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THE LAWYER’S ROLE IN FOSTERING AN ELDER RIGHTS MOVEMENT

Nina A. Kohn†

I. INTRODUCTION

Over the past century, the United States has experienced successive, sometimes overlapping, waves of civil rights movements.

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From the fight for equal rights for racial minorities, to the struggle for women’s rights, to the disability rights movement, to the more recent push for the rights of lesbian, gay, bisexual, and transgender individuals, civil rights movements have been central to American politics. However, despite the fact that ageism is pervasive and older adults suffer from significant discrimination, the United States has yet to experience the emergence of an elder rights movement.

Lawyers have played an important role in previous civil rights movements by helping raise awareness of rights violations and by instigating litigation aimed at inciting systemic reform. This article argues that the legal community can and should play a similar role with regard to elder rights. It proceeds in two primary parts. First, it describes the civil rights concerns facing older adults and how an elder rights movement could address those concerns. Second, it explores the role attorneys could play in fostering an elder rights movement. Specifically, it argues that the legal community, and especially the elder law bar, could play an important role in advancing the rights of older adults by (1) reframing key elder law concerns as civil rights concerns, and (2) engaging in and with “cause lawyering” efforts.

II. THE NEED FOR AN ELDER RIGHTS MOVEMENT

Although older adults are the beneficiaries of significant advocacy efforts, these efforts are not capable of adequately addressing older adults’ civil rights concerns. To show why this is the case, this Part describes the type of rights issues facing older adults and the unique advantages that a social movement focused on such issues could provide.

A. Civil Rights Concerns Faced by Older Adults

Older adults face a myriad of civil rights concerns. Some arise directly as a result of their chronological age. Others are the result of age-related phenomena, such as the onset of disability. While these concerns often go underappreciated, and even unnoticed, they can profoundly affect the nature and quality of older adults’

1. See infra Part II.A.
2. See infra Part II.B.
3. See infra Part III.
lives.

The civil rights problem affecting older adults that perhaps most closely resembles problems challenged by earlier civil rights movements is age discrimination. Age is not recognized as a constitutionally protected classification, and the United States lacks the type of statutory protections against age discrimination that exist for a wide variety of other forms of discrimination. The primary statutory prohibition on age discrimination, the 1967 Age Discrimination in Employment Act (ADEA), is limited to larger employers and certain forms of employment-based discrimination. Moreover, it provides only limited protection even to covered older workers. The ADEA prohibits discriminating against older workers in hiring decisions, but such claims are often impossibly difficult to prove and thus these protections go largely

4. See Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–14 (1976) (rejecting the claim that Massachusetts’ mandatory retirement age for state police officers violated the officers’ right to equal protection on the grounds that “uniformed state police officers over 50” did not constitute a suspect class for purposes of equal protection analysis); Nina A. Kohn, Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus, 44 U.C. DAVIS L. REV. 213, 224–231 (2010) [hereinafter Kohn, Rethinking] (discussing Murgia’s progeny and how the case has been broadly interpreted as requiring all age-based classifications to be upheld against Equal Protection challenges so long as they are rationally related to a potential legitimate government interest).

5. For example, age is not a protected class under Title VII, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2(a)–(d) (2006). Similarly, discrimination based on age is not prohibited under the Fair Housing Act, unlike discrimination based on race, color, religion, sex, handicap, familial status, or national origin. See 42 U.S.C. §§ 3604–3606 (2006); see also Laurie A. McCann & Cathy Ventrell-Monsees, Age Discrimination in Employment, in The New Politics of Old Age Policy 356, 357 (Robert B. Hudson ed., 2d ed. 2010) (comparing protection from age discrimination in employment to protection from other forms of employment discrimination).


7. See 29 U.S.C. § 630(b) (2006) (defining “employer” to limit the requirements of the ADEA to employers with twenty or more employees).

unenforced.9 Claims based on age discrimination in the workplace, especially after the United States Supreme Court’s 2009 decision *Gross v. FBL Financial Services, Inc.*,10 are also difficult to prove.11 The result is that older adults face significant discrimination in the employment context, typically with little recourse.12

9. See Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 U. Rich. L. Rev. 757, 777–78 (1997) (explaining that although there is good reason to believe that age discrimination is more prevalent in employee hiring practices than in employee discharge practices, far more discharge claims are brought under the ADEA than hiring claims, and explaining that this suggests that hiring claims are particularly hard to prove). The difficulty in showing hiring discrimination under the ADEA parallels that with proving hiring discrimination under other anti-discrimination laws. See Naomi Schoenbaum, *It’s Time That You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an “Information-Shifting” Model*, 30 Harv. J.L. & Gender 99, 99–100 (2007) (arguing that hiring discrimination cases are difficult to prove because the “applicant knows almost nothing about the employer’s decision process”); Julie C. Suk, *Discrimination at Will: Job Security & Equal Employment Opportunity in Conflict*, 60 Stan. L. Rev. 73, 106–07 (2007) (observing that the fact that Title VII claims are more likely to be based on firing discrimination than hiring discrimination does not necessarily mean that discrimination in firing is more common given that subtle forms of hiring discrimination are “difficult to prove in civil litigation”).


11. In *Gross*, the Supreme Court held that mixed-motive claims are not cognizable under the ADEA, that therefore a plaintiff must prove that his or her age was the “but for” cause of the complained-of adverse employment action, and that the plaintiff cannot shift the burden to the defendant even by showing that age was one motivating factor in the decision. See id. at 2350–52; see also Martin J. Katz, *Gross Disunity*, 114 Penn St. L. Rev. 857, 881–88 (2010) (explaining how *Gross* will make it harder for plaintiffs to prevail in future ADEA cases).

12. Economic problems appear to be exacerbating this situation. See Frederick R. Lynch, *Political Power and the Baby Boomers*, in *The New Politics of Old Age Policy* 87, 95 (Robert B. Hudson ed., 2d ed. 2010) (describing how, at the time of publication, age discrimination in employment was “exacerbated” by recession conditions). Poor economic conditions not only mean that older adults may have greater trouble finding a new job if they become unemployed, but also that older adults may be more likely to accept unfair employment practices because they are more pessimistic about their prospects for finding alternative employment. Indeed, poor economic conditions may account for the Equal Employment Opportunity Commission (EEOC) receiving more age discrimination complaints in 2008 and 2009 than it had in any of the eleven previous years. See U.S. Equal Employment Opportunity Commission, *Age Discrimination in Employment Act (includes concurrent charges with Title VII, ADA and EPA)* FY 1997–FY 2009, http://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm (last visited Oct. 17, 2010); see also McCann & Ventrell-Monsees, supra note 5, at n.2 (reporting that there were more age discrimination complaints in 2008 than any of the previous fifteen years).
Age discrimination is also a problem in non-employment contexts. As a result of their age, for example, older adults may be denied access to certain medical treatments.13 New forms of age discrimination are also emerging. Specifically, new state laws designed to address elder abuse and neglect have created legal regimes that significantly undermine even constitutionally protected rights based on age. Perhaps most notably, mandatory elder abuse reporting statutes,14 although well intentioned, can have profound consequences for older adults’ civil rights and civil

13. Older adults may be denied complete access to treatment because of their age, as in the case of persons who are ineligible for organ transplants because of their age. See Arthur Caplan, Organ Transplantation, in FROM BIRTH TO DEATH & BENCH TO CLINIC: THE HASTINGS CENTER BIOETHICS BRIEFING BOOK FOR JOURNALISTS, POLICYMAKERS, & CAMPAIGNS 129–32 (Mary Crowley ed., 2008), available at http://www.bioethics.org/gr/Hastings/organtransplantationHastings.pdf (stating that organ transplant teams “rarely consider anyone over 75 years of age”). This is despite evidence that transplants are medically appropriate even at advanced ages. See, e.g., Kristian Heldal et al., Benefit of Kidney Transplantation Beyond 70 Years of Age, 25 NEPHROLOGY DIALYSIS TRANSPLANTATION 1680, 1681 (2009) (reporting the findings of a study indicating that kidney transplantation offers a survival advantage over dialysis treatment for persons over the age of seventy). They may also be denied insurance coverage for certain procedures because of their age which, from a practical point of view, may have the same effect as an outright denial of access to treatment. For example, the Medicare program does not cover lumbar artificial disc replacement for persons over the age of sixty. See CENTERS FOR MEDICAID AND MEDICARE SERVICES, DECISION MEMO FOR LUMBAR ARTIFICIAL DISC REPLACEMENT (LADR) (CAG-00292R), available at http://www.cms.hhs.gov/mcd/viewdecisionmemo.asp?from2=viewdecisionmemo.asp&id=197& (last visited Oct. 26, 2010) (explaining the basis for this limitation). In addition, and arguably most significantly, older adults experience health care-related age discrimination as the result of health care providers providing differential treatment to older adults based on inaccurate stereotypes or assumptions about their lives, health, or preferences. See Phoebe Weaver Williams, Age Discrimination in the Delivery of Health Care Services to Our Elders, 11 MARQ. ELDER’S ADVISOR 1, 3–4 (2009) (discussing different forms of age discrimination in health care, and especially concerns that health care providers inappropriately limit treatment to older adults because of their chronological age); Mary Crossley, Injected Judgment: Legal Responses To Physician Bias, 48 VILL. L. REV. 195, 231–33 (2003) (describing research indicating that older patients receive less aggressive treatment than younger ones, even controlling for patient preferences and the severity of illness, and attributing this difference in part to provider bias).

14. Under federal law, elder abuse occurring in certain residential facilities, including nursing homes, must be reported to the government. See 42 C.F.R. § 483.15(c) (2) (2009). The vast majority of states also require at least some persons to report elder abuse regardless of where it occurs. See LORI STIEGEL & ELLEN KLEM, REPORTING REQUIREMENTS: PROVISIONS & CITATIONS IN ADULT PROTECTIVE SERVICES LAWS, BY STATE, http://www.abanet.org/aging/docs/MandatoryReportingProvisionsChart.pdf (last visited Oct. 17, 2010) (indicating that all but five states have mandatory reporting schemes).
liberties. For example, Rhode Island requires all persons with “reasonable cause to believe that any person sixty (60) years of age or older has been abused, neglected, or exploited, or is self-neglecting” to report their suspicions to the state.\footnote{15}{See R.I. GEN. LAWS § 42-66-8 (2010).} Similarly, Texas requires reporting by anyone with reason to believe that someone age sixty-five or older is experiencing abuse, neglect, or exploitation.\footnote{16}{See TEX. HUM. RES. CODE ANN. § 48.002(a)(1), § 48.051 (Vernon 2001 & Supp. 2010).} These reporting requirements have the effect of denying older adults the right to engage in confidential communications with doctors, nurses, clergy members, attorneys, and even spouses. As a result, these laws may violate older adults’ informational privacy rights—despite a strong argument that such rights are constitutionally protected in some circumstances.\footnote{17}{See Nina A. Kohn, Outliving Civil Rights, 86 WASH. U. L.R. 1053, 1067–87 (2009) [hereinafter Kohn, Outliving] (discussing the potential for successful informational privacy challenges to elder abuse reporting statutes).} By selectively subjecting older adults to significant rights burdens, they may also violate the Fourteenth Amendment’s Equal Protection guarantees.\footnote{18}{See id.} In addition, to the extent that they require clergy to report, they may also violate the First Amendment,\footnote{19}{See id.} and, to the extent that they require attorneys to report, they may violate the Fifth and Sixth Amendments.\footnote{20}{See id.}

In addition to being denied civil rights and liberties as a result of their chronological age, older adults frequently have their rights and liberties undermined because of their actual or perceived physical and psychological challenges. Older adults may experience significant civil rights problems as a result of being or becoming disabled, or as the result of being perceived as disabled. For example, residents of assisted living communities may find themselves facing eviction in violation of the Fair Housing Act (FHA) when their needs are perceived to be too great.\footnote{21}{See Robert G. Schwemm & Michael Allen, For the Rest of Their Lives: Seniors and the Fair Housing Act, 90 IOWA L. REV. 121, 204–05 (2004) (discussing the applicability of the FHA as amended to assisted living facilities and noting that eviction may be unlawful under the act where residents’ increased needs could be addressed through a reasonable accommodation). Older adults may also be improperly denied admission to an assisted living facility for parallel, also potentially illegal, reasons. See id. at 179–202; Eric M. Carlson, Disability
understaffing of nursing homes means that many nursing home residents can expect that even their most basic needs will routinely be neglected and that many of the rights “guaranteed” to them under the Nursing Home Reform Act will be largely illusory. Older adults wishing to remain in the community may find themselves forced into more restrictive and less integrated settings, contrary to the requirements of the Americans with Disabilities Act (ADA). Elderly individuals in the guardianship system may find themselves subjected to plenary guardianships that strip them of the right to make any meaningful decisions about their own life and body, instead of the less intrusive limited guardianships that would allow them to retain a portion of their decision-making capacity.

Discrimination in Long-Term Care: Using the Fair Housing Act to Prevent Illegal Screening in Admissions to Nursing Homes and Assisted Living Facilities, 21 NOTRE DAME J.L. ETHICS & PUB. POLY 363, 403 (2007) (discussing how assisted living admission policies may conflict with the FHA).

22. See HEALTH CARE FIN. ADMIN., REPORT TO CONGRESS: APPROPRIATENESS OF MINIMUM NURSE STAFFING RATIOS IN NURSING HOMES, Exec. Summary, at 6 (2000), available at http://web.archive.org/web/20001213195400/http://www.hcfa.gov/medicaid/reports/rp700hmp.htm (finding that only approximately eight percent of U.S. nursing homes have sufficient staff to meet the minimum quality of care standards required to receive federal funding and indicating that nearly half of all nursing homes would have to increase nurse aide staffing levels by at least fifty percent just to meet federal standards); see also Eric M. Carlson, Does the Nursing Home Reform Law Matter? Establishing the Standard of Care in Nursing Facility Cases, 3 NAELA Q. 13, 13 n.4 (2003) (noting the nursing home industry’s lack of compliance with the Nursing Home Reform Act).

23. See, e.g., V.L. v. Wagner, 669 F. Supp. 2d 1106, 1119–20 (N.D. Cal. 2009) (holding that plaintiffs showed a likelihood of success on their claim that a new state system for determining eligibility for home care services for older adults and others would violate the integration mandates of the ADA by severely increasing the risk that such persons would be institutionalized); cf. Olmstead v. L.C., 527 U.S. 581, 597 (1999) (in considering whether a state had violated the ADA by keeping two mentally disabled women institutionalized, explicitly holding that “[u]njustified isolation . . . is properly regarded as discrimination based on disability” within the meaning of the ADA).

24. This can occur even when limited guardianship is clearly appropriate under state law. See Lawrence A. Frolik, Guardianship Reform: When the Best is the Enemy of the Good, 9 STAN. L. & POL’Y REV. 347, 349, 354 (1998) (explaining that limited guardianship, a key element of guardianship reform, was designed to “revolutionize the system by maximizing autonomy” but that it is rarely used even in situations where it would be appropriate); Pamela B. Teaster, Erica F. Wood, Susan A. Lawrence & Winsor C. Schmidt, Wards of the State: A National Study of Public Guardianship, 37 STETSON L. REV. 193, 233 (2007) (reporting the findings of a national study and concluding that “[c]ourts rarely appoint the public guardian as a limited guardian”).
These are serious civil rights concerns that affect older adults as individuals and as a group. While it is certainly true that older adults also experience significant forms of positive age discrimination—for example, older adults gain eligibility for Medicare benefits and Social Security benefits to which younger adults are generally not entitled—this does not negate the negative consequences of harmful discrimination. Such positive forms of discrimination may soften the impact of harmful discrimination to a degree, but they cannot erase the stigma, indignity, and loss of liberty that age discrimination can cause. Being denied employment because one is “too old” is demeaning even if one can compensate for lost health care benefits by qualifying for Medicare. Being entitled to social security payments may be of little consolation if one has been stripped of the ability to decide how it is spent. And no public benefit can adequately compensate for the profound consequences of a mandatory elder abuse reporting law that causes one to lose the right to make a confidential confession to a priest or to speak in confidence to one’s spouse.

B. The Value of a Social Movement Approach

The term “social movement” generally refers to a form of collective action aimed at promoting or opposing social change to further a particular social goal or ideal. Social movements have been described as having three defining features. First, they are engaged in political or cultural conflict for the purpose of promoting or opposing a particular form of social change. Second, they are comprised of dense informal networks of individuals and organizations such that no single actor (whether an

25. The civil rights issues listed in the preceding paragraphs are by no means an exhaustive list of the civil rights issues older adults face, but, rather, are merely meant to illustrate the types of such problems that are currently part of the aging experience.
26. See McCann & Ventrell-Monsees, supra note 5, at 364–65 (arguing that age discrimination is no less “wrong or injurious” than discrimination based on race or sex, and that age-based entitlement programs do not compensate for its effects).
27. The term “social movement” can be used in a variety of ways. See Michael McCann, Law and Social Movements: Contemporary Perspectives, 2 ANN. REV. L. & SOC. SCI. 23–24 (2006) [hereinafter McCann 2006] (noting that the term is used in variable ways, even by those who specialize in the study of social movements).
individual or an organization) represents the enterprise. Third, they have a collective identity that extends beyond specific events or initiatives to create a sense of common purpose and shared commitment to a cause. This last characteristic allows social movements to sustain or revive action even after particular campaigns or initiatives have come to a close. Social movements are different from interest groups, although the two are sometimes conflated, in that they are less hierarchical and cannot be fully represented or controlled by a single entity or organization.

Consistent with this understanding of social movements, this article uses the term “elder rights movement” to refer to a collective effort through which individuals (including older adults acting on their own behalf) and organizations join together around the common goal of transforming social, political, and legal structures to allow older adults to fully exercise their civil and human rights and liberties. To achieve such social change, an elder rights movement would likely utilize a wide array of tactics, only some of which would be legalistic in nature.

Older adults have been the beneficiaries of significant advocacy on their behalf. For example, strong aging-interest groups have helped preserve and expand old-age entitlement programs such as Medicare, Social Security, and the programs provided under the Older Americans Act. However, the United States has yet to experience the emergence of an elder rights movement. To the extent that previous mobilizations related to

29. See id.
30. See id.
31. See id. at 24.
32. See id. at 25–26.
33. This definition is compatible with McCann’s description of social movements. See McCann 2006, supra note 27, at 23–24.
34. See Robert H. Binstock, The Old-Age Lobby in a New Political Era, in THE FUTURE OF AGE BASED PUBLIC POLICY 56, 57 (Robert B. Hudson ed., 1997) [hereinafter Binstock, Old-Age Lobby] (stating that the major aging-related policy innovations of the 1930s through 1970s, including Social Security and Medicare, “were established largely through the initiatives of elites: national political leaders, reformers, and professionals. The impact of old-age interest groups in creating policy was confined to programs that distributed benefits to professionals and practitioners in the field of aging . . . .”).
35. Not even the Gray Panthers, arguably the group most closely associated with grassroots, age-oriented activism, makes elder rights a priority. Civil rights is only one of eight of the group’s priorities, and, within civil rights, the organization lists “challenging ageism” (its only age-related civil rights priority) last out of twelve priorities. See Gray Panthers, Issue Resolutions Summary, http://graypanthers.org
aging issues could be said to constitute a social movement—which is dubious—these mobilizations were generally focused on securing social security benefits and did not extend to aging concerns more broadly. Moreover, “much of the activity that gets described as ‘the aging movement’ has been conducted on behalf of the aged, not by the aged themselves.”

This lack of an elder rights movement is unfortunate because current forms of advocacy are insufficient to protect older adults’ rights. Current aging interest groups in the United States are dominated by professionals and, in particular, professionals who provide and administer health care and social services to older adults. Aging service providers’ interests are often aligned with those of older adults. This is particularly true of interests related to public benefits or entitlements. When the government grants older adults rights to benefits, this typically works to the advantage of both older adults (who receive the benefits) and professionals who would provide or administer such entitlements (and thereby receive payment). However, when the right in question is not a positive right (i.e., the right to have a benefit), but a negative one (i.e., the right not to have one’s freedom to act curtailed or


37. See id. at 100.

38. Aging interest groups range from membership organizations (which may have a broad focus, such as AARP, or focus on a specific concern such as the Association of Retired Federal Employees, which focuses on federal employee retirement benefits), to professional organizations, to organizations that focus on particular causes related to older adults (e.g., the Alzheimer’s Association), to trade associations representing particular groups of aging service providers. See ROBERT H. BINSTOCK, THE CONTEMPORARY POLITICS OF OLD AGE POLICY 265, 278–81 (Robert E. Hudson ed., 2005) (hereinafter Binstock, CONTEMPORARY POLITICS). Despite their vast differences, they tend to be run by professionals who provide services to older adults. See HARRY R. MOODY, ABUNDANCE OF LIFE: HUMAN DEVELOPMENT POLICIES FOR AN AGING SOCIETY 140–41 (1988) (arguing that as aging interest groups expanded their numbers, size, and visibility, the ideological agenda of aging advocacy efforts became “defined and dominated by professionals”); ROBERT B. HUDSON, ADVOCACY AND POLICY SUCCESS IN AGING 28 GENERATIONS 17, 25 (2004) (suggesting that the professionalization of aging interest groups has led to the displacement of citizen advocacy on aging issues).
burdened in a particular way), the interests of older adults and service providers are likely to diverge.\textsuperscript{39} If older adults can refuse services or treatment, or opt out of “protections” or programs, this reduces service providers’ control and, ultimately, the market for their services. Thus, in the context of negative rights and liberties, current advocacy efforts can be expected to not fully protect the rights of older adults.\textsuperscript{40}

The history of elder protection laws illustrates the potential consequences of such divergence of interests with regard to negative rights. Advocacy for protecting older adults from abuse and neglect has been dominated by formal service agencies and professionals.\textsuperscript{41} The historical dominance of aging service providers in the debate over how to respond to elder mistreatment has several major effects on policy design. For example, it means that those advocating for elder abuse laws are often the same people who provide services to elder abuse victims. Advocates are thus disproportionately likely to see people who provide such services as generally competent, well-intentioned, and trustworthy. They, therefore, may be inclined to be unduly dismissive of concerns about such officials violating rights or behaving in a manner that unnecessarily undermines rights. It also means that the nature—and at times even the very existence—of their employment will depend on the state recognizing elder abuse as a problem and funding efforts to combat it. As such, those advocating for new legislation have an interest in seeing that legislation is passed to address elder mistreatment, even when it has significant—and potentially hard to justify—consequences for older adults’ freedoms. Mandatory elder mistreatment reporting statutes are a prime example. Despite concerns that mandatory reporting laws are ineffective or even counterproductive,\textsuperscript{42} and the

\begin{itemize}
\item \textsuperscript{39} Cf. James J. Callahan Jr., \textit{The World of Interest Group Advocacy: An Insider’s View}, 28 \textit{Generations} 36, 38 (2004) (explaining that advocacy groups can have conflicts of interest when lobbying on behalf of their constituents, and that such conflicts are especially likely to arise when advocacy groups are “advocating for more resources to flow to their organizations” as in the case of health care providers seeking more funds for their services).
\item \textsuperscript{40} This is not to say that a service provider-dominated advocacy approach will never protect negative rights, but simply that it is not a reliable means of doing so given the expected priorities of, and incentives facing, would-be advocates.
\item \textsuperscript{41} Rosalie S. Wolf & Karl A. Pillemer, \textit{Helping Elderly Victims: The Reality of Elder Abuse} 6 (1989) (comparing the field to that of domestic violence, which has seen a significant activist component).
\item \textsuperscript{42} See, e.g., Elizabeth Capezuti, Babara L. Brush & William T. Lawson,
fact that such laws can have profound, adverse consequences for older adults’ rights and liberties, they continue to be very popular within the aging services community.43

Older adults’ rights-related interests are also less likely to be aligned with aging interest group advocacy efforts where the rights at issue are those against service providers. That is, where the issue is not the existence of a government entitlement, but enforcement of the right to that entitlement against a service provider charged with its delivery, the current form of aging advocacy is unlikely to be sufficient to protect older adults’ rights. For example, long-term care providers may be excellent advocates for older adults having access to payment for long-term care services. However, they are unlikely to advocate for (and may advocate against) enforcement of long-term care quality standards or enforcement of residents’ rights provisions.

Another policy issue prone to interest misalignments is age discrimination. From an older adult’s point of view, age discrimination can be both beneficial and detrimental. While age-based entitlements are likely to be welcomed, age-based limitations are not. By contrast, aging service providers may find it expeditious to treat consumers differently based on their age. They may therefore resist laws and policies that limit their ability to make age-based distinctions that limit older adults’ rights and liberties.

43. It is no coincidence that the Wisconsin mandatory elder abuse reporting statute, arguably the nation’s most rights-protective, was designed with the input of both domestic violence and disability rights advocates—advocates who were in a position to embrace a victim empowerment model for responding to such abuse. For a discussion of Wisconsin’s approach, see Kohn, Outliving, supra note 17, at 1064–65, 1084–85, 1110–11.
The problems caused by a lack of alignment between social service provider interests and older adults’ interests may be exacerbated by ageism. First coined in 1969, the term “ageism” refers to stereotyping and discriminating against a particular age group. Scholars have also identified a phenomenon termed the “new ageism,” which is posited to be especially common among “advocates and service providers for the aged.” This “new ageism” has several key characteristics, including that: (1) “[i]t stereotypes the ‘elderly’ in terms of the characteristics of the least capable, least healthy, and least alert of the elderly”; (2) “[i]t perceives the older person as . . . a relatively helpless and dependent” individual requiring social services; and (3) “[i]t encourages the development of services without adequate concern as to whether the outcome of these services contributes to reduction of [elders’] freedom . . . to make decisions controlling their own lives.”

Such stereotyping, even if unconscious, can lead social service providers to view a denial of rights to older adults as inconsequential. If older adults are seen as no longer engaged in the community or as no longer experiencing a valuable existence, limiting their liberties may be seen as largely harmless. For example, if older adults are seen as no longer being sexual beings, limiting their sexual freedom (e.g., by restricting the rights of nursing home residents to engage in sexual behaviors, or by creating new crimes that limit older adults’ consensual sexual activities as some states have begun to do) is unlikely to be perceived as troubling. Rather, limiting sexual freedom may merely be seen as a way to protect such individuals from something they do not—and perhaps should not—desire in the first place.

45. This is, admittedly, a bit of a simplified definition. In fact, there are a number of competing definitions. See Palmore, supra note 44, at 4.
47. *Id.* at 15 (citing Kalish, supra note 46, at 398).
48. See generally Evelyn M. Tenenbaum, *To Be or to Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery*, 42 INDIANA L. REV. 675, 675 (2009) (discussing nursing home policies regarding the sexual expression of their residents and what forms of sexual expression they should “allow”).
49. See Kohn, *Outliving*, supra note 17, at 1090–94 (describing laws aimed at addressing elder mistreatment that also limit older adults’ sexual freedoms).
Thus, the current dominant approach to aging advocacy in the United States, while advantageous to older adults in some important ways, is insufficient to protect their civil rights and liberties. There is, therefore, a need for a new form of advocacy for older adults. An elder rights movement could meet this need.

An elder rights movement would complement current advocacy strategies by focusing on negative rights and liberties, older adults’ rights vis-à-vis service providers, and age discrimination. A social movement, by definition, includes the action of individuals—in this case, older adults participating in their individual capacity. As such, it would not suffer from the type of misalignment of interests to which aging interest group-dominated advocacy is prone. Moreover, direct participation by older adults could be a powerful force for challenging ageism. By demonstrating that older adults can be active, engaged members of the polity, an elder rights movement could undermine the “compassionate” yet ageist stereotypes of older adults as dependent and disengaged. This, in turn, could make policies that discriminate against older adults based on such stereotypes more susceptible to reform.

In short, current forms of advocacy are no substitute for an elder rights movement. By directly engaging older adults acting on their own behalf, an elder rights movement could help advance and protect numerous types of rights that are not adequately protected by current advocacy approaches.

III. THE ROLE FOR LAWYERS IN FOSTERING AN ELDER RIGHTS MOVEMENT

Each of this country’s civil rights movements has had a strong legal component, including a significant emphasis on impact litigation—i.e., litigation brought for the purpose of establishing important legal precedents or otherwise advancing systemic reforms. Likewise, lawyers have an important role to play in

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51. See Binstock, supra note 38, at 266.
52. Some might fear that challenging these stereotypes will undermine policies that selectively benefit older adults because of their perceived need. This concern is not sufficient to justify avoiding an elder rights movement for largely the same reasons described infra in Part III.C.
53. See generally Austin Sarat & Stuart Scheingold, Cause Lawyers and Social Movements (2006) [hereinafter Sarat & Scheingold, Social Movements]
fostering an elder rights movement. Although other groups or entities could also help foster such a movement, lawyers’ unique skill set and social position make them well-suited to cultivating the conditions for an elder rights movement.

By examining the historical development of previous civil rights movements, Michael McCann has identified two important roles that lawyers can play in helping social movements emerge. First, attorneys can be instrumental in generating rights-consciousness among group members. By identifying group grievances that undermine rights and labeling them in terms of legal rights, they can help foster a sense of group identity and help define collective goals. In this manner, they can also impart a sense of legitimacy to a cause that can be both internally empowering and externally powerful. Second, lawyers can help social movements emerge by using traditional legal advocacy tools, such as high-profile litigation. By increasing the costs associated with existing power structures, including costs associated with negative media attention, litigation and threatened litigation make existing power structures more vulnerable. This vulnerability can reduce resistance to change, making it possible for movements to pressure political or institutional actors to

(exploring the relationship between lawyering and social movements, including the role of impact litigation in twentieth century U.S. social movements); AUSTIN SARAT & STUART SCHEINGOLD, CAUSE LAWYERING: POLITICAL COMMITMENTS & PROFESSIONAL RESPONSIBILITIES (1998) [hereinafter SARAT & SCHEINGOLD, CAUSE LAWYERING] (featuring a series of essays showcasing different types of cause lawyers and their impacts); see also Herbert A. Eastman, Speaking the Truth to Power: The Language of Civil Rights Litigators, 104 YALE L.J. 763, 772 (1995) (in the context of exploring the design and value of pleadings in civil rights cases, describing the power of civil rights litigation to help advance civil rights movements).

54. See McCann 2006, supra note 27; Michael McCann, Law and Social Movements, in THE BLACKWELL COMPANION TO LAW & SOCIETY (Austin Sarat, ed. 2004) [hereinafter McCann 2004]; see also SARAT & SCHEINGOLD, SOCIAL MOVEMENTS, supra note 54, at 11 (discussing McCann’s work).

55. See McCann 2006, supra note 27, at 25; McCann 2004, supra note 54, at 511.

56. See McCann 2004, supra note 54, at 511.

57. See SARAT & SCHEINGOLD, SOCIAL MOVEMENTS, supra note 54, at 11.

58. See McCann 2006, supra note 27, at 26–29; McCann 2004, supra note 54, at 511.

59. McCann 2006, supra note 27, at 26 (noting that some evidence suggests that legal mobilization helps build social movements because it generates media attention).

60. Id.; McCann 2004, supra note 54, at 511; accord SARAT & SCHEINGOLD, SOCIAL MOVEMENTS, supra note 53, at 11.
change practices. This Part applies McCann’s model to the elder rights context and show how legal advocacy, although not sufficient to foster a civil rights movement, could be instrumental in doing so. It also shows why common critiques of legalistic, rights-based approaches to social reform do not mitigate against the pursuit of such an approach in the elder rights context.

A. The First Role: Naming and Framing

Consistent with McCann’s model, the first role for the legal community in fostering the emergence of an elder rights movement would be to identify rights violations experienced by older adults and to label them in terms of legal rights. This would enhance the perceived legitimacy of elder rights as a cause and, therefore, could help empower older adults to vocalize their objections and organize around them.

Elder law is a rapidly growing area of practice, and, thus, there is a growing portion of the bar now focused on the legal concerns of older adults. This means that there is, at least theoretically, a growing number of lawyers who are in a position to work with older adults to identify and label the rights concerns they face. While elder law practice typically focuses on planning for later-in-life needs through individual client counseling and

63. See Lawrence A. Frolik, The Developing Field of Elder Law: A Historical Perspective, 1 ELDER L.J. 1, 4 (1993) (stating that “[t]en years ago, if you asked a lawyer if he or she was an elder law attorney, you would have been met with a blank stare, a laugh, or a frown. . . . I doubt if any lawyer in 1980 ever used the term elder law, far less did they consider themselves properly identified by the term.”); Nina A. Kohn & Edward D. Spurgeon, Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field, 59 J. LEGAL EDUC. 414 (2010) (discussing the recent growth spurt in elder law education in U.S. law schools).
64. See Charles P. Sabatino, Elder Law 2009–2039?, 30 BIFOCAL 105, 107 (2009), available at http://www1.cobar.org/SectionsAndCommittees/Sections/ElderLaw/Future_of_Elder_Law_7_09.pdf (reporting that, as of June 2009, there were thirty-nine state bar associations with elder law sections or committees and estimating that at least 25,000 U.S. lawyers concentrate in elder law).
document drafting—tasks not traditionally associated with civil rights—these tasks often have significant civil rights dimensions. For example, by helping clients plan for long-term care and its financial implications, elder law attorneys can help older adults increase their control over their health care, living arrangements, and resources. Similarly, by helping older adults execute advance directives, elder law attorneys enhance their clients’ abilities to determine future life choices and how those choices are made. Not only do such documents allow older adults to specify who may act as their surrogate and allow older adults to guide the surrogate’s decision making, but they also help older adults avoid guardianship. Even sophisticated trusts and estates practices can have significant civil rights implications and dimensions. For example, trust or gifting practices designed to reduce tax burdens may come at the cost of reducing the ability of donors (frequently older adults) to control their finances and, thereby, their lifestyle. By making older adults more dependent on others, such practices may inadvertently hinder older adults’ freedom and sense of control. A reduction in perceived sense of control, in turn, could

65. For example, elder law attorneys can assist clients who wish to “age in place” with advance-planning techniques that help them to achieve that, at times difficult, goal. See generally Lawrence A. Frolik, The Client’s Desire to Age in Place: Our Role as Elder Law Attorneys, NAELA Q. 6 (2002). At times, however, advance planning may have the paradoxical effect of reducing clients’ perceived sense of control. See Nina A. Kohn, Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney, 59 RUTGERS L. REV. 1, 26–33 (2006) [hereinafter Kohn, Elder Empowerment] (discussing how the importance of perceived sense of control for older adults’ well-being, and describing the potential for durable power of attorney arrangements to undermine that sense of control).

66. Execution of a durable power of attorney or advance directive for health care can obviate the need for a court-imposed guardianship. See Joe Rosenberg, Regrettably Unfair: Brooke Astor and the Other Elderly in New York, 30 PACER L. REV. 1004, 1032 (2010) (explaining that courts may choose not to impose guardianship where a valid power of attorney is in effect and citing cases in which courts considered the existence of a valid power of attorney and health care proxy in declining to impose guardianship); Kohn, Elder Empowerment, supra note 65, at 2–3 n.2 (“When an individual has appointed an agent under a DPOA and that agent is able and willing to assume the duties that appointment entails, courts will generally deny any petition to impose a guardianship on the principal, at least as to matters the agent is empowered to handle.”). While guardianship can be an important intervention for some, the guardianship process is inherently rights limiting because imposition of guardianship prevents older adults from making all or certain decisions on their own behalf; see also Lawrence A. Frolik, The Developing Field of Elder Law Redux: Ten Years After, 10 ELDER L.J. 1, 5 (2002) [hereinafter Frolik, Redux] (“Though the need for guardianship is always a possibility, an experienced elder law attorney can often find ways to avoid it.”).
have significant negative consequences for the older adults’ emotional and physical well-being.\(^\text{67}\)

Unfortunately, the elder law bar is not currently poised to play this role. Practicing elder law attorneys typically do not see “civil rights” as part of their work.\(^\text{68}\) Elder law organizations also typically do not embrace the civil rights dimensions of elder law. For example, the National Academy of Elder Law Attorneys (NAELA), the leading organization of practicing elder law attorneys, does not specifically identify this dimension when defining elder law,\(^\text{69}\) nor are civil rights (or age or disability discrimination) listed in its description of key elder law issues.\(^\text{70}\) In addition, although NAELA has adopted an extensive list of courses that might be included in an elder law curriculum, a course on civil rights is not included in the list, even as an elective.\(^\text{71}\) Similarly, the National Elder Law Foundation (NELF), which certifies attorneys in elder law, lists thirteen substantive areas of law about which elder law attorneys must be knowledgeable in order to receive certification in elder

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\(^\text{67}\). See Kohn, Elder Empowerment, supra note 65, at 27–33 (discussing this effect in the context of how durable powers of attorney can reduce the perceived sense of control).

\(^\text{68}\). Rather, elder law practice is typically focused on planning for later in life and, although such planning has a significant civil rights dimension, it tends not to be emphasized in descriptions of the practice. See, e.g., Frolik, Redux, supra note 66 (describing the practice as focusing on planning for later in life, but omitting any specific mention of the civil rights consequences of such planning).

\(^\text{69}\). See Press Release, National Academy of Elder Law Attorneys, National Elder Law Month Press Release (Nov. 2009), available at http://www.naela.com/Media_ElderLawMonth.aspx (defining elder law as “a specialized area of law that involves representing, counseling and assisting seniors, people with disabilities and their families in connection with a variety of legal issues, from estate planning to long term care issues, with a primary emphasis on promoting the highest quality of life for the individuals. Typically, elder law attorneys address the client’s perspective from a holistic viewpoint by addressing legal, medical, financial, social and family issues.”).

\(^\text{70}\). See NATIONAL ACADEMY OF ELDER LAW ATTORNEYS, WHAT IS ELDER LAW?: THE KEY ISSUES, available at http://www.naela.org/documents/WhatsElderLawDiagram-color.pdf (also phrasing issues related to decision making in terms of delegating decision-making authority, as opposed to retaining it).

\(^\text{71}\). Likewise, courses that might provide students with preparation for civil-rights oriented litigation (e.g., federal courts, trial advocacy, employment discrimination) are also not included. See National Academy of Elder Law Attorneys, Law School Curriculum: Suggested for Studies in Elder Law and/or Special Needs Law, http://www.naela.org/Pros_Law_School_Curriculum.aspx (last visited Oct. 17, 2010).
In only one of these areas—that related to housing and long-term care—does NELF use the term “rights.”

The fact that the elder law bar does not embrace civil rights implications of elder law practice could pose an obstacle to the emergence of an elder rights movement. In past civil rights movements, attorneys have helped those movements gain legitimacy and self-empowerment by labeling their grievances in legal terms and, specifically, in terms of legal rights. If those interacting with elders as legal advisors do not acknowledge the rights implications of their work and interactions, these interactions could have the opposite result: communicating to older adults that their rights-oriented concerns are not legal or legally relevant in nature.

The first step to legal mobilization for elder rights would therefore be for the bar, and, especially the elder law bar, to recognize and name the civil rights concerns affecting older adults. By doing so, they can increase the likelihood that they will address these concerns when working with older clients. They can also help legitimate older adults’ rights-related grievances and potentially empower older clients to think more broadly and ambitiously about their rights and their role in society. For example, an elder law attorney advising clients regarding planning for long-term care should recognize that the choice of a long-term care provider is not merely a financial decision, but also a decision that can fundamentally alter an individual’s life and liberty. Advising clients of such implications will allow clients to plan more appropriately for their own care. It will also help the clients

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73. See id.

74. See supra notes 53–57 and accompanying text. Notably, even those who critique a civil rights approach to social change acknowledge the role that the language of rights can play in helping movements gain legitimacy. See, e.g., Duncan Kennedy, The Critique of Rights in Critical Legal Studies, in LEFT LEGALISM/LEFT CRITIQUE 178, 214 (Wendy Brown & Janet Halley eds., 2002) (suggesting that the value of the rights rhetoric has been exaggerated, while at the same time acknowledging that the use of rights language can be an effective advocacy tool).

75. Accord Harriet McBryde Johnson & Lesly Bowers, Civil Rights and Long-Term Care: Advocacy in the Wake of Olmstead v. L.C. ex rel. Zimring, 10 E LDER L.J. 453, 453 (2002) (in the context of discussions about long-term care, urging “elder law attorneys to see the broader civil rights struggle that may lie hidden in their day-to-day client representations”).
recognize that they have rights, thereby empowering them to take a more active role in structuring their future living situations—potentially through collective action.

This role of naming and framing, which has been critical in other civil rights movements, may be especially important for an elder rights movement. One of the most significant barriers to the emergence of an elder rights movement is that older adults are a diverse group and lack a cohesive group identity. By framing the issues older adults face in the powerful language of legal rights, the legal community could play a much-needed role in creating a sense of shared interest and identity that could encourage older adults to mobilize on their own behalf. By making elder rights concerns seem tangible and legitimate, such framing could make achieving related reforms seem more feasible and elders more likely to engage in political action if they believe it is likely to achieve desired goals. Similarly, such framing could help make public and salient often unrecognized threats to older adults’ rights, and elders are more likely to engage in direct action where they perceive that their interests are threatened.

While identifying and naming rights may sound simple, it would actually require a significant change in the legal profession’s current practices. Even the elder law bar, the portion of the bar most likely to be sensitized to the civil rights issues faced by older adults, would need to reframe the way it typically categorizes older adults’ legal problems. As previously discussed, practicing attorneys often do not adequately consider and prioritize the civil rights implications of their practices. And even in the elder law literature, violations of older adults’ civil rights are commonly described merely as undermining their “interests” or “autonomy,” not their rights.

76. See Williamson, Evans, & Powell, supra note 36, at 100–01 (describing the elderly as lacking a “mature ‘age consciousness’”); Andrea Louise Campbell, How Policies Make Citizens 94–95 (2003) (suggesting that although seniors have distinctive political behaviors, they do not appear to have distinctive political attitudes on age-related issues).
77. See Campbell, supra note 76, at 99.
78. See id. at 100–11 (discussing how seniors’ participation in the political arena increases in response to threats to age-based benefits).
79. Howard Eglit, Elders on Trial: Age and Ageism in the American Legal System 81–82 (2004) [hereinafter Eglit] (hypothesizing that elder law attorneys may be inclined to be less ageist than the general attorney population).
80. Cf. Kohn, Outliving, supra note 17, at 1065–67 (discussing how mandatory elder abuse reporting laws have been extensively critiqued in the legal literature,
Identifying and labeling the rights concerns of older adults in legal terms might also require a significant change in the legal profession’s sensibilities. This is true even within the elder law bar. Although those writing in the field of elder law frequently hold up client autonomy as a central value of the field, the field has some paternalistic tendencies. For example, the field’s focus on determining client capacity, and tendency to question it, may lead elder law attorneys to be overly directive in their interactions with clients.\(^1\) Moreover, there is not a clear consensus in the legal field that older adults should be protected from age-based discrimination.\(^2\) Rather, there is an emerging body of legal literature promoting new, creative uses of age discrimination.\(^3\) In addition, it is not uncommon for those advocating for other groups to treat age discrimination as legally unproblematic in order to

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1. See EGLIT, supra note 79, at 98 (suggesting that by focusing on questions of cognitive capacity, the literature addressing the relationship between lawyers and their elderly clients may mistakenly lead lawyers to think that capacity is a more frequent concern than it actually is).

2. See, e.g., Christine Jolls, Hands-Tying and the Age Discrimination in Employment Act, 74 Tex. L. Rev. 1813, 1813 (1996) (stating that “prohibitions on discrimination based on race, gender, religion, and national origin . . . . reflect . . . a basic normative judgment that different outcomes for equally qualified employees of different races or other protected categories are simply wrong, wholly apart from their efficiency,” but also indicating that protections against age discrimination can only be justified on other grounds); George Rutherglen, From Race to Age: The Expanding Scope of Employment Discrimination Law, 24 J. Legal Stud. 491, 521 (1995) (strongly questioning whether the ADEA is justifiable because “[t]hose 40 years old or older are not politically powerless and do not, as a group, suffer from economic disadvantages.”).

3. The most dramatic proposals for new forms of age discrimination tend to be found in student notes, a pattern that could either be seen as reassuring because more established writers are not generating these proposals or deeply concerning because it suggests that the younger generation of legal thinkers may see age discrimination as remarkably unproblematic. See, e.g., David Rosenfield, Note, From California to Illinois to Florida, Oh My!: The Need for a More Uniform Driver’s License Renewal Policy, 12 Elder L.J. 449, 482–83 (2004) (arguing that older drivers should not only be required to undergo “comprehensive and frequent testing” to maintain their driver’s license, but also that that they should clearly be required to report—presumably to the government—“their own medical conditions and medical usage.”); Jessica A. Fay, Note, Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters, 13 Elder L.J. 453, 483 (2005) (arguing that states should implement a capacity test to ensure nursing home residents are capable of voting) (quotation omitted); Ashley E. Rathbun, Comment, Marrying into Financial Abuse: A Solution to Protect the Elderly in California, 47 San Diego L. Rev. 227, 232 (2010) (proposing that California require older adults to obtain proof of mental capacity to marry from a physician or mental health professional before being permitted to wed).
show that arguments for protecting their favored group do not imply that all groups warrant special protection.  

B. The Second Role: Using Litigation to Make Current Systems Vulnerable

Consistent with McCann’s model, the second role for lawyers to play in fostering an elder rights movement would be litigation-oriented. By carefully structuring test cases, lawyers could create valuable legal precedents. Simultaneously, by publically using the law to attack policies and procedures that undermine older adults’ rights, lawyers could reduce resistance to policy reforms. Thus, even without decisive legal victories, a litigation strategy could play a role in enabling older adults to realize more fully their civil rights and civil liberties.

This role would require the legal community to develop the requisite capacity to coordinate and structure litigation to challenge, and ultimately undermine, policies and practices that limit older adults’ rights. A key component of the capacity building would be to develop a sufficient cadre of elder rights “cause lawyers” to coordinate and frame impact litigation. The term “cause lawyer” is somewhat fluid, but is generally used to refer to lawyers who use their professional skills to further a particular form of social change, often because of a commitment to a particular set of ideals. Cause lawyers are typically linked to a broader social agenda and often work with or for cause-specific advocacy groups.

84. Similarly, those interested in protecting other groups from discrimination sometimes express concern that protecting older adults from discrimination will undermine the perceived legitimacy and impact of their efforts. See, e.g., Rhonda M. Reaves, One of These Things Is Not Like the Other: Analogizing Agerism to Racism in Employment Discrimination Cases, 38 U. Rich. L. Rev. 839 passim (2004) (arguing that analogizing age-based employment discrimination and race-based employment discrimination will negatively impact black plaintiffs).

85. Sarat & Scheingold, Cause Lawyering, supra note 53, at 5–8 (discussing why, despite coining the term “cause lawyering,” they resist the urge to precisely define it).

86. It should also be noted that cause lawyering includes several distinctive modes of practice. See Thomas M. Hilbink, Review Essay, “You Know the Type . . . :” Categories of Cause Lawyering, 29 Law & Soc. Inquiry 657, 662–65 (2004) (outlining the evolution of cause lawyering and the subsequent styles of practice for cause attorneys).

87. In the context of the disability rights movement, a recent article defined cause lawyers as “attorneys who spend a significant amount of their professional time designing and bringing cases that seek to benefit various categories of people with disabilities and who have formal connections with disability rights
Cause lawyering has been critical to the success of litigation-based civil rights strategies. Across a wide variety of issues, cause lawyering has helped dismantle discriminatory legal regimes. In part this has been because, by carefully pursuing and coordinating litigation, cause lawyers have successfully leveraged the courts to establish high-impact legal precedents and enforce key legal rights. In part it is because cause lawyers have helped articulate key movement values by publically framing group grievances.

In the elder rights context, however, such cause lawyering is currently limited. While there are many attorneys providing direct representation to older adults through organizations funded by the Legal Services Corporation and the Older Americans Act (OAA), funding restrictions, and funder preferences, among other organizations.” Michael Ashley Stein, Michael Evans Waterstone & David B. Wilkins, Book Review, Cause Lawyering for People with Disabilities, 123 HARV. L. REV. 1658, 1661 (2010).

88. See generally SARAT & SCHEINGOLD, CAUSE LAWYERING, supra note 53 (featuring a series of essays showcasing different types of cause lawyers and their impacts).

89. See Michael A. McCann & Helena Silverstein, Rethinking Law’s “Allurements”: A Relational Analysis of Social Movement Lawyers in the United States, in CAUSE LAWYERING: POLITICAL COMMITMENTS & PROFESSIONAL RESPONSIBILITIES 261–92 (Austin Sarat & Stuart Scheingold, eds., 1998) (responding to critiques of litigation-based approaches to cause lawyering, and finding—in the context of two particular causes—that cause lawyers used litigation and legal techniques in a politically sophisticated manner that complemented other movement strategies).

90. See Stein, Waterstone & Wilkins, supra note 87, at 1693–94 (noting that civil rights movements have used Supreme Court litigation to “articulate key values”).

91. See Rebekah Diller & Emily Savner, A Call to End Federal Restrictions on Legal Aid for the Poor, BRENNAN CENTER FOR JUST. 1 (2009), available at http://www.brennancenter.org/content/resource/a_call_to_end_federal_restrictions_on_legal_aid_for_the_poor/ (discussing how funding restrictions limit the advocacy tools available to lawyers working on behalf of poor clients and consequently restrict the ability of such attorneys to promote or effectuate systemic reforms); Laura Beth Nielsen & Catherine R. Albiston, The Organization of Public Interest Practice: 1975–2004, 84 N.C. L. REV. 1591, 1616–17 (2006) (explaining that the manner of government funding of public interest law organizations “negatively impacts their efforts to promote social change”); Penelope A. Hommel, Elder Rights Advocacy & the Legal Services Corporation Restrictions: How Serious is the Conflict? 31 CLEARINGHOUSE REV. 256, 259, 261–67, 269–70 (1997), available at http://www.tsg.org/bpnotes/march98/advocacy.htm (discussing the restrictions imposed on legal services funded under the OAA and provided by legal service organizations also funded by the Legal Services Corporation and their implications).

92. For example, legal service providers funded under the OAA typically have received their funding directly from public social service agencies and, as such, may fear pursuing impact-oriented litigation challenging these entities’ policies or
factors, significantly limit their ability to pursue impact litigation. In part as a consequence, only a handful of organizations are actively engaged in pursuing impact litigation on behalf of older adults. The scope of impact litigation brought on behalf of older adults is also relatively limited. Current elder rights-oriented impact litigation focuses on problems that arise because of functional age, not chronological age. Moreover, the majority of such litigation focuses either on access to housing or access to public benefits. For example, attorneys have chipped away at policies and procedures that limit the ability of older adults to choose where they live by bringing suit under the federal FHA, which prohibits discrimination on the basis of disability. The ADA has also been successfully employed to protect the housing-related rights of older adults, including those of long-term care residents.

93. While the group is small, it includes a number of noteworthy organizations, including the National Senior Citizens Law Center, which has been active in litigating federal and state policies that deny or fail to provide needed public benefits to older adults, including in the long-term care context; the AARP Litigation Foundation, which does a substantial amount of fair housing-related work; and Bet Tzedek, which litigates on behalf of older adults through multiple projects, including its Nursing Home Advocacy Project. It also includes some disability rights-oriented organizations that have broadened their reach to the intersection of aging and disability such as the Judge David L. Bazelon Center for Mental Health Law, which has expanded its focus to consider the special challenges facing older adults with mental illness. See JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, CIVIL RIGHTS & HUMAN DIGNITY: THREE DECADES OF LEADERSHIP ADVOCACY FOR PEOPLE WITH MENTAL DISABILITIES 112–13 (2002).

94. Even AARP Foundation Litigation, one of the handful of organizations actively involved in elder rights litigation, is focused primarily on the intersection of aging and disability. Cf. Daniel B. Kohrman, On the Road Again—Wait, Not You! Driver Discrimination in America, 34 HUM. RTS. 16, 16–17 (2007) (noting that AARP is not engaged in attacking—either from a legal or from an advocacy perspective—laws that impose different requirements on older drivers; rather, AARP limits its involvement in this issue to offering driving-related education for older drivers).

95. Accord Erin Ziaja, Note, Do Independent and Assisted Living Communities Violate the Fair Housing Amendments Act and the Americans with Disabilities Act?, 9 ELDER L.J. 313 (2001) (discussing the use of the Fair Housing Amendments Act and the ADA to attack discriminatory senior housing policies).

96. For example, FHA cases have successfully been brought on behalf of seniors whose housing providers failed to make “reasonable accommodations” in rules, policies, practices or services as required by the Act. See, e.g., Weinstein v. Cherry Oaks Ret. Cmty., 917 P.2d 336, 339–40 (Colo. App. 1996) (holding that a residential care facility violated the Colorado Fair Housing Act when it refused to permit a wheelchair-bound resident to use his wheelchair in the facility’s dining room).

97. For example, a case currently pending in the U.S. District Court for the
Similarly, impact litigation has been used to help older adults obtain access to public benefits, including vital health-related benefits. For example, in early 2010, a federal district court granted a preliminary injunction enjoining California from implementing new eligibility criteria for adult day care services under California’s Medicaid program that would have made it much harder for disabled older adults to qualify for such care.\(^98\)

These types of impact litigation are important and influential. Fair housing litigation, for example, has allowed many elderly individuals to live where they wish and served to put housing providers on notice of the need to accommodate individual needs.\(^99\) Nevertheless, the current level and scope of elder rights-oriented impact litigation falls far short of a comprehensive or systemic attack on systems and structures that undermine the civil rights and civil liberties of older adults. As a result, important civil rights violations go unaddressed. For example, the mandatory reporting statutes discussed previously have profound implications for the basic civil rights and civil liberties of older adults, but the legal permissibility of such statutes has yet to be challenged in a court of law. By comparison, mandatory child abuse reporting statutes—statutes which require significantly less justification\(^100\)—

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98. See Cota v. Maxwell-Jolly, 688 F. Supp. 2d 980, 985 (N.D. Cal. 2010). The injunction was the result of a suit brought by lawyers from Disability Rights California, the National Health Law Program, AARP Foundation Litigation, and a private law firm on behalf of a group of elderly individuals and persons with disabilities in need of adult day care. Id. In granting the preliminary injunction, the court found that the plaintiffs showed a likelihood of success on claims under the federal Medicaid Act, the ADA, the Rehabilitation Act, and the Fourteenth Amendment’s due process clause. Id. at 991–97.

99. This is true even though not all such litigation is successful. See, e.g., Herriot v. Channing House, No. C 06-6323 JF (RS), 2009 WL 225418, at *5–7 (N.D. Cal. Jan. 29, 2009) (finding that the Fair Housing Amendments Act did not require a ninety-year old resident of a continuing care retirement community to be permitted to remain in an independent living unit because the resident’s request to remain with privately paid care was not reasonable, and that the refusal also did not constitute impermissible discrimination in violation of the ADA; the case, however, was subsequently settled out of court).

100. Adults have greater rights than children, and, accordingly, the courts grant the government greater latitude in regulating children’s rights than in regulating adults’ rights. See Hodgson v. Minnesota, 497 U.S. 417, 482 (1990) (Kennedy, J., concurring) (“The law does not give to children many rights given to
have been the subject of many legal challenges.\footnote{101}

The experience of the disability rights movement suggests that cause lawyering should be a top priority for those interested in fostering an elder rights movement. While litigation has been an important part of the disability rights movement, that litigation has been far less successful than hoped.\footnote{102} Samuel Bagenstos has adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent."); Bellotti v. Baird, 443 U.S. 622, 634 (1979) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."). This means that challenges to elder abuse reporting statutes should meet with greater success than challenges to child abuse reporting statutes. \textit{Cf.} Aid for Women v. Foulston, 441 F.3d 1101, 1120 (10th Cir. 2006) (explicitly recognizing that children’s informational privacy rights are diminished with respect to those of adults when considering an informational privacy-based challenge to a mandatory child abuse reporting statute).

\footnote{101. See, e.g., \textit{Foulston}, 441 F.3d at 1116 (10th Cir. 2006) (considering a constitutional challenge to a Kansas child abuse reporting statute that mandated reporting of the consensual sexual activity of minors and finding that the statute impacted minors’ rights to informational privacy); \textit{Planned Parenthood Affiliates of Cal.} v. \textit{Van de Kamp}, 226 Cal. Rptr. 361, 363 (Ct. App. 1986) (successfully challenging the California Attorney General’s interpretation of a mandatory child abuse reporting statute that required reporting of any minor under the age of fourteen who presented any “indicia of past or present sexual activity.”); \textit{People v. Younghamz}, 292 Cal. Rptr. 907, 910 (Ct. App. 1984) (holding that a defendant’s constitutional rights were not violated when a counselor reported his ongoing sexual abuse of a minor to the State after defendant had been warned such a report was required and he nevertheless continued discussing his abusive behavior with the counselor); \textit{People v. Hodges}, 13 Cal. Rptr. 2d 412, 420–21 (App. Dep’t Super. Ct. 1992) (defendants, a pastor and assistant pastor of a church who also held similar positions at a private school operated in conjunction with the church, unsuccessfully challenged convictions for failure to report child abuse on First Amendment and due process grounds, among others); \textit{Barber v. Florida}, 592 So. 2d 330, 335 (Fl. Dist. Ct. App. 1992) (a foster care counselor unsuccessfully challenged conviction for failure to report child abuse on the grounds that the underlying statute was overbroad); \textit{Minnesota v. Grover}, 437 N.W.2d 60, 61 (Minn. 1989) (elementary school principal charged with failing to report child abuse under a state law unsuccessfully challenged the law as vague and overbroad); \textit{Washington v. Motherwell}, 788 P.2d 1066, 1067 (Wash. 1990) (religious counselors unsuccessfully tried to overturn their convictions for failure to comply with a child abuse reporting statute on first amendment grounds, but an ordained minister had his conviction reversed after the court interpreted the relevant statute as not applying to those acting in the role of clergy).

\footnote{102. See \textit{Samuel R. Bagenstos, Law and the Contradictions of the Disability Rights Movement} 1–2 (2009) (describing disability rights hopes as largely unfulfilled and noting that the Supreme Court has read the ADA narrowly, that ADA plaintiffs lose their cases at “astounding rates,” that certain ADA provisions are “wildly underenforced,” and that the employment of persons with
argued that one reason why ADA claims have failed to achieve significant success is that tensions within the diverse disability rights movements have allowed courts to choose among competing principles articulated by disability rights advocates with competing visions of the movement. In their discussion of Bagenstos’ arguments in a recent book review, Michael Stein, Michael Waterstone, and David Wilkins suggest that the failure of disability rights advocates to coordinate their message before the Supreme Court can be explained by “the almost complete absence of disability rights ‘cause lawyers’ in the ADA cases that have gone to the Supreme Court.” This, in turn, has led to a failure to ensure that claims before the Supreme Court are framed in a way that maximizes their potential to advance systemic reforms.

The implications for an elder rights movement are clear: developing a cadre of elder rights cause lawyers may be necessary to shape and coordinate an effective litigation strategy. It is critical, however, that such lawyers be aware of and in communication with more traditional elder law practitioners. A coordinated litigation approach that frames legal issues in a way that maximizes the possibility of in-court success will require not only pursuing cases capable of setting favorable precedents, but also avoiding cases prone to setting problematic precedents. By working with the private bar, cause lawyers can help the bar think about the implications of its cases for the elder rights movement. While lawyers who have undertaken representations must be loyal and vigorous in their advocacy for their clients, this does not preclude lawyers from thinking seriously about what cases they take and under what circumstances they seek appellate review. Pursuing the wrong case at the wrong time may have implications far beyond the individual client context that warrant consideration in deciding how to proceed.

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disabilities “has remained stagnant at best.”); Stein, Waterstone & Wilkins, supra note 87, at 1658 (noting the particular failure of employment-related ADA claims).  
103. See BAGENSTOS, supra note 102.  
104. Stein, Waterstone & Wilkins, supra note 87, at 1661.  
105. Id. at 1692–97 (also indicating that this has meant that Supreme Court litigation has not been an effective tool for articulating the values of the disability rights movement).
C. The Risks and Limitations of Legal Mobilization

The preceding sub-sections explained that two changes are necessary for the legal community to position itself to advance elder rights as a movement. First, a significant portion of attorneys, especially elder law attorneys, must come to recognize the civil rights concerns facing older adults and openly label them in rights terms. Second, the elder law bar must expand its cadre of “cause lawyers” to ensure that there will be sufficient lawyers willing and able to structure litigation to advance systemic reforms.

In calling for a rights-focused approach to addressing the civil rights problems facing older adults, especially one with a significant litigation element, this article rejects as overbroad the skepticism of rights critics who blame a focus on legal rights for diverting resources and attention from allegedly more appropriate political strategies for achieving social change. The current predicament of elder rights illustrates the limitations of this critique by suggesting that, at the very least, a focus on rights is of significant value where the rights in question have not yet been recognized as such. In the context of elder rights, there has yet to emerge any meaningful, broad-based political agitation, and none is likely to emerge unless these political actors are aware of these problems and consider them to be important ones. By labeling and describing these problems as ones that threaten rights, and especially ones that threaten constitutional rights, a rights-based approach can both bring needed attention to them and elevate their perceived importance. As such, it is not an alternative to a political strategy, but potentially a prerequisite for one.

Critics of rights-based approaches also warn that significant losses in court may not only set detrimental legal precedents, but...
may sap a movement’s energy. However, this risk is easily outweighed by the potential benefits of legal mobilization. At the current time, there is no meaningful elder rights movement from which a legal mobilization strategy could sap resources or attention. Moreover, to the extent that unsuccessful court battles could harm an elder rights social movement, the bulk of the damage has already been done. In the United States, serious debate as to the constitutionality of age discrimination all but disappeared after the Supreme Court reaffirmed its decision that age was not a suspect class for equal protection purposes in 1981.

There is also little discussion of elders’ other legal concerns from a rights perspective. Indeed, the legal field has largely absented itself from public policy discussions that surround aging, and, to the extent that it has entered these discussions, has largely done so from social services and public policy perspectives, not from a uniquely legal perspective.

The potentially more significant risk of legal mobilization in the context of elder rights is not that a litigation strategy would undermine an elder rights movement, but that it would spark an anti-elderly backlash that would endanger old-age entitlement programs and other forms of pro-elderly discrimination. However, it is questionable that a legal mobilization approach would generate significantly more anti-elderly sentiment than already exists, given that the past two decades have already seen a rise in negative attitudes towards older adults. Moreover, the

108. See id.
109. See Kohn, Rethinking, supra note 4 at 231–32 (discussing the consensus that emerged following the Supreme Court’s decision in Vance v. Bradley, 440 U.S. 93 (1979), that age discrimination is constitutional).
110. See Israel Doron, Elder Law: Current Issues & Future Frontiers, EUR. J. AGEING (2006) (arguing that the legal field and its approach to analyzing public policy has yet to play a significant role in shaping the field of gerontology).
111. This concern has been voiced by others. See, e.g., JOHN MACNICOL, AGE DISCRIMINATION: AN HISTORICAL AND CONTEMPORARY ANALYSIS 267 (2006) (“Combating age discrimination in employment may lead on to a wider, and much-needed, onslaught upon ageism in social relations and attitudes. On the other hand, it may be the Trojan horse of an attack upon the welfare rights of older people.”). It helps explain the notable dearth of impact litigation challenging age discrimination.
112. Much has been written about the negative attitudes Americans have toward older adults. See, e.g., Binstock, Contemporary Politics, supra note 38, at 257 (“[t]hroughout the 1980s, the 1990s, and into the twenty-first century, the new stereotypes, readily observed in popular culture, have depicted aged persons as a new elite—prosperous, hedonistic, politically powerful, and selfish.”); Debra Street
legal community’s silence on elder rights and age discrimination has not prevented a number of age-based entitlements from being scaled back in recent years,\(^{113}\) nor has it prevented the emergence of new forms of age discrimination in legal systems designed to address elder abuse and neglect.\(^{114}\) Rather, through its silence, the legal community creates the impression that it condones age discrimination and ageist legal systems and structures. Given this history of actual or apparent complicity, legal mobilization may be a particularly powerful component of an elder rights movement.

The conclusion that the expected benefits of a legal mobilization approach outweigh the potential costs is further supported by recognizing that the types of legal tactics proposed in this article could have significant instrumental value even if they failed to foster an elder rights movement. Even if no such movement emerges, reframing elder rights in the language of civil rights has the potential to change how the legal community, policymakers, and even the general public think about older adults. This, in turn, has the potential to profoundly shape policy preferences. The political vocabulary of civil rights is one premised on the idea that all persons are equal, and that individuals cannot be deprived of benefits or liberties based merely on their group membership status; rather, there must be some more meaningful justification for such deprivations. By bringing elder rights issues under the rubric of civil rights, lawyers may be able to change societal and political assumptions about policies affecting older adults, such that older adults are presumed to have the same rights and interests as younger adults, and it is assumed that they will not be treated otherwise unless there is a bona fide reason for differential treatment.

\(^{113}\) For example, the Social Security Reform Act of 1983 subjected social security benefits to taxation and raised the eligibility age for claiming benefits, and the Medicare Modernization Act of 2003 raised Medicare Part B premiums, especially for higher-income beneficiaries. For a description, see generally Kohn, *Rethinking*, supra note 4.

\(^{114}\) See *supra* Part II.A.
IV. CONCLUSION

This article has posited that an elder rights movement could help advance and protect the civil rights and liberties of older adults, and that the legal community can play a critical role in generating such a movement. Specifically, by recognizing the civil rights problems faced by older adults and labeling them in rights terms, the bar can help legitimize elder rights as a cause and define collective goals. Also, by helping to bring and to target impact litigation designed to undermine age discrimination and ageist legal structures, the bar can potentially also help set favorable legal precedents and create an environment ripe for social reform.

Neither of these changes will occur overnight or spontaneously. They will instead require deliberate efforts and a commitment of additional resources. There are a number of players whose participation in this process could be valuable. By including civil rights issues in the growing number of elder law courses available at U.S. law schools, elder law professors can help the next generation of elder law attorneys see the problems older clients face through a civil rights lens, and potentially encourage some to pursue cause lawyering on behalf of older adults. Those teaching civil rights-oriented classes can also contribute by integrating elder rights concerns into their courses and discussing such concerns from a civil rights perspective. The practicing bar, particularly those engaged in providing continuing legal education to elder law practitioners, can play a similar role by encouraging attorneys to understand and appreciate the civil rights implications of their daily interactions with older clients. Foundations and others interested in funding civil rights issues could leverage their resources to great advantage by providing support for cause lawyering aimed at age-specific concerns.

In short, the process of creating an elder rights movement, and positioning the legal community to play a role in fostering it, will take time, resources, and deliberate effort. This article is intended as a proposal for beginning that process. It is also an open invitation to those interested in promoting elder rights to enter into a dialogue: a dialogue about whether the time has come for an elder rights movement, and what it would take to build one.