
BIBLIOGRAPHY

GERONTOLOGY AND THE LAW: A SELECTED ANNOTATED BIBLIOGRAPHY: 1995-98 UPDATE

COMPILED BY

RACHEL PERGAMENT^{*}
& BRIAN RAPHAEL^{**}

PREFACE

This bibliography is the 1995-98 update to “Gerontology and the Law: A Selected Bibliography.” The first “Gerontology and the Law” bibliography was published in the *Law Library Journal* in 1980.¹ Five

* Formerly Collection Development/Acquisitions Librarian, University of Southern California Law Library. B.S., 1988, Loyola University, Chicago; M.P.A., 1990, University of Southern California; M.L.I.S., 1995, University of California at Los Angeles.

** Assistant Director, University of Southern California Law Library. B.A., 1987, University of California at Los Angeles; J.D., 1990, UCLA School of Law; M.L.S., 1992, University of California at Los Angeles.

The bibliographers wish to express their sincere appreciation to Palma Denham for her expert assistance, dedication, and care in the typing, formatting, and proofreading of this bibliography, as well as for her infinite patience. The bibliographers would also like to thank Michael O'Hara for his assistance with verifying citations.

The cooperation and support of Albert Brecht, Associate Dean, Chief Information Officer, and John Stauffer Professor of Law; Denise Russell, formerly Assistant Director of the Law Library; Leonette Williams, Associate Director for Collections and Technical Services; and the entire Law Library greatly contributed to the completion of this work.

1. 73 L. LIBR. J. 255 (1980).

subsequent updates were published in the *Southern California Law Review* between the years 1982 and 1995.² The original bibliography and the previous five updates all provide a list of citations to books, reports, and articles focusing on legal, public policy, and other law-related topics concerning the elderly or aging process. This update is similar to its predecessors in terms of its coverage of topics and types of materials, but differs significantly in that appearing with each citation is a descriptive annotation that summarizes the topics and/or major points discussed in the cited book or article.

The bibliographers had to be particularly selective for this update, partly because of the voluminous amount of material related to “Gerontology and the Law” that was published during 1995-98, and partly because the decision to make an annotated bibliography meant that fewer citations could be included. In deciding which articles to include in this update, the bibliographers considered the emphasis placed on the gerontological as well as legal aspects of whatever topics were being discussed. Thus, some articles were excluded because the bibliographers felt that they did not focus enough on the elderly or have a strong enough connection with the law.

Excluded altogether from this bibliography were publications directed toward the general public (e.g., self-help publications and articles from popular magazines), book reviews, newspaper articles, and other articles reporting new laws or other legal developments concerning the elderly without incorporating much analysis or commentary. Although included in some of the previous updates, conference proceedings, dissertations, and government documents were also excluded from this update. In addition, the bibliography is limited to English language publications and emphasizes “Gerontology and the Law” from an American perspective. However, some works offering an international perspective were included. Also, new editions of previously published books were included, though for books that had more than one edition published during the time period covered by this update, only the most recent edition was included.

The bibliographers searched online databases periodically during 1998 and early 1999. Many of the searches conducted during the Spring and Summer of 1998 were rerun in December 1998 and February 1999.

The following databases were consulted for this update:

2. 56 S. CAL. L. REV. 289 (1982); 57 S. CAL. L. REV. 631 (1984); 60 S. CAL. L. REV. 897 (1987); 64 S. CAL. L. REV. 1675 (1991); 69 S. CAL. L. REV. 287 (1995).

Ageline (produced by the American Association of Retired Persons)*

Books in Print (produced by R.R. Bowker Co.)*

Legal Resource Index (produced by Information Access Co.;
searched via Westlaw)

Journals and Law Reviews (Westlaw database)

Social Scisearch (produced by the Institute for Scientific*
Information)

As in previous updates to this bibliography, citations do not conform completely to *The Bluebook: A Uniform System of Citation*. In particular, names of publishers and places of publication are included in the book citations and the titles of law reviews and other journals are not abbreviated in the article citations.

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* DIALOG database, searched via Westlaw.

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I. GENERAL WORKS ON LAW AND AGING

Books

BROWN, DAVID K. INTRODUCTION TO PUBLIC POLICY: AN AGING PERSPECTIVE. Lanham, MD: University Press of America, 1997.

This book examines public policies, programs, and services designed to meet the needs of older Americans. The author discusses how federal initiatives for the elderly have expanded during the past four decades. Among the topics he covers in this book are health care reform efforts, long term care, managed care, and how state-local and state-federal interactions affect programs for the elderly. A summary of the activities of the 1995 White House Conference on Aging and an examination of efforts to reform Social Security are also included. The conclusion includes a substantive discussion of possible future policy initiatives.

COX, HAROLD, ED. *AGING*, 12TH ED. Guilford, CT: Dushkin Publishing Group, 1998. This book is an anthology of essays discussing the problems and opportunities confronting older adults. The essays are organized into eight categories. The categories include the phenomenon of aging, the quality of later life, societal attitudes toward old age, problems and potentials created by the aging process, the social implications of early retirement, the experience of dying, living environments in later life, and social policies, programs, and services for older adults.

FROLIK, LAWRENCE A. & KAPLAN, RICHARD L. *ELDER LAW IN A NUTSHELL*. St. Paul, MN: West Publishing, 1995. One of the West Group's "In a Nutshell" series, this book provides a comprehensive overview of legal issues concerning the elderly. It is directed at lawyers, law students, educators, social workers, medical professionals, and others who work with the elderly. Topics covered include ethical considerations, health care decision making, Medicare/Medicaid, long-term care insurance, nursing homes and housing options, guardianships, age discrimination in employment, and elder abuse and neglect. A table of cases is also included.

KAPP, MARSHALL B. *KEY WORDS IN ETHICS, LAW AND AGING: A GUIDE TO CONTEMPORARY USAGE*. New York: Springer Publishing Company, 1995. This is an annotated glossary designed to reduce the linguistic confusion surrounding many legal and ethical terms and phrases found in the gerontology literature. The book is arranged alphabetically and definitions of the common usage of the words are provided along with subsidiary definitions. Related terms are cross-referenced. The focus of the book is on legal and ethical concepts which may be encountered in health and human services administration, to the exclusion of other areas which affect the elderly, such as disabilities, housing, recreation, and property.

- MOON, MARILYN & MULVEY, JANEMARIE. ENTITLEMENTS AND THE ELDERLY: PROTECTING PROMISES, RECOGNIZING REALITY. Washington, D.C.: Urban Institute Press, 1996. In this examination of the three major entitlement programs available to older Americans (i.e., Social Security, Medicare, and Medicaid), the authors argue for maintaining entitlements for the elderly within the recognized constraints posed by the current budget climate and an aging population. The authors propose changes to entitlement programs involving less frequent cost-of-living increases, shortening the process for raising the eligibility age for full Social Security benefits, and implementing an expansion of public long term care services. The conclusion states that constructive reforms may require additional spending in some areas and large cuts in others.
- POSNER, RICHARD A. AGING AND OLD AGE. Chicago: University of Chicago Press, 1995. The author, a judge on the U.S. Seventh Circuit Court of Appeals, is a leading advocate of the "Law and Economics" philosophy, which he applies to social and legal issues concerning the elderly. He argues that economic theory is a more appropriate model than biology, psychology, sociology, philosophy, or other natural or social science disciplines for explaining the behavior and attitudes associated with aging and the development of public policies concerning the elderly. The book is divided into three parts. "Aging and Old Age as Social, Biological and Economic Phenomena" presents an overview of aging and old age in the United States and relevant economic theories. "The Economic Theory Elaborated and Applied" explores in detail the theories described in the first part. The book concludes with a section entitled "Normative Issues" that examines the implications of the economic theory on elder law.
- SCHARLACH, ANDREW E. & KAYE, LENARD W., EDS. CONTROVERSIAL ISSUES IN AGING. Boston: Allyn and Bacon, 1997. Organized in a debate format, this book examines 20 controversial issues that have arisen because of the changing societal and public policy conceptions of the aged in the United States. Each debate includes a position statement and a rebuttal. Topics include reducing Social Security benefits for upper income individuals, means testing for Medicare coverage, dismantling the public agencies serving the elderly, and private versus public sector financing of long term medical care.
- SCHWARTZ, RONALD J. LAW & AGING: ESSENTIALS OF ELDER LAW. Dallas: Pearson Publications, 1998. This book is intended to be used as a textbook and provides an overview of the current issues in elder

care law. There are fourteen chapters and they cover a wide range of topics of relevance to elderly Americans, including advance directives, patients' rights, entitlement programs, and estate and financial planning. Each chapter is presented in an outline format with questions, notes to readers, and a list of relevant resources included.

Articles

- Binstock, Robert H. *Public Policies on Aging in the Twenty-First Century*. 9 *STANFORD LAW & POLICY REVIEW* 311 (1998). This article reviews public policies that have been adopted over the past 60 years in order to improve social conditions and medical care for older Americans. The first section analyzes the evolution of social and political attitudes toward older persons. The author describes how negative stereotypes of the elderly have been replaced by the "compassionate ageism" that has become the overarching motivation for the majority of policy initiatives focused on geriatric issues. The second part of the article explores the uncertain future of Social Security and Medicare and the problems of financing long term care. The author examines various reform measures designed to keep Social Security solvent, the fiscal outlook for Medicare, and recent policy changes aimed at containing the costs associated with these programs. He provides an explanation of the Balanced Budget Act of 1997, legislation designed to encourage the development of managed care organizations (MCOs) and Medical Savings Accounts (MSAs) to replace traditional open-ended, fee-for-service plans. The final section includes a discussion of the politics of aging. The author critiques the "senior power" model of advocating for social programs designed solely to ameliorate the problems of the elderly while ignoring the problems faced by other segments of the population and concludes that it is neither an "empirically valid nor conceptually sound" approach.
- Gonyea, Judith G. *Age-Based Policies and the Oldest-Old*. 19 *GENERATIONS* 25 (Fall 1995). This article discusses public policy issues related to the oldest-old, defined as those over 75 years of age. The article describes the needs of these individuals and their dependency on increasingly scrutinized large national expenditures. The article also describes how national policies are focused on restructuring entitlements to older Americans. These structural changes include means testing, reducing Medicare coverage, raising the age for eligibility, and increasing taxation of Social Security benefits. The article

suggests that the oldest-old may have the most to gain by changes to entitlement programs. In addition, the article asserts that the best way to achieve equity against the catastrophic costs of long-term care services may be through a functionally-based and not an aged-based program.

Hemp, Susan J. & Nyberg, Cheryl R. *Elder Law: A Guide to Key Resources*. 3 THE ELDER LAW JOURNAL 1 (1995). This research guide is for individuals undertaking legal research related to the elderly. The guide identifies and describes books, periodicals (though not individual articles), library reference tools, databases, electronic discussion groups, organizations, and U.S. government agencies that publish useful materials related to the elderly. Most of the print sources included in this guide are from the mid-1980s. The guide includes three appendices: Appendix A provides a listing (organized by state) of aging agencies, bar association committees and sections, law school courses and clinics, and state law publications; Appendix B lists acronyms related to elder law; and Appendix C lists related subject headings and index terms used in library catalogs, periodical indexes, and other bibliographic sources.

Villa, Valentine M. and others. *Economic Diversity and an Aging Population: The Impact of Public Policy and Economic Trends*. 21 GENERATIONS 13 (Summer 1997). The authors analyze the effects of recent public policies and economic trends on the economic status of older Americans. The authors present statistics to show how a number of elderly subgroups are economically vulnerable. They discuss how the tax cuts and large military spending of the 1980s "brought pressure to reduce domestic spending," resulting in public policies aimed at cost containment, decreasing eligibility for Medicare benefits, and increasing privatization of services without regard to the impact on the elderly. The authors conclude that policy proposals must be designed to ensure "an economically secure old age" for all Americans.

II. INCOME MAINTENANCE AND FINANCIAL/RETIREMENT PLANNING

A. GENERAL WORKS/MISCELLANY (INCLUDING PRIVATE PENSIONS)

Books

- BODIE, ZVI AND OTHERS, EDS. *SECURING EMPLOYER-BASED PENSIONS: AN INTERNATIONAL PERSPECTIVE*. Philadelphia: University of Pennsylvania Press, 1996. This book explores the need for increased pension security for citizens of developed and developing nations. The book includes a summary of facts concerning public and private pensions throughout the world and an evaluation of the positive and negative aspects of these pension systems. Examples are provided illustrating the role sensible tax, insurance and funding policies, investment management, and actuarial oversight play in building and maintaining successful public and private pension systems.
- COSTA, DORA L. *THE EVOLUTION OF RETIREMENT: AN AMERICAN ECONOMIC HISTORY, 1880-1990*. Chicago: University of Chicago Press, 1998. This book is a survey of how people financed their retirements in the United States during the late 19th century and most of the 20th century. Through the use of historical census data, the author shows that during the 19th century, people financed their retirements through Union Army pensions. During the 1920s and 1930s, many states began to provide pensions to the elderly who were needy. These state pension programs were replaced by federal Social Security Old Age Assistance and Old Age Insurance programs. The growth of these programs was a result of the availability of revenue resources and the efforts of elderly pressure groups who brought attention to these programs and fought for continued government financial support of them.
- MAINTAINING PROSPERITY IN AN AGING SOCIETY. Paris: Organization for Economic Cooperation and Development, 1998. This book explains the multifaceted fiscal, social, health, and education policies necessary for maintaining the prosperity of people in Organization for Economic Cooperation and Development (OECD) countries. The book includes a description of a multidisciplinary study undertaken to develop the most effective public policy strategies for the maintenance of prosperity in OECD countries. Among those strategies are encouraging people to work longer and reforming public pension systems to reward individuals who remain in the work force.
- MCGILL, DAN M. AND OTHERS. *FUNDAMENTALS OF PRIVATE PENSIONS, 7TH ED.* Philadelphia: University of Pennsylvania Press, 1996. This book provides an overview of private pension plans in the United States. Divided into five main sections, the book examines the regulatory environment governing pension plans, the various forms of retirement plans available to workers, the economics of pensions, the

funding and accounting environment of private employer-sponsored retirement plans, and the handling of assets in employer-sponsored pension plans.

Articles

- Baumann, Timothy R. *Family Limited Partnerships, Trusts, or Limited Liability Corporations: Which Should the Elderly Choose?* 3 THE ELDER LAW JOURNAL 111 (1995). This article discusses the advantages and disadvantages of three financial planning devices (family limited partnerships (FLPs), trusts, and limited liability companies (LLCs)) and whether the elderly should use them. The author describes how these devices can help individuals protect their assets and save taxes. The author also evaluates how recent court cases and statutes have affected the potential effectiveness of these devices. He concludes that FLPs, which offer less asset protection than trusts, should not be used by elderly clients. He believes that LLCs, on the other hand, do provide the elderly with unique advantages and, though a new device, may be worth employing in conjunction with trusts.
- Dilley, Patricia E. *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security.* 30 LOYOLA OF LOS ANGELES LAW REVIEW 1063 (1997). This article provides a critique of "pension integration," whereby private pension benefits are coordinated and correlated with Social Security benefits, resulting in "lower proportionate pension benefits to low-wage workers than to high wage workers . . ." The author argues that pension integration violates basic entitlement principles that are at the heart of our system of "liberal democratic capitalism." The article begins with a theoretical discussion concerning the function of retirement entitlement. This is followed by a historical look at America's earnings-based entitlement structure and how the dual public-private retirement system developed. The author then focuses on the topic of pension integration, discussing the origin of integration rules, how they have been used, and the attempts made to reform them. She concludes by reviewing various critiques of pension integration and arguing for its elimination.
- Fronstin, Paul. *Employee Benefits, Retirement Patterns, and Implications for Increased Work Life.* 184 EBRI ISSUE BRIEF 1 (April 1997). The author explores why policy makers are concerned about the trend toward early retirement and its relation to Social Security, Medicare, and employee health and retirement benefits. The author also ex-

plores the implications for policies designed to reverse the growth in early retirement and raise the eligibility age for Social Security and Medicare. The article includes a review of the role economic incentives play in early retirement decisions and a summary of empirical literature on the retirement process. The author notes that changing public policy to reverse early retirements would reduce employer flexibility and interfere with the ability of employers to alter compensation packages for individual employees.

- Hardy, Melissa A. & Kruse, Kim S. *Realigning Retirement Income: The Politics of Growth*. 22 GENERATIONS 22 (Spring 1998). The authors discuss income adequacy and individual equity in pension programs for people who belong to the baby boom generation. Members of this group are the first group of people who are expected to assume more direct responsibility for financing their own retirement. This responsibility is the result of economic changes that occurred during the 1970s and 1980s. The authors discuss various reform proposals for Social Security and the reasons why these reform proposals share the common theme that individuals must take more responsibility for funding their own retirement. The authors argue that Social Security's system of taxation and benefits has historically attempted to balance two principles, adequacy and individual equity, but that recent changes have shifted the adequacy/equity balance by increasing taxes and decreasing benefits for higher wage workers.
- Minda, Gary. *Aging Workers in the Postindustrial Era*. 26 STETSON LAW REVIEW 561 (1996). This article explores the emerging intersection of elder law and employment law. The article describes how at-will employment affects older workers (defined in this article as workers over the age of forty) in an environment of "restructuring" and "downsizing." The author argues that the downsizing of aging workers represents "a threat to our society by undermining morale, . . . widening income inequality, exacerbating the pending retirement crisis, and further deepening the unemployability of elderly workers." The author suggests that scholars and practitioners from the fields of employment and elder law collaborate to deal with "the coming challenge of an ever increasing, aging world in the postindustrial age."
- Villani, Patricia J. & Roberto, Karen A. *Retirement Decision-Making: Gender Issues and Policy Implications*. 9(1) JOURNAL OF WOMEN AND AGING 151 (1997). Much of the research on retirement decision-making and retirement planning focuses on men in the labor

force. This article examines the retirement decision-making process from the perspectives of both older men and older women. The authors make recommendations for policy changes, including the elimination of discrimination against women in the workplace. The authors suggest that gender bias in current research results in outdated social policies that fail to address the concerns of women. They argue that extensive research is required to develop and implement innovative pre-retirement planning programs that assist all workers and that more longitudinal studies comparing the behaviors of men and women in the workplace should be performed to eliminate gender-based discrimination in retirement policies.

Voirin, Michel. *Private and Public Pension Schemes: Elements of a Comparative Approach*. 48(3-4) INTERNATIONAL SOCIAL SECURITY REVIEW 91 (1995). This article presents a summary of the major trends in public and private pension schemes. The author applies a matrix as an analytical tool to compare public and private pension systems. In addition, the author explains the benefits and consequences for businesses, workers, and states when private pension plans are developed and used to fill the gaps left by public pension plans. He concludes that differences existing between public schemes in different countries cannot always explain why the private schemes have developed unequally.

B. SOCIAL SECURITY/PUBLIC PENSIONS

Books

AARON, HENRY J. AND OTHERS. *THERE WHEN YOU NEED IT: SAVING SOCIAL SECURITY FOR FUTURE GENERATIONS OF AMERICANS*. New York: Century Foundation Press; Washington, D.C.: Distributed by Brookings Institution Press, 1998. The authors argue that the predictions that the Social Security system will fail due to rising costs and an increase in the number of people who are expected to retire are greatly exaggerated. The authors discuss the economic circumstances that different generations have faced and analyze how changes in the Social Security system have affected life in the United States. The authors examine various economic assumptions which underlie current reform efforts and scrutinize proposals to privatize Social Security by transforming it from an insurance program to a system of Individual Retirement Accounts.

- BALL, ROBERT M. STRAIGHT TALK ABOUT SOCIAL SECURITY: AN ANALYSIS OF THE ISSUES IN THE CURRENT DEBATE. New York: Century Foundation Press; Washington, D.C.: Distributed by Brookings Institution Press, 1998. In this book, the author attempts to correct the misinformation that has been reported about the future financing of the Social Security system. Much of this misinformation has become part of conventional wisdom and has added to a growing lack of confidence in the Social Security system. The author also analyzes various privatization proposals and discusses ideas for reform.
- CARTER, MARSHALL N. & SHIPMAN, WILLIAM G. PROMISES TO KEEP: SAVING SOCIAL SECURITY'S DREAM. Washington, D.C.: Regnery Publishing, 1996. The authors explore the impending financial collapse of the Social Security system and argue for the privatization of the current system through the creation of Personal Social Security Accounts. Under this system, participants would have a full range of investment options for their personally controlled accounts, which would be funded by mandatory payroll deductions. The authors argue that Personal Social Security Accounts will increase the U.S. savings rate, raise the level of retirement benefits, and reduce payroll taxes. A review of the origins and history of Social Security and an explanation of the future problems faced by the Social Security system due to the impending retirement of baby boomers are also provided.
- DIAMOND, PETER A. AND OTHERS, EDS. SOCIAL SECURITY: WHAT ROLE FOR THE FUTURE? Washington, D.C.: National Academy of Social Insurance: Distributed worldwide by the Brookings Institution Press, 1996. This book examines the future of old-age protection in the United States under the present Social Security system. Included in this discussion is an analysis of Social Security from economic, actuarial, and public policy perspectives. The book also explores the impact of mortality levels, birth rates, inflation, wage levels, and pension benefits on the income of future retirees. A review of social security programs from around the world and recent social security reforms in Chile are included.
- KINGSON, ERIC R. & SCHULZ, JAMES H., EDS. SOCIAL SECURITY IN THE 21ST CENTURY. New York: Oxford University Press, 1997. This collection of 18 essays focuses on the challenges faced by Social Security in the twenty-first century. An overview of the Social Security system and its historical development introduces the problems facing Social Security. Among the solutions proposed in this book for

solving the problems faced by Social Security are means testing and altering the income allocation system for people with disabilities. Other topics covered in this book are gender equity in the provision of Social Security benefits, the effects of Social Security on work and the economy, and the contradictions between high public support for Social Security and low public confidence in the system.

LIGHT, PAUL C. *STILL ARTFUL WORK: THE CONTINUING POLITICS OF SOCIAL SECURITY REFORM*, 2ND ED. New York: McGraw-Hill, 1995.

This book describes the passage of the 1983 legislation that enabled the Social Security system to remain solvent. The book discusses the roles of the president and Congress in resolving this crisis, the functions of the Social Security system, the economic and demographic assumptions which precipitated the crisis, and the events which lead up to solving the crisis.

MIDGLEY, JAMES & SHERRADEN, MICHAEL W., EDS. *ALTERNATIVES TO SOCIAL SECURITY: AN INTERNATIONAL INQUIRY*. Westport, CT: Auburn House, 1997.

This book provides an international perspective on the debate over reforming the United States Social Security system. An examination of the history of Social Security and the current problems affecting Social Security's fiscal viability, economic development, and managerial efficiency introduce the discussion. The book also provides a detailed analysis of the social security systems in Australia, Singapore, and Hong Kong and a critique of the new social security system in Chile. In addition, outlines of changes taking place in the British and Kenyan social security systems are included. These international models serve as a basis for predicting changes that may occur in the Social Security system in the United States.

REPORT OF THE 1994-1996 ADVISORY COUNCIL ON SOCIAL SECURITY. Washington, D.C.: Advisory Council on Social Security, 1997.

This two-volume set reports on the findings and recommendations of the 1994-1996 Advisory Council on Social Security. Volume one identifies areas of concern regarding the financial soundness of Social Security and discusses three options for reform. These options include maintaining benefits through an increase in income taxes on benefits, creating individual accounts with a portion of payroll taxes allocated to self-directed accounts, and creating mechanisms for placing the majority of payroll taxes into self-directed personal security accounts. Volume two provides a summary of the technical panel's statements on the trends and issues pertaining to retirement savings.

Articles

- Bosworth, Barry & Burtless, Gary. *Budget Crunch: Population Ageing in Rich Countries*. 15 BROOKINGS REVIEW 10 (Summer 1997). Although industrialized nations all face the challenge of an increasingly older population, a consensus about this issue has not emerged. This article analyzes the funding difficulties confronting the social security systems in the United States, France, Germany, Japan, and the United Kingdom. An analysis of the demographic changes and the availability of public programs in each country underscores the fact that each country is affected by aging differently. The authors explore methods to restore long-term solvency to public pensions and examine four alternatives for reforming pensions. These alternatives include cutting benefits, increasing contribution rates and raising the retirement age, and moving away from a pay-as-you-go system to one that incorporates more "advance financing." The authors also analyze proposals to address the financing problem through tax increases. The authors argue these proposals are inherently divisive because they create dramatically different contribution and benefit levels.
- Burke, Karen C. & McCouch, Grayson M.P. *Women, Fairness, and Social Security*. 82 IOWA LAW REVIEW 1209 (1997). This article focuses on the forces that have shaped the Social Security system and the theories behind some of the current reform proposals. The authors are particularly concerned about how the Social Security system treats women. They argue that many of the inequities found in the Social Security benefit structure could be reduced by introducing "earnings sharing" and eliminating the system of spousal benefits. The authors explore the topic of Social Security privatization, which they criticize because it rejects the "fundamental premise of compulsory, universal participation." They conclude that the Social Security system "serves more than a single objective; its future depends both on its adaptability to changing family and social patterns and on . . . its ability to accommodate the competing goals of individual equity and social adequacy."
- Devlin, Steven J. & Arye, Lowell. *The Social Security Debate: A Financial Crisis or a New Retirement Paradigm?* 21 GENERATIONS 27 (Summer 1997). This article investigates the financial and demographic challenges facing Social Security. The authors examine how the aging of America's population is creating greater dependency upon entitlement programs. The authors argue that this dependency threatens the current Social Security system. The article also de-

scribes some of the proposals from the White House Advisory Council on Social Security. The authors discuss the reform proposals for privatizing Social Security. They argue that none of the current proposals provides a mechanism for improving the well-being of all retirees, eliminating poverty in old age, or removing economic disparities in society.

Forman, Jonathan B. *Reforming Social Security to Encourage the Elderly to Work*. 9 STANFORD LAW AND POLICY REVIEW 289 (1998). This article discusses how the Social Security system currently discourages elderly individuals from remaining in the workforce. The author examines proposals that would encourage the elderly to continue working beyond the age of 62. Among the proposals the author recommends is the creation of Individual Social Security Retirement Accounts (ISSRAs) for employees who decide to work past age 62. ISSRA accounts would grow through both investment income and "any Social Security contributions attributable to earnings after age sixty-two." The author believes the ISSRA system would be beneficial to both older Americans as well as the country as a whole.

Forman, Jonathan B. *Whose Pension Is It Anyway?: Protecting Spousal Rights in a Privatized Social Security System*. 76 NORTH CAROLINA LAW REVIEW 1653 (1998). This article discusses proposals to privatize the Social Security system through a system of "individual retirement savings accounts" (IRSAs). These accounts would function "much like today's Individual Retirement Accounts . . . and employer 401(k) savings plans." The author first provides an overview of the Social Security system and examines the need for reform. With respect to IRSAs, the author is primarily concerned that protections be put in place to ensure that spouses receive adequate income. The author "outlines a modest proposal for spousal protections under [a system of] IRSAs."

Kingson, Eric & Quadagno, Jill. *Social Security: Marketing Radical Reform*. 19 GENERATIONS 43 (Fall 1995). This article provides a review of the current Social Security financing problem and selected proposals for restoring the long-term solvency of the Social Security trust fund. Proposals to reform Social Security include means testing, privatization, and scaling back benefits. The authors conclude by suggesting that the projected financing problems should be addressed through a combination of tax increases and benefit reductions. They argue that unless this is accomplished, the Social Security system will be destroyed.

- Moore, Kathryn L. *Privatization of Social Security: Misguided Reform*. 71 TEMPLE LAW REVIEW 131 (1998). This article describes some of the pending proposals to privatize the Social Security system and discusses some of the practical and theoretical arguments against privatization. The practical drawbacks to privatizing that are discussed in the article are the exposure of employees to investment risk and the transition costs that will be incurred as a result of the shift to a "funded system." The theoretical arguments are based on the view that privatization proposals "promote misguided paternalism . . ." and "misconceive the role [S]ocial [S]ecurity should play in our national security system." The author concludes that while privatization proposals are becoming increasingly popular, they are not "the solution to [S]ocial [S]ecurity's long-term funding difficulties."
- Quadagno, Jill. *Social Security and the Myth of the Entitlement "Crisis."* 36 GERONTOLOGIST 391 (1996). The author discusses two central ideological themes in the "entitlement crisis" debate. The first theme is that entitlement spending is "crowding out" funds for other social needs and programs. The second theme is that the current types and amount of support given to individuals are unsustainable. The author believes that the long-term projections used by the critics of the Social Security system to argue that the system is failing are inaccurate and have generated a fictional crisis. According to the author, the "entitlement crisis" has not had an impact on actual policies, but the perception of crisis is undermining the public's confidence in the Social Security system. The perception of a crisis has allowed critics to propose radical reforms such as means testing and privatizing the Social Security system. The author believes that these proposals undermine the moral framework that supports the Social Security system and erodes public support for the system.
- Thompson, Lawrence H. *Principles of Financing Social Security Pensions*. 49(3) INTERNATIONAL SOCIAL SECURITY REVIEW 45 (1996). The author provides a framework for the debate on the financing of Social Security pensions. The article is divided into four sections. The first section discusses the rationale for government intervention in the market for retirement income, the factors that determine the social costs of supporting pensioners, the mechanisms used to deliver support to pensioners, the allocation of costs, and the role played by political and cultural influences in determining the actual economic impact of a particular institution. The second section examines how the burden of providing support to retirees can be lightened. The third section focuses on the distribution of benefits. The fourth sec-

tion examines the challenges of maintaining an economically and politically viable system over a period of time.

- Walker, David M. *Looming Retirement Crisis*. 22(2) EMPLOYEE BENEFITS JOURNAL 17 (1997). The author argues that there is an impending retirement crisis in the United States and how this crisis will lead to the financial instability of the Social Security and Medicare programs. The author suggests several approaches for averting the retirement crisis. These strategies include raising the retirement age, eliminating disincentives to work, adding a supplemental savings account to Social Security, and revising policies governing Medicare eligibility.
- Wheeler, Peter M. & Kearney, John R. *Income Protection for the Aged in the 21st Century: A Framework to Help Inform the Debate*. 59 SOCIAL SECURITY BULLETIN 3 (Summer 1996). This article evaluates some of the options available to reform the Social Security system in the United States. The authors describe how the values of fairness, adequacy, and efficiency are embodied in the Social Security system and examine the relationship between Social Security and economic growth. They also describe various mechanisms that provide old-age income protection throughout the world and discuss the advantages and disadvantages of each system. They use the experiences of other countries to analyze each of the proposed changes to Social Security that are described in the article.
- Williamson, John. *Should Women Support the Privatization of Social Security?* 40 CHALLENGE 97 (July-August 1997). This article analyzes the potential impact on women of proposals to privatize Social Security. The author argues that the proposals endorsed by the 1995 Advisory Council on Social Security will result in higher rates of poverty and near poverty among older women. According to the author, under privatization schemes, women will have greater difficulty in meeting the proposed increase from 35 to 38 years of work necessary to obtain benefits. In addition, because of lower income levels, women are limited in their ability to invest in the stock market (or make similar investments) and withstand income losses caused by downturns in the stock market and national economy. The author proposes changes to the Social Security system designed to avoid the creation of gender bias.

III. AGE DISCRIMINATION

A. GENERAL WORKS/MISCELLANY

Articles

Schneider, Elizabeth K. *The ADA—A Little Used Tool to Remedy Nursing Home Discrimination*. 28 THE UNIVERSITY OF TOLEDO LAW REVIEW 489 (1997). The author argues that because of the anticipated changes in the age composition of the population, the Americans with Disabilities Act of 1990 (ADA) will become an important tool in the prevention of disability-based discrimination against nursing home residents, particularly the mentally impaired and those suffering from infectious diseases. Specifically, the Act has the potential to protect nursing home residents “from being denied admission to a nursing home, from impermissible transfers or discharges, and from discrimination in the receipt of services.” The author argues that those who specialize in health care law must understand the ADA and educate nursing home professionals about its potential impact.

Shoemaker, Paul A. *An Equity Analysis of Tax Policy Towards the Elderly*. 68 TAX NOTES 615 (1995). The author questions the different tax treatments of elderly and non-elderly taxpayers. Based on a survey of taxpayers from the Internal Revenue Service Panel of Individual Tax Returns and a comparison of tax liabilities one year before and one year after reaching the age of 65, the author demonstrates that both horizontal equity and vertical equity decreased after taxpayers reached the age of 65. He contends that these results prove that current federal tax policy is misguided and discriminates against the elderly. He concludes by advocating legislative tax changes in the areas of equity and marginal tax rates to remedy the age discrimination inherent in the current federal income tax code.

Whitton, Linda S. *Ageism: Paternalism and Prejudice*. 46 DEPAUL LAW REVIEW 453 (1997). This article examines the factors shaping “our individual and collective attitudes about age” and the impact of these attitudes on lawyers, legislators, and judges. The article also examines the impact of ageism in the health care profession and on the development of health care public policies. The author reviews current research regarding the actual effects of aging and discusses some common myths and stereotypes about aging as well. She argues that ageism results in “paternalistic interventions that encourage dependency and decrease autonomy” and that ageism in the health care profession can result in “undertreatment or nontreatment of the elderly.”

She points to guardianship and adult protective statutes and cases to demonstrate how ageism has negatively affected the legal profession and concludes that the legal profession has an obligation "to ensure that ageist stereotypes do not become rebuttable presumptions" which elderly citizens must overcome to maintain their rights.

B. AGE DISCRIMINATION IN EMPLOYMENT

1. GENERAL WORKS/MISCELLANY

Books

AMERICAN ASSOCIATION OF RETIRED PERSONS WOMEN'S INITIATIVE & WOMEN'S LEGAL DEFENSE FUND. *EMPLOYMENT DISCRIMINATION AGAINST MIDLIFE AND OLDER WOMEN: VOLUME I: HOW COURTS TREAT SEX-AND-AGE DISCRIMINATION CASES, A REPORT*. Washington, D.C.: American Association of Retired Persons, 1996. This study examines 335 judicial opinions involving sex and age discrimination decided between 1975 and 1995. The report documents the fact-specific nature of the majority of decisions and the often idiosyncratic applications of the law. In addition, the report demonstrates that a significant number of discrimination claims were not evaluated on the merits of the claims but instead, were decided on procedural grounds. The book also compares plaintiffs' success rates in state and federal courts. The study demonstrates that results in state and federal courts were virtually identical, with 41 percent of plaintiffs in federal court succeeding and 40 percent of plaintiffs in state court succeeding.

Articles

Butler-Brust, Lisa A. *Protecting Older Americans Working for Foreign Employers from Age Discrimination in Employment*. 65 *FORDHAM LAW REVIEW* 2535 (1997). The author argues for the applicability of the Age Discrimination in Employment Act (ADEA) to Americans employed in the United States by foreign-owned companies. Several courts have ruled that the ADEA is enforceable against foreign-owned employers in the United States; however, two federal courts have disagreed. The author argues that a subsequent amendment to the ADEA by the Older Americans Act Amendments of 1984 was intended to limit the extraterritorial impact of the ADEA to American employers and not to exempt foreign employers in the U.S. The

author discusses why the ADEA should apply to such foreign employers.

Crawshaw-Lewis, Stacey. "Overpaid" Older Workers and the Age Discrimination in Employment Act. 71 WASHINGTON LAW REVIEW 769 (1996). This article reviews the legislative history of the ADEA and demonstrates that Congress passed the ADEA in response to concerns that inaccurate stereotypes about older workers were fueling discrimination in employment situations. The article includes a review of ADEA cases decided between 1984 and 1995 to illustrate the high incidence of cases involving older workers allegedly fired or not hired because of the higher salaries earned by these more experienced workers. In addition, the article explores the application of several court cases including *Biggins v. Hazen Paper Co.* In this decision, the U.S. Supreme Court strengthened ADEA claims by focusing on the importance of age stereotyping. It also weakened claims, however, by holding that seniority based discrimination is distinct from age discrimination. The author argues that in ADEA cases, courts should give more consideration to whether stereotypes about older workers played a role in the employment decisions at issue.

Eglit, Howard C. *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going.* 31 UNIVERSITY OF RICHMOND LAW REVIEW 579 (1997). This article begins with a review of the ADEA's first twenty years. The second part of the article examines empirical data (from 1996) regarding ADEA litigants and litigation. In the third part of the article, the author examines demographic and scientific data regarding workers in the workforce. The author concludes by discussing some of the important legal and structural issues that he believes will "occupy the attention of employees, employers, lawyers, courts, and maybe even legislators in the next five, ten, even fifteen years."

Fentonmiller, Keith R. *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims.* 47 AMERICAN UNIVERSITY LAW REVIEW 1071 (1998). This article focuses on the issue of "whether disparate impact analysis is appropriate in ADEA cases against federal-sector employers . . ." In contrast to disparate treatment analysis, disparate impact analysis does not "require[] a showing of specific discriminatory intent . . ." The author begins with a discussion of disparate treatment and disparate impact analyses in employment discrimination cases, with particular emphasis on the ADEA. The remaining parts of the article present

arguments in favor of using disparate impact analysis in both federal-sector as well as private-sector ADEA cases.

- Gillin, C.T. *Political Elites and Regulatory Bureaucrats: A Case Study Concerning Age Discrimination*. 8(1) JOURNAL OF AGING AND SOCIAL POLICY 77 (1996). The author critiques the ideological constructs under which the Equal Employment Opportunity Commission (EEOC) enforces the ADEA. The author argues that the enforcement of the ADEA is fundamentally flawed because of the political compromises that created the ADEA. Under the original legislation, the EEOC was not given strong enforcement authority. The elimination of the statute of limitations for ADEA claims under the Civil Rights Act of 1991 strengthened the EEOC's ability to enforce the ADEA. Despite these changes, the ability to enforce the ADEA remains limited. The percentage of ADEA charges litigated by the EEOC is one-half of one percent and more than half of the age-based charges are dismissed after a finding of "no cause."
- Hood, Constance K. *Age Discrimination in Employment and the Americans with Disabilities Act: "A Second Bite at the Apple."* 6 THE ELDER LAW JOURNAL 1 (1998). The ADEA prohibits an employer from discriminating against an older employee because of age, except where age constitutes a "bona fide occupational qualification" (BFOQ). The ADEA permits an employer to consider reasonable health factors in its employment decisions. The author notes that many older Americans have lost employment discrimination suits where their employers have persuaded the courts that age discrimination was justified based on the better health of the younger employees. The author analyzes whether the Americans with Disabilities Act (ADA) will influence the outcome of ADEA cases. The author discusses the history of the ADA, the Supreme Court's narrow construction of BFOQ, and the ADA's definition of a disabled person. Two evidentiary scenarios are discussed and with respect to each one, the author concludes that a BFOQ defense under the ADEA would not survive an ADA challenge. The author concludes by comparing the procedures for bringing ADA and ADEA claims and noting that an employee can file both claims simultaneously.
- Issacharoff, Samuel & Harris, Erica W. *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*. 72 NEW YORK UNIVERSITY LAW REVIEW 780 (1997). The authors of this article argue that the ADEA is fundamentally flawed because it was based on the "classic" antidiscrimination model used to protect disadvantaged

groups, as opposed to taking into account the unique aspects of age discrimination. According to the authors, the classic model is inappropriate in the age discrimination context because it is designed to address problems occurring at the hiring stage of employment, whereas the "source of concern for older employees is overwhelmingly at the tail end of a lifetime of employment." They argue that by not drafting appropriate age discrimination legislation, Congress, through the ADEA amendments, has allowed older workers to receive a "special interest capture of unjustified wealth." They conclude by advocating changes in the law that will eliminate windfalls while at the same time, grant older Americans "additional opportunity and dignity" in the workforce.

Jolls, Christine. *Hands-Tying and the Age Discrimination in Employment Act*. 74 TEXAS LAW REVIEW 1813 (1996). This article examines the justification of the ADEA from a "hands-tying" perspective. "Hands-tying refers to a commitment not to engage in behavior that is attractive in the short term but ultimately destructive of long-term goals." In this article, the author focuses on the rationale behind tying the hands of employers by preventing them from terminating or otherwise discriminating against older employees because they command higher wages than equally qualified younger workers. The author concludes that hands-tying is justified in this context and best accomplished through the ADEA (as opposed to another legal doctrine such as the law of wrongful discharge). The author also discusses court interpretations of the ADEA that logically follow from the hands-tying analysis.

Minda, Gary. *Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment*. 48 HASTINGS LAW JOURNAL 511 (1997). The author examines the impact of "opportunistic downsizing," which he defines as downsizing that is "implemented to exploit the vulnerable position of a late-career employee who cannot easily leave the [employment] relationship" The author argues that this type of downsizing "conflicts with the congressional purpose underlying both [the] ADEA and ERISA" The article begins with an examination of how older workers have been negatively affected by downsizing. The author then examines the current state of the law as it pertains to downsizing and the impact that judicial attitudes have had on the law. He argues the case for applying age and pension discrimination law to the practice of opportunistic downsizing, which he believes will both exacer-

bate the pending retirement crisis and “further advance the slow death of the American work ethic” if it is not regulated.

Rutherglen, George. *From Race to Age: The Expanding Scope of Employment Discrimination Law*. 24 JOURNAL OF LEGAL STUDIES 491 (1995). This article analyzes the differences between Title VII of the 1964 Civil Rights Act, which prohibits discrimination based on race and gender, and the ADEA. Individuals litigating claims under the ADEA differ significantly from those filing claims under Title VII. The author presents the “results of an empirical study of employment discrimination cases in seven cities around the nation.” The author surveyed claims brought under the ADEA and found that claims are brought predominantly by “white males who are relatively well off in status, positions, and pay.” These claims mainly allege discriminatory discharge and result in significantly higher money judgments than those recovered from other claims of employment discrimination. The author argues that the ADEA can no longer “be justified in terms of opening opportunities to a historically disfavored group,” and that new justifications for the ADEA need to be supplied.

2. EMPLOYEE BENEFITS

Articles

Garen, John and others. *Pensions, Non-Discrimination Policies, and the Employment of Older Workers*. 36 QUARTERLY REVIEW OF ECONOMICS AND FINANCE 417 (1996). This article poses the question of whether the presence of a defined benefit pension plan, in conjunction with nondiscriminatory policies, deters firms from hiring older workers instead of untrained, entry level workers. The authors initially hypothesized that defined contribution plans, which are age-neutral, would not have this effect. Their study demonstrated that employers who offered defined contribution pension plans did not differentiate between workers on the basis of age when hiring. Employers who offered defined benefit pension plans employed older workers, but tended not to hire these workers for entry level jobs.

Lussier, Richard J. *Title II of the Older Workers Benefit Protection Act: A License for Age Discrimination? The Problem Identified and Proposed Solutions*. 35 HARVARD JOURNAL ON LEGISLATION 189 (1998). This article examines Title II of the Older Workers Benefit Protection Act which was passed in 1990 by Congress to ensure that when employees waive their rights to bring age discrimination

claims, they do so knowingly and voluntarily, rather than under duress, coercion or mistake. In this article, the author argues that the Act, as it is currently written and interpreted by the courts, does not adequately protect employees. The central point of the author's argument is that the statute does not require an employer to provide its employee with information regarding his replacement at the time of the waiver, thereby defeating the purpose of the 1990 Act. Also, some courts have held that an employee must return severance benefits before being allowed to bring an ADEA suit, thereby deterring the employee from bringing such an action. The author proposes an amendment to the Older Workers Benefit Protection Act that would help to correct these problems and offer added protections to both employees and employers.

McMorrow, Judith A. *Retirement Incentives in the Twenty First Century: The Move Toward Employer Control of the ADEA*. 31 UNIVERSITY OF RICHMOND LAW REVIEW 795 (1997). This article examines the role of the ADEA in helping to shape and reinforce retirement policy in the United States. The author argues that retirement incentives (benefits employers provide which are "not included as a regular and permanent part of a pension plan") will play an increasingly important role "as employers attempt to alter retirement patterns among their workers." She also discusses how the current ADEA, as interpreted, "is providing employers with increased control and autonomy in how to structure those incentives" and the public policy consequences of this private control. The author is concerned that retirement incentives are likely to interfere with both the non-discrimination goals of the ADEA as well as the goals that are reflected in our national retirement policies.

IV. HEALTH CARE

A. GENERAL WORKS/MISCELLANY

Books

SMITH, GEORGE P. *LEGAL AND HEALTHCARE ETHICS FOR THE ELDERLY*. Washington, D.C.: Taylor & Francis, 1996. The author presents an overview of the law pertaining to health care for the elderly and related bioethical issues. The first part of the book provides a discussion of aging from sociological, medical, and demographic perspectives. The second part of the book provides a description of "bureaucratic medicine" and its role in the care of the elderly and ex-

plores the ethical obligations with respect to health care delivery. This part also examines the proper role of medical technology in light of concerns about the "whole patient" and the patient's autonomy. The book concludes with a chapter examining the future of long-term care.

Articles

- Houtepen, Rob. *Meaning of Old Age and the Distribution of Health-Care Resources*. 15 *AGEING AND SOCIETY* 219 (1995). This article explores the meaning of old age in the context of the distribution of health care resources. This article defines old age based on the values of liberal individualism. The theme of liberal individualism is further explored using the works of Harry Moody and Thomas Cole. The conclusion discusses changing the meaning of old age, so that the needs of the population at the local level are factored into account, rather than generalizing to a larger global one and changing the practice of distributing health care resources. The author argues that instead of distributing health care resources based on regulated communitarian interpretations of the value of old age, resources should be distributed based on a general standard where individual needs are considered.
- Kapp, Marshall B. *De Facto Health-Care Rationing by Age*. 19 *JOURNAL OF LEGAL MEDICINE* 323 (1998). This article examines the implicit age-based rationing that is taking place in hospitals and other health care settings. The author relies on medical evidence to demonstrate that this type of rationing is occurring and discusses the ethical, economic, and legal implications of this form of "de facto age discrimination."
- Riley, Trish. *States' Perspective on Managed Care for the Elderly*. 22 *GENERATIONS* 69 (Summer 1998). The author discusses managed care for older adults from the states' perspective. In the past, states have been reluctant to move older Medicaid beneficiaries into managed care programs. However, states have begun to see the benefits of managed care for those eligible for Medicare and Medicaid. The author examines the various approaches states have been taking to provide managed care for older adults. She also discusses the concerns that have been raised about whether these new plans will meet the standards that are applied to other managed care organizations.
- Robinson, Gail K. and others. *Managed Care Policy: Meeting the Mental Health Needs of the Aged?* 22 *GENERATIONS* 58 (Summer 1998).

The authors describe various approaches taken by states to manage publicly financed mental health services for the elderly. States that design Medicaid managed care programs must decide the important matter of whether or not to integrate mental health services into the general health managed care program. Generally, states have separated specialized mental health services from other health services; however, the authors believe that this trend is fading and will be replaced by more integrated arrangements as more funds are directed into managed care programs.

Smith, George P., II. *Patient Dumping: Implications for the Elderly*. 6 THE ELDER LAW JOURNAL 165 (1998). The author discusses the problem of patient dumping both before and after the enactment of the Emergency Medical Treatment and Active Labor Act (EMTALA). While this Act was designed to eliminate patient dumping, the author notes that it has actually led many hospitals to curtail emergency facilities and thereby avoid having to treat indigent and uninsured elderly patients. He also explains how EMTALA regulations may indirectly encourage hospitals to dump elderly patients who do not have Medicare. The article discusses both the strengths and the weaknesses of EMTALA and recommends that Congress strengthen the Act and incorporate aspects of effective state and local anti-dumping programs. The author concludes by discussing society's ethical obligations to the elderly, including the obligation of doctors to treat indigent patients.

Wallace, Steven P. and others. *The Consequences of Color-Blind Health Policy for Older Racial and Ethnic Minorities*. 9 STANFORD LAW & POLICY REVIEW 329 (1998). The authors analyze the phenomenon of the growing proportion of older persons in the United States and the increasing racial and ethnic diversity of this group. The authors discuss the fact that elderly minority individuals are in a poorer state of health than elderly whites and argue that this disparity results from a history of racial discrimination in the United States and the fact that health care policies have been insensitive to the needs of racial and ethnic minorities. The authors review recent public policies affecting Medicare, Medicaid, and cash assistance programs for poor and disabled persons and argue that evidence exists that race-neutral policy initiatives hurt the health status of older minorities more than the health status of elderly whites. They argue that racial and ethnic gaps with respect to the health status of older Americans will only widen if public policies do not take into account the racial and ethnic disparities that already exist.

B. LONG TERM CARE/NURSING HOMES

Books

- EISEN, ROLAND AND SLOAN, FRANK A., EDS. *LONG-TERM CARE: ECONOMIC ISSUES AND POLICY SOLUTIONS*. Boston: Kluwer Academic Publishers, 1996. This book examines economic issues and policy solutions related to long-term care. The chapters discuss research on empirical, theoretical, and policy related topics. Several of the chapters contain cross-country comparative analyses of long-term care systems.
- GIARCHI, GEORGE G. *CARING FOR OLDER EUROPEANS: COMPARATIVE STUDIES IN 29 COUNTRIES*. Brookfield, VT: Ashgate Publishing Company, 1996. The author presents an overview of the types of care available for older adults in Europe and discusses various socioeconomic issues affecting older Europeans. Specifically, the author examines population demographics of elderly Europeans, the impact of recent geopolitical events on the elderly, the material, social, and spiritual deprivation facing many older Europeans, the welfare and government programs providing formal care, and the use of informal care to meet the needs of those cared for at home. The book is organized into 29 chapters, each addressing an individual country. The identical format of each chapter facilitates comparisons between different countries.
- HARRIS-WEHLING, JO AND OTHERS, EDS. *REAL PEOPLE, REAL PROBLEMS: AN EVALUATION OF THE LONG-TERM CARE OMBUDSMAN PROGRAMS OF THE OLDER AMERICANS ACT*. Washington, D.C.: Division of Health Care Services, Institute of Medicine, 1995. This book assesses the efficiency of the state long-term care ombudsman programs of the Older Americans Act. The book serves as the summary of the report of the Institute of Medicine's Committee on State Long-Term Care Ombudsman Programs which was commissioned by Congress through the Administration on Aging. Ombudsman programs were created because of concerns in the 1970s with the quality of nursing facilities, the care provided in them, and the government's ability to enforce regulations in them. Long-term care ombudsmen advocate to protect the health, safety, welfare, and rights of the institutionalized elderly in nursing facilities and board and care homes. The committee was asked by Congress to assess the long-term ombudsman programs' performance and to make recom-

mendations on public policy strategies to better achieve the programs' goals and objectives. The conclusions of the committee are that the ombudsman programs serve a vital public purpose and merit continuation of their present mandate.

KANE, ROSALIE A. & PENROD, JOAN D., EDS. *FAMILY CAREGIVING IN AN AGING SOCIETY: POLICY PERSPECTIVES*. Thousand Oaks, CA: Sage Publications, 1995. This book contains eight chapters on policy-oriented issues related to families and aging. The topics include respite care, direct services to family caregivers, compensation to families, and legal and ethical issues in caregiving.

PYNOOS, JON & LIEBIG, PHOEBE S., EDS. *HOUSING FRAIL ELDERERS: INTERNATIONAL POLICIES, PERSPECTIVES, AND PROSPECTS*. Baltimore: Johns Hopkins University Press, 1995. This book examines global policies and trends pertaining to the housing of "frail elders." Shelter and care options for the "frail old" in the United States are compared with those in Denmark, Sweden, Great Britain, the Netherlands, Germany, Israel, Canada, and Australia. The demographic and housing status of the elderly in each country is profiled and a summary of the successes and failures of past and current housing strategies in each country is provided.

ROWLES, GRAHAM D. AND OTHERS, EDS. *LONG-TERM CARE FOR THE RURAL ELDERLY: NEW DIRECTIONS IN SERVICES, RESEARCH, AND POLICY*. New York: Springer Publishing Company, 1996. The separately authored chapters in this book review the current state of long-term care for the elderly living in rural areas of the United States. The tone of the book is uniformly critical of the current system of long-term care for rural elders. The system is viewed as inadequate because it is based on urban models which are ineffective for rural settings. The various contributors to the book suggest reforms which could substantially improve this system. The topics that this book addresses include the individual components of the rural long-term care system, institutional aspects of rural long-term care, and the obstacles that delay the development of systems to assist the elderly. In the conclusion, the editors integrate the themes of the individual contributors and identify seven principles for creating a new rural model of long-term care.

Articles

Barnes, Alison. *The Policy and Politics of Community-Based Long-Term Care*. 19 NOVA LAW REVIEW 487 (1995). This article examines how

long-term care has evolved in the United States and “the practical and policy justifications for including home and community-based care in the current wave of health care reform.” The author notes that existing programs and recent health care reform proposals have not adequately addressed the problems associated with our system of providing long-term care. The article includes a discussion of “specific issues and recommendations [related to] the financing and delivery of publicly funded home and community-based care.”

Bonifazi, Wendy L. *Federal Factor: How Government Rules and Regulations Have Shaped Long Term Care*. 21 CONTEMPORARY LONG TERM CARE 2 (February 1998). The author examines the ways in which federal law has shaped long term care. In doing so, she discusses the significant pieces of federal legislation enacted since the 1960s that address long term care issues, beginning with the 1965 amendment to the Social Security Act that expanded Medicare coverage to include long term care and concluding with the Balanced Budget Act of 1997 that introduced Medicare’s prospective payment system for skilled nursing facilities. The article also includes a discussion of the Nursing Home Reform Act enacted in 1987 as part of the Omnibus Budget Reconciliation Act

Cohen-Mansfield, Jiska and others. *Autonomy for Nursing Home Residents: The Role of Regulations*. 13 BEHAVIORAL SCIENCES & THE LAW 415 (1995). This article explores the role of government regulation on the autonomy of nursing home residents. Relying on interviews with nursing home residents, family members, nursing staff members, and nursing home administrators, the authors highlight areas where regulations create barriers to autonomy and control. Specific problem areas include the scheduling of daily living activities, food portions, the physical environment, and medical documentation. The article concludes with several suggestions for maintaining the autonomy of nursing home residents.

Edelstein, Stephanie. *Assisted Living: Recent Developments and Issues for Older Consumers*. 9 STANFORD LAW & POLICY REVIEW 373 (1998). This article discusses issues relating to the “assisted living” housing option for older persons. “Assisted living” is described as an option that “provides residents with personal care tasks . . . with an emphasis on individual needs and preferences.” Assisted living thus attempts to combine some supervision and medical care available in nursing facilities with personal autonomy enjoyed by people in their own homes. The author notes that while assisted living facilities may of-

fer many advantages, the industry is still evolving, and there is a need for greater monitoring of these facilities' performance and quality.

- Hayley, D.C. and others. *Ethical and Legal Issues in Nursing Home Care*. 156 ARCHIVES OF INTERNAL MEDICINE 249 (1996). This article discusses the ethical and legal issues confronting physicians who provide care to residents of long-term care facilities. The issues discussed include advance directives, competence and decision-making capacity, decisions about life-sustaining treatment, abuse and neglect, and the use of restraints and psychotropic medications.
- Herrington, Elizabeth B. *Strengthening the Older Americans Act's Long-Term Care Protection Provisions: A Call for Further Improvement of Important State Ombudsman Programs*. 5 THE ELDER LAW JOURNAL 321 (1997). This note discusses measures that need to be taken to improve the ombudsman program, which was created by the federal government to monitor nursing home residents' care by using ombudsmen to "receive, investigate, and try to resolve problems or complaints." Because the program is implemented at the state level, the role of the ombudsman varies substantially from state to state. The author argues that poor staffing and limited authority and autonomy impair the effectiveness of the ombudsmen. The author argues for the establishment of a "uniform documentation system to see the actual effects of the ombudsman program," new statutes to ensure a more consistent level of service between states, and the use of "legal counsel for advice, representation and consultation."
- Kapp, Marshall B. *Persons with Dementia as "Liability Magnets": Ethical Implications*. 9 JOURNAL OF CLINICAL ETHICS 66 (1998). This article discusses the ethical issues related to the characterization of individuals with dementia as sources of potential litigation and legal liability. The author argues that this characterization by health and human service providers tends to result in excessive preoccupation with liability exposure and not enough concern about patients' rights and welfare. The author points to situations where assisted living providers curtail residents' autonomy in the name of safety or intervene in residents' lives contrary to the expressed wishes of patients because of fears of possible litigation. The author believes these interventions are particularly inexcusable given the fact that most providers' anxiety about liability are general and not tied to any specific and identifiable lawsuit, statute, or regulation.
- Keating, Norah C. and others. *Bridging Policy and Research in Eldercare*. 16 CANADIAN JOURNAL ON AGING 22 (Supp. 1997). The authors de-

scribe a new paradigm that has emerged for continuing care policies based on assumptions about formal vs. informal care and the benefits of caring partnerships and client-centered care delivery. The authors also describe how existing research may contribute to the new policy paradigm and how the paradigm may influence research in the future.

- Knepper, Kathleen. *Involuntary Transfers and Discharges of Nursing Home Residents Under Federal and State Law*. 17 THE JOURNAL OF LEGAL MEDICINE 215 (1996). This article discusses “the permissibility of involuntary transfers and discharges of nursing home residents” under federal and state regulations pertaining to nursing home operations. The author notes that these transfers and discharges often occur “with little consideration for the impact that relocating a resident would have on the resident’s well-being.” The article focuses on the protections that exist under the federal Medicaid statute and compares them to the protections created under the licensure and certification statutes and regulations of two states, Illinois and Missouri. The author notes that “[t]hese comparisons offer fertile ground for similar analyses under the laws of other states.” The article concludes by “draw[ing] inferences about how effective the application of the statutes and regulations in Illinois and Missouri have been in protecting the rights of elderly individuals not to be transferred or discharged from nursing homes without their consent.”
- Kovach, Christine R. *Alzheimer’s Disease: Long-Term Care Issues*. 12 ISSUES IN LAW & MEDICINE 47 (1996). This article discusses issues related to dementia care and various long-term care services and facilities available to individuals with dementia, including community-based care, nursing homes, and special care units. The author believes that much can be done to help people with dementia and recommends that further research in this area is needed.
- Meuser, Craig S. *Why Government and Business Should Take a Closer Look at Adult Day Care*. 1 QUINNIPIAC HEALTH LAW JOURNAL 219 (1997). This note discusses the benefits of adult day care as an inexpensive and successful alternative to institutional long-term care. The author first provides a history of adult day care in the United States and explains how it has been regulated by state governments. He then discusses financing issues related to adult day care and how more federal, state, and private sector support is needed to expand the availability of adult day care centers in the United States.
- Pasaba, Janice C. & Barnes, Alison. *Public-Private Partnerships and Long-Term Care: Time for a Re-Examination?* 26 STETSON LAW

REVIEW 529 (1996). This article focuses on the ongoing debate about "the need for long-term care for the elderly." The authors discuss the current acute care model system that addresses medical crises. The authors assert that this model "is increasingly inappropriate" for addressing the needs of the growing elderly population. The authors discuss the options for paying for long-term care and advocate a re-examination of a program to encourage the purchase of long-term care insurance.

Snowden, Mark & Roy-Byrne, Peter. *Mental Illness and Nursing Home Reform: OBRA-87 Ten Years Later*. 49 PSYCHIATRIC SERVICES 229 (1998). This article provides a review of the literature on the effects of the nursing home reforms initiated by the Omnibus Budget Reconciliation Act of 1987 (OBRA). The materials reviewed were obtained from Medline searches for peer-reviewed articles from January 1985 through January 1997 and from PsychInfo searches for articles from 1967 through 1997. The data collected focused on the use of antipsychotic medications, the use of physical restraints, and preadmission screening of nursing residents. The review suggests that the reform legislation is having its intended impact, especially in reducing the use of antipsychotic medications and physical restraints in nursing homes. The authors caution that there are three areas that require greater study. These areas are the preadmission screening of nursing home residents with mental illness, the economic costs of OBRA reforms, and whether there have been improvements in the overall quality of nursing home residents' lives.

Spitzer-Resnick, Jeffrey & Krajcinovic, Maya. *Protecting the Rights of Nursing Home Residents: How Tort Liability Interacts with Statutory Protections*. 19 NOVA LAW REVIEW 629 (1995). This article discusses the different legal avenues available to nursing home residents whose rights have been violated. The article discusses both statutory private causes of action (in Wisconsin, New York, Illinois, and Missouri) as well as common law causes of action that are particularly important in states that do not offer adequate statutory remedies. The authors point out some of the "procedural barriers" that often prevent plaintiffs from succeeding on the basis of common law theories. They also note that a shift has occurred in the way damages are awarded in nursing home abuse cases. Damage awards are increasingly recognizing the value of older people's lives (beyond mere "life expectancy and earning capacity").

Stoudemire, A. & Smith, D.A. *OBRA Regulations and the Use of Psychotropic Drugs in Long-Term Care Facilities: Impact and Implications for Geropsychiatric Care*. 18 GENERAL HOSPITAL PSYCHIATRY 77 (March 1996). This article reviews the guidelines enacted by the Omnibus Budget Reconciliation Act of 1987 (OBRA) to regulate the use of psychotropic drugs and agents in long-term care facilities. Among the guidelines discussed in this article are those delineating clinical indications for administering psychotropic drugs to residents of long-term care facilities, the responsibilities of physicians, facility medical directors and pharmacists concerning drug use, and quality assurance procedures designed to ensure compliance with OBRA regulations. The authors conclude that OBRA regulations have reduced the use of psychotropic drugs and physical restraints in long-term nursing facilities.

C. FINANCING LONG TERM HEALTH CARE/MEDICAID ESTATE PLANNING

Books

MOSES, STEPHEN A. *LONG-TERM CARE PUBLIC POLICY: THE FUTURE OF SENIORS HOUSING*. Washington, D.C.: American Seniors Housing Program, 1995. The author discusses the impact senior housing programs have had on lower-middle and middle class market segments currently served by Medicaid nursing homes. He also suggests that a system should be created to educate the public about the financing of long-term care and advocates the creation of a social safety net for those unable to pay for their own care.

WALKER, LESLIE C. AND OTHERS, EDS. *PUBLIC AND PRIVATE RESPONSIBILITIES IN LONG-TERM CARE: FINDING THE BALANCE*. Baltimore: Johns Hopkins University Press, 1998. The various contributors to this book offer differing perspectives regarding the roles of the public and private sectors in providing and financing long-term care for the elderly. One general theme of this book is that the traditional division of responsibilities between the public and private sectors in the area of long-term care no longer provides a suitable framework for analyzing or debating public policies concerning long-term care financing.

Articles

- Cook, Amber R. *Estate Planning with Medicaid: Qualification and Planning for the Elderly*. 99 WEST VIRGINIA LAW REVIEW 155 (1996). This article first examines the qualification criteria for Medicaid entitlements (including asset limitations), the recovery by states of medical assistance from the estate of a deceased recipient, and the extent of asset divestment. The article suggests a planning technique that may reduce or eliminate the value of an applicant's assets for eligibility purposes and secure favorable tax treatment on the transferred property. In addition, the article discusses the ethical considerations for disposing of assets to qualify for Medicaid assistance.
- Fliegelman, Hal & Fliegelman, Debora C. *Giving Guardians the Power To Do Medicaid Planning*. 32 WAKE FOREST LAW REVIEW 341 (1997). The authors advocate the permissibility of Medicaid estate planning by guardians of individuals who are incompetent. According to the authors, individuals who have been declared incompetent should not be denied access to financial planning practices that are otherwise afforded to competent persons. The authors begin by discussing the topics of guardianship powers and Medicaid planning generally. They then examine some cases in which these planning techniques have been used and argue that judicial standards should be applied in support of Medicaid estate planning by guardians.
- Hennessy, Patrick. *The Growing Risk of Dependency in Old Age: What Role for Families and for Social Security?* 50(1) INTERNATIONAL SOCIAL SECURITY REVIEW 23 (1997). This article reviews the recent world-wide trends in the organization and financing of long-term care. Special attention is given to the role of families and social security systems. The author describes three trends in long-term care occurring in most Organization for Economic Cooperation and Development (OECD) countries. These trends include the growth of nursing home beds as an alternative to hospital-based services and the closing of facilities that provide social care for those individuals with less severe disabilities. The author also examines recent reforms in OECD countries. This discussion is broadly divided between countries with systems of tax-funded health and social services and countries with social insurance-based health care systems. The author concludes that long-term care should be regarded as a normal risk of growing old and that efforts should be undertaken to create a balanced delivery system and provide coverage against the most catastrophic costs associated with long-term care.

- Johnson, Nancy L. & Sullivan, Katherine R. *Long-Term Care Financing: Federal Policy Implications, Actions, and Options*. 1 QUINNIPIAC HEALTH LAW JOURNAL 139 (1997). This article examines the various ways long-term care is financed in the United States and the various congressional laws that have been passed in recent years to both ease the financial burden of families coping with chronic health conditions and encourage the purchase of private long-term care coverage. Among the topics the authors cover are Medicaid coverage for long-term care, spousal impoverishment protections, transfers of assets, estate recovery, and long-term care insurance. The authors conclude by recommending additional federal legislation pertaining to long-term care financing.
- Kapp, Marshall B. *Taking a Long Term View of Long-Term Care: 'Right'-sizing Terms of the Discussion*. 1 QUINNIPIAC HEALTH LAW JOURNAL 123 (1997). This essay presents "some of the more salient themes running through current writings" regarding the need for new governmental approaches with respect to entitlements for the elderly, particularly relating to the financing of long-term care. The author believes that too much of the earlier literature about long-term care financing "took place in isolation from consideration of other major public entitlement programs for the elderly," and he recommends a more integrated approach that examines the combined effects of all types of entitlement programs on the elderly and the nation.
- Margolis, Harry S. *A Proposal for Reform of Medicaid Rules Governing Coverage of Nursing Home Care*. 9 STANFORD LAW & POLICY REVIEW 303 (1998). The author argues that Congress' recently passed Medicaid eligibility laws (which limit the effectiveness of estate planning techniques to preserve one's assets) are complicated, poorly drafted, and unfair. The author surveys the different types of sources available to pay for nursing home costs and explains the Medicare eligibility rules. The author provides several possible solutions for reforming Medicare eligibility and the "transfer of assets" rules.
- Regan, Shawn P. *Medicaid Estate Planning: Congress' Ersatz Solution for Long-Term Health Care*. 44 CATHOLIC UNIVERSITY LAW REVIEW 1217 (1995). This comment explores "the Medicaid eligibility rules that allow many people to shelter . . . assets in order to qualify for taxpayer-financed long-term health care benefits, while requiring others to deplete their entire life savings to receive the same assistance." The author provides a review of previous congressional

initiatives designed to prevent individuals from qualifying for Medicaid through divestiture and an explanation of the new eligibility rules enacted as part of the Omnibus Budget Reconciliation Act of 1993. The author concludes that the new legislation fails to address “the underlying problem prompting Medicaid planning—the lack of long-term care financing options.”

Szczygiel, Anthony. *Long Term Care Coverage: The Role of Advocacy*. 44 UNIVERSITY OF KANSAS LAW REVIEW 721 (1996). The author presents a consumer analysis of Medicare, the Department of Veterans Affairs (VA) assistance programs, and private insurance funding for long-term care. The author argues that these programs are uncoordinated, overlapping, and missing critical areas of coverage.

Torch, Louis D. *Spousal Impoverishment or Enrichment? An Assessment of Asset and Income Transfers by Medicaid Applicants*. 4 THE ELDER LAW JOURNAL 459 (1996). This article examines what happens when the institutionalization of a spouse in a long-term care facility occurs and how that situation impacts the financial stability of an elderly couple. The article focuses on regulations governing transfers of income and assets between an institutionalized and a community (i.e., non-institutionalized) spouse. Such regulations provide a safety net for community spouses. The article also provides an overview of Medicaid and a brief history of the Medicare Catastrophic Coverage Act of 1988. The author also discusses the 1993 Omnibus Reconciliation Act, which placed additional restrictions on the transfer of assets. The author objects to any further restrictions on asset transfers.

Zeman, Laura H. *Estate Planning: Ethical Considerations of Using Medicaid to Plan for Long-Term Medical Care for the Elderly*. 13 QUINNIPIAC PROBATE LAW JOURNAL 187 (1998). This article examines the ethical considerations regarding Medicaid estate planning techniques used by elder law attorneys to help their clients become eligible for long-term care coverage. In discussing these ethical issues, the author makes a distinction between the proper role of the attorney “as an advocate for her client” and the proper role of the legislature “as a policy maker for the public.” The author begins by discussing the legal framework regarding Medicaid estate planning, including some of the loopholes in the law that Congress has closed in recent years. She then analyzes some of the estate planning techniques that attorneys utilize on behalf of their clients. This is followed by a discussion of the ethical issues facing attorneys and legislators. The author concludes that it is the

responsibility of Congress to close the remaining loopholes regarding Medicaid estate planning and that attorneys have a duty to inform their clients of all viable planning techniques that fall “within the parameters of the law.”

Zieger, Jon M. *The State Giveth and the State Taketh Away: In Pursuit of a Practical Approach to Medicaid Estate Recovery*. 5 THE ELDER LAW JOURNAL 359 (1997). The author of this note examines Medicaid estate recovery programs, whereby “the cost of medical assistance provided to a Medicaid recipient becomes a debt of the recipient’s estate or the estate of the recipient’s surviving spouse.” The author discusses the goals of such programs and considers how effective states have been in achieving these goals. He also discusses “planning strategies for avoiding estate recovery . . .” and presents a “model estate recovery plan” that is designed to balance the fiscal needs of the state with the financial security needs of recipients and their surviving families.

D. COMPETENCY/CAPACITY FOR DECISION MAKING (INCLUDING GUARDIANSHIPS)

Books

SMYER, MICHAEL AND OTHERS, EDS. *OLDER ADULTS’ DECISION-MAKING AND THE LAW*. New York: Springer Publishing Company, 1996. The individually authored chapters in this book examine the legal and ethical issues pertaining to the competency of older adults. Among the topics covered in the book are the involvement of the elderly in health care decisions, assessing the capacity for decision-making, mechanisms for dealing with the consequences of incapacity, alternatives to guardianship, and guardianship reform.

ZIMNY, GEORGE H. & GROSSBERG, GEORGE T., EDS. *GUARDIANSHIP OF THE ELDERLY: PSYCHIATRIC AND JUDICIAL ASPECTS*. New York: Springer Publishing Company, 1998. This book covers various legal aspects of the guardianship process, including the process of assessing competency, judicial procedures and decision-making in guardianship cases, and the monitoring of guardians to prevent abuse of the wards. The book provides a basic explanation of guardianship and a set of related definitions. The book also presents an actual guardianship case as well as a discussion of how empirical research studies have contributed to guardianship reform.

Articles

- Andrews, Mark D. *The Elderly in Guardianship: A Crisis of Constitutional Proportions*. 5 THE ELDER LAW JOURNAL 75 (1997). The author of this note critiques the current state of guardianship systems in the United States. The author argues that the interests of the elderly are being undermined by the current guardianship systems. The author contends that the elderly are denied their constitutional rights by both federal and state governments because of the reluctance to enact new laws or to reform existing legislation concerning guardianship procedures. The author identifies the compelling constitutional and policy reasons to change the guardianship system. He concludes that the imposition of guardianship on many elderly persons severely curtails their rights and liberties.
- Frolik, Lawrence A. *Guardianship Reform: When the Best is the Enemy of the Good*. 9 STANFORD LAW & POLICY REVIEW 347 (1998). This article is an assessment of the guardianship reforms of the 1970s and 1980s. Although there have been procedural improvements in the guardianship system, more radical reforms have not occurred. The author argues that current reformers wish for too-perfect a guardianship system, endangering the benefits that past reformers have achieved. The author argues that reformers should concentrate on educating judges about the reforms that are in existence and stress the importance of embracing autonomy and independence for the elderly.
- Gorman, Warren F. *Testamentary Capacity in Alzheimer's Disease*. 4 THE ELDER LAW JOURNAL 225 (1996). This article examines whether Alzheimer's sufferers have testamentary capacity (i.e., "the mental competence to execute a will"). The author discusses the standards that are used to assess testamentary capacity and the fact that courts focus on the lucidity of the testator at the time the will was executed. The author discusses some of the appellate court cases in which the courts held that the testators were "'Alzheimer's but competent.'" The article concludes with a discussion of the role of the medical expert in proving testamentary capacity.
- Holmes, Christy. *Surrogate Decisionmaking in the 90s: Learning to Respect Our Elders*. 28 UNIVERSITY OF TOLEDO LAW REVIEW 605 (1997). This comment begins with a historic perspective on the guardianship system and an evaluation of current practices under recently passed state laws. The author argues for "less intrusive means of surrogate decisionmaking in certain circumstances," and evaluates the efforts made towards this objective. She believes that surrogate decisionmakers need to be held more accountable and that courts

need to do a better job of protecting the rights of the elderly during the guardianship hearing. Additionally, she argues that statutes need to recognize that older people have “the right to make ‘bad’ decisions.”

Johns, A. Frank & Bowers, Vicki J. *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?* 27 STETSON LAW REVIEW 1 (1997). This article describes how guardianship has been “misgoverned” in England, Greece, Rome, and America. The authors focus primarily on the unmet needs of older Americans and explore the breakdown in the judicial administration of guardianships and conservatorships. The authors also analyze several decades of empirical research and legal changes pertaining to guardianships. They conclude that a “mask of virtual reality” hides the nature of the problems with guardianships. They note that unless the mask is removed and measures to reform the guardianship system are passed, older Americans face continued threats to their autonomy and individual rights.

Kapp, Marshall B. *Medical Decisionmaking for Older Adults in Institutional Settings: Is Beneficence Dead in an Age of Risk Management?* 11 ISSUES IN LAW & MEDICINE 29 (1995). This article explores the tensions within nursing facilities between providing ethical and beneficent care to residents on one hand and the preoccupation with legal and financial risk management on the other. The article concentrates on the unintended consequences of regulations and efforts to ameliorate the ethical tensions through the creation of ethics committees cognizant of the tensions.

Kapp, Marshall B. *The “Voluntary” Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications.* 24 NEW ENGLAND JOURNAL ON CRIMINAL AND CIVIL CONFINEMENT 1 (1998). This article examines the legal, policy, and practical issues pertaining to the “voluntary” admission of incompetent or questionably competent individuals into nursing facilities. The author notes that while nursing facilities ordinarily do not question the voluntariness of such individuals’ admissions in cases where no legally authorized surrogate decision makers exist, admission directors appear to be increasingly apprehensive about admitting such individuals into their facilities. The author presents his observations based on research he conducted in 1996-97. His research consisted, in part, of interviews with nursing

home and hospital personnel, regulatory officials, and others knowledgeable about nursing facilities. These interviewees were asked whether nursing facilities are in fact increasingly becoming reluctant to admit someone unless that person "or a surrogate has clear legal authority to consent voluntarily to admission." They were also asked questions concerning what policies and measures may be appropriate for dealing with the negative consequences resulting from this increased reluctance to admit certain individuals, how nursing facilities evaluate decision-making capacity, and whether changed admission practices have led to more guardians being appointed for the purpose of giving consent to nursing facility placement.

Novak, Mark & Novak, Sean M. *Clear Today, Uncertain Tomorrow: Competency and Legal Guardianship, and the Role of the Lawyer in Serving the Needs of Cognitively Impaired Clients*. 74 NORTH DAKOTA LAW REVIEW 295 (1998). This article describes the role and responsibilities of attorneys in evaluating their cognitively impaired clients' competency and capacity. The authors note that "[c]ognitive impairment will be a growing issue for attorneys." The article describes situations requiring an attorney to act against the wishes of a client and support a shift of decisional authority from the client to another individual. The authors recommend that attorneys "understand the concepts of capacity and competency for elderly clients as they are now being developed by medical and social science." In this article, competency and capacity are viewed on a continuum and attorneys are urged to recommend the "least restrictive solution" in cases of incompetency or incapacity.

Rein, Jan E. *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*. 9 STANFORD LAW AND POLICY REVIEW 241 (1998). This article examines how the ABA Model Rules of Professional Conduct offer elder law attorneys little guidance when it comes to dealing with ethical issues arising from a client's mental impairment. The author addresses such questions as whether "ethically safe" actions by attorneys are "helpful or harmful to the impaired client" and under what circumstances it is appropriate for attorneys to take protective action, such as seeking guardianship on behalf of an incapacitated client. The author concludes by providing "suggestions for prevention and reform."

Whitton, Linda S. *Caring for the Incapacitated—A Case for Nonprofit Surrogate Decision Makers in the Twenty-First Century*. 64 UNIVERSITY OF CINCINNATI LAW REVIEW 879 (1996). This article

explores the subject of surrogate decision makers and the idea of “permitting competent individuals to appoint nonprofit organizations as agents under durable powers when an appropriate individual is unavailable to serve in that capacity.” The author notes that while “corporate fiduciaries are commonly delegated financial durable powers and trust powers, this practice has not yet extended to delegation of powers over the person, such as health care authority.” The author proposes that nonprofit agents be allowed to have delegable durable health care powers so that competent persons who are without appropriate individual agents may avoid guardianship and achieve greater self-determination.

E. RIGHT TO DIE/DECISIONS ABOUT DYING (INCLUDING ADVANCE DIRECTIVES)

Articles

Horttor, Bretton J. *A Survey of Living Will and Advanced Health Care Directives*. 74 NORTH DAKOTA LAW REVIEW 233 (1998). This article surveys selected state statutes concerning end-of-life treatment decisions, living wills, health care agent designation laws, and surrogate decision maker laws. The article is useful for comparing and contrasting differences in state laws and regulations governing these forms of decision making.

Kapp, Marshall B. *Old Folks on the Slippery Slope: Elderly Patients and Physician-Assisted Suicide*. 35 DUQUESNE LAW REVIEW 443 (1996). This article outlines the reasons why legalizing physician-assisted suicide would lead to a “moral slippery slope toward unintended consequences that almost everyone would condemn.” The author, in making his argument, briefly examines issues such as decision making capacity, voluntariness, and ageism in the health care system. He also briefly discusses some alternatives to physician-assisted suicide.

Larson, Edward J. & Eaton, Thomas A. *The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act*. 32 WAKE FOREST LAW REVIEW 249 (1997). This article discusses the merits and limitations of the Patient Self-Determination Act. The authors describe the legislative history of and policy considerations behind the Act. The article also includes a description and analysis of the empirical studies conducted to assess the Act’s effectiveness. The authors argue that the Act has had only a “modest” impact at best, that the use of advance directives will remain limited, and that alter-

native modes of health care treatment decision making will need to be developed.

Meisel, Alan. *Barriers to Forgoing Nutrition and Hydration in Nursing Homes*. 21 AMERICAN JOURNAL OF LAW & MEDICINE 335 (1995). Like competent patients in a hospital, competent nursing home patients have the right to forego artificial nutrition and hydration, according to the author. He explains why it is often more difficult to forego such therapies in a nursing home than in a hospital setting. He suggests that this situation could be remedied with clearer state regulations and nursing home policies.

Morgan, Rebecca C. & Sutherland, D. Dixon. *Last Rights? Confronting Physician-Assisted Suicide in Law and Society: Legal Liturgies on Physician-Assisted Suicide*. 26 STETSON LAW REVIEW 481 (1996). The authors examine three different models reflecting the various fronts in which the physician-assisted suicide debate has taken place: 1) litigation, 2) legislation, and 3) "the direct participation of doctors." The authors discuss the ideas and assumptions about autonomy or self-determination contained within each model and the ethical issues that arise. The article concludes with a "Model State Act to Authorize and Regulate Physician-Assisted Suicide" that was drafted by a team of lawyers, physicians, academics, and members of the Hemlock Society.

Young, Ernie W.D. *Ethical Issues at the End of Life*. 9 STANFORD LAW & POLICY REVIEW 267 (1998). This article discusses ethical issues related to end of life decisions and the challenge facing "courts, legislatures, health care professionals and bioethicists to discern humane and morally acceptable ways of assisting patients and their families as death approaches." The author provides a historical perspective and also examines where our society is headed with respect to these issues. The author concludes by reviewing possible solutions to some of the specific problems discussed in the article.

V. SOCIAL POLICY/SOCIAL ISSUES

A. SOCIAL POLICY

Books

COCKERHAM, WILLIAM C. THIS AGING SOCIETY, 2ND ED. Upper Saddle River, NJ: Prentice Hall, 1997. This book reviews the literature on the social aspects of the aging experience and the impact an increas-

ingly older population has on society. This discussion is based on an examination of the demography of aging in the United States and a comparison of demographic changes in the United States and the rest of the world. This book also examines the effects of ageism, as well as gender and race discrimination, on the aging experience. The book includes a description of employment and retirement trends, discusses their effects on older persons, and concludes with a discussion of future retirement and social policy trends.

SMITH, GREGORY C., ED. *STRENGTHENING AGING FAMILIES: DIVERSITY IN PRACTICE AND POLICY*. Thousand Oaks, CA: Sage Publications, 1995. This book examines a variety of approaches to social work with aging families of different types and focuses on the changing nature of the family and the needs of a diverse group of elderly family members. Each of the chapters is authored by either a family practitioner or social worker and includes discussions of diverse issues affecting both individual family members and the entire family unit. The chapters also suggest ways to strengthen family functioning. The book is organized into three sections: Part One addresses issues faced by many aging families, such as care for the frail elderly, institutional care, and relating to siblings in later life; Part Two examines issues affecting special aging populations, including how the aged care for adult family members with lifelong disabilities; Part Three focuses on the diversity within family dynamics, including understanding intergenerational issues and considerations of the family's ethnic and/or cultural heritage.

Articles

Francis, Leslie P. *Elderly Immigrants: What Should They Expect of the Social Safety Net?* 5 *THE ELDER LAW JOURNAL* 229 (1997). This article discusses the impact of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and the Balanced Budget Act of 1997 (BBA) on elderly immigrants. The author argues that PRWORA, which took away federal benefits from immigrants, is unjustifiable as applied to elderly immigrants, "particularly the incompetent or ill," who depend heavily on SSI and Medicaid. While the BBA restored some of these lost benefits to immigrants who resided in the United States before the passage of PRWORA, it still leaves even these immigrants without an adequate social safety net, according to the author. She concludes that federal benefits

should be restored to all elderly immigrants, at least to the extent that they "provide a safety net to cushion the effects of catastrophe."

French, Kyle G. *The Elderly and the Discriminatory Use of Genetic Information*. 5 THE ELDER LAW JOURNAL 147 (1997). This note begins with an overview of the science of genetic testing. The author then describes why the elderly are susceptible to genetic information discrimination by insurers and how insurers use this information. This is followed by an examination of laws and legislative proposals designed to limit this type of discrimination. The author concludes by providing suggestions to assist elder law practitioners deal effectively with genetic information issues.

Goodin, Robert E. & Gibson, Diane. *Rights, Young and Old*. 17 OXFORD JOURNAL OF LEGAL STUDIES 185 (1997). The authors explore the plights of the very young and very old, specifically infants and the mentally infirm elderly, who between them pose difficult questions for the "Choice Theory" and "Interest Theory" of rights. Both of these "prevailing theories of rights" are problematic when applied to the mentally infirm elderly because such individuals lack "the capacity for reasoned choice" and have interests that cannot be easily surmised. The authors argue that for reasons of theory and practice, the proper treatment of the immature young and mentally infirm elderly by society should be based on duties and obligations towards these two groups rather than on individual rights and claims.

High, Dallas M. & Doole, Mary M. *Ethical and Legal Issues in Conducting Research Involving Elderly Subjects*. 13 BEHAVIORAL SCIENCES & THE LAW 319 (1995). The authors discuss how the elderly are increasingly becoming the subject of biomedical and behavioral research. This trend is a result of the fact that the elderly are now the fastest growing segment of the population and the resulting societal desire to improve the quality of life of the elderly. The authors believe that behavioral and medical research carries a profound obligation to protect the rights and welfare of research subjects and raises important ethical and legal concerns. This article discusses whether older subjects should be treated as a special class and the ethical and legal issues surrounding informed consent from elderly subjects. Among the specific topics addressed in this article are surrogate/proxy consent procedures in research, the recruitment of elderly subjects, conflicts of interest, problems related to institutional research, and risk/benefit analyses. The authors conclude by offering

several recommendations and practical guidelines for conducting current and future research involving the elderly.

Holstein, Martha. *Opening New Spaces: Aging and the Millennium*. 10(1) JOURNAL OF AGING AND SOCIAL POLICY 1 (1998). The author argues for the use of critical gerontology and social ethics to develop new ways of thinking about aging. The author refutes media reports that have suggested that cutting social programs for the elderly will cause little harm to the aged. She argues that while these media reports have shaped the public's opinion, they have ignored the impact of race, gender, and class that research in the political economy of aging has analyzed. She discusses the fact that elderly people still face injustices, despite recent achievements, and recommends that researchers continue to analyze the conditions that have a negative impact on the elderly.

Hudson, Robert B. *The Evolution of the Welfare State: Shifting Rights and Responsibilities for the Old*. 48(1) INTERNATIONAL SOCIAL SECURITY REVIEW 3 (1995). This article discusses the pressures on the contemporary welfare state and the changes occurring in the condition of the aged populations in industrial nations. The author discusses the role that "economic liberalism" has played in contributing to these pressures and changes. The author notes that those who have built and witnessed the successes of contemporary social welfare programs in the United States and European countries are alarmed by the threats posed to such values as universalism, adequacy, and solidarity. The author suggests how these values can be preserved.

Kapp, Marshall B. *Decisional Capacity, Older Human Research Subjects, and IRBs: Beyond Forms and Guidelines*. 9 STANFORD LAW & POLICY REVIEW 359 (1998). This article analyzes and suggests improvements for Institutional Review Boards (IRBs) at two stages: the initial protocol and post-approval. The author believes that initially, the IRB should look to see whether the protocol provides for and specifies an adequate means of determining the decisional capacity of research subjects. During post-approval, better monitoring of the changing capacity of subjects is necessary. The author recommends the use of proxies and third-party observers to help with this monitoring. He concludes that while a number of ideas for increasing the role of IRBs have been proposed, the costs of imposing new duties must be weighed against the benefits, and a proper balance must be struck. He recommends that pilot studies be conducted before regulations are imposed upon investigators.

- Korzec, Rebecca. *A Feminist View of American Elder Law*. 28 UNIVERSITY OF TOLEDO LAW REVIEW 547 (1997). This article offers a feminist perspective on significant elder law issues, "particularly the feminist jurisprudence of care." The author notes that the traditional approach to American elder law has promoted "autonomy, personal responsibility, rationality, and individualism," while the feminist approach "rejects these traditional concepts in favor of solidarity, empathy and community responsibility." The author advocates gender-neutral policies that would promote the equal participation of men and women in the workforce as well as in the fulfillment of family responsibilities at home.
- Krain, Mark A. *Policy Implications for a Society Aging Well: Employment, Retirement, Education, and Leisure Policies for the 21st Century*. 39 AMERICAN BEHAVIORAL SCIENTIST 131 (1995). This article examines the concept of "aging well," which has become very popular in both academic and popular cultures. The author discusses the significant changes taking place with respect to work and retirement and how these changes could potentially affect the elderly quite severely. The author argues that for people to age well, everyone must work toward the adoption of "social policy that will facilitate our adaptation to the oncoming changes." The author discusses why aging well for the individual and society is best done by reconceptualizing the individual's "life course" (i.e., moving away from traditional notions of what education, work, and leisure options are available to individuals at different points in their lives). The author concludes by suggesting some "social policy objectives to facilitate the changes and to alleviate key problems suffered by those caught in the transitions."
- Morris, Robert & Caro, Francis G. *The Young-Old, Productive Aging, and Public Policy*. 19 GENERATIONS 32 (Fall 1995). This article addresses the issue of "near old" (aged 55-64) and "young old" (65-74) individuals who are not members of the full-time work force but may still be productive workers. The authors discuss how opportunities can be created for these groups through paid employment and how projects can encourage elders to volunteer for community activities. The authors also provide a literature review on the issues of retirement and volunteering.
- Narayanan, Usha. *The Government's Role in Fostering the Relationship Between Adult Children and Their Elder Parents: From Filial Responsibility Laws to . . . What? A Cross-Cultural Perspective*. 4 THE

ELDER LAW JOURNAL 369 (1996). The author begins this note by discussing the costs of social programs for the elderly and the role that families may play in containing these costs. The author describes current United States policies that promote families financially supporting their elderly relatives and contrasts these policies with Japanese policies that promote family support by fostering social relationships that encourage this value. The author describes the benefits of policies that promote family responsibility for elders by encouraging closer social relationships in contrast to mandating a financial duty statutorily.

B. VICTIMIZATION OF THE ELDERLY

Books

BIGGS, SIMON AND OTHERS. *ELDER ABUSE IN PERSPECTIVE*. Philadelphia: Open University Press, 1995. This book examines how the maltreatment of older adults is defined, theorized, and researched and explores the most effective methods of intervention and prevention. The book also provides an explanatory framework of elder abuse that is based on an analysis of the social position of older adults in the United Kingdom and other Western societies, and provides some theoretical understanding that may be lacking in the practice of social gerontology. The authors place the problem of elder abuse in its social and historical context and focus attention on the forms of abuse within families, communities, and institutions such as hospitals and residential homes.

Articles

Blair, Joann. "*Honor Thy Father and Thy Mother*"—*But for How Long?—Adult Children's Duty to Care for and Protect Elderly Parents*. 35 UNIVERSITY OF LOUISVILLE JOURNAL OF FAMILY LAW 765 (1997). The author of this note discusses the scope of the elder abuse problem and how the law has been inadequate in this area. While reporting and criminal liability statutes have been enacted to address the problem of elder abuse and neglect, "some statutes are unconstitutionally vague" and others do not go far enough, according to the author. The author explores the pros and cons of imposing a "legal duty on adult children to care for and protect their elderly parents." She concludes that creating such a duty of care is necessary in order to solve the elder abuse problem.

- Frank, Judith A. *Preneed Funeral Plans: The Case for Uniformity*. 4 THE ELDER LAW JOURNAL 1 (1996). This article discusses the exploitative practices within the funeral industry with respect to "preneed funeral contracts" (used to "prearrange and prepay for the costs of a funeral"), and the lack of adequate consumer protection laws governing such transactions. The author discusses the variety of ways in which states have regulated the sale of these contracts and examines what the various state laws have in common. The author believes that laws governing preneed funeral contracts should be more uniform and offer consumers "viable remedies" in case of nonperformance or a breach of contract. The article concludes with a summary of responses to a survey sent to various state offices, agencies, and individuals regarding preneed funeral plans.
- Ingalls, George S. and others. *Elder Abuse Originating in the Institutional Setting*. 74 NORTH DAKOTA LAW REVIEW 313 (1998). This article provides a survey of federal and selected state law pertaining to elder abuse within institutional settings. The article begins with a summary of statistics from the Long Term Care Ombudsman Annual Report from 1995 to illustrate specific instances of abuse. This is followed by a list of the seven types of elder abuse identified by the Office of the Inspector General of the Department of Health and Human Services and an explanation of the provisions in the Nursing Home Reform Act designed to protect the elderly from abuse. The article then proceeds to discuss definitions in state statutes, federal causes of action and remedies, state criminal liability, and state civil remedies.
- Kapp, Marshall B. *Elder Mistreatment: Legal Interventions and Policy Uncertainties*. 13 BEHAVIORAL SCIENCES AND THE LAW 365 (1995). This article discusses the abuse, neglect, and exploitation of older adults in home and institutional settings by their informal and formal caregivers. The author discusses a variety of legal options for intervention based on the state's "parens patriae" authority to protect the elderly, and suggests that agencies serving elderly abuse victims employ the least restrictive or least intrusive protection measures possible. He concludes by suggesting that the gross insufficiency of resources available for effective follow-up and intervention in cases of abuse requires immediate attention by public policy makers.
- Macolini, Ruthann M. *Elder Abuse Policy: Considerations in Research and Legislation*. 13 BEHAVIORAL SCIENCES AND THE LAW 349 (1995). This article examines recent elder abuse research (from a public policy perspective) as well as related legislation. Specifically,

the article compares elder abuse to other forms of family violence, discusses the difficulties in defining elder abuse, and evaluates abuse reporting statutes. The author argues that elder abuse laws have been developed without a cogent rationale for their existence. The author comments on the dissimilarities between elder and child abuse yet notes that the child abuse paradigm has been the most common model for elder abuse legislation. She also argues that elder abuse legislation has been influenced by ageism and paternalism and concludes with the argument that future responses to elder abuse should be innovative and should attempt to balance concerns over safety and autonomy.

Moskowitz, Seymour. *Private Enforcement of Criminal Mandatory Reporting Laws*. 9(3) JOURNAL OF ELDER ABUSE AND NEGLECT 1 (1998). This article discusses mandatory state statutes that require specified professionals who have reason to believe or suspect that elder abuse or neglect is occurring to report the mistreatment to a designated public authority. The author discusses the fact that the failure to report these acts is typically a criminal offense and that a majority of states designate the omission to report mistreatment as a misdemeanor. In spite of these laws, there have been numerous studies showing that professionals fail to report and that criminal enforcement of the reporting laws has been virtually nonexistent. The author proposes other remedies for failing to report, including civil malpractice liability and licensure sanctions, which may have the desired effect on professionals' behavior.

Murch, Trent M. *Revamping the Phantom Protections for the Vulnerable Elderly: Section 3A1.1(B), New Hope for Old Victims*. 6 THE ELDER LAW JOURNAL 49 (1998). This note discusses the Vulnerable Victim Sentence Enhancement (section 3A1.1(B)) of the United States Sentencing Guidelines. According to the author, courts have not interpreted this section of the Guidelines correctly. The author analyzes the factors that influence elder abuse and discusses the role that the Sentencing Guidelines play in curbing this type of victimization. He argues that courts should adopt a literal interpretation of section 3A1.1(B), which makes it easier for prosecutors to meet the burden of proving that this sentence enhancement should be applied.

Polisky, Robert A. *Criminalizing Physical and Emotional Elder Abuse*. 3 THE ELDER LAW JOURNAL 377 (1995). The author of this note discusses the prevalence of elder abuse and how tort law and criminal law have largely been unable to adequately provide redress for vic-

tims of such abuse. He argues in favor of state statutes that criminalize physically and emotionally abusive acts and believes that such statutes should focus on the abusive act itself instead of requiring proof of the impact of such abuse on the victim. He discusses the constitutionality of such statutes and concludes by proposing model legislation that incorporates the various statutory recommendations set forth in the article.

Pollack, Daniel. *Elder Abuse and Neglect Cases Reviewed by Appellate Courts*. 10 JOURNAL OF FAMILY VIOLENCE 413 (1995). While almost every state in the nation has passed legislation to protect the elderly from abuse and neglect in domestic and institutional settings, most cases are never appealed. Therefore, research on case law in this area is limited. Using LEXIS and Westlaw, the author found ten appellate level cases involving abuse or neglect of the elderly in the United States during 1981-1993. The author provides the factual background and final disposition of each case.

Starnes, Richard A. *Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties*. 4 THE ELDER LAW JOURNAL 201 (1996). This note begins with a discussion of how the elderly are particularly vulnerable to consumer fraud and in need of protection. The author describes some of the fraudulent schemes that target the elderly. He then evaluates the current statutory and enforcement scheme used to attack this problem and concludes that there are currently too many loopholes in the law. He proposes "a uniform plan for both the federal government and state governments to stop consumer frauds on the elderly, to punish those who perpetrate [them], and to help elderly victims regain what they lost to these schemes."

Velick, Molly D. *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*. 3 THE ELDER LAW JOURNAL 165 (1995). In this note, the author explains why mandatory reporting statutes are essential in the fight against elder abuse. The author refutes the arguments against these statutes and suggests how compliance with mandatory reporting laws can be increased. She first proposes that adult protective services and other governmental agencies receive more funding to give potential reporters assurance that there are adequate resources to help the victims of abuse. She also proposes some lower-cost strategies, including increasing public awareness of elder abuse and reporting statutes, improving interagency co-

operation and coordination, and providing more legal protection to reporters of abuse.

C. AGED OFFENDERS

Articles

Brown, Lyle B. *The Joint Effort to Supervise and Treat Elderly Offenders: A New Solution to a Current Corrections Problem.* 59 OHIO STATE LAW JOURNAL 259 (1998). The author of this note provides a profile of the "typical elderly offender" and discusses the drawbacks to prison, probation, and diversion as correctional options for elderly offenders. As far as which options are best for supervising and treating elderly offenders, the author concludes that none of them satisfies both society's need for deterrence and the offender's need for services and counseling. The author proposes a solution called the "Joint Effort to Supervise and Treat Elderly Offenders" that would combine both the structured supervision found in probation programs and the social services found in diversion programs. The purpose of the "Joint Effort" program is to prevent new criminal activity by elderly parolees.

Ornduff, Jason S. *Releasing the Elderly Inmate: A Solution to Prison Overcrowding.* 4 THE ELDER LAW JOURNAL 173 (1996). This note examines the dual problems of prison overcrowding and an aging prison population in the United States. The author discusses the special needs of elderly inmates and how attempting to meet these needs places extra burdens on a correctional system already suffering from overcrowding and run-down facilities. The author examines some of the ways in which governments are trying to solve these problems and argues that "early release programs for the elderly, especially the Program for Older Prisoners," offer the best solution for reducing the elderly prison population.

Pertierra, Cristina J. *Do the Crime, Do the Time: Should Elderly Criminals Receive Proportionate Sentences?* 19 NOVA LAW REVIEW 793 (1995). This note focuses on the question of "whether sentencing elderly offenders to a term of years that exceeds their life expectancies constitutes cruel and unusual punishment." The author examines how federal and state "cruel and unusual punishment" clauses have been interpreted and how courts "consider age as a mitigating factor when sentencing." The author concludes that life expectancy should

not be used as a basis for giving reduced sentences for elderly offenders.

VI. ELDER PRACTICE

Articles

Gary, Susan N. *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*. 32 WAKE FOREST LAW REVIEW 397 (1997). This article explores the benefits as well as disadvantages of using mediation to resolve probate disputes. The author is particularly interested in the use of mediation in guardianship and inheritance cases, which often involve an elderly family member. According to the author, "[t]he personal and family aspects of many probate issues make mediation particularly appropriate in this area of the law." The author examines how mediation is currently being used in probate cases and discusses some of the court rules and procedures that have been adopted recently to promote the use of mediation and make it more available to parties involved in probate disputes. She concludes by making some policy recommendations regarding the use of mediation in probate disputes and offering guidance as to when such mediation would be beneficial and when it would not.

Kruse, Clifton B., Jr. *The Elder Law Attorney: Working With Grief*. 3 THE ELDER LAW JOURNAL 99 (1995). This article contains practical advice to elder law attorneys who must deal with a client's grief. The author discusses different types of grief that elder law attorneys typically witness in their practices and suggests techniques that these attorneys can use to help their grieving clients.

McNeal, Mary H. *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*. 32 WAKE FOREST LAW REVIEW 295 (1997). This article discusses "discrete-task representation," whereby legal services are unbundled or broken down into discrete tasks so that clients are able to hire an attorney with respect to only some aspects of a case. The author explores whether this type of representation is the appropriate solution to the problem of the unmet legal needs of the moderate-income elderly population. The author first outlines some potential problems with discrete-task representation from both the lawyer's and client's perspective. She then discusses the full range of professional obligations to which lawyers are subject, with particular emphasis placed on the "ethical requirements of

competence, diligence, and zeal.” She then examines whether the discrete-task model is consistent with the fulfillment of these professional obligations. An examination of some of the arguments in favor of this model follows and the author concludes by making recommendations regarding its use. In her opinion, more research is needed to determine whether discrete-task representation is the best solution available for improving the moderate-income elderly’s access to legal services.

- Rains, Ramona C. *Planning Tools Available to the Elderly Client*. 19 AMERICAN JOURNAL OF TRIAL ADVOCACY 599 (1996). This note is directed towards lawyers who represent less affluent elderly clients in estate planning matters. The author discusses a number of tools and techniques that may help to assist such clients, including conservatorships and durable powers of attorney (as tools for managing the financial affairs of incapacitated individuals), living wills, durable health care powers of attorney, and reverse mortgages.
- Stewart, Lisa and others. *The Interdisciplinary Team Focus: A Strategy for Developing a Successful Practice of Elder Law*. 19 NOVA LAW REVIEW 647 (1995). This article discusses “techniques for effective counseling and communication with older clients” and the need for elder law practitioners to take an interdisciplinary approach to their clients’ needs by developing relationships with professionals in other fields. The authors encourage elder law practitioners to become familiar with the roles of geriatric care managers, financial and estate planners, as well as long-term care insurance professionals. The article concludes with a discussion of issues related to guardianships.
- Stolle, Dennis P. *Professional Responsibility in Elder Law: A Synthesis of Preventive Law and Therapeutic Jurisprudence*. 14 BEHAVIORAL SCIENCES AND THE LAW 459 (1996). The author’s purpose in this article is to suggest that “lawyers rendering advice to older clients should give explicit consideration to maintaining or enhancing the client’s psychological well-being.” The author also believes that lawyers who represent older clients have a special responsibility “to ensure that their older clients have the capacity to manage their own affairs” as well as to “plan for the possibility of future incapacity.” The author presents an analytic framework for fulfilling these professional responsibilities, one that integrates “therapeutic jurisprudence,” which focuses on the psychological well-being of the client, and “preventive law,” which emphasizes the importance of legal planning. The author discusses the advantages as well as limitations of his

framework and he applies it to a typical lawyer/client interaction encountered in elder law practice.