

# Elder Law and Its Justifications: A Hybrid Vision Inspired by Family Law Jurisprudence

*Daphna Hacker\**

*This Article calls for a departure from the 'positivist-professional' definition of Elder Law. It offers a new definition that demands answers regarding the justifications for this legal area and the normative base that should guide its content. The paper draws on findings from a qualitative study with grown children who have an elderly parent in need. These findings point toward a) a preliminary theoretical framework that justifies a special area of Elder Law, embracing and transcending that of anti-ageist law, and b) the relevance of Family Law jurisprudence as a normative inspiration for this legal area.*

## INTRODUCTION

Six years of endless running around between hospitals in different cities, never-ending visits in 11 elderly care homes in three different cities, and constant fear of the phone call that will tell me that my mother or father is hospitalized again and is in intensive care are completely erased from my memory now. . . Their death redeemed me from their torments, and since then not a day passes by without me thinking of

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them in their prime, before I was forced to become, myself, *mother to them both*.<sup>1</sup>

Elder Law is a relatively new legal category.<sup>2</sup> Except in the U.S., the interest in Elder Law as a coherent legal area and professional specialty, and as a teaching subject within law faculties, is very young and somewhat sporadic.<sup>3</sup> As the fascinating conference that yielded this volume amply demonstrated, this new category's definition and justifications are still a debated intellectual work-in-progress.

The most commonly applied definition of Elder Law is the 'positivist-professional' one:<sup>4</sup> the practice of law shaped by the needs of elderly clients.<sup>5</sup> According to the National Elder Law Foundation, which certifies U.S. lawyers in Elder Law, this practice specializes in matters relating to health and long-term care planning; public benefits; legal capacity; surrogate decision-making; and estate planning and administration.<sup>6</sup> These legal subject matters are accepted by other professional organizations and by leading scholars as constituting the core of Elder Law.<sup>7</sup>

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- 1 Neri Livneh, *From the Diary of a Heretic*, HAARETZ, Feb. 23, 2018, at 59 [emphasis added].
  - 2 Israel (Issi) Doron, *25 Years of Elder Law: An Integrative and Historical Account of the Field of Law and Aging*, 21 THEORETICAL INQUIRIES L. 1 (2020).
  - 3 For example, Meenan and Broadbent argued, in 2007, that in the UK "there is no coherent body of law that can be properly described as elder law," "nor is there a taught subject known as elder law in Higher Education." Helen Meenan & Graeme Broadbent, *Law, Ageing and Policy in the United Kingdom*, 2 J. INT. AGING, L. & POL'Y 67, 102 (2007). See Doron, *supra* note 2 for an update on the recent developments in the field.
  - 4 Ann Numhauser-Henning, *An Introduction to Elder Law and the Norma Elder Law Research Environment*, in AN INTRODUCTION TO ELDER LAW AND THE NORMA ELDER LAW RESEARCH ENVIRONMENT 21, (Ann Numhauser-Henning ed., 2013).
  - 5 Rebecca C. Morgan, *The Future of Elder Law Practice*, 37 WM. MITCHELL L. REV. 1, 7 (2010); Nina A. Kohn & Edward D. Spurgeon, *Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field*, 59 J. LEGAL EDUC. 414, n.63 (2010).
  - 6 Morgan, *supra* note 5, at 8.
  - 7 Meenan & Broadbent, *supra* note 3, at 75–76. See Doron, *supra* note 2. In a recent study with 12 elder law academics, mostly from the U.S., some echoed the positivist-professional definition of Elder Law, while others described the field's core component as "how the law works for older people," apparently pointing to its antidiscrimination component. Moreover, while the interviewees from the U.S. considered Elder Law as its own field, scholars from other countries argued that it has not yet evolved as such. See Nina Kohn, Maria T. Brown &

It is easy to see that this positivist–professional definition leaves very little room for the question of the *theoretical* justifications and *normative* guidelines of Elder Law. If Elder Law is simply what lawyers are practicing, and if the elderly are the only clients of Elder Law, then of course Elder Law is justified, as a *pragmatic* matter, as lawyers have a duty to provide legal services to their clients. Moreover, the normative aspect of Elder Law is taken as a given, since the basis of the professional practice is the current law in the books, and there is little room for imagining a different set of laws. The pragmatic aspect of the positivist–professional definition leads to lawyers working towards best serving their clients in light of the existing legal situation. It is left to academics to move beyond the current legal situation and to look into the question of desirable law while developing theories to support it.

Indeed, while this pragmatic perspective may satisfy lawyers and their certifying organizations, its tautological rationale does very little to develop a debate that will guide legislators and judges on the intersection between the law and old age.<sup>8</sup> I would argue, therefore, that the positivist–professional definition of Elder Law should *not* satisfy the demands of legal academia and policymakers, as it impedes the much-needed theoretical and normative discussion over Elder Law, rather than opening it up. As Meenan and Broadbent argue, without such discussion, we are left with eclectic old age-related laws that are “based on differing, and sometimes conflicting, premises.” I contend that a much more robust rationale is called for, one that withstands theoretical and normative scrutiny and is of value to all those struggling with the legal meaning of our graying world.<sup>9</sup>

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Israel Doron, *Identifying Connections between Elder Law and Gerontology: Implications for Teaching, Research, and Practice*, 25 ELDER L.J. 69 (2017), at 76-77.

- 8 There is no agreed upon definition of “old age” within international law, with some referring to the age of 60 as their starting point, see Diego Rodriguez-Pinz & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18(4) AM. U. IN. L.R. 915, 916 (2013); and others suggesting that the definition depends on social attitudes, for example at what age people start to suffer from ageism. See Israel Doron & Itai Apter, *The Debate Around the Need for an International Convention on the Rights of Older Persons*, 50(5) THE GERONTOLOGIST 586 (2010). As this Article suggests, a strict legal definition of old age might be undesirable, and a more nuanced approach centering on the point in time in which the subject becomes dependent in a new age-related way should be developed, alongside other definitions.
- 9 Meenan & Broadbent, *supra* note 3, at 102. On the concept of the ‘graying world,’ see TED C. FISHMAN, SHOCK OF GRAY: THE AGING OF THE WORLD’S POPULATION

Hence, I would like to offer a new and different definition of Elder Law, which, I believe, better sets the stage for deliberation on this field's theoretical justifications and normative content. According to my working definition,

Elder Law is the area of law (in books and in action, existing and potential) specifically aimed at people due to their (perceived or actual) old age or due to their connection with old people as such, and any area of law that generates old-age-related disparate treatment or impact.

Under this definition, Elder Law not only refers to the practice of lawyers representing clients, but includes also all levels of regulation and the judiciary creating the law in the books and in action, and relates as well to all three roles that the law holds in general: channeling behavior, resolving conflicts, and redistributing resources.<sup>10</sup> Likewise, under my proposed focus, the clients of Elder Law are not restricted to those elderly people who are in a position to purchase lawyers' services, but also include older people who cannot afford a lawyer, family members of the elderly, strangers with whom the elderly interact on a legal basis, and society as a whole. Indeed, one of the ideas that will be promoted in this Article is that while elder persons must remain the main focus of Elder Law, this area of law must include the impact of the law on people due to their connections with elder people.

My suggested definition is, at one and the same time, both more limited and broader than the positivist–professional one. It is more limited in the sense that it does not cover all the legal issues on which elderly clients currently consult their lawyers or that affect the elderly just as they affect others, but only those matters that echo an age-based qualitative difference. It is broader, as it provides a lens through which we can evaluate the impact of any law and court decision on the elderly as a distinct category — even those laws that are allegedly neutral and relevant to all, regardless of age.

So, for example, Estate Law in general would not fall under my proposed definition of Elder Law, as it is aimed at all citizens and impacts, first and foremost, the heirs of those who have already passed away.<sup>11</sup> However, under this new suggested definition, the question of whether will contracts are valid under the law *would* be part of Elder Law. This is because the ability to contract one's estate impacts, in particular, those elderly persons

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AND HOW IT PITS YOUNG AGAINST OLD, CHILD AGAINST PARENT, WORKER AGAINST BOSS, COMPANY AGAINST RIVAL, AND NATION AGAINST NATION (2010).

10 DAPHNA HACKER, *LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION* Ch. 2 (2017).

11 Daphna Hacker, *The Rights of the Dead through the Prism of Israeli Succession Disputes*, 11 INT'L. J.L. CONTEXT, 40 (2015).

who wish to ensure that they can leave their property to a caretaker (be it a family member or not) when they die, based on a legal contract, in return for daily care in their own home for the remainder of their lives.<sup>12</sup> Likewise, if an elderly person seeks advice in relation to Employment Law, I contend that the advice should be perceived as part of Elder Law only if the answer relates to issues of retirement age or salaries and benefits affected by old age, or has some other old age-based disparate impact. Similarly, under the suggested new definition, Immigration Law would be part of Elder Law insofar as it affects an elderly person's ability to import care, be reunited with their grown-up children who immigrated to another country, or immigrate to a country in which elder-care is cheaper.<sup>13</sup> Finally, I agree with Sagit Mor that there is a considerable overlap between Elder Law and Disability Law,<sup>14</sup> and I contend that the former should be distinguished from the latter and applied in cases of disability only if the disability is specifically age-related *and* only if that fact has, or should have, distinctive legal implications. For example, the question of the right to geriatric hospitalization, including public funding and availability, should be discussed as part of Elder Law.

Unlike the positivist–professional definition, my proposed definition calls for theories on the justifications — or lack thereof — of Elder Law, and brings up a number of questions that must be answered for the normative content of this field to be shaped. Does old age call for its own distinct jurisprudence, to join other social group-based legal fields such as feminist jurisprudence, Poverty Law, and critical race theory? And, if so, why? Should ‘old age’ be a meaningful legal category and, if so, why, and how should it be defined? Should special laws be legislated for the elderly because they have special rights, interests, and needs? Or are laws governing all adults, regardless of age, sufficient, or even superior, as they do not stigmatize the elderly? Without answers to these questions, it will be impossible to know if, and when, the law should be “*specifically aimed at people due to their (perceived or actual) old age or due to their connection with old people*” or should “*generate old age-related disparate treatment or impact,*” and hence if Elder Law is not only an existing legal fact but also a justified and desirable one.

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12 HENDRIK HARTOG, *SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE* (2012).

13 Israel Doron & Tal Golan, *Aging, Globalization and the Legal Construction of “Residence”*: *The Case of Old Age Pensions in Israel*, 15 *ELDER L.J.* 1 (2007); HACKER, *supra* note 10, at Ch. 8.

14 Sagit Mor, Law faculty, Haifa U., Comment address at the Elder Law and its Discontents Conference at The Cegla Center for Interdisciplinary Research of the Law, Tel Aviv U. (June 19, 2018).

My moral stance is that there is no justification for Elder Law unless old age creates special interests or vulnerabilities, be it because old age carries some intrinsic, even if contextualized, qualities, or because of social differentiation or ageist discrimination. In my opinion, this general moral stance cannot be philosophically enriched much further as the question of old age-related “*special interests or vulnerabilities*” is an empirical one. Hence, what it calls for are contextual empirical investigations that will enable a fuller theory to be developed, as well as knowledgeable and justifiable concrete content of laws and court decisions. As Nancy Dowd states, “Within the project of elder law it is very important to focus and make visible the myths versus the realities of elders, however defined.”<sup>15</sup>

Hence, in an attempt to enrich the general moral stance I set out here, I turn in Part I of this Article to the findings from my recent qualitative study, as well as to quantitative findings of others, to support two arguments. First, the basic assertion, made by many others, that old age carries with it a greater risk of dependency as compared to adulthood prior to old age; second, a more nuanced argument that calls for the reconceptualization of this dependency. I would argue that in many cases this dependency is *unique* and echoes the dependency of children on their parents. It is also unfamiliar to the elderly person concerned and to their personal surroundings, and dynamically generates new and unexpected vulnerabilities. In Part II, I will translate these empirical findings into a normative call for Elder Law that is inspired, at least in part, by Family Law jurisprudence.

## I. PARENT–CHILD ROLE REVERSAL IN OLD AGE

Both my research fields — Family Law and the Sociology of the Family — focus almost exclusively on family relations between parents and their minor children. Indeed, as I have argued elsewhere, in both these fields there is an unspoken premise that ‘family relations’ end when children reach the age of 18.<sup>16</sup> However, by far the longest stage of familial relations between parents and their children is experienced, in fact, after the latter have reached adulthood. The great majority of people spend most of their lifetimes being grown-up children of their parents and, later, being parents of their own grown-up children. Yet this substantial period of familial relations is under-theorized and barely studied within the Sociology of the Family. Likewise,

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15 Nancy Dowd, *Conceptualizing Elder Law*, in AN INTRODUCTION TO ELDER LAW AND THE NORMA ELDER LAW RESEARCH ENVIRONMENT 11, 12, *supra* note 4.

16 Hacker, *supra* note 11, at 292.

very few within Family Law academia, or indeed the public at large, perceive this significant timespan of relations between parents and grown-up children as having legal implications.<sup>17</sup> This lack of awareness exists despite the fact that, just as in the case of parents and their minor children, these relations are configured in the shadow of Family Law, as well as Welfare Law, Inheritance Law, Immigration Law, and other branches of law.<sup>18</sup> This shadow might include also the shadow of Elder Law, as determined in this Article, when the parents grow old.

The sociological and legal lacunae regarding families in the context of old age have never been in such desperate need of attention as in this era. Longer life expectancy and accompanying chronic illnesses, decreasing fertility rates, higher rates and intensity of female employment, growing internal and external emigration, and successive global economic recessions have all contributed to higher numbers of elderly parents in need of assistance, and to the declining will and ability of adult children to assist.<sup>19</sup>

According to a recent United Nations survey, the demographic generational reversal, which is already evident in many developed countries,<sup>20</sup> is set to become global. By 2030, older persons (over the age of 60) will outnumber children aged 0–9 years (1.4 billion versus 1.3 billion); by 2050, people aged 60 years or more are projected to account for one in five people globally; and

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17 One of the issues that does get attention, from scholars from different disciplines as well as from policy makers, is the right of grandparent vis-a-vie their grandchildren. See, for example, Ross A. Thompson, Barbara R. Tinsley, Mario J. Scalora & Ross D. Parke, *Grandparents' Visitation Rights: Legalizing the Ties that Bind*, 44 AM. PSYCHOLOGIST 1217 (1989).

18 As I have argued in my recent book, we should move away from the traditional concept of “Family Law” to that of “Families Laws” so as to capture the many ways other branches of the law affect families. See Hacker, *supra* note 10, at 67-72.

19 HACKER, *supra* note 10, at Ch. 8; Martina Brandt, Klaus Haberkern, & Marc Szydlik, *Intergenerational Help and Care in Europe*, 25 EUR. SOC. REV. 585, (2009); Esther Iecovich & Israel Doron, *Migrant Workers in Eldercare in Israel: Social and Legal Aspects*, 15 EUR. J. SOC. WORK 29, 30 (2012).

20 In many parts of the world, the present era marks the first in history in which the average married couple has more parents than children between them. See Gunhild O. Hagestad, *The Aging Society as a Context for Family Life*, in AGING AND ETHICS: PHILOSOPHICAL PROBLEMS IN GERONTOLOGY 123, 124 (Nancy S. Jecker ed., 1991).

the number of persons aged 80 or over (the so-called “old old”) is predicted to more than triple by 2050, from 137 million in 2017 to 425 million.<sup>21</sup>

For many people, old age brings increasing economic, physical, and psychological dependency. Forced or voluntary retirement from the labor market means, in many cases, less income, often in the face of the pension crisis experienced in developed countries and the growing difficulties of individuals and governments worldwide to secure an adequate post-retirement standard of living.<sup>22</sup> Likewise, the elderly are known to be more at risk of physical and mental impairments.<sup>23</sup> For example, according to the World Health Organization (WHO), dementia, which is known to correlate with old age, “is one of the major health challenges for our generation.”<sup>24</sup> According to 2015 data, more than 47 million people worldwide suffer from dementia, 60 percent of whom live in low- and middle-income countries. It is estimated that by 2030 more than 75 million people will be living with dementia, and the number is expected to triple by 2050.<sup>25</sup> The different manifestations of dementia, which include Alzheimer’s disease, impair the cognitive brain functions of memory, language, perception and thought, and interfere with the ability to maintain the activities of daily living.<sup>26</sup> According to the WHO, “The personal, social and economic consequences of dementia are enormous. Dementia leads to

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21 U.N., DEP’T OF ECON. & SOC. AFF, WORLD POPULATION AGEING HIGHLIGHTS (2017), [https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017\\_Highlights.pdf](https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017_Highlights.pdf).

22 OECD, PENSIONS AT A GLANCE (2013), <http://www.oecd.org/pensions/publications/OECDPensionsAtAGlance2013.pdf>; Armando Barrientos, Mark Gorman, & Amanda Heslop, *Old Age Poverty in Developing Countries: Contributions and Dependence in Later Life*, 31 WORLD DEV.: CHRONIC POVERTY & DEV. POLICY 555 (2003).

23 WORLD HEALTH ORGANIZATION [WHO]., WORLD REPORT ON AGEING AND HEALTH (2015) Ch. 3, [http://apps.who.int/iris/bitstream/10665/186463/1/9789240694811\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/186463/1/9789240694811_eng.pdf?ua=1).

24 WORLD HEALTH ORGANIZATION [WHO]., Call For Action by the participants in the First WHO Ministerial Conference on Global Action Against Dementia, at 1 (2015), [http://www.who.int/mental\\_health/neurology/dementia/call\\_for\\_action\\_en.pdf](http://www.who.int/mental_health/neurology/dementia/call_for_action_en.pdf).

25 *Id.*

26 See, however, the interesting findings in Titti Mattsson & Lottie Giertz, *Vulnerability, Law and Dementia: An Interdisciplinary Discussion of Legislation and Practice*, 21 THEORETICAL INQUIRIES L. 139 (2020):

[T]he interviews demonstrate . . . that some persons with dementia find their quality of life to be high no matter how or where they live. They are also pleased with the contact they have with their relatives. Family members who serve as caregivers, on the other hand, point to the many examples of difficult and complex situations in everyday life.



increased long-term care costs for governments, communities, families and individuals, and to losses in productivity for economies. The global cost of dementia care in 2010 was estimated to be 604 billion US\$: 1.0 percent of global gross domestic product.<sup>27</sup>

In some countries, the need for care in old age is currently answered by public funding, as is the case, for example, in Sweden, which is considered one of the best countries for older citizens<sup>28</sup> and which covers 96 percent of care costs with state funding, leaving only 4 percent of care expenses to be privately funded by the elderly themselves or their families.<sup>29</sup> However, as the global population is ageing, welfare regimes in most countries are eroding and governments are increasingly reluctant or unable to take responsibility for such care.<sup>30</sup> This global neoliberal shift exposes older persons and their families to a growing pressure to find private solutions to the needs that accompany old age.<sup>31</sup>

Recent studies provide strong evidence that, in developing as well as developed countries, adult children are still highly involved in filial caregiving.<sup>32</sup> In the European Union, for example, 80 percent of the hours devoted to elderly care are provided by the family, mainly by female spouses and daughters.<sup>33</sup>

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27 WORLD HEALTH ORGANIZATION, *supra* note 24, at 59.

28 Sweden is rated by Global Age Watch as 3<sup>rd</sup> worldwide in the social and economic wellbeing of its elderly. See *Switzerland Tops the 2015 Index*, HELP AGE INTERNATIONAL, GLOBAL AGE WATCH INDEX 2015, <http://www.helpage.org/global-agemwatch/population-ageing-data/global-rankings-table/>.

29 ELDERLY CARE IN SWEDEN, <https://Sweden.Se/Society/Elderly-Care-In-Sweden/>. For an additional reading on the differences between welfare regimens and their implications on care costs of families, see Merrill Silverstein, Aviad Tur-Sinai & Noah Lewin-Epstein, *Intergenerational Support of Older Adults by the 'Mature' Sandwich Generation: The Relevance of National Policy Regimes*, 21 THEORETICAL INQUIRIES L. 55 (2020).

30 Karin Schwiter, Christian Berndt & Jasmine Truong, *Neoliberal Austerity and the Marketization of Elderly Care*, 2005 SOC'Y & CULTURAL GEOGRAPHY 1, <http://www.tandfonline.com/doi/full/10.1080/14649365.2015.1059473>.

31 Ruth Katz, Ariela Lowenstein & Yitzhak Brick, *Intergenerational Relations and Old Age in the Modern Era: Cross-Country Comparisons*, in THE ELDERLY AND THE FAMILY: MULTI-GENERATIONAL ASPECTS OF AGING 53 (Yitzhak Brick & Ariela Lowenstein eds., 2010) (in Hebrew).

32 Merrill Silverstein, Daphna Gans & Frances M. Yang, *Intergenerational Support to Aging Parents: The Role of Norms and Needs*, 27 J. FAM. ISSUES 1068 (2009).

33 Francesca Bettio, Annamaria Simonazzi & Paola Villa, *Change in Care Regimes and Female Migration: The 'Care Drain' in The Mediterranean*, 16 J. EUR. SOC. POL'Y 271 (2006).

In my recent study on the option, adopted by some countries and rejected by others, of making filial piety a legal obligation,<sup>34</sup> I wanted to take a closer qualitative look at filial care for elderly parents. I put out a call on social media to find grown children with a widowed or single parent, explaining that I was looking for cases in which the parent “needs assistance (from any source, due to physical, emotional or economic disability”). The study, conducted in 2016–2017, comprised 37 interviews, 20 with daughters and 17 with sons, from the four main ethnic groups in Israel: the descendants of Western Jews (WJ), the descendants of Eastern Jews (EJ), the children of immigrants from the former USSR (R), and Arabs (A).<sup>35</sup> In some cases, the parent needed assistance due to dementia, accompanied or not by a physical disability or an economic dependency. In other cases, the parent had one or more physical disabilities, at times coupled with a relatively minor emotional or economic dependency.<sup>36</sup> While elder people’s perceptions are crucial for shaping Elder Law, those of their children who care for them are also an important source of knowledge and inspiration.

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34 The study also included interviews with nine of the elderly parents of the grown children interviewed, as well as a comparative law project on filial piety that will not be reported here. For additional findings from this study, see Daphna Hacker, *Filial Piety in Israel: Between the Law in the Books and the Law in Action*, 14 *FRONTIERS L. CHINA* 145 (2019).

35 The research assumption was that these four groups might have different cultural and religious perceptions regarding filial piety. For a detailed explanation of the origin of this assumption and for findings which indeed validated it, see *id.*

36 In one case, the parent was mentally and physically able, yet the son insisted on being interviewed, to show me how, even in such cases, the parent needs assistance from the children. In another case, a daughter was interviewed although both her parents are alive, as, due to her personal experience, she became an activist in the area of elder rights and I was interested in her normative as well as private insights. Finally, in one case, the son and the grandson were interviewed together, as it became apparent, after scheduling the interview with the son, that it is the grandson who performs the primary caregiving task. The interviews were conducted in the native language of the interviewees, recorded, transcribed, and translated into Hebrew in the cases in which they were conducted in Arabic or Russian. I thank Lena Sultan Bishara for conducting the interviews in Arabic, and Lena Russovsky and Elena Tartakovsky for conducting the interviews in Russian. I conducted all the Hebrew interviews. The transcriptions were analyzed according to the grounded theory method, see STRAUSS ANSELM & JULIET M. CORBIN, *BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY* (2d ed. 2008), with the assistance of Atlas software. The findings are reported here with the anonymization necessary to secure the privacy of the interviewees and their families.

One of the most dominant themes to emerge from listening to the grown children interviewed was the role reversal between parents and children in the ‘care’ dimension of the relationship, as perceived by the latter. When the elder parent is in need, grown children find themselves ‘parenting’ their parents. At times, and especially in cases in which the parent suffers from severe dementia, the ‘parenting’ described by the interviewees resembles that of a helpless baby, and might include feeding and changing diapers. For example, Sara (WJ) referred to her 95-year-old mother, who has suffered from severe dementia for several years, as her baby, and mentioned that her mother is aware of the role reversal between them:

Q: You said that your mother is sweet now...

A: Incredibly sweet. She became our baby, it is exactly like that. She became a baby. She said, by the way, “Now you’ve become my mother” a couple of months ago.

Q: Really? Amazing.

A: Yes, amazing.

Q: She understood the reversal?<sup>37</sup>

A: She understood the reversal. She was a very intelligent woman, something is still left.

Q: And what do you say about this reversal?

A: Nobody prepared me for this.

In other cases, the ‘parenting’ described by the interviewees resembles that of young children or adolescents, who vary in their degree of dependency, and who might be relatively independent yet still need their guardians’ involvement and supervision, for example when dealing with various authorities. Gabi (R) compared his stubborn and opinionated, yet mentally unstable, 89-year-old mother, to his eight-year-old daughter: “My wife laughs at me that sometimes I behave like a parent and expect her [the mother] to behave like my daughter, and sometimes it’s true. I mean, my eight-year-old daughter is already an independent girl yet at times I just grab her and put her in the car.”

Indeed, more than half of the interviewees used childhood as a comparative metaphor for old age in general, and in relation to the care they provide for

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37 Note that in this interview the label “reversal” was mine and not the interviewee’s. Only one interviewee used this label spontaneously, talking of “this role reversal that happens somewhere along our age” when describing her relations with her sick elderly mother. While the “childhood” metaphor was part of the *Emic* in this research field, the conceptualization of the situation as “role reversal” is more a part of the *Etic*.

their parent in particular.<sup>38</sup> For example, Jo (WJ) observed, in relation to her attempts to feed her 85-year-old mother, who suffers from dementia: “From childhood to old age: we begin [our life] with a blender and we end [it] with a blender.” Likewise, in relation to her very sick and institutionalized 75-year-old father, Lea (EJ) revealed: “He did not swallow the food and . . . it was the first time that I felt [he] is like a baby.” Dani (EJ), who has a physically disabled 78-year-old mother cared for by a Filipino migrant worker, described what his brother told him about his attempts to settle disputes between the mother and the caregiver: “He tells me that he speaks with both of them like little girls.” Yael (EJ) was determined not to treat her 82-year-old physically disabled father like a child, even when he refused to change his torn shirt for a new one she had bought him: “I cannot take the torn shirt and make it disappear, like you do with a child.” Nevertheless, when describing her father’s disability when walking, she said: “So he is like a baby, toddles like that.” Likewise, Nasreen (A) described how she and her siblings assisted their 86-year-old mother after a fall impaired her walking: “We assisted her like you assist a little boy.” Finally, even Liat (WJ), who said she expresses anger whenever a doctor or administrator infantilizes her 90-year-old mother (who had moved to an elderly care home following a medical crisis), admitted: “Truly, there is some return to childhood in this dependency and she [the mother] is very, very . . . became very dependent, and I have sisters abroad, so I am here alone.” She also added, in relation to finances: “But this is exactly what happens in old age, that at a certain stage it is like with children, do you calculate [your budget] with your children? Do you have a separate [bank] account from your children? No, it is one account, right? It becomes the same, because it does not matter at the moment . . . if [my mother’s] money runs out, so what? I will not care for her?”

While the interviews as a whole contained many examples of how the interviewees treated the parent with dignity and tried to respect their autonomy and wishes as long as those could be expressed and exercised, they nevertheless provided ample evidence of the role reversal that many grown-up children experience with their elderly mother or father. These examples can be grouped into four different kinds of tasks that very much resemble the legal duties

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38 For similar findings see Liat Ayalon, *Family and Family-Like Interactions in Households with Round-The-Clock Paid Foreign Caregivers in Israel*, 29 *AGING & SOC’Y* 671, 676 (2009). However, unlike Ayalon, who found even “more degrading metaphors,” I do not understand the interviewees in my study as using the childlike metaphor in a degrading manner, but rather as a way to explain the new situation in a factual, and most often also loving and respectful, manner.

imposed by the law on parents of minor children:<sup>39</sup> representation; stimulation; physical care (both direct and via supervision of paid caregivers); and economic assistance. I will not elaborate on all these examples, but only provide a few to illustrate each type of task.

### **A. Representation**

Most of the interviewees were not the legal guardians of their parent. It seems that children delay pursuing legal guardianship over their parent, as the very last resort. Nevertheless, this does not mean they do not act as the representatives of the parent when interacting with third parties. The interviewees revealed that various authorities in Israel disclose private information to the adult child about the parent and allow them to sign important documents on behalf of the parent, even if that child is neither the legal guardian nor holds any other kind of legal authorization to represent the parent. In that respect, the authorities are assigning the elderly parent the status of a minor, by denying the parent the right to confidentiality and enabling the grown-up child's agency and access to personal information. Liat observed: "It is very interesting that the whole confidentiality thing does not apply to elderly people. In relation to my [grown-up] son — I have a son with a disability, my son is deaf and has autism — in relation to him, everything is confidential, they will not tell me anything, right? But with the elderly, it is like little children." Dani claimed that although his mother was in full mental capacity, and although he was not in possession of any legal document that formally granted him authority over her affairs, "Social Security, agencies [of care-workers], Matav [an NGO that assists grown children who have a disabled parent] ... they let the children sign. I do not know if it even has legal validity. I thought about it when I signed, what legal validity does it have? My mother could say, 'who is he anyway?' But they let you sign on behalf [of the parent]."

Interestingly, I found that in some families the division of the 'representation' task is made according to the grown children's occupation. For example, in one case of a mother (WJ) who had been sick with Alzheimer's for nine years, since the age of 64, her three daughters were intensely involved in managing various aspects of her life that required them to represent her, although no legal order had been issued in relation to her capacity. The daughter who is a doctor deals with all matters related to health; the daughter who is a lawyer deals with social security rights and the legal aspects of the employment of the mother's migrant care-worker; and the daughter who is an economist deals

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39 3 EUROPEAN FAMILY LAW IN ACTION: PARENTAL RESPONSIBILITIES (Katharina Boele-Woelki, Bente Braat & Ian Curry-Sumner eds., 2005).

with all the mother's accounting. However, in families not fortunate enough to be able to draw on such relevant professions among siblings, one child can find herself having to deal with all kinds of authorities. Such is the case of Noa (EJ), the daughter of relatively able, yet dependent, parents (aged 87 and 84): "I travel there [the city where the parents live, more than an hour's drive from Noa's home] at least once a week, for a day. [...] There are plenty of errands on the way, I am sent on all kinds of errands, sometimes to the Kupat Holim [national health insurance organization] to bring medicines. [...]. Sometimes it is to fight with all kinds of service companies, with Bezek [the phone company], with that... there is always [an] additional something to be done, so I am there."

The prevalent role of representation among adult children was also apparent when I analyzed the calls received by the Hotline for the Elderly, operated by the Haifa University Law Faculty Clinic for Elderly Rights together with The Law at the Service of Old Age (an NGO).<sup>40</sup> A quarter of the 525 calls received in 2012–2013 were from the daughter (n=83) or son (n=43) of the elderly person who was the subject of the consultations.

## **B. Stimulation**

Many of the interviewees acknowledged the parent's need for company and conversation. Yana (R), for example, visited her institutionalized 84-year-old mother twice a week, although it took her three or four hours of back-and-forth commuting each time. While the mother was very confused and suffered from depression, Yana talked to her during these visits and took her outdoors in a wheelchair.

Other interviewees, in cases of a parent who did not have dementia, mentioned attempts at non-routine stimulation. David (WJ), for example, told of his sister's attempts to entertain their physically disabled 87-year-old mother. While he went every Saturday for a couple of hours to visit his mother — and thus give the paid caregiver some time off — his sister Ruth went a step further. In addition to a once-a-month Friday dinner with the mother and Ruth's nuclear family, for which Ruth does all the cooking, the mother and daughter:

have a subscription to the theatre [...] so Ruth takes her to the theatre, which is a serious project, understand, it is a half-hour walk, she walks very, very slowly or with a wheelchair, and during the show she needs the toilet [so Ruth must] take her out. It is hard work. My mother's

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40 I thank Adv. Carmit Toledano (Shay), the Legal Advisor of the Clinic, for granting me access to this information.

other hobby is movies, so Ruth takes her once in a while to see a movie on a Saturday night.

Even in cases of severe Alzheimer's, however, there are adult children who do not give up on attempts to stimulate their parent. The three daughters mentioned above, for example, host their mother two afternoons a week each, taking turns. They do so, among other reasons, to allow the migrant caregiver two free hours a day. In addition, they try to stimulate the mother with different activities, such as playing the piano (which she manages at times) or peeling pomegranates, which she can enjoy for hours. In fact, the daughters must find the mother things to be occupied with, for otherwise she becomes restless and wants to go home. A few days before the interview, the daughters had decided to buy the mother a therapeutic dog. The interviewed daughter reported: "It is just amazing, just amazing to see her with it. All of a sudden she is all smiling and full of life; it is adorable, truly adorable."

### C. Physical Care

My findings echo those of other scholars who have shown that family members from Western societies often employ a paid worker to care for the physical needs of the elderly person; this leaves them free to act as 'administrators' and as providers of social and emotional support.<sup>41</sup> However, in the present study, this was true only for the Jewish interviewees. Eight of the ten parents of the Arab interviewees were physically cared for only by their daughters, sons, or daughters-in-law, with no paid caregiving. Manar, for example, described her sister's life as dedicated to their 84-year-old mother. The two sisters never married, never pursued higher education, and both live with their mother. The mother is deaf, suffers from problems with her legs (as she refused to undergo an operation), and has been depressed for the last nine years since one of her three sons took his own life. While Manar also cares for the children of the deceased brother and leaves the house from time to time, her sister devotes herself entirely to the everyday care of the mother, including taking her to the toilet, as she cannot walk on her own. All this is done although the mother favors her two living sons and shows no gratitude for the care provided by her daughters. Manar explained: "Perhaps there are people who would throw their parents into a nursing home, or there are people who do not value their parents, they do not feel committed to them. Some people leave them all the time in the same clothes. We are not like that; we shower them, pay attention to them, and feed them. We do not expect a reward. Only that people will say

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41 Hila Shamir, *Migrant Care Workers in Israel: Between Family, Market and State*, 28 ISR. STUD. REV. 192, 200 (2013).

so-and-so is good with her mother.” Indeed, other Israeli studies have also found that institutionalization and paid care for the elderly are significantly less common in the Arab than in the Jewish sector and that family-based care is still the primary solution to dependency among the Arab elderly.<sup>42</sup>

Among the Jewish interviewees, there was only one example of intense physical care provided by a child. Rachel (WJ) had given up her job as a lawyer two years earlier, after realizing that she had to make herself completely available to cope with the very advanced Alzheimer’s from which her 86-year-old mother was suffering. The migrant caregiver of Rachel’s mother is allowed to take every weekend off, during which Rachel provides all the necessary physical care. Rachel’s husband and two teenage daughters refuse to help in any way, almost as if to punish Rachel for refusing to institutionalize her mother: “There is a paid caregiver. This is a great relief. She feeds her, changes her diapers, cares for her nursing needs. She does not look after the aspects, let’s say, of stimulating her curiosity about something. She is not that kind of a person ... she does not have a culture to share with her, or ... I don’t know. I mean, she cares for the nursing aspect. She is on leave every Friday–Saturday, so Friday–Saturday I take care of those things.” Rachel has been providing this care despite the significant challenges it presents:

This is the thing that is most difficult for me. Also because of the physical dimension that is very, very ... like, it is not easy to care for your mother’s intimacy. In general. She is also very, very aggressive, and very, very violent, and all sorts of such things. And also the mental difficulty, I mean, you are in such a state, that as a child you are angry with your mother, or you are ... I don’t know, I am angry at her all the time, in short. Angry at her, and she is angry at me. These are not some kind of compassionate relations, caressing and love. So it is very complicated. And that’s it. And as for the showers, we give them to her together during the week also, because she is not ... like, you need to hold her ... you need to hold her, because she resists it. This is also part of the disease, that any touch is terribly, terribly upsetting, and very frightening for her.

While no other Jewish interviewee described dealing with such demanding physical needs,<sup>43</sup> many mentioned providing their parents with varying

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42 Faisal Azaiza & Tal Kroytoro, *Change in the Status of the Elderly within the Arab Society*, in *THE ELDERLY AND THE FAMILY: MULTI-GENERATIONAL ASPECTS OF AGING*, *supra* note 31, at 75.

43 In an informal conversation with a group of Jewish women, in which I shared some of the study’s findings (Sept. 2018), one of them described how she cared



degrees of physical or personal care, including help with shopping (food and clothes), cooking, feeding, cleaning, bathing, putting to bed, walking, driving, escorting to medical appointments, staying during hospitalization, and arranging medicines. Many interviewees, moreover, were deeply involved in different aspects related to the paid care their parent received. First, there is the involvement in choosing the *type* of paid care — from just a few hours a day, to round-the-clock at-home paid care, or an institution. Lea, for example, described how her parents' small apartment and meager resources made it obvious to her and her sister that they needed to look for a state-run institution to place the father, as there was no room for an in-house caregiver and no money for a private institution. Second, there is the process of choosing the particular institution or caregiver. For example, Yonatan (WJ) described how, for three years, he had been assisting his 79-year-old mother in her search for suitable elderly housing: "I went with her to all the possible places in the Haifa area and, when the moment of decision arrived, she said 'No, I am coping, I do not need this'." Only after a medical crisis did the mother decide that she wanted to leave her house and move to an elder-care home. Again, Yonatan joined her in the search, but "I was only the escort and I did not intervene. I wanted the decision to come from her, because I think this is right. I did not want to push, so as not to make her feel as if we were pushing her to leave her home." And third, there is the ongoing supervision needed to make sure that the parent indeed receives the right care by the paid-care provider. For example, Avi (WJ) described how he had experienced one crisis after another during the ten years his 93-year-old mother was cared for by different migrant workers. While all three successive caregivers were "very nice" and "devoted," Avi and his siblings nevertheless found themselves facing a care deficit when the first caregiver was forced to return to Nepal by her father, the second took maternity leave after giving birth and then disappeared, and the third faced deportation after her visa expired. So, while no supervision was needed when the caregivers were available, Avi found himself searching for temporary and permanent replacements, and negotiating for visas with the authorities to secure the care his mother needed.<sup>44</sup>

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for her two elderly parents, with whom she lived. Her mother, aged 86 and physically disabled, receives a few hours a day of paid care through the social security system. However, the daughter said: "I am the Filipino," thus both naming her total devotion to her parents, and highlighting how rare it is within the Jewish sector, in which usually the demanding and intimate physical care of elderly parents is delivered by migrant workers, who come mainly from the Philippines (See HACKER, *supra* note 10, at Ch. 8).

44 See also Keren Mazuz, *The State of the Family: Eldercare as a Practice of Corporal Symbiosis by Filipina Migrant Workers*, in ETHNOGRAPHIC ENCOUNTERS

The high level of involvement of grown children in physical-care supervision for their parents is also evident in the data stemming from a new email information service, recently established by the Tel Aviv University Law Faculty Clinic for Employees' Rights. This service is aimed at informing those who employ migrant care-workers (the vast majority being elderly) about their employee's rights. To date, it has received 145 email consultations. Out of the 105 consultations in which the identity of the enquirer was recorded, 40 were from daughters of the care-recipients and 27 were from sons (64% in total).<sup>45</sup> Hence, while formally the elderly person is the employer of the care-provider, the children play a major role in handling the complex tasks of applying for permission to employ a migrant worker and managing her employment.<sup>46</sup>

#### **D. Economic Assistance**

In some cases, the grown children find themselves directly funding the parent's needs. Nasreen, for example, who has five brothers and three sisters, revealed that, as the Social Security was funding a caregiver for her elderly mother for just a few hours during the mornings, her brothers pay the caregiver to come also during the afternoon: "You know that in our [Arab] society, the son is responsible for such matters. If there had been no funding, the daughters... we would have given, we would have no problem, but we see that we are not needed and that they [the brothers] do for her [the mother] what is needed in that respect."

Dror (WJ) reported having economically assisted his elderly mother for four years, just to reassure her that she was financially secure, although apparently there was no objective need. In this case, with no embedded and

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IN ISRAEL: POETICS AND ETHICS OF FIELDWORK 97 (Fran Markowitz ed., 2013); Ayalon, *supra* note 32.

45 Idit Zimmerman, The Emps. Rights Clinic at Tel Aviv Univ., address at event of the Research Project TraffLab (ERC), *Between Care-Recipients and Employers: The Challenges Facing a Care Recipient as an Employer*, (Nov. 11, 2018).

46 This high level of involvement is also evident in a very active Facebook group devoted to people with Alzheimer and Dementia. This closed Facebook group consists in fact of family members of people with dementia, mainly spouses and grown children, and not the sick persons themselves. Many of the posts written by grown children are related to the challenges they face in directly or indirectly physically caring for their parents. See *Haba'it Hamishpati Lecholey Alzheimer Vedementia Israel* [*The Legal House for Sick People with Alzheimer and Dementia in Israel*], FACEBOOK, <https://www.facebook.com/groups/alzheimer.support/> (last visited Sep. 10, 2019).

shared norms of economic filial piety, such as those that exist within the Arab society, this economic support resulted in some tension among the siblings:

A: There was a period in which it seemed to us that she [the mother] was stressed [economically]. I did not think the stress was justified, but she was stressed so we all helped her.

Q: In equal shares?

A: Yes, yes. It was also a thing, the only time there was a bit of ... tension among us, [was] because Dalit [Dror's spouse], it annoyed her. We made a standing order, Dalit and I made a standing order, and my brother and sister did not. Each time they had to be reminded, and it annoyed Dalit. I understood that. [...]

Q: And how did your mother respond to that [the economic assistance]?

A: I don't think she was even aware in particular. It was important to her to know that she was fine, but that's it.

Lea was among the interviewees who were surprised to learn that Israeli law does not leave economic filial piety to the good intentions of the grown children, but makes it obligatory when parents cannot support themselves.<sup>47</sup> Although she was struggling to support her own nuclear family, the state charged her about 400 NIS a month (the equivalent of 100 U.S. dollars) for her father's institutionalization. Her sister, who is even more economically vulnerable, was required to pay about 120 NIS a month.

In addition to these examples of direct economic support, it is clear from the other examples in relation to representation, stimulation, and direct and indirect physical care that adult children economically assist their parents also by performing different kinds of tasks that have market value but are done by them for free. Without the assistance of the children in driving the parent, doing the accounting, dealing with legal matters and providing day-to-day care, more funds would have had to be paid by the parents for taxis, banks, lawyers and paid caregivers.

The findings in this Part echo Mancini and Blieszner's insight that:

[a]lthough in contemporary society there is flexibility in the ways that parents of minors accomplish childrearing, there is social and legal consensus concerning the roles of parent and child: parents are to provide affection, physical sustenance, socialization, and recreation; children are to respect and obey their parents, do well in school, and attain social skills. No such clear-cut role parameters exist for the period

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47 Family Law Amendment (Maintenance) Law, 5719-1959, 13 LSI 73 (1958-1959) (Isr.). For more on the economic dimension of filial piety in Israeli law and society, see Hacker, *supra* note 34.

when both child and parent are adults, but certainly there is widespread recognition that the relationship changes.<sup>48</sup>

The findings detailed above show that this change may, at times, amount to a role reversal in which adult children find themselves, to varying degrees, ‘parenting’ their parents. In the next Part, I will argue that these circumstances are a good indicator of the circumstances that justify Elder Law that not only fights ageism, but also acknowledges the unique vulnerabilities that might accompany old age. Moreover, I would argue that such an acknowledgement points to Family Law jurisprudence as a highly relevant and inspirational source for Elder Law.

## II. FAMILY LAW JURISPRUDENCE AS A SOURCE OF INSPIRATION

Returning to the question of the justifications and normative content of Elder Law, as set out in the Introduction, I share Numhauser-Henning’s normative stand that “There is, as a general rule, no need to distinguish a certain set or body of laws to apply to older persons.”<sup>49</sup> In that sense, a major role of Elder Law is to provide anti-discriminatory protections, based on the premise that there is no qualitative difference between adults due to their different ages. However, as she further argues in relation to the autonomy/dependency and individual/collective dichotomies that are often found within the disputes over the justifications for Elder Law, a non-paternalistic autonomous and individual approach is not necessarily the preferable solution to real-world problems.<sup>50</sup>

The empirical findings reported above, with the ‘childlike parent’ metaphor dominating the interviewees’ narratives and the rich examples of the role reversal that might occur between elder parents and their children, point to “real-world problems.” The findings reveal that old age-related needs might not only be similar to those experienced by minor children, but might also be — as in the case of a first newborn — a new experience and a challenge that affects their surroundings. In many cases, the elderly person and their family members are ill-prepared for these new vulnerabilities, and find themselves

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48 Jay A. Mancini & Rosemary Blieszner, *Aging Parents and Adult Children: Research Themes in Intergenerational Relations*, 51 J. MARRIAGE & FAM. 275, 277 (1989).

49 Numhauser-Henning, *The Contextualised Ageing Individual as The Subject of Elder Law* (2018) (unpublished manuscript) (on file with the author).

50 Ann Numhauser-Henning, *The Elder Law Individual Versus Societal Dichotomy: A European Perspective*, in *ELDER LAW EVOLVING EUROPEAN PERSPECTIVES* 86 (Ann Numhauser-Henning ed., 2017).

trying to cope with complex new situations. Moreover, as in the case of children, albeit in a reversed scenario, the dependency on others is dynamic, so a successful adjustment to one new circumstance might be quickly followed by an unexpected, and often more intense, dependency that calls for rapid adjustment and new capacities on the part of caregivers.<sup>51</sup>

These real-world challenges are not restricted to elderly people who have children, or to those who experience actual role reversal with the children they have, but rather are shared by many elderly people regardless of their familial status and actual familial relations. Moreover, though the study focused on filial piety, the question of how Elder Law should cope with these challenges is much vaster and forcing children to care for their parents, by law, is hardly the answer.<sup>52</sup> Hence, Elder Law must evolve into a complex legal area that provides an individualistic anti-discriminatory legal framework that is universal for all regardless of age and, at the very same time, is also a framework that reflects the prevalence of some unique age-based vulnerabilities, which call for a pragmatic and sensitively tailored legal ethic of care.

In what follows, I argue that Family Law jurisprudence in general, feminist Family Law jurisprudence in particular,<sup>53</sup> is highly relevant to the development of the latter framework within Elder Law. Indeed, I believe that feminist jurisprudence of Family Law provides us with a rich theoretical and methodological background and the inspiration to discard the autonomy/dependency and individual/collective dichotomies for the sake of a better and more nuanced understanding of the justifications for Elder Law. I shall briefly highlight, as preliminary food for thought and further discussion, three pillars of Family Law — two theoretical and one procedural — that, in my view, are particularly relevant to Elder Law. I also add a note on the philosophical question of ‘the life worth living,’ which I hold to be an important nexus between these two legal fields.

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51 There are many empirical studies on the characteristics of informal care provided to the elderly, including by their grown children. Much of it is based on SHARE [SURVEY OF HEALTH, AGEING AND RETIREMENT IN EUROPE, [www.share-project.org](http://www.share-project.org) (last visited Apr. 22, 2019)].

52 In fact, one of the conclusions of this study was that filial piety should not be enforced by the law, but rather encouraged by positive incentives. See Hacker, *supra* note 34.

53 There is no universal agreement on what Family Law is, see Ayelet Blecher-Prigat & Ruth Zafran, *Celebrating 40 Years of the TAU Law Review: Evaluating 40 Years of Family Law Research*, 40 TEL AVIV L. REV. 547 (2017) (in Hebrew). I believe the principles I offer in this section are based on a broad consensus that can be found within the feminist Family Law scholarship.

## A. Core Values

While formal equality and freedom lie at the heart of many modern and liberal legal areas, Family Law offers us a different set of core values. Indeed, no area of law has demonstrated the limitations of the legal discourse on equality and freedom quite as much as current Family Law. Through the emphasis on the best interest of the child and its conceptualization as the “primary consideration,”<sup>54</sup> the emphasis on parents’ duties and responsibilities rather than their rights and freedoms,<sup>55</sup> and the exposure of the fallacy of the perception that spousal relations are based on formal equality and absolute freedom,<sup>56</sup> Family Law theories, inspired by feminist and children’s rights theories, reveal the need to embrace an additional set of values beyond the classic liberal ideals of formal equality and freedom. Care,<sup>57</sup> relational autonomy,<sup>58</sup> and equity<sup>59</sup> are all crucial if the law aims to meet our needs as human beings. The family relations themselves and the presence of dependent children create special kinds of vulnerabilities, dependencies, and ongoing and ever-changing relations that the law must address with these values in mind.

Hence, antidiscrimination law to combat ageism is extremely important, but it is insufficient as the sole component of Elder Law when elderly people become more dependent on others as compared to in their earlier adult lives, as evident from the previous Part. By contrast, Elder Law that is inspired by Family Law *would* hopefully be able to assist in balancing the rights and interests of elderly people with those of others and in offering a consistent theory regarding when the elderly person’s best interest should be given primary consideration, and when it should not. Likewise, such a conception

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54 United Nations Convention on the Rights of the Child (UNCRC), Nov. 20, 1989, 1577 U.N.T.S. 3, art. 3(1).

55 Of course, parental rights are part of Family Law, but they are not rights in the simple liberal sense, but rather embody a special quality of the right to perform the duties toward the children. See Rhona Schuz, Parental Rights in the Era of Children’s Rights (in Hebrew) (unpublished manuscript) (on file with the author).

56 See, e.g., Ayelet Blecher-Prigat, *The Costs of Raising Children: Toward a Theory of Financial Obligations between Co-Parents*, 13 THEORETICAL INQUIRIES L. 179 (2012); Julia Halloran McLaughlin, *Should Marital Property Rights Be Inalienable? Preserving the Marriage Ante*, 82 NEB. L. REV. 460 (2003).

57 MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1996).

58 JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* (2011).

59 SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1991); Katharine T. Bartlett, *Feminism and Family Law* 33 FAM. L.Q. 475 (1999).

of Elder Law would have the capacity to advance the values of care, relational autonomy, and equity when we shape legal policies aimed at, or that affect, the elderly and their caregivers. This advancement is, of course, relevant for those older people embedded in family relations as well as for those who are not, the latter being even more dependent on public policies that adopt the ethic of care of vulnerable sections of society.

The feminist Family Law caveat not to confuse the familial ideal with familial reality is also very relevant to Elder Law. While the findings reported in Part I highlight the common cases of loving familial care and its many beneficial manifestations among elderly parents, feminist family scholarship constantly reminds us that families can also be a source of neglect, abuse, exploitation, and violence.<sup>60</sup> Hence, Elder Law, like feminist Family Law, should portray the ideal caring familial relations<sup>61</sup> and encourage citizens to aspire to them, while at the same time setting explicit anti-abuse norms and being alert and punitive toward their violation, including within familial intimacy and dependency in old age.<sup>62</sup> For example, a more severe punishment should be set when an elder is abused by his or her guardian than when by a stranger, as is the case with children.<sup>63</sup>

## B. The Familial Subject

Current Family Law feminist theories reject both the autonomous, rational, and individualized ideal subject — as embedded, for example, in Contract

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60 For a discussion of familial abuse of elderly persons, see Deblina Dey, *A Socio-Legal Analysis of Elder Care Laws in India*, 21 THEORETICAL INQUIRIES L. 77 (2020).

61 While there is no one familial ideology, internationally shared, I argue that “families, at their best, can, and should, provide a unique and essential source of nurturing and support that benefits their members. As a minimal standard, families must provide a secure physical and emotional space in which each family member is kept safe from abuse.” See Hacker, *supra* note 11, at 245.

62 An inspiring example of this kind of idealistic–realistic move can be found in Carolyn Frantz & Hanoach Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004). While they offer an ideal for the institution of marriage — marriage as an egalitarian liberal community — they nevertheless acknowledge and address cases of spousal subordination and patriarchal abuse.

63 For example, Israeli law sets a more severe punishment of five-year imprisonment for assaulting an elder (aged 65 and above) as compared to two years for “regular assault.” When minors or “helpless” adults are assaulted by their guardians, the punishment is raised to seven-year imprisonment, see Penal Law 5737-1977, §368B, 368F, 379, Special Volume LSI 1 (1977), (as amended) (Isr.).

Law<sup>64</sup> — and also the purely vulnerable, dependent, and incapacitated subject, such as that which governed Family Law’s attitude to children until the emergence of the children’s rights discourse in the 1990s.<sup>65</sup> Rather, the guiding concept of the ‘vulnerable subject,’ developed by Martha Fineman, one of the pioneering feminist Family Law scholars, is shared by many, and is now one of the most widely referenced within Elder Law.<sup>66</sup> Her theory on vulnerability as a universal, inherently human trait that should be reflected in social policy and law,<sup>67</sup> including within the Elder Law context,<sup>68</sup> can be traced back to her early work on the mother–child dyad and its moral lessons.<sup>69</sup> Indeed, Family Law theories, as well as recent Family Law reforms, offer us an understanding of human subjects as simultaneously both independent legal subjects *and* subjects entwined in intense relations that involve dependency and vulnerability. While Family Law centers on minor children and their parents and on spouses, this understanding of the human subject within the family constellation is relevant to all children and adults, in their capacity as siblings, aunts, grandparents, grandchildren, and so on.<sup>70</sup> Within the feminist Family Law corpus, each family member ought to be treated as a legal subject in its own right and also as a subject embedded in an intense interdependent web of rights and obligations.

Moreover, from this perspective, the familial subject is not fixed but rather dynamic, evolving over time and affected by changing circumstances. So, for example, while the passing of time means, in most cases, the growing independence of children,<sup>71</sup> for the parent who is the children’s primary caregiver

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64 Elizabeth Anderson, *The Ethical Limitations of the Market*, 6 ECON. PHIL. 179 (2008).

65 Michael D. A. Freeman, *Taking Children’s Rights More Seriously*, 6 INT’L J.L. POL’Y & FAM. 52 (1992).

66 See, e.g., ANN NUMHAUSER-HENNING, AN INTRODUCTION TO ELDER LAW AND THE NORMA ELDER LAW RESEARCH ENVIRONMENT, *supra* note 4; Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J.L. & FEMINISM 1 (2014).

67 Martha Alberston Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

68 Martha Alberston Fineman, “Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 20 ELDER L.J. 71 (2012).

69 FINEMAN, *supra* note 57.

70 Blecher-Prigat, *supra* note 56.

71 In some legal systems, the child support obligation stops at a certain age, while in others, it diminishes over time more gradually. In Israel, for example, parents are expected to fully support their children until the age of 18, and to support them to a lesser degree until they are 21. If the child cannot support himself, for example due to severe disability, the parents might be legally obliged to support



it usually also means growing economic dependence on the breadwinning parent, due to the former's ongoing (relative or absolute) absence from the paid labor market.<sup>72</sup> Dominant theoretical approaches of Family Law also prioritize the actual family over the theoretical one, and insist on serving each family as a unique unit, paying special attention to each of its members' distinct and evolving needs.<sup>73</sup>

I argue that how the familial subject is perceived within feminist Family Law is extremely relevant to the justifications of Elder Law. Old age, in itself, does not justify special legal treatment, except, as mentioned above, in the shape of antidiscrimination law in the common cases of an ageist society. In that sense, Fineman's argument that we are all vulnerable<sup>74</sup> does not point to any specific elder law, but to the need, shared by all, for a generous welfare state.<sup>75</sup> However, as the findings detailed in Part I demonstrate, old age might be accompanied by new dimensions of need, dependency, and familial and other care-related relations. Given that these dimensions are also highly contextualized and vary between individuals, families, communities and nations, a universal one-size-fits-all legal prism is very problematic. I contend that these dimensions of need constitute a major justification for Elder Law in general, Elder Law inspired by Family Law in particular. Indeed, the familial subject within Family Law jurisprudence, which so very much resembles that of the dependent elder person, provides a warning about taking age as a strict and rigid legal criterion, such as in mandatory retirement at a certain age.<sup>76</sup> Conversely, it pushes toward more flexible and contingent legal rules that are sensitive to the possible impact of old age, yet do not create an unnecessary age-based impact. As such flexibility may involve some economic or emotional

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him even as an adult. See Family Law Amendment (Maintenance) Law, 5719-1959, 13 LSI 73 (1958-59) (Isr.).

72 Hence, even when the children are fully grown and leave the parental home, the caregiver parent might find herself still economically dependent, as her ability to reintegrate into the labor force is limited due to lack of experience or ageism, or both. See Ruth Halperin-Kaddari, *Wife Support: From Perception of Difference to Perception of [In]Equality*, 7 MISHPAT U'MIMSHAL [LAW & GOV'T] 767 (2003) (Isr.).

73 Shifman Pinhas, *On the New Family: Introductory Notes*, 28 TEL AVIV U.L. REV. 643 (2005) (Isr.).

74 Fineman, *supra* note 67.

75 See also, Kohn & Spurgeon, *supra* note 5.

76 Yehuda Baruch, Susan Sayce & Andros Gregoriou, *Retirement in a Global Labour Market: A Call for Abolishing the Fixed Retirement Age*, 43 PERSONNEL REV. 464 (2014).

cost — for example, a requirement for expensive or burdensome medical examinations — the benefits must be balanced against the drawbacks.

Notwithstanding, the familial subject inspiration that I have taken from dominant Family Law theories' understanding of the human subject, relevant both to the elderly and to their caregivers, should not be misinterpreted as Elder Law pushing for the privatization of care or glorifying a heteronormative familial vision. On the contrary, feminist critiques of the private/public dichotomy<sup>77</sup> and of the heteronormative family<sup>78</sup> are highly relevant to the importation of the normative inspiration from the *familial* subject to the *elderly* subject, who has the right to have her/his relational autonomy protected by the law, irrespective of her/his familial configuration and based on state-defined and legislated duties to care.

### C. Procedures

Current Family Law also offers procedural inspirations and not only substantial ones. Again, if there are no qualitative differences between elderly people and other adults, then there is no need to think about special legal procedures within Elder Law. But, if my findings are convincing that old age can be, at times, a uniquely challenging life phase with unique needs and dependencies, then the special procedures developed by Family Law in different jurisdictions may be of relevance.<sup>79</sup>

In the last three decades, many countries have established special tribunals designated to deal with family matters, characterized by a unique blend of

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77 See, e.g., Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

78 See, e.g., Daphna Hacker, *Single and Married Women in the Law of Israel: A Feminist Perspective*, 9 FEMINIST LEGAL STUD. 29 (2001). Of particular relevance here are the findings that the care provided to elderly parents is gendered, with daughters carrying most of the burden. See, for example, Angelina Grigoryeva, *Own Gender, Sibling's Gender, Parent's Gender: The Division of Elderly Parent Care among Adult Children*, 82 AM. SOC. REV. 116 (2017).

79 Most of the attention to the need of special procedures within Elder Law is focused on cases of elder abuse. see for example, Candace J. Heisler, *Elder Abuse and the Criminal Justice System: New Awareness, New Responses*, 24 GENERATIONS 52 (2000). See also Dey, *Supra* note 60 (on the special procedures established in India for filial piety claims). Rebecca C. Morgan adds another dimension of a physically and technologically adapted "elder-friendly court". See Rebecca C. Morgan, *From the Elder-Friendly Law Office to the Elder-Friendly Courtroom: Providing the Same Access and Justice for All*, 2 NAELA J. 325 (2006).

legal and therapeutic expertise.<sup>80</sup> Moreover, in many of these tribunals there are special procedural rules, which enable, for example, speedy procedures in emergency cases<sup>81</sup> and behind-closed-doors hearings to secure the privacy of those involved and allow off-the-record deliberations in particularly delicate matters.<sup>82</sup> The privacy of the family members is also protected by other means, such as anonymized court decisions.<sup>83</sup> Family Law recognizes, moreover, that children experience time differently from adults, and that the court must take this difference into account, for example by endeavoring to minimize the duration of adoption cases.<sup>84</sup> Finally, Family Law encourages alternative dispute resolution (ADR), on the realization that litigation can be especially harmful to children and to ongoing family relations.<sup>85</sup>

I argue that Elder Law should consider the application of such unique procedural law and that there are scenarios relevant to elderly people, and to people connected to their lives, that similarly justify special courts, speedy procedures, closed doors,<sup>86</sup>

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80 Hila Meller, *The Mutual Relations Between the Assistance Units and the Family Court: Between the “Legal” and the “Therapeutic”* (2014) (unpublished Ph.D. dissertation, Bar Ilan University) (on file with the author).

81 For example, under Israeli law, a protection order in cases of domestic violence can be issued in the sole presence of the petitioner, so as to facilitate a rapid response to the potential harm. If such an *ex parte* protection order is issued, a hearing with both parties present is held within a week. *See* Prevention of Family Violence Law, 5751-1991, SH No. 1352, p.138 (Isr.).

82 For example, under Israeli law, hearings at the Family Court are held behind closed doors. *See* Courts Law (Consolidated Version), 5744-1984, 38 LSI 271, (1983-84) (Isr.).

83 In many countries, all court decisions in family matters, or those related to minors, are published with all parties’ names and other possibly identifying details anonymized. *See* YARON UNGER, KNESSET (ISRAELI PARLIAMENT), PIRSUM PSIKA LE’INYANEY MISHPA’HA [PUBLICATION OF FAMILY LAW DECISIONS] (2014) (Isr.).

84 *See* Family Appeal Request 377/05 Roe v. Biological Parents, 60(1) PD 124, 158-59 (2005) (Isr.).

85 Kayla O. Holmes, *Transforming Family Law Through the Use of Mandated Mediation*, 7 RESOLVED: J. ALTERNATIVE DISP. RESOL. 29, 51 (2018).

86 While several jurisdictions have moved to open the doors in family matters, Israel is among the countries still conducting all family court produces behind closed doors. While I am among those arguing to open family procedures to the public and research gaze via anonymized published court records, I object to completely opening the door in the name of preserving the “private” within the “private sphere” even when public intervention is mandated. *See* Daphna Hacker, *Legal Review: What has Changed this Year? Families’ Law between Harmonization and Chaos*, 9 DIN UDVARIM 295 (2015) (Isr.).

and mediation.<sup>87</sup> For example, I suggest that special tribunals be established for all grievances relating to elderly state benefits. These tribunals would be equipped with a special in-house unit with gerontologists and social workers, to assist the judge. The procedures would be fast-tracked, as these decisions are crucial for the everyday survival and wellbeing of elderly people and their ever-changing needs. Likewise, speedy procedures should be the norm with all very old litigants, and mediation should be encouraged when full litigation cannot be handled at speed, to promote the chance of justice while the litigant can still enjoy its fruits. Finally, when court hearings and decisions might harm the dignity of the elder litigant, due, for example, to the discussion of a private and intimate medical condition, the hearing should be conducted behind closed doors; and the decision, if published, should anonymize all disclosing information.

#### **D. Life (Not) Worth Living**

There is a growing — and justified — interest within different disciplines, including the law, in the right to a dignified end of life. I believe this right should sit under the auspices of Elder Law, as it is most relevant to the very old and as it is directly linked to planning ahead to live lives worth living in old age.

Family Law, in its broad sense, which includes Reproduction Law,<sup>88</sup> can also offer Elder Law important insights in relation to the end of life. Abortion Law<sup>89</sup> and the law governing ‘wrongful birth’ are the most developed areas of law relating to the moral dilemma surrounding the question of what makes a life worth living.<sup>90</sup> As such, they should be considered relevant to elderly people who suffer from severe illness or who wish to control the circumstances of

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87 In 2013, a division that focuses on socio-legal issues of seniors was established within the Circuit Court of Cook County, Illinois. This division assists senior citizens in accessing the legal system and provides multi-professional advice. See Patricia Banks, *Legal Access for Elders: A Workable Court Model in Cook County, Illinois*, 37 BIFOCAL 108 (2016).

88 Blecher-Prigat & Zafran, *supra* note 54.

89 For example, Yael Hashiloni-Dolev, *Abortions on Embryopathic Grounds: Policy and Practice in Israel and Germany*, in 34 INTERNATIONAL LIBRARY OF ETHICS, LAW, AND THE NEW MEDICINE, A LIFE (UN)WORTHY OF LIVING 83 (David N. Weisstub & Dennis R. Cooley eds., 2007).

90 Paola Frati, Vittorio Fineschi, Mariantonia Di Sanzo, Raffaele La Russa, Matteo Scopetti, Filiberto M. Severi & Emanuela Turillazzi, *Preimplantation and Prenatal Diagnosis, Wrongful Birth and Wrongful Life: A Global View of Bioethical and Legal Controversies*, 23 HUM. REPRODUCTION UPDATE 338 (2017).

their end of life. Especially in relation to severe dementia and the challenge it can create in preserving one's dignity toward the end of one's life, as was very evident from my interviews with the grown children who have a severely mentally disabled parent, the law is lagging behind reality, and much more needs to be done to address this, both theoretically and normatively.<sup>91</sup>

## CONCLUSION

In this Article, I offer a new definition of Elder Law that moves away from the positivist–professional one. This new definition centers on the question of how the law affects — or should affect — people due to their old age, or due to their connections with the elderly. This question demands the doctrinal study of existing law in the books, the empirical study of elderly lives and of law in action, and the theoretical and normative deliberations regarding desired law.

Indeed, based on my empirical study with grown-up children who have a spouseless parent in need, I join those who argue that these deliberations should be based on actual realities rather than on stereotypical, imagined, or idealized notions of old age. The study revealed a reality in which adult children find themselves in a new, dynamic, challenging — and at times rewarding — reality, in which they 'parent' their parent. The role reversal they report demonstrates the many ways in which old age might be accompanied by new dependencies and vulnerabilities that are not experienced during pre-elderly adulthood. In particular, I argue that the tasks of representation, stimulation, physical care and economic support that can fall to the adult children of the elderly have cumulative implications for all concerned, and that they constitute a discernible phase in which the law can play a protective and facilitative role. This new phase (which will most probably come at one point or another during old age, if death does not come sooner),<sup>92</sup> I argue, justifies Elder Law that encompasses, simultaneously, an anti-ageist component and a special treatment component. I have strived to show that this challenging

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91 Only very few countries allow assisted suicide, and even in Switzerland, which leads in the recognition of dignified end of life, the consent of the patient is needed, and so it is not relevant to people with cognitive impairment. See S. Burkhardt, R. La Harpe, T. W. Harding & J. Sobel, *Euthanasia and Assisted Suicide: Comparison of Legal Aspects in Switzerland and Other Countries*, 46 *MED., SCI. & L.* 287 (2006). Euthanasia is also recognized by very few countries and the discourse on a life worth living and dignified end of life at old age is almost nonexistent.

92 Mor, *supra* note 14.

simultaneity might be inspired by the core values and the familial subject of feminist Family Law jurisprudence, as well as by procedures unique to Family Law and the relatively evolved legal corpus around the question of ‘life worth living’ during pregnancy and at birth. Indeed, I believe that Family Law jurisprudence might be an indispensable source of inspiration in Elder Law’s intellectual and normative journey towards maturing as a hybrid field that sustains both antidiscrimination law and unique vulnerability law, with a thick theory to explain their coexistence as well as the interrelations between them.