

## BROOKS ON STAGE(S): A ONE-MAN SHOW ABOUT LIFE AND LAW

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We buy tickets to a play, or borrow a book from the library, or meet a friend with the hope of learning something and maybe having some fun in the process. At a minimum, we expect to gain some insight into ourselves by listening to others and observing their experiences. We may receive affirmation of what we already believed was true, or we may find new ways of thinking about the world and our place in it, or we may recognize new ways to be helpful. Richard O. Brooks's writings offer all of these rewards.

In this brief essay thanking Brooks for his scholarship, I want to focus on recent and some yet-unpublished work. This work may be unfamiliar to readers who know Brooks best for his brilliant contributions in the environmental law field, addressed elsewhere in this festschrift. I especially want to direct the reader's attention to a remarkable 2006 article entitled *The Refurbishing: Reflections upon Law and Justice among the Stages of Life*.<sup>1</sup>

Writing about the stages of life—by which Brooks means segments of a human life divided by age—the author is himself on stage declaiming, in elegant prose that's filled with “Aha!” moments, ideas that are powerfully obvious and yet strikingly original. He has a gift for describing familiar principles and events in entirely new ways, clarifying meanings, and linking causes and effects. In a one-man show that would draw crowds in a New York theater, he answers questions that we've all had, but rarely asked, about the most fundamental aspects of life, law, culture, politics, economics, ethics, and even sex. On nearly every page I've stopped myself to ask, “Why didn't I see that before?”

The illuminating quality of Brooks's writing seems clearly related to—indeed to be grounded in—his life-long devotion to the study of philosophy. This subject, described by one popular novelist as an investigation of “the visible, graspable world in all its varied aspects and phenomena,”<sup>2</sup> was the focus of Brooks's early formal education, with bachelor and master degrees

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<sup>1</sup> Richard O. Brooks, *The Refurbishing: Reflections upon Law and Justice among the Stages of Life*, 54 BUFF. L. REV. 619 (2006) (hereinafter *Stages*).

<sup>2</sup> BENJAMIN BLACK, WOLF ON A STRING 74 (2017).

from the University of Chicago in social and political philosophy. The scholarship described here is in fact filled with references to the works of Western philosophers, ancient and modern.<sup>3</sup>

Brooks' recent work is also somewhat autobiographical, reflecting the author's insights accumulated from a long and thoughtful life in law and public service. Writing about the current stage of his own life—old age, accompanied by retirement and a growing awareness of his mortality—Brooks shows us new ways to think about ourselves in each succeeding stage and to embrace this final one with grace and dignity. And he does so with something approaching cheerfulness—albeit tinged occasionally by a growing sense of resignation—yet with a clear determination to put whatever time he has remaining to good use. This despite his admission that as a graduate student he was “uninterested, indeed repelled at the prospect of aging and the study of it!”<sup>4</sup>

In his article on the stages of life, Brooks systematically examines each of five major periods in most people's lives—birth and childhood, student days, marriage and family, middle age, and old age—setting forth the characteristics typical of each stage. In the process, however, he acknowledges that because individuals mature at varying rates, and because they are shaped in succeeding stages by differing personal experiences and environments, the assignment of stages to particular ages is imprecise. So also, the placement of boundaries between stages is somewhat arbitrary, and the boundaries themselves are not sharply defined but marked by gradual transitions.

Brooks points out that at an earlier age he was unaware that he was a member of any particular stage in life.<sup>5</sup> It is only “in retrospect [that] these stages and my passage through them seem[] obvious.”<sup>6</sup>

Recognition of stages is the product of both common sense and culture, based in part on biology. We don't want kindergartners driving or drinking, and octogenarians probably should not pilot jetliners. We've spared individuals younger than 18 years from the death penalty for capital crimes because they lack the responsibility that comes with maturity, and because they are especially susceptible to outside influences.<sup>7</sup> And middle-aged

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<sup>3</sup> My own background in philosophy is extremely limited. When I read Kant in an introductory college course, my response was, “I can't.” Much of what I know about philosophy, I have gleaned from Brooks' writings.

<sup>4</sup> Stages, *supra* note 1, at 619.

<sup>5</sup> *Id.* at 623.

<sup>6</sup> *Id.*

<sup>7</sup> See *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (explaining that juveniles are more susceptible to negative influences).

individuals are barred from public school, where their presence would be disruptive.

The law also recognizes these stages and has a profound influence on the lives of individuals within each stage. “It establishes, creates, or ratifies the boundaries of the stages of life; it allocates goods within these boundaries: and it helps give meaning to the various stages.”<sup>8</sup> It “establishes links between and among the stages of life,” and “helps to define the justice relevant to each stage and between the stages.”<sup>9</sup>

Despite the considerable variations among members at each stage of life, however, the law tends to treat members within each stage alike. Yet, it recognizes those members in sometimes inconsistent ways. On the one hand, law bestows benefits based on age, as when children are entitled to a public education and senior citizens may enroll in Medicare. Law also protects individuals from discrimination based on age, as in hiring. On the other hand, law sometimes imposes “unjustified constraints upon the freedom to define ourselves and pursue a range of actions at any age,”<sup>10</sup> as when children are forbidden to marry, and senior citizens are denied the opportunity to serve in the military.

Brooks points out that the law “does, and indeed should, play an important role in the steps of our self-development.”<sup>11</sup> Law also should serve as a “vehicle for the self-fulfillment of citizens . . . based, in part, upon our changing capacities at different stages of our lives,” just as those changing capacities mark our changing social responsibilities and rights.<sup>12</sup>

What law fails to do is to recognize these stages in relation to one another over the entire span of a lifetime—what Brooks calls “an arc of life.”<sup>13</sup> The stages of life, Brooks writes, “must be recognized as part of a unity of life rather than simply handy categories for making some age-specific legal rules and decisions.”<sup>14</sup>

What’s more, instead of serving as a “vehicle for self-fulfillment,” law may interfere with an individual’s freedom to choose how to live her own life by treating individuals within each respective stage of life similarly.<sup>15</sup>

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<sup>8</sup> Stages, *supra* note 1, at 627.

<sup>9</sup> *Id.* at 628.

<sup>10</sup> *Id.* at 620

<sup>11</sup> *Id.* at 630.

<sup>12</sup> *Id.*

<sup>13</sup> Stages, *supra* note 1, at 620.

<sup>14</sup> *Id.* at 621.

<sup>15</sup> *Id.* at 630.

The individual narratives of our lives have a much more vivid meaning to us, whether these lives are lives which follow standard stages or not. Stages of life appear as merely the expressions of poetry or the product of “scientific generalizations” of outside observers drawing up averages of individually unique lives.<sup>16</sup>

Of particular relevance here, Brooks notes, “[h]ow one responds to old age appears to differ from person to person.”<sup>17</sup>

In his article, Brooks seeks “a refurbishing of the ancient idea of life stages.”<sup>18</sup> He notes that the Greeks recognized a “close link” between law and custom. But, while “the law was reflective of the character of [both] the law maker and the persons to which the law applied,” it also “measured distribution according to merit or need, corrective justice according to the rectification of selfish deeds, and exchange justice according to the market.”<sup>19</sup> Thus, both the determination of stages, and the allocation of the goods of life within each stage, would depend on the need or merit of individuals within that stage. “[I]t is useful,” Brooks asserts, “to regard modern laws in a somewhat classical fashion in order to construct the vision of a progressive series of stages of life, each with its own unique moral meaning.”<sup>20</sup>

One modernist approach “enable[s] citizens to freely choose the activities, capacities, and objects they prefer at any and every time in their lives.”<sup>21</sup> The main concerns of age-related modern laws, however, are to “ensure the satisfaction of basic needs, especially of the dependant young and the helpless old,” and to “ensure that age groups, especially the old, are not discriminated against.”<sup>22</sup> Yet in serving these ends, the law’s fixing of boundaries for each stage seems arbitrary, and the freedoms associated with each stage are not always pegged to levels of maturity. For example, in young adulthood the eligibility to drink, drive, vote, and serve in the military may arise at different ages even though the physical abilities, judgment, and responsibility required for each seem comparable, and individuals arrive at each fixed boundary with varying qualifications. In old age, the boundaries may or may not fairly reflect the process of biological

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<sup>16</sup> *Id.* at 637.

<sup>17</sup> *Id.* at 638.

<sup>18</sup> *Id.* at 620.

<sup>19</sup> *Stages, supra* note 1, at 645.

<sup>20</sup> *Id.* at 657.

<sup>21</sup> *Id.* at 646.

<sup>22</sup> *Id.*

decay within a given individual. Also remarkable, Brooks insists, is the fact that modern laws fail to “reflect any sense of the continuity and cumulateness of growth and decay of life processes.”<sup>23</sup>

Still, according to Brooks, “law, rather than nature or custom, is required for the recognition of stages of life in complex modern societies.”<sup>24</sup> Law and the political process are needed to achieve distributive justice in allocating fungible goods, such as wealth, access to education, and health services, among the stages.<sup>25</sup> For this purpose, law might provide a “more refined set of criteria for distribution according to need, freedom and merit reflecting the stages of development.”<sup>26</sup>

“Probably the most developed legal regime of any stage of life is the array of laws bearing upon the stage of old age.”<sup>27</sup> These laws are aimed at protecting the vulnerable elderly and providing resources for the end of life. Yet by at least tacitly linking the old age stage of life to decay and death, they may disempower the elderly.<sup>28</sup> On the other hand, the law may provide solace to the elderly by allowing them to interact with future generations in making wills, transmitting wealth and wisdom to survivors.

Most important, in Brooks’s view, “the stages of life are part of ‘a life’—they are not discrete steps in a ladder to nowhere.”<sup>29</sup> The law helps to tie these stages together. Laws governing education, parenting, and saving for retirement are examples. Viewing such laws this way invites questions about their appropriateness in serving the ethical function of supporting a good life.

“The curve of life,” Brooks concludes, quoting Carl Jung, “is like the parabola . . . which, disturbed from its initial state of rest, rises and then returns to a state of repose.”<sup>30</sup> Still, the stages of life are not viewed by either “the underlying culture or the law as parts of an arc of a whole life . . . . And yet, it might be desirable to view the law as either reinforcing or establishing the arc of life,”<sup>31</sup> because “one role of law is the bestowal of justice among the stages within an arc of life.”<sup>32</sup> By putting the life stages

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*Id.*

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*Stages, supra* note 1, at 621.

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*Id.* at 646.

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*Id.* at 667.

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*Id.* at 675.

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*Id.* at 678.

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*Stages, supra* note 1, at 681.

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*Id.* at 688 (quoting CARL G. JUNG, *The Structure and Dynamics of the Psyche*, in 8 COLLECTED WORKS OF C. G. JUNG 406 (Herbert Reed et al. eds., 2d ed. 1978)).

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*Brooks, supra* note 1, at 688.

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*Id.* at 622.

together, furthermore, we might “better understand how law facilitates and impedes self-fulfillment.”<sup>33</sup>

If this all seems to be headed in one direction, that’s because it is, just as we all are. Brooks ends his *Stages* article this way: “In old age, social institutions might support both the recognition and acceptance of the growing vulnerability of age along with new opportunities in leisure to make sense of the entire arc of one’s life.”<sup>34</sup> Thus, the article provides background and an introduction for a more recent work, still in progress, focused on old age, retirement, and the end of life.

A new book, yet unpublished at this writing, bears the working title “The Final Elegy: The Consolations of the Classics.”<sup>35</sup> It describes an experiment in which Brooks seeks to embrace old age and its losses by consulting the classics of literature, hoping to find in them a measure of detachment and consolation suited to this final stage of life. Old age is dominated, he suggests, by physical and mental decline, forced retirement, loss of respect, the death of friends and loved ones, and, for many, a diminished optimism and ambition. With a heightened awareness of the propinquity of one’s own death, there is also an increasing sense of a foreshortened future. These losses are naturally accompanied by emotions of sadness, regret, nostalgia, and alienation. One way to understand and cope with these emotions, Brooks posits, is through meditative reflection assisted by a review of the classics. The new book includes reports on his own reflective meditations on each of the various losses.

Building on his earlier work, Brooks treats the stage of old age as an elegy — a poetic form that traditionally addresses the death of a loved one, characterized by sadness but offering consolation. But more modern elegiac writing may treat other kinds of losses and may take the form of prose. So, as he concludes, it may be useful in achieving a sense of detachment from the losses associated with old age.

In composing his elegy, Brooks reflects on a number of classical works, with special regard for the writers’ engagement in “classical leisure,” which he describes as reflective activity undertaken for its own sake. He points especially to the writings of Petrarch, Montaigne, and Henry David Thoreau, all reflections on a solitary life apart from society. So Brooks employs this strategy to look back at past losses, and to anticipate future

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<sup>33</sup> *Id.* at 689.

<sup>34</sup> *Id.* at 692.

<sup>35</sup> Richard O. Brooks, *The Final Elegy: The Consolations of the Classics* (unpublished manuscript) (on file with author). Brooks has shared only portions of his draft manuscript with me thus far, so my review of it here is necessarily qualified not only by that incompleteness, but also by the fact that the work as a whole is unfinished.

losses and the completion of life. With the perspective that only hindsight can offer, he expects to find solace in his ability to grapple with the emotions arising from these losses.

The literary classics play a critical role by helping to understand the experience of old age in the light of what he calls “universal ideas,” expressed in what he views as the best of thought and expression, as well as the fine arts and historical accounts of great deeds. Thus, for example, classical writings about work and leisure help in understanding retirement; ideas of biological functioning and the cycle of nature illuminate the process of physical decline in old age; analyses of self-reliance and self-determination shed light on the process of growing dependency; and works on being and consciousness help to appreciate death itself more fully. The permanent truths revealed in the classics, according to Brooks, allow us to make sense of our lives.

Needless to say, the classical works are only accessible to those with a liberal education like the one Brooks received. Such instruction includes, for example, a reading of the great books that express the foundations of Western culture. Therefore, Brooks’s new book includes a strong plea for liberal education for all students, as providing a basis for effective citizenship and preparation for more specialized vocational training.

In a Preface, Brooks confesses that he undertook this latest book as an excuse for doing what he wanted to do in old age anyway—to read (or reread) the classics to which he was introduced in his early liberal education and to consider their implications for the final stage of life. He might also have regarded this work as a testamentary effort, as Dean Thomas Shaffer put it, “to frustrate or at least to manipulate the grim reaper.”<sup>36</sup>

All of this may sound far more melancholy in this brief description than it really is in Brooks’s fascinating, fuller account. To be sure, the new book appears to contain almost none of the fine, straightforward legal analysis that marks so many of his earlier works, although the legal implications are very clear. Instead it offers a new way for everyone—not just the elderly, but also younger legal scholars, students, and others—to think about loss and consolation at every stage of life. It is a way to understand the last stage in an “arc of life” to relate better to members of this stage, and to work for justice for them. Equally important, it contains powerful suggestions for members of this last stage about how to find comfort and even joy as they prepare for their eventual exit stage right. Whatever Brooks’s motivations for this latest work, we may be deeply grateful for the result.

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<sup>36</sup> 9 (1970).

THOMAS L. SHAFFER, DEATH, PROPERTY, AND LAWYERS: A BEHAVIORAL APPROACH

This tribute to Brooks' scholarship would be incomplete without a recognition of his influence on my own writing. In his role as Director of the Environmental Law Center at Vermont Law School, Brooks gave me my very first opportunity to publish my work. That came in my third year as a law teacher, with the editorship of an anthology on groundwater protection in Vermont, which was published by the Environmental Law Center.<sup>37</sup> This nudge from my friend and mentor gave me the confidence I needed to send off the manuscript for my first law review article the following year.<sup>38</sup>

One other early collaboration with Brooks was very important to me. The Attorney General of Vermont called Brooks in 1989 to ask whether the Law School's Environmental Law Center would submit an amicus curiae brief supporting the state's position in what turned out to be a landmark public trust doctrine case in the Vermont Supreme Court.<sup>39</sup> The case concerned the planned conveyance of filled land on Burlington's Lake Champlain waterfront that the state had transferred to a railroad company more than a century earlier. Brooks asked me to help with the brief.<sup>40</sup>

I remember that we both struggled with a very tight deadline. On the day the amicus brief was due, I complained that I just wasn't quite ready to stop researching and polishing my part of the brief. Brooks responded, "This brief can either be perfect or be filed, but not both." The brief was filed on time (barely).<sup>41</sup> The Supreme Court ruled that the railroad's interest in the filled land was conditioned on its continued use for railroad purposes, and that the state was obliged to protect and administer the land as trustee for the benefit of the public.<sup>42</sup> The Court described the public trust doctrine as "antediluvian," but retaining "an undiminished vitality."<sup>43</sup> The doctrine is not "fixed or static," the Court wrote, but one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit," and evolving "in tandem with the changing public perception of the values and uses of waterways."<sup>44</sup> It was a splendid victory for the public interest.

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<sup>37</sup> GROUNDWATER LAW IN VERMONT: PLANNING FOR UNCERTAINTY, PLURALISM, AND CONFLICT (Stephen Dycus ed., 1979).

<sup>38</sup> See J. Stephen Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners*, 33 VAND. L. REV. 871 (1980).

<sup>39</sup> State v. Central Vermont Ry., Inc., 153 Vt. 337, 571 A.2d 1128 (1989).

<sup>40</sup> *Id.* at 1129.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1135.

<sup>43</sup> *Id.* at 1130.

<sup>44</sup> *Id.* (internal quotations and citations omitted).

Brooks's work on this case, like so much of his teaching and scholarship, underscored for me the opportunities and responsibility that lawyers have to use their professional training and experience to be helpful. It combined hard work, creativity, high standards, a commitment to the truth, and a determination to use whatever influence he could muster for the public good. It also was yet another demonstration of Brooks's generosity and sense of humor.

Brook's example, like his written work, has informed and inspired us all, and it will inspire the efforts of future generations. We are deeply grateful. Fortunately, his scholarship is still work in progress, only the latest stage in a long life well lived. We can hardly wait for the next act.