

A Framework for Theoretical Inquiry into Law and Aging

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With populations aging worldwide, the need for appropriate and just public policy related to old age is critical. Elder law scholars can support the creation of such policy by advancing the theoretical understanding of the relationship between law and aging — understanding that can help policymakers identify and prioritize goals, and evaluate potential interventions. This Article aims to provide a framework for this work by distilling the core theoretical questions at the intersection of law and aging. It also challenges common assumptions that could pose a barrier to developing a more robust theory of law and aging. Specifically, it argues that scholarship in this area will be most fruitful if it recognizes that the study and practice of “elder law” are intertwined but not a single unified field, that “preferential” treatment of older adults can be a form of discrimination, and that old age is not a universal human experience.

INTRODUCTION

The world’s population is rapidly becoming older. A combination of lower fertility rates and increased life expectancies indicates that the number of

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people aged 60 and older will more than double between 2017 and 2050.¹

This new reality raises substantial questions for policymakers, including whether new legal tools and bodies of law should be developed to address the “silver tsunami” washing over the world.² How do we meet the needs of older adults in this world? Perhaps more ambitiously, how do we create societies in which older adults have high quality of life? Or, even more ambitiously, how do we create societies in which older adults live the lives they want to live? And how do we do it in a way that is consistent with resources, and that is just across generations, populations, and identity groups? Answering these questions requires identifying and prioritizing goals, and predicting the consequences of different types of interventions. But how can goals be best identified and prioritized, and which types of consequences are most important and which matter less?

Although the field of elder law has grown rapidly over the past several decades, its growth has largely been focused on the clinical practice of elder law. Consistent with this practice-oriented focus, research has been limited and, to the extent it has occurred, has tended to focus on issues related to individual legal concerns of older adults.³ Foundational questions about how the law can and should respond to population aging have only begun to be

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- 1 U.N. Dep. Econ. & Soc. Affairs, World Population Prospects: Key Findings and Advance Tables (2017), https://population.un.org/wpp/Publications/Files/WPP2017_KeyFindings.pdf.
 - 2 As Daphna Hacker and I wrote in the original call for papers for this symposium, “A key question is whether new bodies of law are necessary to address this ‘silver tsunami.’ This debate can be seen in the UN process to consider the possibility of a convention on the rights of older persons. Proponents argue that demographic shift makes rights protection for older adults imperative, while critics contend that existing international law that is applicable across populations or to other populations (e.g. persons with disabilities) adequately covers the needs of older adults. Similar debates are occurring at the domestic level. For example, while some advocates for older adults urge enhanced protections against age discrimination in employment and other contexts, others caution against efforts attacking age discrimination and ageism on the ground that they may actually be a “Trojan Horse” that could open the door to undermining age-based entitlements and benefits.”
 - 3 A survey of professors teaching elder law in the United States conducted in the 2008-09 academic year found that while there had been tremendous growth in law school courses focused on preparing students to practice elder law, scholarship in the area remained limited and was primarily targeted at practicing attorneys and policymakers. Nina A. Kohn & Edward D. Spurgeon, *Elder Law Teaching & Scholarship: An Empirical Evaluation of an Evolving Field*, 59 J. LEGAL EDUC. 414, 422-23 (2010).

explored. The current theoretical literature is sparse even on basic concerns such as the role of old age as a legal construct, the impact of intersectionality on legal responses to older adults, and the relationship between elder law and other bodies of law.

This symposium marks an important step forward in developing a theoretical dialogue about the relationship between law and aging, and in building the intellectual capacity to meet the challenges associated with rapid population aging. It brings together scholars from diverse countries to explore the relationship between law and aging, including how law shapes the aging experience and how legal rules and systems should respond to the needs of older adults. Its aim is not merely to stimulate theoretically informed scholarship at the intersection of law and aging, but also to motivate and guide future work in the area.

This Article reflects upon the diverse contributions to the symposium to suggest how this future work should evolve. After discussing the importance of building a theoretical foundation for old age policy, it draws on the contributions to distill core theoretical questions at the heart of the study of law and aging. It then shows how the contributions provide insight into what can be done to advance such research. First, they collectively suggest that elder law scholars must recognize that “elder law” is not a single unified field, but rather that the topics addressed in the practice of elder law are merely a small subset of the issues at the heart of the academic study of elder law. Second, the contributions combined with other scholarship to date suggest that — despite its antidiscrimination ethos — elder law scholarship often promotes policies that provide “preferential” treatment to older adults. In addition, it argues that the field would benefit from recognizing that old age is not a universal human experience, but rather is only experienced by individuals who live long enough to become old.

I. THE ROLE FOR THEORETICAL INQUIRY

Developing a theoretical foundation for the law’s response to the phenomenon of aging is not simply an intellectually rich endeavor. It can also inform legal responses to changing demographics. This is important because designing effective and efficient old age policies is enormously challenging.

In addition to the challenges inherent in social welfare policy (e.g., the challenges of allocating limited resources and determining whether responsibility for particular needs should lie with the state or with private actors), designing legal responses to meet the needs of an aging demographic is difficult because aging itself is a complex phenomenon. At one level, age is a remarkably

simple construct. One's chronological age can be readily ascertained simply by knowing one's birthdate, and is often accurately estimated with a brief glance. On the other hand, chronological age is a complex identity characteristic in that its impact is both highly predictable and highly variable. For youth, chronological age is highly correlated with abilities and needs, as the body and mind typically develop during infancy and adolescence in a predictable manner. For middle-aged and older adults, by contrast, the extent to which chronological age correlates with functional age (i.e., demonstrated physical or mental signs of aging) varies significantly based on culture, lifestyle, access to healthcare, genetic composition, and other intersecting identities. In addition, chronological age is also a complex identifier in that it is entirely fluid. One's age is never stagnant; as the minutes tick away, age increases. Moreover, age is in many ways a relative characteristic. One may feel "old" in a certain context, and "young" in another. A 40-year-old woman, for example, may feel "young" when attending the opera but "old" when she goes to a bar that caters to twenty-somethings immediately afterwards. This reflects the fact that, while chronological age is an objective measure, categories such as "childhood," "adulthood," "older adult," and "old" are social constructs.⁴

It is perhaps no wonder then that the law struggles to respond to "old age" and how to balance the interests of different generations in light of the often substantial differences within generations. As Jenny Julen Votinius and Mia Ronnemar have argued, "intergenerational ambivalence" — the simultaneous embrace of and conflict with other generations — can lead to laws that are vague and legal schemes that are contradictory.⁵ Confronted with the need to balance conflicting interests, and unsure of how best to do so, policymakers may draft statutes and regulations that are susceptible to multiple interpretations. Similarly, lawmakers may adopt policies that undermine one another — such as those that broadly assert the equality of older adults but allow state actors to enact policies that substantially undermine that equality.

4 See PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* (1965) (the classic, although much criticized, historical account of the development of the concept of childhood); Jeylan T. Mortimer & Phyllis Moen, *The Changing Social Construction of Age and the Life Course: Precarious Identity and Enactment of "Early" and "Encore" Stages of Adulthood*, in *HANDBOOK OF THE LIFE COURSE* 11 (Michael J. Shanahan et al. eds., 2016) (discussing the social construction of stages of adulthood).

5 Jenny Julen Votinius & Mia Ronnemar, *Intergenerational Aspects of Elder Law: Conflict, Solidarity — Or Ambivalence*, in *ELDER LAW: EVOLVING EUROPEAN PERSPECTIVES* (Ann Numhauser-Henning ed., 2017).

One area in which such vague and contradictory responses can be seen is in countries' legal "prohibitions" on age discrimination,⁶ which tend to be weaker than prohibitions against other forms of discrimination.⁷ For example, in the U.S., the most significant piece of anti-age discrimination is the Age Discrimination in Employment Act (ADEA). Although the ADEA was modeled on Title VII of the U.S. Civil Rights Act of 1964 (which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin), it has substantial exceptions not found in Title VII.⁸ Similarly, despite an ostensible "ban" on age discrimination in employment in the European Union's Charter on Fundamental Rights, many forms of age discrimination are actually permitted in the European Union on the grounds that they are justified.⁹

Legal theory has the potential to help policymakers deal with these challenges. By providing a normative framework for legal responses to old age, legal theory can help policymakers identify and prioritize goals, thus making it easier for policymakers to craft tailored policy responses and thus reducing the perceived need for vagueness. Legal theory can also help make visible the advantages and disadvantages of competing legal approaches, thus supporting consistent policy responses. To be sure, even very robust and well-disseminated legal theory will not eliminate the use of vague law or prevent policymakers from adopting contradictory legal schemes; both can have significant political appeal. However, robust, well-disseminated, and accessible legal theory increases the likelihood that, to the extent that policies are vague or self-contradictory, this is deliberate and not the result of a lack of information.

6 *Accord id.*

7 See Ann Numhauser-Henning et al., *Equal treatment and age discrimination — inside and outside working life*, in *ELDER LAW: EVOLVING EUROPEAN PERSPECTIVES*, *supra* note 4, at 151, 155 (noting that "an important characteristic of EU age discrimination law ... is its weaker template as compared to other grounds of non-discrimination regulation").

8 Most importantly, unlike Title VII, ADEA permits practices that disadvantage the protected class based on a reasonable factor. Specifically, under the ADEA, an employer may disadvantage older adults based on a reasonable factor other than age (RFOA). See *Smith v. City of Jackson*, 544 U.S. 228, 261 (2005) (discussing this difference). This difference led the U.S. Supreme Court to determine that disparate impact claims under the ADEA are substantially narrower in scope than those under Title VII. *Id.* at 228.

9 See Ann Numerhauser-Henning, *Ageism, age discrimination and employment law in the EU*, in *EUROPEAN PERSPECTIVES ON THE RIGHTS OF OLDER PERSONS* (Israel Doron & Nena Georgantzi eds., 2018).

Legal theory informed by empirical research, and empirical research informed by legal theory, have the potential to be particularly valuable as they can help policymakers tailor interventions to identified goals. For example, a key challenge facing nations is how to incentivize family care for older adults, both as a means to ensure that older adults receive needed care and as a means to reduce the burden on the state of providing that care.¹⁰ Creating legal regimes that establish the right incentives is a high-stakes game. If policies disincentivize care, the result may be reduced welfare and even increased mortality for older adults, and a greater financial burden for the state. If policies incentivize care, the opposite may result, but perhaps sometimes at the expense of care for children or others in need.¹¹ Research that can help inform states as to how to design policies that create the right incentives and balance of care is thus much-needed. Silverstein, Tur-Sinai and Lewin-Epstein's contribution to this issue provides a fine example of the potential for theoretically informed, empirical research to guide national policy in this area. Silverstein, Tur-Sinai and Lewin-Epstein examine the association between the type of social welfare regime found in a country and the provision of social and financial support to older parents. Examining data from Europe, they find that such regimes impact the provision of both financial support and social support. For example, "sandwich-generation" members who live under a Social Democratic welfare regime are more likely, and members of this generation who live under a Conservative Mediterranean or East European welfare regime are less likely, to provide their parents with social support than are those who live under a Liberal welfare regime.¹²

Legal theory need not be specifically tailored to law and aging to fulfill these functions. While scholars should be encouraged to explore and develop theories specifically focused on law and aging as Doron suggests,¹³ there also are ample existing theoretical perspectives that can be productively brought

10 See Nina A. Kohn, *For Love and Affection: Elder Care and the Law's Denial of Intra-Family Contracts*, 54 HARV. C.R.-C.L. REV. 211, 246-48 (2019) (discussing the advantages to the state of encouraging family care in the context of the United States).

11 Merril 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) (showing that there is an inverse relationship between the number of children an individual has and the odds that the individual will provide support to aging parents).

12 *Id.*

13 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, 8 (2020). In Doron's view, "Every field of knowledge needs theory." *Id.*

to bear on the key questions at the intersection of law and aging. Bringing existing theoretical perspectives to bear on law and aging has the potential to help us better understand the relationship between law and aging, and may suggest new methodologies for interrogating the questions central to the field of elder law.

II. THE CORE THEORETICAL QUESTIONS

Asserting the importance of legal theory is merely a first step in building a normative foundation for old age policy. The next step is to identify the theoretical questions to be explored. The contributions to this symposium suggest that three core theoretical concerns lie at the heart of elder law.¹⁴

The first core theoretical concern is to understand how legal rules and structures affect the experience of aging. From a descriptive perspective, the question is how systems created or incentivized by law and legal structures directly or indirectly create conditions which lead to particular experiences, or particular qualities of life, among older adults. From a normative perspective, the key question is how to create legal systems that lead to desirable outcomes, whether those be “successful aging” (a broad term generally used to refer to high quality of life in older age)¹⁵ or intergenerational justice. For example, Dey’s paper considers the impact of India’s Maintenance and Welfare of Parents and Senior Citizens Act, concluding, among other things, that it has reduced the stigma associated with being mistreated by adult children.¹⁶ Similarly, Lurie asks whether separate legal structures for protecting older workers may stigmatize older workers.¹⁷ Silverstein, Tur-Sinai, and Lewin-Epstein’s empirical examination of how different types of national welfare regimes on adults’ provision of care and income to their elderly parents shows another way that law can affect the aging experience.¹⁸

14 I do not mean to suggest that this typology is the only reasonable one. There are a variety of ways one could reasonably parse the core theoretical queries.

15 For a discussion and critique of the modern concept of “successful aging” — including discussion of the concept’s evolution from a focus on physical and mental health to an expanded focus that includes social engagement and functioning — see SARAH LAMB, *SUCCESSFUL AGING AS CONTEMPORARY OBSESSION: GLOBAL PERSPECTIVES* (2017).

16 Deblina Dey, *A Socio-Legal Analysis of Elder Care Laws in India*, 21 *THEORETICAL INQUIRIES L.* 77, (2020).

17 Lilach Lurie, *Should Age Discrimination Be an Integral Part of Employment Discrimination Law?*, 21 *THEORETICAL INQUIRIES L.* 103 (2020).

18 Silverstein, Tur-Sinai & Lewin Epstein, *supra* note 11.

A second core theoretical concern is how to locate responsibility for meeting the needs of older adults. To what extent is meeting such needs a public concern and, if so, what level of government should address it? To what extent is meeting such needs a private concern and, if so, which private actors should have responsibility and under what conditions? Contributions to this symposium provide insight into this inquiry. Boni-Saenz suggests that governments should be responsible for ensuring that vulnerable persons — of which older adults are a prime group — have sufficient (although not necessarily substantially equal) resources.¹⁹ Mattsson and Giertz suggest that respect for individual autonomy may cause policymakers to locate too much responsibility with older adults and thus can lead a government unreasonably to abdicate responsibility for meeting older citizens' basic needs.²⁰ Dey's study suggests the limitation of public law as a tool for meeting older adults' emotional needs, which suggests that locating responsibility exclusively with the government would be misguided.²¹

A third core theoretical concern is the legal significance of older age. From a descriptive perspective, the key inquiry is whether chronological age (after the age of majority) gives rise to distinct legal statuses. From a normative perspective, it is whether the law *should* treat older adults differently — including more or less favorably — because of their chronological age. For example, to what extent should public resources be allocated based on chronological age, on indicators of need that do not consider chronological age, or on some combination of these factors? And if the law distributes resources based on chronological age, how strong must the justification be to support discrimination on this basis? Should the law permit differential treatment based on chronological age anytime it is not arbitrary, or should differential treatment be permitted only when there is a robust — perhaps even compelling — justification?²²

19 Alexander A. Boni-Saenz, *Age, Equality, and Vulnerability*, 21 THEORETICAL INQUIRIES L. 161 (2020).

20 Titti Mattsson & Lottie Giertz, *Vulnerability, Law and Dementia: An Interdisciplinary Discussion of Legislation and Practice*, 21 THEORETICAL INQUIRIES L. 139 (2020) (exploring the implications of Sweden's respect for individual autonomy on its ability to provide needed care to older adults).

21 Dey, *supra* note 16.

22 In the United States, such distinctions are permitted as long the age-based criteria are rationally related to the policy goal. In past work I have argued for greater scrutiny. See Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 1 (2010).

Underlying this inquiry is a question about what is the just distribution of resources between current generations.²³

Contributions to the symposium show competing approaches to addressing this third core concern and, in the process, revive and reenergize the classic debate over what role — if any — chronological age should play in establishing rights or benefits.²⁴ For example, Hacker suggests that the law should treat older adults differently when they are in a dependency relationship.²⁵ Mattsson and Giertz make the case that vulnerability may be a better proxy for resource allocation than chronological age, criticizing age-based classifications as too “blunt.”²⁶ In the context of antidiscrimination law, Lurie challenges the notion that specialized treatment is better treatment.²⁷

These three questions — how the law shapes aging; how rights and responsibilities should be allocated to address the needs and interests of older adults; and what the legal significance of age is — can serve as a basis for dialogue and a framework for both theoretical research and empirical research. Notably, each of these areas of inquiry can serve to inform one another. For example, making a particular age legally significant can strongly shape the experience of reaching that age. Indeed, in the U.S., age 65 is commonly perceived as a major milestone and the entrance into old age because it has been deemed “retirement age” for critical social welfare programs.²⁸

23 This issue has been termed one of “intergenerational justice,” but should not be confused with discussions of intergenerational justice that focus on justice between now-living generations and future ones (as is common in the environmental justice literature).

24 See *AGE OR NEED* (Bernice Neugarten ed., 1982) (a seminal work containing a variety of perspectives on this debate); Bernice L. Neugarten, *Age Distinctions and Their Social Functions*, 57 *CHI.-KENT L. REV.* 809, 822-23 (1981). For a more recent overview of competing theories of justice between generations and rationing resources based on age, see HARRY LESSER, ED., *JUSTICE FOR OLDER PEOPLE* 133-180 (2012).

25 See Daphna Hacker, *Elder Law and Its Justifications: A Hybrid Vision Inspired by Family Law Jurisprudence*, 21 *THEORETICAL INQUIRIES L.* 25 (2020).

26 Mattsson & Giertz, *supra* note 20. For my own, earlier view on this issue see Kohn, *supra* note 22.

27 See Lurie, *supra* note 17.

28 Articles and blog posts about what it feels like to turn 65 are commonplace in the U.S. The following quote from a blog aimed at older adults captures a common sentiment: “Turning 65 years old is one of those life passages – like college hazing and infantry basic training – many men would rather avoid contemplating until it’s upon us. At least that’s the way I feel. Nobody wants to think about becoming an elder.” *Turning 65 Years Old: Scream About It, Suddenly Senior*

Just as the three core theoretical inquiries necessarily inform one another, theoretical and empirical research will be most robust and useful if they inform one another too. Theory can help shape empirical research questions, and be a lens through which to view empirical findings. Likewise, empirical research can be used to refine, and at times reject, theoretical understandings.

III. ADVANCING THE FIELD

The preceding Part outlined the rich theoretical questions that lie at the intersection of law and aging, and the importance of pursuing them. Despite the potential richness, however, the scholarship on these issues is meager and not nearly as developed as in specialized fields such as family law.²⁹ What can be done to stimulate research exploring these foundational questions? Drawing on the contributions, this Part suggests three approaches elder law scholars can take to encourage and inspire research in this area.

A. Distinguish Practice and Scholarship

In 2010, Ned Spurgeon and I wrote that “Elder law is a specialty focused on counseling and representing older persons or their representatives on later-in-life planning and other legal issues of particular importance to older adults.”³⁰ The definition’s focus on practice was consistent with how the practice of elder law had been described elsewhere in the U.S. academic literature,³¹

(Mar. 26, 2018), available at <https://www.suddenlysenior.com/turn-65-and-scream-about-getting-old/>.

29 Cf. Hacker, *supra* note 25 (for a demonstration of the rich perspectives offered by family law).

30 See Kohn & Spurgeon, *supra* note 3. This definition was the result of deliberation among a working group of U.S. elder law academics and practitioners assembled for the purpose of guiding a study of the state of elder law education in the United States. *Id.*

31 See, e.g., Rebecca C. Morgan, *Elder Law in the United States: The Intersection of Practice and Demographics*, J. INT’L AGING, L. & POL’Y 103, 107 (2007), stating that:

[E]lder law has come to be recognized not only by the legal tasks performed by the lawyers, but by the attorney’s function as a counselor to the client and/or the client’s family, the attorney’s knowledge of the aging services network and the nature of the representation of the clients in the later years of their lives.

See also Paul Premack, *Elder Law Practice: An Overview*, 45 S.D. L. REV. 461, 461 (2000) (noting that elder law is a “service-based practice” that “primarily

and consistent with definitions offered by leading practitioner-focused organizations.³²

Authors contributing to this symposium have critiqued this approach to defining elder law as insufficient to describe the field or to motivate thoughtful inquiry into the relationship between law and aging. Hacker, for example, critiques current definitions of elder law as leaving too little room for theory.³³

serves senior citizens.” Elder law is “defined by the client who is served rather than by its technical, legal distinctions.” An elder law practice “should be holistic — one should be able to examine the broad needs of the client in an effort to find solutions.”); Monte L. Schatz, *The Elder Law Attorney: Is Knowledge of the Law Enough?*, 45 S.D. L. REV. 554 (2000), noting that:

Elder law practice emphasizes a holistic, interdisciplinary approach to the practice of law. Many specialized law practices lend themselves to solving legal problems that occur after the fact. Elder law, however, in its finest form, looks prospectively toward the remaining life and post mortem issues by anticipating the problems in advance of their occurrence. The underlying paradox of elder law as a specialty is that, in its fullest sense, it is a practice defined not by its narrow focus but by its substantive breadth and non-legal extensions. It is cross cutting, cross disciplinary, and oriented toward the goal of achieving a holistic quality of life for the client.

See also Lawrence A. Frolik, *The Developing Field of Elder Law Redux: Ten Years After*, 10 ELDER L.J. 1, 2 (2002) (“I believe that elder law has deviated from its original path, and is evolving into a field that is best termed later life planning.”).

- 32 See Kohn & Spurgeon, *supra* note 3. At that point in time, the National Academy of Elder Law Attorneys, for example, defined the field as:

[A] specialized area of law that involves representing, counseling and assisting seniors, people with disabilities and their families in connection with a variety of legal issues, from estate planning to long term care issues, with a primary emphasis on promoting the highest quality of life for the individuals. Typically, elder law attorneys address the client’s perspective from a holistic viewpoint by addressing legal, medical, financial, social and family issues.

Id. at 429. Similarly, the U.S.-based National Elder Law Foundation (NELF) defined elder law as:

[T]he legal practice of counseling and representing older persons and their representatives about the legal aspects of health and long term care planning, public benefits, surrogate decision making, older persons’ legal capacity, the conservation, disposition and administration of older persons’ estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.

Id.

- 33 Hacker, *supra* note 25.

Adopting Doron's classification of the current approach as a "positivist professional definition,"³⁴ she proposes an alternative definition of elder law: "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."³⁵

The critique of existing definitions as not providing adequate justification for elder law as an area of intellectual study, and as not being sufficiently expansive to motivate theoretical exploration, is understandable. Certainly, the definition Spurgeon and I offered in 2010 does not capture the breadth of study of law and aging nor does it describe the core theoretical concerns identified in the previous Part of this Article. However, it does an excellent job describing the practice of elder law (at least in North America), whereas the alternative definitions noted above are not tailored to describing elder law as a field of practice or the substantive content of that practice. Hacker's definition, for example, would leave out the core counseling and problem-solving functions described by elder law practitioners as central to elder law practice.³⁶ In addition, in no country in which elder law has developed as an area of specialized practice would lawyers who view themselves as working in the field see their expertise as covering all law that has a disparate impact on older adults.³⁷

How then do we resolve this basic definitional question? The answer, I believe, is to recognize that we are trying to define two different things — arguably, two different fields. The first is elder law as a field of legal practice. The second is elder law as a field of academic study. The "professional-

34 This descriptive has been offered by Israel Doron. See Israel Doron, *Jurisprudential Gerontology: Theorizing the Relationships Between Law and Ageing*, in HANDBOOK OF THEORIES OF AGING (Vern L. Bengtson et al. eds., 2d ed. 2009).

35 Hacker, *supra* note 25 at 28. Similarly, in a draft originally provided for this symposium, Ann Numhauser-Henning also called for a new way of defining the field. In her view, elder law is a field that "relates to the implications of law as an institution of society seen through the lens of the older person." See Numhauser-Henning draft (on file with the author). Nevertheless, she suggested that a definition may not be possible at the current time, and perhaps "elder law" should simply be defined as "what elder law researchers do." *Id.*

36 See Hacker, *supra* note 25.

37 To be sure, there is no empirical data to fully support this point. Empirical data does exist for the United States. See Nina A. Kohn & Edward D. Spurgeon, A *Call to Action on Elder Law Education: An Assessment & Recommendations Based on National Survey*, 21 ELDER L.J. 345 (2014) (surveying elder law attorneys, including about the scope of their practices).

positivist” approach is appropriate and helpful for the former. It explains to practitioners what the work involves, and to clients what services they may expect. While the definition of elder law practice can be tinkered with, or evolve as practice evolves, abandoning this approach would do a disservice to the lawyers and their clients by obfuscating the nature and substance of the practice.

The “professional-positivist” definition, however, does not adequately describe the subjects that are at — and should be at — the center of research and theoretical inquiry at the intersection of law and aging. The topics addressed in the practice of elder law are only a subset of the topics worthy of academic inquiry, which should be more broadly focused on understanding the impact of legal systems and structures on older adults, analyzing the relative value of different (often hypothetical) laws and legal systems in promoting the welfare of older adults, and considering how to fairly balance the needs and interests of older adults and those of younger persons. While these inquiries may ultimately inform the statutes and policies with which elder law attorneys work, they are not part of the daily practice of elder law.

If we acknowledge that the contours of the practice of elder law and the study of elder law are not contiguous, it becomes possible to accurately and succinctly define each. The practice of elder law can be defined, much as Spurgeon and I did in 2010, as a field focused on counseling older adults on later-in-life planning and related concerns. The academic field of elder law can then be defined in relation to research and theory. At a broad level, the academic field can be defined as the study of how the law affects and responds to old age and the experience of getting older.³⁸ Indeed, the academic field of elder law might be better termed “the study of law and aging,” “legal gerontology,” or “jurisprudential gerontology” to capture this research and theory orientation.³⁹

If distinguishing between these two pursuits (which could reasonably be classified as separate fields) has such value, one might query why the two for so long have been treated as unified. The answer perhaps can be found in examining the evolution of elder law in the United States. Elder law emerged, in large part, out of the liberal poverty law movement that focused on helping individuals, and its growth was facilitated by attorneys in traditional trusts and

38 This definition is consistent with the core theoretical inquiries described in this Article.

39 The term “jurisprudential gerontology” has been offered by Israel Doron. See Israel Doron, *Jurisprudential Gerontology: Theorizing the relationships between law and ageing*, in *HANDBOOK OF THEORIES OF AGING* (V.L. Bengtson et al., eds., 2 ed., 2009).

estates practices expanding their practices into the elder law space. It was, thus, practical and practice-oriented. Likewise, much of the early scholarship in the field was created by professors who came to it from a practical or clinical background and focused on the day-to-day issues of counseling older adults. As legal theory in U.S. law schools is generally not client-focused, and was especially not so at the time elder law emerged, it is no wonder that those writing in the area of elder law did not embrace legal theory. Indeed, much of the early writing on elder law can be seen as a rejection of a theoretical approach to legal scholarship that could rightfully be critiqued as elitist and largely nonresponsive to the needs of clients.⁴⁰ This approach has persisted, such that the bulk of elder law scholarship in the U.S. remains directed at practicing attorneys and policymakers.⁴¹

Treating the study and practice of elder law as a single field can also be explained as a strategic move on the part of elder law academics. For better or worse, U.S. law schools — especially elite law schools — are more likely to provide faculty resources for subjects that are seen as intellectually robust.⁴² Joining elder law scholarship with the teaching of elder law thus served as a strategy to promote the latter.

In short, the joinder of these two fields was deliberate and consistent with nomenclature used in parallel fields (e.g., the issues that family law scholars consider, and those addressed by family law attorneys, only partially overlap, but both groups typically refer to their field as “family law”). Nevertheless, the two fields are distinct despite their overlap, and there are many important issues for elder law scholars to pursue that are outside the scope of elder

40 Cf. Lawrence A. Frolik, *The Developing Field of Elder Law*, 1 ELDER L. J. 1 (1993) (in an early description of the academic field of elder law, describing interest in elder law among U.S. legal academics as an outgrowth of the legal realism movement, and describing the field as appealing to “academics who feel constricted by examining society solely through the legal lens . . . Elder law is one route out of sterile legalism into the richness of public policy choices which balance multiple interests, limited resources, finite choices, and uncertain outcomes.”).

41 See Kohn & Spurgeon, *supra* note 3, at 422 (reporting, based on a 2008 survey of U.S. elder law professors, that professors “writing in the field of elder law tend to see practicing attorneys and policymakers as their key audiences, although other legal academics are also a commonly cited target audience”).

42 Cf. Frolik, *supra* note 40, at 18 (in an early article describing the growth of elder law in academia, noting that a barrier to law schools offering advanced elder law offerings is that the courses must “seem intellectually worthwhile to the other faculty” and “valuable enough to the dean to warrant devoting additional professorial resources”).

law practice. Recognizing this may help motivate and justify much-needed theoretical work and research.

B. Acknowledge Discrimination

Age discrimination is a universal feature of the law. Across cultures, across geographies, and across eras, polities have discriminated on the basis of age. Whether it be by varying the standard of care required by age,⁴³ providing benefits to one age group but not to another,⁴⁴ or compelling certain behavior of some age groups but not others,⁴⁵ states differentiate on the basis of age. Sometimes this discrimination results in unjust or prejudicial treatment of people in a particular category. For example, mandatory retirement policies may deny employment to capable older adults in need of earned income. Sometimes this discrimination fairly recognizes meaningful differences between groups. For example, laws mandating education for minors but not for adults recognize such distinct needs and abilities.⁴⁶ And sometimes whether the differentiation is fair or based on meaningful differences is in dispute, as in the case of laws that provide state-funded health care insurance or pensions for some age groups and not others.⁴⁷

43 For example, minors are typically held to a lower standard of care in both civil and criminal cases. *See* DAN B. DOBBS ET AL, *THE LAW OF TORTS* §§134-37 (2d ed., June 2019 update) (discussing the standard of care to which minors are held in tort actions in the United States); UNIFORM MODEL PENAL CODE §4.10 (2018) (setting forth a general policy against convicting a person for an offense under the Code who was under the age of 16 at the time the offense was committed).

44 For example, states commonly make eligibility for certain social welfare benefits dependent on age. For example, in the United States, eligibility for public health insurance varies by age. Eligibility criteria for Medicaid (the program that provides health insurance for the poor) are more favorable for older adults and children relative to younger adults. Likewise, Medicare coverage is limited almost exclusively to older adults. *See* NINA A. KOHN, *ELDER LAW: PRACTICE, POLICY, AND PROBLEMS*, 247-48; 275-281 (2014) (setting forth basic eligibility criteria for Medicare and Medicaid).

45 For example, states may make education compulsory for minors, or require older adults wishing to drive to submit to certain tests not required of younger adults wishing to drive. *See id.* at 57-59 (describing differing approaches to regulating older drivers in the United States).

46 Of course, if these age cutoffs are set at the wrong chronological age, then they serve more to perpetuate stereotypes than to recognize meaningful differences in ability.

47 These different types of “discrimination” are inherent in the word “discrimination” itself. The Merriam-Webster Dictionary groups definitions of the word

Age discrimination is so central to the law that rules which treat people differently on the basis of their age — even when the rules prejudice certain people based on their age — are often not even regarded as notable, let alone concerning. Indeed, as I have explored in earlier work, the absence of concern led to states in the U.S. adopting a series of civil and criminal statutes that — in the name of protecting the elderly — undermine the civil rights of older adults based on their advanced chronological age.⁴⁸

Given the universality of policies that differentiate on the basis of age, elder law scholarship needs to be able to fully grapple with the question of when age-based classifications are appropriate and wise, and when they are not. Robust analysis in this area is critical to informing policies that allocate resources and rights. In a world where growing aging populations pull on (often increasingly) limited resources, robust theoretical and empirical work can shed light on how best to allocate resources in a just manner and with a just result. Indeed, a key theme across all three of the core foundational questions identified in the previous Part is when the law should differentiate based on age and how. It is of little wonder then that the scholars engaged in this symposium have, in thinking about how to meet the needs of older adults, proposed various frameworks for determining how to prioritize certain individuals or groups over others. For example, Boni-Saenz and Mattsson and Giertz focus on using “vulnerability” as a criterion for favorable allocation of resources.

In order to fully grapple with issues of allocation, and the potential consequences of distributing resources and rights to certain groups and not others, elder law must confront its own myth: that it is a field that eschews discrimination. While elder law scholarship has frequently explored and attacked ageism (i.e., negative stereotypes associated with older adults), scholars in the field typically embrace differential treatment on the basis of age when it works

“discrimination” into three general groups, describing the word variously as: (1) “prejudiced or prejudicial outlook, action, or treatment” or “the act, practice, or an instance of discriminating categorically rather than individually”; (2) “the quality or power of finely distinguishing”; and (3) “the act of making or perceiving a difference . . .”. See *Discrimination*, MERRIAM-WEBSTER DICTIONARY (2018), <https://www.merriam-webster.com/dictionary/discrimination>.

48 See, e.g., Nina A. Kohn, *Elder (In) Justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1 (2012) (showing how the proliferation of elder-specific crimes undermines older adults’ civil rights, including the right to contact and the right to free exercise of religion); Nina A. Kohn, *Outliving Civil Rights*, 86 WASH. U. L. REV. 1053 (2009) (focusing attention on the civil rights implications of laws that require professionals and others to report abuse of persons over the age of 60 or 65).

to the advantage of older adults.⁴⁹ Thus, elder law scholars are often both the standard-bearers for attacking systems and attitudes that disadvantage older adults because of age, and at the forefront of efforts to promote specialized policies that favor individuals based on old age⁵⁰ — i.e., policies consistent with what has been termed “compassionate ageism.”⁵¹ Indeed, while the scholars participating in this symposium may disagree as to whether that differentiation should directly turn on chronological age, there seems to be a consensus that the law should act in a way that is favorable to older adults.

Acknowledging the centrality of age-based discrimination to the field’s work may feel uncomfortable. As others have written, the term discrimination has such pejorative implications that it is often rejected.⁵² However, discrimination — especially choosing which individuals or groups are allocated which rights — is the central function of the law. To determine how best to allocate rights or resources, based on age or any other criteria (e.g., “vulnerability”), we must acknowledge that discrimination will occur. As Deborah Hellman has urged, we must not allow the pejorative connotations of the word “discrimination” to stand in the way of thoughtful, honest discussions of allocation.⁵³

49 See, e.g., Israel Doron, *Municipal Elder Law: An Exercise in Legal Futurism*, 37 WM. MITCHELL L. REV. 80 (as part of an argument that municipalities should actively promote laws and policies to combat ageism, urging municipalities to create and fund a number of programs exclusively for older adults, including ombudsmen for older adults, an Older Adults’ Public Council, and a publically funded entity to provide counseling and information for older adults); JOHN MACNICOL, *AGE DISCRIMINATION: AN HISTORICAL AND CONTEMPORARY ANALYSIS* 267 (2006) (discussing the benefits of combating age discrimination in employment, but expressing concern that such arguments might undermine support for entitlements specifically for older adults, warning that such attacks “may be the Trojan horse of an attack upon the welfare rights of older people”).

50 In this way, elder law scholars are like many other professionals in the field of aging who selectively embrace certain forms of ageism in order to promote favored policies. As early as 1979, Richard Kalish described social service providers serving as advocates for older adults as embracing a form of ageism by portraying older adults as incompetents in need of services. See Richard A. Kalish, *The New Ageism and the Failure Models: A Polemic*, 19 GERONTOLOGIST 398 (1979).

51 Cf. Robert H. Binstock, *Old Age Policies, Politics, and Ageism*, 3 GENERATIONS 73 (2005) (describing the phenomenon and politics behind what he has termed “compassionate ageism” and comparing it to other forms of ageism); Linda Whitton, *Ageism: Paternalism & Prejudice*, 46 DEPAUL L. REV. 453 (1997).

52 See, e.g., DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* (2008).

53 Cf. *id.* (explaining the rationale for using the term “discrimination” in a value-neutral way).

Ultimately, the value of elder law as a discipline may well be to provide a cadre of thinkers who can help policymakers, philosophers, and even front-line practitioners make reasoned decisions about how to differentiate between needs and populations. The need for such reasoned work is pressing in light of the population aging in a world of increasingly limited resources.

C. Recognize that Old Age Is not an Inevitable Human Experience

Another way that elder law scholars could enrich the study of aging and the law is to recognize that old age is not inevitable for individuals. There is a tendency among those who write about aging to treat aging as an inevitability, a part of life that we will all at some point reach.⁵⁴ However, many individuals will never reach old age. Whether because of illness or violence, they will die in their youth or younger adulthood.

Recognizing that old age is not inevitable for all persons would encourage scholars to compare older adults to other members of their own generation, including the deceased, not merely younger individuals. From this perspective, older adults are the winners of the lottery of life. Rather than being people who have “lost” abilities and status (as they appear when compared to younger adults), they are people who have “retained” abilities and status relative to those who predeceased them. Although they may appear vulnerable as compared to younger adults, they appear resilient as compared to deceased generational peers.

Considering the needs and claims of older adults in comparison to other members of their generation may be uncomfortable for elder law scholars. It runs contrary to the narrative of the older adult as needy, a narrative which is used to justify favorable discrimination often embraced by elder law scholars. Viewing older adults as privileged relative to their deceased contemporaries might discourage policies that selectively benefit them. Nevertheless, ignoring this comparison fails to capture the experience of many individuals, especially those most likely to die at younger ages (i.e., the poor, individuals with disabilities, and minority populations). Thus, it fails to capture the full equitable consequences of preferentially allocating rights or distributing resources to older adults. Recognizing that old age is not an

54 Cf. Boni-Saenz, *supra* note 19 (asking whether poor treatment of older retirement home residents relative to younger residents can be justified on the grounds that “we all know that those middle-aged, middle-class residents will experience misery themselves in the retirement home someday?”); Mattsson and Giertz, *supra* note 20 (“Our standpoint is that ageing is more a part of life than a distinct group of persons.”).

inevitable or universal phenomenon, by contrast, can help theorists more fully consider the consequences of various old age policies.

CONCLUSION

This symposium marks an important step forward in developing a theoretical dialogue about the relationship between law and aging, and building the intellectual capacity to meet the challenges associated with changing demographics. It demonstrates the core theoretical questions at the intersection of law and aging, and the value of engaging with them. It suggests concrete steps scholars can take to advance the field of elder law: (1) disentangling the academic study of law and aging from the practice of elder law; (2) peeling away the field's antidiscrimination façade to more directly engage with its central query of how to allocate resources and rights; and (3) exploring the theoretical and practical implications of early death.

In short, in order to advance the field of elder law, scholars may need to confront our own assumptions and ask uncomfortable questions. But by doing so, we have an opportunity to provide the theoretical foundation to inform and shape policies that affect people worldwide.

