decrepit, inadequate, declining senior is . . . unintentionally, reinforced."<sup>120</sup> Rather, Eglit refers to Edwin Boyer, who advises attorneys to "[b]egin with a presumption of capacity, recognize diversity in the older population, confront personal attitudes toward the elderly, listen to the client, not just the family, understand the aging process, and be patient."<sup>121</sup>

## JUDGES

In chapter seven, "Judges," Eglit notes the enormously important role of a judge as "master in the court room."<sup>122</sup> He notes that any discussion of the impact of age in the American legal system must address the more than 18,000 judges.<sup>123</sup> As

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115. *Id.* at 106 (quoting Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 STAN. L. & POL'Y REV. 241, 252 (1998)).

116. *Id.* at 107.

117. *Id.* at 108.

118. *Id.*

119. *Id.* at 98.

120. ELDERS ON TRIAL, *supra* note 1, at 98.

121. *Id.* at 99 (quoting Edwin M. Boyer, *Representing the Client With Marginal Capacity: Challenges for the Elder Law Attorney—A Resource Guide*, 12 NAELA Q. 3, (Spring 1999)).

122. *Id.* at 113-14.

123. *Id.* at 114.



such, he discusses the age of judges in a number of contexts, including competence, retirement, judicial treatment of substantive issues, and judicial responses to litigants. Eglit believes assessing judicial performance is a risky endeavor. Adding age as a factor makes it even more difficult.<sup>124</sup> As examples, evaluating competency in terms of morally correct behavior undoubtedly invites subjectivism.<sup>125</sup> Observable behaviors such as demeanor in the courtroom and treatment of witnesses may also be difficult to assess objectively.<sup>126</sup> And because judges respond to arguments made by lawyers or testimony offered by witnesses, it is a flawed exercise to address a judge's performance in isolation without considering how the question or the issue was framed.<sup>127</sup>

Eglit takes issue with the imposition of age-based mandatory retirement on state judges.<sup>128</sup> He calls for its abolishment because mandatory retirement only looks at intellectual or physical decline, as measured by chronological age, without considering a judge's "individual merits and abilities to perform."<sup>129</sup> As such, it reinforces the insidiousness of ageism. In contrast, federal judges are protected by the Constitution's guarantee of life tenure.<sup>130</sup> However, Eglit notes the different ways that have been used to work around the age factor for federal judges. They are mandatory, minimum, or maximum age requirements for appointment to the bench, financial incentives to make retirement and semi-retirement attractive, and senior status whereby the judge enjoys a full salary but has a reduced workload.<sup>131</sup>

What Eglit finds particularly disturbing about mandatory retirement is that proof exists that it is unwarranted. Many elderly judges continue to serve competently.<sup>132</sup> Federal senior judges continue to carry heavy caseloads.<sup>133</sup> State level elderly

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124. *Id.* at 116.

125. *Id.* at 115.

126. ELDERS ON TRIAL, *supra* note 1, at 114.

127. *Id.*

128. *Id.* at 127. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Supreme Court upheld a mandatory retirement provision in the Missouri constitution that required judges to retire at age seventy. The Court would not conclude that the ADEA should supplant state authority absent a "plain statement" by Congress. *Id.* at 125.

129. ELDERS ON TRIAL, *supra* note 1, at 127.

130. *Id.* at 130.

131. *Id.* at 129-30.

132. *Id.* at 131.

133. *Id.*

judges are often called back to serve on special status on the lower state courts.<sup>134</sup>

Eglit proposes alternatives to the finality of mandatory retirement. He suggests "a judicial fitness panel that would review periodically the competence of judges over a certain age and would certify those deemed fit to serve. Absent certification, a given judge would be automatically retired."<sup>135</sup> He considers bringing the issue before voters to determine if state judges, who do not perform, should be ousted.<sup>136</sup> Eglit argues that these alternatives can be a win-win solution. For example, the stigma of incompetence could be reduced, diversity of age on the bench could be enhanced, valuable judges could be retained, and a powerful message would be sent to counter the negative stereotypes of ageism.<sup>137</sup>

In addition, Eglit provides interesting research that correlates the ages of judges to their stance on substantive issues. For example, "[o]lder judges simply tended to be more conservative on the criminal procedures, civil liberties, labor, injured persons, political liberalism, economic liberalism, and activism dimensions."<sup>138</sup> He also cites findings that establish age as a factor in sentencing offenders. "On average, the probability of defendants in their [sixties] being incarcerated is about 25% less than defendants in the [twenty-one to twenty-nine-] year-old group; and, if incarcerated, the older defendants received incarceration sentences on average [eight] months shorter."<sup>139</sup>

## JURIES

Eglit begins chapter eight, *Juries*, by underscoring the significant symbolic and functional roles juries serve in the American legal system as "bulwarks . . . of fairness and justice."<sup>140</sup> Given the importance of juries, he asks whether age is

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134. *Id.*

135. ELDERS ON TRIAL, *supra* note 1, at 132.

136. *Id.* at 132.

137. *Id.*

138. *Id.* at 117 (quoting Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 75 AMERICAN POL. SCI. REV. 491, 499 (1975)).

139. *Id.* at 120 (quoting Darrell Steffensmeir & Mark Motivans, *Older Men and Older Women in the Arms of Criminal Law: Offending Patterns and Sentencing Outcomes*, 55B J. OF GERONTOLOGY: SOC. SCI. S141, S148-49 (2000)).

140. ELDERS ON TRIAL, *supra* note 1, at 139. Jurors are expected to represent their community and its values. Actual problems of fairness arise when a juror's bias is inappropriately used to decide issues of guilt and innocence. *Id.* at 152.

a useful indicator of juror decisions.<sup>141</sup> In other words, does age correlate with juror attitudes, and, if so, to what extent? Two schools of thought respond to this question. For legal practitioners, who base their conclusions on their experience, age matters.<sup>142</sup> For academicians, who ground their observations on research, age is much less significant.<sup>143</sup> Yet another general proposition is that people of different ages may have different values and attitudes, "not because of their ages per se, but rather because of interests and experiences that correlates with age."<sup>144</sup> Given these conflicting views, Eglit advises that it is best to err of the side of caution, and consider the age factor in the courtroom.<sup>145</sup> Why? Because, if there a possibility that age as a factor "adulterates (or enhances) truth-seeking and ultimately, justice," then action is need to "cleanse the process of ageist bias."<sup>146</sup>

Eglit acknowledges that a perfect legal system, uncontaminated by age bias, is unrealistic and unattainable. He substantiates this position by evaluating several aspects of the jury process.<sup>147</sup> For example, "*voir dire*, which involves questioning prospective jurors as to their knowledge of the case, their biases, . . . ," is not necessarily a foolproof device. In front of a powerful figure like the judge, a juror will often provide the politically correct answer, instead of expressing his or her own views, which in fact may reveal prejudice.<sup>148</sup> Another example involves "statutes, court rules and/or common practice, all of

141. *Id.* at 150.

142. *Id.* at 148. A rule of thumb lawyers use that correlates age with jury verdicts is: A young juror is more likely to return a verdict favorable to the plaintiff than the defendant; an older juror is more likely to be sympathetic to the plaintiff than the defendant in civil, personal injury cases; and a juror whose age closely approximates the age of client, lawyer, or witness is more likely to give a favorable verdict *Id.* at 142 (citing RITA SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 33 (1980)).

143. *Id.* at 142. "Those variables [such as race, age, gender, and occupation] that are the most observable are least predictive of verdicts and jury behavior." *Id.* (quoting Amy Singer, *Focusing on Jury Focus Groups*, 19 TRIAL DIPLOMACY J. 321, 322 (Nov./Dec. 1996)).

144. *Id.* at 145. "In a heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation." *Id.* at 145-46 (quoting *People v. Wheeler*, 583 P.2d 748, 755 (1978)).

145. *Id.* at 152.

146. ELDERS ON TRIAL, *supra* note 1, at 152.

147. *Id.* at 154.

148. *Id.* at 153. See Stephanie Nickerson et al., *Racism in the Courtroom*, in PREJUDICE, DISCRIMINATION, AND RACISM 259, 264 (John F. Davidio & Samuel L. Gaertner eds., 1986).

which allow elderly men and women to voluntarily excuse themselves" [from jury duty].<sup>149</sup> Other statutes, some as recent as 1979, have directly barred older adults from serving on jury duty.<sup>150</sup> Although these statutes have been upheld in the face of legal challenge, they also account, at least in part, for the low representation of older adults on juries.<sup>151</sup>

Eglit notes that one way to balance the "ill consequences of ageist bias is to ensure that *all* biases are admitted into the [courtroom] . . ." <sup>152</sup> Research on jury performance suggests that "the more heterogeneous the jury's composition, the greater the likelihood of rich and unbiased performance . . . due to a great variety of life experiences and points-of-view . . ." <sup>153</sup> To this end, the Sixth Amendment requires that federal and state juries reflect a "fair cross-section of the community."<sup>154</sup> Sixth Amendment claims, however, can only be raised by criminal defendants.<sup>155</sup> A key requirement is to show that the alleged excluded group is "distinctive."<sup>156</sup> However, if an individual is excluded from a jury pool, he or she can challenge that exclusion under the Fourteenth Amendment's Equal Protection Clause. There, the plaintiff must show that a "distinct group of which she is a member has been singled out for different, adverse treatment . . ." <sup>157</sup>

## CONCLUSION

On the one hand, reform of the jury process is unlikely because there is little pressure for change from the public, the bar, politicians, or even the Supreme Court.<sup>158</sup> But Eglit does not

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149. ELDERS ON TRIAL, *supra* note 1, at 155-56.

150. *Id.* at 156. See statutes listed at *id.* at 268 n.93.

151. *Id.* at 156. A 1991 study revealed the percentage of federal and state court jurors, age sixty and over, ranged from 13% to 25%. Individuals seventy years and over varied from 1% to 8%. *Id.* at 155, 156. See *id.* at 267 n.85. See also Mark Hansen, *Reaching Out to Jurors*, 88 ABA J. 33, 35 (Feb. 2002).

152. ELDERS ON TRIAL, *supra* note 1, at 154.

153. *Id.* at 155 (quoting JOHN GUINTEHER, *THE JURY IN AMERICA* 58 (1988)).

154. *Id.* at 156 (citing U.S. Const., amend. VI).

155. *Id.* at 157.

156. *Id.* Characteristics of "distinctiveness" are a definite composition that defines the group, a cohesion that cannot be expressed if the group is excluded from the jury process, and a community of interest that cannot be protected by the rest of the populace *Id.* (citing *Duren v. Missouri*, 439 U.S. 357 (1979)).

157. *Id.* at 157-58. See *Castaneda v. Partida*, 430 U.S. 482 (1977).

158. ELDERS ON TRIAL, *supra* note 1, at 159.

give up. In anticipation of the demographic tidal wave, he pushes for action now to improve the entire legal system.<sup>159</sup> He advocates that we need to recognize that an aging America and a ubiquitous legal system that governs many important aspects of our lives have crossed paths and will continue to do so. More importantly, Eglit inspires us to take steps, small and large, to ensure our legal system is responsive and fair to the legal needs and issues of aging individuals.<sup>160</sup>

Eglit calls for more research on the impact of an aging population on our legal system, and vice versa; self-awareness training for judges, lawyers, and law students to help them understand any biases they may have; better ways for older witnesses and jurors to contribute;<sup>161</sup> elimination of mandatory retirement of judges; amendment of judicial codes of conduct to condemn age bias;<sup>162</sup> and greater attention to the needs of aging attorneys.<sup>163</sup>

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159. *Id.* at 162.

160. *Id.*

161. *Id.* at 79. Techniques include those that optimize the recollection of elderly witnesses, increased lighting in the court room, larger type for documents, different modes of interrogation such as the cognitive interview and pre-instructions to help older adults construct the evidence. *Id.* at 79, 141.

162. *Id.* at 133, 138. See generally Judicial Conference of the United States, Code of Conduct for United States Judges (1996).

163. ELDERS ON TRIAL, *supra* note 1, at 162-63.