OLD-AGE-BASED AND DISABILITY-FOCUSED: A SCOPING LITERATURE REVIEW ON THE INTERSECTION OF OLDER PERSONS' RIGHTS AND DISABILITY RIGHTS

YOTAM TOLUB,[*] SAGIT MOR,[**] ISRAEL (ISSI) DORON[***]

Elder law and disability law have historically developed separately, with minimal interaction. However, there are many similarities and shared interests between both fields and both groups – older persons and persons with disabilities. This paper is the first attempt to comparatively analyze the legal academic publications that have addressed both disability and older persons' rights in the last two decades. Using a systematic scoping review methodology, we quantitatively analyzed 180 articles published in the last two decades in legal journals and qualitatively analyzed seventeen of these articles that directly address the relationship between both fields. This systematic review yielded a comprehensive up-to-date quantitative and qualitative picture of the relationship between disability law and elder law. Our findings show that current comparative literature is one-directional, as it is 'old-age-based' and 'disability-focused'. The analysis produced five elements characterizing the relationship between the two fields: similarities, differences, tension, separation efforts and bridging efforts. Discussing these findings, this paper suggests two different narratives to explain the revealed relationship. One emphasizes the subtle manifestations of ageism in disability studies and disability law and ableism in gerontology and elder law. The other highlights the different histories of both fields and the human rights movements they serve. More broadly, the paper demonstrates the benefits of a systematic scoping review as an empirical methodology for comparative research generally, and specifically, the opportunities that an open dialogue between elder law and disability law provides.

---

[*] Yotam Tolub, LL.B. (Hebrew University in Jerusalem); MA in gerontology (Haifa University); Doctoral Student at the Faculty of Law at the Haifa University and a young researcher at the Minerva Center on Intersectionality in Aging (MCIA).

[**] Prof. Sagit Mor, LL.B. (Tel Aviv University); LL.M. (NYU Law School); JSD (NYU Law School). Prof Mor is the director of the LL.M. Program in Law and Health at the University of Haifa Faculty of Law, the Head of the International Center for Health Law and Ethics, and the co-founder of Collaborative Research Network on Disability Legal Studies at the Law and Society Association.

[***] Prof. Israel (Issi) Doron, LL.B. (Hebrew University in Jerusalem); LL.M. (Washington College of Law, D.C.); Ph.D. (Osgoode Hall Law School, Toronto): Currently Prof. Doron is the Dean of the Faculty of Social Welfare and Health Sciences at the University of Haifa, and the Past President of the Israeli Gerontological Society.

TABLE OF CONTENTS

INTRODUCTION

This article presents the outcomes of a scoping literature review that examines the existing legal research comparing the rights of individuals with disabilities and older persons and the relationship between these two fields of research. The objective is to identify the current intersections between disability law and elder law and analyze their broader potential. To our knowledge, this scoping review represents the first attempt to compare the writings about the intersection between disability law and elder law through both fields' published research. The outcomes of our review uncover an underexplored narrative concerning the connection between these two fields' intersectional writing, which we have termed "old-age-based" and "disability-focused". This term represents the tension between elder law and disability law as well as both fields' potential benefit from a more direct and eye-to-eye dialogue.

In Part I, the article discusses the similarities and differences in the development of disability law and elder law, providing a theoretical foundation for the subsequent sections. Part II outlines the methodology employed, introducing the scoping review method and the two components used for analysis: quantitative and qualitative. Part III focuses on the quantitative analysis, drawing on a selection of 180 articles. It presents a detailed statistical examination of the current comparative legal research on disability and older persons' rights, including the nature of the research, publication venues, specific issues addressed, and contextual frameworks. In Part IV, the qualitative analysis delves into 17 articles that directly explore the relationship between the rights of older persons and people with disabilities. This chapter examines the similarities, differences, and additional patterns, such as tension, efforts toward separation, and efforts toward bridging. Lastly, in the integrative Part V, we engage in a comprehensive discussion of the implications of our findings from both the qualitative and quantitative chapters. In the concluding remarks, we highlight the potential and relevance of further research on the understudied connection between these two fields, impacting the daily lives of many people.

I. OVERVIEW ON DISABILITY LAW AND ELDER LAW – PARALLEL
AND INTERSECTING LINES

Historically, the disability rights movement and the older persons rights movement have progressed independently with minimal interaction. Consequently, it is not surprising to find significant disparities in the fields of disability law and elder law. In this part, we will examine the historical evolutions of disability law and of elder law and analyze their similarities and differences as a foundation for addressing the central inquiry of our research: how do these fields intersect? As will be demonstrated in this chapter, there is a parallel in the development of both fields, transitioning from a positivist and impartial legal perspective to a more critical and proactive approach supported

by wider theoretical frameworks.

A. Disability Law

Prior to the 1970s, disability law primarily fell under the umbrella of welfare law, which addresses issues related to people with disabilities within the context of social welfare, such as rehabilitation, financial benefits, medical treatment, and social services. This approach, rooted in positivism, considered disability as a welfare matter with distinct legal aspects that should be addressed through relevant legal frameworks.[1]However, the emergence of the disability movement and the establishment of disability studies as an academic discipline during the latter half of the twentieth century reshaped disability law. Understanding the foundations of disability studies is crucial for comprehending the transformations in disability law.

To better comprehend disability studies it is helpful to understand the approach it sought to replace.[2] The traditional approach to disabilities - as formulated by its critics - was an individualist approach that viewed disability as an individual trait and a personal tragedy.[3] Disability was considered an objective problem to be remedied by society through healing and rehabilitation, and when necessary by providing a social and economic safety net and special segregated frameworks developed for persons who lacked the capacity to integrate in society.[4] The medical approach to disability is related to the individual one, and it reduces the experience of illness and disability to a purely medical-clinical phenomenon. Therefore, people with disabilities are considered to be sick and in need of treatment[5] resulting in medical, health and welfare professions being granted sweeping authority in all areas of their lives.[6]

The social model of disability offers a completely different perspective:[7]

---

1. *See, e.g.*, SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 117-131 (1998); David Pfeiffer, *A Bit of History*, 21 DISABILITY STUD. Q. 1 (2001); Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L. J. 527 (2014).

2. HANDBOOK OF DISABILITY STUDIES 125 (Gary L. Albrecht, Katherine Seelman & Michael Bury eds., 2001).

3. COLIN BARNES & MICHAEL OLIVER, DISABILITY: A SOCIOLOGICAL PHENOMENON IGNORED BY SOCIOLOGISTS (1993); Simon Brisenden, *Independent Living and the Medical Model of Disability*, 1 DISABIL. HANDICAP & SOC. 173 (1986).

4. Marno Retief & Rantoa Letšosa, *Models of Disability: A Brief Overview*, 74 HTS THEOL. STUD. (2018).

5. LINTON, *supra* note 1; MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH 12-24 (1990).

6. For a brief historical context of the medical model, *see* Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1404-14 (2021).

7. Tom Shakespeare, *The Social Model of Disability*, *in* DISABILITY STUD. READER 2, 197 (Lennard J. Davis ed., 2d ed. 2006); Tony Makin, *The Social Model of Disability, in* COUNSELLING: THE BACP COUNSELLING READER 184, 184-85 (Volume 2, Pat Milner & Stephen Palmer eds., 2001); Torn Shakespeare & Nicholas Watson, *The Social Model of Disability: An Outdated Ideology?, in* EXPLORING THEORIES AND EXPANDING METHODOLOGIES: WHERE WE ARE

disability is not inherent to individuals but rather is located in relationships and interactions between people and their surroundings. Thus, disability is not an individual medical condition but the product of a longstanding social construct that includes discrimination, marginalization, oppression, and paternalism.[8] Therefore, the burden of remedying this relationship rests on society.[9]

A critical theory of disability not only underlines the oppression (negative) against people with disabilities but also calls for liberation (positive) by mobilizing for a common struggle, pride, and the celebration of disability as part of human diversity.[10]

The emergence of disability studies, concurrent with the rise of the Independent Living (IL) movement[11] and drawing lessons from the civil rights movement and feminist struggle,[12] played a pivotal role in shaping the development of disability law. This transformative period can be characterized as a shift from a welfare-oriented approach to a rights-based approach.[13] Disability law became a site for advancing equality, combating discrimination, advocating for accessibility, and promoting accommodations to include and integrate people with disabilities in all aspects of life.

At the core of the rights-based approach to disability law is a deep-seated mistrust of the existing segregating welfare services. Here, persons with disabilities were conceptualized as a minority group vulnerable to marginalization and discrimination.[14] Under this view, the law's role is to

---

AND WHERE WE NEED TO GO 9, 9-28 (Sharon N. Barnartt & Barbara M. Altman eds., 2001). There are many nuanced combinations of the social model and human rights model in disability studies. *See also* Shakespeare's analysis of four approaches (sociology of chronic illness, British social model, American cultural disability studies (critical disability studies), Nordic relational understanding of disability which he favors). TOM SHAKESPEARE, DISABILITY RIGHTS AND WRONGS REVISITED (2d ed. 2013).

8. Paul Abberley, *The Concept of Oppression and the Development of a Social Theory of Disability*, 2 DISABIL. HANDICAP & SOC. 5 (1987); SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY 35 (1996).

9. For a comprehensive comparison of the two competing approaches, the individualistic traditional representation of disability and disability studies' perspective, *see* Linton's forceful essay. Simi Linton, *Disability Studies/Not Disability Studies*, 13 DISABILITY & SOC. 525 (1998). The limits of the social model as a theoretic model in disability law is discussed in: Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV 1251 (2007).

10. *See, e.g.*, John Swain & Sally French, *Towards an Affirmation Model of Disability,* 15 DISABILITY & SOC. 569 (2000).

11. David L. Braddock & Susan L. Parish, *An Institutional History of Disability*, *in* HANDBOOK OF DISABILITY STUDIES 11, 48 (Gary L. Albrecht, Katherine D. Seelman & Michael Bury eds., 2001).

12. Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or An Introduction to Disability Legal Studies*, 42 COLUMBIA HUM. RTS. L. REV. 403 (2011); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT *105* (1994).

13. Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L. J. 1 (2004).

14. *Id.*, at 14-15. Bagenstos argues that human rights activists for people with disabilities went farther than other welfare activists by rejecting welfare services for people with disabilities and not advocating for improving services.

protect the rights of this minority group, eliminate discriminatory practices, promote equality, dismantle barriers, and provide the necessary support for full inclusion and participation. [15]

A landmark achievement of the rights-based approach occurred in 1990 with the passage of the Americans with Disabilities Act (ADA).[16] The ADA made significant strides by emphasizing the prohibition of discrimination, promoting accessibility in various domains, and introducing accommodations to enable equal opportunities for individuals with disabilities. Its success served as an inspiration for similar legislative efforts in other countries, amplifying the impact of the rights-based approach to disability law. [17]

In conjunction with the rights-based approach, a more radical and critical theory of disability law emerged, known as disability legal studies (DLS). [18] This theoretical framework, as identified by Mor, bridges critical disability theory with critical legal theories. [19] Similar to feminist legal theory, critical race theory, and queer theory, disability legal studies aim to shed light on how the law reflects, perpetuates, and establishes power dynamics and oppression between individuals with and without disabilities. This perspective challenges the notion that relying solely on existing legal structures, such as anti-discrimination laws, is sufficient in addressing the needs and rights of people with disabilities.[20]

According to this third wave of disability law, there is a recognition that the existing legal framework is inadequate for ensuring the full participation and empowerment of individuals with disabilities. New doctrines and approaches are required to amplify the voices of people with disabilities, grant them agency over their own lives, and enable active engagement in the social realm. [21]

One key concept that emerges within disability legal studies is "ableism," which encompasses the socially constructed hierarchy between "able-bodied" individuals and people with disabilities. Ableism is sometimes codified into law and sometimes dealt with by law for example in determining that accessibility

---

15. Kanter, *supra* note 12. *See also* Waterstone, *supra* note 1. Waterstone's claim that too much effort was invested in legislation and jurisprudence for prohibiting discrimination and providing benefits or support without developing a constitutional approach to disability law.

16. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101.

17. Elizabeth F. Emens, *Disabling Attitudes: US Disability Law and the ADA Amendments Act*, 60 AM. J. COMPAR. L. 205, 206 (2012); KATHARINA HEYER, RIGHTS ENABLED: THE DISABILITY REVOLUTION, FROM THE US, TO GERMANY AND JAPAN, TO THE UNITED NATIONS 5 (2015).

18. Sagit Mor, *Equal Rights for People with Disabilities in Employment – From Rehabilitation of the Individual to Rehabilitation of the Society*, 35 TEL AVIV UNIV. L. REV. 97, 100 (2012) (Heb.).

19. Sagit Mor, *Between Charity, Welfare and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy,* 18 YALE J. OF L. & HUMAN. 63, 67-79 (2006).

20. Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683, 691 (2021).

21. Sagit Mor, *Towards Radicalization of Disability Insurance: Chronicles of a Struggle for Social Change*, *in* L. SOC. & CULT. – EMPOWERMENT IN LAW 91, 124-26 (Mimi Aizenshtat & Guy Mundlak eds., 2008) (Heb.).

is a fundamental right designed to remove barriers society enacts against its members.[22]

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) is arguably the most advanced legal document to reflect the findings of critical disability legal studies.[23] The Convention is firmly rooted in the framework of critical disability legal studies theory, along with the overarching model of human rights.[24] Notably, it encompasses both civil and social-economic rights, making it one of the most comprehensive UN conventions in terms of the range of issues it addresses and the practical tools it provides .[25]

Let us now turn to elder law and examine its theoretical development.

B. Elder Law

Elder law emerged in the United States in the late 1970s and was centered around the clinical aspects of legal practices in this field.[26] The lack of adequate legal mechanisms to meet the needs of older people required a development of new legal instruments to contend with the unique needs of older people. This led the way to a newly recognized specialization.[27] During these years, elder law was positivist and eclectic by nature, split into topics and areas, such as: age-based discrimination, asset planning, Medicaid/Medicare law, legal competency, protective labor law, wills and estate planning, and more. This first stage was characterized by the absence of an over-arching organizing theory, very little interdisciplinary research (and even estrangement from the field of gerontology) and few empirical studies in the field.[28]

But more than anything else, elder law's early positivist approach responded to the existing needs using systems that were based on the existing legal paradigms. It made no attempt to envision an alternative, nor did it critically examine the role of the law in sustaining the dominant paradigm, and naturally

22. Gregor Wolbring, *The Politics of Ableism*, 51 Dev. 252, 253 (2008); Kathleen R. Bogart & Dana S. Dunn, *Ableism Special Issue Introduction*, 75 J. of Soc. Issues 650, 652 (2019); Fiona A. K. Campbell, *Inciting Legal Fictions: Disability's Date with Ontology and the Ableist Body of the Law*, 10 Griffith L. Rev. 42, 43 (2001).

23. U. N. Convention on the Rights of Persons with Disabilities (2007).

24. Theresia Degener & María Gómez-Carrillo de Castro, *Toward Inclusive Equality: Ten Years of the Human Rights Model of Disability in the Work of the UN Committee on the Rights of Persons with Disabilities*, *in* Disability Law and Human Rights: Theory and Policy 27 (Franziska Felder, Laura Davy & Rosemary Kayess eds., 2022).

25. Arlene S. Kanter, The Development of Disability Rights Under International Law: From Charity to Human Rights 7 (2014).

26. Israel Doron, *25 Years of Elder Law: An Integrative and Historical Account of the Field of Law and Aging*, 21 Theoretical Inquiries L. 1, 3 (2019).

27. *Allan D. Bogutz, Elder Law: A Personal Perspective*, *in* Theories on Law and Ageing: The Jurisprudence of Elder Law 1 (Israel Doron ed., 2009)*; Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective* 1 Elder L.J. 1 (1993).

28. Israel Doron, *A Multi-Dimensional Model of Elder Law*, *in* Theories on Law and Ageing: The Jurisprudence of Elder Law 59 (Israel Doron ed., 2009).

it did not try to replace it.[29]

New and significant changes began in the 1990s with innovative empirical research in elder law; elder law transcended the boundaries of the United States and was incorporated into international law and regional contexts (Africa, South America and Europe),[30] as well as various theoretical approaches, such as the therapeutic approach, a law and economics approach, the feminist approach, a multidimensional model, and others.[31] This second stage in the development of elder law was characterized by an effort to apply existing legal theories without formulating a broad and unique theory grounded in aging.

A more radical and critical approach to elder law emerged during the first decade of the millennium, addressing old age as a social construct and lamenting the elimination of unique identities in the classic discourse on elder law. It seeks to focus on the unique experience of certain groups who are older people and envisions a new legal reality which remedies existing injustices.[32] In this context, Kohn, for example, presented three questions which she argued that this new approach seeks to examine: how does the law define old age and how can it aid aging successfully and intergenerational justice; how can it guarantee support and solutions suitable for the needs and interests of older persons; and what is the legal significance of age, meaning when—if at all—and how should the law treat the category of age (such as for affirmative action based on age).[33]

Under this new legal scholarship, older persons were thus viewed as a social group subject to ageism, i.e. stereotyping, social prejudices and discrimination based on chronological age or on perceptions of old age overtly or covertly.[34] Similarly to Ableism in the disability context, ageism is manifested both in societal attitudes and in discriminatory and exclusionary practices embedded in law.[35] Finally, in an attempt to transcend sociological characteristics of ageism, elder law was framed not only in new and critical approaches, but also in new ideological forms. For example, Doron suggested the term *ageivism* to describe the current need for an elder rights movement based on political, social and economic principles of identity, respect and social justice.[36]

---

29. Dafna Hacker, *Elder Law and Its Justifications: A Hybrid Vision Inspired by Family Law Jurisprudence,* 21 THEORETICAL INQUIRIES L. 25, 27 (2020); Nina A. Kohn, *A Framework for Theoretical Inquiry into Law and Aging*, 21 THEORETICAL INQUIRIES L. 187, 198 (2020).

30. Diego Rodriguez-Pinzón & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18 AM. U. INT'L L. REV. 915 (2003); Israel Doron, *From National to International Elder Law*, 1 J. INT'L AGING L. & POL'Y 43 (2005).

31. Doron, *supra* note 26.

32. Sue Westwood, *I May Be Older, but I Ain't No 'Elder': A Critique of 'Elder Law'*, 21 TEMPLE POL. & CIV. RTS. L. REV. 485 (2012).

33. Kohn, *supra* note 29.

34. Thomas Nicolaj Iversen, Lars Larsen & Per Erik Solem, *A Conceptual Analysis of Ageism,* 61 NORDIC PSYCH. 4 (2009).

35. Robert N. Butler, *Ageism: A Foreword*, 36 J. SOC. ISSUE 8 (1980); Israel Issi Doron et al., *Ageism and Anti-ageism in the Legal System: A Review of Key Themes*, *in* CONTEMPORARY PERSPECTIVES ON AGEISM 303 (Liat Ayalon & Clemens Tesch-Römer eds., 2018).

36. Israel Doron, *Re-thinking Old Age: Time for Ageism*, 27 HUM. RTS. DEF. 33 (2018).

C. Disability Law and Elder Law – Similarities and Differences

As we have observed, there are notable distinctions between disability law and elder law. While the critical perspective is predominant in disability studies, prominent approaches in elder law do not necessarily emphasize the social construct and marginalization of old age, often leaning toward a positivist and liberal approach. While both elder law and disability law share a common focus on stigma and discrimination, they differ in their approaches. Elder law emphasizes the use of anti-discrimination tools and equal rights while disability law addresses the rights to access and to inclusion based on the principles of the social model.[37]

Elder law, primarily developed by legal professionals and scholars who may not have been older persons themselves,[38] differs from disability law, which has been significantly influenced by the activism and literary contributions of individuals with disabilities, emphasizing the principle of "nothing about us without us."[39] Furthermore, while disability law has undergone transformative changes, particularly in the form of comprehensive equal rights for individuals with disabilities and the UN Convention on disability rights, these changes have yet to be fully or extensively applied to elder law.[40]

Despite these differences, there are conceptual commonalities and overlaps between the two fields.[41] First and foremost, both groups are engaged in a struggle for the recognition of their fundamental human rights. Individuals with disabilities and older people face a heightened risk of having their human rights curtailed or even eradicated, including the rights to liberty, equality, and legal capacity.[42] Shared struggles for human rights serve as the initial and central connection between disability and old age.

In addition, both fields consider the role of social constructs based on stigma, discriminatory approaches and wrongful assumptions and their influence on both groups of people. In disability theory this is termed *ableism*

---

37. Doron et al., *supra* note 35. An interesting comparison between elder law and disability law in terms of strategies to combat ageism/ableism can be found in: Annika Taghizadeh Larsson & Håkan Jönson, *Ageism and the Rights of Older People*, *in* CONTEMPORARY PERSPECTIVES ON AGEISM 369 (Liat Ayalon & Clemens Tesch-Römer eds., 2018).

38. Frolik, *supra* note 27.

39. Richard K. Scotch, "*Nothing About Us Without Us": Disability Rights in America*, 23 OAH MAG. HIST. 17 (2009).

40. Israel Doron & Itai Apter, *The Debate Around the Need for an International Convention on the Rights of Older Persons*, 50 GERONTOLOGIST 586, 586 (2010); Israel Doron, *Elder Law: Current Issues and Future Frontiers*, 3 EUR. J. AGEING 60 (Mar. 2006).

41. Sagit Mor, Law Fac., Haifa U., Comment Address at the Elder Law and its Discontents Conf. at The Cegla Ctr. for Interdisc. Rsch. of the Law, Tel Aviv U. (June 19, 2018). *See* Hacker, *supra* note 29 (distinguishing elder law from disability law as a response to this overlap).

42. Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People Under International Law,* 25 GA. ST. U. L. REV. 527, 527 (Apr. 1, 2009).

and in elder theory it is termed *ageism*, and these are more similar than different.[43] The significance is that any policy analysis concerning persons with disabilities and older persons must strive to expose social, legal, and historical circumstances which have shaped the conditions these groups face. Limiting research to examining the needs of these populations and to ways for addressing these needs without considering external circumstances is partial and therefore unjust.

Moreover, international law is assuming more of a central role in developing the rights of persons with disabilities and older persons.[44] The UN Convention on the Rights of Persons with Disabilities demonstrates the power of international law to shape the lives of persons with disability by raising awareness and changing legislation. The international perspective is crucial as international law expands to address more areas and deepens its grip on domestic law[45] in a world that must contend with global demographic challenges of aging population and an increasing number of persons with disabilities, and where international and multinational knowledge have become readily accessible.[46]

Finally, people with disabilities live longer (aging with disability) and older persons acquire disabilities (aging into disabilities). There is a growing group of people that are both persons with disabilities and elder persons.[47] Therefore, there is an increasing need, opportunity, and potential for a dialogue between both fields.

In summary, it is evident that the legal context offers numerous potential intersections between disability and age. Nevertheless, the existing academic literature lacks a comprehensive examination of these intersections. Therefore, this study, the first of its kind, aims to address this scholarly gap by conducting a systematic review and analysis of the evolving relationship between disability and age.

II. METHODOLOGY

Scoping reviews have been used increasingly over the past fifteen years for mapping areas of research. Such reviews are designed to determine the scope of literature in the field and conceptualize core theories in the existing research.

---

43. Christine Overall, *Old Age and Ageism, Impairment and Ableism: Exploring the Conceptual and Material Connections*, 18 NWSA J. 126, 126 (2006).

44. Gerard Quinn, *The United Nations Convention on the Rights of Persons with Disabilities: Toward A New International Politics of Disability*, 15 TEX. J. CL & CR 33 (Apr. 17, 2009); Doron, *From National*, *supra* note 30.

45. Daphne Barak-Erez, *The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue*, 2 INT. J. CONST. L. 611, 614 (Oct. 2004).

46. Benny Spanier et al., *Older Persons' Use of the European Court of Human Rights*, 28 J. CROSSCULT. GERONTOL. 407, 407 (Oct. 20, 2013).

47. THE AGING–DISABILITY NEXUS 3 (Katie Aubrecht, Christine Kelly & Carla Rice eds., 2020).

Scoping reviews are suitable for the preliminary stage of developing the area when it is still too early for a systematic literature review which also assesses the research methods and the empirical findings. Scoping reviews are used to identify the existing data, clarify central terms, examine how research is designed and managed in a certain field, identify themes and central characteristics, and point to gaps.[48] Scoping reviews are particularly well suited for policy-oriented research and are frequently used to lay the groundwork for more focused research in the future. Scoping reviews are most commonly use to map the existing literature in a certain field, and this is how it is being used here.[49]

The most notable model for conducting a scoping review was developed by Arksey and O'Malley and it includes five stages: formulating the research question; locating relevant research using various information sources; sampling the studies using inclusion and exclusion parameters that arise during the process of reading and gaining a more profound understanding of the literature; organizing information by arranging it according to themes and central issues by coding and narrative descriptions; and processing and synthesizing knowledge by way of comparison, conclusion and presenting the findings.[50]

For this research, the "population group" (and inclusion criteria) is all the articles published over the past decade (2009–2021)[51] in law reviews and journals that discuss specific or general *legal issues while addressing or mentioning their implication on both persons with disabilities and older people*. The search strategy required at least five mentions of the following three components: older people, persons with disabilities, and policy/rights.[52] Searches were conducted using the web-based legal database Westlaw US, complemented by searches in Westlaw International and Google Scholar. The search results included 377 initial articles. Initial search results were sorted in two stages: first by title and abstract and then by full text. After reading the abstracts, 197 of the articles were filtered out: 112 because of their unrelated topics, forty-nine were on Medicaid or Medicare, twenty-four were on caregivers and the remaining were drawn out due to technical reasons (they were not law review articles, or they were duplicates). 180 articles were left for the

---

48. Zachary Munn et al., *Systematic Review or Scoping Review? Guidance for Authors When Choosing Between a Systematic or Scoping Review Approach*, 18 BMC MED. RSCH, METHOD. 1, 2 (2018).

49. Phillip D. Rumrill et al., *Using Scoping Literature Reviews as a Means of Understanding and Interpreting Existing Literature*, 35 WORK 399, 401 (2010).

50. Hilary Arksey & Lisa O'Malley, *Scoping Studies: Towards a Methodological Framework*, 8 INT'L J. SOC. RSCH. METHOD. 1, 19 (2005); Kathy Davis, et, *What are Scoping Studies? A Review of the Nursing Literature*, 46 INT'L J. NURSING STUD. 1386 (Mar. 27, 2009).

51. The search was conducted in June 2021.

52. (ATLEAST5(elderly) or ATLEAST5("senior citizen") or ATLEAST5("senior citizens") or ATLEAST5("older people")) and (ATLEAST5(disability!) or ATLEAST5(disable!)) and (ATLEAST5(rights) or ATLEAST5(policy)).

quantitative research.

The research methodology included two components: quantitative and qualitative. Quantitative research was undertaken by coding the articles included in the final sample and quantifying the data to form a statistical dataset. Coding included the research's characteristics (discipline, methodology, geographical location), publication characteristics (type of publication, publication year, authors), the population's characteristics (characteristics of disabilities and characteristics of old age), the article's core topic and the nature of the relationship between disabilities and old age, as well as type of research.

Qualitative research focuses on seventeen articles that directly addressed the comparison between disability and old age and vice versa, as will be later explained in part IV. Thematic content was analyzed based on identifying and extracting central theories in the various research, as well as their central arguments. This analysis was based on the substantive content in the articles and based on in-depth and repeated reading by the research team, as well as by creating criteria for identifying and defining the various arguments in the articles.

We will now describe the quantitative analysis, its findings, and a discussion of its findings, followed by the quantitative analysis, its findings and an integrative discussion of the issues that arose.

III. QUANTITATIVE ANALYSIS

As described above, the scoping review yielded a sample of 180 articles that addresses both disability rights and older persons rights. In the following we provide an analysis of this sample on two different levels: a descriptive quantitative level, and a qualitative analysis level. We begin with the quantitative analysis.

A. Key Background Characteristics of the Articles

The analysis of the background characteristics of the articles found that 85% of the articles were of an academic nature, while 12% were non-academic, appearing in non-refereed or popular publications. Furthermore, 88% of the articles were published in the United States, reflecting a predominant focus on the domestic legal landscape. Among the selected articles, approximately seventy-six percent concentrated on national-level issues, with 13% addressing state or regional matters, particularly in states such as Texas, Illinois, and New York. Around 8% of the articles adopted an international perspective. The temporal distribution of publications revealed a notable trend, with half of the articles published between 2009 and 2014, and the remaining half between 2015 and 2021. Notably, two peak years of interest emerged: 2009 and 2017, followed by a subsequent fluctuation in attention over the years (see Chart 1). On a broader scale, the long-term pattern suggests a decline in publications within

this field.

Chart 1 – Publication Year

Publication Year
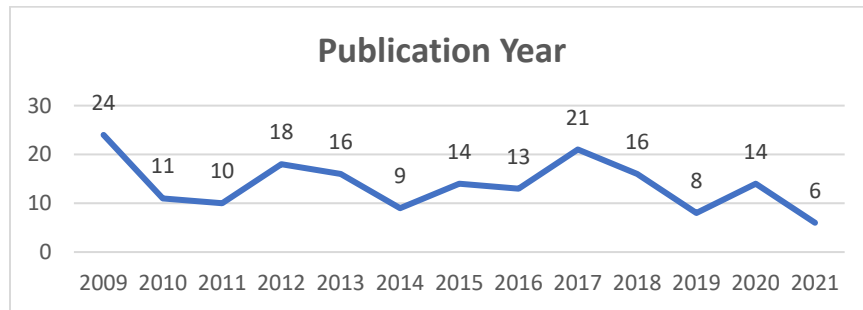
The sources utilized in this research exclusively comprised legal and policy papers. Within this category, approximately 56% of the articles were published in general academic legal journals, encompassing a range of legal disciplines rather than being specifically focused on disability or elder law. The remaining 44% were specialized academic journals, with 10% specifically centered on elder law, while others explored topics such as human rights, health, race, gender, class, finance, and international human rights (see Chart 2). It is worth noting that there are no journals dedicated to disability and law, which attests to the marginalized status of the field in legal research.
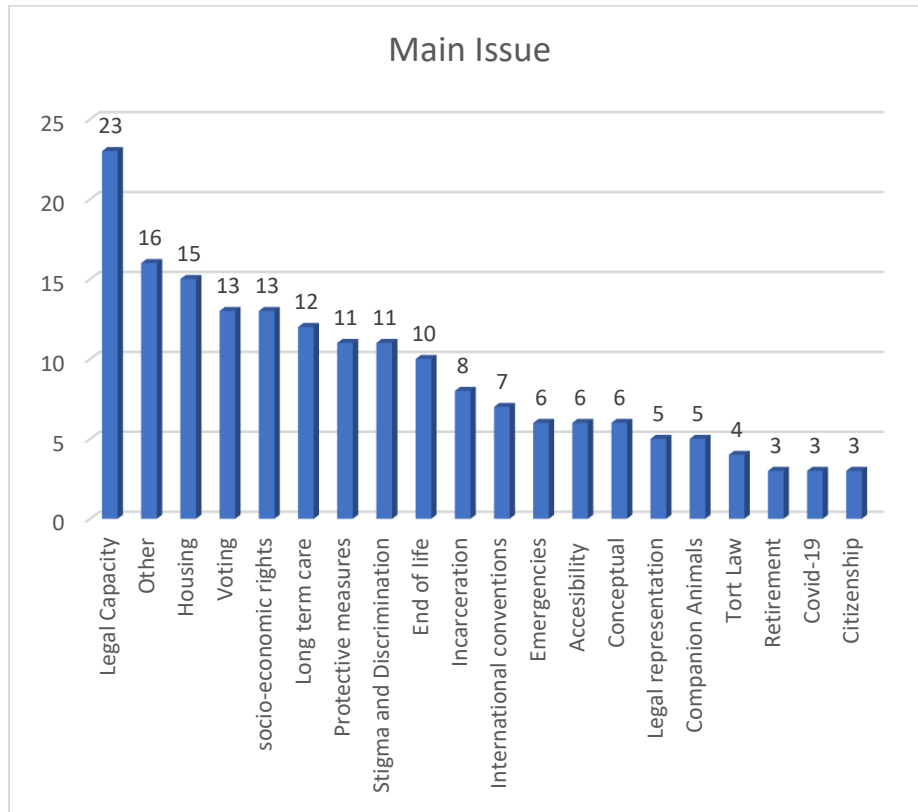
Chart 2 – Sub-Discipline of Journal

Sub-Discipline of Journal (Percentage)
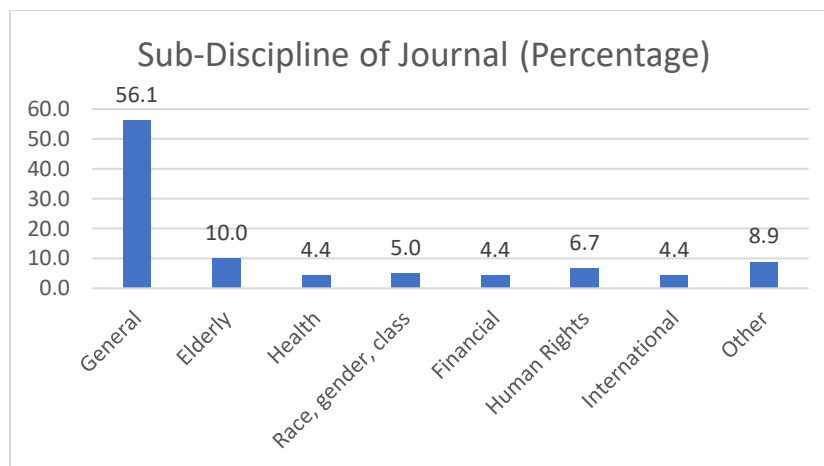
B. Key Content Description of Articles

Upon coding for key legal topics and issues, we found twenty distinct subjects at center of the articles. Notably, the concept of legal capacity emerged as the most prevalent topic, accounting for 12% of the articles (see Chart 3).

Chart 3 – Main Issue

Main Issue

Issue	Value
Legal Capacity	23
Other	16
Housing	15
Voting	13
socio-economic rights	13
Long term care	12
Protective measures	11
Stigma and Discrimination	11
End of life	10
Incarceration	8
International conventions	7
Emergencies	6
Accesibility	6
Conceptual	6
Legal representation	5
Companion Animals	5
Tort Law	4
Retirement	3
Covid-19	3
Citizenship	3

Through the process of clustering the various issues, a more distinct understanding of the dominant themes has emerged. Two prominent themes, namely personhood (encompassing legal capacity, voting, legal representation, and citizenship) and independent living and inclusion (encompassing housing, discrimination, long-term care, accessibility, socio-economic rights, and deinstitutionalization), come into focus (see Chart 4). Additionally, the topic of protection, encompassing protective measures, emergencies, and COVID-19, also received attention.

Chart 4 – Main Theme

Main Theme

Other 18%	
Protection 13%	Personhood 30%
	Independent Living 39%
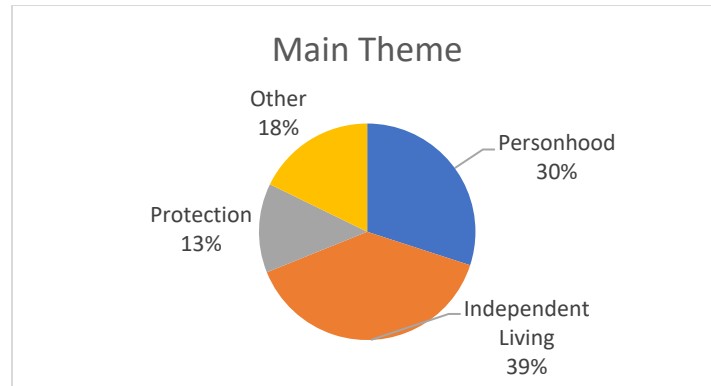
The majority of articles included in our research adopt a normative-argumentative approach (70%), wherein a legal issue is addressed, its shortcomings are identified, and suggestions for improvement are proposed. These articles do not incorporate empirical investigations as part of their methodology. A smaller proportion of articles are descriptive (10%), primarily focusing on providing an overview of the current situation. Another portion (14%) takes a critical perspective, employing a critical lens to comprehend and interpret the legal landscape. Only a small percentage of articles (4%) are theoretical in nature, establishing a theoretical foundation on disability or elder law. It is noteworthy that a significant portion of the articles (59%) do not explicitly state or rely on a single theoretical framework, while the remaining articles discuss or reference a diverse range of theoretical frameworks (24% primarily referencing civil rights theory and 17% citing other theories such as distributive justice, disability studies, vulnerability, critical thinking, and therapeutic justice).

When identifying the population at center in the articles we can see that older persons (22%) or people with disabilities (18%) were at the center of less than half of the articles. In 12% of the articles the population at center was intersectional mostly referring to people aging into disability such as dementia and only one article focused on people aging with disability. [53] In 19% of the articles, both populations were equally referenced, typically in articles that concentrated on a specific subject relevant to both groups. The largest category of population at the center (24%) was broader groups, such as vulnerable populations or individuals living in poverty, which included both people with disabilities and older persons. The majority of articles did not specifically focus on particular disabilities (76%), with the sole major sub-category of disability being "mental disability" (13%), which included individuals with diminished

---

53. William N. Myhill & Peter Blanck, *Disability and Aging: Historical and Contemporary Challenges*, 11 MARQ. ELDER'S ADVISOR 47 (2009).

capacity such as those with psychosocial disabilities, intellectual disabilities, dementia, and autism.

Approaching the core of our research, we identified three distinct relationships between older persons and people with disabilities in the articles. The primary category (72%) encompasses similar issues that are relevant to both groups, indicating overlapping concerns and challenges. The second category (19%) explores the intersectionality between older persons and disability, primarily focusing on people aging into disability and analyzing the shared needs of people with disabilities, regardless of whether their disabilities are lifelong or age-related. Finally, a mere 9% of the articles directly compared the rights of older persons and disability rights. These seventeen comparative articles have been selected as the focal point for a separate qualitative research study in the subsequent chapter.

C. Analysis of Articles Content

Through the process of cross-tabulation, we have uncovered intriguing relationships between the various fields. When examining the frequencies of the main themes in relation to the population at the center, a distinct pattern emerges. Articles centered on people with disabilities primarily focus on personhood (34%) and independent living (thirty-eight percent), while placing relatively less emphasis on protection issues (6%) (Chart 5). On the other hand, articles concentrating on older persons exhibit a lower focus on personhood (10%) and a greater emphasis on protection (13%) (Chart 6).

Chart 5 – PwD: Article Content
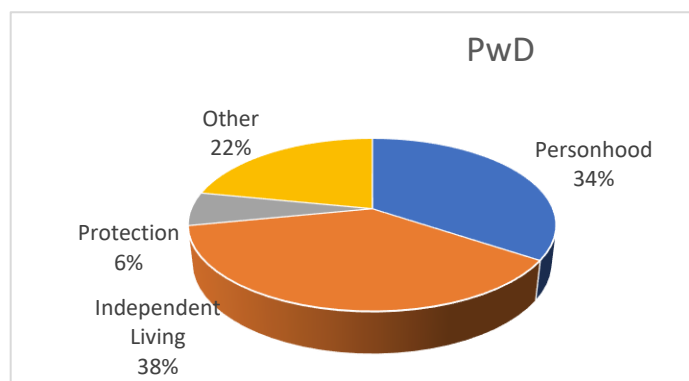
Chart 6 – Older Persons: Article Content
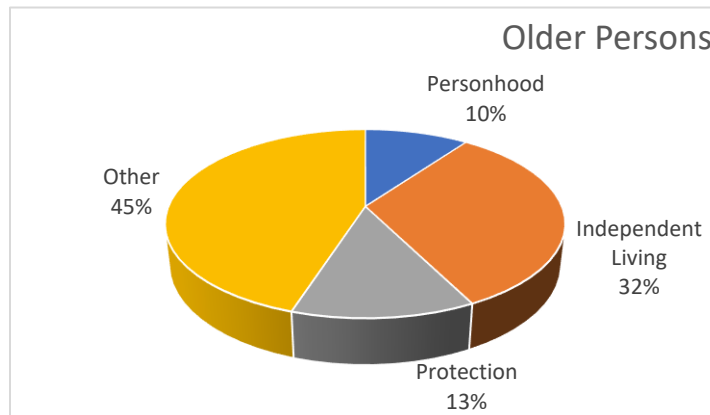
Furthermore, in articles that address both populations, the majority concentrate on themes related to personhood (40%) and independent living (51%). None of the comparative articles, when cross-tabulated with the main themes, incorporate the topic of protection (Chart 7).

Chart 7 – Comparative Articles' Main Themes:
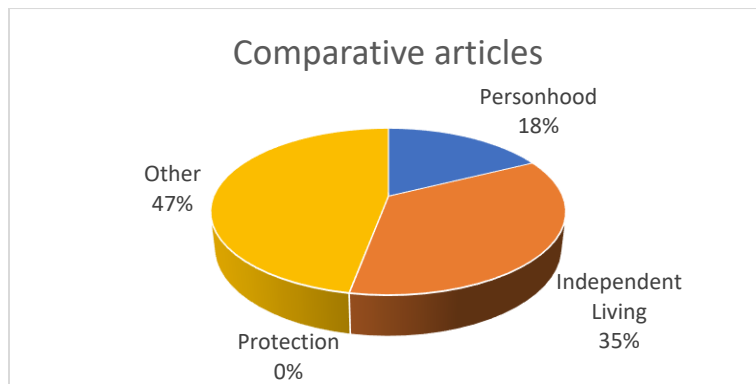
Lastly, it is noteworthy that there is no apparent evolvement in the main themes throughout the years. Articles covering all three major themes were written in equal proportions during both the periods of 2009–2014 and 2015–2021.

D. The Overall Quantitative Descriptive Picture

The overall findings provide a comprehensive overview of the published

literature in the comparative field of disability and aging. The majority of the literature originates from the United States, primarily focusing on national-level issues. A wave-pattern is observed, with peaks in publication years occurring in 2009 and 2017.

Methodologically, the majority of articles take a non-empirical and normative approach, with only a small number of studies employing quantitative measurements or developing theoretical frameworks.

Regarding the population at the center, a diverse range of relationships between disability and older persons is evident. These relationships can be categorized into five groups, with varying proportions ranging from 12% to 24%: the marginalized population (such as poor people comprising both people with disabilities and older persons), people with disabilities in the forefront and older persons in the background, the front and older person at the back, older persons in the forefront and people with disabilities in the background, both groups in the forefront, and individuals who are aging into disability (such as those experiencing dementia). The main connection between disability and age is through common legal issues (such as voting rights), rather than the shared experience of being both old and having a disability (such as the negative social construction, stereotypes, or stigma associated with it).

The findings highlight two key issues that connect disability and aging discourse: independent living and personhood. Protection concerns are more prevalent in literature focused on old age and is absent in the seventeen comparative articles. In the subsequent chapter, we will delve further into the relationship between disability and aging as reflected in these comparative articles.

IV. QUALITATIVE ANALYSIS

Following the statistical analysis of 180 articles through a scoping review, our research now transitions into a qualitative analysis focusing on a subset of seventeen articles. These selected articles were specifically chosen for their comparative nature, aiming to explore what one group can learn from the other. Through this qualitative analysis, we aim to uncover current trends in disability and elder law and to understand the relationship between both fields.

A. Key Background Characteristics of the Articles

Out of the initial pool of 180 articles examined in the quantitative chapter, our focus narrowed down to seventeen articles that were identified as comparative in nature. These selected articles delve into six distinct issues: international law, stigma and discrimination, legal capacity, theory development, housing, and reasonable accommodation. Notably, none of these articles center on the topic of protection.

Of the seventeen articles, the majority (82%) approach disability rights from

the perspective of elder law, seeking to explore what lessons can be gleaned from disability law. Two articles adopt a thematic comparative approach, analyzing legal capacity[54] and discrimination[55] in both groups, while only one article focuses on the intersectionality of aging with disability[56]. It is worth noting that none of these articles specifically address the reverse perspective, wherein disability law learns from elder law.

As indicated in the quantitative chapter, if these selected articles reflect current trends, it suggests that disability scholars generally do not perceive elder law as a source for learning within the field of disability studies. Additionally, there has been criticism from the gerontology community regarding the exclusion of older individuals from the disability discourse. Westwood, for instance, highlights this concern by stating:

> Ageing as experienced by a person with a disability is an under-researched area and still needs to be put on the policy agenda. It involves in part seeing people through a single identity lens and as their disability, rather than in terms of intersecting identities. But it also involves the way disability is conceptualized. Older people are routinely excluded from disability rights discourse . . . .[57]

In a similar vein, another argument highlights the exclusion of older individuals from disability activism and policies, suggesting that disability movements inadvertently contribute to ageism by creating a divide between disability rights and the rights of older persons aging with and into disabilities.[58] The complex tension arising from this issue will be thoroughly examined and discussed in the forthcoming chapter. Additionally, our discussion will explore traces of ableism within the elder law writing.

We will now turn to analyze the content of these articles and the main themes that can be extricated from them.

B. Common Features

The starting point of all seventeen articles is that there are many common features shared by older people and people with disabilities. These commonalities vary based on the standing point and topic of the research. They can be phrased from an individualistic, and partly medical, point of view such

---

54. Eliana J. Theodorou, *Supported Decision-Making in the Lone-Star State*, 93 N.Y.U. L. REV. 973 (2018).

55. Leslie Pickering Francis & Anita Silvers, *Bringing Age Discrimination and Disability Discrimination Together: Too Few Intersections, Too Many Interstices*, 11 MARQ. ELDER'S ADVISOR 139 (2009).

56. Myhill & Blanck, *supra* note 53.

57. Westwood, *supra* note 32, at 501.

58. Håkan Jönson & Annika Taghizadeh Larsson, *The Exclusion of Older People in Disability Activism and Policies—A Case of Inadvertent Ageism?*, 23 J. AGING STUD. 69 (2009).

as this, "Membership in either group suggests depleted capability, decreased social contribution, significant fragility, and heightened susceptibility to maltreatment by other people."[59]

They are sometimes set in a civil-human right perspective, some with a social-model influence, addressing the common social challenges of stigma, inequalities and discrimination that are common in different areas such as participation in the workforce or independent living.[60]

Alternatively, the common features can be set in a demographic context such as the growing rate of older adults or people with disabilities in the population.[61] And they can be set in a legal context comparing both groups as protected categories[62] that share the ambivalence of the law toward them as vulnerable categories that do not reach the "discrete and insular" minority title that race and sex have been acknowledged.[63]

In addition to comparing both categories, many of the articles address their potential for intersectionality. One of the articles interestingly emphasizes the conflation of both categories since historically people were regarded as old when their abilities decreased to a level of disability.[64] But even today when there are definitions that draw a distinct line between both categories, more and more people cross over these lines. Many of the seventeen articles address the growing numbers of older people with acquired disabilities[65] stating that "arguably every person will be disabled if they live long enough".[66] Only one article addresses the *intersection* of age and disability from the other direction— not only are older people acquiring more disabilities but more people with disabilities are living longer hence reaching older age.[67] There is an understanding that as more and more people belong to both groups, the difference in attitudes, theories and policies bring many people into conflict with themselves.[68] Therefore, there is a need for a more holistic approach and bridging efforts between both categories acknowledging the conceptual benefits

---

59. Francis & Silvers, *supra* note 55, at 140.

60. Myhill & Blanck, *supra* note 53, at 47.

61. *Id*. at 56. It is interesting to see how the 'tsunami' metaphor common in gerontology ('the gray tsunami') is infiltrating into disabilities' discourse mostly regarding autism. *See*, e.g., Mark Blaxill et al., *Autism Tsunami: The Impact of Rising Prevalence on the Societal Cost of Autism in the United States*, 52 J. Autism & Developmental Disorders 2627 (2022).

62. For example, the Age Discrimination in Employment Act compared to the Americans with Disabilities Act of 1990.

63. Francis & Silvers, *supra* note 55, at 147-48.

64. Paul Harpur, *Old Age Is Not Just Impairment: The CRPD and the Need for a Convention on Older Persons*, 37 U. Pa. J. Int'l L. 1027, 1043 (2015).

65. Myhill & Blanck, *supra* note 53, at 56; *see also* Kevin M. Cremin, *Regarding Age as a Disability: Conceptualizing Age Discrimination at Work as (Mis) Perception of Disability Discrimination*, 39 Cardozo L. Rev. 439, 447 (2017); Phyllis Talley, *The Elderly Disabled: The Applicability of Disability Rights for Age-Related Disability*, 40 J. Legal Med. 115, 121 (2020).

66. Harpur, *supra* note 64, at 1043.

67. They are sometimes addressed as the first generation of individuals aging with disabilities. *See* Myhill & Blanck, *supra* note 53, at 56.

68. Francis & Silvers, *supra* note 55, at 141.

of mutual learning.

In the next sections we will focus on three comparative perspectives in these articles: analysis of the relationships between disability law and elder law; common human rights challenges; and finally, the effect of the CRPD on current efforts to protect older persons' rights in international law.

C. The Relationships Between Elder Law and Disability Law

The relationship between elder law and disability law, as reflected in these articles, can be reduced to five elements: disability and old age are both <u>similar</u> and <u>different</u> in many aspects. This unique combination leads to a <u>tension</u> between both worlds in their legal context. The tension is approached by two opposite strategies: <u>separation</u> efforts and <u>bridging</u> efforts. The discussion in this chapter is based on the seventeen articles that were at the heart of the qualitative research and, when necessary, with a few references to additional articles.

1. Similarity

As already stated in chapter I, there is a considerable overlap between Elder Law and Disability Law due to many common challenges and social obstacles. This overlap is addressed throughout the focus articles in several ways. For example, both fields deal with similar issues such as legal capacity, housing, and employment. Both are tied, sometimes wrongly, to vulnerability and diminished capacities. Both suffer from a similar perception as 'warm but incompetent' leading to a paternalistic prejudice against them.[69]

But the main similarity that was addressed in the focus articles is that both old age and disability are labels and categories that can be used to trigger legal overprotection and to promote human rights.[70] This raises one of the leading dilemmas of both disability and old age discourse: is the gain of their unique label worth the pain? This is also addressed as the law's ambivalence toward disability and old age as to when they matter and when are they irrelevant in shaping policies and social attitudes. For example, age and disability are set apart from race and sex regarding the Fourteenth Amendment because the age or disability of the person is seen to be a relevant and legitimate question.[71] Both disability and old age share the tension between stereotypical generalizations used to justify discrimination versus relevant characterizations that are the basis for benefits (pensions, discounts), special services (assisted living) and rights

---

69. Cremin, *supra* note 65, at 450-51.

70. Helene Love, *Ageism, Language and the Law*, 31 WINDSOR REV. LEGAL & SOC. 133, 141 (June 8, 2011).

71. Francis & Silvers, *supra* note 55, at 148.

(accommodations).[72] In other words, they share the "difference dilemma:"[73] is equality best achieved by treating people with disabilities and older people the same as others or by treating them differently?[74] One of the main questions lying underneath many of the discussions in the articles is when does specialism perpetuate the marginalization of both groups and when does it help shed a light on their disempowerment and need for affirmative action?

Another important similarity is the mutual focus on the structural factors that lead to inequality and rejection of the idea that individual differences and deficits explain and justify discriminatory practice. Disability legal scholars often reject the medical model and refer to the social model and to human rights as a basis for reframing and interpreting the legal aspects of disabilities.[75] The interactive model that acknowledges the equally important roles of the person's state and the environment's design is usually at the core of these articles.[76] Age scholars as well have emphasized the structural approaches that lead to oppression, poverty, and marginalization of older persons.[77]

Finally, older persons and people with disabilities share a common history of neglect under international law for many years. This similarity has dramatically changed since the adoption of the CRPD, as will be elaborated later in this chapter.[78]

2. Difference

The similarities described above, do not cover all grounds. There are different historical and social background to ageism and ableism. Ableism is driven by a unique history of segregation, medicalization, and eugenics. Ageism, on the other hand, derives from a combination of power and disempowerment that characterize the economic status, social power, and position of older persons in society. Ableism and ageism describe different social problems and fighting them means using a different set of tools.[79] One example of the difference between both worlds is the rejection of the medical and individual model within disability studies. This leads to critique of the health and welfare professionals, who are viewed with suspicion for being paternalistic, arbitrary, and oppressive. A notion that is not as dominant in elder

---

72. *Id.* at 149.

73. Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 L. & CONTEMP. PROB. 157 (1985).

74. Westwood, *supra* note 32, at 508.

75. Jerome E. Bickenbach et al., *Models of Disablement, Universalism and the International Classification of Impairments, Disabilities and Handicaps*, 48 SOC. SCI. & MED. 1173 (1999).

76. Matilde Leonardi et al., *The Definition of Disability: What Is In a Name?* 368 LANCET 1219 (Oct. 7, 2006).

77. Harpur, *supra* note 64, at 1047-56.

78. Kanter, *supra* note 42, at 539.

79. Harpur, *supra* note 64, at 1058.

law.[80]

Another difference is the scholar's perception of legal change and reform. A good example is the efforts to apply lessons learned from the *Olmstead* decision addressing institutionalization and the right to receive services in the most integrated setting, to the legal capacity field. Two of the articles that focus on legal capacity for older adults, learn from *Olmstead* the need for safeguards in guardianship and the role of public guardians in promoting community living:[81] *Olmstead* serves as a charge to states, if not a duty, to address unmet needs in the area of public guardianship.[82]

These articles do not say a word about eliminating guardianship and do not call for a paradigm shift. This thread of thought is almost outrageous in the disability rights movement.[83] In the disability rights discourse, *Olmstead* is a call for elimination of exclusion and isolation of people with disabilities. Guardianship is exactly these things, since it "creates a legal construct that parallels the isolation of institutional confinement."[84] Therefore, guardianship is a form of disability-based discrimination. It needs not improvement but replacement, and a shift from substitute decision making to supported decision making.[85] This is one example of the different mindsets of disability and old-age legal scholars. Its outcomes will be followingly discussed. Interestingly enough, none of the articles learned from *Olmstead* about de-institutionalization of nursing homes.

This example might imply a more dramatic difference between disability law and elder law. Disability law scholars turn to critical thinking hence to a radical demand for full human rights realization and opposition to segregation-based arrangements. Whereas elder law scholars have a more moderate perspective which emphasizes the spectrum of solutions and interventions and even a discomfort from all-or-nothing approaches.

---

80. Theodorou, *supra* note 54, at 985. However, one can find some criticism over professionals' paternalistic approach toward older persons, for example, in elder law writings in the field of elder-guardianship. *See* Israel Doron, *Aging in the Shadow of the Law: The Case of Elder Guardianship in Israel*, 16 J. AGING & SOC. POLICY 59 (2004).

81. *See* Eleanor Cashmore, *Guarding the Golden Years: How Public Guardianship for Elders Can Help States Meet the Mandates of Olmstead*, 55 B.C. L. REV. 1217 (2014).

82. Hailey M. Hanners, *Who Wants the Ward: The State's Role in Adult Guardianship Proceedings*, 11 EST. PLAN. & CMTY. PROP. L. J. 359, 371 (2018).

83. Robert Dinerstein, Esme Grant Grewal & Jonathan Martinis, *Emerging International Trends and Practice in Guardianship Law for People With Disabilities*, 22 ILSA J. INT'L & COMP. L. 435 (2015); Arlene S. Kanter & Yotam Tolub, *The Fight for Personhood, Legal Capacity, and Equal Recognition Under Law for People With Disabilities in Israel and Beyond*, 39 CARDOZO L. REV. 557 (2017).

84. Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans With Disabilities Act*, 81 U. COLO. L. REV. 157, 194 (2010).

85. Claudia Martin et al., *The Human Rights of Older Persons in the European Institutions: Law and Policy*, *in* 45 HUMAN RIGHTS OF OLDER PEOPLE: UNIVERSAL AND REGIONAL LEGAL PERSPECTIVES 125, 135 (2015).

3. Tension

The similarities and differences described above create a complex intertwined relationship between the assumptions at the base of the disability movement and those at the base of the older rights movement. Ageism is the attribution of a deficit in abilities based upon age. Therefore, one of the main strategies used by age scholars to fight ageism is to disentangle age from disability. Whereas one of the main strategies used in disability discourse is to describe disability as a 'difference' that reflects the range of human experience.[86] This leads to an inherent tension between one movement's renunciation of the other movement's main characteristic. Without explicitly saying so, the fight against ageism can easily turn to ableism.[87]

This ambivalence can be seen also in Love's paper on the term 'elderly'. Love turns to feminist and disability critical writing that emphasizes the importance of language in perpetuating or revealing stereotypes and oppression. But her next step is to reject the use of the word 'elderly' (as opposed to older adults) because it implies frailty, disability, and senility. Older adults, according to Love, choose not to associate with the term 'elderly' because of its negative connotation of disability, care, vulnerability, and neediness.[88] Again disability is seen as a negative stigma that is wrongly tied to old age.

The tension hereby described, can explain a tendency that is shared by disability and older age legal scholars, to step away one from the other, as described in the next part.

4. Separation

There are many levels of efforts in the focus articles, to mark the difference between disability and old age. These efforts are described as the tendency of the people themselves, but they are explained, understood, and even supported by scholars. For example, many older people tend to alienate themselves from a disability label and even more from a disability identity, attributing their disabilities to normative aging to alienate themselves from the stigma that comes along with a disability label.[89] This shoving away also happens when there are clear advantages under the disability label; for example, the remedies of employment discrimination under the ADA or access to disability benefits. For many people, the disability-label's 'cost' outweighs its benefits.[90] The disability-label brings along stigma, a declaration of incompetence, and calls for protective and limiting measures. Older people are in no hurry to embrace these

---

86. Myhill & Blanck, *supra* note 53, at 55.
87. Harpur, *supra* note 64, at 1047-56.
88. Love, *supra* note 70, at 146, 153.
89. Cremin, *supra* note 65, at 450-51.
90. *Id*, at 475-79; Talley, *supra* note 65, at 125.

limitations.[91]

There are other separative efforts for more practical reasons. For example, revealing the unique manifestations of ageism that are not protected under anti-disability-discrimination policy. Harpur lists several examples of ageist attitudes that are not related to disability: a mandatory retirement age, conceptualizing old age as a demographic hazard, and discrimination based on the appearance as old.[92] This is part of a broader effort to define a distinct line between disability and older persons' rights.

A different way to differentiate disability and older persons' rights is to relocate all the issues derived from 'physical or mental infirmities' to the disability world. In other words, some scholars claim that legal capacity or supported housing should be conceptualized through a disability's lens as opposed to age.[93] A similar but more nuanced approach is to distinguish between different kinds of disabilities. For example, Hacker distinguishes between age-related disability (e.g. geriatric hospitalization) and other kinds of disabilities[94] while Kaya distinguishes 'atypical impairments' covered by the disability rights umbrella and 'age-based impairments or weaknesses' that are typical and therefore ignored by the disability community.[95] To summarize, we can see that scholars are busy differentiating between disability and older person's rights.

5. Bridging

Along these separationist efforts we can also see an attempt to develop bridging strategies. The rising number of people with acquired disabilities in mid and later life enhances the need to develop successful aging practices from a disability perspective. The rising number of people with disabilities reaching old age requires a deeper understanding and acknowledgment of gerontology in the disability community. The two worlds cannot stay apart.[96]

An interesting example of the potential cooperation between disability and older persons' rights is manifested in Theodorou's explanation to Texas' pioneering 2015 legislation on supported decision-making.[97] Texas is a conservative state, suspicious of international law, and yet it is the first state in the US to legislate a CRPD inspired law. Thodorou's explanation is that two combined forces came into play—a disability rights movement that, according to Thodorou, was an effective stakeholder, and concern from the 'gray tsunami' and its implications on the public guardian system. Theodorou illustrates how

---

91. Talley, *supra* note 65, at 125-28.

92. Harpur, *supra* note 64, at 1052-54.

93. Westwood, *supra* note 32, at 507.

94. *See generally* Hacker, *supra* note 29 (this article, which was not included in the focus articles, includes interesting opening remarks regarding the distinction between disability law and elder law).

95. Refia Kaya, *Reasonable Accommodation for Age*, 33 CAN. J. LAW SOC. 115, 129 (2020).

96. Myhill & Blanck, *supra* note 53, at 59.

97. Theodorou, *supra* note 54.

disability and age interplay and affect each other in unexpected ways, one bringing ideology and the other the urgent need for reform.

To summarize this section, the differences and similarities between both worlds lead to interesting and sometimes conflicting efforts to create a dialogue between disability and older persons' rights. In the next chapter we will dive into several common human rights issues addressed in the focus articles to see this complex relationship in action.

D. Common Human Rights Challenges

There are many shared human rights challenges for people with disabilities and older persons. In this chapter we will address three main examples described in the articles and analyze the similarities and differences in how these challenges are approached by each discipline.

1. Legal Capacity

As described earlier, legal capacity is one of the leading subjects in the quantitative analysis. There is shared concern regarding peoples' capacity, the flaws of guardianship, and the need for change.[98] The CRPD is also a powerful force to promote change based on Article 12's standards. However, the emancipative arguments against guardianship from the disability standpoint turns to a more moderate note, hesitant or cautious, in the articles concerning older persons' rights:

> Although there is growing societal acknowledgment of the importance of respecting individual choice, guardianship is still widely accepted as a necessary mechanism for the protection of vulnerable adults.[99]

Respectively, the focus of legal capacity in these articles focused on older persons is improving guardianship, recognizing new mechanisms such as supported decision making and pushing forward safeguards. One interesting effort that is described in several articles is redefining the guardian's role as an advocate for human rights. For example, fighting for the right of their wards for independent living with community-based services instead of institutionalization.[100]

2. Independent Living and De-Institutionalization

The Independent Living Movement that arose in the 1960s in the disability community had a major effect on developing both person-centered services and

---

98. Martin et al., *supra* note 85, at 134-39.
99. Cashmore, *supra* note 81, at 1220.
100. *Id.* at 1235-37; Hanners, *supra* note 82, at 370-71.

home and community-based services (HCBS). Personal care assistance (PCA) is prominent today for people with disabilities and older persons who need in-home assistance and enables an alternative to institution-based care.[101] There is a vibrant discussion regarding the different aspects of PCA that need to be rethought, such as recognizing and paying for family caregiving, self-directed programs, and giving out money versus service providing.

However, there is an important difference between disability and older persons when it comes to segregated living. 'Senior living' communities are common in the United States and are seen as a legitimate response for older persons. This trend affects and weakens the right to independent living of older persons in many ways. The communities are isolated, transportation is mostly private, choices are more likely to be limited in a gated neighborhood, and they set a distance between older adults and their families and communities. Moreover, the rising alternative of senior living communities has a negative impact on the development of services, support, and accommodations that enable older persons to age in their communities.[102] Although one can find articles, mostly non-legal writing, legitimizing 'intentional communities' for people with disabilities[103], the leading line especially in policy papers is to oppose these solutions and to describe them as new versions of the same old and problematic institutional regime[104].

3. Employment

The main issue discussed regarding employment in the focus articles, is the right for accommodation. Both ADEA and ADA protect from discrimination on age and disability grounds respectively. ADA covers employers of fifteen or more people while the ADEA covers only employers of twenty or more. But the main difference between both groups is the right to accommodation. An employer is obligated to provide reasonable accommodations due to disability. Failure to do so constitutes discrimination. This is a clear disadvantage for older persons who do not enjoy this right. Two of the articles in this research address this difference. One investigates why older people with disabilities do not make more use of the ADA measures.[105] The other tries to develop a separate clause for reasonable accommodation based on age.[106] This is a good example of how disability sets forward a new legal mechanism that can eventually influence the

---

101. Bridget Haeg, *The Future of Caring for Elders in Their Homes: An Alternative to Nursing Homes*, 9 NAELA J. 237, 238-41 (2013).

102. Francis & Silvers, *supra* note 55, at 150-57.

103. Louise Meijering et al., *Intentional Communities in Rural Spaces*, 98 TIJDSCHRIFT VOOR ECONOMISCHE EN SOCIALE GEOGRAFIE 42 (2007).

104. NATIONAL COUNCIL ON DISABILITY, HOME AND COMMUNITY-BASED SERVICES: CREATING SYSTEMS FOR SUCCESS AT HOME, AT WORK AND IN THE COMMUNITY 36-40 (2015) https://ncd.gov/publications/2015/02242015 [https://perma.cc/G33R-6LD9].

105. Cremin, *supra* note 65

106. Kaya, *supra* note 95, at 9.

rights of older people.

Finally, there are many issues mentioned in the articles that provoke a comparison between disability and older persons' rights. In the U.S, anti-hate crime legislation includes people with disabilities and excludes older persons,[107] protection against exclusion in public places and receiving public services is given to people with disabilities and absent in older persons' legislation, the Fair Housing Act protects people with disabilities against discrimination without including older persons.[108] One can see a returning pattern: people with disabilities enjoy greater protection by law. In our discussion we will ask how this difference shapes the relationship between disability and elder law.

E. International Law Instruments – The CRPD and Older Persons' Rights

Four of the articles included in this research focus on international law and CRPD's influence on the promotion of older persons' human rights. The discussion includes two questions: is there a need for a special convention on the rights of older persons and how are older persons affected by the CRPD?

One of the main arguments against promoting a separate human rights convention for older persons, mentioned in these articles, is that they are already protected under existing international human rights law—in general, and by CRPD—specifically, hence there are no normative gaps that need to be dealt with. The articles also mention the position that fragmentation of human rights poses danger to the idea of universal rights and therefore we should avoid them.[109] The strongest answer to this argument comes from a comparison to people with disabilities. Both people with disabilities and older persons have not received adequate protection in international law through the universal mechanisms (i.e. the Universal Declaration of Human Rights).[110] Just as people with disabilities experience unique social conditions that need to be addressed separately, so do older persons. Finally, just as people with disabilities have benefited in many ways from the CRPD, so will older people benefit from their own UN convention.[111] One example of the need for a separate treaty is given in an analysis of the scarce reference to older persons in human rights reports. For example, out of 124 state reports under the ICCPR from 2000–2008, only three made a reference to older persons.[112]

The CRPD has the potential to influence the rights of older persons by highlighting the gaps in the current international elder law field. It calls for a shift from a focus on treatment and protection to a human rights-based approach. This includes not only addressing issues like guardianship, social security, and

---

107. Francis & Silvers, *supra* note 55, at 141.

108. *Id.* at 149.

109. Frédéric Mégret, *The Human Rights of Older Persons: A Growing Challenge*, 11 HUM. RTS. L. REV. 37, 41 (2011).

110. Kanter, *supra* note 42 at 549.

111. Harpur, *supra* note 64, at 1036.

112. Mégret, *supra* note 109, at 50.

medical care but also recognizing the right to work, independent living, access, autonomy, and even a general human right to age. The CRPD stands out as a treaty that encompasses both human, civil, and political rights, as well as social, economic, and cultural rights.[113] In conclusion, the CRPD's participatory process, inclusive language, comprehensive human rights framework, and effective legal enforcement mechanisms can serve as a model for developing a specific UN treaty addressing the rights of older persons.[114]

The second question raised in the articles is in what ways are older persons included and excluded from the CRPD? First, older persons are included in the CRPD since many of them meet the definition of disability. Two articles in the CRPD[115] specifically protect older persons with disabilities[116] and the others cover the most fundamental rights of any person with disability, including older persons with disabilities, such as the right to health, liberty, access to justice, mobility, privacy, legal capacity, independent living and more.[117]

Furthermore, the CRPD has an indirect influence on older persons by promoting new standards for their rights. For instance, the Recommendation on Promotion of Human Rights of Older Persons, adopted by the Committee of Ministers of the Council of Europe in 2014, is directly influenced by Article 12 of the CRPD, which highlights supported decision-making as a best practice.[118] This demonstrates how the CRPD extends its impact beyond disability rights to shape the discourse on the rights of older persons.

However, protection against ageism is not directly related to disability and therefore is not protected under the CRPD. Unlike women and children, older persons with disabilities are not specifically addressed in dedicated articles within the CRPD. Additionally, there are issues that are specifically relevant to older individuals, such as retirement, and challenges that are relevant to disability but manifest uniquely in old age, including the right to life in the context of euthanasia, the right to family life in relation to nursing homes and hospitalization, and the right to legal capacity in cases of dementia.[119] These gaps in coverage underscore the necessity for a distinct treaty dedicated to upholding the human rights of older persons.

In summary, the CRPD stands out as a prominent illustration of both direct and indirect influence from the disability sphere on older persons, serving as a significant normative framework that encompasses older persons with disabilities and as a reference for the possible advancement of older persons' rights in the realm of international law.

---

113. Kanter, *supra* note 42, at 572.

114. *Id.* at 571.

115. G.A. Res. 61/106, at Art. 25 (Dec. 12, 2006); *see also id.* at Art. 25.

116. Harpur, *supra* note 64, at 1044-47.

117. Harpur, Paul, Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities, 27 Disability & Soc'y 1 (2012).

118. Martin et al., *supra* note 85, at 136-38.

119. Mégret, *supra* note 109, at 49-63.

V. DISCUSSION

In this final chapter we wish to integrate the quantitative and qualitative parts and incorporate them into a broader context rooted in elder law and disability law. In the first part we will discuss the characteristics of the articles in this research. In the second part we will draw a wider picture of the relationship between elder law and disability law that can be drawn from this research.

A. Literature Characteristics

There a several distinct attributes that can be observed in the reviewed literature. Firstly, it is predominantly centered on the American context, emphasizing its specific legal framework. Secondly, the literature exhibits a non-empirical approach, primarily analyzing the existing legal situation from a normative perspective. Thirdly, when conducting direct comparative analysis, the articles are primarily focused on issues related to old age, thus the 'old age based and disability focus' theme. Finally, there is an interesting pattern regarding the three core issues of independent living, personhood and protection. We will address each one of these characteristics separately.

1. American-Based

This research is primarily based on English literature, which limits its representation of the extensive international discussions taking place in the fields of elder law and disability law. Nevertheless, it is important to acknowledge that both disciplines have a significant foundation rooted in the American legal context. Both academic disciplines, elder law and disability law, have emerged and are primarily rooted in the American legal literature. The reasons behind this association are distinct for each field yet also share commonalities. Elder law literature, in particular, has traditionally been more extensively developed in North America,[120] with a significant emphasis on the civil rights framework and sociolegal theory. Its origins can be traced back to the 1980s when the aging population in America led to the recognition of a distinct and unique field of study. Consequently, references and contributions to elder law from outside the United States were scarce until the 2000s. However, over the past two decades, there has been a notable shift, with an increasing interest in this field from other countries and the emergence of transnational comparative elder law studies, as well as international developments in elder law. Despite this growing international interest, it remains evident that U.S. academic writings continue to hold a central position in shaping the discourse

---

120. Helen Meenan, *Age Discrimination and the Future Development of Elder Rights in the European Union: Walking Side by Side or Hand in Hand?*, *in* BEYOND ELDER LAW: NEW DIRECTIONS IN LAW AND AGING 57 (Israel Doron et al. eds. 2012).

surrounding elder law.[121]

Since the implementation of the Americans with Disabilities Act (ADA) in 1990, disability law scholarship has predominantly thrived in the United States, significantly influencing the anti-discrimination perspective within the field.[122] In the wake of the ADA, numerous countries enacted their own disability rights legislation, leading to the development of localized disability jurisprudence that bore the unmistakable imprint of American influence. This influence is particularly noteworthy in English-speaking countries like England, Canada, and Australia. Additionally, the widespread adoption of the Convention on the Rights of Persons with Disabilities (CRPD) by many countries played a pivotal role in fostering international and comparative interest in disability law.[123]

Nevertheless, disability legal theory, often referred to as disability legal studies (DLS), remains predominantly grounded in sociolegal and critical legal theories originating from the United States. These theories scrutinize the role of law in perpetuating and reinforcing social hierarchies, drawing inspiration from critical legal studies, feminist and queer legal theory, and critical race theory.[124]

Consequently, it is evident that both elder law and disability law have flourished in the United States due to the distinctive characteristics of American legal scholarship and its tradition of civil rights advocacy. This contextual backdrop may account for the predominance of United States-based academic research that compares the rights of older individuals and individuals with disabilities.

2. Normative-Based

Traditionally elder law and disability law are normative in their methodology i.e., they are based on textual analysis and founded on moral, value-based, or ideological argumentation on how law should address old-age or disability issues.[125] Therefore, it is not surprising that there were very few empiricist articles (2 of 180) in our research. Although empirical legal studies have become central in legal publications and the number of empirical-based works published have skyrocketed over the decades,[126] this is not the case in this literature review.

---

121. Doron, *supra* note 26 at 3.

122. Bagenstos, *supra* note 13; David A. Weisbach, *Toward a New Approach to Disability Law*, 2009 U. CHI. LEGAL F. 47 (2009).

123. ANDREA BRODERICK & DELIA FERRI, INTERNATIONAL AND EUROPEAN DISABILITY LAW AND POLICY 30 (2019); Michael L. Perlin, *A Change is Gonna Come: The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 N. ILL. UL REV. 483 (2008); Kanter, *supra* note 12, at 471.

124. Mor, *supra* note 19, at 68.

125. This is a wider tradition of legal research. *See* Sanne Taekema, *Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice*, L. & METHOD (2018).

126. Daniel E. Ho & Larry Kramer, *Introduction: The Empirical Revolution in Law*, 65 STAN. L. REV. 1195 (2013).

Elder law started out with very little empirical-quantitatively based research in the field,[127] and empirical information describing the field is scarce.[128] This has changed in the last decades and there is a call from within legal scholarship for more ELS oriented research.[129]

Disability law was also established from a non-empiricist perspective. The theoretical thickness of disability studies has influenced disability law research to focus on the application of the human rights model and the social model in the legal context of disability. The sociological roots of disability law have also affected the nature of the research focusing on the social construction of disability, a more conceptual than empirical perspective.[130]

Throughout the years there is a rise in empirical research in disability law and elder law. Disability law researchers have analyzed court decisions to reveal law in action[131], conducted surveys and in-depth interviews to understand the perspectives of people with disabilities and their surroundings[132], and mined data to find a correlation between disability policy and the actual lives of people with disabilities.[133] Old age law scholars have analyzed legal texts such as wills, court decisions, and lasting powers of attorney to reveal their hidden agendas,[134] conducted in-depth interviews with older persons, policy makers and others to help shape the next steps in legislation,[135] and used empirical methods to describe the evolving field of elder law (courses taught, areas litigated and attitudes toward the field).[136] The low rate of empirical research in this study cannot be attributed solely to the nature of disability and elder law.

Consequently, we explore four possible explanations for the lack of an empirical approach in our literature. First, as previously mentioned, legal

---

127. Doron, *supra* note 26, at 14; Israel Doron & Itai Apter, *International Rights of Older Persons: What Difference Would a New Convention Make to the Lives of Older People?* 11 MARQ. ELDER'S ADVISOR 367, 368 (2009).

128. Nina A. Kohn & Edward D. Spurgeon, *Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field*, 59 J. LEG. EDUC. 414 (2010);

129. Doron, *supra* note 26, at 7-8, 14.

130. Katharina Heyer & Sagit Mor, *Guest Editors' Introduction: Disability Legal Studies*, 53 L. & SOC'Y REV. 948 (2019).

131. Sagit Mor & Rina B. Pikkel, *Disability, Rights, and the Construction of Sexuality in Tort Claims*, 53 L. & SOC'Y REV. 1016 (2019); Robyn M. et al., *The Americans with Disabilities Act and Termination of Parental Rights Cases: An Examination of Appellate Decisions Involving Disabled Mothers*, 39 YALE L. & POL'Y REV. 157 (2020).

132. Doron Dorfman, *(Un)usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 UC IRVINE L. REV. 557 (2020).

133. David Freeman Engstrom & David K. Hausman, *Rights, Redistribution, and the Rise of the "Litigation State": The Case of Disability Discrimination Laws*, 46 L. & SOC. INQUIRY 788 (2021); Christopher L. Griffin, Jr., *Explaining ADA Employment Discrimination Charges over the Business Cycle*, 84 U. CIN. L. REV. 737 (2016).

134. Shiri Regev-Messalem, *How the Law "Keeps the Money in the Family": Lessons at the Intersection of Elder Care and Inheritance Disputes in Israel*, 45 L. & SOC. INQUIRY, 1 (2019).

135. Nina A. Kohn et. al, *Identifying Connections Between Elder Law and Gerontology: Implications for Teaching, Research, and Practice*, 25 ELDER L.J. 69 (2017).

136. Spanier et al. *supra* note 46; Israel Doron, *Older Europeans and the European Court of Justice*, 42 AGE & AGEING, 604 (2013); Kohn & Spurgeon, *supra* note 128.

research tends to be primarily normative in nature. Second, the scarcity of data regarding individuals with disabilities and older persons poses a challenge to understanding legal policies, attributable to privacy concerns and a lack of effort in collecting relevant data by the authorities. When available, the data often relies heavily on statistical analysis and is infused with ageist or ableist assumptions, such as the medical definition of disability.[137] Third, this literature review concentrates on the emerging comparative field of age and disability. Given its nascent stage, the focus naturally gravitates toward thematic and normative comparisons, encompassing legislation, societal barriers, and ideologies. Although empirical research and normative research are parallel and stand in tension and relation,[138] empirical research often emerges once common theoretical foundations are established, and a clearer understanding of the areas requiring investigation and comparison is attained.[139] Lastly, empirical studies tend to incur higher costs, which may influence researchers in doctrinal-focused fields to lean toward non-empirical endeavors.

3. Old-Age-Based and Disability-Focused

Perhaps the most noteworthy observation derived from this research is the prevailing nature of the existing literature on disability and aging, which we refer to as "old-age-based and disability-focused." In other words, it primarily explores what older individuals and old-age policies can learn and benefit from disability policies.

This conclusion is substantiated by two key findings. First, 82% of the articles analyzed in the qualitative research approach the subject from an old-age perspective, focusing predominantly on older persons. Only one article adopts a disability perspective to investigate aging policies in relation to disability.[140] Second, in the quantitative research, when examining articles that address intersectional identity (n=34), with the exception of two, all of them center on the concept of aging into disability, particularly in the context of dementia. The second finding can be attributed to the historical integration of

---

137. Andrea Rosales & Mireia Fernández-Ardèvol, *Structural Ageism in Big Data Approaches*, 40 NORDICOM REV. 51 (2019); Cynthia Bruce, *Unsettling Ableism in Research Traditions: Toward Establishing Blind Methodologies*, *in* SOCIAL RESEARCH AND DISABILITY: DEVELOPING INCLUSIVE RESEARCH SPACES FOR DISABLED RESEARCHERS 127 (Ciaran Burke & Bronagh Byrne eds. 1st ed. 2020).

138. Theresia Anita Christiani, *Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object*, GLOB. J. OF BUS. & SOC. SCI. 16 (2015); Carlo Leget et. al, *'Nobody Tosses a Dwarf!' The Relation Between the Empirical and the Normative Reexamined*, 23 BIOETHICS 226 (2009).

139. *See* Taekema, *supra* note 124, at 10-11 ("It is not fully social scientific, because it does not usually aim at empirical data collection or at answering explanatory questions. In its own way, it does gather facts, but then one needs to understand fact-gathering more broadly than as empirical data collection.").

140. Myhill & Blanck, *supra* note 53. Two other articles come from a thematic point of view and do not have a population focus.

aging into disability discourse, while the exploration of aging with disability is a relatively emerging and understudied area, particularly beyond the realm of medicine.[141] However, the first finding suggests an imbalance in the relationship between disability and older individuals within legal studies. It raises the question of why scholars specializing in elder law demonstrate interest in disability law, while the opposite perspective seems to be lacking.

While various explanations exist, the issue at hand remains unexplored, thus underscoring the novelty of our argument. One potential reason could be attributed to the remarkable progress made within the disability field, which has positioned itself as a paradigm for other groups to follow. Alternatively, some may emphasize the well-established nature of elder law as a field that is receptive to drawing lessons from its surroundings.[142] We want to suggest that the one-directional observed in this research can be key to gaining a better understanding of the two-directional relationship and intersection between elder law and disability.

4. Core Issues

As described above, there are three core issues that are discussed in the literature: personhood, independent living, and protection. However, when analyzing the core issues by main target-population we can clearly see a difference between disability-focused and old-age-focused literature. Disability-focused research is mostly interested in personhood and independent living and less in protective measures. In contrast, older persons' literature is much less interested in personhood and more interested in protection. Among the comparative articles, none has focused on protection. Why is protection absent from the articles included in the qualitative research?

According to Bagenstos, the disability rights movement in America primarily prioritized two key objectives. First, there is a negative goal of attaining freedom from the control and paternalism of others, emphasizing autonomy. Second, there is a positive aim of complete integration into society.[143] For many activists within the disability rights movement, protective measures such as guardianship, forced treatment, and out-of-home placement are considered part of the problem rather than a solution. Consequently, disability-focused literature is less inclined to address protective measures as a goal, instead choosing to concentrate on concepts such as personhood, independent living, and the provision of access accommodations and support as

---

141. Michelle Putnam, *Extending the Promise of the Older Americans Act to Persons Aging with Long-term Disability*, 39 RSCH. ON AGING 799, 799 (2017).

142. Kohn & Spurgeon, *supra* note 128.

143. *See* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 76 (2009) (claiming that these two objectives are limited and therefore we need to move beyond anti-discrimination and accommodation toward a new definition of a tailored social welfare).

a means to achieve these objectives.[144] This is also the reason why the focus articles, old-age-based and disability-focused, do not include protection as a core issue.

The perspective of elder law on protection differs from that of disability law. Doron's multi-dimensional model of elder law highlights the significance of the protective dimension in addressing issues of abuse and neglect.[145] The negative perception of protective measures within disability scholarship might explain why scholars in elder law tend to avoid making comparisons. Instead, they focus on shared areas of learning and enrichment, such as personhood and independent living.

In summary, the issue of protection emerges as a distinguishing factor when comparing elder law and disability law, influencing discussions related to personhood and independent living. If protection is considered a priority, guardianship and institutionalized settings may be viewed as legitimate solutions for older individuals. However, where protection is viewed more as a double-edged sword, the disability law community tends to adopt a more critical all-or-nothing stance toward guardianship and institutionalization.

B. The Relationship Between Disability Law and Elder Law

In this final chapter we wish to take a step forward and propose a connection between the findings of our research and the relationship between disability law and elder law. There exists a tension between these two, and while this tension is not explicit in the reviewed literature, it is present in numerous subtle ways. In the following section, we will explore the various manifestations of this tension.

1. Manifestation of Ableism in Elder Law and Ageism in Disability Law

When investigating the complex realm of discrimination and stigma between two marginalized groups and two critical legal domains, one must exercise caution. In the subsequent section, our aim is to present potential manifestations of ageism and ableism in the approaches adopted by elder law and disability law. These manifestations are not explicit in the focus articles.[146] We therefore turn to broader legal and non-legal literature to propose an explanation for our principal finding, which highlights the "old-age-based and disability-focused" nature of the qualitative analysis.

---

144. Robert Perske, *The Dignity of Risk and the MR,* 10 MENTAL RETARDATION 24 (1972) (first coining the term 'dignity of risk' as a human right; it is one of the ways scholars address risk and protective measures in disability); for a literature review on the subject, *see* Pauline Marsh & Lisa Kelly, *Dignity of Risk in the Community: A Review of and Reflections on the Literature*, 20 HEALTH, RISK & SOC. 297 (2018).

145. Doron, *supra* note 28, at 61.

146. *See* Jönson & Larsson, *supra* note 58 (the one exception, addressing ageism in disability activism).

First, we will acknowledge the <u>common attributes</u> between ageism and ableism. Recognizing the parallels between these forms of discrimination is a crucial stride toward comprehending their intersections, divergences, and occasional collision. Afterward, we will address the <u>tension</u> between both fields, which can lead to mutual stigma and discriminatory attitudes.

We will start with the shared grounds of both fields. Both disability and old age are socially constructed categories. Both ageism and ableism are group-based discriminations that share many assumptions on frailty and vulnerability,[147] and both are based on a social constructionist approach to old age and disability.[148] Moreover ageism and ableism frequently go hand-in-hand, positioning older persons and people with disabilities on the same discriminated side. The Covid-19 pandemic serves as a most recent example, where we saw how older persons and people with disabilities were excluded in protocols from lifesaving treatments,[149] were being called to sacrifice themselves for the sake of the economy,[150] were isolated in long-term care institutions and suffered higher rates of mortality in those institutions.[151] As one article title said, Covid-19 was not only a virus spread. Ageism and Ableism were diffused as well.[152]

Finally, both disability and old age policy and anti-discrimination efforts refer to communities with loose boundaries. There is a potential wide entrance door to these categories. This looseness can explain the efforts to define who is a person with disability and who is a person of old age; when the borders are vague, they become an essential part of the discussion.[153] Responses to this question may vary depending on the context, but the question itself serves as a compelling and distinctive characterization of both groups. In a playground where boundaries hold significance, the convergence of age and disability introduces complexity and fluidity. How do we categorize a sixty-five-year-old individual with Parkinson's disease? Where do we place a fifty-year-old person with intellectual disability and memory loss? Does the differentiation between a seventy-five-year-old individual who has been blind since birth and a seventy-

147. Carla Branco et al., *The Association of Group-Based Discrimination with Health and Well-Being: a Comparison of Ableism with Other "Isms"*, 75 J. SOC. ISSUES 814 (2019).

148. Overall, *supra* note 43, at 129

149. Samuel R. Bagenstos, *Who Gets the Ventilator? Disability Discrimination in COVID-19 Medical-Rationing Protocols*, 130 YALE L.J. F. 1 (2020); Leniza de Castro-Hamoy & Leonardo D. De Castro, *Age Matters But It Should Not Be Used to Discriminate Against the Elderly in Allocating Scarce Resources in the Context of COVID-19*, 12 ASIAN BIOETHICS REV. 331 (2020).

150. Sunder John Boopalan, *Injustices of Ableism and Ageism During the Pandemic: A Call for Intergenerational Solidarity*, 22 VISION 52 (2021); Joel Michael Reynolds & Anna Landre, *Ableism and Ageism: Insights from Disability Studies for Aging Studies*, *in* CRITICAL HUMANITIES AND AGEING: FORGING INTERDISCIPLINARY DIALOGUES 118 (Kate de Medeiros, Marlene Goldman & Thomas Cole eds., 2022).

151. Liat Ayalon et al., *Long-Term Care Settings in the Times of COVID-19: Challenges and Future Directions*, 32 INT'L PSYCHOGERIATRICS 1239 (2020).

152. Federica Previtali, Laura D. Allen & Maria Varlamova, *Not Only Virus Spread: The Diffusion of Ageism During the Outbreak of COVID-19*, 32 J. AGING & SOC. POLICY 506 (2020).

153. Bagenstos, supra note 143, at 34 (discussing the Supreme Court's decisions to narrow ADA's definition of disability and the politics of definition in disability).

five-year-old individual who has recently acquired blindness hold significance and carry weight?

This last emphasis on boundaries is a valuable starting point to discuss the tension between these two fields. In a bifurcated system wherein older individuals and people with disabilities are entitled to distinct rights, benefits, and supports, the act of categorization becomes instrumental in determining the allocation of resources. Besides these practical implications, there is a concealed ideological and social bias that subtly influences the process of categorization. Who is part of "us" and who is not, who do we want to join "us" and who is unwelcomed?

This brings us to the possible manifestations of ableism in elder law and ageism in disability law. Despite the shared values, experience, barriers and challenges of both fields there is a tension between ageism and ableism as two competing frameworks of power relations. Kelley-Moore coined the term 'the social construction of causality' to describe the social process of framing disability prior to old age as non-normative and disruptive while perceiving the development of functional limitation in later stages of life as normative.[154] In other words, disability is seen as a relevant category when experienced in early stages of life. As a person grows old, disability is a 'normal' part of being old and therefore it is secondary and sometimes completely transparent in old age as a separate category.

Moreover, the disentanglement of disability and old age is one of the main goals of the 'successful aging' project.[155] Successful Aging emerged in the 1960s as a significant ideal within the field of gerontology, aiming to challenge dominant negative narratives of old age that emphasized decline in old age. It encompasses various multidimensional aspects, including physical health, mental well-being, social engagement, and active participation in meaningful activities.[156] Successful aging emphasizes the importance of maintaining functional independence, adaptive coping strategies, and a positive outlook on aging. It recognizes that aging is a diverse and individualized process, influenced by various factors such as genetics, lifestyle choices, and environmental circumstances.[157] However these positive aspects of 'successful aging' come with a price tag. The emphasis of health and functionality, absence of disease and disability, and activeness leads to a form of what Gibbons named 'compulsory youthfulness' i.e. the idea that to be fully human, one must remain youthful and able-bodied.[158] In recent years there have been many critiques that

154. Jessica Kelley-Moore, *Disability and Ageing: The Social Construction of Causality*, SAGE HANDBOOK SOC. GERONTOLOGY 96 (Dale Dannefer & Chris Phillipson eds., 2010).

155. John W. Rowe & Robert L. Kahn, *Successful Aging*, 37 GERONTOLOGIST 433 (1997).

156. Ann Bowling, *Enhancing Later Life: How Older People Perceive Active Ageing?*, 12 AGING & MENTAL HEALTH 293 (2008).

157. Sarah Lamb et al., SUCCESSFUL AGING AS A CONTEMPORARY OBSESSION: GLOBAL PERSPECTIVES (2017).

158. Hailee M. Gibbons, *Compulsory Youthfulness: Intersections of Ableism and Ageism in "Successful Aging" Discourses*, 12 REV. DISABILITY STUD. 3 (2016).

call for a rejection of the 'successful aging' model, not only because it is too narrow but also because it is rooted in medical assumptions regarding the good life and therefore associated with understanding disability solely through the medical lenses. Consequently, it contributes to the marginalization of older persons with disabilities.[159] In Berridge & Martinson's words:

> If we continue to promote models of aging that leverage ableism to combat ageism, we leave people fearful of their own and others' aging bodies—hardly a liberating scenario for older adults, and especially for older women, who are particularly disadvantaged by successful aging and the medical model of disability.[160]

Moreover, only a minority (12%) of people older than sixty-five in the US meet Rowe and Kahn's definition of successful aging.[161] In other words, ableist assumptions embedded in the concept of successful aging can contribute to ageism toward older persons who do not meet the health and activity standards associated with successful aging. As a result, scholars highlight the intersections and entanglement of ageism with ableism, emphasizing that these two forms of discrimination can reinforce and perpetuate each other.[162]

Alongside the presence of ableism within elder law, manifestations of ageism can also be observed within disability law. Jönson and Larsson highlight the presence of ingrained age-related stereotypes within the discourse of disability rights activists aiming to advocate for the inclusion of young individuals with disabilities in activities typically associated with youth. By making comparative references to younger age groups, the focus shifts from the individual's disability and functional limitations toward their potential and rightful pursuit of a rich and purposeful life.[163] Consequently, the entitlements of individuals with disabilities in later stages of life, such as the right to engage in purposeful activities, participate in community life, access accessible environments, and maintain autonomy, are diminished.

The comprehension of the tension between ableism and ageism appears to be in its early stages. Numerous practical dilemmas arise when grappling with

---

159. Marty Martinson & Clara Berridge, *Successful Aging and Its Discontents: A Systematic Review of the Social Gerontology Literature*, 55 GERONTOLOGIST 58 (2015); Stephen Katz, *Active and Successful Aging. Lifestyle as a Gerontological Idea*, 44 RECHERCHES SOCIOLOGIQUES ET ANTHROPOLOGIQUES 33 (2013); Jiayin Liang & Baozhen Luo, *Toward a Discourse Shift in Social Gerontology: From Successful Aging to Harmonious Aging*, 26 J. AGING STUD. 327 (2012).

160. Clara W. Berridge & Marty Martinson, *Valuing Old Age Without Leveraging Ableism*, 41 GENERATIONS 83, 89 (2018).

161. Sara J. McLaughlin et al., *Successful Aging in the United States: Prevalence Estimates from a National Sample of Older Adults*, 65 J. GERONTOLOGY SERIES B: PSYC. SCI. & SOC. SCI. 216 (2010).

162. Mariska van der Horst & Sarah Vickerstaff, *Is Part of Ageism Actually Ableism?*, 42 AGEING & SOC. 1979 (2021).

163. Håkan Jönson & Annika Taghizadeh Larsson, *Ableism and Ageism*, *in* ENCYCLOPEDIA GERONTOLOGY & POP. AGING 4 (2022).

this intricate relationship. For instance, in the attempt to challenge ageist criteria within COVID-19 treatment protocols by emphasizing the resilience and wisdom of older individuals, are we inadvertently reinforcing ableist perspectives on human worth and value?[164] When prioritizing younger people with disabilities in de-institutionalization programs, are we supporting ageist assumptions on whose life matters more?

The findings in this research strengthen our assumption that ageism and ableism play a role in both disability law and elder law. The tendency of many old-age-focused articles to mark a clear line between older persons and people with disabilities can be understood as ableist or at the least, as an attempt to duck ableist prejudice by others. The fact that disability-focused articles do not turn to elder law can also be explained as an ageist tendency to dismiss the valuable knowledge developed in gerontology and perceive it as irrelevant.

However, as later discussed, there are other reasons for this phenomenon, one being the difference in the developments of rights in each realm and their different characteristics.

2. Contrasting Approaches in Elder Law and Disability Law: Exploring Divergence

Another plausible explanation for the unbalanced nature of the articles in the qualitative analysis lies not in the mutual biases and stigmas harbored by the fields, but rather in the distinct attributes that characterize each domain. For example, when comparing the legal accomplishments of each field, disability law demonstrates an advantage. In fact, many of the articles in this research described elder law as being one step behind disability law. The articles, mostly old age based, mentioned the many ways in which disability is a better protected category compared to age in employment, discrimination in public places and services, housing, and de-institutional efforts. This is not only in legislation but also in litigation. Even twenty years after Olmstead, we do not have a landmark 'Olmstead II' decision on nursing homes acknowledging the state's obligation to promote inclusive independent living for older persons.[165] On the international level the CRPD has accelerated unprecedent international and cross-national legislative, litigative and academic efforts in disability. The significance of establishing an international UN convention on the rights of older persons becomes evident when considering the profound impact of the CRPD. This can explain the lack of disability-based articles focused on old age and the interest in disability by elder law.

---

164. Christopher C. Colenda et al., *COVID-19 Pandemic and Ageism: A Call for Humanitarian Care*, 68 J. GERONTOLOGY: SERIES A BIO. SCI. & MED. SCI. (2020); Cera Cruise & Bonnie Lashewicz, *Say What?! Ableist Logic Used in Misguided Attempt to Combat Ageism During COVID-19*, 69 J. AM. GERIATRICS SOC. 47 (2021).

165. Stephen J. Bartels et al., *Are Nursing Homes Appropriate for Older Adults with Severe Mental Illness? Conflicting Consumer and Clinician Views and Implications for the Olmstead Decision*, 51 J. AM. GERIATRICS SOC. 1571 (2003).

Nevertheless, this justification based on difference in achievements might obscure a more fundamental distinction between elder law and disability law. The different historical development of each field results in differences in character. Consequently, as will be demonstrated shortly, both fields perceive each other through their own distinct perspectives. This is meant to say that elder law's interest in disability law demonstrates its multi-faceted nature. Disability law's relatively limited interest in elder law indicates its more radical nature.

The history of disability is marked by a distressing chronicle of attempts to "fix" disabled people, the denial of autonomy and authority, marginalization of people with disabilities, as well as the presence of eugenic policies. Older people have suffered from discrimination and exclusion but in less absolute and blatant ways or in more ambivalent ways (i.e. in some cases withholding status, social privileges and respect due to old age). This can explain the radical nature of disability discourse in general and disability law in particular. The disability movement aims not only to improve individuals' lives but also strives to liberate them from oppressive practices. Surtees sees a direct connection between the different histories of people with disability and older persons and their respective social change strategies:

> This different history helps explain why the civil rights model was seen as such a step forward for people with disabilities . . . . The civil rights model was an improvement, and a move closer to the universalism model for people with disabilities. It would not be much of a move forward for elders. Certainly, there are individual elders and elder law issues which can and do receive helpful results from the civil rights model. As a group, however, elders generally do not have to take steps in order to move the conversation towards the need to accommodate. That is where the conversation starts.[166]

Hence the achievements of the disability movement when compared to those of older persons, serve as a reminder of their relatively disadvantaged starting point.

Another difference between the two movements is related to their leadership. In the field of older persons' rights, professionals and service providers take the lead in advocating for policy changes, while older individuals themselves have not been actively involved in advocating for their own rights. This is quite different from the disability movement, where self-advocacy and the principle of "[n]othing about us without us" are central and highly valued.[167] Another important difference is that while old age does not generally form a

---

166. Doug Surtees, *What Can Elder Law Learn from Disability Law?*, *in* THEORIES ON LAW AND AGEING: THE JURISPRUDENCE OF ELDER LAW 93, 103-04 (Israel Doron ed., 2009).

167. Nina A. Kohn, *A Civil Rights Approach to Elder Law*, *in* BEYOND ELDER LAW: NEW DIRECTIONS IN LAW AND AGING 19, 24 (Israel Doron & Ann M. Soden eds., 2012).

cohesive group identity,[168] disability often serves as a significant identity for many individuals. Another closely interconnected distinction lies in the fact that old age has not emerged as a unified group identity, whereas disability often holds significant importance as an identity, and in some cases, takes precedence over other identities.[169] These differences in historical, sociological, and political backgrounds, undoubtfully have influenced the difference in character between disability law and elder law.

Both disability rights discourse and elder law discourse draw upon principles of human rights. However, they interpret and apply these principles differently. Disability rights discourse takes a more categorical and dichotomous approach, sharply distinguishing between policies that uphold human rights and those that violate them. In contrast, elder law discourse emphasizes the need to consider a range of flexible solutions and strike a balance between conflicting factors, such as protecting individuals while respecting their autonomy. This contrast is evident in discussions among elder law scholars regarding legal capacity, where the concept of supported decision-making was introduced as an additional legal tool alongside existing mechanisms like lasting power of attorney and guardianship.[170] The conflict between autonomy and the need for care and protection is recognized in elder law as a tension that should be acknowledged. In response, a range of interventions is available to enable individuals and their families to make choices based on their specific needs and preferences.[171] While disability law encourages a variety of legal approaches as long as they conform to the human rights framework, elder law encourages various legal approaches and tactics to reach a fine balance between the different values and needs.[172] As summarized by Morgan:

> Elder law, so the multi-dimensional model suggests, includes distinct types of legal tools, a range of political and philosophic approaches, and multiple perspectives on the concept of "elder rights." In other words, this field is by no means directed by a single viewpoint: it cannot be considered either "individualistic" or "paternalistic," nor can it be portrayed as promoting "negative" as opposed to "positive" rights, or as favoring the individual over the family, the private over the public. Elder law covers the range of possible approaches and perspectives, and it can be fully appreciated only by understanding the internal balance

---

168. Nina A. Kohn, *Elder Rights: The Next Civil Rights Movement*, 21 TEMP. POL. & CIV. RTS. L. REV. 321, 325 (2012).

169. Kohn, *A Civil Rights Approach*, *supra* note 167, at 24.

170. Charles P. Sabatino & Erica Wood, *The Conceptualization of Legal Capacity of Older Persons in Western Law*, *in* BEYOND ELDER LAW: NEW DIRECTIONS IN LAW AND AGING 35, 35-36 (Israel Doron & Ann M. Soden eds., 2012).

171. Terry Carney, *Guardianship, "Social" Citizenship, & Theorizing Substitute Decision-Making Law*, *in* BEYOND ELDER LAW: NEW DIRECTIONS IN LAW AND AGING 1, 10 (Israel Doron & Ann M. Soden eds., 2012).

172. Doron, *supra* note 28, at 71.

between all of its components.[173]

In summary, the differing perspectives of each field can impact how they interact with one another. The majority of old-age-based and disability-focused articles can be attributed to the willingness to adopt elements from disability law and integrate them in the range of solutions available for older persons. The efforts to mark a line between elder law and disability in many articles, can be explained not only by their differences or by ableist bias but also because of a strong notion that these are two distinct fields. The binary treatment of institutions, guardianship, segregated settings in disability law, is at odds with elder law's approach to these issues. As is the different perspective on the role of professionals and family members. And so, while open to compare and learn from disabilities, elder scholars are careful in marking the line and differentiating both fields.

In contrast, disability legal scholars, particularly those adopting a critical perspective, will have mixed feelings about the more moderate approach taken by elder law scholars. The acceptance of segregated settings or the recognition of the necessity for guardianship is perceived as a compromise, and even more so, as a paternalistic compromise imposed by professionals above the heads of older people themselves. This unspoken aspect of the relationship carries significant implications. What elder law considers as balanced and nuanced, can be viewed as a potential threat within the realm of disability law. For instance, if a UN convention on older persons' rights were to recognize the legitimacy of guardianship, it could trigger a backlash against the progress achieved by the disability movement. The relative silence within disability scholarship regarding issues related to older age may reflect an intense silence driven by concerns about the potential outcomes of this relationship.

VI. CONCLUSION

This study is innovative in its focus on the relationship between elder law and disability law. It demonstrated the rich potential of a direct dialogue between both. This dialogue is currently at an early stage, and it consists not only of what is said and written in current literature but of the silences and subtext in this dialogue. We tried to mark the current common issues and the comparative insights, quantitively and qualitatively. We also tried to bring a wider picture of the relationship between disability rights and elder rights and to understand the tension between both disciplines. One thing is sure, comparative research between disability and elder law has far and wide horizons. When are age boundaries relevant in disability policy, if at all? How can the radical nature of disability studies and the practical problem-solving

---

173. R. C. Morgan, *The Future of Elder Law*, *in* THEORIES ON LAW AND AGEING: THE JURISPRUDENCE OF ELDER LAW 145, 148 (Israel Doron ed., 2009).

nature of elder law join forces? How can the disability perspective enrich the lives of people aging into disability and how can the old-age perspective enrich the lives of people aging with disability? These are all questions that need to be addressed and that can influence the lives of many people living at the intersection of age and disability.

Lastly, we would like to outline several potential research directions that can guide future studies on this issue. This article highlights the scarcity of comparative research in the fields of disability and elder law, emphasizing the potential of this kind of work. There are several types of research that can be undertaken in this regard.

First, thematic comparative research can delve into exploring the similarities and differences between elder law and disability law on various shared subjects, such as guardianship, institutionalization, protective measures, accessibility, voting rights, end of life, vulnerability, stigma etc. Although legislation may sometimes encompass both populations, practical application of the law and litigation may differ.

Second, procedural comparative research can focus on examining the legislative processes and the evolution of legal frameworks in both fields. This includes a comparison of the different achievements as well as exploring how variations in the process influence the outcomes.

Third, epistemological comparative research can explore the different ways in which both fields conceptualize the relationship between law, people with disabilities or older persons. This research can shed light on the unique perspectives and approaches employed by each field.

Finally, it is time for a direct and constructive dialogue between disability and elder law practitioners, scholars, and stakeholders. This dialogue should encompass discussions surrounding fears, disagreements, potential collaborations, and constructive criticism. Only through such a dialogue can each field address its unexplored territory, uncover hidden perspectives, and develop in innovative and productive ways. This article, written by scholars from both fields, is our contribution to this evolving dialogue and serves as an exemplar of its potential.