# Chapter 2
# A Civil Rights Approach to Elder Law

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## 2.1 Introduction

The study and development of public policy focused on older adults has historically been dominated by the medical sciences, related fields such as psychology and social work, and other social sciences that examine group behavior and structure such as sociology and anthropology.[1] The legal field and its approach to analyzing public policy, by comparison, have yet to play a significant role in shaping the field of gerontology.[2] This has created an environment in which governmental treatment of older adults has been framed primarily as a social welfare concern, and in which the implications of such treatment for older adults' civil rights are typically under-appreciated or even unrecognized.

This chapter argues that incorporating a civil rights perspective into the study of gerontology would not only better inform the study of aging, but would also help improve aging-related laws and policies. Such a perspective would contribute to the discourse over aging and old age policy by identifying and describing how laws and policies impact civil rights (i.e., the rights individuals have by virtue of their membership or presence in a particular polity). In this manner, it would complement a variety of other legal perspectives that can be applied to gerontology such as a human rights perspective,[3] a feminist perspective,[4] a therapeutic justice

[1] *See* Doron (2006) [hereinafter Doron, *Elder Law*].

[2] *See id.*

[3] *See* Prof. Helen Meenan, Chap. 4 in this book.

[4] *See* Dayton (2009).

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perspective,[5] or a law and economics perspective.[6] Like these other normative perspectives,[7] a civil rights perspective reveals a particular set of concerns and suggests a particular set of strategies for addressing those concerns.

The chapter proceeds with three major sections. Section 2.2 describes the civil rights concerns facing older adults. It then provides a theoretical overview of how the legal field could promote elder-friendly legal reform by explicitly labeling those concerns in the language of rights. Section 2.3 discusses specific examples of how applying a civil rights perspective has and could affect specific legal regimes and policy choices. Finally, Sect. 2.4 describes the special role that elder law practitioners and scholars can play in bringing this perspective to the field of gerontology and to the discourse concerning aging-related laws and policies.

## 2.2 The Value of the Civil Rights Perspective

Older adults experience a wide range of civil rights concerns. Some of these are the direct result of their chronological age. A major concern in many countries is age discrimination in employment, which ranges from mandatory retirement policies, to discrimination in hiring, to on-the-job age-related harassment.[8] Age discrimination occurs in other contexts as well. For example, older adults may be denied access to certain forms of efficacious medical care as a result of their advanced age.[9] Other

[5] *See* Kapp (2009).

[6] *See* Kaplan (2009).

[7] The civil rights perspective described in this chapter, by comparison, is not capable of providing a comprehensive, descriptive view of elder law, such as that provided by the Multi-Dimensional Model of Elder Law described by Doron. *See* Doron (2003) (originating the model). *See also* Doron and Kohn (2010) (most recently refining the model).

[8] Such discrimination occurs even in those countries which provide formal legal protections from age discrimination, such as the United States where the Age Discrimination in Employment Act protects most older workers from being subjected to adverse employment actions on the basis of age. *See* U.S. Equal Employment Opportunity Commission, Age Discrimination in Employment Act FY 1997-FY 2010, http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm (presenting data on age discrimination claims made pursuant to the ADEA from 1997 through 2010, and showing that there was a significant increase in both the number of claims and the number of successful claims during that time period); Press Release, EEOC, EEOC Hearing Highlights "Devastating Impact" of Age Discrimination (July 15, 2009) *available at* http://www.eeoc.gov/eeoc/newsroom/release/7-15-09.cfm (reporting on a EEOC hearing at which experts reported on the problem of age discrimination in employment in the U.S.; a transcript of the hearing is available at http://www.eeoc.gov/eeoc/meetings/7-15-09/index.cfm.

[9] *See* Williams (2009) (discussing evidence of physicians in the United States, Canada, and the United Kingdom discriminating against older adults by providing reduced access to certain forms of efficacious health care to older patients); Kane and Kane (2005) (discussing both overt and subtle forms of age discrimination in health care, including the exclusion of older patients from clinical trials, low reimbursement rates for geriatrics, differential treatment with regard to long-term care, the over-use of do-not-resuscitate orders with older adults, and health care professionals distancing themselves from older patients); Whitton (1997) (discussing ageism in the health care profession in the United States).

less recognized forms of age discrimination include those stemming from overly paternalistic legal regimes. In the United States, new state laws aimed at combating elder abuse and neglect can significantly undermine older adults' civil rights. For example, as discussed in the next section, mandatory elder abuse reporting statutes in the United States can deny older adults the right to engage in confidential communications with doctors, nurses, clergy members, attorneys, and even spouses once they reach a statutorily specified age.

Other civil rights issues experienced by older adults are triggered by age-related phenomena, although not directly by chronological age. Older adults can experience significant civil rights problems as a result of being or becoming disabled, or as a result of being perceived as disabled. They may be denied the right to live in certain housing arrangements because of actual or perceived disabilities. Frail older adults may find their basic needs neglected by caregivers both in institutional care settings and in community-based settings. Those with cognitive capacity concerns may find themselves subjected to plenary guardianships that strip them of the right to make any meaningful decisions about their own lives and bodies, instead of limited guardianships that would allow them to retain a portion of their decision-making capacity. In many cases, these problems appear to be the result of explicit or implicit ageism which fosters discriminatory and overly paternalistic treatment of older persons.[10]

Recognizing these civil rights concerns as civil rights issues—and publicly labeling them as such—has the potential to change how governments and societies treat older adults. Most directly, bringing a civil rights perspective to the analysis of the laws and policies affecting older adults has direct legal value in that it may reveal that some of these laws and policies conflict with legally protected rights. This, in turn, can pave the way for successful court-based challenges of statutes and regulations that unlawfully undermine older adults' civil rights, and thereby lead to more elder-friendly legal regimes.

The power of applying a civil rights lens to elder policy issues, however, extends far beyond the courts. Perhaps most importantly, applying a civil rights perspective has the potential to influence whether a given policy is deemed desirable by policymakers. The fundamental principle of liberalism is that individual freedom is to be treated as the default, and that therefore those who would restrict individual freedom bear the burden of justifying such restrictions.[11] In the Westernized world, a world in which societies have largely accepted a liberal conception of the role of the state, the fact that a public policy restricts an individual's liberty is therefore of significant consequence. Specifically, where a proposed law or policy undermines individual liberty, the onus will generally be on supporters of the proposal to justify that infringement.

[10] There is a rich body of literature discussing the phenomenon of ageism. *See*, *e.g.*, Palmore (1999).

[11] *See* Stanford Encyclopedia of Philosophy (2007), for the definition of "Liberalism".

Where that individual liberty interest rises to the level of an individual "right"—that is, one recognized as protected under the law—the proponent will generally be expected to make an even greater showing of justification. In the political discourse of the United States, for example, "rights" have historically functioned as trump cards. The writings of American theorist Ronald Dworkin both exemplify and describe this tendency. Dworkin explains that if something is a "right" it means that "it is worth paying the incremental cost in social policy or efficiency" required to prevent an invasion of that right.[12] Thus, it is inappropriate to balance a "right" against a competing interest because this type of balancing approach would be anathema to the very concept of a "right."[13]

This elevated treatment of rights means that employing the rhetoric of rights can create political power. Cloaking an argument in rights-based terms is a vibrant and powerful form of argumentation both in policy-making circles and in the public discourse.[14] The rhetorical power of rights language is particularly robust where framed in the language of a nation's core legal rights. In the United States, for example, labeling something as a *constitutionally protected* right further enhances its perceived value and inviolability. As Larry Kramer has written, "the ability to tie an argument to the [United States] Constitution is critical in constitutional politics, and the stronger or more persuasive the connection, the greater one's claim to legitimacy in public debate."[15] Similarly, in Canada, the perceived strength of a class-based claim can be enhanced by framing it in terms of rights granted by the Canadian Charter of Rights and Freedoms. Indeed, the adoption of the Charter has been credited with increasing both the prevalence and power of rights-based rhetoric in Canadian society and politics.[16]

The rhetorical power of rights does not necessarily depend on the receptiveness of courts to that rhetoric. There is political value in framing arguments in rights language even where a rights-based legal challenge would be unsuccessful. This is

[12] Dworkin (1978).

[13] *Id.* at 200.

[14] This is true despite the fact that such rhetoric is attacked by intellectuals on both the left and the right. Martha Minow summarized the United States' experience with this two-sided attack in 1987, writing: Rights are under attack. Some conservatives criticize the expansion of rights for lacking a legitimate basis, for contributing to adversariness and social conflict, or for undermining respect for law. Some left-leaning scholars criticize rights because they are incoherent and indeterminate, or because they fail to promote community and responsibility. Whatever the reason, rights criticism abounds. Minow (1987).

[15] Kramer (2006). *Accord* Glendon (1991) (discussing how legal language shapes public opinion in the United States and arguing that people in the United States view legal norms, and especially those grounded in the United States Constitution, as "expressions of minimal common values").

[16] This effect has been the subject of significant criticism. *See, e.g.,* Macfarlane (2008) (stating that the adoption of the Charter has caused rights claims to "assume a particularly pronounced stature" and has encouraged the framing of political claims in rights language, and providing an overview of the resulting concerns); Hiebert (1993) (exploring concerns that the Charter prompted the increased use of "rights language" and a "rights must be paramount" view of Canadian politics).

because rights-based arguments can gain traction and help generate political support for a social cause even if those arguments would not prevail in a court of law.[17]

Moreover, the political value of a civil rights perspective is not limited to its rhetorical value. Publically identifying policies as affecting individual liberties and rights affects not only the perceived desirability of those policies, but also human behavior. As Martha Minow has explained, recognizing rights—even if that recognition is not formal or condoned by authority—can give rise to "rights consciousness."[18] This, in turn, allows individuals and groups to imagine and act in light of rights that have neither been enforced nor even formally recognized.[19] Thus, educating the public about the rights of older adults may encourage individual behaviors that are more respectful and supportive of older adults' rights than they would otherwise be.[20] It may also encourage political behavior and political organizing around aging issues.

This ability to affect behavior is critically important in the elder law context. Even Western countries that have experienced waves of civil rights movements have yet to witness a clear civil rights movement for older adults. In the United States, civil rights movements have been central to the country's political discourse for over half a century, starting with the fight for equal rights for racial minorities, and then moving to the struggle for women's rights, the disability rights movement, and the more recent push for the rights of lesbian, gay, bisexual, and transgender individuals. However, despite experiencing pervasive ageism and continuing age discrimination, older adults in the United States have yet to engage in the type of collective action that could fairly be said to rise to the level of a rights-based movement.[21] Rather, advocacy efforts have been led by service providers and

[17] *See* Kramer, *supra* note 15, at 1445 ("[T]o say that a social movement must appeal by arguments that are recognizably legal in form is not to say that these arguments will satisfy a court, or even a lawyer or law professor . . .. Popular understandings of what constitutes a proper or persuasive legal argument may diverge from those of the profession . . .."). *See also* Schwartz (2001) ("[T]he presence of rights in a constitution [does not] require[] that they be *judicially* enforceable for them to be meaningful. There is also *political* enforceability. An obligation that is constitutionally mandated will have more persuasive force in debates over budget and other priorities than something that is completely discretionary with the legislature."). *Cf.* Mark Tushnet, Why the Constitution Matters (2010) (taking this argument one step further by arguing that the primary value of the United States' Constitution is that it creates a structure for the country's politics).

[18] *See* Minow, *supra* note 14, at 1867.

[19] *Id.*

[20] *Cf.* Doron and Apter (2010) (discussing the potential of an international rights convention, such as a proposed convention on the rights of older persons, to raise awareness about the plight of targeted groups).

[21] Perhaps the closest the United States has come to such a mobilization is the pension movement led by Dr. Francis Townsend in response to the Great Depression. *See* Amenta (2006) (describing the pension movement and reporting that two million people joined Townsend clubs and even more participated in movement activities such as rallies and meetings).

professionals,[22] and have therefore focused primarily on obtaining benefits and services for older adults.[23] While this has resulted in significant advances in entitlement programs and aging-related services, it has failed to create a constituency for protecting or enhancing older adults' negative liberties and their rights vis-à-vis service providers.[24]

A key barrier to the emergence of an elder rights movement is that older adults do not have a cohesive group identity. Older adults are a diverse group with varied backgrounds, interests, and objectives. As Frédéric Mégret has described, "the elderly are more a *category* of population than a constituted group within it."[25] In part because of their differences, older adults frequently do not identify with one another and have historically not been a cohesive political force.[26] Even when they do identify with one another, their age-based identity is typically secondary to other, previously adopted identities such as those based on family, religion, occupation, and political affiliation.[27] Moreover, some older adults actively resist being categorized based on their age,[28] perhaps reflecting society's preference for youth and concerns about the negative stereotypes associated with aging. This lack of a common identity, in turn, reduces the likelihood of older adults engaging in civic activism or voting behavior based on common interests.

Framing issues facing older adults in the language of rights, however, could foster a sense of shared interest and identity which, in turn, could encourage the mobilization of older adults to advocate for group interests.[29] Specifically, rights-conscious behavior could make the rights concerns facing older adults appear more salient and important—and thus prompt greater understanding among older adults of their common interests and the common threats that they face. Since people are more likely to engage in social action when they perceive that their interests are

[22] *See* Hudson (2004) (expressing concern that the professionalization of aging interest groups may have displaced citizen advocacy on aging issues); Wolf and Pillemer (1989) (comparing aging-related advocacy efforts to domestic violence related advocacy efforts, in which there has been a significant activist component); Moody (1988) (arguing the agenda for old age advocacy is "defined and dominated by professionals").

[23] *See* Kohn (2010a) [hereinafter Kohn, *Fostering*].

[24] For a longer discussion of this point, please see *id.*

[25] Mégret (2011).

[26] *See* Lynch (2005) (explaining that older adults in the United States have generally not acted as a cohesive voting bloc); Binstock (2007) (discussing data showing that older people do not form a voting bloc in the United States and analyzing why they do not do so).

[27] Pratt (1995) (noting that elder empowerment, and membership organizations for the elderly, are challenged by the fact that the strongest group attachments are typically those formed earlier in life and thus older people "reach old age with their primary affiliations . . . already firmly fixed").

[28] *Cf.* Mégret, *supra* note 25, at 44–45 (commenting that some older adults may "insist that their rights should be construed strictly identically to those of the rest of the population . . . even when the issue is defining a distinct elderly group to better protect its human rights.").

[29] This argument is developed in greater depth in Kohn, *Fostering*, *supra* note 23.

threatened, this could facilitate social action.[30] In addition, by making rights concerns seem tangible and legitimate, such framing could make achieving related reforms seem more feasible. This too could facilitate social action because people tend to be more willing to engage in political action that they believe will be successful.

In short, by recognizing when laws and policies undermine civil rights, the legal field has the potential to change the underlying assessment of those laws and policies by the courts, as well as among policymakers and the public. In contrast, by failing to recognize or acknowledge such rights burdens, the legal field creates an environment in which it is relatively easy for political bodies and other entities to create and enforce policies and laws that undermine older adults' liberties without robust justification.

## 2.3 Applying the Civil Rights Perspective

To better understand the instrumental value of a civil rights perspective, it is useful to consider how applying such a perspective can affect specific laws and policies.

Such a perspective has, at times, been a useful tool for legal advocates seeking to use the courts to challenge policies that undermine older adults' civil rights. Lawyers in Canada and Israel, for example, have successfully attacked certain forms of age discrimination in employment by framing that discrimination in terms of their countries' core civil rights. In a landmark 1987 decision, the Israeli Supreme Court held that a governmental agency's policy requiring women to retire at age 60 and men to retire at age 65 was an impermissible violation of a basic principle in Israeli law: that of equality.[31] Similarly, Section 15 of the Canadian Charter of Rights and Freedoms which guarantees individuals equal treatment by the state without discrimination (and which explicitly prohibits age discrimination) is beginning to be successfully employed to invalidate mandatory retirement policies. Specifically, although the Canadian Supreme Court has repeatedly upheld mandatory retirement policies,[32] several lower tribunals have found certain

[30] *Cf.* Lynch, *supra* note 26, at 102 (suggesting that members of the baby boom generation in the United States will be more likely to mobilize to promote common goals if they perceive their common economic interest to be threatened by, for example, threats to the U.S. Social Security or Medicare systems).

[31] HCJ 104/87 Nevo v. Nat'l Labour Court et al. 44(4) PD 749 (Isr.).

[32] The leading case was *McKinney v. Univ. of Guelph*, [1990] 3 S.C.R. 229 (Can.). In *McKinney*, the Court held that the Canadian Charter of Rights and Freedoms neither directly barred a university from imposing a mandatory retirement policy on university employees, nor did it prohibit the Province of Ontario from applying a Human Rights Code that denied protection from mandatory retirement only to those age 65 and over. For an excellent discussion of *McKinney* and other Canadian Supreme Court mandatory retirement cases prior to the reform of the Ontario Human Rights Code, see generally Klassen and Gillin (2005).

mandatory retirement policies to be in violation of Section 15.[33] In addition, the Canadian Supreme Court relied on Section 15 to invalidate a law restricting unemployment insurance benefits to persons under age 65.[34]

There are also times where the civil rights approach has advanced law reform objectives in the absence of court intervention. The Canadian province of Ontario's process of reforming its provincial law related to mandatory retirement provides a good case study of how a rights-based approach to elder law can be a powerful tool for such law reform. In 2001, the Ontario Human Rights Commission published a report entitled "Time for Action: Advancing Human Rights for Older Ontarians." The report detailed the ways in which the province of Ontario's legal system engaged in age discrimination and labeled this discrimination as a human rights issue. Among its most significant findings was the conclusion that mandatory retirement policies were discriminatory and akin to other clearly prohibited forms of discrimination, such as discrimination on the basis of race, sex, or disability.[35] According to the report, "[m]andatory retirement is age discrimination. Making a decision solely on the basis of age, and not on the basis of a person's ability to perform the essential duties of the job, is a form of unequal treatment."[36] The report called on the Province to reform its human rights code in order to remove an exception that permitted age discrimination in employment where employees were 65 years of age or older. The report noted that "[a]s a society, we would not find it acceptable to terminate someone's employment in such a fashion if the reason were related to another ground in the [Ontario Human Rights] *Code* such as race, sex or disability. Therefore, there are significant public policy reasons to re-examine mandatory retirement at this time to determine whether the arguments based on social utility should continue to justify what is otherwise a discriminatory practice."[37]

The report, which was followed by the Commission developing a formal policy on discrimination against older people, became a powerful catalyst for legal reform.[38] The report's classification of age discrimination in employment as a rights issue was seized upon by the local media and by political actors,[39] and

[33] *See* Vilven & Kelly v. Air Canada, 2009 CHRT 24 (Can.); CKY-TV v. Commc'ns Energy & Paperworkers Union of Canada, Local 816, 2009 MBQB 252 (Can.); Assn. of Justices of the Peace of Ontario v. Ontario, [2008] 92 O.R. (3d) 16.

[34] Tétreault-Gadoury v. Canada, [1991] 2 S.C.R. 22 (Can.).

[35] Ontario Human Rights Commission (2001).

[36] *Id.*

[37] *Id.*

[38] *Accord Assn. of Justices of the Peace*, 92 O.R. (3d) at ¶ 45 (describing the Commission's work as leading "a sea change in the attitude to mandatory retirement in Ontario"); Klassen and Gillin, *supra* note 31, at 50.

[39] The author's review of Canadian newspapers' coverage of the report and the issue of mandatory retirement subsequent to the report found substantial coverage of the issue, and significant discussion of mandatory retirement as an issue of workers' and older adults' "rights". *See also* Ontario Human Rights Commission (2005) (noting that the Report "has been referenced in other reports and by media, both nationally and internationally").

within a few years the Ontario Human Rights Code had been revised to prohibit age discrimination. The report's identification of mandatory retirement as a rights concern appears to have been critical to the law reform process. Identifying the issue in rights terms both elevated the cause and made the issues more salient to the public. The human rights terminology, for example, facilitated a poster campaign led by the Commission in partnership with the Canadian Association of Retired Persons (CARP), the "centerpiece" of which was "a series of posters featuring persons with stickers on their foreheads stating a 'Best Before' age with the tag line, 'Nobody has a shelf life. Stop age discrimination now. It's illegal, and it's just plain wrong.'"[40] Across Ontario, the issue was readily picked up by the media. News stories and editorials portraying mandatory retirement as discrimination and as a deprivation of older adults' rights proliferated. This paved the way for a bipartisan embrace of legislation revising the Code as advocated by the Commission.[41]

The Ontario experience shows the political and rhetorical power of identifying burdens on older adults in rights-based terms. In particular, it is illustrative of the fact that such identification can have a powerful effect even where such arguments would fail—and or even have failed—in a court of law. Prior to the revision of the Ontario Human Rights Code, there were repeated, unsuccessful attempts to bring court challenges to mandatory retirement policies on the grounds that such policies violated the Canadian Charter of Rights and Freedoms and the Ontario Human Rights Code.[42]

There is great potential for a civil rights lens to have a similar impact in other locales and with respect to other issues. In the United States, for example, such an approach has the potential to fundamentally change the nation's response to the problem of elder abuse and neglect.

Over the past two decades, the United States has seen tremendous growth in legislation designed to protect older adults from abuse and neglect. Unfortunately, a significant portion of this legislation has resulted in limiting older adults' rights based on their chronological age.[43] For example, almost all states in the United

[40] *See id.* at 12.

[41] The Conservative-led government of Ontario introduced a bill to end mandatory retirement in May 2003. The bill died when a new election was called and the Conservative government was defeated. After coming to power, the Liberal government introduced and passed a parallel bill that became effective December 12, 2006. *Cf.* Munro (2005) (expressing surprise that both parties embraced the issue).

[42] *See, e.g., McKinney*, 3 S.C.R. 229; Charles v. Canada (Attorney General), 1995 CarswellOnt 1037, Ontario Court of Justice (General Division) (unsuccessfully challenging the mandatory retirement of judges as a violation of the Ontario Human Rights Code and the Canadian Charter of Rights and Freedoms).

[43] *See generally* Kohn (2009) [hereinafter Kohn, *Outliving*] (discussing the civil rights impacts of elder abuse reporting statutes and new criminal codes aimed at combating elder sexual abuse); Kohn (2012) (also discussing the civil rights impact of laws designed to criminalize elder financial exploitation effectuated through "undue influence").

States have adopted statutes requiring elder abuse to be reported to the state.[44] The broadest such statutes require reports about all suspected victims of a statutorily specified triggering age, regardless of whether the alleged victim has diminished mental capacity or any other characteristics indicating unusual vulnerability, regardless of the relationship between the would-be reporter and the alleged victim, and regardless of whether a report would even be in the alleged victim's interest. An example is the state of Rhode Island's statute that requires "[a]ny person who has reasonable cause to believe that any person sixty (60) years of age or older has been abused, neglected, or exploited, or is self-neglecting" to report it to the State.[45] Similarly, Texas requires anyone with reason to believe that a person age 65 or older is being subjected to abuse, neglect, or exploitation to report that belief to the state.[46] To clarify the requirement, Texas' statutory code explicitly states mandated reporters include those "whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, and mental health professional."[47] Other states use the chronological age of an alleged victim as one of two or more factors that trigger the duty to report otherwise confidential information about suspected abuse or neglect to the state.[48] Yet others do not directly make chronological age a factor triggering the duty to report, but indirectly make it a factor by allowing "infirmities" or "impairments" associated with "age" or "aging" to trigger statutory reporting duties.[49]

Mandatory elder mistreatment reporting schemes have been subject to extensive criticism, but that criticism has done little to deter states from adopting or strengthening these schemes.[50] A key reason for this appears to be that such criticisms have been almost entirely focused on functional grounds (e.g., that such laws are ineffective or counterproductive) and moral grounds (e.g., that such laws undermine older adults' autonomy and dignity, are ageist, or conflict with pre-existing ethical norms). Such critiques have almost uniformly failed to describe the burdens such statutes impose on older adults in terms of individual rights.[51] For example, scholars criticizing mandatory reporting schemes for undermining older adults' autonomy have generally failed to consider that such autonomy limitations may not only raise moral, ethical, or efficiency concerns, but may also violate privacy rights protected by the United States Constitution.[52] As such, current critiques of mandatory elder mistreatment reporting schemes generally fail to fully appreciate and describe the negative impacts of such schemes, and therefore have diminished political and rhetorical strength.

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[44] Previously, reporting was only mandatory when abuse occurred in certain residential facilities, including nursing homes.

[45] *See* R.I. Gen Laws Sect. 42-66-8 (Supp. 2010).

[46] *See* Tex. Hum. Res. Code Ann. Sects. 48.002(a)(1), 48.051 (West Supp. 2010).

[47] Section 48.051(c).

[48] *See* Kohn, *Outliving*, *supra* note 43, at 1063–1064.

[49] *See id.* at 1063.

[50] *See id.* at 1065–1067.

[51] *See id.*

[52] *See id.*

A rights-based critique of such statutes, by comparison, has significantly greater potential to affect policy choices related to elder abuse. One reason for this is that such a critique provides a more complete—and far more problematic—picture of their impacts. For example, as the author has explored at length in an earlier work, it reveals that such statutes may violate a constitutionally protected right to informational privacy—that is, the right to control the acquisition or dissemination of information about oneself.[53] It also suggests that at least a subset of such laws may violate the 14th Amendment of the United States Constitution in so far as that Amendment guarantees equal protection of law.[54]

A rights-based critique of mandatory elder abuse reporting statutes could significantly impact policy choices due to the political and rhetorical weight such a critique could carry even if such statutes were not found legally impermissible in a court of law. When the impact that such laws have on older adults' autonomy is described only in ethical and moral terms, and not identified as a rights concern, it is easier for policymakers to dismiss this impact by treating it merely as one of many factors to be considered in determining the relative wisdom of such statutes.

The potential of a rights-based approach to change United States elder abuse policy is further suggested by the experience of the state of Wisconsin. In 2006, Wisconsin adopted an unusual mandatory reporting policy. Most reporting schemes in the United States require reporting as long as the victim fits into a statutorily defined category of person and the reporter has a reasonable suspicion of mistreatment. However, unless a third party is at risk,[55] Wisconsin only requires reporting where two additional conditions are satisfied: (1) the alleged victim is at imminent risk of serious harm, and (2) the alleged victim cannot "make an informed judgment about whether to report the risk."[56] Thus, the Wisconsin approach invades alleged victims' privacy interests only where the state has a very strong interest in doing so.

Wisconsin's rights-protective approach to elder abuse reporting appears to be attributable, at least in part, to the rights-consciousness of those who drafted it. The law was drafted by experts with extensive knowledge of domestic violence issues who recognized that a significant portion of elder abuse is also domestic violence.[57] Consistent with this background, the framers were accustomed to a victims' rights approach to abuse intervention and embraced a victim empowerment model for

[53] For a full exploration of why such statutes could and should be found unconstitutional on informational privacy grounds see Kohn, *Outliving*, *supra* note 42, at 1067–1087.

[54] For a full exploration of why such statutes could and should be found unconstitutional on equal protection grounds, see generally Kohn (2010b).

[55] *See* wis. Stat. Ann. Sect. 46.90(4) (West Supp. 2010).

[56] *See id.*

[57] Interview with Jane Raymond, Advocacy & Protection Systems Developer, Wisconsin Department of Health & Family Services (Aug. 11, 2008); Interview with Betsy Abramson, Wisconsin attorney involved in drafting the 2006 reforms (Aug. 13, 2008).

responding to such abuse.[58] By contrast, other states' mandatory elder abuse reporting laws tend to be modeled on child abuse reporting statutes.[59] Looking at elder mistreatment policy through a rights lens—as Wisconsin did—makes the heavily paternalistic approaches developed to address abuse of children seem inappropriate when applied to address elder abuse. Whereas children lack full legal rights,[60] the subjects of elder abuse reporting include persons with full legal rights: competent, adult citizens. Thus, Wisconsin's experience suggests that a rights-based approach can affect the frames of reference that policymakers employ when designing policies related to older adults, and thereby result in more rights-protective policies.

These two case studies—Ontario's experience with mandatory retirement for older workers and Wisconsin's experience with mandatory reporting for elder abuse—provide brief examples of how identifying rights issues affecting older adults and using the language of rights to describe those affects has the potential to shape and inform aging policy.

It is important to recognize, however, that the impact of this lens will naturally vary from country to country and culture to culture. Both the nature and magnitude of the impact of using a civil rights lens may be diminished in other countries without an individual rights-based tradition. The specific language, and specific rights discussed, can also be expected to vary based on locale. In some countries, the language of "civil rights"—that is, rights granted by the state—will be most powerful. In the United States, civil rights language has particular resonance due, in part, to the storied history of the country's civil rights movements. In other countries, appeals may be stronger if they use the terminology of "human rights"—that is, rights that an individual has by virtue of being a human being—even when talking about rights that derive in totality or in part from the state.

[58] The state was explicit about its decision to incorporate domestic violence concepts and victim empowerment strategies into its statutory approach to addressing elder abuse. *See* Abramson (2006) (summarizing the state's approach to elder abuse made available by the state, and stating that elder abuse and domestic violence are the result of the same factors); Div. of Disability and Elder Servs., Dep't of Health and Family Servs., State of Wis., Ddes Info Memo 2004–03 at 5 (June 22, 2004), *available at* http://dhs.wisconsin.gov/dsl_info/InfoMemos/DDES/CY_2004/InfoMemo2004-03.htm ("The rationale for an entity to potentially not report an incident of domestic violence in later life to an external agency is based on the need for victim safety (trusting the victim to know what is best for him/her) and the principles of self-determination and empowerment.").

[59] *See* Kohn, *Outliving*, *supra* note 43, at 1057–1058, 1108.

[60] Children in the U.S. have fewer legal rights than adults, and those rights are generally seen by the courts as deserving less protection from government intrusion. *See, e.g.,* Hodgson v. Minnesota, 497 U.S. 417, 482 (1990) (Kennedy, J., concurring) ("The law does not give to children many rights given to adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent."); Bellotti v. Baird, 443 U.S. 622, 634 (1979) (plurality opinion) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.").

The Ontario experience with mandatory retirement, for example, gained strength from the language of human rights even though it in fact focused on rights granted by the polity.[61]

## 2.4 The Role of the Legal Field

The previous sections have described the importance and potential impact of viewing policies related to aging through a civil rights lens. The legal field has a critical role to play in helping to realize this potential. The core competency of legal experts—whether they are legal academics or legal practitioners—is to identify and explain legal rules and entitlements. Indeed, in defining legal "competence," the American Bar Association's Model Rules of Professional Conduct states that "[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge."[62] It is this ability to recognize and characterize the legal issues at play in a situation that gives legal experts a unique skill set and distinguishes them from other types of professionals.[63]

Unfortunately, to date, the legal field has been largely absent from the study of gerontology. This absence partially reflects the fact that the legal field has only recently begun to recognize aging issues as relevant to its work, and that recognition has largely been limited to the emergence of elder law as a specialized area of practice. By contrast, legal scholars are only at the early stages of considering the possibility that elder law could be a distinct legal discipline worthy of theoretical and doctrinal analysis. Historically, elder law scholarship has tended to eschew traditional doctrinal legal analysis. Rather, when older adults' interests are aided or undermined by policy choices, the tendency even among legal academics specializing in elder law has been to focus their analyses on the ethical, practical, or moral implications of those choices. The result has been a significant contribution to the legal literature in the form of scholarship that has brought non-traditional

[61] From the beginning of its mandatory retirement law reform efforts, the Ontario Commission on Human Rights focused its analysis on the interaction between age discrimination and Ontarians' legal rights. Due to the nature of the Commission's charge, however, these rights were sometimes called "human rights." Similarly, the author's review of newspaper coverage of the reform of the Ontario Human Rights Code to eliminate protection for mandatory retirement policies found that this coverage reported the issue as one involving unspecified rights, worker's rights, and human rights—but did not use the phrase "civil rights" even when clearly discussing such rights.

[62] Model Rules of Prof'l Conduct R. 1.1 cmt. 2 (2010).

[63] This explains why law school exams traditionally focus on "issue spotting" questions, and helps explain why lawyers are often criticized for an "overly legal" approach to problem-solving. *Cf.* Kruse (2010) ("Although reducing a client to nothing more than a bundle of legal interests is problematic, legal issue-spotting is a core competency of lawyering and a necessary component of virtually all legal representation.").

and interdisciplinary perspectives to the study of law. However, this tendency has had the unfortunate unintended consequence of missing an opportunity to adequately inform the field of gerontology about more traditional legal concerns raised by laws and policies affecting older adults.

The absence of the legal field from the study of gerontology also reflects the fact that elder law practitioners typically do not perceive their work as concerning civil rights. Elder law practice involves, albeit at times indirectly, many civil rights issues. Elder law practices typically focus on assisting clients with planning for later-in-life needs through document drafting and client counseling. These tasks can have significant civil rights implications even though they are not traditionally considered to be civil rights-oriented by either attorneys or their clients. For example, executing advance directives can promote older adults' self-determination because such documents allow them to specify who may act as their surrogate, to guide that surrogate's decision-making process, and even to avoid guardianship. Similarly, elder law attorneys can facilitate clients' control over their care and lifestyle by counseling them on structuring their resources in light of potential long-term care needs. Nevertheless, despite the frequent involvement of civil rights issues, neither the practice of elder law, nor the legal substance of elder law issues, is typically described in civil rights terms by either academics or practitioners. For example, the United States-based National Elder Law Foundation (NELF) specifies twelve substantive areas of law about which elder law attorneys must be knowledgeable in order to receive the organization's certification as an elder law specialist.[64] The term "rights" is mentioned in only one of these areas—that related to housing and long-term care.[65] Accordingly, although the legal field has a critical role to play in identifying these types of civil rights concerns as civil rights concerns, doing so will require a departure from current prevailing tendencies among elder law academics and practitioners.

By stepping up to the challenge of viewing aging issues through a civil rights lens—and acting in light of that perspective—the legal field will fulfill Israel Doron's 2006 call for the field of elder law not to confine itself to a specialized area of practice, but rather to "become an integral part of gerontological science" by contributing "legal knowledge, methodology and philosophy to . . . the gerontological imagination."[66] In making that call, Doron implicitly acknowledged that part of the value of the legal field's contribution to gerontology would be that the legal field would bring civil rights discourse into gerontology.[67]

[64] *See* National Elder Law Foundation. The National Elder Law Foundation Board of Certification Program Rules and Regulations Regarding Certification of Elder Law Attorneys, http://www.nelf.org/becoming-certified/rules-and-regulations (last visited July 2011).

[65] *See id.*

[66] *See* Doron, *Elder Law, supra* note 1, at 64.

[67] *See id.* at 64–65.

## 2.5 Conclusion

Older adults face a myriad of civil rights concerns. Accordingly, applying a civil rights lens to aging issues facilitates an understanding of both the practice and legal substance of the field of elder law. It also facilitates legal reform by paving the way for new court-based legal challenges, by diminishing the perceived desirability of policy choices that undermine rights, and by harnessing the power of rights rhetoric to change political behavior. Thus, by contributing a civil rights perspective to gerontological imagination, the legal field could make a significant contribution to the study and design of aging-related policies.

## References

Abramson B (2006) Wisconsin's elder abuse & adult at risk reporting law. Wisconsin Department of Health Services. http://dhs.wisconsin.gov/aps/Links/index.htm

Amenta E (2006) When movements matter: the townsend plan and the rise of social security, p 117

Binstock RH (2007) Older people & political engagement: from avid voters to 'cooled-out marks'. Generations 30:24

Dayton AK (2009) A feminist approach to elder law. In: Doron I (ed) Theories on law & aging: the jurisprudence of elder law, p 45, Springer, Berlin, Germany

Doron I (2003) A multi-dimensional model of elder law: an Israeli example. Ageing Int 28:242

Doron I (2006) Elder law: current issues and future frontiers. Eur J Ageing 3:60

Doron I, Apter I (2010) International rights of older persons: what difference would a new convention make to the lives of older people? Marq Elder's Advisor 11:367

Doron I, Kohn NA (2010) Aging and law: using a multi-dimensional model to understand the legal response to aging. In: Chen S, Powell JL (eds) Aging in perspective and the case of china: issues and approaches, p 71, Springer, New York

Dworkin R (1978) Taking rights seriously. Harvard University Press, Cambridge, p 199

Glendon MA (1991) Rights talk: the impoverishment of political discourse, pp 101–102, Simon and Schuster, Inc., New York

Hiebert J (1993) Rights and public debate: the limitations of a "rights must be paramount" perspective. Int J Can Studs 7–8:117, 119–120

Hudson RB (2004) Advocacy and policy success in aging. Generations 28:17, 22–23

Kane RL, Kane RA (2005) Ageism in health care and long-term care. Generations 29(3):49, 53

Kaplan RL (2009) A law and economics approach. In: Doron I (ed) Theories on law & aging: the jurisprudence of elder law, p 75, Springer, Berlin, Germany

Kapp MB (2009) A therapeutic approach. In: Doron I (ed) Theories on law & aging: the jurisprudence of elder law, p 31

Klassen TR, Gillin CT (2005) Legalized age discrimination. J Law Soc Pol 20:35

Kohn NA (2009) Outliving civil rights. Wash Univ Law Rev 86:1055

Kohn NA (2010a) The lawyer's role in fostering an elder rights movement. Wm Mitchell Law Rev 37:49, 58–59

Kohn NA (2010b) Rethinking the constitutionality of age discrimination. UC Davis Law Rev 44:213

Kohn NA (2012) Elder In (Justice): A Critique of the Criminalization of Elder Abuse. Am Crim Law Rev 48 (forthcoming, 2012)

Kramer L (2006) Generating constitutional meaning. Cal Law Rev 94:1439, 1445

Kruse KR (2010) Beyond cardboard clients in legal ethics. Geo J Legal Ethics 23:103, 129–130

Lynch FR (2005) Political power and the baby boomers. In: Hudson RB (ed) The new politics of old age policy, 2nd edn. John Hopkins University Press, Baltimore, pp 87, 90
Macfarlane E (2008) Terms of entitlement: is there a distinctly Canadian "Rights Talk"? Can J Pol Sci 41:303, 304, 324
Mégret F (2011) The human rights of older persons: a growing challenge. Hum Rights Law Rev 11:37, 44
Minow M (1987) Interpreting rights: an essay for Robert cover. Yale Law J 96:1860
Moody HR (1988) Abundance of life: human development policies for an aging society, pp 140–141, Columbia University Press, New York
Munro J (2005) The debate about mandatory retirement in Ontario universities: positive and personal choices about retirement at 65. In: Gillin CT, MacGregor D, Klassen TR (eds) Time's up!: mandatory retirement in Canada. James Lorimer & Co., Toronto, pp 190, 190–191
Ontario Human Rights Commission (2001) Time for action: advancing human rights for older Ontarians, p 32. http://www.ohrc.on.ca/en/resources/discussion_consultation/TimeForActionsENGL/pdf
Ontario Human Rights Commission (2005) From research to legislation: challenging public perceptions and getting results, case study of the Ontario Human Rights Commission, p 10. http://www.ohrc.on.ca/en/resources/discussion_consultation/AgeSymposiumENG/pdf
Palmore EB (1999) Ageism: negative and positive, 2nd edn, Springer, New York
Pratt HJ (1995) Seniors' organizations and seniors' empowerment: an international perspective. In: Thursz D et al (eds) Empowering older people: an international approach. Auburn House, Towson, p 75
Schwartz H (2001) The wisdom and enforceability of welfare rights as constitutional rights. Hum Rights Brief 8:2, 3
Whitton L (1997) Ageism: paternalism and prejudice. Depaul Law Rev 46:453, 472–476
Williams PW (2009) Age discrimination in the delivery of health care services to our elderly. Marq Elder's Advisor 11:1, 3–6
Wolf RS, Pillemer KA (1989) Helping elderly victims: the reality of elder abuse, p 6, Columbia University Press, New York