
BIBLIOGRAPHY

**GERONTOLOGY AND THE LAW: A
SELECTED ANNOTATED
BIBLIOGRAPHY: 2002–2005 UPDATE**

COMPILED BY

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I. INTRODUCTION

This bibliography serves as the 2002–2005 update to *Gerontology and the Law: A Selected Annotated Bibliography*. First published in 1980 by *Law Library Journal*,¹ the bibliography has since been updated seven times between 1982 and 2001 in the *Southern California Law Review*.² The original bibliography and the first five updates provide citations to a variety of books, articles, and other law related materials on various aspects of the law and gerontology. Starting with the sixth update, the style and content of the bibliography was changed in two ways: first, the bibliographers took a more selective approach in choosing resources to include and second, the bibliographers added descriptive annotations briefly describing the source after each citation.

For this 2002–2005 update, the bibliographers chose a selection of scholarly books and articles discussing legal issues related to gerontology, aging, and the elderly in the United States published between the years 2002–2005. This bibliography does not include sources that are directed towards the general public, such as popular literature and self-help guides, and sources that do not deal with both law and gerontology. Other sources not included, some of which have been included in prior versions, are book reviews, newspaper articles, government documents, congressional

1. Jill Mubarak, Diane Sapienza, & Robert Shimane. *Gerontology and the Law: A Selected Bibliography*. 73 L. LIBR. J. 255 (1980).

2. John Hasko, Alan Holoch & Nancy Young. *Gerontology and the Law: A Selected Bibliography*. 56 S. CAL. L. REV. 289 (1982); Leonette Williams. *Gerontology and the Law: A Selected Bibliography, 1982-83 Update*. 57 S. CAL. L. REV. 631 (1984); Pauline M. Aranas, Mary Jo Brazil, & Paul M. George. *Gerontology and the Law: A Selected Bibliography, 1984-85 Update*. 60 S. CAL. L. REV. 897 (1987); Susan McGlamery, Hazel Lord & Sue Burkhart. *Gerontology and the Law: A Selected Bibliography, 1986-90 Update*. 64 S. CAL. L. REV. 1675 (1991); Brian Raphael, Wendy Nobunaga & Lisa Moske. *Gerontology and the Law: A Selected Bibliography: 1991-94 Update*. 69 S. CAL. L. REV. 287 (1995); Rachel Pergament & Brian Raphael. *Gerontology and the Law: A Selected Annotated Bibliography: 1995-98 Update*. 72 S. CAL. L. REV. 1461 (1999); Diana C. Jaque, Jennifer S. Murray & Jessica Wimer. *Gerontology and the Law: A Selected Annotated Bibliography: 1999-2001 Update*. 76 S. CAL. L. REV. 699 (2003).

documents, conference proceedings, dissertations, and sources written in a language other than English. Although the focus of this 2002–2005 update is on the United States, a limited number of sources with an international or foreign perspective are included if they seem useful to researchers in the United States. Newer editions of older works are included if they were published between 2002–2005; however, if more than one edition was published between these dates, only the latest edition is included.

To locate sources to include in this bibliography, the bibliographers searched the following databases periodically from March 2006 through January 2007:

AgeLine (produced by AARP; searched via SilverPlatter WebSPIRS)

Journals and Law Reviews (Westlaw database)

Legal Resource Index (produced by the Information Access Company; searched via Westlaw)

MEDLINE (produced by the National Library of Medicine; searched via Ovid Web Gateway)

Social Sciences Citation Index (produced by Thomson Scientific; searched via ISI Web of Knowledge)

WorldCat (produced by OCLC Online Computer Library Center, Inc.; searched via OCLC FirstSearch)

As with prior updates, the citations in the bibliography do not conform to the *The Bluebook: A Uniform System of Citation* or to *The Chicago Manual of Style*. Instead, the citation format is a combination of the two styles and is consistent with previous updates of the bibliography.

II. GENERAL WORKS ON LAW AND AGING

A. BOOKS

ALTMAN, STUART H. & SHACTMAN, DAVID I., EDS. *POLICIES FOR AN AGING SOCIETY*. Baltimore, MD: The Johns Hopkins University Press, 2002. In this book, the editors have compiled a selection of essays by writers from diverse political and ideological perspectives on the challenges of providing health and income security to an aging population. Issues examined include problems involved with caring for an aging population, the current system for doing so, methods of reforming the current system, and the economic and political realities that hinder responsibly addressing these problems.

FROLIK, LAWRENCE A. & KAPLAN, RICHARD L. *ELDER LAW IN A NUTSHELL*, 3RD ED. St. Paul, MN: Thomson/West, 2003. This book from the popular Nutshell series briefly explains and summarizes numerous legal issues affecting elderly Americans, including age discrimination in employment, housing alternatives, guardianship, Social Security, pensions, financing medical needs, and the scope of medical care. This is the third edition; earlier editions were published in 1995 and 1999.

KAPP, MARSHALL B. *THE LAW AND OLDER PERSONS: IS GERIATRIC JURISPRUDENCE THERAPEUTIC?* Durham, NC: Carolina Academic Press, 2003. Kapp, a professor at Wright State University School of Medicine, takes a critical look at the laws, regulations, and judicial opinions in the areas of long-term care regulation, end-of-life medical care, protection of research subjects, guardianship, and other interventions that currently affect the lives of older persons and evaluates whether they accomplish what they intend to accomplish. He concludes that they generally do not and argues for less government intervention in older people's lives.

B. ARTICLES

DORON, ISRAEL. *From National to International Elder Law*. 1 *JOURNAL OF INTERNATIONAL AGING, LAW & POLICY* 43 (2005). Doron advocates adding more of an international dimension to the field of elder law. In this article, he describes how the globalization phenomena, both generally and in the law, worldwide aging populations, and the general development of international elder law support his theory that the time is ripe for elder law to be addressed at the international level. He believes an international approach will help improve how societies effectively address elder law issues.

DORON, ISRAEL & HOFFMAN, ASAF. *Time for Law: Legal Literacy and Gerontological Education*. 31 *EDUCATIONAL GERONTOLOGY* 627 (2005). The authors make the argument that gerontologists need to better incorporate the law into their research and scholarship and that gerontological educators need to incorporate more law into their teaching. As support for their argument, the authors cite to the power and impact that law can have as a social tool and agent for change. They argue that the study of law is too important to be left solely to legal scholars and believe that both disciplines would benefit from better collaboration.

GERKEN, JOSEPH. *Elder Law Sources*. 23(1) LEGAL REFERENCE SERVICES QUARTERLY 67 (2004). In this bibliography and research guide intended for librarians, attorneys, and the general public, Gerken briefly describes a limited number of tools and sources for researching legal issues that impact the elderly. Topics covered include treatises, law reviews, web sites, and specific subjects such as Medicare, Social Security, ERISA, and age discrimination.

TORRES-GIL, FERNANDO M. *The New Aging: Individual and Societal Responses*. 10 ELDER LAW JOURNAL 91 (2002). Torres-Gil examines a trend he calls "the new aging," in which our population is becoming both older and more diverse, and what this means to society. After first describing the trend, he discusses the challenges of this phenomenon and suggests policy decisions to better address the future problems of our aging society.

III. INCOME MAINTENANCE AND FINANCIAL/RETIREMENT PLANNING

A. GENERAL WORKS/MISCELLANY (INCLUDING PRIVATE PENSIONS)

1. Books

BONOLI, GIULIANO & SHINKAWA, TOSHIMITSU, EDS. *AGEING AND PENSION REFORM AROUND THE WORLD: EVIDENCE FROM ELEVEN COUNTRIES*. Cheltenham, UK: Edward Elgar Publishing Ltd., 2005. These essays, the result of a conference in Sapporo, Japan in March 2003, take a look at aging populations and pension reform in eleven democratic countries in Western Europe, East Asia, and North America with particular emphasis on institutional structures and political decision making in the face of these demographic changes.

GALE, WILLIAM G. & OTHERS, EDS. *THE EVOLVING PENSION SYSTEM: TRENDS, EFFECTS, AND PROPOSALS FOR REFORM*. Washington, DC: Brookings Institution Press, 2005. The essays in this volume examine the pension system, including its role in the American economy and different models of reform. The issues discussed include trends in the pension system, the role of pensions in labor markets, their impact on the accumulation of wealth, and various proposals for reforming the pension system. This book is a companion volume to *Private Pensions and Public Policies* also annotated in this bibliography.

- GALE, WILLIAM G. & OTHERS, EDS. PRIVATE PENSIONS AND PUBLIC POLICIES. Washington, DC: Brookings Institution Press, 2004. The essays in this volume take a look at the private pension system and suggest various reforms, including how to improve participant information and choice and how pension reform proposals might be affected by reforms to Social Security and tax policy. This book is a companion volume to *The Evolving Pension System: Trends, Effects, and Proposals for Reform* also annotated in this bibliography.
- GHILARDUCCI, TERESA & OTHERS, EDS. IN SEARCH OF RETIREMENT SECURITY: THE CHANGING MIX OF SOCIAL INSURANCE, EMPLOYEE BENEFITS, AND INDIVIDUAL RESPONSIBILITY. New York, NY: The Century Foundation Press, 2005. This selection of essays, derived from sessions at the National Academy of Social Insurance's sixteenth annual conference held in Washington, D.C. in January 2004, takes a critical look at issues related to financial security for the elderly. The essays examine and critique the current retirement system, including whether to encourage later retirement and how to do so, the proper mix of government and private benefits, the role of the individual in preparing for retirement, and pension reform in Sweden.
- KLEIN, JENNIFER. FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE. Princeton, NJ: Princeton University Press, 2003. Klein analyzes the historical development of private-sector insurance and corporate welfare programs from the first half of the twentieth century and the effect these programs have had on the development of the public welfare system. She argues that understanding how the private sector addressed the public's demand for security is fundamental to understanding how American social and welfare policy developed through this time period and that policy makers should consider this historical background in current efforts to reform social welfare programs such as Social Security and Medicare.
- MODIGLIANI, FRANCO & MURALIDHAR, ARUN. RETHINKING PENSION REFORM. Cambridge, UK: Cambridge University Press, 2004. Modigliani and Muralidhar take a look at the types of funding mechanisms for old age pensions, including the "pay-as-you-go" system common in most industrialized countries, the defined contribution funding system adopted by Chile and Mexico, and various hybrid models, including the United States with its mix of 401(k) plans and Social Security. After first describing the different systems, the authors then evaluate these options and address the efficacy of various

reform models in both the United States and Spain.

MUNNELL, ALICIA H. & SUNDÉN, ANNIKA. *COMING UP SHORT: THE CHALLENGE OF 401(K) PLANS*. Washington, DC: Brookings Institution Press, 2004. The authors take a critical look at 401(k) plans from their emergence in the early 1980s to their current status as a critical component of retirement income for most middle-class Americans. They believe that the plans as currently structured and used by most Americans will provide insufficient retirement income in the future and conclude with suggested changes to lessen some of the faults in the current system.

OVERBYE, EINAR & KEMP, PETER A., EDS. *PENSIONS: CHALLENGES AND REFORMS*. Aldershot, England: Ashgate, 2004. This is a selection of papers presented at an annual conference held by the Foundation of International Studies in Social Security in June 2002 in Sigtuna, Sweden. This ninth volume in the International Studies on Social Security series focuses on pension reform and how it has been implemented in the United States and various European and Latin American countries.

REIN, MARTIN & SCHMÄHL, WINFRIED, EDS. *RETHINKING THE WELFARE STATE: THE POLITICAL ECONOMY OF PENSION REFORM*. Cheltenham, UK: Edward Elgar Publishing Ltd., 2004. This selection of essays compares pension reform in various countries of Europe and Latin America, the United States, and Japan. The essays analyze what type of change took place, how it came to be, and what can be expected in the future due to the change.

SOLOMON, LEWIS D. *FINANCIAL SECURITY & PERSONAL WEALTH*. New Brunswick, NJ: Transaction Publishers, 2005. Solomon, a professor at The George Washington University Law School, examines the political history of Social Security and various efforts over the years to reform the system. Because of current fiscal realities, the author believes Social Security is facing a funding crisis. To help address this crisis, he advocates simplifying and expanding individual and employer-sponsored retirement plans and reforming Social Security through the use of private accounts.

VITT, LOIS A., ED. *ENCYCLOPEDIA OF RETIREMENT AND FINANCE*. Westport, CT: Greenwood Press, 2003. This two volume encyclopedia discusses a variety of financial topics related to retirement and is a follow up to the *Encyclopedia of Financial Gerontology*. The entries vary in length from a page to multiple pages and cover over a hundred

diverse topics such as estate planning, Medicaid, funeral expenses, and long-term care. Each entry includes references to related organizations and resources to consult for further information.

WOOTEN, JAMES A. *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY*. Berkeley, CA: University of California Press, 2004. Wooten takes a detailed and comprehensive look at the political history of the creation of ERISA. The emphasis of Wooten's discussion is on who supported and opposed the legislation and their reasons behind it. He concludes with a discussion of why he thinks that the legislative process worked in this case to create "a minor miracle."

2. Articles

BROWN, DOROTHY A. *Pensions, Risk, and Race*. 61 WASHINGTON & LEE LAW REVIEW 1501 (2004). Brown, a critical race theory scholar, examines the race and gender related data on private sector worker participation in pension plans and concludes that Hispanic workers are the least likely to participate and white workers are the most likely. Further, in plans where investment decisions depend on individual decisions, the author finds that workers who do participate make decisions that adversely affect the rate of return. She advocates further education to maximize the investment of those funds.

DILLEY, PATRICIA E. *Hope We Die Before We Get Old: The Attack on Retirement*. 12 ELDER LAW JOURNAL 245 (2004). Dilley believes our current retirement system based on Social Security, private pensions, and personal savings is in poor shape and is not likely to survive when most workers of today reach retirement age. She is particularly concerned that lower and middle income retirees are the most at risk of harm due to the retirement system's emphasis on earned income and the declining fortunes of Social Security. She recommends greater redistribution of wealth from higher income to lower and middle income retirees to avoid a complete retirement system failure. She also advocates a more flexible approach to retirement age to better reflect the realities of today's workforce.

EASON, JOHN K. *Retirement Security Through Asset Protection: The Evolution of Wealth, Privilege, and Policy*. 61 WASHINGTON & LEE LAW REVIEW 159 (2004). Eason examines retirement fund asset protection in the context of federal retirement policy goals. He first looks at the law of trusts and how it relates to federal retirement policy.

He then evaluates asset protection mechanisms in the federal retirement model and concludes with a discussion encouraging Congress to take a more comprehensive approach to retirement plan asset protection by emphasizing federal retirement policy goals.

GREGOIRE, THOMAS K. & OTHERS. *Gender and Racial Inequities in Retirement Resources*. 14 (3/4) JOURNAL OF WOMEN & AGING 25 (2002). In this study, based on 1982 and 1991 Social Security Beneficiary surveys, the authors examine the retirement resources of various groups by gender, marital status, and race/ethnicity. The authors conclude that there is a significant relationship between these different groups in retirement resources to the detriment of unmarried, nonwhite women. They further argue that increasing divorce rates, greater longevity, and privatization trends will exacerbate these disparities in the future.

HALPERIN, DANIEL. *Employer-Based Retirement Income—the Ideal, the Possible, and the Reality*. 11 ELDER LAW JOURNAL 37 (2003). Halperin looks at current government policy related to employer-sponsored retirement plans and concludes that these plans fail to provide adequate retirement income to lower income groups. The author recommends tougher standards to better ensure plans replace pre-retirement income and government subsidies to workers' retirement savings in order to make such plans feasible.

KAPLAN, RICHARD L. *Enron, Pension Policy, and Social Security Privatization*. 46 ARIZONA LAW REVIEW 53 (2004). Using the collapse of Enron as a cautionary example, Kaplan critically examines the current trend in employer-sponsored retirement plans away from defined benefit pension plans and toward 401(k) plans and increased investment in 401(k) plan funds in employer stock. The author then looks at how these trends will be exacerbated by plans to privatize Social Security, which he believes would further jeopardize Americans' already fragile retirement security.

LAWRENCE, JANICE KAY. *Pension Reform in the Aftermath of Enron: Congress's Failure to Deliver the Promise of Secure Retirement to 401(k) Plan Participants*. 92 KENTUCKY LAW JOURNAL 1 (2003). With 401(k) plans increasingly becoming the primary source of employer-sponsored retirement benefit and with many workers relying on company stock in these plans, Lawrence argues that Congress must effectively strike a balance that does not inhibit support or investment in 401(k) plans while still protecting workers. She further argues that

this desire for balance can include placing overall limitations on 401(k) plan investment in company stocks.

MILLON, DAVID. *Worker Ownership Through 401(k) Retirement Plans: Enron's Cautionary Tale*. 76 ST. JOHN'S LAW REVIEW 835 (2002). Millon reviews arguments in favor of worker ownership in their own company for their 401(k) investments. Arguments he surveys include self-realization through work, resolution of the conflict between capital and labor, benefits of democratic self-governance, and efficiency considerations such as motivation, trust, and governance savings from worker ownership. He concludes that these arguments fail when considering the potential for harm that can be caused when the value of such investments collapses and believes that the case for mandatory diversification of 401(k) plan assets is strong.

MOORE, KATHRYN L. *Reforming Retirement Systems: Why the French Have Succeeded when Americans Have Not*. 22 ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 251 (2005). Moore compares the French retirement system, with its reliance on mandatory base retirement systems, mandatory supplemental retirement systems, and optional supplemental retirement systems with the United States' reliance on one mandatory base system (Social Security), optional employer-sponsored pensions, and personal savings. The author looks at how, after years of failed attempts, the French were finally able to reform their retirement system in 2003 and possible implications for reform of the American system.

MUIR, DANA M. *Counting the Cash: Disclosure and Cash Balance Plans*. 37 JOHN MARSHALL LAW REVIEW 849 (2004). Muir considers the current trend toward conversion of defined benefit plans into cash balance plans, which many have criticized as unfairly harming older workers. After providing some background on this trend and discussing the legal and ethical implications of these conversions, the author then discusses the argument for increased disclosure and proposes a voting model that addresses stakeholder concerns with these conversions. This article is part of an issue devoted to articles from a symposium on Employee Benefits.

MUIR, DANA M. *ERISA and Investment Issues*. 65 OHIO STATE LAW JOURNAL 199 (2004). Muir examines current weaknesses in pension plan assets as they relate to investments. Issues examined include ERISA's failure to provide appropriate fiduciary compliance of defined benefit plans, the role of professional investment advice in defined

contribution plans, and whether regulation or reform of these issues is required and how that might be accomplished. This article is part of an issue devoted to articles from a symposium on Public Policy for Retirement Security in the 21st Century held at Ohio State University in April 2003.

POTERBA, JAMES M. *Individual Decision Making and Risk in Defined Contribution Plans*. 13 ELDER LAW JOURNAL 285 (2005). Poterba critically examines the decisions 401(k) participants are required to make, such as the decision to participate, especially by lower income workers, investment patterns and allocation decisions of participants, and early withdrawal decisions pre- or post-retirement and the effect of that decision. The author concludes with suggestions for 401(k) plan design improvements that better reflect current insights about human nature.

PRATT, DAVID A. *Pension Simplification*. 35 JOHN MARSHALL LAW REVIEW 565 (2002). Due to future challenges from an aging population and the financial situation of Social Security and Medicare, Pratt believes the current pension system discourages participation by both employers and employees and needs to be simplified. He suggests numerous ways to do so in order to encourage more individuals and businesses to join the system. This article is part of an issue devoted to articles from a symposium on the Future of Employee Benefits Law.

RAJNES, DAVID. *An Evolving Pension System: Trends in Defined Benefit and Defined Contribution Plans*. 249 EBRI ISSUE BRIEF 1 (2002). This update of a 1997 EBRI report analyzes the data and trends in participation in employment-based defined benefit and defined contribution pension plans from the 1975 to 1998 (the latest information available at the time this report was published). This report notes that defined benefit plans have steadily and consistently been losing ground in favor of defined contribution plans and suggests reasons for this trend.

REECE, SHARON. *Enron: The Final Straw & How to Build Pensions of Brick*. 41 DUQUESNE LAW REVIEW 69 (2002). Reece first describes the current private retirement system under ERISA. The author then goes on to describe the Enron Corporation's retirement plan and how its structure played a role in adversely affecting its participants when it collapsed. She recommends proposed legislation to help avoid future problems in plans that have a similar structure to Enron's plan.

- SCHMALL, LORRAINE. *Defined Contribution Plans after Enron*. 41 BRANDEIS LAW JOURNAL 891 (2003). Schmall uses Enron's collapse as a cautionary tale to criticize the current pension system's overreliance on the "racist, sexist, classist, and, ultimately, uninsurable" defined contribution plan. She argues that defined contribution plans are inherently untrustworthy and unable to satisfy participants' need for retirement security due to stock market volatility. She believes that defined contribution plans should not be the foundation of a retirement plan and should only be offered as an additional tool for retirement savings.
- SCHMALL, LORRAINE. *Women and Pension Reform: Economic Insecurity and Old Age*. 35 JOHN MARSHALL LAW REVIEW 673 (2002). Schmall examines the current pension system and its impact on women. She argues that the system as currently structured is woefully inadequate and discriminatory toward women. Reasons behind this discriminatory impact on women include the lower average pay for women, a tendency for women to spend more on family needs, and the lack of financial knowledge on women's part. She goes on to criticize the government and businesses for failing to address this problem in a meaningful way. This article is part of an issue devoted to articles from a symposium on the Future of Employee Benefits Law.
- SMITH, PEGGIE R. *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*. 25 BERKELEY JOURNAL OF EMPLOYMENT & LABOR LAW 351 (2004). Smith believes that caring for our elderly populations is similar to child care and points out that caring for our elders falls disproportionately on women. Therefore, she argues that we need to place elder care within the context of general work/family issues. While she applauds some family friendly policies such the Family and Medical Leave Act, she argues that the business community needs to do more than they are currently doing to help their workers deal with their employees' elder care needs and not limit their help to those who were once employees.
- STABILE, SUSAN J. *Freedom to Choose Unwisely: Congress's Misguided Decision to Leave 401(k) Plan Participants to Their Own Devices*. 11 CORNELL JOURNAL OF LAW & PUBLIC POLICY 361 (2002). Stabile proposes a new regulatory scheme for investment choices in 401(k) plans. She argues that ERISA section 404(c), which currently exempts employers from fiduciary responsibility for financial loss, should be

revisited because employers are, in reality, making many of the investment decisions when they choose the plans for their employees. She also believes additional regulations are needed to protect employees from bad investment decisions in their 401(k) plans.

STABILE, SUSAN J. *The Behavior of Defined Contribution Plan Participants*. 77 NEW YORK UNIVERSITY LAW REVIEW 71 (2002). Stabile examines participant choices in 401(k) plans using the rational choice model in law and economics. She first critiques current law using this model and then proposes changes that better reflect behavioral traits that would encourage the goal of achieving retirement security. Suggested changes include eliminating cofiduciary protection of employers, requiring rollovers to prevent behavioral biases that cause participants to take cash distributions, and requiring plans to contain automatic enrollment features unless participants specifically opt out.

STEIN, NORMAN. *Three and Possibly Four Lessons About ERISA that We Should, but Probably Will Not, Learn from Enron*. 76 ST. JOHN'S LAW REVIEW 855 (2002). Stein examines three "shortcomings" in ERISA. These shortcomings are provisions relaxing requirements restricting investments in stock of the sponsoring employer, the provision shifting responsibility for portfolio allocation to plan participants, and the provision allowing directors and employees of plan sponsors to serve as plan fiduciaries which implicitly allows them to make critical judgments on issues where plan sponsors and participants may conflict. The author encourages Congress to address these shortcomings to help prevent future disasters like the one that befell the participants of Enron's retirement plan.

ZELINSKY, EDWARD A. *The Defined Contribution Paradigm*. 114 YALE LAW JOURNAL 451 (2004). Zelinsky believes there has been a paradigm shift in Americans' perception of retirement accounts as individual accounts. This article explains why this paradigm shift matters, how it happened, and what it means for the future of pension funding. He argues that since the paradigm shift has already happened, policymakers need to make the new defined contribution paradigm work rather than try to resuscitate classic annuity paying benefits.

B. SOCIAL SECURITY/PUBLIC PENSIONS

1. Books

- ALTMAN, NANCY J. *THE BATTLE FOR SOCIAL SECURITY: FROM FDR'S VISION TO BUSH'S GAMBLE*. Hoboken, NJ: John Wiley & Sons, Inc., 2005. Altman weaves a tale using the personalities and people who helped to create Social Security. Throughout the book, she emphasizes the real value this program has had on peoples' lives. She starts off discussing early battles at the creation of the program and then uses this historical background to critically evaluate reform efforts advocated by President Bush. She is a strong advocate for keeping Social Security much like it is to, as Roosevelt said, "provide sound and adequate protection against the vicissitudes of modern life."
- ATTARIAN, JOHN. *SOCIAL SECURITY: FALSE CONSCIOUSNESS AND CRISIS*. New Brunswick, NJ: Transaction Publishers, 2002. Attarian argues that Social Security is in grave crisis, due primarily to what he terms "false consciousness," or a deliberate and dishonest marketing to the public of Social Security as "insurance" and an "earned right" when it is really the redistribution of earned income from younger workers to elderly retirees. He proposes repeal of the Social Security Act and setting up a new system that is financially sound and yet still satisfies the goal of providing financial security to the elderly poor.
- BÉLAND, DANIEL. *SOCIAL SECURITY: HISTORY AND POLITICS FROM THE NEW DEAL TO THE PRIVATIZATION DEBATE*. Lawrence, KS: University Press of Kansas, 2005. Béland discusses the history of the political debates that have occurred surrounding the formation and changes to Social Security over the years. He also examines the impact of gender and race on these debates and argues that gender, in particular, has had a profound and often overlooked impact on Social Security reform over the years.
- BERKOWITZ, EDWARD D. *ROBERT BALL AND THE POLITICS OF SOCIAL SECURITY*. Madison, WI: The University of Wisconsin Press, 2003. This policy-oriented biography of Robert Ball, the chief administrator of Social Security from 1953 to 1972, shows how he used "the conservative means of contributory social insurance toward the liberal ends of an expanded welfare state." His promotion of benefit formulas that had a relation to contributions but still allowed poorer people a greater return were key to the political success of Social Security and later to Medicare. Berkowitz takes a look at how Ball shepherded his vision through the decades and speculates about what he would think about the current debate about replacing Social Security with private accounts.

- DIAMOND, PETER A. & ORSZAG, PETER R. *SAVING SOCIAL SECURITY: A BALANCED APPROACH*, REV. ED. Washington, DC: Brookings Institution Press, 2005. Diamond and Orszag describe their plan to address current problems with the fiscal solvency of Social Security. They recommend a variety of reforms to the program to keep it solvent, such as increasing the tax on higher income workers, whose incomes are not fully taxed in the current system. This revised edition has a chapter considering President Bush's plan to reform Social Security with voluntary individual accounts.
- EDELMAN, PETER & OTHERS, EDS. *THE FUTURE OF SOCIAL INSURANCE: INCREMENTAL ACTION OR FUNDAMENTAL REFORM?* Washington, DC: Brookings Institution Press, 2002. This book is a selection of papers presented at the thirteenth annual conference of the National Academy of Social Insurance, held in January 2001 on issues facing social insurance programs. The topics covered include Social Security reform, retirement income, unemployment insurance, welfare reform, Medicare, philanthropic initiatives in health security, and comments by conference participants.
- FAVREAU, MELISSA M. & OTHERS, EDS. *SOCIAL SECURITY AND THE FAMILY: ADDRESSING UNMET NEEDS IN AN UNDERFUNDED SYSTEM*. Washington, DC: Urban Institute Press, 2002. This selection of essays, first presented in at the Urban Institute Conference on Social Security and the Family in June 2000, takes a look at the benefit structure of Social Security and how it treats today's families. Issues addressed include single parents, working women, child rearing, new family structures, and comparisons with other countries.
- FELDSTEIN, MARTIN & LIEBMAN, JEFFREY B., EDS. *THE DISTRIBUTIONAL ASPECTS OF SOCIAL SECURITY AND SOCIAL SECURITY REFORM*. Chicago, IL: The University of Chicago Press, 2002. The articles in this volume take a look at the income distributional aspects of Social Security, with a focus on how income distribution would be affected by reform proposals that include private retirement accounts. Included among the articles are surveys of how the current system distributes income among various groups and how proposals for reform would affect or change that distribution.
- HILTZIK, MICHAEL. *THE PLOT AGAINST SOCIAL SECURITY: HOW THE BUSH ADMINISTRATION IS ENDANGERING OUR FINANCIAL FUTURE*. New York, NY: HarperCollins Publishers, 2005. Hiltzik, a journalist for the *Los Angeles Times*, takes a critical look at President Bush's

plans to reform Social Security through privatization. He considers Bush's plans to be part of a long term conspiracy to destroy, what he terms, "the United States' most effective social insurance program" and turn it into a system based on private accounts. He feels this change would expose Americans to an unacceptable risk of vagaries in the economy and financial markets. While he does agree some changes to Social Security might be appropriate, he believes the program as currently structured is fundamentally strong and should not be radically altered through privatization.

SANTOW, LEONARD J. & SANTOW, MARK E. *SOCIAL SECURITY AND THE MIDDLE-CLASS SQUEEZE: FACT AND FICTION ABOUT AMERICA'S ENTITLEMENT PROGRAMS*. Westport, CT: Praeger, 2005. The authors are father and son with very different perspectives on the value and effectiveness of Social Security, Medicare, and Medicaid. The son, a historian and supporter of the programs, looks at the problems facing the middle-class and how those problems are currently alleviated by these programs. The father, an economist and critic of the ways these programs are organized and funded, takes a look at these same problems and tries to come up with solutions that pay for these programs in an equitable manner without putting additional financial pressure on the economy or individuals. They end up both agreeing to a list of recommendations to reform the programs and address some of the problems they describe.

STERETT, SUSAN M. *PUBLIC PENSIONS: GENDER AND CIVIC SERVICE IN THE STATES, 1850–1937*. Ithaca, NY: Cornell University Press, 2003. Sterett looks at the history of pensions provided by states and local governments in the United States from the Civil War to the New Deal through the prism of class, gender, constitutional law, federalism, and social welfare. She argues that states have had an important and undervalued role in developing public welfare programs long before the New Deal and that these state programs were instrumental in laying the groundwork for the eventual adoption and acceptance of the New Deal's programs by the courts.

TANNER, MICHAEL D., ED. *SOCIAL SECURITY AND ITS DISCONTENTS: PERSPECTIVES ON CHOICE*. Washington, DC: Cato Institute, 2004. This selection of previously published essays by the Cato Institute, a libertarian think tank, argues that fundamental reform of Social Security is needed to avoid a financial crisis. The essays recommend a variety of market-based solutions, argue that the current system is harmful to women and minorities, and argue that the American public

understands and is ready for a fundamental change to the program. Authors include Nobel Prize winner Milton Friedman and pollster John Zogby.

WHITE, JOSEPH. *FALSE ALARM: WHY THE GREATEST THREAT TO SOCIAL SECURITY AND MEDICARE IS THE CAMPAIGN TO "SAVE" THEM*, JOHNS HOPKINS PAPERBACKS ED. Baltimore, MD: The Johns Hopkins University Press, 2003. This paperback edition of the 2001 book takes a skeptical look at suggestions for radical reforms of Social Security and Medicare. White wrote the first edition at a time of projected budget surpluses that had disappeared by the time this version came out. He argues that the vagaries inherent in budget forecasting shown by this change add support to his recommendation for "responsible" but not radical reform.

2. Articles

BROWN, DOROTHY A. *Social Security and Marriage in Black and White*. 65 OHIO STATE LAW JOURNAL 111 (2004). Brown compares the benefits under Social Security of African-American surviving spouses with their contributions. She concludes that African-American wives are heavily penalized by the current system due to a higher proportion of dual income African-American households and encourages scholars to consider this racially disparate impact in their analyses of the program. This article is part of an issue devoted to articles presented at a symposium on Public Policy for Retirement Security in the 21st Century held at Ohio State University in April 2003.

BROWN, JEFFREY R. & OTHERS. *Top Ten Myths of Social Security Reform*. 13 ELDER LAW JOURNAL 309 (2005). The authors critique some of the current arguments, or "myths" as they call them, related to the need to reform Social Security and the role individual accounts will play in solving the funding problems. They argue that Social Security needs serious reform and that only changes to both the tax and benefits sides of the equation will solve its problems. The authors encourage policymakers to stop denying these problems or claiming that adding individual accounts is all that is needed to solve its problems. Instead, they encourage policymakers to recognize the reality of Social Security's funding problems and work toward a solution.

BUCHANAN, NEIL H. *Social Security, Generational Justice, and Long-Term Deficits*. 58 TAX LAW REVIEW 275 (2005). Buchanan believes that we should stop thinking of Social Security and other government funded

programs as distinct and separate from each other. Instead, he advocates thinking about all public finances more holistically. What is important, according to Buchanan, is that policymakers balance our current well-being and the well-being of generations to come. He recommends using the current annual and ten-year budget deficit projections when evaluating spending priorities and long-term fiscal health for all government programs, including Social Security.

COGAN, JOHN F. & MITCHELL, OLIVIA S. *Perspectives from the President's Commission on Social Security Reform*. 17 JOURNAL OF ECONOMIC PERSPECTIVES 149 (Spring 2003). This article by two members of the President's Commission to Strengthen Social Security attempts to summarize the positions of the members the Commission. The authors report that the members generally agreed that reform was needed to avoid drastic benefit cuts and/or tax hikes. They also believe that the Commission's reform proposal to add personal retirement accounts will go a long way toward shoring up the system and are consistent with Roosevelt's vision for the program.

CORONADO, JULIA LYNN & SMITH, PAUL A. *Social Security at 70: Principles, Issues and Alternatives*. 58 NATIONAL TAX JOURNAL 505 (2005). The authors divide arguments related to the debate about Social Security reform into two different sets of principles. They describe the first set as "collectivist principles," which emphasize the social insurance aspects of the program. The second set is described as "individualist principles," which focus on the efficiency gains that may be realized from a reduction in government intervention and an increase in individual self-determination. After first describing these two sets of principles, they then consider how advocates of each set might address certain reform proposals, such as the size and shape of the program, price indexing of benefits, and individual accounts. Their goal is to provide an analytical framework for evaluating issues related to proposals for reform.

DIAMOND, PETER A. & ORSZAG, PETER R. *Saving Social Security*. 19 JOURNAL OF ECONOMIC PERSPECTIVES 11 (Spring 2005). Diamond and Orszag argue that the fiscal problems of Social Security can and should be addressed through modest reform proposals that help to restore the actuarial balance, yet keep the system essentially intact, by combining benefit reductions with revenue increases. The authors also believe an expansion and improvement of existing tax preferred retirement accounts will help to further shore up the retirement system. They reject the need or desirability of individual accounts or any other

reform proposal that dramatically changes the current system.

DIAMOND, PETER A. *Social Security*. 94 AMERICAN ECONOMIC REVIEW 1 (2004). Diamond argues that Social Security is actually in much better financial shape than many politicians and the public believe. His position is that radical proposals for reform of Social Security are unnecessary, ill advised, and potentially damaging. He instead advocates trying to improve the current system rather than implementing radical changes. The article is derived from an address he gave at a meeting of the American Economic Association in January 2004.

ESTES, CARROLL L. *Social Security Privatization and Older Women: A Feminist Political Economy Perspective*. 18 JOURNAL OF AGING STUDIES 9 (2004). Estes, a frequent writer on women, aging, and Social Security issues from a critical feminist perspective, analyzes current Social Security privatization proposals. She argues that privatization would be disastrous to women and would end up transferring trillions away from the state to private corporations at the expense of women, minorities, and low income workers.

FEITL, LAURA FERNANDEZ. *Caring for the Elderly Undocumented Workers in the United States: Discretionary Reality or Undeniable Duty?* 13 ELDER LAW JOURNAL 227 (2005). This note looks at current laws and regulations that prohibit benefits for Social Security if the individual was not lawfully eligible to work in the United States. She concludes that this prohibition is a gross violation of the person's human rights and does nothing to prevent illegal immigration. She urges Congress to change the law and respect the dignity of these vulnerable workers who deserve receiving the benefits they are entitled to if the law did not discriminate against them based on their status as undocumented workers.

FELDSTEIN, MARTIN. *Structural Reform of Social Security*. 19 JOURNAL OF ECONOMIC PERSPECTIVES 33 (Spring 2005). Feldstein looks at how Social Security works now and how it would work under a "mixed system," combining pay-as-you-go benefits with investment based personal retirement accounts. He believes that a mixed-system is the best approach to solve Social Security's fiscal problems and that it can be accomplished without resorting to large deficits, large tax increases, or decreases in expected retirement incomes. Due to demographic stresses, he urges quick adoption of a mixed system approach to help avoid the large tax increases that he believes will otherwise be needed

to shore up the system if nothing is done.

FORMAN, JONATHAN BARRY. *Making Social Security Work*. 65 OHIO STATE LAW JOURNAL 145 (2004). Forman argues that the current Social Security System creates too much of a disincentive to work and that if the system were changed to encourage greater participation in the workforce by older Americans then many of its fiscal problems could be resolved. He suggests a two-tiered approach that guarantees a basic benefit financed out of general revenues and a second tier that would provide additional earnings-related benefits based on tax contributions made to individual accounts. This article is part of an issue devoted to articles presented at a symposium on Public Policy for Retirement Security in the 21st Century held at Ohio State University in April 2003.

GRAMLICH, EDWARD M. *Social Security Reform in the Twenty-First Century: The United States*. 14(1) JOURNAL OF AGING & SOCIAL POLICY 67 (2002). Gramlich, a member of the Board of Governors of the Federal Reserve System, argues that Social Security needs reform and is currently in an actuarial deficit. To solve this problem, he advocates an approach that reduces benefits to future retirees and creates a system of individual accounts to greatly increase the national saving rate, which he believes is the key to reform. This issue of the *Journal of Aging & Social Policy* contains numerous articles considering Social Security reform from a worldwide perspective.

HAWES, MATTHEW H. *So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits*. 65 UNIVERSITY OF PITTSBURGH LAW REVIEW 865 (2004). Hawes takes a look at constitutional issues related to Social Security, specifically whether a constitutional right has been created to receive the payments. After reviewing current Supreme Court decisions directly related to Social Security, as well as more recent decisions related to welfare benefits and property law, the author concludes that Social Security benefits cannot be arbitrarily terminated without due process of law and just compensation because contributors paid into the system and relied on government promises of regular payments after retirement in their retirement planning.

HESS, DAVID. *Protecting and Politicizing Public Pension Fund Assets: Empirical Evidence on the Effects of Governance Structures and Practices*. 39 UC DAVIS LAW REVIEW 187 (2005). Hess empirically examines the evidence of the influence of governance structures on

public pension fund performance. Using data derived from surveys of state and local pension systems between 1990 and 2000, he concludes that boards of trustees that include member-elected trustees are better able to resist political misuse of fund assets.

JACKSON, HOWELL E. *Accounting for Social Security and Its Reform*. 41 HARVARD JOURNAL ON LEGISLATION 59 (2004). Jackson critiques the current system of accounting, known as the cash flow method, to evaluate the fiscal health of Social Security and concludes that it is a woefully inadequate judge of its fiscal health. He argues that the accrual method of accounting should be used instead. The accrual method recognizes commitments of future benefit payments when those obligations are actually incurred. Under the accrual method, Social Security would already be reporting a loss and accrued liabilities. He believes this realistic, but sober fact, would help to spur seriously needed reform. Following the article are numerous comments critiquing and evaluating his recommendations.

MARTIN, PATRICIA P. & WEAVER, DAVID A. *Social Security: A Program and Policy History*. 66(1) SOCIAL SECURITY BULLETIN 1 (2005). The authors review the history of the Social Security system from its beginning to the present time. The article focuses on each decade from the 1930s onwards and briefly describes the major developments and changes to the program in each of the decades. Numerous charts, graphs, and timelines are used to help illustrate what the authors are describing.

MATHENY, KEN. *Social Security Disability and the Older Worker: A Proposal for Reform*. 10 GEORGETOWN JOURNAL ON POVERTY LAW & POLICY 37 (2003). Matheny looks at the consequences of current laws and regulations regarding Social Security disability benefits and their unrealistic assumptions about the employment prospects of older workers. He argues for changes to the system that provide for temporary disability benefits with Medicare coverage and job training assistance programs to help alleviate some of the problems and discrimination older individuals face in the marketplace for employment.

MEDILL, COLLEEN E. *Challenging the Four "Truths" of Personal Social Security Accounts: Evidence from the World of 401(k) Plans*. 81 NORTH CAROLINA LAW REVIEW 901 (2003). Medill critically examines four findings, facetiously referred to as "truths," of the President's Commission to Strengthen Social Security which tout the benefits of

personal Social Security accounts. Based on her review of current research on 401(k) plans, she concludes that the Commission's findings are not justified. She also argues that low income and minority workers would suffer as a result of including personal accounts in the Social Security system.

NWAFOR, FERDINAND C. *Social Security Privatization and African Americans: A Comparative Analysis*. 35 JOURNAL OF BLACK STUDIES 248 (2005). Using the descriptive case study approach, Nwafor considers the implications of plans to privatize Social Security on African-Americans. After reviewing and discussing the current literature on the subject, the author gathers statistical data from a variety of sources and analyzes the data to determine that the current system benefits African-Americans far more than it costs them. He concludes with a discussion of why he believes the costs of privatization to African-Americans exceed the benefits relative to the white population.

O'NEILL, JUNE E. *Why Social Security Needs Fundamental Reform*. 65 OHIO STATE LAW JOURNAL 79 (2004). O'Neill argues that the current pay-as-you-go system for Social Security is flawed due to its vulnerability to demographic changes and disincentive toward work. She advocates reform proposals that would raise the retirement age, shrink the size of the program, and make it more of a purely antipoverty program by reducing benefits to wealthier retirees. This article is part of an issue devoted to articles presented at a symposium on Public Policy for Retirement Security in the 21st Century held at Ohio State University in April 2003.

OZAWA, MARTHA N. & YOON, HONG-SIK. *Social Security and SSI as Safety Nets for the Elderly Poor*. 14(2) JOURNAL OF AGING & SOCIAL POLICY 1 (2002). Ozawa and Yoon look at the effect partial privatization of Social Security would have on the current system's safety net against poverty. After reviewing the literature on the role Social Security and SSI have had in bringing the elderly out of poverty, they argue that any reform proposal that includes a privatization component should explicitly provide for a safety net that keeps the elderly out of poverty.

QUINN, JOSEPH F. *Social Security Reform: Options for the Future*. 21 JOURNAL OF APPLIED GERONTOLOGY 257 (2002). Quinn argues that

Social Security has some fiscal problems but it is not in a crisis. He believes the fiscal problems can be managed using conventional solutions and radical change is unnecessary. He then goes on to discuss proposals to partially privatize the system and concludes that it is worth looking into. However, he emphasizes that privatization is not the only method available for addressing Social Security's fiscal problems and that policymakers must be very cautious making any drastic changes to such an important program to the economic well-being of Americans.

SHAVIRO, DANIEL. *Social Security Privatization and the Fiscal Gap*. 65 OHIO STATE LAW JOURNAL 95 (2004). Shaviro notes that arguments in favor of privatization of Social Security have three separate components. These components are: 1) offering choice with respect to benefits, 2) eliminating transfers from high earners to low earners, and 3) changing the language from "trust fund" to "individual accounts." He believes that the first two are dubious proposals and the last one is essentially a semantic argument. Instead, he argues that we should address the fiscal gap directly rather than complicate reform proposals with arguments for privatization. This article is part of an issue devoted to articles presented at a symposium on Public Policy for Retirement Security in the 21st Century held at Ohio State University in April 2003.

IV. AGE DISCRIMINATION

A. AGE DISCRIMINATION, GENERALLY

1. Books

FREDMAN, SANDRA & SPENCER, SARAH, EDS. *AGE AS AN EQUALITY ISSUE*. Oxford, UK: Hart Publishing, 2003. In this book, Fredman and Spencer argue for a more holistic approach to age-based inequality and discrimination. The first part examines the myths and realities of the aging process and the role misunderstanding about the aging process plays in promoting discrimination in employment, health care, and education. Later chapters look at approaches to age discrimination in the United States and Europe and how policymakers can learn to apply the principles discussed in this book to better address the problem.

NELSON, TODD D., ED. *AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS*. Cambridge, MA: The MIT Press, 2002. Articles in this book address ageism from a variety of perspectives, including

gerontology, communication, and psychology. The emphasis is in on empirical research on the causes and effects of ageism. Nelson hopes this book will encourage prejudice researchers to more fully examine the problems of ageism and explore ways of reducing its impact.

2. Articles

BARNES, ALISON. *Envisioning a Future for Age and Disability Discrimination Claims*. 35 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM 263 (2001–2002). Barnes compares the Americans with Disabilities Act (ADA) with the Age Discrimination in Employment Act (ADEA). The author first discusses the history and structure of the two statutes. She is especially critical of judicial decisions that she believes have prevented full realization of the intent behind these statutes. She then explores what effect the retirement of the baby boomer generation will have on disability and age discrimination legislation and believes that, when this happens, it would be a good time to push for invigorating protections in this area because of that generation's size and political clout.

MEENAN, HELEN. *The Future of Ageing and the Role of Age Discrimination in the Global Debate*. 1 JOURNAL OF INTERNATIONAL AGING, LAW & POLICY 1 (2005). Meenan makes the case for a global approach to age discrimination that includes all aspects of life, such as housing, trade, and services, and not just age discrimination in employment. She touts Ireland as a good example of how countries and international institutions should approach the problem of age discrimination.

NEUMARK, DAVID. *Age Discrimination Legislation in the United States*. 21(3) CONTEMPORARY ECONOMIC POLICY 297 (2003). Neumark summarizes and examines the available literature on age discrimination legislation in the United States, including the limited empirical data on its effectiveness. He concludes with an assessment that the legislation has accomplished what it intended, but cautions that his conclusions are based on a limited amount of information and data.

SCHWEMM, ROBERT G. & ALLEN, MICHAEL. *For the Rest of Their Lives: Seniors and the Fair Housing Act*. 90 IOWA LAW REVIEW 121 (2004). The authors look at the Fair Housing Act (FHA) and its effect on housing for people over sixty-five, especially its effect on the advertising, admissions, terms, conditions, accessibility, and insurance for senior living facilities such as nursing homes and assisted living

facilities. They argue that the ramifications of the FHA will become much more pronounced and difficult to manage as the population ages and more people are in need of these types of facilities.

B. AGE DISCRIMINATION IN EMPLOYMENT

1. Books

KUMASHIRO, MASAHARU. *AGING AND WORK*. London, UK: Taylor & Francis, 2003. This book is a selection of papers from the International Conference on Aging and Work held in Japan in September 2001. The papers included discuss governmental, personnel, and legal policies that have been used to address the problems associated with rapidly aging workforces in various countries. Most of the discussion comes out of the ergonomics and occupational health fields and is based on research in East Asian countries, where the population in the workforce is aging the fastest.

LINDEMANN, BARBARA T. & KADUE, DAVID D. *AGE DISCRIMINATION IN EMPLOYMENT LAW*. Washington, DC: BNA Books, 2003. In this treatise, Lindemann and Kadue examine federal anti-age discrimination law from a practicing litigator's perspective. Throughout the volume, they emphasize the unique difficulties of proving "motive" inherent in any age discrimination action. Chapters include an overview of the issues in this area of the law, the parties involved, the basis for proving a claim, and how courts have dealt with age discrimination claims. Each chapter is extensively footnoted with citations to the statutes and cases for further research of the primary law on the subject. Appendixes at the end provide reprints the law, some major cases, EEOC regulations, and sample forms.

2. Articles

ADAMS, SCOTT J. *Age Discrimination Legislation and the Employment of Older Workers*. 11 *LABOUR ECONOMICS* 219 (2004). Adams empirically analyzes population and employment data from various states, prior to enactment of the ADEA in 1967, to determine if age discrimination legislation in various states prior to that law had any influence on the employment, hiring, and retirement of older workers. He concludes that the legislation raised the employment level of workers and lowered the retirement rates, but did not impact the hiring of workers covered by the protected age ranges in the legislation.

- DAVIS, KENNETH R. *Age Discrimination and Disparate Impact*. 70 BROOKLYN LAW REVIEW 361 (2004–2005). Davis looks at the theory of disparate impact discrimination and its applicability to claims under the ADEA in the Supreme Court case *Smith v. City of Jackson* (after the case had been accepted for review by the Supreme Court but prior to its decision). He first discusses the history of the disparate impact discrimination theory. He then analyzes the Fifth Circuit opinion in the case and other legal arguments both for and against applying the theory to the ADEA. He concludes with a discussion of the policy arguments behind applying the theory to adults over 40, the protected class in the ADEA, and makes the argument that disparate impact theory should not be extended to workers covered by the ADEA.
- FISCHER, JUDITH D. *Public Policy and the Tyranny of the Bottom Line in the Termination of Older Workers*. 53 SOUTH CAROLINA LAW REVIEW 211 (2002). Fischer looks at salary-based terminations of older workers. She argues that allowing salary-based terminations of elderly workers is poor public policy. To support her position, she cites to numerous studies that prove the adverse impact salary-based terminations have on older workers. She argues that current anti-age discrimination law protects workers from salary-based terminations, but advocates further legislative action to address the problem if the courts fail to do so.
- FRANCK, LEE. *The Cost to Older Workers: How the ADEA Has Been Interpreted to Allow Employers to Fire Older Employees Based on Cost Concerns*. 76 SOUTHERN CALIFORNIA LAW REVIEW 1409 (2003). This note discusses a trend among circuit courts toward allowing cost considerations to impact termination decisions and the split among the circuit courts about whether to allow disparate impact theory claims under the ADEA. Franck uses this trend as evidence of the need for allowing disparate impact theory under the ADEA.
- GOLD, MICHAEL EVAN. *Disparate Impact Under the Age Discrimination in Employment Act of 1967*. 25 BERKELEY JOURNAL OF EMPLOYMENT & LABOR LAW 1 (2004). Gold analyzes the various arguments both for and against recognizing disparate impact claims under the ADEA, including those based on the text of the act, the legislative history, and the rationale behind allowing disparate impact in the first place. After this analysis, he then explains why he believes the arguments in favor of allowing disparate impact claims are stronger.

- HAWES, MATTHEW H. & HARDY, W. SCOTT. *Morelli v. Cedel: Ignoring Jurisdictional Limits and Outflanking Congress Towards the Internationalization of the ADEA*. 65 UNIVERSITY OF PITTSBURGH LAW REVIEW 507 (2004). The authors take a critical look at *Morelli v. Cedel*, a recent Second Circuit decision holding that an entire foreign company's workforce should be counted when determining who is an employer under the terms of the ADEA. They argue that the decision flies in the face of clear congressional intent. They also argue that the decision will have adverse geopolitical consequences and ultimately hurt workers and the economy.
- HEAD, TAMMY M. & BURKE, DEBRA D. *Broadbanding: Legal and Policy Implications Under the ADEA*. 27 SETON HALL LEGISLATIVE JOURNAL 275 (2003). Grouping employees into broad compensation structures rather than into specific jobs with associated pay ranges for those jobs is known as broadbanding. Broadbanding has become a popular management tool for employers to become more flexible, agile, and competitive in organizing their workforces. The authors look at the trend toward broadbanding and discuss how allowing disparate impact claims under the ADEA could affect its implementation.
- JOHNSON, JUDITH J. *Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other Than Age" Defense and the Disparate Impact Theory*. 55 HASTINGS LAW JOURNAL 1399 (2004). Johnson concludes that we are currently experiencing a long-term trend in "opportunistic terminations" of older workers that flies in the face of the underlying purpose behind the ADEA. She argues that this trend will continue unless the ADEA is interpreted to allow claims under a disparate impact theory and employers must prove that an age-correlated factor is justified under a "reasonable factors other than age" defense.
- KOHRMAN, DANIEL B. & HAYES, MARK STEWART. *Employers Who Cry 'RIF' and the Courts that Believe Them*. 23 HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL 153 (2005). Some federal circuit courts impose an additional evidentiary burden on plaintiffs in actions under the ADEA, when the plaintiff's termination took place during a "reduction-in-force" (RIF). Using a Sixth Circuit case *Sisk v. Falcon Products* as a template, the authors examine and criticize the court's application of the issue. After analyzing the issue and considering the arguments and decisions of the various circuits, the authors propose a test that will help courts in these circumstances determine whether an employee has been terminated *because of* a RIF and not just *at the*

same time as a RIF.

- LACY, D. AARON. *You Are Not Quite as Old as You Think: Making the Case for Reverse Age Discrimination Under the ADEA*. 26 BERKELEY JOURNAL OF EMPLOYMENT & LABOR LAW 363 (2005). Lacy discusses the Supreme Court case *General Dynamics Land Systems, Inc. v. Cline*, which held that the ADEA does not allow claims for "reverse age discrimination" for people outside the protected class (those under 40). He argues that this decision goes against the Court's prior antidiscrimination jurisprudence and contradicts the plain meaning of the ADEA and its related regulations.
- PORTER, NICOLE BUONOCORE. *Sex Plus Age Discrimination: Protecting Older Women Workers*. 81 DENVER UNIVERSITY LAW REVIEW 79 (2003). Current employment discrimination law requires older workers to make claims of either sex or age discrimination claims but not both. Porter argues that the current state of the law is unfair and that older women should have legal protections that accurately reflect the type of multifaceted discrimination they face. She argues that the precedent set in race and sex based discrimination claims, the so-called sex-plus theory, should be allowed for older women as well.
- REAVES, RHONDA M. *One of These Things Is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*. 38 UNIVERSITY OF RICHMOND LAW REVIEW 839 (2004). Reaves looks at what she terms "cross-contamination" by courts between various types of discrimination claims and remedies, in particular race and age. She believes that courts should treat different types of discriminatory conduct as separate and distinct claims, arguing that if we continue to lump the different types of discriminatory conduct together in our jurisprudence, we run the risk of diluting race-based antidiscrimination law.
- SPERINO, SANDRA F. *Disparate Impact or Negative Impact?: The Future of Non-Intentional Discrimination Claims Brought by the Elderly*. 13 ELDER LAW JOURNAL 339 (2005). Sperino critiques the Supreme Court's decision in *Smith v. City of Jackson, Mississippi*, which allows disparate impact claims under the ADEA. She argues that the decision is harmful to age discrimination claimants because it places many unnecessary and unwarranted roadblocks in the way of pursuing this type of claim. She fears the decision will have a harmful impact on the rights of plaintiffs seeking relief for age discrimination based claims.
- WINGATE, PETER H. & OTHERS. *Organizational Downsizing and Age*

Discrimination Litigation: The Influence of Personnel Practices and Statistical Evidence on Litigation Outcomes. 27 LAW & HUMAN BEHAVIOR 87 (2003). In this study of federal court decisions, the authors empirically examine whether there is a statistically significant relationship between judicial outcomes in age discrimination claims and employers' claims that they are downsizing or conducting a "reduction-in-force." They conclude that when an employer is downsizing, employees' claims of age discrimination are more likely to be decided in favor of the employer.

V. HEALTH CARE

A. GENERAL WORKS/MISCELLANY

1. Books

ANDERSON, NORMAN B. & OTHERS, EDS. *CRITICAL PERSPECTIVES ON RACIAL AND ETHNIC DIFFERENCES IN HEALTH IN LATE LIFE*. Washington, DC: The National Academies Press, 2004. This book brings together a collection of papers that originate from a two day workshop organized by the National Research Council's Committee on Population's Panel on Race, Ethnicity, and Health in Later Life. At this workshop, leading researchers came together to discuss current research and research priorities. Topics that are included address racial differences in health care from a number of perspectives starting with the nature of racial and ethnic differences and ending with international comparisons.

2. Articles

BLOOM, BERNARD S. & OTHERS. *Cost of Illness of Alzheimer's Disease: How Useful Are Current Estimates?* 43 GERONTOLOGIST 158 (2003). The authors conducted a review of the literature to determine the validity of recent estimates regarding the cost of Alzheimer's disease. Their goal was to determine how useful current published cost-of-illness estimates are in practice. Accurately determining the costs of Alzheimer's disease is problematic because this diagnosis is usually given to the elderly with multiple high-cost diagnoses. This difficulty in coming up with the correct estimate must be balanced against the fact that accurate cost data are imperative to make informed policy and clinical decisions by patients, physicians, and other interested

individuals.

CHIPLIN, ALFRED J., JR. *Breathing Life into Discharge Planning*. 13 ELDER LAW JOURNAL 1 (2005). Discharge planning is one facet of the larger enterprise of "transitions," or moving from one healthcare setting to another. In his discussion of discharge planning across several care settings, Chiplin focuses on the acute care hospital setting. He chooses the acute care setting because it is the setting from which discharge planning from one setting to another is most likely to occur. Chiplin also discusses the Medicare statute's discharge planning requirements, which, in his opinion, have two significant shortcomings. In order to remedy these shortcomings, he provides strategies for improvement that take a variety of approaches from working to improve the Medicare statutes, to working with families and state laws to find solutions for better patient outcomes.

IUTCOVICH, JOYCE MILLER & PRATT, DONALD J. *Establishing Geriatric Health Centers: Can the Aging Network Successfully Navigate the Changing Healthcare System*. 17 JOURNAL OF AGING STUDIES 231 (May 2003). The authors present their findings from a study of demonstration geriatric health centers that were created through an alliance of area agencies on aging, senior centers, and medical providers. The alliance's goal was to establish senior health centers that would deliver primary care using a holistic approach to meet the medical and social needs of the elderly. The data from the study showed that the Geriatric Health Model Demonstration that was being studied was not as successful as expected, and that further research is needed to determine if other model of strategic alliances would better meet the health care needs of the elderly and improve their quality of life.

KRAUSE, JOAN H. *Healthcare Fraud and Quality of Care: A Patient-Centered Approach*. 37 JOURNAL OF HEALTH LAW 161 (2004). Krause looks at health care fraud to determine the degree to which quality-related fraud settlements benefit patients. She contends that the federal government's assertion that one of the reasons why antifraud efforts are undertaken, to protect beneficiary health and welfare, does not accurately represent the situation because this consideration only plays a minor role in many of the negotiated settlements. Krause concludes that it is probably necessary to design new models of fraud settlements that will provide adequate compensation to the patients who have suffered harm.

- LEWIS, TERRIE. *Pain Management for the Elderly*. 29 WILLIAM MITCHELL LAW REVIEW 223 (2002). Lewis discusses how the elderly experience pain and how it affects all aspects of their lives, and even deaths. After first describing the prevalence of pain in the elderly population and the roles it plays in their daily lives, and eventually their deaths, she moves on to describe how health care providers respond to elderly individuals' experiences of pain. She explores why pain is often undertreated and whether there is in fact an ethical obligation to relieve pain. Lewis provides case examples to further clarify how the legal system addresses pain management in the elderly. She concludes by providing methods of pain management that can be utilized to relieve the pain experienced by the elderly.
- MUELLER, PAUL S. & OTHERS. *Ethical Issues in Geriatrics: A Guide for Clinicians*. 79 MAYO CLINIC PROCEEDINGS 554 (April 2004). Inadequate patient-clinician communication is often the cause of ethical dilemmas, especially when dealing with the elderly. The authors carefully examine common ethical dilemmas faced by clinicians, such as ensuring informed consent and confidentiality, determining decisionmaking capacity, the use of advance directives, and withholding interventions, to name a few. While improved communication greatly aids in avoiding these and other dilemmas, the authors describe an approach that enables clinicians to effectively handle an ethical problem and suggest a solution.
- WALLACE, STEVEN P. & VILLA, VALENTINE M. *Equitable Health Systems: Cultural and Structural Issues for Latino Elders*. 29 AMERICAN JOURNAL OF LAW & MEDICINE 247 (2003). Using World Health Organization (WHO) and Organization for Economic Cooperation and Development (OECD) criteria on health outcomes, access, and financing, Wallace and Villa determine how equitable the United States health care system is for older Latinos. They argue that in order to improve health equity, it is necessary to make broad policy changes in social and political processes that affect the entire population instead of relying solely on individuals to change their behavior.
- WAYS DORF, SUSAN L. *The Aging of the AIDS Epidemic: Emerging Legal and Public Health Issues for Elderly Persons Living with HIV/AIDS*. 10 ELDER LAW JOURNAL 47 (2002). The elderly population in the United States is experiencing the largest growth in the rate of new AIDS cases than any other age group. Within this larger group, elderly women and minority groups are experiencing the greatest rate of growth. Waysdorf addresses the social impact, public policy

challenges, and legal issues that accompany the elderly population with AIDS. In her discussion, she describes the demographics of this population and the unique impact AIDS has on their lives. She also provides the legal challenges and potential reforms that face the elderly with AIDS.

B. LONG-TERM CARE/NURSING HOMES

1. Books

AGICH, GEORGE J. *DEPENDENCE AND AUTONOMY IN OLD AGE: AN ETHICAL FRAMEWORK FOR LONG-TERM CARE*, SECOND AND REV. ED. Cambridge, UK: Cambridge University Press, 2003. Long-term care and the concept of autonomy are unavoidably linked. In this work, Agich argues that it is ethically necessary that those who provide care respect the autonomy of vulnerable elderly. In reviewing the topic, Agich takes a close look at the concept of autonomy, in theory and in practice, and at the methods of long-term care used today, and shows how these two are related. He wraps up by providing a basic framework that is designed to help reassess the problems associated with autonomy in long-term care.

COX, CAROLE B. *COMMUNITY CARE FOR AN AGING SOCIETY: ISSUES, POLICIES, AND SERVICES*. New York, NY: Springer Publishing Company, Inc., 2005. Cox addresses both the current practices and the policy issues that direct elder care in the United States. She begins the book with an examination of the factors that contribute to the need for care by members of the elderly community and the ways society determines whether care is necessary. The discussion moves to the policy issues affecting care, and addresses how the need for care is met by various community programs and services. In this section, Cox provides specific examples such as adult day care, the role of family in providing care, and housing options, that are being provided. She also includes relevant examples of new and innovative responses that are being implemented on the state level and by private institutions that provide practical illustrations on how caring for the elderly is being handled in our changing society.

HUMBER, JAMES M. & ALMEDER, ROBERT F., EDS. *CARE OF THE AGED*. Totowa, NJ: Humana Press, 2002. In this volume, a panel of experts is brought together to weigh in on many of the moral issues that come into play when treating and caring for the elderly. Each contributor

provides an essay that either raises general questions about the way those in the Western culture choose to treat elderly citizens or discusses problems that medical professionals and family members encounter when trying to care for the elderly.

KOLB, PATRICIA J. *CARING FOR OUR ELDERS: MULTICULTURAL EXPERIENCES WITH NURSING HOME PLACEMENT*. New York, NY: Columbia University Press, 2003. Kolb presents the findings of her exploratory study designed to provide information about the experiences of ethnically and racially diverse nursing home residents and the informal caregivers who were involved in their lives. Through the interview process, Kolb provides information about the residents' relationships in their early lives, the placement process, and the experiences of the residents and their families and friends after admission into the nursing home.

OLSON, LAURA KATZ. *THE NOT-SO-GOLDEN YEARS: CAREGIVING, THE FRAIL ELDERLY, AND THE LONG-TERM CARE ESTABLISHMENT*. Lanham, MD: Rowman & Littlefield Publishers, Inc., 2003. Olson's work examines issues of long-term elder care from a variety of perspectives. She gives a voice to the elderly themselves, the many caregivers who play a role, and those who work in the long-term care industry as well. The author highlights the influences that have shaped the current system and provides strategies for change.

SEATON, GUY. *THE CRISIS IN AMERICA'S NURSING HOMES: WHAT ARE WE DOING WRONG?* New Ross, Ireland: Adverbage, Ltd., 2002. Seaton uses his experience as a private owner of a nursing home to highlight the problems he sees in the nursing home industry today. Seaton argues that the current federal and state rules and regulations governing nursing homes are at best ineffective, and at worst fail both the caregivers and those cared for. After describing the current situation using the case study approach, Seaton offers advice on how to make improvements.

2. Articles

ALLEN, REBECCA S. & OTHERS. *Advance Care Planning in Nursing Homes: Correlates of Capacity and Possession of Advance Directives*. 43 GERONTOLOGIST 309 (2003). Allen's article presents the findings of a study designed to identify nursing home residents who maintained the capacity to participate in advance care planning when it came to end-of-life care. Findings show that most participants could state simple

treatment preferences, but many did not have the capacity to understand treatment alternatives or appreciate the consequences of their choice. In addition, participants were more likely to possess advance directives when they were socially engaged, and had proxies who both possessed advanced directives and were less religious.

BATAVIA, ANDREW I. *The Growing Prominence of Independent Living and Consumer Direction as Principles in Long-Term Care: A Content Analysis and Implications for Elderly People with Disabilities*. 10 ELDER LAW JOURNAL 263 (2002). Batavia explores the concepts of independent living and consumer direction in relation to individuals who choose to control their long-term care assistance. In doing so, he addresses the advantages that independent living and consumer direction bring to disabled individuals' quality of life. In comparing the phenomenon of independent living for the disabled in the elderly community against the younger community at large, he notes that the trend is much less popular for the disabled elderly. Despite this, he argues that the elderly should not be excluded from the independent living or consumer direction model. Instead, they should be viable options for those who need long-term care.

CHAMPION, TINA M. *The Elderly Suing Doctors: Reasons and Recovery*. 12 ALBANY LAW JOURNAL OF SCIENCE & TECHNOLOGY 895 (2002). In her discussion of medical malpractice and the elderly, Champion highlights two mistakes that primarily impact the elderly, the misdiagnosis of depression and errors in prescribing medication, and explains the resulting legal consequences. In addition, the author recaps past actions brought by the elderly and describes the types of damages the elderly can recover when successful. Champion concludes by providing her predictions for the future of medical malpractice.

COBURN, ANDREW F. *Rural Long-Term Care: What Do We Need to Know to Improve Policy and Programs?* 18(Suppl.) JOURNAL OF RURAL HEALTH 256 (2002). Coburn takes a close look at the quality and availability of long-term care in rural communities. In doing so, he begins by documenting the population trends and characteristics of the rural elderly. He provides a framework for identifying critical questions that concern the finance and delivery of rural long-term care. Coburn also discusses specific topics relevant to long-term care policy and program improvements, such as: residential care alternatives in rural communities; the quality of long-term care; innovations in long-term care financing and service delivery; and the use of technology in rural long-term care.

- DAVIDSON, MICHAEL J. *Governmental Responses to Elder Abuse and Neglect in Nursing Homes: The Criminal Justice System and the Civil False Claims Act*. 12 ELDER LAW JOURNAL 327 (2004). Davidson examines the effectiveness of the government's use of elder-specific criminal statutes and the civil False Claims Act when attempting to deal with elder abuse in nursing homes, and argues that currently these are the two best and most appropriate methods available. Properly applied criminal statutes, even with their current limitations, provide for enhanced sentencing that address elderly victims, and have a deterrent effect. Davidson additionally outlines the provisions of the False Claims Act that make it a viable tool to minimize elder abuse. In his discussion he argues that increased application of these tools would be moving in the right direction.
- DAYTON, KIM. *Abuse in Nursing Homes and Care Facilities*. 5 VICTIMIZATION OF THE ELDERLY & DISABLED 71 (January–February 2003). Dayton takes a close look at specific cases involving the criminal prosecution of nursing homes and their employees. According to the author, these cases tend to be inherently difficult to litigate due to the many procedural issues that can result in the dismissal of abuse cases before the merits can be considered. As a result, in her discussion, Dayton focuses on three cases that were appealed due to procedural rather than substantive matters.
- DREHER, KEVIN B. *Enforcement of Standards of Care in the Long-term Care Industry: How Far Have We Come and Where Do We Go From Here?* 10 ELDER LAW JOURNAL 119 (2002). Because mistreatment and neglect of older adults in long-term care settings continues to grow, Dreher examines how standards of care in this industry are enforced. In doing so, he argues that the current system of regulation and criminal prosecution does little to deter and punish abusers. He proposes that rather than continuing with the current system, we should instead adopt a different system of accountability that provides incentives for compliance and deterrents for those who violate the law. His new model would better ensure that residents are protected, abusers are punished, and notice would be given to potential, future abusers. Dreher's model incorporates standards of care that could be enforced through private causes of action, more funding for oversight and compliance, and increased access to information.
- HOFFMANN, DIANE E. & TARZIAN, ANITA J. *Dying in America – An Examination of Policies that Deter Adequate End-of-Life Care in Nursing Homes*. 33 JOURNAL OF LAW, MEDICINE & ETHICS 294

(2005). The authors argue that the literature supports the assertion that in addition to having their dignity and autonomy compromised, dying individuals residing in nursing homes receive inadequate pain medication, palliative care, and psychological support in the dying process. Furthermore, they argue that although the use of hospice care is increasing, it remains an underused tool in the long-term care setting as a result of current government policies and practices. After providing a background explanation of these issues, Hoffman promotes a shift in policy that balances the competing concerns when it comes to the palliative care debate in order to provide appropriate end-of-life care.

IYER, PATRICIA. *Liability in the Care of the Elderly*. 33 JOURNAL OF OBSTETRIC, GYNECOLOGIC, & NEONATAL NURSING 124 (2004). Iyer takes a close look at the recent increase in the number of nursing home negligence lawsuits, which is one of the fastest growing areas of medical malpractice. Through her examination of 118 nursing home lawsuits, she outlines the common liability issues in nursing home cases and identifies them in order of occurrence. She then provides an overview of the nursing home litigation process. In doing so, she includes the typical outcomes in nursing home negligence suits. She also provides common defenses used by defense attorneys in her discussion of the topic. Iyer wraps up by enumerating risk prevention strategies that can be used to avoid such lawsuits in the first place.

JOHNSON, CHRISTOPHER E. & OTHERS. *Predicting Lawsuits Against Nursing Homes in the United States, 1997-2001*. 39 HEALTH SERVICES RESEARCH 1713 (December 2004). The authors present the findings of their study in an effort to provide insight about the increasing amount of litigation activity against nursing homes in the United States. They test variables such as staffing, number of beds, and for-profit ownership status, among others, in an effort to determine the nursing home characteristics that are likely to increase the chances of litigation. In addition to presenting the findings of their study, the authors also identify the factors that may indicate a higher chance of litigation as well as those factors that seem to have less impact on the likelihood a nursing home will face future lawsuits.

KAPP, MARSHALL B. *Legal Anxieties and End-of-life Care in Nursing Homes*. 19 ISSUES IN LAW & MEDICINE 111 (2003). After reviewing current literature, analyzing relevant state and federal law, interviewing specialists in the nursing home field, and reading comments submitted to a pertinent listserv, Kapp finds that the quality of end-of-life care

provided in nursing homes is negatively influenced by the anxiety care providers have over potential law suits. In his explanation of the topic, Kapp delves into the causes of these fears, and concludes by providing practice and policy recommendations designed to facilitate the ability of health care professionals to provide quality end-of-life care while minimizing their fears of negative legal repercussions.

KEMPER, PETER. *Long-Term Care Research and Policy*. 43 GERONTOLOGIST 436 (2003). Kemper's goal in writing this article is to begin a discussion in the long-term care (LTC) field about the important contribution research makes to policymaking, and to provide ways to ensure that such contributions continue in the future. Kemper facilitates the discussion by asking four broad questions: (1) how does LTC research contribute to policy; (2) what LTC research investments are needed for future policy; (3) what are the barriers to investment in LTC research; (4) and what can researchers do to enhance the future contributions of LTC research to policy? Kemper provides data found through a variety of methods that include telephone interviews with relevant experts, a review of health services and political science literature, an internet survey, and the author's own experience in this area.

KRASUSKI, ANN E. *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*. 8 DEPAUL JOURNAL OF HEALTH CARE LAW 263 (2004). According to Krasuski, nursing homes are incorporating mandatory arbitration agreements into patient nursing home admission contracts in an attempt to avoid litigation that can be both costly and damaging to their reputation. She argues that in addition to barring such agreements in nursing homes, Congress should specifically prohibit their use by the industry as a whole. In making her argument, Krasuski examines the use of such agreements and the reasons nursing homes want to include them in admissions contracts. She also outlines the use of the Federal Arbitration Act as it has interacted with nursing home arbitration case law.

LO SASSO, ANTHONY T. & JOHNSON, RICHARD W. *Does Informal Care from Adult Children Reduce Nursing Home Admissions for the Elderly?* 39 INQUIRY 279 (Fall 2002). Changing demographics in society have caused many individuals to be concerned that in the future there will be reductions in care provided by family members to frail elders, resulting in severe repercussions for the quality of care for the elderly. In fact, many elderly would have no choice but to live in nursing homes rather than on their own. The authors use data from the

Study of Asset and Health Dynamics Among the Oldest Old to determine the impact of informal care on nursing home admissions.

MARA, CYNTHIA MASSIE. *Expansion of Long-Term Care in the Prison System: An Aging Inmate Population Poses Policy and Programmatic Questions*. 14(2) JOURNAL OF AGING & SOCIAL POLICY 43 (2002). Mara examines the extent of the long-term care issues confronting prisons due to an expanding inmate population of elderly individuals. She focuses on older inmates and points out an increased need for long-term care in the prison setting. Along with this, she provides examples of facilities that provide long-term care and makes recommendations for how to properly develop strategies designed to address this problem.

MORRISON, R. SEAN & OTHERS. *The Effect of a Social Work Intervention to Enhance Advance Care Planning Documentation in the Nursing Home*. 53 JOURNAL OF THE AMERICAN GERIATRICS SOCIETY 290 (February 2005). The authors report the results of a study conducted to determine whether a multicomponent advance care planning intervention used by nursing home social workers helped to better identify and document the medical treatment preferences of elderly nursing home residents. The authors conclude that the interventions used by social workers in the study improved the way in which patient wishes regarding life-sustaining treatments were identified and documented.

RUSTAD, MICHAEL L. *Heart of Stone: What Is Revealed About the Attitude of Compassionate Conservatives Toward Nursing Home Practices, Tort Reform, and Noneconomic Damages*. 35 NEW MEXICO LAW REVIEW 337 (2005). Rustad argues that if the current call for nursing home tort reform succeeds, not only will many more elderly die of neglect and abuse, in the process, their need for help will be ignored. Therefore, Rustad advocates uncapped noneconomic damages to encourage trial lawyers to represent members of this class of individuals. This need for representation is only going to grow in the future due to the following factors: (1) the Baby Boomers reaching the age of sixty-five, (2) more nursing homes being incorporated (bringing associated problems such as understaffing), and (3) the current lack of state enforcement of nursing home quality standards.

SCOTT, ELLEN J. *Punitive Damages in Lawsuits Against Nursing Homes*. 23 JOURNAL OF LEGAL MEDICINE 115 (March 2002). Nursing homes must meet minimum care standards set forth in the federal Omnibus

Budget Reconciliation Act of 1987 (OBRA). Under this act, states are required to enforce federal and state regulations, and are also able to enact higher state standards. Scott looks at quality of care problems in nursing homes, explains possible recovery under common law theories, and highlights current federal and state reform efforts. She argues for stronger state statutory protection that would help remedy the flaws in OBRA.

STUDDERT, DAVID M. & STEVENSON, DAVID G. *Nursing Home Litigation and Tort Reform: A Case for Exceptionalism*. 44 GERONTOLOGIST 588 (2004). Nursing homes have become a target of reform due to the increase of medical malpractice cases that is currently in place in the United States. Consequently, many policymakers are considering extending conventional medical malpractice tort reforms to the nursing home sector. Studdert and Stevenson caution against this approach, due to the number of distinctive features of nursing home litigation that they feel would be problematic. The authors describe findings from an earlier study of nursing home litigation to identify key concepts that should not be ignored.

WELCH, LISA C. & OTHERS. *End-of-Life Care in Black and White: Race Matters for Medical Care of Dying Patients and Their Families*. 53 JOURNAL OF THE AMERICAN GERIATRICS SOCIETY 1145 (2005). The authors of this study compared the perceptions of bereaved family members of African-American and white decedents regarding end-of-life care provided in a variety of settings (including hospitals, nursing homes, hospice and home health care). The results of the study highlight existing disparities in the quality of medical care provided to African-Americans and the lower rate of satisfaction African-American family members have with the care provided. African-American family members were more unhappy with their role in the decisionmaking process and the level of communication with the treating physician than their white counterparts. The study also brings to light the disparity in the financial impact end-of-life care has on the family.

C. MEDICAID ESTATE PLANNING/FINANCING LONG-TERM HEALTH CARE

1. Books

BLUMENTHAL, DAVID & OTHERS, EDS. LONG-TERM CARE AND MEDICARE

POLICY: CAN WE IMPROVE THE CONTINUITY OF CARE? Washington, DC: Brookings Institution Press, 2003. This book is a selection of papers from a conference held in 2002 by the National Academy of Social Insurance on methods of financing long-term health care. The goal of the conference was to examine how disparate funding sources adversely affect the continuity of care. Topics covered include the long-term health care needs of the elderly, how the current policy impacts those needs, the federal-state Medicaid welfare model, and suggested reforms to improve the current system.

2. Articles

BARNES, ALISON. *An Assessment of Medicaid Planning*. 3 HOUSTON JOURNAL OF HEALTH LAW & POLICY 265 (2003). Barnes explores whether current state laws and Medicaid eligibility policies actually identify eligible persons and exclude those that should not be eligible. She describes how Medicaid eligibility is determined and the divisions of opinion regarding the ethics of Medicaid planning. She also discusses how this issue has played out over the years, including the spousal impoverishment provisions Congress enacted in 1988 by Congress and the Supreme Court's recent decision in *Wisconsin Department of Health & Family Services v. Blumer*.

BELIAN, JULIA. *Medicaid, Elective Shares, and the Ghosts of Tenures Past*. 38 CREIGHTON LAW REVIEW 1111 (2005). Belian uses a recent Kansas Supreme Court opinion, *Miller v. Kansas Department of Social and Rehabilitation Services*, as an example of how current Medicaid eligibility rules fly in the face of our modern understanding of what is meant by ownership of property. *Miller* held that a widow's available assets for Medicaid eligibility included a twenty year old elective share in a trust created prior to her husband's death. The author urges legislatures to move from the traditional "rights-based" approach to property when determining Medicaid eligibility toward a "mutual obligation and reciprocal duties" analysis. She believes this model better reflects the reality of how property ownership is currently understood in the United States.

BOBROFF, ROCHELLE. *Judicial Deference to Federal Government Erodes Medicaid Protections for Elderly Spouses Impoverished by the High Costs of Nursing Home Care*. 29 WILLIAM MITCHELL LAW REVIEW 159 (2002). Bobroff, a staff attorney for the AARP, critically examines the United States Supreme Court's decision, *Wisconsin Department of Health & Family Services v. Blumer*. *Blumer* eliminated Medicaid's

“resources first” approach. The author argues that the decision contradicts the clear language and legislative history of the Medicaid Catastrophic Coverage Act of 1988 and will force many middle-class couples into poverty or divorce, exactly what this Act was intended to prevent.

CHEN, YUNG-PING. *Funding Long-term Care: Applications of the Trade-Off Principle in Both Public and Private Sectors*. 15 JOURNAL OF AGING & HEALTH 15 (2003). With the growing need for long-term care services combined with the increasing costs of those services, Chen believes the current model of paying for those services through government and personal payment sources is in dire straights. Instead, he advocates moving to a model based on social insurance that would be supplemented by private insurance and personal resources. He describes various methods to implement this model using trade-offs and linkages to other types of insurance, such as Social Security and life insurance.

KAPLAN, RICHARD L. *Cracking the Conundrum: Toward a Rational Financing of Long-Term Care*. 2004 UNIVERSITY OF ILLINOIS LAW REVIEW 47 (2004). In Kaplan’s view, the current tangle of funding sources for long-term care provides inadequate coverage, is unfair in its application, and is prone to abuse. After describing the current system’s flaws, he proposes a solution whereby Medicare covers all nursing home services, more long-term care is provided in a less expensive healthcare setting such as assisted living facilities, and improvements are made to long-term care insurance. He believes these recommendations will go a long way toward improving the current system and minimizing the risk of impoverishing families when a loved one enters a nursing home.

MILLER, EDWARD ALAN. *State Discretion and Medicaid Program Variation in Long-Term Care: When Is Enough, Enough?* 14(3/4) JOURNAL OF AGING & SOCIAL POLICY 15 (2002). Miller looks at the wide variation among state administered Medicaid programs and the arguments for and against this approach. After examining the wide variation between state Medicaid programs, he argues that proponents of further devolution of poverty and elderly programs to the states may want to consider the current inequitable divergence between these programs and whether these inequities can only be addressed by more, rather than less, federal involvement.

MILLER, JOHN A. *Voluntary Impoverishment to Obtain Government*

- Benefits*. 13 CORNELL JOURNAL OF LAW & PUBLIC POLICY 81 (2003). Miller believes that the financial realities of long-term care guarantee that voluntary impoverishment will continue to be used as an estate planning tool, even with further tightening of the Medicaid eligibility standards. To better address this reality, he advocates keeping the current means-tested approach to government funded long-term care but limiting it to the first two years of a long-term care stay. After the two years have passed, every elderly person would be entitled to government funded care, regardless of their financial circumstances. This approach will limit an individual's susceptibility to catastrophic loss, while still being financially manageable for taxpayers, because most long-term care stays are for less than two years.
- PANDEY, SANJAY K. *Assessing State Efforts to Meet Baby Boomers' Long-Term Care Needs: A Case Study in Compensatory Federalism*. 14(3/4) JOURNAL OF AGING & SOCIAL POLICY 161 (2002). In this case study of Maryland's efforts to provide long-term care for members of the baby boom generation, Pandey examines how state efforts to meet the challenge of important public policy goals through compensatory federalism are being realized in practice. For his case study, he used three different frameworks to analyze the state's policy development. These frameworks are a bureaucratic politics perspective, an agenda setting perspective, and an interest group politics perspective. He argues that states should use these frameworks to examine their success at realizing public policy goals.
- TAKACS, TIMOTHY L. & MCGUFFEY, DAVID L. *Medicaid Planning: Can It Be Justified?: Legal and Ethical Implications of Medicaid Planning*. 29 WILLIAM MITCHELL LAW REVIEW 111 (2002). The authors, both elder law attorneys, examine the legal and ethical issues confronting elder law attorneys as they deal with estate planning for Medicaid eligibility. They believe that our current system of health care financing makes it impossible for elder law attorneys to satisfactorily resolve legal and ethical issues brought up by this issue. Therefore, they recommend that elder law attorneys advocate for a single payer health care system as a long-term solution to the legal and ethical dilemmas that arise from Medicaid planning.
- WEGNER, ELDON L. & YUAN, SARAH C. W. *Legal Welfare Fraud Among Middle-Class Families: Manipulating the Medicaid Program for Long-Term Care*. 47 AMERICAN BEHAVIORAL SCIENTIST 1406 (2004). The authors criticize current Medicaid policies that encourage individuals to voluntarily impoverish themselves to receive Medicaid benefits. They

believe these policies are a form of legal welfare fraud, end up diverting needed resources intended for use by the poor to the middle-class, contribute to the financial strain on the Medicaid system, and will ultimately lead to substandard care for its beneficiaries. They advocate following the German or Japanese model of social insurance as a better and more equitable method of paying for long-term care.

D. MEDICARE

1. Books

CASSEL, CHRISTINE K. *MEDICARE MATTERS: WHAT GERIATRIC MEDICINE CAN TEACH AMERICAN HEALTH CARE*. Berkeley, CA: University of California Press, 2005. Cassel, a physician specializing in geriatric medicine, is a strong supporter of Medicare, but has problems with the design of the program. In this book, she takes evidence from what works in the treatment of the elderly and applies these principles to a suggested redesign of the program, while still honoring the “social contract” at its heart.

LAWLOR, EDWARD F. *REDESIGNING THE MEDICARE CONTRACT: POLITICS, MARKETS, AND AGENCY*. Chicago, IL: The University of Chicago Press, 2003. Lawlor advocates using agency theory to reform Medicare. He believes this framework is particularly useful because it recognizes Medicare’s public sphere, where society’s interests are addressed, and its private sphere, where beneficiaries’ needs and interests are realized. After describing why he thinks this approach is necessary, he proposes new institutional arrangements that reflect his reconceptualization of Medicare under agency principles.

MOON, MARILYN & HERD, PAMELA. *A PLACE AT THE TABLE: WOMEN’S NEEDS AND MEDICARE REFORM*. New York, NY: Century Foundation Press, 2003. Women make up a disproportionate share of the population served by Medicare. This report examines the effect the program has on women and how various Medicare reform proposals may impact women enrolled in the program. The authors recommend a go-slow approach to any reform efforts as a better way to serve the women who depend on it.

OBERLANDER, JONATHAN. *THE POLITICAL LIFE OF MEDICARE*. Chicago, IL: The University of Chicago Press, 2003. Oberlander, a health policy scholar, reviews Medicare from an historical and political perspective. He emphasizes how the foundations of the program—government

health insurance, federal administration, and universal entitlement—are being challenged in the Republican-dominated political atmosphere in Washington. He traces past political battles about the program, compares those battles to current arguments about the need for reform, and discusses what he envisions the program will look like in the future.

SHAVIRO, DANIEL. WHO SHOULD PAY FOR MEDICARE? Chicago, IL: The University of Chicago Press, 2004. Shaviro takes a look at the economics of the way we pay for Medicare, including the recently added prescription drug benefit. He believes that if nothing is done to correct Medicare's design flaws, we face massive hyperinflation and possible economic collapse. He advocates adopting reform measures that raise taxes, control prices, limit benefits, and require the elderly to share more of the burden of the costs of the program.

2. Articles

CHANNICK, SUSAN ADLER. *The Ongoing Debate over Medicare: Understanding the Philosophical and Policy Divides*. 36 JOURNAL OF HEALTH LAW 59 (2003). This article examines Medicare financing by looking at the philosophical roots of the program, as both a nonneed-based program modeled on Social Security and a need-based social insurance program that cares for the Medicare eligible elderly. The author argues that the conflicts between these competing philosophies must be resolved before Medicare's financial situation can truly be addressed, especially as the program's finances reach a crisis in the coming years.

DEPARLE, NANCY-ANN. *Medicare at 40: A Mid-Life Crisis?* 7 JOURNAL OF HEALTH CARE LAW & POLICY 70 (2004). This article is adapted from lecture that DeParle, President Clinton's Administrator of the Health Care Finance Administration (now Centers for Medicare and Medicaid Services or CMS) from 1997–2000, gave at the Stuart Rome Lecture at the University of Maryland School of Law on October 10, 2002. In the lecture, she argues that Medicare's challenges are daunting but not insurmountable. She would like policymakers to implement changes that are currently possible, such as giving CMS the power to manage its own affairs and reward providers for high quality care. In general, she recommends implementing careful incremental reforms rather than sweeping changes to avoid unduly harming such a vital and necessary program for America's elderly.

- FOX, JACQUELINE. *Medicare Should, but Cannot, Consider Cost: Legal Impediments to a Sound Policy*. 53 BUFFALO LAW REVIEW 577 (2005). The author examines the legal impediments preventing the Centers for Medicare and Medicaid Services (CMS) from considering cost when allocating benefits and Congress's lack of guidance on the issue. She believes these cost-related problems are likely to become even more difficult due to a new regulation requiring CMS to explicitly state the factors that go into coverage decisions. The author encourages Congress to provide proper guidance to CMS to help it deal with cost-related issues both ethically and pragmatically.
- HYMAN, DAVID A. *Medicare Meets Mephistopheles*. 60 WASHINGTON & LEE LAW REVIEW 1165 (2003). In this humorous and satirical article, Hyman masquerades as a junior bureaucrat (Underling Demon 666) writing a memo to his boss (Satan) reporting on the progress of their use of Medicare and human susceptibility to the seven deadly sins to accomplish their goal of corrupting the American republic. The author hopes that this satirical look at Medicare will help shake up defenders of the program to acknowledge Medicare's numerous problems. This article is part of an issue devoted to articles presented at a symposium on The Future of Medicare, Post Great Society and Post Plus-Choice: Legal and Policy Issues.
- JOST, TIMOTHY STOLTZFUS. *The Most Important Health Care Legislation of the Millennium (So Far): The Medicare Modernization Act*. 5 YALE JOURNAL OF HEALTH POLICY, LAW & ETHICS 437 (2005). Jost posits that the recently enacted Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) radically changes Medicare because it allows various levels of benefit coverage and institutes means-testing of certain benefits. He also fears that the loosening of cost controls under the MMA will make the program financially unsustainable in the long-term. He believes this retreat from the long-standing policy of providing equal benefits to all beneficiaries and the loosening of cost controls sow the seeds for Medicare's future destruction due to political and market forces.
- LUU, ARLENE & LIANG, BRYAN A. *Case Management: Lessons from Integrated Delivery to Promote Quality Care to the Elderly*. 9 JOURNAL OF MEDICINE & LAW 257 (2005). The authors argue that case management can improve the quality of health care for the elderly and should be reimbursed under Medicare. To support their position, they

point to the fact that most health plans recognize the impact case management can have by improving quality and lowering the cost of care as evidence of its effectiveness.

MARMOR, THEODORE R. & HACKER, JACOB S. *Medicare Reform and Social Insurance: The Clashes of 2003 and Their Potential Fallout*. 5 YALE JOURNAL OF HEALTH POLICY, LAW & ETHICS 475 (2005). The authors examine and criticize the Medicare Modernization Act of 2003 and believe it will have deleterious effects on the future viability of Medicare. They are especially concerned with its provisions for means-testing some of the benefits because of the impact the provisions will have on its long-term political support.

MOON, MARILYN. *The Future of Medicare as an Entitlement Program*. 12 ELDER LAW JOURNAL 225 (2004). Moon looks at the effect of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) and the effect its means-testing provisions will have on the future of Medicare. She argues that the risk to the program's entitlement status must be carefully weighed against any cost savings that may result from reform proposals such as the MMA. She strongly encourages a more honest and forthright discussion about the effect such policy changes will have on the program in the future.

RICE, THOMAS & DESMOND, KATHERINE A. *The Distributional Consequences of a Medicare Premium Support Proposal*. 29 JOURNAL OF HEALTH POLITICS, POLICY & LAW 1187 (2004). One method of reforming Medicare would be to enact a policy of federal support to individuals to purchase health care insurance coverage on their own, sometimes referred to as "premium support." After first outlining the various premium support proposals, and examining a bill before Congress known as Breaux-Frist I that included a premium support provision, the authors argue that premium support, as proposed in this bill, would increase premiums for those remaining in traditional Medicare and adversely impact people who live in areas with higher medical costs.

SHORT, PAMELA FARLEY & OTHERS. *Health Insurance for Americans Approaching Age Sixty-Five: An Analysis of Options for Incremental Reform*. 28 JOURNAL OF HEALTH POLITICS, POLICY & LAW 41 (2003). In the absence of comprehensive health care coverage reform, the authors examine the viability of enacting incremental reforms to provide health insurance coverage for older Americans approaching age sixty-five. They first examine the arguments for this type of reform

and then propose various policy guidelines to accomplish this goal. They believe that the goal of such a policy should not be to lower the number of uninsured, but rather one guided by principles of equity and efficiency.

STANTON, THOMAS H. *The Administration of Medicare: A Neglected Issue*. 60 WASHINGTON & LEE LAW REVIEW 1373 (2003). Citing numerous studies to back up his claim, Stanton argues that the administration of Medicare by the Centers for Medicare and Medicaid Services (CMS) is weak and blames CMS's problems on the disconnect between its resources and its responsibilities. After describing the problem, he makes numerous suggestions to improve the administration of the program. This article is part of an issue devoted to presentations made at a symposium on The Future of Medicare, Post Great Society and Post Plus-Choice: Legal and Policy Issues.

E. COMPETENCY/CAPACITY FOR DECISIONMAKING (INCLUDING GUARDIANSHIPS)

1. Articles

GUINN, DAVID E. *Mental Competence, Caregivers, and the Process of Consent: Research Involving Alzheimer's Patients or Others with Decreasing Mental Capacity*. 11 CAMBRIDGE QUARTERLY OF HEALTHCARE ETHICS 230 (2002). Guinn explores the ethical problems relating to consent for research from individuals with Alzheimer's disease. These individuals have an impaired mental capacity that will probably further deteriorate during the course of research. Guinn argues that current efforts to balance the need for research against the duty to protect research subjects are flawed, largely because the model of consent used assumes the research subject is a fully competent individual. Instead, Guinn proposes an alternative model that modifies research practices to better facilitate the participation of the subjects, if it is determined that is their desire. His model makes use of three tactics designed to recognize the unique challenges of obtaining consent from this population of individuals.

HIRSCHMAN, KAREN B. & OTHERS. *Do Alzheimer's Disease Patients Want to Participate in a Treatment Decision, and Would Their Caregivers Let Them?* 45 GERONTOLOGIST 381 (2005). The authors present the findings of a study that looked at the factors associated with the preferences of patients suffering from Alzheimer's disease.

Specifically, the authors try to determine if patients had a desire to participate in deciding whether or not to use disease slowing medication and to what degree their caregivers would let them be involved in making this decision. Through the interview process, the authors found that the vast majority of patients with mild to moderate Alzheimer's disease did indeed want to be involved in making treatment decisions. Most caregivers also expressed a willingness to allow the patient to participate in decision-making, but had real concerns regarding the patient's ability to actually participate in the process.

- KIM, SCOTT Y. H. & OTHERS. *Impaired Decision-Making Ability in Subjects with Alzheimer's Disease and Willingness to Participate in Research*. 159 AMERICAN JOURNAL OF PSYCHIATRY 797 (May 2002). The authors examined the effects of cognitive and decisional impairment on the willingness of individuals with Alzheimer's disease to participate in research. This is an area highly charged with ethical debate due to the fact that individuals with Alzheimer's disease may lack the ability to understand the risks and burdens related to different research protocols. Researchers studied thirty-four individuals with varying levels of Alzheimer's disease and fourteen healthy individuals, and documented their willingness to participate in hypothetical research protocols of various risk. In the majority of protocols, willingness to participate was the same for both groups, with the desire to participate declining as the associated risks increased. The authors conclude that individuals with Alzheimer's should be allowed to participate in research, as long as the proper informed consent that is sensitive to the needs of this group is obtained.
- LAMBERT, HEATHER C. & OTHERS. *Factors Affecting Long-Term-Care Residents' Decision-Making Processes as They Formulate Advance Directives*. 45 GERONTOLOGIST 626 (2005). The authors provide the results of their qualitative study designed to describe the factors that contribute to the decision-making process by the elderly who formulate advance directives in long-term care. Results show that the elderly make their decisions based on information gained from personal experience with death and illness rather than from professionals or the media. The major factors they considered were based on spiritual, emotional, and/or social matters. The authors recommend that professionals keep these factors in mind to ensure that offered services best meet the needs of the clients.
- MARSON, DANIEL C. & OTHERS. *Testamentary Capacity and Undue*

Influence in the Elderly: A Jurisprudent Therapy Perspective. 28 LAW & PSYCHOLOGY REVIEW 71 (2004). Testamentary capacity (TC) is necessary in order to grant an individual the freedom to choose how his or her property will be disposed of following death. It is also necessary that the individual be free from undue influence in order to make a valid will. Many cases arise based on issues of TC and undue influence involving mental health professionals. Therefore, this article examines testamentary capacity from a jurisprudent therapy approach. The article is divided into three sections: the law of TC and undue influence; current mental health practice, science, and roles as they apply to TC and undue influence in the elderly; and how well mental health practice and psychological science support the structure and goals of the law in this area.

ROSEN, CRAIG S. & OTHERS. *How Well Are Clinicians Following Dementia Practice Guidelines?* 16 ALZHEIMER DISEASE & ASSOCIATED DISORDERS 15 (January–March 2002). Clinical practice guidelines that are used to inform treatment decisions can improve the quality of patient care. Among the areas of care that guidelines address are durable powers of attorney and decisionmaking issues, along with the creation of legally required reports of drivers with dementia. This article presents the results of a study designed to address how such guidelines have impacted processes of care for patients with dementia.

YARBOROUGH, MARK. *Adults Are Not Big Children: Examining Surrogate Consent to Research Using Adults with Dementia.* 11 CAMBRIDGE QUARTERLY OF HEALTHCARE ETHICS 160 (2002). Yarborough discusses the ethically challenging issues regarding surrogate consent in research settings that have no direct benefit for the subjects being asked to participate in the research. Focusing specifically on nontherapeutic research, Yarborough argues that the best interest standard of surrogate consent is an unethical choice. Instead, he argues that the better standard is the substituted judgment standard. This is because it provides better guidance to institutional review boards, investigators, and surrogate decision-makers. Yarborough concludes by stating that in situations where an individual with dementia may undergo nontherapeutic research, it is most important to focus on the quality of surrogate consent rather than the risk of the research.

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

1. Articles

- ALLEN, REBECCA S. & SHUSTER, JOHN L. JR. *The Role of Proxies in Treatment Decisions: Evaluating Functional Capacity to Consent to End-of-Life Treatments Within a Family Context*. 20 BEHAVIORAL SCIENCES & THE LAW 235 (2002). The authors review existing literature to further their goal of creating a model designed to aid in evaluating the capacity of family members to make end-of-life treatment decisions. The authors highlight those articles that discuss how capacity to consent can be assessed within the context of end-of-life medical decisions, examine the causes of the discrepancies that often exist between the older adult and the proxy, and propose a model designed to evaluate capacity.
- GUNTER-HUNT, GAIL & OTHERS. *A Comparison of State Advance Directive Documents*. 42 GERONTOLOGIST 51 (2002). The authors present the findings of a study designed to compare similarities and differences in the content of various state advance directive documents. The methodology used in the study to gather the information was to compare the advance directive documents from each state and the District of Columbia that were made available on the Partnership for Caring web site. After analyzing the results, the authors find little uniformity between states. As a result, the authors recommend a national dialogue that would result in the standardization of some provisions included in advance directive documents across the board.
- HAWKINS, NIKKI AYERS & OTHERS. *Micromanaging Death: Process Preferences, Values, and Goals in End-of-Life Medical Decision Making*. 45 GERONTOLOGIST 107 (2005). The authors report the findings of their study that was designed to determine both the attitudes of patients and their surrogates in the use of advance directives to manage end-of-life medical care, as well as patient preferences in how decisions are made during this time. The results of the interviews and questionnaires completed by 337 elderly patients and their surrogates showed that few wished to document specific medical treatment preferences that must be followed without exception. Rather, most desired a more general expression of preferences with surrogates being granted considerable leeway in decisionmaking.
- HEALY, TARA C. *Ethical Decision-Making: Pressure and Uncertainty as Complicating Factors*. 28 HEALTH & SOCIAL WORK 293 (November 2003). Healy examines the ethical tension experienced by social workers when trying to evaluate the decisional capacity of elderly

individuals who are cognitively impaired. In collecting the data for her study, Healy uses an open ended interview model. After she compares the results of the open interviews, Healy brings to light three prime areas that cause the highest degree of ethical tension. These three areas are identified as: (1) clinical uncertainty, (2) pressure from other professionals, and (3) a combination the two above areas. Experiencing both pressure from other professionals and clinical uncertainty is shown to cause the highest level of ethical tension for the social workers who participated in this study.

- JACELON, CYNTHIA S. & OTHERS. *A Concept Analysis of Dignity for Older Adults*. 48 JOURNAL OF ADVANCED NURSING 76 (October 2004). Human dignity is a key component of the American Nurses Association Code of Ethics. As a result, nurses strive to not only treat patients with dignity, but also to allow them to die with dignity. Despite the fact that the concept of dignity is often discussed in health care literature, the term dignity does not have a clear meaning or consistent definition across the literature. This paper describes the literary analysis undertaken by the authors in order to develop a definition of dignity in older adults. It also provides a behavioral definition of dignity that was constructed, and that could be the basis for nurses to develop interventions that foster dignity in older adults.
- RAINER, JACKSON P. & MCMURRY, PATTI ELLIS. *Caregiving at the End of Life*. 58 JOURNAL OF CLINICAL PSYCHOLOGY 1421 (2002). In writing this article, Rainer and McMurry attempt to help mental-health professionals better meet the needs of family members and/or caregivers and to guide them in the decisionmaking process when it comes to the palliative care of dying patients. The authors give special attention to the most appropriate way to communicate information to caregivers and the legal and financial decisions that must be addressed. The authors focus on the preparation of advance directives to adequately honor the wishes of the dying patient.
- ROSNICK, CHRISTOPER B. & REYNOLDS, SANDRA L. *Thinking Ahead: Factors Associated with Executing Advance Directives*. 15 JOURNAL OF AGING & HEALTH 409 (May 2003). Few adults choose to execute advance directives despite the known benefits. Surprisingly, many researchers actually contribute to this resistance. This study examines the characteristics of those individuals who choose to execute advance directives with those who choose not to use them. The study highlights the reasons why certain individuals are not executing advance directives. The findings suggest that along with demographics, other

factors may affect an individual's willingness to execute them. These factors are listed.

TEMKIN-GREENER, HELENA & OTHERS. *Advance Care Planning in a Frail Older Population: Patient Versus Program Influences*. 27 RESEARCH ON AGING 659 (November 2005). Studies show that the Patient Self-Determination Act, enacted to promote patient autonomy and encourage advance care planning, has had only a modest impact on the rate of which individuals decide to complete advance directives. This study examines the Program of All-Inclusive Care for the Elderly (PACE) to determine the role that individual characteristics of both the patient and health care provider play in explaining the choices that are made surrounding advance directives. Despite their initial hypothesis that choices regarding end-of-life treatment and health care proxies largely depend on the individual patient rather than the program, the study showed the opposite to be true.

VI. SOCIAL POLICY/SOCIAL ISSUES

A. SOCIAL POLICY

1. Books

CAPUTO, RICHARD K. ED. CHALLENGES OF AGING ON U.S. FAMILIES: POLICY AND PRACTICE IMPLICATIONS. Binghamton, NY: The Haworth Press, Inc., 2005. Caputo brings together a collection of essays in his book to inform the reader of the economic and caregiving challenges confronting a majority of the elderly population today and in the future. The authors of the included essays discuss the factors that influence the economic status of families, the various aspects and issues surrounding family members operating as caregivers, and family member involvement following the institutionalization of the elderly.

TEPPER, LYNN M. & CASSIDY, THOMAS M., EDS. MULTIDISCIPLINARY PERSPECTIVES ON AGING. New York, NY: Springer Publishing Company, 2004. In this book, Tepper and Cassidy bring together discussions of important issues that confront the elderly and professionals who work with them on a daily basis. The scholarly essays that are included touch on important social, financial, legal, and ethical matters, and provide the necessary tools to meet the needs of the elderly and professionals alike.

WEGMAN, DAVID H. & MCGEE, JAMES P. EDS. HEALTH AND SAFETY

NEEDS OF OLDER WORKERS. Washington, DC: The National Academies Press, 2004. The Committee on the Health and Safety Needs of Older Workers was created specifically to closely research issues unique to older workers. Its report clearly explains the effects work plays on older adults, public policies, practices related to ensuring the health and safety of the older workforce, and necessary interventions unique to older workers. The last chapter of the book not only summarizes the committee's conclusions, it also presents detailed recommendations that arose from examining older workers. Three areas in need of further attention that came to light from the project are the need for improved databases and systems to track the health and safety needs of older workers and the programs designed to address them; research that sheds light on the factors that relate to the health and safety needs of older workers; and research that identifies policies, programs, and strategies that are ineffective in helping this population.

2. Articles

HAWES, CATHERINE & OTHERS. *National Survey of Assisted Living Facilities*. 43 GERONTOLOGIST 875 (2003). The authors conducted a nationwide study to determine if most assisted living communities in operation today actually meet key philosophical elements that have been set forth by the Assisted Living Quality Coalition. This coalition is made up of consumer groups, such as AARP, and provider groups who came together to agree on the key aspects that should be acknowledged as a part of assisted living. The study highlights a distinct lack of uniformity in the degree to which various assisted living facilities met the key elements.

MEMON, AMINA & OTHERS. *The Aging Eyewitness: Effects of Age on Face, Delay, and Source-Memory Ability*. 58B JOURNALS OF GERONTOLOGY 338 (2003). This article provides the results of a study designed to determine the relevance of the role that age plays when older individuals are asked to identify potential perpetrators on a lineup after witnessing a crime. Existing data show that older individuals make more false identifications. The authors closely examined the discrepancy age caused to find out what causes the difference in performance. In their study, the authors tested older adults to find out if the age of the perpetrator or the amount of time between witnessing the crime and seeing the lineup played a role in their accuracy.

ROY, KINGSHUK K. *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*. 11 ELDER LAW JOURNAL 109 (2003).

Many states automatically revoke an elderly person's right to vote when he or she enters guardianship. This is largely due to the fact that in order to enter guardianship, an individual must be determined to be incompetent. Roy examines the purposes behind these laws and contends that although the purpose of these laws is to protect the elderly, in reality, they often prevent eligible and interested voters from voting. Roy sets forth an alternate framework that can be used by the courts to determine the competency of the elderly who wish to vote.

WHITE, JOSEPH. *(How) Is Aging a Health Policy Problem?* 4 YALE JOURNAL OF HEALTH POLICY, LAW & ETHICS 47 (2004). White reviews the health policy implications of our aging society and concludes that the challenge of health care costs posed by this population is exaggerated. He argues that it is unnecessary to worry about the implications aging has on medical costs and that any changes to the current health policy would be inappropriate. Instead, White argues that the area that does need attention as a health policy problem is how to deliver health care, not how to finance it. Specifically, citizens need to examine how the current health care system is organized and determine if the necessary caregivers are available to meet future needs.

B. VICTIMIZATION OF THE ELDERLY

1. Books

ALT, BETTY L. & WELLS, SANDRA K. *FLEECING GRANDMA & GRANDPA: PROTECTING AGAINST SCAMS, CONS, AND FRAUDS*. Westport, CT: Praeger, 2004. Alt and Wells take a practical approach in presenting many of the common schemes designed to make victims out of the elderly. Each chapter is devoted to a different category of scam, and highlights the most common ones in each category. The authors take it one step further by providing information that guides the reader on ways to avoid becoming a victim, and what steps to take if they have.

PAYNE, BRIAN K. *CRIME IN THE HOME HEALTH CARE FIELD: WORKPLACE VIOLENCE, FRAUD, AND ABUSE*. Springfield, IL: Charles C. Thomas Publisher, Ltd., 2003. Payne addresses abuses that often occur in the home health care industry. He begins by providing a general background of the common abuses against the elderly that occur. Each of the following chapters focus on a specific type of abuse that the elderly commonly encounter with home health care. Finally, he ends

the discussion by illustrating common responses to crime and devotes a chapter to preventing home health care misconduct.

SHARPE, CHARLES C. *FRAUDS AGAINST THE ELDERLY*. Jefferson, NC: McFarland & Company, Inc., 2004. Sharpe focuses on prevalent frauds and scams designed to victimize the elderly, with the hope that this information will allow the public to make informed decisions and avoid becoming victims of fraud. After defining fraud for the purposes of this book, Sharpe takes an in-depth look at many different scams, including those involving business opportunities, credit cards, direct mail, do not call registries, door-to-door sales, investments, and predatory lending. Each description includes red flags individuals should look for to identify potentially fraudulent situations and what to do when an elderly person may have become a victim of a scam.

2. Articles

ANONYMOUS. *Protecting Older Americans: A History of Federal Action on Elder Abuse, Neglect, and Exploitation*. 14(2/3) JOURNAL OF ELDER ABUSE & NEGLECT 9 (2002). This article provides a general outline and description of congressional hearings that focus on elder abuse. The paper argues that more could be done to address the problem and points out the distinct need for more coordination between federal legislative and departmental activity. Along with setting forth the problems, the article mentions state and local initiatives that have potential to help remedy the problem of elder abuse in the United States. An appendix is included that provides an explanation of many terms that come into play when the topic of elder abuse is discussed.

BACHMAN, RONET & OTHERS. *Reducing Injury Through Self-Protection by Elderly Victims of Violence: The Interaction Effects of Gender of Victim and the Victim/Offender Relationship*. 16(4) JOURNAL OF ELDER ABUSE & NEGLECT 1 (2004). While some data show that older individuals are less likely than younger individuals to become victims of violence, other research shows that the elderly are vulnerable to victimization in a unique way and have differing health outcomes than younger victims. In this article, the authors explore the patterns and health consequences of robbery and assault victimizations. In doing so, they focus on the age and gender of the victim and the relationship to the offender. They also address what sort of self protective measures the elderly can take to reduce the risk of injury in the event of a violent attack.

- BRANDL, BONNIE & HORAN, DEBORAH L. *Domestic Violence in Later Life: An Overview for Health Care Providers*. 35(2/3) *WOMEN & HEALTH* 41 (2002). Domestic abuse of the elderly is a growing problem in the United States, but current estimates indicate that only about 1 in 5 incidences are ever reported. Because this abuse is often at the hands of the spouse or adult child of elderly women, the authors assert that the best individual to identify such abuse might be the treating physician. This article was written to help physicians to better identify possible victims of domestic violence. In an effort to achieve this goal, Brandl and Horan provide an overview of the indicators that are often present in abuse situations as well as identifying specific issues that must be confronted.
- BREAUX, JOHN B. & HATCH, ORRIN G. *Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation*. 11 *ELDER LAW JOURNAL* 207 (2003). According to Breaux and Hatch, government action is needed to confront the problem of elder abuse in the United States. While congressional hearings on elder abuse declared it a national disgrace, few resources or systems are in place to reduce or eliminate the problem. Breaux and Hatch, who are both members of the Senate Special Committee on Aging, provide an outline of legislation that would devote adequate resources and structures to detecting, treating, and hopefully eliminating the problem of elder abuse.
- DALY, JEANETTE M. & OTHERS. *Mandatory Reporting: Relationship of APS Statute Language on State Reported Elder Abuse*. 15(2) *JOURNAL OF ELDER ABUSE & NEGLECT* 1 (2003). Mandatory reporters are required by law to report allegations or suspicions of abuse. Currently, forty-four states and the District of Columbia have laws that consider the individuals who assume the care of older adults to be mandatory reporters. While many of these statutes specify specific reporting instructions, the instructions are not the same across the states. This study evaluates the relationship between state adult protective service wording of mandatory reporting legislation and the rates of the actual reported, investigated, or substantiated abuse.
- DESSIN, CAROLYN L. *Financial Abuse of the Elderly: Is the Solution a Problem?* 34 *MCGEORGE LAW REVIEW* 267 (2003). Dessin closely examines the different attempts made by various state legislatures to remedy financial abuse by enacting laws designed to improve the quality of life for their elderly citizens. She begins her discussion of the topic by pointing out that even defining financial abuse or exploitation

is not an easy task and that such abuse has been handled in a number of different ways. After suggesting an alternate approach, Dessin then compares state statutes aimed at remedying financial abuse, and highlights the case law interpreting those statutes. Many of the weaknesses of these statutes and approaches are brought to light as she suggests an alternate model for dealing with the problem.

DIMAH, AGBER & DIMAH, KEREN PATRICIA. *Gender Differences Among Abused Older African Americans and African American Abusers in an Elder Abuse Provider Agency*. 32(5) JOURNAL OF BLACK STUDIES 557 (2002). Dimah and Dimah examine the gender differences among mistreated elderly African Americans and their abusers. In examining this topic, they focus on six forms of abuse and the gender differences by both the victims and perpetrators. Dimah and Dimah begin with an outline of the general problem of elder abuse. In doing so, they explain the categories of mistreatment, identify typical individuals who victimize the elderly, explain various forms of elder abuse, and highlight common theories used to explain why family members become abusers. They chose to focus on the African American community after realizing there is a distinct lack of research on this population.

EGGERT, KURT. *Lashed to the Mast and Crying for Help: How Self-Limitation of Autonomy Can Protect Elders from Predatory Lending*. 36 LOYOLA OF LOS ANGELES LAW REVIEW 693 (2003). Eggert takes a close look at the frustrating problem of protecting the elderly from financial abuse while avoiding the problem of overprotection that unnecessarily limits their autonomy, also causing harm. Eggert addresses many issues, starting with an explanation of the various types of financial elder abuse, which is categorized as either personal financial abuse or commercial financial abuse. In his discussion of the need for protection, Eggert also devotes significant attention to the importance seniors place on autonomy. He includes a number of tests and other methods that can be used to remedy many of the problems brought forth in this article.

GLICK, JENNIFER BETH. *Protecting and Respecting Our Elders: Revising Mandatory Elder Abuse Reporting Statutes to Increase Efficacy and Preserve Autonomy*. 12 VIRGINIA JOURNAL OF SOCIAL POLICY & THE LAW 714 (2005). Mandatory elder abuse reporting statutes that require designated individuals to report suspicions or knowledge of elder mistreatment to designated state agents have been criticized as being both impractical and ethically flawed. In her explanation of this, Glick

argues that there is little proof that such statutes actually remedy the problem of elder abuse, and instead may both undermine the autonomy of elders, and compound any existing abuse. Glick argues that while flawed, reporting statutes should not be abandoned altogether. Instead, such statutes should be revised in such a way that they both protect the elderly and preserve their autonomy when possible.

GOLDING, JONATHAN M. & OTHERS. *The Effect of Gender in the Perception of Elder Physical Abuse in Court*. 29 LAW & HUMAN BEHAVIOR 605 (October 2005). In this article, the authors present the results of two experiments that were designed to determine whether the gender of jury members makes a difference in the determination of actual elder abuse in court. Results showed that women were more likely to believe the victim and consequently render a guilty verdict more often than men in fictional criminal trials.

GOLDING, JONATHAN M. & OTHERS. *Perceptions of Elder Neglect in the Courtroom*. 16(1) JOURNAL OF ELDER ABUSE & NEGLECT 23 (2004). After providing a general background of the phenomenon of elder abuse and how cases have traditionally been handled in the courtroom, the authors present the results of their study designed to provide insight into how elder abuse is perceived and if it is likely to result in conviction. The authors argue that outcomes will help determine whether using the courts is an effective intervention strategy to remedy the problem of elder abuse.

HARKNESS, DONNA S. *Packaged and Sold: Subjecting Elder Law Practice to Consumer Protection Laws*. 11 JOURNAL OF LAW & POLICY 525 (2003). Consumer law is at the heart of many of the problems that cause the elderly to seek legal assistance. Unfortunately, attorneys themselves can also be the source of unfair and deceptive practices. In this article, Harkness discusses the development of state consumer protection statutes addressing fraudulent consumer practices, and also explores how consumer protection concepts should be applied to the practice of elder law.

HEATH, JOHN M. & OTHERS. *Interventions from Home-Based Geriatric Assessments of Adult Protective Service Clients Suffering Elder Mistreatment*. 53 JOURNAL OF THE AMERICAN GERIATRICS SOCIETY 1538 (2005). The authors present the results of a study designed to describe interventions made for clients that were referred by adult protective services for geriatric assessment. The study found that in home geriatric assessment services that visited the elderly and screened

for all forms of elder mistreatment were useful in interventions that helped mitigate situations of elder mistreatment.

HILLIARD, JENNIFER L. *The Nursing Home Quality Initiative*. 26 JOURNAL OF LEGAL MEDICINE 41 (March 2005). Hilliard examines the Nursing Home Quality Initiative (NHQI), a program introduced by the Centers for Medicare & Medicaid Services in November 2002. The NHQI was designed to improve the quality of care in Medicare and Medicaid certified nursing homes by bringing together nursing home regulatory and enforcement systems, consumer information, and community based quality programs, along with other collaborative efforts. Hilliard presents the impact of the NHQI, focusing on such things as its apparent strengths and weaknesses, and publicly reported quality measures. She concludes by providing suggestions for alterations to the NHQI that would maximize the positive impact it has on quality nursing home care.

INGRAM, EBEN M. *Expert Panel Recommendations on Elder Mistreatment Using a Public Health Framework*. 15(2) JOURNAL OF ELDER ABUSE & NEGLECT 45 (2003). In July 2002, the Centers for Disease Control convened a panel of experts to provide recommendations on how the agency should address the issue of elder mistreatment utilizing the public health perspective. This report begins with an explanation of the public health approach and presents a model that depicts the process of identifying effective approaches to prevention of elder abuse and intervention in situations of mistreatment. The article concludes with an extensive list of the panel of expert's recommendations that were designed to advise the agency on developing a comprehensive agenda for activities in the area of elder abuse and neglect.

JOGERST, GERALD J. & OTHERS. *Domestic Elder Abuse and the Law*. 93 AMERICAN JOURNAL OF PUBLIC HEALTH 2131 (2003). In an effort to combat the growing problem of domestic abuse or neglect of the elderly, by 1993 all states had enacted laws that addressed elder abuse in both domestic and institutional settings. Unfortunately there is little or no uniformity in these laws. Additionally, they vary tremendously in such key areas as who they protect, who must report, and what defines reportable behavior, to name just a few. The authors designed a study to evaluate the impact of state adult protective services legislation on rates of reported, investigated, and substantiated cases of domestic elder abuse. The authors found substantial differences in these factors between states, and as a result, call for improved data collection, increased standardization in legislation, and increased funding for

research in this area.

- KOENIG, RAY J., III & DEGUERRE, CAMERON R. *The Legal and Governmental Response to Domestic Elder Abuse*. 21 CLINICS IN GERIATRIC MEDICINE 383 (May 2005). Keonig and DeGuerre provide a general explanation of elder abuse and its prevalence in society today. They further explore this topic by analyzing the federal and state legal definitions of abuse and neglect. They conclude by providing many of the legal options available to combat the problem of domestic elder abuse.
- KOHN, NINA A. *Second Childhood: What Child Protection Systems Can Teach Elder Protection Systems*. 14 STANFORD LAW & POLICY REVIEW 175 (2003). Kohn's position is that efforts to better protect against elder mistreatment should be modeled on laws and policies crafted to protect children. This is because contributing factors to both elder abuse and child abuse are strikingly similar, yet more research has gone into investigating the cause and solutions to child mistreatment. In presenting her argument, Kohn provides an in-depth description of elder mistreatment and describes child mistreatment when necessary. She goes on to list the challenges attributing to holding individuals accountable for such abuse. She closes by highlighting the lessons learned from child mistreatment that can be applied to the mistreatment of the elderly.
- LACHS, MARK & OTHERS. *Older Adults as Crime Victims, Perpetrators, Witnesses, and Complainants: A Population-Based Study of Police Interactions*. 16(4) JOURNAL OF ELDER ABUSE & NEGLECT 25 (2004). The authors present the results of their study designed to determine the nature of community police interventions with older adults. Data was obtained by searching police records in order to identify the general types and interactions elderly individuals had with the police from 1985–1995. The authors found that the primary interaction the elderly had with police was as the victim of a crime. As a result, they urge policymakers to consider the elderly when training law enforcement officers and planning services.
- LUNDY, MARTA & GROSSMAN, SUSAN F. *Elder Abuse: Spouse/Intimate Partner Abuse and Family Violence Among Elders*. 16(1) JOURNAL OF ELDER ABUSE & NEGLECT 85 (2004). In this article, authors Lundy and Grossman focus specifically on domestic abuse when it comes to the issue of elder abuse. Domestic abuse of the elderly can be an

underreported issue due to the fact that after the age of fifty, most women discontinue accessing domestic abuse services and/or shelters. In presenting their findings, the authors focus on the general characteristics of victims and abusers, as well as looking at the circumstances of their abuse. They also examine the unique social service needs of elderly victims of domestic violence. The data is gleaned from a review of relevant literature and on the experiences of over one thousand victims of abuse over the age of sixty-five, who utilized support and services at domestic violence programs.

MARCUS, E-L. & OTHERS. *Strict Vegan, Low-Calorie Diet Administered by Care-Giving Daughter to Elderly Mother – Is This Elder Abuse?* 24 MEDICINE & LAW 279 (June 2005). In an attempt to paint a picture of a typical case of elder abuse, the authors present a case where a daughter who was the primary caregiver of her mother provided her with a strict vegan diet that ended up causing the mother to suffer from severe malnutrition. The authors, primarily using this example and drawing on others, outline the key ethical and legal issues this case raises. In exploring these issues, the authors review some of the reported cases of child and elder abuse or neglect that further illustrate the identified issues. In doing so, the authors extend their view beyond just the laws of the United States and highlight how other countries' laws address these types of issues.

MOORE, SHELBY A. D. & SCHAEFER, JEANETTE. *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse.* 41 SAN DIEGO LAW REVIEW 505 (2004). Moore and Schaefer take an in-depth look at the problem of financial abuse against elderly individuals in an effort to encourage legislators to strengthen existing laws against all types of elder abuse, but particularly financial abuse. The authors point out that as with most crimes, the elderly are uniquely vulnerable to financial abuse. In their exploration of the topic, Moore and Schaefer focus on current law and methods used to protect the elderly and describe the need for uniform and strict laws against this kind of abuse. The authors also provide brief descriptions of the types of financial abuse elderly often encounter and the government's response to the different types of abuse. The article concludes with proposed solutions, and includes extensive charts listing state statutes specifically targeting elder abuse.

QUINN, MARY JOY & HEISLER, CANDACE J. *Legal Response to Elder Abuse and Neglect.* 14(1) JOURNAL OF ELDER ABUSE & NEGLECT 61 (2002). Many current elder abuse laws focus on the overextended

caregiver as the source of abuse. In reality, recent findings show this to focus to be misplaced. As a result, new models look at the criminal behavior and equate it to situations involving domestic violence and other criminal behavior in an attempt to identify potential causes of elder abuse. This article demonstrates how society's understanding of elder abuse has changed along with evolving civil and criminal laws.

QUINN, KATHLEEN & ZIELKE, HOLLY. *Elder Abuse, Neglect, and Exploitation: Policy Issues*. 21 CLINICS IN GERIATRIC MEDICINE 449 (May 2005). The authors discuss the fact that elder abuse has not received major attention at the national level, despite affecting the fastest growing population group. After providing possible explanations, the authors proceed to highlight the developments that have been made over the last fifteen years in the area of elder abuse and adult protective services policies.

PAYNE, BRIAN K. & BERG, BRUCE L. *Perceptions About the Criminalization of Elder Abuse Among Police Chiefs and Ombudsmen*. 49(3) CRIME & DELINQUENCY 439 (2003). Payne and Berg present the findings of a study that examines how officials, specifically police chiefs and nursing home ombudsmen, decide how elder abuse cases should be handled. The authors point out that the increased acknowledgment and recognition of elder abuse in society has resulted in the "criminalization" of elder abuse. This in turn has resulted in, among other remedies, the creation of mandatory reporting legislation and increased penalties for abusers. It is the police chiefs and hospital ombudsmen who then actually decide how to respond and which remedy to apply in abuse situations. This study illustrates that the general response and overall attitude toward elder abuse depends on the individual responding. In general, police chiefs rank street offenses or white collar offenses as more severe offenses than home offenses, while in general, ombudsman have the opposite view.

RABINER, DONNA J. & OTHERS. *A Conceptual Framework of Financial Exploitation of Older Persons*. 16(2) JOURNAL OF ELDER ABUSE & NEGLECT 53 (2004). Research indicates that financial abuse accounts for a significant proportion of reported elder abuse cases. Because this type of abuse affects the victim's economic well-being and overall quality of life, there is much that needs to be learned about the general characteristics, causes, and effective methods of deterrent for this type of crime. In an effort to better define financial exploitation of the elderly, the authors present a conceptual framework that can be used to assist interested parties to better develop and evaluate strategies to

reduce the risk of financial abuse against the elderly.

- RABINER, DONNA J. & OTHERS. *Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them*. 16(1) JOURNAL OF ELDER ABUSE & NEGLECT 65 (2004). Financial abuse of the elderly often goes unreported by both victims and professionals. When discussing financial abuse of the elderly, the authors categorize the following as abuse: the misuse of powers of attorney and guardianships, illegal transfers of property, as well as general fraud and theft. This article reports the results and recommendations from the Department of Health and Human Services mandated by Congress in its 2000 reauthorization of the Older Americans Act.
- REED, KIMBERLY. *When Elders Lose Their Cents: Financial Abuse of the Elderly*. 21 CLINICS IN GERIATRIC MEDICINE 365 (May 2005). After defining the problem of financial abuse of the elderly, Reed sets forth common situations where the aged will most likely encounter this kind of abuse. Early detection of abuse is defined as the best remedy for stopping abuse in the future. As a result, Reed provides a practical method for developing a detecting and screening protocol that would be useful to the health care professionals who deal with incidents of financial elder abuse. Relevant federal and state laws are clearly outlined and explained.
- SMITH, JILL M. *Nixon v. Commonwealth: Providing Protection to the Elderly and Disabled by Conducting Criminal Background Checks on Their Caretakers*. 14 WIDENER LAW JOURNAL 679 (2005). Smith describes Pennsylvania's Older Adults Protective Service Act ("OAPSA"), enacted in 1987 and the subsequent suit brought to enjoin the enforcement of the act. OAPSA was designed to protect the elderly by prohibiting convicted felons from working in and around facilities that care for the elderly and disabled. Smith provides a background to the act and describes the constitutionality of the statute as discussed in the court in *Nixon v. Commonwealth*. An evaluation of how this suit will affect healthcare providers in the future is also included. While this article does focus specifically on a Pennsylvania statute, it can serve as a model for others interested in similar legislation.
- TEASTER, PAMELA B. & ROBERTO, KAREN A. *Sexual Abuse of Older Women Living in Nursing Homes*. 40(4) JOURNAL OF GERONTOLOGICAL SOCIAL WORK 105 (2003). Teaster and Roberto present data collected from Adult Protective Services files of sexually abused older women in nursing homes. The authors examine the

aggregated data that was collected over a five year period, focusing on those women who are between the ages of 70 and 89 years old. Teaster and Roberto present their findings and conclusions, and in doing so, hope to bring the problem of sexual abuse of older adults to the attention of those individuals who are in positions to reduce, and ultimately prevent, abuse from happening in the future.

TROYER, JENNIFER L. & THOMPSON, HERBERT G., JR. *The Impact of Litigation on Nursing Home Quality*. 29 JOURNAL OF HEALTH POLITICS, POLICY & LAW 11 (2004). The authors use empirical research to determine the possible cause of litigation against nursing homes. They focus on three possible causes, the first being that litigation against nursing homes is the result of quality problems monitored during the inspection process. The second possible cause is the litigation itself causes quality problems because it diverts financial resources away from patient care. Finally, the authors look at the possibility that litigation simply duplicates the efforts of the inspection process. In presenting the information, Troyer and Thompson start by providing background on the quality of care in nursing homes and then identify common legal actions against nursing homes for quality of care issues. They conclude that government initiated inspections fail to cause the necessary quality of care to reduce legal claims against nursing homes.

TWOMEY, MARY & OTHERS. *From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Late Life*. 6 JOURNAL OF THE CENTER FOR FAMILIES, CHILDREN & THE COURTS 73 (2005). This article provides a clear, straightforward description of elder abuse, the role it plays in domestic violence, and some of its major causes. The authors also list a few of the barriers that keep the elderly from seeking help when they are victimized. Most importantly, the authors highlight key issues that must be considered by the courts when handling cases of elder abuse in domestic violence situations. While the article mainly focuses on California courts, national court efforts are also mentioned.

C. AGED OFFENDERS

1. Books

ADAY, RONALD H. *AGING PRISONERS: CRISIS IN AMERICAN CORRECTIONS*. Westport, CT: Praeger, 2003. Aday introduces the topic of the aging prison population by providing a detailed description of

the phenomenon of the elderly criminal. He starts by painting a general picture of the problem, and then focuses on practical problems that arise when the elderly enter the prison setting. Within his descriptions of the various problems and issues confronting elderly prisoners and prison workers, Aday also provides real world examples and potential solutions to common problems.

EGLIT, HOWARD. *ELDERS ON TRIAL: AGE AND AGEISM IN THE AMERICAN LEGAL SYSTEM*. Gainesville, FL: University Press of Florida, 2004. Eglit approaches aspects of ageism and its impact on the legal system. He lays the groundwork by starting with a general discussion of age bias and the potential causes of this bias. He then examines the phenomenon in greater depth by devoting a chapter to each of the following groups: plaintiffs, defendants, and witnesses; lawyers and clients; judges; and juries. Each chapter approaches the problem from multiple points of view and offers strategies to overcome the problems raised.

2. Articles

ARNDT, STEPHAN & OTHERS. *Older Offenders, Substance Abuse, and Treatment*. 10 *AMERICAN JOURNAL OF GERIATRIC PSYCHIATRY* 733 (November–December 2002). The authors present the results of a study designed to determine the mental health and substance abuse treatments needs of seniors. Specifically, the study examined psychiatric treatment history and substance abuse problems in elderly inmates undergoing their initial evaluation when entering the prison system. Results showed that older offenders would benefit from treatment, and that this treatment should be tailored to the unique needs of this group.

BURROW, JOHN D. & KOONS-WITT, BARBARA A. *Elderly Status, Extraordinary Physical Impairments and Intercircuit Variation Under the Federal Sentencing Guidelines*. 11 *ELDER LAW JOURNAL* 273 (2003). Just as the population of incarcerated elderly is increasing, so is the average period of time individuals are spending incarcerated. The authors research empirical data to determine whether “elderly” is a status that should be considered and used as a departure under current Federal Sentencing Guidelines. Burrow and Koons-Witt suggest that society is better served when the age and physical impairments of elderly offenders are considered as mitigating sentencing factors. They also suggest that uniform standards be adopted that take age and physical condition into consideration as sentencing departures.

- CIANCIOLO, PATRICIA K. & ZUPAN, LINDA L. *Developing a Training Program on Issues in Aging for Correctional Workers*. 24(3) GERONTOLOGY & GERIATRICS EDUCATION 23 (2004). Cianciolo and Zupan describe the "Issues in Aging for Correctional Workers" training program developed in order to help correctional workers effectively handle the elderly prison population. In addition to describing the program, which touches on many issues from the perceptions of aging to the laws applicable to the treatment of older workers, the authors also identify the training program's strengths and limitations.
- FRIERSON, RICHARD L. & OTHERS. *Competence-to-Stand-Trial Evaluations of Geriatric Defendants*. 30 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY & THE LAW 252 (2002). While the elderly are incarcerated at a substantially lower rate than their younger counterparts, the number of geriatric arrests is predicted to increase as the total population of elderly individuals in the United States increases. Consequently, it is predicted that a larger number of elderly will be seen in pretrial and correctional settings. Because dementia and other such disorders are more prevalent in the elderly, the authors take a close look at competency in the trial setting and compare geriatric defendants found to be competent to stand trial with those found incompetent. The authors find a relatively high rate of incompetence among those over 65. In addition to presenting these findings, they provide demographic characteristics of this population and highlight social policy questions.
- LEMIEUX, CATHERINE M. & OTHERS. *Revisiting the Literature on Prisoners Who Are Older: Are We Wiser?* 82 PRISON JOURNAL 440 (December 2002). This article provides a critical review of scholarly literature written about older inmates, from 1977 through 2001, in an attempt to facilitate additional empirical analysis. Included in the discussion is an overview of the general demographics of this population a description of the different types of elderly prisoners, and common health and social problems encountered by this population. The review wraps up with an examination of correctional responses to older prisoners and provides recommendations for future research.
- REVIERE, REBECCA & YOUNG, VERNETTA D. *Aging Behind Bars: Health Care for Older Female Inmates*. 16(1/2) JOURNAL OF WOMEN & AGING 55 (2004). By 2001, the number of women in state and federal prisons had increased 114% since 1990. The authors point out that as the general population of women prisoners increases, the natural consequence is that the number of incarcerated older women also

increases. The authors present the findings of their study of federal and state prisons for women. From the answers provided through a detailed questionnaire, the authors conclude that prisons are inadequately anticipating the increase in older women prisoners and may be failing to provide many of this population's health needs.

VII. ELDER PRACTICE

A. ARTICLES

BRINIG, MARGARET F. & OTHERS. *The Public Choice of Elder Abuse Law*. 33 JOURNAL OF LEGAL STUDIES 517 (2004). The authors present a detailed study of elder abuse laws and the motivation to write elder abuse legislation, as well as the actions of social welfare workers charged with investigating alleged cases of elder abuse. The study finds that the care legislatures take to carefully construct elder abuse laws is mirrored by the care lower-level bureaucrats take in investigating reported abuse.

DESSIN, CAROLYN L. *Should Attorneys Have a Duty to Report Financial Abuse of the Elderly?* 38 AKRON LAW REVIEW 707 (2005). Dessin argues that it is in everyone's best interest to require attorneys to report potential abuse to protective authorities when they suspect their clients are being victimized. She supports her argument with the assertion that the role an attorney plays in the lives of the client puts the attorney in a unique position to discover abuse. In presenting her argument, Dessin presents the various approaches to mandatory reporting taken by different states. Because there is an interaction between these mandatory reporting laws and the rules governing attorneys' client confidences, the author spends considerable time outlining relevant provisions of the Model Rules of Professional Conduct. While Dessin does assert that it is desirable to require attorneys to report suspected abuse, she also acknowledges the problems and complications that might arise from asking them to do so.

FAULKNER, CINDY E. *Therapeutic Jurisprudence and Preventative Law in the Thomas M. Cooley Sixty Plus, Inc., Elder Law Clinic*. 17 SAINT THOMAS LAW REVIEW 685 (2005). Faulkner describes the SixtyPlus, Inc., Elderlaw Clinic and how the principles of Therapeutic Jurisprudence and preventative law inform all actions taken by those who work at the Clinic. The Clinic's policy is to take a client-centered approach, and to make sure that the interns, who are involved in all

aspects of client interaction, follow this general approach. This article takes a step-by-step look at every aspect from client intake to case conclusion, and describes how the interns are taught to focus on client needs.

FROLIK, LAWRENCE A. *The Developing Field of Elder Law Redux: Ten Years After*. 10 ELDER LAW JOURNAL 1 (2002). Frolik discusses the evolution of elder law practice that has occurred over the past ten years since the first issue of the Elder Law Journal was published. In his essay, Frolik identifies developing issues confronting attorneys who practice elder law today. These issues are good indicators of the areas that lawyers practicing elder law should be sure to watch.

GOLICK, TOBY & LESSEM, JANET. *A Law and Social Work Clinical Program for the Elderly and Disabled: Past and Future Challenges*. 14 WASHINGTON UNIVERSITY JOURNAL OF LAW & POLICY 183 (2004). Golick and Lessem use this article to describe their experiences in creating an interdisciplinary law and social work program at Cardozo Bet Tzedek Legal Services, a law clinic at Cardozo School of law. The authors describe the necessary steps they took to establish the program and the challenges they encountered along the way. Not only do they include their successes, they also describe the less successful aspects of the program and the necessary changes that they made.

MCINTIRE, TIMOTHY. *Is the Pain Getting Any Better? How Elder Abuse Litigation Led to a Regulatory Revolution in the Duty to Provide Palliative Care*. 11 ELDER LAW JOURNAL 329 (2003). Pain management is a significant quality of care issue as physicians balance the need to properly medicate patients suffering from chronic pain with the fear of contributing to illegal narcotic availability that could result in a charge of physician-assisted suicide. McIntire outlines steps attorneys can take to insure their clients get the pain management they need. He explains how the use of elder abuse statutes that hold physicians liable for medical malpractice is just one method that can be used. McIntire provides checklists and example cases to guide the attorney through this complex area of law.

MITCHELL-CICHON, MARLA LYN. *What Mom Would Have Wanted: Lessons Learned from an Elder Law Clinic About Achieving Clients' Estate-Planning Goals*. 10 ELDER LAW JOURNAL 289 (2002). Mitchell-Cichon outlines six lessons she learned practicing elder law that deal with counseling elderly clients on estate planning. In doing so, she draws on her experience advising clients in Cooley Law School's Sixty

Plus Elderlaw Clinic. After identifying each of the six lessons, Mitchell-Cichon provides suggestions to help other practitioners who find themselves in similar circumstances properly handle the given situation. After providing this advice, the author identifies other issues that could cause further trouble for attorneys practicing elder law.

MOSKOWITZ, SY. *Still Part of the Clan: Representing Elders in the Family Law Practice*. 38 FAMILY LAW QUARTERLY 213 (2004). Moskowitz provides a general overview of the many broad areas of law an attorney must be aware of when representing the elderly and their families. Rather than specializing in one area, those who represent the elderly must be able to understand economic issues, such as spousal liability for health and institutional care costs, health care decisionmaking, and elder abuse and neglect, to name just a few. The attorney must also be aware of the ethical issues that often arise when representing the elderly.

SCHIMER, MARIA. *Elder Abuse: The Attorney's Perspective*. 28(1/2) CLINICAL GERONTOLOGIST 55 (2005). Schimer uses three scenarios to analyze problems many attorneys encounter when they are confronted with situations in which they suspect elder abuse is occurring. Schimer begins his discussion with an introduction to general ethical principles seen in elder practice. She then moves on to present an overview of the current state of the law in this area and the legal considerations that must be acknowledged by attorneys. Adult protective services, guardianship, and the hospitalization of the mentally ill are briefly explored as they relate to elder abuse.

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