

Introduction

What is Elder Law and what are its discontents? These questions, which inform the title of this issue of *Theoretical Inquiries in Law*, are aimed at encouraging a discourse about the relationship between law and aging, how the law should respond to the aging of populations, and the place of Elder Law in the legal field. In other words, this issue seeks to contribute to the discussion of the values and principles that instruct, or should instruct, societies as they design and implement policies regarding elder populations. As life expectancy has risen continuously in the past decades,¹ it has become a pressing matter to contemplate these questions and to examine the implications that policy choices may have for everyday life, in an interdisciplinary manner.

While Elder Law has the potential to influence the lives of most people, and thus could be a robust field of research and study, traditionally this field of law has been considered practice-oriented, stemming largely from the daily work of lawyers.² Even today, academic courses that teach Elder Law are mostly practice-oriented, dealing with end-of-life or later-in-life decisions and other legal issues of particular importance to older adults. Yet in recent years scholars around the world have begun to theorize the field and to address it from a variety of perspectives. This issue aspires to intervene at this point in the evolution of a growing academic field: to engage with its historic development, to draw its current contours, and to muse about its further directions and limitations.

This issue starts with Israel (Issi) Doron's opening article, which provides a description of the development of Elder Law (law and aging, as he calls it) intertwined with his own personal perspective on the field. As his own professional journey unwound in parallel to the development of law and

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- 1 U.N. Dep't Econ. & Soc. Affairs, World Population Prospects: The 2017 Revision, <https://www.un.org/development/desa/publications/world-population-prospects-the-2017-revision.html>; UN DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, WORLD POPULATION AGING – HIGHLIGHTS 8 (2017), https://www.un.org/en/development/desa/population/publications/pdf/ageing/WPA2017_Highlights.pdf. Of course, in some locales and nation states life expectancy is decreasing.
 - 2 Lawrence A. Frolick, *The Developing Field of Elder Law: A Historical Perspective*, 1 ELDER L.J. 1 (1993).

aging, from a young student to a leading scholar in the field, Doron describes the creation of the field as he himself saw it and introduces the people, organizations and decisions that have shaped the field into what it is today. Following this historical account, he further points out trends in the field, predicting and suggesting what its future developments and needs may be. Doron stresses the need for the rise of gerontological jurisprudence, calls for further study on ageism and points to the rise of intersectional law and aging and the stagnation of American Elder Law. He concludes his article with some suggestions for the future of the field. To mention a few, Doron stresses the need for the establishment of “jurisprudential geriatrics,” the need for international elder law, and the importance of building a future leadership of the field in the U.S.

Daphna Hacker suggests a new hybrid definition of Elder Law that is comprised of antidiscrimination law and vulnerability law. She argues that it is time to depart from the positivist-professional definition of Elder Law that lacks a theoretical and normative justification for the field. Hacker bases her suggestion on findings from a study, which she conducted and is presented in the article. The study focuses on adult children of a spouseless parent, and their intrafamilial relationships. It reveals the dependency of the elderly on their family members, which echoes the dependency of children on their parents. Thus, Hacker draws her inspiration for the new approach from the theoretical framework of feminist Family Law and procedures unique to Family Law in general.

The next article, by Merril Silverstein, Aviad Tur-Sinai & Noah Lewin-Epstein, also examines the implications and manifestations of intrafamilial relations, looking into the effects of social policy and welfare regimes on the “sandwich generation” – those with elderly parents *and* adult children – and the support members of this generation provide to their parents and their children. They investigate whether there is a relationship between the amount of care provided by the “sandwich generation” to their elderly parents and the welfare regimes types, analyzing the results of an extensive multi-state empirical study, conducted in various states that fall into four different groups of welfare regimes.

Continuing the inquiry into the impact of policy regimes is Deblina Dey’s article, which reviews the condition of elderly care in India, focusing on an aspect of the welfare regime in India that relates to older adults. She examines the legal aspects of both the maintenance provided to the elderly by their children and their inheritance of the elderly’s property. As she explains, the role of caring for the elderly in Indian culture is the primary responsibility of family members — in the past a matter of custom and today mandated by law. Dey finds that the Indian law system still faces challenges in dealing with

meeting the expectations of older adults regarding how their adult children will treat them and family property, and shows that one significant obstacle is the substantial emotional component of these expectations.

The labor market is another sphere where older adults face difficulties, sometimes caused and amplified by the policies that regulate the market. Lilach Lurie argues that a universal approach to antidiscrimination at work — regulating age discrimination and other types of discrimination at work in a uniform way — is generally preferable over a particularistic approach, which seeks to regulate each cause differently. Lurie supports this claim with a snapshot of current litigation regarding discrimination in Israel and by discussing various doctrines that apply in Israeli law. Additionally, she bolsters her argument by repudiating common justifications for the particularistic approach to discrimination law, and stresses the advantages of the universal approach, such as improved intergenerational justice and efficiency to the benefit of both litigants and the judicial process.

Titti Mattsson and Lottie Giertz continue the examination of current policy and welfare regimes. They challenge the concept of the human subject as being autonomous and independent, which shapes the approach to providing social services for people with dementia in Sweden. They argue that in the context of dementia, this concept is misleading, leaving patients without the daily assistance they need. Instead, Mattsson and Giertz propose the adoption of Martha Fineman's vulnerability theory as the conceptual basis for criticizing the reliance of the Swedish social care system on consent. They claim that forming social policy through the prism of Fineman's vulnerability theory may provide for a more effective approach to persons with dementia as well as their family members and social workers.

With respect to Fineman's vulnerability theory, Alexander Boni-Saenz suggests that it should abandon its current goal of substantive equality. He adduces problems with the goal of equality, mainly the need for relative comparison. Boni-Saenz proposes adopting a continuous doctrine of sufficiency as an alternative center of vulnerability theory. In contrast to equality, sufficiency means to have "enough," making it an internal measure that doesn't require external comparisons. Moreover, the sufficiency threshold is tied to the capability of being resilient, and hence concerns individual needs. Boni-Saenz uses time and age to demonstrate the advantages of sufficiency over equality, stating that vulnerability theory must contend with philosophical issues whether it adopts a continuous doctrine of sufficiency or keeps substantive equality as its goal.

Nina Kohn rounds off this issue, stressing the need for appropriate and just public policy related to old age. Kohn believes there is a correlation between the legal theory of law and aging and the creation of such policy, as the former

has the potential to assist in designing successful policy. She reflects upon the work of the scholars in this issue and their contribution to the theoretical field of law and aging and upon the theoretical concerns that lie at the center of elder law. She suggests three approaches that elder law scholars should take in order to advance the field. First, to distinguish the academic study of the field from its practice. Second, to recognize that discrimination is inherent to age and therefore it is necessary to recognize when age-based classifications are appropriate and when not. And third, she advocates recognizing that old age is not a universal experience as it is perceived to be, thus suggesting a new point of view on old age and the difficulties that come with it which may affect the allocation of rights and distribution of resources in society.

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