

BIBLIOGRAPHY

GERONTOLOGY AND THE LAW: A SELECTED ANNOTATED BIBLIOGRAPHY: 2006–2008 UPDATE

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I. INTRODUCTION

This bibliography serves as the 2006–2008 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 eight times between 1982 and 2007 in the *Southern California Law Review*.² The original bibliography and the first five updates provided 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 annotations that briefly describe the source after each citation.

1. MUBARAK, JILL & OTHERS. *Gerontology and the Law: A Selected Bibliography*. 73 LAW LIBRARY JOURNAL 255 (1980).

2. HASKO, JOHN & OTHERS. *Gerontology and the Law: A Selected Bibliography*. 56 SOUTHERN CALIFORNIA LAW REVIEW 289 (1982); WILLIAMS, LEONETTE. *Gerontology and the Law: A Selected Bibliography, 1982–83 Update*. 57 SOUTHERN CALIFORNIA LAW REVIEW 631 (1984); ARANAS, PAULINE M. & OTHERS. *Gerontology and the Law: A Selected Bibliography, 1984–85 Update*. 60 SOUTHERN CALIFORNIA LAW REVIEW 897 (1987); MCGLAMERY, SUSAN & OTHERS. *Gerontology and the Law: A Selected Bibliography, 1986–90 Update*. 64 SOUTHERN CALIFORNIA LAW REVIEW 1675 (1991); RAPHAEL, BRIAN & OTHERS. *Gerontology and the Law: A Selected Bibliography, 1991–94 Update*. 69 SOUTHERN CALIFORNIA LAW REVIEW 287 (1995); PERGAMENT, RACHEL & RAPHAEL, BRIAN. *Gerontology and the Law: A Selected Annotated Bibliography: 1995–98 Update*. 72 SOUTHERN CALIFORNIA LAW REVIEW 1461 (1999); JAQUE, DIANA C. & OTHERS. *Gerontology and the Law: A Selected Annotated Bibliography: 1999–2001 Update*. 76 SOUTHERN CALIFORNIA LAW REVIEW 699 (2003); MOORMAN, PAUL J. & WIMER, J. *Gerontology and the Law: A Selected Annotated Bibliography: 2002–2005 Update*. 80 SOUTHERN CALIFORNIA LAW REVIEW 1077 (2007).

For this update, the bibliographers chose a selection of scholarly books and articles published between 2006–2008 that discuss legal issues related to gerontology, aging, and the elderly in the United States. This bibliography does not include sources that are directed toward 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 updates—are book reviews, newspaper articles, government documents, congressional documents, conference proceedings, dissertations, and sources written in a language other than English. Although the focus of this 2006–2008 update is on the United States, a limited number of sources with an international or foreign perspective are included if deemed useful to researchers in the United States. Newer editions of older works published between 2006 and 2008 are included; 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 September 2009 to January 2010:

AgeLine (produced by the American Association of Retired Person; searched via OvidSP or EBSCO)

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 OvidSP)

Social Sciences Citation Index (produced by Thomson Reuters; 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 this bibliography do not conform to *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

- BINSTOCK, ROBERT H. & OTHERS, EDS. HANDBOOK OF AGING AND THE SOCIAL SCIENCES, 6TH ED. Burlington, MA: Academic Press, 2006. This book discusses the latest information on aging-related research found in the legal and social science literature. Legal topics include chapters on economic security and retirement, health care financing, long-term care, elder law, and intergenerational justice. The book is part of the *Handbooks of Aging* series, which includes additional titles on the biology of aging and the psychology of aging.
- FROLIK, LAWRENCE A. & KAPLAN, RICHARD L. ELDER LAW IN A NUTSHELL, 4TH ED. St. Paul, MN: Thomson/West, 2006. The topics covered in the latest edition of this Nutshell on elder law are consistent with the three prior editions and include health care, Medicare, Medicaid (including discussion of the recently enacted Medicare prescription drug coverage), nursing homes, housing alternatives, guardianship, Social Security, Supplemental Security Income, veteran's benefits, pensions, and age discrimination.
- PRUCHNO, RACHEL A. & SMYER, MICHAEL A., EDS. CHALLENGES OF AN AGING SOCIETY: ETHICAL DILEMMAS, POLITICAL ISSUES. Baltimore, MD: Johns Hopkins University Press, 2007. In this book, scholars from various disciplines as diverse as gerontology, law, social work, economics, religion, and medicine discuss ethical issues brought about by aging populations. The articles are grouped into broad categories of autonomy and end-of-life decisions, family responsibility, politics and generational responsibility, and health and welfare responsibility issues. The editors hope that by bringing such varied perspectives and approaches together, they will promote cross-disciplinary understanding of the ethical issues related to aging populations.
- SCHULZ, JAMES H. & BINSTOCK, ROBERT H. AGING NATION: THE ECONOMICS AND POLITICS OF GROWING OLDER IN AMERICA, JOHNS HOPKINS PAPERBACKS ED. Baltimore, MD: Johns Hopkins University Press, 2008. The authors, an economist and a political scientist, discuss problems brought about by an aging population in areas such as retirement, pensions, Social Security, and Medicare. The authors argue that the crisis language used to describe these problems is largely unwarranted. Instead, they argue that the problems can be addressed by

implementing a few minor fixes and the political will to accomplish them. A hardback edition of the book was published by Praeger in 2006.

KIMMELL, DOUGLAS & OTHERS, EDS. *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AGING: RESEARCH AND CLINICAL PERSPECTIVES*. New York, NY: Columbia University Press, 2006. In this book, the editors brought together experts in a variety of fields to discuss current research on the gay, lesbian, and transgendered elderly population. Topics covered include transgender issues, health care, sexuality, victimization, drug and alcohol abuse, retirement, family, legal concerns, end-of-life considerations, and community building.

B. ARTICLES

BRANK, EVE M. *Elder Research: Filling an Important Gap in Psychology and Law*. 25 *BEHAVIORAL SCIENCES & THE LAW* 701 (2007). With our aging population, Brank encourages scholars working in the field of psychology and the law to focus more on the elderly. Areas with a critical need for research include the elderly as witnesses, jury members, and parties to legal cases, as well as competency and caregiving issues. While recognizing the difficulty researchers sometimes face in finding elderly research subjects, Brank believes adult day care facilities are an underutilized and promising source for locating research subjects.

DORON, ISRAEL. *Bringing the Law to the Gerontological Stage: A Different Look at Movies and Old Age*. 62 *INTERNATIONAL JOURNAL OF AGING & HUMAN DEVELOPMENT* 237 (2006). Socio-legal gerontology has emerged as an important multidisciplinary field that researches how older people and the law interact in real-world settings. In this article, Doron deconstructs five films with elderly characters that have underlying legal issues ignored by the films. He argues that these films were missed opportunities to “bring the law to the gerontological stage.” He hopes that by encouraging more in-depth coverage of older people’s legal issues in film, it will help to educate the public and to bring these important issues into public consciousness.

III. INCOME MAINTENANCE AND FINANCIAL/RETIREMENT PLANNING

A. GENERAL WORKS / MISCELLANY (INCLUDING PRIVATE PENSIONS)

1. Books

- AMERIKS, JOHN & MITCHELL, OLIVIA S., EDS. *RECALIBRATING RETIREMENT SPENDING AND SAVING*. New York, NY: Oxford University Press, 2008. This book is about postretirement financial issues. Topics covered include consumption, work, asset dilution, property values, Individual Retirement Accounts (“IRAs”), out-of-pocket health care costs, variable annuities, and tax issues. This book is one in a series on pension and retirement issues published by the Pension Research Council of The Wharton School of the University of Pennsylvania.
- BARR, NICHOLAS A. & DIAMOND, PETER A. *REFORMING PENSIONS: PRINCIPLES AND POLICY CHOICES*. New York, NY: Oxford University Press, 2008. This book, by two prominent economists, analyzes policy-related issues regarding pensions and pension reform. The authors begin with a discussion of pension economics. They then discuss various policy choices that policymakers should take into consideration when drafting policy change. The choices they identify are (1) balancing competing social goals, (2) not being limited to simple economic models, and (3) being cognizant of the risk-sharing and income-distribution nature of pensions.
- BLITZSTEIN, DAVID & OTHERS, EDS. *RESTRUCTURING RETIREMENT RISKS*. New York, NY: Oxford University Press, 2006. This volume brings together contributions from various authors discussing pension risk and reward sharing. Article topics include who should and should not bear pension risk and rewards, legal and insurance mechanisms that address pension risk and rewards, and strategies to better allocate pension risk and rewards. The editors and many of the authors are affiliated with the Pension Research Council and the Boettner Center for Pensions and Retirement Research at The Wharton School of the University of Pennsylvania.
- CLARK, GORDON L. & OTHERS, EDS. *OXFORD HANDBOOK OF PENSIONS AND RETIREMENT INCOME*. New York, NY: Oxford University Press, 2006. This reference book discusses diverse aspects of pensions and retirement income, including the history of retirement, public and

private retirement plans, individual efforts to save for retirement, prospects for the future of retirement, and retirement income worldwide. The goal of the book is to use the latest research on these topics to explain the theoretical, historical, social, and demographic nature of retirement.

EVANS, JOHN & OTHERS, EDS. *PENSION FUND GOVERNANCE: A GLOBAL PERSPECTIVE ON FINANCIAL REGULATION*. Cheltenham, UK: Edward Elgar, 2008. The editors bring together various contributions on pension fund governance from a worldwide perspective, with particular emphasis on the United States and Australia. The book is divided into four parts, with the first part discussing background and structural issues related to pension governance, the second part exploring pension governance worldwide, the third part discussing pension governance in the United States and Australia, and the fourth part examining issues related to pension fund insurance.

FENGE, ROBERT & OTHERS, EDS. *PENSION STRATEGIES IN EUROPE AND THE UNITED STATES*. Cambridge, MA: MIT Press, 2008. Economists from various countries discuss issues related to pension plan funding strategies in the United States and Europe with particular focus on the inadequacies caused by a reliance on a pay-as-you-go funding system. Using theoretical concepts, empirical research, country studies, and results of pension reform efforts in a variety of countries, the authors discuss the viability and advisability of various reforms, including changing the retirement age, increasing retirement savings, and the political implications of reform.

GHILARDUCCI, TERESA. *WHEN I'M SIXTY-FOUR: THE PLOT AGAINST PENSIONS AND THE PLAN TO SAVE THEM*. Princeton, NJ: Princeton University Press, 2008. Ghilarducci outlines what she describes as the "attack" on retirement and proposes major reforms to improve the system. She blames the breakdown of the current system on excessive risk shifting from employers to employees, undue reliance on self-funding of pensions, inadequate regulatory oversight of pension plans, and misguided Social Security privatization efforts. She then outlines a new retirement system, which she claims will provide improved retirement security, greater retirement income, and better allocation of risk.

KOLB, ROBERT W., ED. *CORPORATE RETIREMENT SECURITY: SOCIAL AND ETHICAL ISSUES*. Malden, MA: Blackwell Publishing, 2007. Kolb brings together scholars from a variety of disciplines to discuss

retirement security issues. The articles are grouped into sections on the ethics of pension plan design, changes to pension plans, and investment of pension plan funds. The articles cover a variety of topics including corporate social responsibility, defined-contribution plans, conversion of traditional pension plans into cash-balance pension plans, and socially responsible investing by pension funds.

MACKENZIE, GEORGE A. *ANNUITY MARKETS AND PENSION REFORM*. New York, NY: Cambridge University Press, 2006. With public pension funding problems, aging populations, and greater reliance on defined-contribution plans, annuities are playing an increasingly important role in retirement. Mackenzie, an economist with the International Monetary Fund, discusses issues related to annuities and IRAs and includes chapters on the supply and demand for annuities, the regulations of annuity markets, IRA reform in various countries, government regulation of IRAs, mandatory annuities, and privatization of annuity provisions.

ORSZAG, PETER R. & OTHERS, EDS. *AGING GRACEFULLY: IDEAS TO IMPROVE RETIREMENT SECURITY IN AMERICA*. New York, NY: Century Foundation Press, 2006. In this book, the Retirement Security Project outlines its prescription for boosting savings and improving retirement income security. It proposes making enrollment in 401(k) plans automatic to help lower the decisionmaking burden, implementing an automatic IRA for those not eligible for 401(k) plans, revising the "saver's credit" to make it more transparent and attractive for lower- and middle-income workers, and reducing penalties for savings in eligibility for income-dependent programs such as food stamps and Medicaid. It advocates these changes as feasible, common-sense improvements to help address the growing problem of inadequate retirement income.

ZELINSKY, EDWARD A. *THE ORIGINS OF THE OWNERSHIP SOCIETY: HOW THE DEFINED CONTRIBUTION PARADIGM CHANGED AMERICA*. New York, NY: Oxford University Press, 2007. In this book, Zelinsky discusses what he calls the defined-contribution "revolution" that has taken place in the United States over the past thirty years. He begins by tracing the revolution's history from its beginning stages with the passage of The Employee Retirement Income Security Act ("ERISA") and the creation of 401(k) plans up to the more recent collapse of Enron and President George W. Bush's failed attempt to create private Social Security accounts. He then explains why this revolution happened, what it means to society, and how it may impact tax policy

and other social welfare goals. He concludes with a discussion about ways to help mitigate some of the defined-contribution revolution's harsher elements while still recognizing its likely durability.

2. Articles

ANENSON, T. LEIGH & LAHEY, KAREN E. *The Crisis in Corporate America: Private Pension Liability and Proposals for Reform*. 9 UNIVERSITY OF PENNSYLVANIA JOURNAL OF LABOR & EMPLOYMENT LAW 495 (2007). The authors believe that ERISA's original goals of mandating adequate funding for pensions and providing insurance for plans that cannot meet their liabilities are not being realized. They credit Congress with helping to address inadequate pension plan funding levels by passing the Pension Protection Act of 2006 and making it easier for employers to switch to cash-balance pension plans. They are, however, critical of Congress's efforts to reform pension plan insurance with more regulation of the Pension Fund Guarantee Corporation. Instead, the authors recommend reducing insurance benefits or increasing the age of retirement as the best way to address this problem.

BEEDON, LAUREL. *Retirement Income Security in the United States of America: An Intergenerational Challenge*. 4 JOURNAL OF INTERGENERATIONAL RELATIONSHIPS 93 (2006). As populations age, Beedon examines how problems with funding retirement income for older generations may impact intergenerational relationships. She notes that all generations are in general agreement about the importance of maintaining adequate retirement income and that there is little evidence to support the claim that there is a growing conflict between generations related to this issue.

BEFORT, STEPHEN F. *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*. 91 MINNESOTA LAW REVIEW 938 (2007). Befort describes the current retirement-funding crisis as the "perfect [actuarial] storm" caused by increased longevity and inadequate funding of Social Security, pensions, and savings. After first describing the problem, the author lays out a plan to address the issues brought about by this perfect storm, including increasing taxes and the age of retirement, default pension plan participation, and tax credits to promote increased savings.

- BROWN, DOROTHY A. *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*. 11 LEWIS & CLARK LAW REVIEW 385 (2007). Brown continues her scholarship on the racial, gender, and class impact of federal tax policy. In this article, Brown examines empirical evidence that shows that black and Hispanic workers are less likely to invest in the stock market, resulting in lower retirement account levels than whites with similar incomes. Using research on investor behavior and behavioral economics, she recommends various reforms that will help address this problem, including automatic enrollment in retirement plans, partnership with community groups to educate populations on the need to invest in retirement, outreach efforts by Wall Street to minority groups, and increased educational campaigns to educate consumers about the opportunity cost of failing to invest in stocks.
- CONWAY, KAREN S. & RORK, JONATHAN C. *State "Death" Taxes and Elderly Migration—The Chicken or the Egg?* 59 NATIONAL TAX JOURNAL 97 (2006). The authors analyze research on the migration patterns of older adults from states with estate, inheritance, and gift ("EIG") taxes to those without EIG taxes. Prior studies have generally supported the theory that older people move from states with EIG taxes to those without and hypothesized that one of the reasons for this may be a desire to avoid EIG taxes. The authors note, however, that these prior studies fail to use cross-sectional data to help control for the fact that states with a large number of in-migration from elderly residents are much less likely to have EIG taxes. When this factor is incorporated into the analysis of the data on elderly migration, the results show that states with EIG taxes actually have greater in-migration of elderly residents compared to a younger control group.
- CHASON, ERIC D. *Outlawing Pension-Funding Shortfalls*. 26 VIRGINIA TAX REVIEW 519 (2007). Chason examines inadequate pension funding and laws that allow this problem to continue. He blames inadequate pension funding problems on ERISA's accounting rules that allow amortization of losses, deferral of shortfalls over years, and valuation of assets using historical averages rather than current market values ("smoothing"). He advocates a change in the law that would require full funding of pensions and would prohibit pension shortfalls.
- CUMMINS, JUSTIN & NIKOLAI, MEG L. *ERISA Reform in a Post-Enron World*. 39 JOHN MARSHALL LAW REVIEW 563 (2006). The authors analyze current problems affecting pensions within the context of the corporate governance scandals of the 1990s and early 2000s. They

believe ERISA's procedural and substantive problems are likely to result in more accounting scandals and cases of corporate malfeasance unless Congress makes drastic changes to ERISA. To help prevent this from happening, they recommend a variety of changes to ERISA, including providing better information to workers about actual retirement benefits, requiring the use of independent auditors, implementing incentives for whistle-blowers, increasing administrative oversight, and reforming corporate bankruptcy laws.

DAVIS, DEBRA A. *Do-It-Yourself Retirement: Allowing Employees to Direct the Investment of Their Retirement Savings*. 8 UNIVERSITY OF PENNSYLVANIA JOURNAL OF LABOR & EMPLOYMENT LAW 353 (2006). Davis looks at how workers are currently investing defined-contribution retirement funds and whether the evidence shows that workers are successful in their investments. She concludes that the evidence is insufficient to show how best to permit investor choice without causing undue risk of losses that result in inadequate retirement savings. She recommends additional studies to investigate this issue, especially on investor-directed Social Security personal accounts.

GORDON, JEFFREY N. *The "Prudent Retiree Rule": What to Do When Retirement Security Is Impossible?* 11 LEWIS & CLARK LAW REVIEW 481 (2007). Using the insight of a classic 1830 case on trusts, *Harvard College v. Amory*, which held that there are no risk-free investments and created the "prudent investor rule," Gordon proposes what he calls the "prudent retiree rule." He encourages policymakers to adopt his prudent retiree rule, which recognizes that risk is inevitable in any investment but balances that risk with the potential reward.

HUTCHENS, ROBERT & GRACE-MARTIN, KAREN. *Employer Willingness to Permit Phased Retirement: Why Are Some More Willing Than Others?* 59 INDUSTRIAL & LABOR RELATIONS REVIEW 525 (2006). The authors report on the results of a survey of employer practice on allowing phased retirement of white-collar workers. The survey showed that workers in establishments with fewer part-time workers, stricter hours, and unionized workplaces were much less likely to give workers realistic phased retirement options. The survey also showed that employers that allowed phased retirement preferred to do it in informal, case-specific situations. Because unionized workplaces generally had stricter workplace policies and procedures, informal arrangements for phased retirement were less available.

- HUTCHESON, MATTHEW D. *Uncovering and Understanding Hidden Fees in Qualified Retirement Plans*. 15 ELDER LAW JOURNAL 323 (2007). Hutcheson outlines four considerations plan sponsors need to keep in mind when dealing with the problem of hidden fees in 401(k) retirement plans: (1) these fees are discoverable; (2) plan sponsors have a fiduciary duty to discover and manage these fees; (3) these fees are caused by the comingling of fiduciary and nonfiduciary philosophies; and (4) managers of retirement plans should use plan assets only for the benefit of plan participants, what he calls the “independent fiduciary only” approach to plan management.
- KAPUR, KANIKA & ROGOWSKI, JEANNETTE. *The Role of Health Insurance in Joint Retirement Among Married Couples*. 60 INDUSTRIAL & LABOR RELATIONS REVIEW 397 (2007). In this study of workers near retirement, using data from the Health and Retirement Survey, the authors investigate whether the availability of retiree health insurance encourages couples to retire together and also whether the health of the individuals affects this decision. Their findings show that having retiree health insurance increases couples’ joint retirement when wives have retiree health insurance, but not when husbands do.
- KOZAK, BARRY & WALDBESER, JOSHUA. *Much Ado About the Meaning of “Benefit Accrual”: The Issue of Age Discrimination in Hybrid Cash Balance Plan Qualification Is Dying but Not Yet Dead*. 40 JOHN MARSHALL LAW REVIEW 867 (2007). The authors discuss some legal issues related to statutory hybrid retirement plans, also called cash-balance plans. Statutory hybrid plans are defined-benefit retirement plans that promise a specific balance upon retirement instead of the traditional monthly payment for life. The authors first discuss the legal landscape for statutory hybrid retirement plans both before and after the Pension Protection Act of 2006, a law that gives great flexibility to employers to offer this type of plan. They then evaluate the advantages and disadvantages of offering a statutory hybrid retirement plan using the guidelines set out in the Act. They believe the movement toward offering statutory hybrid retirement plans is a positive one that may help stem the tide of employers moving away from traditional defined-benefit plans.
- LAHEY, KAREN E. & ANENSON, T. LEIGH. *Public Pension Liability: Why Reform Is Necessary to Save the Retirement of State Employees*. 21 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 307 (2007). The authors examine the implications of the Wilshire Report, a 2005 report on the health of state retirement plans, which shows that

many state retirement plans are woefully underfunded and that many public employees will not receive their promised benefits if current trends persist. To address this problem, the authors recommend that public retirement plans switch to offering defined-contribution plans for public employees and that states adopt the mandatory fiduciary responsibility and financial disclosure laws in the Uniform Management of Public Employees Retirement Systems Act.

MARTIN, CRAIG C. & OTHERS. *Baby Ka-Boom! Coming Developments in ERISA Litigation Due to Social, Demographic, and Financial Pressures from the Baby Boom Generation*. 41 JOHN MARSHALL LAW REVIEW 1037 (2008). The authors investigate the historical impact social, demographic, and financial pressures have had on ERISA litigation and speculate about the effect the upcoming retirement of the baby boomers will have on future ERISA litigation. The authors believe past litigation trends were partly responsible for employers shifting toward defined-contribution plans and away from defined-benefit plans. They speculate that future litigation will pressure fiduciaries to more closely monitor plan operations, selection of investments, and communication with plan participants.

MCCLENDON, JANICE K. *The Death Knell of Traditional Defined Benefit Plans: Avoiding a Race to the 401(k) Bottom*. 80 TEMPLE LAW REVIEW 809 (2007). McClendon takes a critical look at the Pension Protection Act of 2005. She believes the Act will exacerbate the trend of employers switching from defined-benefit plans to defined-contribution plans and criticizes it for doing nothing to protect defined-contribution plan participants. She encourages Congress to provide further incentives for cash-balance plans, which she prefers over defined-contribution plans, and to more adequately regulate defined-contribution plans to better protect and inform workers in those types of plans.

PRATT, DAVID. *Retirement in a Defined Contribution Era: Making the Money Last*. 41 JOHN MARSHALL LAW REVIEW 1091 (2008). Pratt identifies and describes a variety of reasons why he believes Americans are unlikely to have sufficient assets in retirement. His reasons include inadequate employer pension provisions, inadequate sources of income, income inequality among workers, Social Security's and Medicare's financial problems, the decline in participation and eligibility for defined-benefit plans, the low balances and risk inherent in defined-contribution plans, underestimated income needed to maintain postretirement standards of living, and increasing medical and

long-term care costs. He goes on to examine the impact that working longer, the viability of annuities and other financial products, and recent pension reform proposals may have on this issue.

RIX, SARA E. *The Aging of the American Workforce*. 81 CHICAGO-KENT LAW REVIEW 593 (2006). Rix examines the causes behind and the implications of an aging population on the workforce. She traces the cause for the growth in number of older workers to an aging population, financial necessity, the move toward defined-contribution plans, eroding health benefits, higher education levels, improved health, and demand from employers for experienced workers. She then examines the implications of this aging workforce on the workplace and the workers themselves, and outlines possible governmental, business, and labor responses to this trend.

SANCHEZ, JOHN. *The Vesting, Modification, and Financing of Public Retiree Health Benefits in Light of New Accounting Rules*. 41 JOHN MARSHALL LAW REVIEW 1147 (2008). Sanchez outlines the impact of new accounting rules on public retiree health benefits. He first compares and contrasts public retiree health benefits with pensions and analyzes whether states may modify or terminate vested retiree health benefits. He then examines the impact new accounting rules will have on these benefits and concludes that they will expose significant unfunded liabilities and likely force state and local governments to enact politically unpopular solutions to address this problem.

STABILE, SUSAN J. *Is It Time to Admit the Failure of an Employer-Based Pension System?* 11 LEWIS & CLARK LAW REVIEW 305 (2007). Stabile believes the employer-based pension system as it is currently structured fails to provide adequate retirement income for workers. She is particularly critical of the move toward defined-contribution plans and the large percentage of employers who provide no pension coverage for their workers. After first describing the inadequacies in the current system, she discusses two alternative models: a governmental pension that provides adequate retirement income or one that mandates that employers provide pension coverage to their employees. She recognizes that neither model is easy to enact politically, but argues that the system needs to be changed if we are to realize the goal of providing adequate retirement income for workers.

THOMPSON, LAWRENCE H. *US Retirement Income System*. 22 OXFORD REVIEW OF ECONOMIC POLICY 95 (2006). In this overview of the current retirement system of the United States for a British audience,

Thompson describes the current system and some of the challenges it faces, such as an aging population and inadequate funding of public and private pensions. He then goes on to describe various attempts to improve the system, including failed efforts to privatize Social Security, proposals to address inadequate retirement income, and future prospects for reform efforts.

WELLER, CHRISTIAN E. *PURE: A Proposal for More Retirement Income Security*. 19(1) *JOURNAL OF AGING & SOCIAL POLICY* 21 (2007). Weller blames inadequate worker retirement income on a lack of employer pension participation, inadequate distribution of pension wealth, and excessive risks from private investments. He proposes a new system which would include universal pension coverage, better equalization of income across income groups through matching government contributions and creation of Personal Universal Retirement (“PURE”) accounts, and improved safeguards and oversight of retirement funds. He proposes funding these accounts by removing various tax cuts instead of through additional government debt.

B. SOCIAL SECURITY / PUBLIC PENSIONS

1. Books

AMENTA, EDWIN. *WHEN MOVEMENTS MATTER: THE TOWNSEND PLAN AND THE RISE OF SOCIAL SECURITY*. Princeton, NJ: Princeton University Press, 2006. The Townsend Plan was a 1934 proposal to have the government give two-hundred dollars to all Americans age sixty and older in exchange for a promise not to work and to spend the money immediately. The plan was touted as a way to help alleviate poverty among elderly, open up jobs, and stimulate the economy. It quickly became a cause célèbre of depression-weary elderly citizens but sparked much criticism by others as a government handout and a form of socialism. In this book, Amenta traces the history of the Townsend Plan movement and the impact it had on the eventual passage of Social Security.

PAPADIMITRIOU, DIMITRI B., ED. *GOVERNMENT SPENDING ON THE ELDERLY*. Basingstoke, UK: Palgrave Macmillan, 2007. This book focuses on the economics and public financing of retirement, health care, and other government programs from a worldwide perspective. It is divided into sections on the welfare state, economic well-being of the

elderly, retirement behavior, public and private provisioning, budgeting, and retirement security. Each article in the book includes a comment critiquing the article.

ORENSTEIN, MITCHELL A. *PRIVATIZING PENSIONS: THE TRANSNATIONAL CAMPAIGN FOR SOCIAL SECURITY REFORM*. Princeton, NJ: Princeton University Press, 2008. Orenstein examines the influence international institutions and actors, such as the World Bank and the United States Agency for International Development, have had on domestic and national pension policy. The book tackles this issue from both a narrow perspective—how pension privatization has been promoted and encouraged worldwide and how those efforts have been or have not been successful—and a broad perspective—how world actors have influenced and are influencing domestic policy and the implications of this trend.

PIETERS, DANNY. *SOCIAL SECURITY: AN INTRODUCTION TO THE BASIC PRINCIPLES*, 2ND ED. REV. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2006. In this update of the author's 1993 introduction to the concepts and principles underlying social security from an international perspective entitled *Introduction into the Basic Principles of Social Security*, Pieter builds on the goals of his previous work, while adding new information gathered in the intervening twenty years. The book aims to help develop a "common social security language" and "common law" on what constitutes social security worldwide. The book is focused on European social security systems but includes discussion about social security systems in other countries, including the United States.

SKIDMORE, MAX J. *SECURING AMERICA'S FUTURE: A BOLD PLAN TO PRESERVE AND EXPAND SOCIAL SECURITY*. Lanham, MD: Rowman & Littlefield Publishers, 2008. According to Skidmore, Social Security is not in a "crisis" and does not need any major reforms. Because of disappearing pensions, a weakening economy, and rising health care costs, however, he advocates a few minor reforms both to improve Social Security and to expand on its coverage. His proposed reforms include exempting the first \$20,000 in income and taxing income over \$97,500—currently exempt—while retaining current benefit levels. He also urges adoption of a universal health insurance program to better address rising health care costs, which he believes is the biggest fiscal challenge facing the country. The book includes a forward by former senator and presidential candidate, George McGovern.

2. Articles

ALTMAN, NANCY J. *Social Security and the Low-Income Worker*. 56 AMERICAN UNIVERSITY LAW REVIEW 1139 (2007). Altman examines the positive effects Social Security has had on low-income workers and the impact projected deficits will have on the program. She credits Social Security with essentially eliminating poverty among the elderly, a sea change from the “poor house” days prior to its adoption, and providing an important safety net for children and disabled adults. In order to maintain Social Security’s long-term fiscal health while still retaining its progressive nature, she advocates reinstating the practice of covering 90 percent of the taxable wage base, restructuring the federal estate tax as a Social Security tax, and allowing the Social Security Trust Fund to invest in stocks and Treasury bonds. Altman believes these changes will restore Social Security’s long-term fiscal health and allow it to retain its vital social insurance role for low-income workers.

BOSSI, LUCA. *Intergenerational Risk Shifting Through Social Security and Bailout Politics*. 32 JOURNAL OF ECONOMIC DYNAMICS & CONTROL 2240 (2008). Using economic modeling, Bossi compares a pay-as-you-go (“PAYG”) social security system with a fully funded social security system in a majority-voting-rule political system. He concludes that during an economic shock, low-income younger workers will join with the elderly to implement a PAYG system and that a PAYG system continues even during times of economic strength if the social security system has enough redistributive elements. This model is consistent with the idea that a PAYG system provides a base level of protection and helps to protect against economic risk.

BUCHANAN, NEIL H. *Social Security and Government Deficits: When Should We Worry?* 92 CORNELL LAW REVIEW 257 (2007). Buchanan argues that Social Security, when viewed separately from other government benefits, is in much better financial health than generally accepted. After explaining why he believes this to be the case, Buchanan examines whether Social Security should be used to help alleviate the real and severe budgetary challenges caused by rising health care costs and tax cuts. He ultimately rejects this approach and instead advocates addressing these issues directly and not tinkering with Social Security’s funding to help solve other governmental fiscal challenges.

- BURKE, KAREN C. & MCCOUCH, GRAYSON M.P. *Social Security Reform: Lessons from Private Pensions*. 92 CORNELL LAW REVIEW 297 (2007). Burke and McCouch are critical of efforts to privatize a portion of Social Security benefits by creating individual accounts controlled by the beneficiary. They believe this is another example of the unfortunate shift away from defined-benefit pension plans toward defined-contribution plans. They first explain the reasons for this shift toward defined-contribution plans and then, using 401(k) plans as an example, critique how effective it has been as a retirement funding plan. They conclude that 401(k) plans have failed in that regard. They also believe that the effort to carve out private accounts from Social Security benefits provides little benefit to Social Security itself and does not solve its funding problems. They feel this effort is an attempt to change Social Security from a social insurance model to an investment model, which would, if successful, ultimately defeat its purpose of providing a safety net for the elderly.
- CHRISTIANS, ALLISON. *Taxing the Global Worker: Three Spheres of International Social Security Coordination*. 26 VIRGINIA TAX REVIEW 81 (2006). Increasing numbers of global workers are living and working in different countries, and these workers pose a challenge to the administration of social security programs. In the United States, Social Security for global workers is controlled by a variety of tax treaties and executive agreements that address specific aspects of Social Security administration. Because these agreements sometimes contradict each other and are applied inconsistently, U.S. global workers face uncertainty about eligibility for benefits and possible double taxation. The author advocates improved agreements between countries that holistically address all elements of the administration of social security to avoid these problems.
- FROLIK, LAWRENCE A. *Core Values in Conflict: The United States Approach to Economic Assistance to the Elderly*. 1 PHOENIX LAW REVIEW 325 (2008). In this essay, Frolik discusses the United States' approach toward programs that assist the elderly. He believes the debate about the future of Social Security, Medicare, and Medicaid is less about the effectiveness and health of the programs and is instead a philosophical argument about the proper role of government, personal responsibility, and individual autonomy. He points out that any legislative response to the problems these programs face is going to be difficult because the public is conflicted about the proper role of government in providing assistance to the elderly. This article is

included as part of a symposium entitled *Elder Law: Economic Planning for the Golden Years*.

KRUEGER, DIRK & KUBLER, FELIX. *Pareto-Improving Social Security Reform When Financial Markets Are Incomplete!?* 96 AMERICAN ECONOMIC REVIEW 737 (2006). Using economic modeling, the authors investigate whether adding an unfunded social security system, thus redistributing wealth across generations and through economic shocks, provides long-term societal welfare benefits (Pareto improvement). Their model shows that the introduction of a social security system generally provides for Pareto improvement; however, increased government spending inefficiencies (the crowding-out effect) caused by the introduction of a social security system essentially negates this improvement in most circumstances.

MCARTHUR, JOHN BURRITT. *Private Pensions and the Justification for Social Security*. 48 SOUTH TEXAS LAW REVIEW 1 (2006). McArthur lists a variety of reasons why creating private accounts within Social Security fails to recognize the reasons why it was created in the first place. To support his argument, he notes that the National Trust Fund was specifically created to be protected from market fluctuations and undue risk and has largely been successful in doing so. He goes on to argue that the market instability that existed when Social Security was enacted continues to this day, that there are better ways to strengthen Social Security than private accounts, and that private accounts were specifically rejected by the drafters of the program. He believes efforts to create private accounts within Social Security constitute an attack on its core purpose of providing a basic level of social insurance protected from market risk.

MEDILL, COLLEEN E. *Transforming the Role of the Social Security Administration*. 92 CORNELL LAW REVIEW 323 (2007). Studies show that Americans do not save enough for retirement and that one reason for this is a lack of retirement financial education. To address this problem, Medill encourages the federal government to begin a national campaign to promote increased savings for retirement that would focus on younger workers and would emphasize the benefits that come from increased savings. She believes the best agency to direct this national campaign is the Social Security Administration rather than the Department of Labor because, unlike the Department of Labor, the Social Security Administration is not beholden to special interests or those who might gain financially from the results of the effort.

MOORE, KATHRYN L. *The Future of Social Security: Principles to Guide Reform*. 41 JOHN MARSHALL LAW REVIEW 1061 (2008). Moore writes about the effect the aging-population boom (the “silver tsunami”) will have on Social Security and recommends guidelines for reform of Social Security to address this problem. She begins with a discussion of Social Security’s guiding principles; these principles are being (1) universal, (2) an earned right, (3) related to wages, (4) self-financed, (5) redistributive, (6) not means tested, (7) indexed to wages, (8) protected from inflation, and (9) compulsory. She then outlines six principles that should guide reform efforts: (1) choosing either collectivist or individual responsibility; (2) addressing Social Security’s funding difficulties adequately; (3) increasing revenues, reducing benefits, or some combination of the two; (4) reforming sooner rather than later; (5) sharing the burden widely; and (6) maintaining the safety net. By following these six principles, Moore believes Social Security can weather this demographic crisis.

MOORE, KATHRYN L. *Social Security Reform: Fundamental Restructuring or Incremental Change?* 11 LEWIS & CLARK LAW REVIEW 341 (2007). In this article, Moore outlines five possible reforms for Social Security that will help to address its funding problems. These reforms include enacting (1) individual accounts, (2) progressive price indexing, (3) general or estate tax revenue financing, (4) an increased maximum taxable wage base, and (5) a raised retirement age. She advocates addressing Social Security’s problems by using estate tax revenue financing, increasing the taxable wage base, and raising the retirement age. She opposes the use of individual accounts because it fails to address Social Security’s fundamental problems. She also opposes progressive price indexing because it leads away from the principle that Social Security be tied to wages.

TEDROW, ELIZABETH D. *Social Security Privatization in Other Countries—What Lessons Can Be Learned for the United States?* 14 ELDER LAW JOURNAL 35 (2006). Tedrow evaluates whether social security “privatization” efforts in Chile, the United Kingdom, Sweden, and Australia have been successful. She concludes that privatization has generally failed to provide better benefits than the alternative state systems and has often resulted in insufficient funds to keep participants out of poverty. She notes that many early participants in these private plans have moved back to the alternative state-run plans and that administrative costs have been much higher than the state-run plans. She cautions policymakers about touting privatization as a panacea for

social security's financial problems and instead advocates a reform plan that includes a combination of tax increases, staged benefit cuts, and incentives for participation in private plans.

TEMPLIN, BENJAMIN A. *Full Funding: The Future of Social Security*. 22 JOURNAL OF LAW & POLITICS 395 (2006). Templin discusses various approaches to bringing the benefits of private investment to Social Security to help address Social Security's funding problems. These possibilities include private individual investment accounts, passive government investment, or the creation of a private investment corporation. Of these three, he believes the first two are flawed and are unlikely to be successful in the current political climate. He instead advocates the creation of a private corporation that would be charged with investing Social Security's Trust Fund assets for the benefit of the public and that would report to Congress. He cites the positive examples of the Canadian Pension Plan and Alaska Permanent Fund as evidence that this type of corporation can be successful.

TEMPLIN, BENJAMIN A. *The Public Trust in Private Hands: Social Security and the Politics of Government Investment*. 96 KENTUCKY LAW JOURNAL 369 (2008). Templin considers the adoption of a plan that includes a private investment component vital for Social Security's future fiscal health and argues that a private federal government corporation is the best method to accomplish this goal. He begins by discussing the constitutional questions at play with the creation of private corporations and how those constitutional questions can be adequately addressed. He goes on to show how a private investment corporation could be structured to give it the freedom to invest without political pressure.

IV. AGE DISCRIMINATION

A. AGE DISCRIMINATION, GENERALLY

1. Books

COTTER, ANNE-MARIE M. *JUST A NUMBER: AN INTERNATIONAL LEGAL ANALYSIS ON AGE DISCRIMINATION*. Aldershot, UK: Ashgate Publishing Ltd., 2008. Cotter examines aging and inequality as an international phenomenon. She believes the best way to achieve an end to age-related inequality is to focus on legislative approaches to ending age-related discrimination. She begins by examining approaches to

ending age inequality in a variety of countries. She then critiques the impact-trade-related agreements, such as the North American Free Trade Act (“NAFTA”) and the European Union Treaty, have had on alleviating age-related discrimination. She concludes that NAFTA has had a negative impact on this issue while the European Union Treaty has had a positive one.

MACNICOL, JOHN. *AGE DISCRIMINATION: AN HISTORICAL AND CONTEMPORARY ANALYSIS*. Cambridge, UK: Cambridge University Press, 2006. Macnicol examines the social and legal history of ageism and age discrimination in Britain and the United States. He traces the evolution of thinking about age, the elderly, and age-related discrimination throughout this century. His focus is on the impact laws against age discrimination and improving health of older people have had on societal thinking about age and age-related discrimination.

2. Articles

BREDA, JEF & SCHOENMAEKERS, DAVID. *Age: A Dubious Criterion in Legislation*. 26 *AGEING & SOCIETY* 529 (2006). The authors take a look at Belgian laws with an age component, focusing on three areas: age discrimination, public transportation, and entitlements to care for the disabled in comparison to the elderly. They find evidence of age discrimination in those laws to the detriment of younger people and the benefit of older people. The authors recommend policymakers avoid using age when drafting legislation and instead use other criteria to better accomplish public welfare goals.

KANNAN, PHILLIP M. *Structuring a Case Against Complex Multidimensional Discrimination*. 36 *UNIVERSITY OF MEMPHIS LAW REVIEW* 335 (2006). Kannan makes the argument for the use of what he calls a “reliable indicator” approach for multidimensional discrimination claims that involve age, gender, and race. A reliable indicator approach uses the underlying facts supporting the claim of discrimination as opposed to a subclass-based analysis that some federal courts of appeals are currently using. He believes his reliable indicator approach more accurately reflects the individual nature of discrimination and Supreme Court precedent and offers plaintiffs a better chance at proving discrimination than the subclass approach.

MUELLER-JOHNSON, KATRIN & OTHERS. *The Perceived Credibility of Older Adults as Witnesses and Its Relation to Ageism*. 25 *BEHAVIORAL SCIENCES & THE LAW* 355 (2007). The authors conducted two

experiments using undergraduate mock jurors to investigate age-related factors influencing the credibility of older witnesses. The first experiment showed that differences in the credibility of older witnesses may vary by the age and sex of the witness. The second experiment found that jurors holding higher levels of stereotypes about the aged judged older witnesses as being less credible. The authors call for more research to confirm their findings and to investigate the impact these findings may have on the justice system.

TANG, KWONG-LEUNG. *Taking Older People's Rights Seriously: The Role of International Law*. 20 JOURNAL OF AGING & SOCIAL POLICY 99 (2008). Tang argues that efforts at the international level to address the human rights of and discrimination against older people have been woefully inadequate. He recommends that the United Nations draft an international convention on the subject to bring attention to the challenges older people face and to create worldwide standards to protect older people's human rights.

B. AGE DISCRIMINATION IN EMPLOYMENT

1. Books

NEUMARK, DAVID. REASSESSING THE AGE DISCRIMINATION IN EMPLOYMENT ACT. Washington, DC: AARP Public Policy Institute, 2008. In this assessment of the 1967 Age Discrimination in Employment Act ("ADEA") on its forty-year anniversary, the AARP Public Policy Institute examines whether the law has succeeded in achieving its goals and considers how the law may need to be changed to better address its goal of eliminating age discrimination in a more dynamic employment market. The report cites studies and statistics that show that the focus of ADEA enforcement has been on terminations rather than on the hiring of older workers, and that the principle benefit of the ADEA has been in the area of protecting workers who are already employed. The report voices concern about an aging population of older workers looking for "bridge" employment or part-time employment during retirement, and indicates that changes to the law may be necessary to better protect older workers seeking employment.

SARGEANT, MALCOLM. AGE DISCRIMINATION IN EMPLOYMENT. Aldershot, UK: Gower Publishing Ltd., 2006. In this book, Sargeant examines what age discrimination is, its impact on people of all ages, and how age discrimination intersects with other types of

discrimination such as sex, ethnicity, sexual orientation, and disability. While the focus of the book is on the United Kingdom, Sargeant includes significant discussion about age discrimination in other countries, including the United States.

2. Articles

ALAKA, AIDA M. *Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has Smith v. City of Jackson Substantially Expanded the Rights of Older Workers Under the ADEA?* 70 ALBANY LAW REVIEW 143 (2006). Alaka considers the impact of the Supreme Court's decision in *Smith v. City of Jackson*, which allowed disparate impact age discrimination claims under the Age Discrimination in Employment Act. She concludes that the financial realities of the workplace combined with the "reasonable factors other than age" defense conspire to make this "victory" a hollow one, and that older workers will continue to face job losses and forced retirement through corporate reorganizations, downsizing, and layoffs, and that successful disparate impact claims are unlikely.

CLARK, ROBERT L. & GHENT, LINDA S. *Mandatory Retirement and Faculty Retirement Decisions*. 47 INDUSTRIAL RELATIONS 153 (2008). Using data gathered about faculty retirees in the University of North Carolina system, the authors investigate the impact caused by the lifting of mandatory retirement restrictions. Their analysis shows that the lifting of mandatory retirement restrictions greatly reduced the retirement rates of seventy- and seventy-one-year-old faculty but that retirement rates at other ages were not significantly different.

DAVIS, TIM. *Beyond the Cat's Paw: An Argument for Adopting a "Substantially Influences" Standard for Title VII and ADEA Liability*. 6 PIERCE LAW REVIEW 247 (2007). In antidiscrimination law, courts have struggled with how to address liability for adverse employment actions made by a committee that may have been based on reports or reviews from biased sources. The author examines court decisions in this area, including a conflict between the Seventh and Fourth Circuits, and recommends courts follow an approach called the "substantially influences" analysis, based on his analysis of agency laws and Supreme Court precedent.

FILINSON, RACHEL. *Age Discrimination Legislation in the U.K.: A Comparative and Gerontological Analysis*. 23 JOURNAL OF CROSS-CULTURAL GERONTOLOGY 225 (2008). Filinson compares the recently

enacted regulations against age discrimination in the United Kingdom to laws in the United States, Canada, and Australia. She concludes that the new British laws allow too many exceptions and are substantially weaker than the laws of other countries. She speculates that the reason for this may be due to the fact that the regulations were passed because of European directives instead of local efforts to address problems with age discrimination.

GROSSMAN, PAUL & OTHERS. *"Lies, Damned Lies, and Statistics": How The Peter Principle Warps Statistical Analysis of Age Discrimination Claims*. 22 LABOR LAWYER 251 (2007). Companies frequently conduct statistical reviews of the adverse impact of major personnel decisions for those groups protected by antidiscrimination laws. Unlike the categories of gender, race, and national origin, these statistical reviews always show an adverse impact on older workers. The authors argue that this statistical result is simply a reflection of the reality that older workers perform less well on the job due to declining abilities, outdated skills, lower motivation and mobility, and the "Peter Principle," whereby workers are promoted to the highest level of their abilities. The authors urge courts to exclude statistical reviews showing an adverse impact on age as not probative of discriminatory intent.

KACZOREK, MARY. *"No Country for Old Men: AARP v. EEOC and Age Discrimination in Employer-Sponsored Retiree Health Benefits*. 26 LAW & INEQUALITY 435 (2008). In this student comment, Kaczorek criticizes a recent Third Circuit opinion, *AARP v. EEOC*, which upheld a federal regulation permitting employers to alter, reduce, or drop coverage for retirees who are eligible for Medicare while avoiding liability for age discrimination under the Age Discrimination in Employment Act. Kaczorek characterizes this decision as effectively repealing laws against age discrimination and calls on Congress to fix the problem by reforming the health care system.

LAHEY, JOANNA. *State Age Protection Laws and the Age Discrimination in Employment Act*. 51 JOURNAL OF LAW & ECONOMICS 433 (2008). In this empirical study on the impact of age discrimination on the employment of older workers, Lahey concludes that the Age Discrimination in Employment Act has had a statistically significant adverse impact on the employment of older workers which is the opposite intent of the law. The author speculates that firms may be avoiding the litigation costs of age discrimination claims by hiring fewer older workers because claims based on age discrimination are harder to prove at the hiring stage.

- MORGESON, FREDERICK P. & OTHERS. *Review of Research on Age Discrimination in the Employment Interview*. 22 JOURNAL OF BUSINESS & PSYCHOLOGY 223 (2008). In this review article, the authors looked at twenty-one field and laboratory studies on age discrimination during the employment interview published since the Age Discrimination in Employment Act took effect. Their review of the literature indicates that while negative stereotypes about age do exist, factors other than age are usually present to explain the variance in evaluations during the interview process. They conclude that there is little evidence of age discrimination during the employment interview that cannot be explained by the existence of other factors. This was true in both the field and laboratory studies they reviewed. Due to the small number of field studies in their review, however, they recognize the need for more research in this area.
- MYERS, MICHAEL J. *Wal-Mart, Shopko Cart Gathering: A Case for Smith v. City of Jackson ADEA Disparate Impact?* 8 MARQUETTE ELDER'S ADVISOR 91 (2006). In 2005, Wal-Mart made headlines when an internal memorandum was leaked discussing how Wal-Mart might be able to reduce its health care costs by adding a physical component, such as cart gathering, to all jobs. Myers evaluates how this requirement might hold up under the disparate impact analysis recently allowed by the Supreme Court in *Smith v. City of Jackson*. He concludes that the policy would likely fail because its primary purpose is to dissuade unhealthy people from applying for the job, thus resulting in a "disproportionate and discriminatory impact" on older workers.
- SPERINO, SANDRA F. *The Sky Remains Intact: Why Allowing Subgroup Evidence is Consistent with the Age Discrimination in Employment Act*. 90 MARQUETTE LAW REVIEW 227 (2006). Sperino looks at recent decisions that have refused to allow evidence of a disparate impact on age-based subgroups within the over-forty protected class. She argues that these decisions are incorrect interpretations of the statutory language, are not supported by the legislative history, contradict the goal of the legislation to prohibit age discrimination, and are inconsistent with Supreme Court decisions in this area.
- WILKINS, DAVID B. *Partner, Shmartner!:* EEOC v. Sidley Austin Brown & Wood. 120 HARVARD LAW REVIEW 1264 (2007). Wilkins considers the implications of Judge Posner's opinion in *EEOC v. Sidley Austin Brown & Wood* on the culture of large law firms and the legal profession in general. The decision held that a group of older partners

who had been delegated to nonequity status and had sued the firm for age discrimination seemed to be more like employees rather than partners and remanded the case to the district court for a determination of their employment status. Wilkins believes Posner's decision hits at the heart of the legal profession's professional identity and that if law firms continue to focus only on money and the bottom line, they risk becoming simple for-profit business enterprises.

WOOD, GEOFFREY & OTHERS. *Age Discrimination and Working Life: Perspectives and Contestations—A Review of the Contemporary Literature*. 10 INTERNATIONAL JOURNAL OF MANAGEMENT REVIEWS 425 (2008). This review article from a British academic business journal identifies and discusses three main categories of research in the area of age discrimination in the workplace. These categories are the "causes and consequences" of age discrimination from a theoretical perspective, the "nature and extent" of age discrimination using empirical methods, and the "effects" of governmental policies to address age discrimination. The authors note that the studies agree that age discrimination exists and is widespread, but what may be causing it is unclear and governmental policies to address the problem have had limited effects.

V. HEALTH CARE

A. GENERAL WORKS / MISCELLANY

1. Book

GOINS, R. TURNER & KROUT, JOHN A., EDS. *SERVICE DELIVERY TO RURAL OLDER ADULTS: RESEARCH, POLICY, AND PRACTICE*. New York: Springer Publishing Company, 2006. This book addresses many modern challenges that older rural residents and their communities encounter in obtaining and providing health care. Each chapter discusses a vital issue concerning rural health care and provides commentary and in-depth analyses of key components of rural systems. Areas covered include health and nutrition, rural hospitals, changes in Medicare, care giving, housing, and transportation.

2. Articles

ANGELARI, MARGUERITE. *Access to Health Care for Elderly Immigrants*. 17 ANNALS OF HEALTH LAW 279 (2008). Angelari contends that the

impending increase in the elderly population will present challenges for Medicare, Medicaid, and the country's entire health care system. She argues that the United States' current approach of restricting immigrant access to federal health care programs for the elderly is unfair. She recommends that comprehensive immigration reform legislation continue to protect immigrants who have made substantial contributions to Medicare and also exempt legal immigrants from penalties for past misuse of a Social Security number in order to obtain employment.

BOLING, PETER A. & PARSONS, PAMELA. *A Research and Policy Agenda for Transitions from Nursing Homes to Home*. 26(4) HOME HEALTH CARE SERVICES QUARTERLY 121 (2007). Despite the fact that over one million adults return from nursing homes to the community every year, limited information exists about the process and outcomes of such transitions. The authors outline a research agenda for studying this important topic. They observe that the postacute care payment reform required by the Deficit Reduction Act is aligned with the Centers for Medicare and Medicaid Services' plan for postacute care reform; these policies, along with other undertakings, may help to improve the quality of health transitions in the future.

MILLER, EDWARD A. & WEISSERT, WILLIAM G. *Geography Still Dictates Rx Coverage for Many Near-Poor Seniors and Disabled Persons*. 19(1) JOURNAL OF AGING & SOCIAL POLICY 77 (2007). Miller and Weissert observe that although the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 is a federal law, the way in which states choose to implement it leaves a great disparity in the amount of pharmaceutical coverage elderly and disabled persons receive. The article addresses the role that state policies play in furthering this continued inequity. Due to the inequalities inherent in federalism, it is unclear how the elderly and disabled in most states will fare if they have to rely on pharmaceutical assistance from their state governments.

MULLAN, FITZHUGH & OTHERS. *Aging, Primary Care, and Self-Sufficiency: Health Care Workforce Challenges Ahead*. 36 JOURNAL OF LAW MEDICINE & ETHICS 703 (2008). Mullan and his colleagues analyze the impending issues that will arise as the baby boomers age. They foresee a looming crisis as the number of America's aged increases, while the number of primary care providers decreases. Options for addressing this issue include avoiding overspecialization for health care professionals, using federal educational funds to target minority professionals and underserved areas, prioritizing geriatrics

practice, investing in health workforce data collections and analysis, and focusing national policy on domestic answers to workforce problems.

SMITH, DIANE L. *Disparities in Healthcare Access for Older Adults with Disabilities*. 24 TOPICS IN GERIATRIC REHABILITATION 192 (2008). Medicare legislation and the Americans with Disabilities Act of 1990 (“ADA”) attempt to ensure access to health care and medical services for older adults. Nevertheless, barriers remain for many proposed recipients, including those with disabilities. Smith examines trends across a ten-year period to assess the potential impact of legislation such as Medicare and the ADA. She concludes that policies must be evaluated and then redesigned or replaced to better address these issues.

B. LONG-TERM CARE / NURSING HOMES

1. Articles

BROWN, LISA M. & OTHERS. *A Comparative Study of Laws, Rules, Codes and Other Influences on Nursing Homes’ Disaster Preparedness in the Gulf Coast States*. 25 BEHAVIORAL SCIENCES & THE LAW 655 (2007). The deaths of seventy nursing home residents in connection with Hurricanes Katrina and Rita exposed many issues related to inadequate policies and planning. The authors contend that the deaths might have been avoided if proper laws, policies, and guidelines had been in effect prior to the hurricanes. Brown and her colleagues analyze federal and state laws concerning disaster preparedness, focusing on nursing homes in particular, and recommend several improvements.

CARLSON, ERIC M. *Disability Discrimination in Long-Term Care: Using the Fair Housing Act to Prevent Illegal Screening in Admissions to Nursing Homes and Assisted Living Facilities*. 21 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 363 (2007). Carlson reveals that nursing homes frequently deny admission not because a potential resident has a medical condition that the facility cannot adequately treat, but because doing so would be expensive. Such screening might be curtailed by enforcement of the Fair Housing Act’s no-inquiry section, which forbids questions about an applicant’s handicaps. Although nursing homes have some legitimate interest in an applicant’s health, discrimination could be reduced if the no-inquiry rule were applied.

- CARLSON, ERIC M. *Protecting Rights or Waiving Them? Why "Negotiated Risk" Should Be Removed from Assisted Living Law.* 10 JOURNAL OF HEALTH CARE LAW & POLICY 287 (2007). This article examines the term "negotiated risk" as it applies in assisted living. The author explains that negotiated risk agreements were originally intended to allow assisted living facilities to care for frail residents for a longer period of time; now, however, they are being refashioned as a method for protecting residents' decisionmaking rights. This transformation has resulted in confused public policy and state laws. Carlson recommends that the term "negotiated risk" be discontinued because protection of residents' decisionmaking rights can be accomplished through proper care planning procedures.
- KELLY, CHRISTOPHER M. & OTHERS. *Nursing Home Deficiencies: An Exploratory Study of Interstate Variations in Regulatory Activity.* 20 JOURNAL OF AGING & SOCIAL POLICY 398 (2008). The authors report their study of interstate differences in nursing home regulatory activity. The study ascertained predictors of the amount and severity of nursing home deficiency and found that the volume of deficiency remained constant across states from 2000 to 2004, while severity saw a notable decrease. The authors conclude that various issues were related to both the amount and severity of deficiencies in each state, and when a national standard for nursing home performance is determined, significant conclusions may be drawn from deficiency patterns in individual states.
- KONETZKA, R. TAMARA & OTHERS. *Medicare Payment Changes and Nursing Home Quality: Effects on Long-Stay Residents.* 6 INTERNATIONAL JOURNAL OF HEALTH CARE FINANCE & ECONOMICS 173 (2006). The Balanced Budget Act of 1997 significantly altered the form of payment for Medicare services in skilled nursing facilities while simultaneously decreasing the overall level of funding. Konetzka and her colleagues observe that because facilities blend multiple revenue streams to cover costs for all residents, private-pay and Medicare margins may be used to subsidize lower Medicaid margins. The authors thus found a relationship between the change in Medicare policies and shifts in resident-level quality.
- LOCKHART, CHARLES & GILES-SIMS, JEAN. *Cross-State Variation in Conceptions of Quality of Nursing Facility Long-Term Care for the Elderly.* 19(4) JOURNAL OF AGING & SOCIAL POLICY 1 (2007). In this article, Lockhart and Giles-Sims investigate to what extent variables accounting for cross-state differences in the generosity of other public

assistance programs also explain the level of funds allocated for long-term nursing facility care. They then discuss the effect that the level of resources committed for these programs has on the quality of state nursing facility services. Despite some surprising findings, the authors conclude that increased resources do enhance the quality of nursing facility services and improve residents' quality of life.

MILLER, EDWARD A. & MOR, VINCENT. *Balancing Regulatory Controls and Incentives: Toward Smarter and More Transparent Oversight in Long-Term Care*. 33 JOURNAL OF HEALTH POLITICS, POLICY & LAW 249 (2008). Miller and Mor state that despite its flaws, oversight of long-term care is a legitimate and necessary endeavor, but it needs to be reformed. The aftermath of Hurricane Katrina provides an example in which improved oversight could have helped nursing home residents. The authors suggest that inspectors need to identify performance issues, while quality-improvement organizations should help design solutions to the problems.

PYNOOS, JON & OTHERS. *Aging in Place, Housing, and the Law*. 16 ELDER LAW JOURNAL 77 (2008). Pynoos observes that "aging in place"—the desire of older people to stay in their own homes and communities despite infirmities—is a growing aspect of public policy. In *Olmstead v. L.C.*, the Supreme Court required states to make community-integrated support programs more widely available, but multiple factors continue to hinder the aging-in-place movement. Pynoos argues that new policies are needed to help modify existing housing, mandate the creation of housing based on principles of universal design, and provide a wider range of housing types.

SMITH, DAVID B. & OTHERS. *Racial Disparities in Access to Long-Term Care: The Illusive Pursuit of Equity*. 33 JOURNAL OF HEALTH POLITICS, POLICY & LAW 861 (2008). The authors observe that when Medicaid was implemented, nursing homes were initially exempted from civil rights enforcement. Complete information by race about nursing-home care has recently become available through a mandatory resident assessment system. Analyzing this data, the authors reveal that African Americans' use of nursing homes was higher than that of Caucasians in 2000. They suggest several reasons for this but conclude that a high degree of segregation and differences in the quality of nursing homes used by African Americans remains.

- STEVENSON, DAVID G. *Is a Public Reporting Approach Appropriate for Nursing Home Care?* 31 JOURNAL OF HEALTH POLITICS, POLICY & LAW 773 (2006). Stevenson identifies several challenges that nursing home public reporting must overcome to be successful. By evaluating the information reported on the Nursing Home Compare website, he finds that the effect of public reporting has been minimal thus far. He concludes that it is unclear whether the minimal reporting effect is specific to that website or whether it is part of the broader need to use quality information to stimulate improvements in the nursing home care sector.
- STEVENSON, DAVID G. & OTHERS. *Medicare Part D and the Nursing Home Setting.* 48 GERONTOLOGIST 432 (2008). The authors examine how the introduction of Medicare Part D is changing the operations of long-term care pharmacies and nursing homes and how those changes affect nursing home residents. They find that Part D has significantly altered the manner in which nursing homes may use prescription drugs, and nursing home providers and long-term care pharmacies have had trouble adjusting to the change. Although the stakeholders will eventually acquire more familiarity with the program, the authors' interviews reveal a range of long-term issues that policymakers will need to address.
- UTTERBACK, JAMES E. *Substituting an Iron Fist for the Invisible Hand: The False Claims Act and Nursing Home Quality of Care—A Legal and Economic Perspective.* 10 QUINNIPIAC HEALTH LAW JOURNAL 113 (2007). The author asserts that the False Claims Act is not the best tool with which to remedy substandard care in nursing homes. He examines several economic factors and concludes that courts should limit the applicability of the Act to cases involving gross negligence. Otherwise, ordinary malpractice claims will become federalized, regulatory agency discretion will be undermined, and the punitive nature of the Act will direct funds away from patient care without actually benefiting the affected residents.
- ZHANG, NING JACKIE & OTHERS. *Has the Medicare Prospective Payment System Led to Increased Nursing Home Efficiency?* 43 HEALTH SERVICES RESEARCH 1043 (2008). This article analyzes the effects of the Medicare prospective payment system on efficiency in skilled nursing homes. The authors conclude that although various organizational and market factors also played significant roles, the Medicare policy changes negatively affected efficiency. Some factors contributing to lower efficiency, however, contribute to higher

efficiency when adjusted for quality, indicating that increased efficiency can occur at the expense of quality.

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

1. Books

FROLIK, LAWRENCE A. *RESIDENCE OPTIONS FOR OLDER AND DISABLED CLIENTS*. Chicago, IL: American Bar Association, 2008. This book presents a thorough explanation of various types of housing available to older and disabled individuals. After presenting an overview of housing needs for the aging and disabled, Frolik examines each type, beginning with relatively independent settings, continuing with intermediate options, and ending with a detailed discussion of medically assisted accommodations. In addition to providing an explanation of the various types of residences, Frolik also discusses the positive and negative aspects of each.

GLECKMAN, HOWARD. *MEDICAID AND LONG-TERM CARE: HOW WILL RISING COSTS AFFECT SERVICES FOR AN AGING POPULATION?* Chestnut Hill, MA: Center for Retirement Research at Boston College, 2007. The author explores trends in Medicaid spending on long-term care and discusses the effects that increased costs will have on the aging population and on taxpayers. Gleckman then discusses the relationship between Medicaid and state spending and evaluates policymakers' current efforts to curb Medicaid spending. He concludes that none of the options has had any substantial effect on spending, nor are any of these attempts likely to significantly reduce future costs.

2. Articles

BELIAN, JULIA. *State Implementation of the Optional Provisions of the Deficit Reduction Act*. 9 *MARQUETTE ELDER'S ADVISOR* 63 (2007). Medicaid law has two types of federal policies—states must provide certain benefits, and they may provide additional optional benefits, as permitted by federal law. A third component of Medicaid law is the waiver process, which permits a state to receive federal reimbursement even if it does not conform to federal standards. The author discusses these processes and concludes that although passage of the Deficit Reduction Act has not made the system more complex, the new options available to states do alter the system in important ways.

- DAYTON, KIM. *Reality Check: The DRA's Impact on Seniors with Disabilities and Their Caregivers*. 9 MARQUETTE ELDER'S ADVISOR 13 (2007). Dayton contends that the \$6.3 billion the Deficit Reduction Act ("DRA") is projected to save is a trifle in the grand scheme of the federal health care budget. Even if the Act reduces federal expenditures for health care, those savings will be at the expense of the nation's most vulnerable elders; in addition, they worsen Medicaid's tendency to impose late-life burdens on women. The author concludes that because no immediate Medicaid "crisis" stems from long-term care spending on the elderly, Congress should repeal the DRA and create long-term care financing that distributes costs in a more equitable manner.
- FROLIK, LAWRENCE A. *An Essay on the Need for Subsidized, Mandatory Long-Term Care Insurance*. 21 NOTRE DAME JOURNAL OF LAW ETHICS & PUBLIC POLICY 517 (2007). Frolik observes that many unknown factors exist with regard to long-term care, such as who will need it in the future and for how long, what type of care will be required, and even what the precise definition of long-term care is. As such, the only options to plan for such uncertainties today are to self-insure or purchase long-term care insurance. After examining the two options, the author concludes that the answer is to compel the public to "save" for the possible need for long-term care through mandatory long-term care insurance.
- GRABOWSKI, DAVID C. & OTHERS. *Medicaid Nursing Home Payment and the Role of Provider Taxes*. 65 MEDICAL CARE RESEARCH & REVIEW 514 (2008). In light of state budget shortfalls and the repeal of the Boren Amendment, legislators have deemed state Medicaid expenditures for nursing home care to be a potential target for payment cuts. Grabowski and his colleagues analyze this issue and conclude that aggregate inflation-adjusted Medicaid payment rates actually increased steadily through 2004. The growth can be partially explained by the nursing home provider taxes that many states have adopted. A recent proposal to cap these taxes, however, could cause a reduction in Medicaid payment rates for nursing home care.
- GRABOWSKI, DAVID C. *Medicare and Medicaid: Conflicting Incentives for Long-Term Care*. 85 THE MILBANK QUARTERLY 579 (2007). The existence of multiple payers in a health care context creates conflicting incentives for providers; dual Medicare-Medicaid eligibility is one such situation in which this conflict occurs. Grabowski analyzes the tension between Medicare and Medicaid over the coverage of acute and long-

term care services for individuals with dual eligibility. He discusses the lack of coordination between the two programs with relation both to cost sharing and to cost shifting within and across health care venues. Possible solutions include capitation, pay-for-performance, and “federalization,” in which the federal government would cover Medicaid’s costs for individuals with dual eligibility.

HARRINGTON MEYER, MADONNA & ROSEAMELIA, CARRIE. *Emerging Issues for Older Couples: Protecting Income and Assets, Right to Intimacy, and End-of-Life Decisions*. 31 GENERATIONS 66 (Fall 2007). This article analyzes long-term care issues for older couples, including those who are unmarried. The authors discuss several topics, including Medicaid impoverishment provisions, couples’ rights to privacy, advance directives, and living wills. The authors conclude that despite the challenges current policies present to older couples, solutions are possible, especially if the United States takes an approach that expands independence and acknowledges unmarried couples.

JENNINGS, CHRISTOPHER C. & DAWE, CHRISTOPHER J. *Long-Term Care: The Forgotten Health Care Challenge: Leading the Way to Broader Reform*. 17 STANFORD LAW & POLICY REVIEW 57 (2006). The authors state that the aging of the baby boomers will create health care expenses that will pressure lawmakers to act on long-term care. Today’s environment is so polarized, however, that such action will fail unless it can be made attractive to both parties. The authors discuss three consensus positions from which an initiative might be framed, and they propose a new private-public collaboration that would integrate these positions and help stabilize America’s retirement security system.

KAPLAN, RICHARD L. *Honoring Our Parents: Applying the Biblical Imperative in the Context of Long-Term Care*. 21 NOTRE DAME JOURNAL OF LAW ETHICS & PUBLIC POLICY 493 (2007). Kaplan discusses the various arrangements that can constitute “long-term care” and explains how Medicare applies to them. He suggests that long-term care financing be restructured to recognize the difference between medically oriented services and those that are more residential and social in nature. In conclusion, he proposes that Medicare be reformed to cover the cost of nursing homes but that care in nonmedical settings remain a private obligation.

KAPLAN, RICHARD L. *Retirement Planning’s Greatest Gap: Funding Long-Term Care*. 11 LEWIS & CLARK LAW REVIEW 407 (2007). In this

article, Kaplan examines long-term care financing, which he describes as the most important missing component of retirement planning today. He analyzes the options currently available and explores the coverage for long-term care provided by the government and private insurance policies. He concludes that Americans must recognize the need for long-term care and plan appropriately; if long-term care insurance is to play a role in this planning, the government should promote its use.

KAPP, MARSHALL B. *Medicaid Planning, Estate Recovery, and Alternatives for Long-Term Care Financing: Identifying the Ethical Issues*. 7 CARE MANAGEMENT JOURNALS 73 (2006). Due to the increasing costs of long-term care, individuals engage in planning to preserve as much of their assets as possible; meanwhile, the government tries to limit such planning and recover its expenses from the estates of the deceased. This article delineates some of the major ethical issues created by individual Medicaid planning and state efforts at estate recovery. The author concludes that neither of the current methods is satisfactory.

KAPP, MARSHALL B. *Ninny Clients of the Nanny State? Selective Paternalism in Public Benefit Programs for Older Americans*. 6 GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY 191 (2008). In this article, Kapp examines two inconsistent concepts of aging in America: older persons as adults who can participate in elements of their own publicly financed long-term care, versus older persons as incompetent "ninnies" who need paternalistic management of public health insurance and retirement benefits. He compares the two types of resulting benefit programs and concludes that paternalism is well-meaning but misguided; a proper idea of aging would take a more consumer-directed approach to long-term care.

MILLER, NANCY A. & OTHERS. *Strengthening Home and Community-Based Care Through Medicaid Waivers*. 18(1) JOURNAL OF AGING & SOCIAL POLICY 1 (2006). States increasingly provide community-based long-term care through the Medicaid 1915c waiver program. The authors of this article thus set out to analyze state use of and spending for waivers. Their analysis determines that states with increased community-based care and reduced nursing home capacity tend to use waivers more than states in which these factors do not exist. Other factors that encourage growth of community-based care include the existence of applicable state and federal policies to address resource issues.

- MOSES, STEPHEN A. *The Brave New World of Long-Term Care*. 21 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 561 (2007). Moses begins by discussing the history of the current long-term care system, which he states is headed for financial collapse. He asserts that the solution is to focus Medicaid on the truly needy, and the remaining individuals will plan ahead to finance their own long-term care. He discusses steps that the Deficit Reduction Act has taken in this direction but states that public funding for long-term care is still excessive and must be reduced.
- O'BRIEN, ELLEN. *What is Wrong with the Long-Term Care Reforms in the Deficit Reduction Act of 2005?* 9 MARQUETTE ELDER'S ADVISOR 103 (2007). This article explores the provisions of the Deficit Reduction Act of 2005 ("DRA") that apply to Medicaid long-term care benefits for older adults. The DRA attempts to save federal funds by restricting eligibility for people who need assistance with the expenses of long-term care and by persuading older adults to purchase long-term care insurance. The author concludes that the DRA actually makes application and determination even more difficult than it already is.
- POLIVKA, LARRY. *Closing the Gap Between Knowledge and Practice in the U.S. Long-Term Care System*. 10 MARQUETTE ELDER'S ADVISOR 75 (2008). The aging of the baby boom generation is likely to make long-term care a growing concern for individuals as well as for policymakers. These trends will create an increasing demand for long-term care services that will significantly increase the financial pressure both on families and on the public sector. Some states have made progress in creating balanced long-term care systems by offering a wide variety of services; Polivka contends that this offers compelling evidence for the viability of policy initiatives in all states.
- WISENSALE, STEVEN K. *Commentary: What Role for the Family and Medical Leave Act in Long-Term Care Policy?* 18(3) JOURNAL OF AGING & SOCIAL POLICY 79 (2006). Wisensale observes that in an effort to provide paid leave to employees, twenty-three of twenty-eight states removed the elder care provision in new family and medical leave initiatives introduced between 2000 and 2003. He states that with the retirement of the baby boomers, informal family care will necessarily help defray costs of an expensive long-term care system. He concludes that in future policy reforms, leave should be paid, cover multiple generations, include more workers, and be adaptable to changing family structures.

D. MEDICARE

1. Books

CASSEL, CHRISTINE K. *MEDICARE MATTERS: WHAT GERIATRIC MEDICINE CAN TEACH AMERICAN HEALTH CARE: WITH A NEW PREFACE*, 2007 ED. Berkeley, CA: University of California Press, 2007. Cassel evaluates the present condition and future outlook of Medicare and recommends a policy for financing and organizing the program. She also discusses how Medicare policy has affected the health of patients, and she advocates policy changes that could improve the health of beneficiaries in years to come. The 2007 edition is essentially identical to the 2005 but contains a new preface noting that since the 2005 edition was published, over 30 million people adopted Medicare Part D in a chaotic implementation of the program.

GEYMAN, JOHN. *SHREDDING THE SOCIAL CONTRACT: THE PRIVATIZATION OF MEDICARE*. Monroe, ME: Common Courage Press, 2006. In this book, Geyman reviews the history of Medicare over the past thirty years and analyzes efforts to privatize it. He concludes that privatization is not the answer; private plans tend to restrict access, offer fewer choices, and provide fewer benefits despite their higher price. Geyman advocates a renewed commitment to the original vision of social insurance on which Medicare was based, including improved quality, reduced health disparities, greater coverage and access, and reduced costs.

KASSNER, ENID & OTHERS. *A BALANCING ACT: STATE LONG-TERM CARE REFORM*. Washington, D.C.: AARP Public Policy Institute, 2008. Focusing on older people and adults with disabilities, the authors study the extent to which the states balance provisions of Medicaid-funded long-term care to persons in home-like settings versus individuals in institutions. They examine states' accomplishments under Medicaid law and study the effect of federal policies on the services that states provide. Medicaid allocates a disproportionately large share of funds for institutional services rather than home-based services, despite indications that older Americans prefer to age in place.

MAYES, RICK & BERENSON, ROBERT A. *MEDICARE PROSPECTIVE PAYMENT AND THE SHAPING OF U.S. HEALTH CARE*. Baltimore, MD: The Johns Hopkins University Press, 2006. This book describes Medicare's Prospective Payment system, which the federal government introduced in 1983 to encourage more cost-efficient management of

medical care. The authors explain how this system helped shift power away from service providers and toward those who pay for the services, and they discuss the ensuing reaction of providers. They conclude by addressing problems with the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 and by offering suggestions as to how policymakers might use the Medicare payment system to improve health care in the United States.

MOON, MARILYN. *MEDICARE: A POLICY PRIMER*. Washington, D.C.: Urban Institute Press, 2006. In this book, Moon describes Medicare in detail and explains its outlook for the future. She also explains how the program functions in relation to the “big picture” of health care, other federal programs, and the U.S. economy. Moon contends that Medicare is neither failed nor unsustainable, but she does suggest improvements in the areas of efficiency, broader access, and equitable financing.

PELTZ, MARLENE C., ED. *MEDICARE AND MEDICAID: CRITICAL ISSUES AND DEVELOPMENTS*. New York: Nova Science Publishers, 2007. This book analyzes contemporary issues relating to Medicare and Medicaid. With chapters contributed by various authors, it discusses current and pending federal laws in light of their effects on Medicare and Medicaid. It also addresses implications for the U.S. budget and suggests approaches that the federal government could take to improve the programs. Specific topics covered include Medicaid citizenship documentation, skilled nursing facility payments, Medicaid cost sharing, federal drug price negotiation, and managed care.

2. Articles

BERENSON, ROBERT A. & GOLDSTEIN, MELISSA M. *Will Medicare Wither on the Vine? How Congress Has Advantaged Medicare Advantage—And What’s a Level Playing Field Anyway?* 1 *SAINT LOUIS UNIVERSITY JOURNAL OF HEALTH LAW & POLICY* 5 (2007). Berenson and Goldstein explore reasons that Medicare Advantage private health plans might be in a more favorable position than traditional Medicare. Although most attention has focused on overpayments, the authors address other issues such as benefits flexibility, the plans’ marketing opportunities and practices, and the exclusive advantages of private fee-for-service plans. They conclude, however, that the most effective action Congress could take now would still be to reduce or abolish the current overpayments.

- CANCELOSI, SUSAN E. *Unlocking the Truth: Evaluating 2008 Election Issues for Elderly Minorities as a Key to Understanding Medicare Reform*. 10 BERKELEY JOURNAL OF AFRICAN-AMERICAN LAW & POLICY 226 (2008). Cancelosi begins by outlining the current Medicare system, focusing on government-managed areas and recently-added private components. She then discusses the 2008 presidential candidates' Medicare reform proposals, calling attention to their fragmented approaches. Finally, she analyzes the proposals that have particular consequences for elderly minorities and concludes that narrowly focused reforms jeopardize the entire system because of potential outcomes that the proposals fail to consider.
- CANNON, MICHAEL F. *Pay-For-Performance: Is Medicare a Good Candidate?* 7 YALE JOURNAL OF HEALTH POLICY, LAW & ETHICS 1 (2007). As a typical third-party purchaser of health care, Medicare normally pays health care providers based on the volume and intensity of the services provided, rather than on quality or value. Cannon analyzes the challenges of designing a system that would allow third-party payers to compensate providers based on high-quality care, especially in light of the current dearth of research on the economics of such a program. After discussing potential pitfalls, he suggests ways to give older beneficiaries the advantages of payment for performance while minimizing their risk.
- CHANNICK, SUSAN A. *The Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Will It Be Good Medicine for U.S. Health Policy?* 14 ELDER LAW JOURNAL 237 (2006). The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 ("MMA") instituted coverage of outpatient prescription drugs. Channick argues that although the MMA may appear to be a legislative commitment to social insurance, it actually undermines progress toward universal health coverage. Because it is expensive and tends to shift costs from the public sector onto private individuals—especially the elderly—Channick concludes that the MMA might bring the nation one step closer to demolishing its already weak health care system.
- FIELD, ROBERT I. & STEFANACCI, RICHARD G. *Beyond Drug Coverage: The Cumulative Effect of Privatization Reforms in the Medicare Modernization Act*. 1 SAINT LOUIS UNIVERSITY JOURNAL OF HEALTH LAW & POLICY 207 (2007). The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 uses private plans to provide outpatient prescription drug coverage to beneficiaries. It has created a significant role for the private sector within Medicare that

previously never existed. This and other changes implemented by the MMA could ultimately influence a sea change in the way beneficiaries view the role of private plans in Medicare. The authors argue that this effect may have a major impact on attempts to privatize traditional Medicare.

HALPERIN, ALISSA E. & OTHERS. *Medicare Advantage Special Needs Plans for “Institutionalized Individuals”*: *What Advantage to Enrollment?* 1 SAINT LOUIS UNIVERSITY JOURNAL OF HEALTH LAW & POLICY 175 (2007). This article discusses the Medicare Advantage Special Needs Plan (“SNP”), one of the lesser-known programs created by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. Such plans are established to enroll “special needs” populations, such as those who are institutionalized. The authors analyze the SNPs for long-term care and conclude that although they appear to have potential, they actually will need significant structuring and regulation to ensure they meet beneficiaries’ needs.

JOST, TIMOTHY S. *Medicare: What Are the Real Problems? What Contribution Can Law Make to Real Solutions?* 1 SAINT LOUIS UNIVERSITY JOURNAL OF HEALTH LAW & POLICY 45 (2007). The author states that although Medicare functions well on many levels, it presents several problems, such as coverage gaps, high cost sharing, problematic payment methods, and a potentially unsustainable funding system. He examines these issues and concludes that Medicare’s long-term survival will require increased tax funding, cost controls, and greater beneficiary care. He suggests possible changes in Medicare law that could provide these improvements.

MCBRIDE, TIMOTHY D. *Medicare Advantage: What Are We Trying to Achieve Anyway?* 1 SAINT LOUIS UNIVERSITY JOURNAL OF HEALTH LAW & POLICY 405 (2008). At first glance, the Medicare Advantage plans that the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 created appear to be flourishing. They have achieved the goals of the legislators who created them—to expand beneficiaries’ available options and to allow Medicare to use techniques that have helped the private sector control costs while expanding service choices. McBride, however, questions the real purpose of Medicare Advantage; he analyzes what he says are additional goals of the program and evaluates their success.

- MARMOR, THEODORE R. & MASHAW, JERRY L. *Understanding Social Insurance: Fairness, Affordability, and the "Modernization" of Social Security and Medicare*. 25 HEALTH AFFAIRS W114 (2006). The authors state that for more than two decades, Americans have been asked to believe that Social Security and Medicare are unwise, unsustainable, and in need of major reform. Marmor and Mashaw argue that critics of these programs are incorrect about the facts and may not even understand the concept of social insurance. Reforms to these programs must be based not on shifting risk back onto individuals and families, but on the economic, social, and political logic of social insurance.
- PRATT, DAVID. *The New Medicare Part D Prescription Drug Benefit*. 17 ALBANY LAW JOURNAL OF SCIENCE & TECHNOLOGY 337 (2007). This article assesses the prescription drug benefit of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 with regard to several of its goals. The author concludes that the prescription benefit is faring reasonably well, but more progress needs to be made. Specifically, he argues that coverage must improve, choices for elders—many of whom suffer from some form of incapacity—should be simplified, and insurers' profit margins should be reduced.
- PRICE, JACK. *The Narrow Passage to Medicare Reimbursement: Where Commercialization Barriers Meet Patients' Rights*. 14 TEXAS WESLEYAN LAW REVIEW 93 (2007). Price addresses several questions that center on the issue of whether state-of-the-art medical devices and procedures will continue to be available to the general population. He discusses Medicare's controversial handling of new technologies, which prevents the commercialization of many promising mechanisms. Price concludes that in order to reverse this trend, legislators and manufacturers must work to improve system-wide access to the best health care products.
- REILLY, KAREN E. & OTHERS. *The Centers for Medicare and Medicaid Services' Nursing Home Case-Mix and Quality Demonstration*. 19(1) JOURNAL OF AGING & SOCIAL POLICY 61 (2007). Federal, state, and local governments have been trying to improve the quality of care of skilled nursing facility ("SNF") residents for many years. Prospective reimbursement policies have created incentives for providers to admit Medicare residents under more equitable payment rates, but controversy over access, quality, and reimbursement remains. This article addresses appropriate reimbursement methods by providing the first complete accounting of the Nursing Home Case Mix and Quality

Demonstration's context and experiences and the resulting SNF Prospective Payment System implemented for Medicare.

SCHLESINGER, MARK & HACKER, JACOB S. *Secret Weapon: The "New" Medicare as a Route to Health Security*. 32 JOURNAL OF HEALTH POLITICS, POLICY & LAW 247 (2007). Schlesinger and Hacker assert that Medicare's twenty-year journey from being a single-payer insurer to its current state as a combination of public and private insurance makes it a promising instrument for surmounting the barriers to universal health insurance. They analyze similar programs and explore ways in which the political dynamics of those programs could overcome impediments to universal health insurance. The authors conclude that expanding Medicare is the most viable approach for overcoming the current deadlock on health care.

SORRESSO, ELEANOR B. *A Philosophy of Privatization: Rationing Health Care Through the Medicare Modernization Act of 2003*. 21 JOURNAL OF LAW & HEALTH 29 (2008). The author reviews the history of managed care in the private market and discusses the genesis of Medicare. She then examines the basic structure of the original Medicare Prescription Drug, Improvement, and Modernization Act of 2003, explaining how the MMA will ration health care within the Medicare system. Sorresso concludes that the approach to health care should not be determined solely by economic principles; to be successful, policymakers must consider ramifications for many areas.

SWEDLOFF, RICK. *Can't Settle, Can't Sue: How Congress Stole Tort Remedies from Medicare Beneficiaries*. 41 AKRON LAW REVIEW 557 (2008). As a minor part of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Congress amended the Medicare Secondary Payer Act in a manner that significantly impacts the ability of Medicare beneficiaries to bring or settle tort claims. The amended Act reduces incentives for attorneys to represent Medicare beneficiaries in tort litigation and affects the tort system as a whole. Swedloff discusses the unanticipated effects that this change could have for the tort system and argues that it will have profound consequences for both mass tort litigation and individual claims.

WEEKS, ELIZABETH A. *Cooperative Federalism and Healthcare Reform: The Medicare Part D "Clawback" Example*. 1 SAINT LOUIS UNIVERSITY JOURNAL OF HEALTH LAW & POLICY 79 (2007). When beneficiaries are dually eligible for Medicare and Medicaid, the Medicare Part D prescription drug law leaves control of prescription

drug coverage to the federal government but requires states to pay for most of the beneficiaries' drugs. States objected to this policy on numerous grounds and even took their arguments to the Supreme Court. Weeks examines this "clawback" provision and the questions that it raises for cooperative state-federal health reform.

WHITE, JOSEPH. *Protecting Medicare: The Best Defense Is a Good Offense*. 32 JOURNAL OF HEALTH POLITICS POLICY & LAW 221 (2007). White perceives attacks on Medicare coming from two fronts—the Republican coalition dislikes social insurance on principle, while the centrist perspective believes that the system is "unaffordable." He calls upon defenders of Medicare to address these threats by arguing that privatization is a bad approach, and by making it clear that the economic fears about Medicare are not realistic. By taking an offensive approach, he contends, defenders can stop Medicare's erosion and possibly even expand the program overall.

E. COMPETENCY / CAPACITY FOR DECISIONMAKING (INCLUDING GUARDIANSHIPS)

1. Articles

FROLIK, LAWRENCE A. & RADFORD, MARY F. "*Sufficient*" Capacity: The Contrasting Capacity Requirements for Different Documents. 2 NATIONAL ACADEMY OF ELDER LAW ATTORNEYS JOURNAL 303 (2006). Frolik and Radford discuss the concept of testamentary capacity, including its origin to modern day common law and statutory requirements. Proof of such capacity is required for certain legal acts and decisions; however, the degree of capacity that is required varies. The authors examine the varying testamentary capacities required to execute a will, trust, deed, durable power of attorney, advance health care directive, to make a gift, and to enter into a contract. They conclude with a discussion about undue influence and argue that capacity lies on a continuum that may be sufficient for some, but not all, legal documents.

HARDY, DAVID. *Who is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring*. 4 NATIONAL ACADEMY OF ELDER LAW ATTORNEYS JOURNAL 1 (2008). From the perspective of a judge, Hardy states that guardianships will grow as the elderly population increases, but warns that guardianship systems are often fraught with substantial problems, including insufficient

information for proper decisionmaking, poor procedural safeguards, and inadequate or nonexistent monitoring. He analyzes responses by policymakers, governments, and attorneys, and examines recent reform efforts. He suggests that jurisdictions, including his own, can improve their guardianship systems by implementing best practices reforms, consisting of eight elements that he sets forth in this article.

HERRING, JONATHAN. *Entering the Fog: On the Borderlines of Mental Capacity*. 83 INDIANA LAW JOURNAL 1619 (2008). Herring discusses the issues raised by two categories of persons with borderline competency, who are often those suffering from dementia and Alzheimer's disease: persons who barely possess mental capacity and persons that barely lack mental capacity. Believing that capacity lies on a continuum, he argues against laws that draw a sharp line between capacity and incapacity. After setting forth the shortcomings of the risk-relative capacity approach, the best interests test, and the substituted judgment standard, Herring offers a more realistic and effective approach. This approach is multifaceted and considers autonomy, dignity, liberty, the patient-doctor relationship, and pluralism.

HORTON, DAVID. *The Uneasy Case for California's "Care Custodian" Statute*. 12 CHAPMAN LAW REVIEW 47 (2008). Horton provides a thorough examination of a California statute that invalidates testamentary gifts made to a "care custodian of a dependent adult," including its legislative history and subsequent case law. The problems arising from the broad definitions of "care custodian" and "dependent adult" and the narrow exceptions are exposed. Although the proposed recommendations to change the statute may help, fundamental problems will remain and thus Horton suggests the "care custodian" provision should be eliminated.

HUTHWAITE, JUSTIN S. & OTHERS. *Declining Medical Decision-Making Capacity in Mild AD: A Two-Year Longitudinal Study*. 24 BEHAVIORAL SCIENCES & THE LAW 453 (2006). The authors report on their empirical research, which is the first longitudinal study of medical decisionmaking capacity in patients with mild Alzheimer's disease. They tested for capacity to consent to medical treatments using four core standards (communicating choice, appreciating consequences, reasoning about treatment choices, and understanding the situation) and one experimental standard (making reasonable choices). The results showed a steady decline in medical decisionmaking capacity and significant declines in four of the five standards at the end of the study.

The authors recommend early capacity assessments and monitoring every two years.

JORGENSEN, MIKE E. *The Convicted Felon as a Guardian: Considering the Alternatives of Potential Guardians with Less-Than-Perfect Records*. 15 ELDER LAW JOURNAL 51 (2007). Jorgensen explains that the pool of individuals eligible to be guardians is shrinking, yet the demand is greater than ever, especially among the indigent elderly and minority populations. He explores the problems with inconsistent state laws that prohibit, limit, or are silent about felons serving as legal guardians. Alternatives, such as seeking a dismissal or expungement of a felony conviction, executing a durable power of attorney, and relying on uniform codes and proposed standards, are inadequate. Jorgensen argues for a case-by-case approach, giving judges discretion to choose a felon as a guardian if it is in the best interests of the ward.

KAPP, MARSHALL B. *Informed Consent Implications of Diagnostic Evaluations for Dementia*. 21 AMERICAN JOURNAL OF ALZHEIMER'S DISEASE & OTHER DEMENTIAS 24 (2006). Whereas issues of informed consent in therapeutic and research circumstances have been discussed significantly, there has been little analysis about the challenges of obtaining informed consent from patients with suspected dementia in the diagnostic context. In Kapp's article, he points out the considerations and challenges of obtaining permission from these patients who already have some mental impairment. He advocates earlier evaluations of dementia, the execution of more durable powers of attorney, use of guardianships, and the passage of state statutes that authorize certain categories of persons to consent to diagnostic procedures.

KARP, NAOMI & WOOD, ERICA F. *Guardianship Monitoring: A National Survey of Court Practices*. 37 STETSON LAW REVIEW 143 (2007). In 2005, the AARP Public Policy Institute and the American Bar Association Commission on Law and Aging conducted a survey to investigate guardianship-monitoring practices throughout the United States. The authors describe the methodology of this survey and the multifaceted findings. Based on these findings, the authors explore various court monitoring aspects, such as the following: reporting requirements, procedures for review, enforcement and sanctions, guardianship plans, court assistance via training and forms, verification and investigation processes, funds for monitoring, roles for attorneys, court-community interactions, and information and court technologies.

KOHN, NINA A. *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*. 59 RUTGERS LAW REVIEW 1 (2006). Calling attention to the increasing execution of durable powers of attorney by the elderly, Kohn explains the purposes, uses, and abuses that arise from this legal relationship between the agent and principal. She discusses the problems and social impacts of agents overreaching their fiduciary duties and failing to confer with their principal in the decisionmaking process. Finding current reform efforts inadequate, Kohn proposes a two-part alternative model that would empower the elderly in the durable power of attorney relationship: (1) requiring communication and consultation, and (2) mandating advance notification of certain “fundamental transactions.”

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

1. Book

FROLIK, LAWRENCE A. *THE LAW OF LATER-LIFE HEALTH CARE AND DECISION MAKING*. Chicago, Illinois: American Bar Association, 2006. Written by renowned expert Frolik and published by the American Bar Association, this book addresses numerous health law areas that are implicated by the elderly, especially in their final years of life. Chapters include discussions on Medicare and other entitlement programs, long-term care options, costs and paying for health care, and protections for those lacking mental capacity. The final chapter provides a comprehensive review of end-of-life decisionmaking aspects, such as informed consent, do-not-resuscitate orders, and organ donation.

2. Articles

KOHN, NINA A. & BLUMENTHAL, JEREMY A. *Designating Health Care Decisionmakers for Patients Without Advance Directives: A Psychological Critique*. 42 GEORGIA LAW REVIEW 979 (2008). In the absence of advance directives, most states have default surrogate laws that allow decisionmaking from individuals who may serve as surrogates according to a priority list that usually consists of spouses, parents, and children. Kohn and Blumenthal review the psychological literature and conclude that there is incongruence between the decisions made by the surrogates and those made by the patients for themselves. They do not find default surrogacy laws meritless nor bad

policy, however. They suggest instead that the laws should be amended to allow for the appointment of surrogates based on their personal attributes, instead of only familial status, and that surrogates be provided with information about patients' modal preferences.

SONGER, BROOKE MYERS & OTHERS. *Decision-Making Capacity in Elderly, Terminally Ill Patients with Cancer*. 25 BEHAVIORAL SCIENCES & THE LAW 393 (2007). The researchers of this study compared decisionmaking capacity and cognitive functioning in two elderly samples: (1) patients with terminal cancer in a palliative care hospital, and (2) physically healthy individuals in a supportive community residence. They also assessed various physical and psychological well-being measures. Results showed substantial deficits in the sample with terminal cancer, but only minimal deficits in the healthy sample. The researchers conclude that cognitive and capacity impairments are more a function of illness, disability, and medical treatments instead of age. They underscore the need for reliable evaluations, advanced directives and health care proxies, and further research in this area.

VI. SOCIAL POLICY / SOCIAL ISSUES

A. SOCIAL POLICY

1. Book

JURKOWSKI, ELANE T. *POLICY AND PROGRAM PLANNING FOR OLDER ADULTS: REALITIES AND VISIONS*. New York: Springer Publishing Co., 2008. Jurkowski's book, divided into four major parts, provides a comprehensive, practical review of social policies affecting the elderly that is valuable for both individuals new to elderly issues and experienced scholars and practitioners. The first part contains background information on elderly demographics, historical events influencing aging policies, policy paradigms and frameworks, and the development of evidence-based policy. The second and third parts discuss legislation that impacts the elderly and tools for policy development. The final part examines various programs and services, and concludes with a list of the top ten challenges for the future.

2. Articles

BHARUCHA, ASHOK J. & OTHERS. *Ethical Considerations in the Conduct of Electronic Surveillance Research*. 34 JOURNAL OF LAW, MEDICINE & ETHICS 611 (2006). Elder abuse and neglect in nursing homes have prompted the enactment of “granny cam” laws that allow the concerned relatives and other representatives of the residents to install video cameras in the residents’ rooms for monitoring purposes. This article discusses an extension of these laws by a project called CareMedia: Automated Video and Sensor Analysis for Geriatric Care, wherein shared, common areas of nursing homes are recorded for research purposes. The authors explore the ethical issues raised by this project, such as informed consent, privacy, and confidentiality, and the strategies used to address the resultant challenges.

BOOKMAN, ANN & HARRINGTON, MONA. *Family Caregivers: A Shadow Workforce in the Geriatric Health Care System?* 32 JOURNAL OF HEALTH POLITICS, POLICY AND LAW 1005 (2007). This article is based on two years of fieldwork, consisting of observations of health care clinicians and interviews of family caregivers of elderly individuals. Given the tremendous strain on the geriatric health care system, the authors found that these caregivers have increasing roles both inside and outside of facilities, referring to them as case managers, medical record keepers, paramedics, and patient advocates. The authors offer six areas for policy reforms that would better acknowledge, support, and train family caregivers of the elderly.

BRINIG, MARGARET F. *The Public Choice of Driving Competence Regulations*. 21 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 405 (2007). With the growing debate of how to balance the driving privileges of the elderly against the safety of society, Brinig examines the varied state regulations specific to this population and their outcome measures. She further considers why some states have laws designed to maximize the number of elderly drivers and others have followed more private, market-based solutions.

FOY, ANGELA CHAPUT. *Adult Adoption and the Elder Population*. 8 MARQUETTE ELDER’S ADVISOR 109 (2006). Foy describes the definition and process of adult adoption, its differences from child adoption, and how it serves as an option for the elderly. Thereafter, she explains that the common reasons for adult adoptions are to impart inheritance rights, provide beneficiary privileges, and formalize parent-child and other nontraditional relationships. Foy highlights how such

adoptions can otherwise affect the elderly, including altering grandparents' rights and standing. She closes with a warning about the risk of abuses, calling for investigations to ensure both parties have proper intentions.

GREEN, EDITH & OTHERS. *Granny, (Don't) Get Your Gun: Competency Issues in Gun Ownership by Older Adults*. 25 BEHAVIORAL SCIENCES & THE LAW 405 (2007). The authors present data showing that gun ownership is increasing in the elderly population more than any other age group and how some evidence shows violent crimes committed by older adults are also on the rise. Coupled with decreased cognitive and functional abilities, and possibly dementia, gun ownership by the elderly is a serious, hidden issue. The authors offer several recommendations, such as reevaluating firearm licenses more regularly, implementing educational awareness programs about safety concerns, administering "cognitive physicals," mandating reporting of dementia by physicians to licensing bureaus, and conducting further research into firearm possession and violence among the elderly.

HURME, SALLY B. & APPELBAUM, PAUL S. *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*. 38 MCGEORGE LAW REVIEW 931 (2007). In this survey article, Hurme and Appelbaum examine the varied state constitutional provisions, election laws, and guardianship procedures related to the capacity to vote. To protect the fundamental right to vote, they argue against categorical exclusions and advocate specific assessments of understanding the nature and effect of voting. They conclude with a discussion on the Competence Assessment Tool for Voting and an initial test of the tool on persons with Alzheimer's disease, and provide two appendix documents summarizing their results.

KOHN, NINA A. *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*. 38 MCGEORGE LAW REVIEW 1065 (2007). Kohn provides a critical discussion on the voting rights of residents living in long-term care institutions and how some practices burden these rights. By underscoring due process, equal protection, and statutory and policy concerns, she argues against having long-term care institutions serve as gatekeepers in the electoral process. Kohn presents alternative approaches that would both improve ballot access to long-term care residents and protect against voting fraud, including model guidelines for long-term care institutions and a template for state legislation.

- LOONIN, DEANNE & RENUART, ELIZABETH. *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations*. 44 HARVARD JOURNAL ON LEGISLATION 167 (2007). Loonin and Renuart expose the many reasons why the elderly are falling deeper into financial debt, such as predatory lending practices; consumer scams; rising costs of housing, utilities, taxes and health care; shrinking incomes; and insufficient financial programs geared to helping this population. Among the diverse set of recommendations offered to address the challenges of elder debt, the authors suggest reforming credit and lending laws; increasing legal representation resources, education and counseling programs; and repairing safety net measures through income security, expense reduction programs, bankruptcy, and alternative debt repayment options. Because the financial and debt problems of the elderly are multifaceted, the authors recognize the need for wide-ranging and complex solutions.
- MOSES, SARAH. *A Just Society for the Elderly: The Importance of Justice as Participation*. 21 NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY 335 (2007). Noting the increase in human longevity and the number of individuals living in the “third age,” Moses explains the need for a moral vision that encourages social participation of the elderly in order to create a more just society for them. From her perspective as a Christian social ethicist, Moses discusses how the areas of retirement, health care resources, and long-term care can be improved by social justice principles.
- ROTHMAN, MAX B. & DUNLOP, BURTON D. *Elders and the Courts: Judicial Policy for an Aging America*. 18(2) JOURNAL OF AGING & SOCIAL POLICY 31 (2006). The authors examine the philosophy of Therapeutic Jurisprudence and how the principle of participation underlying specialized, problem-solving courts can be used to improve how courts address issues involving the elderly population. They studied seven state trial courts and interviewed judges, court officials, and other related service professionals about how they respond to aging issues. The article provides an analysis of answers to ten questions and concludes with a proposal to create an Elder Court.
- SATEL, SALLY L. & HIPPEN, BENJAMIN E. *When Altruism Is Not Enough: The Worsening Organ Shortage and What it Means for the Elderly*. 15 ELDER LAW JOURNAL 153 (2007). Doctors Satel and Hippen critically analyze the growing organ shortage, specifically kidneys, and its implications for the elderly with discussions on the history of dialysis,

early organ rationing, current allocation and donation practices, and applicable law. In order to increase the supply of kidneys, they advocate a regulated incentive arrangement, whereby monetary compensation would be provided for donations from both deceased and living donors.

B. VICTIMIZATION OF THE ELDERLY

1. Books

BRANDL, BONNIE & OTHERS. *ELDER ABUSE DETECTION AND INTERVENTION: A COLLABORATIVE APPROACH*. New York: Springer Publishing Co., 2007. This book, one in the publisher's series on Ethics, Law, and Aging, is written collectively by clinicians, attorneys, and professionals in abuse prevention and law enforcement fields. It begins with an overview of elder abuse, such as its history, dynamics, identification, and reporting, and the responses from various systems including Adult Protective Services, criminal and civil justice systems, and health care institutions. The authors then critically examine collaborative efforts to address elder abuse, including advantages and challenges. They propose collaborative, multidisciplinary approaches, strategies, policy reforms, and further research to end elder abuse.

HARRIS, DIANA K. & BENSON, MICHAEL L. *MALTREATMENT OF PATIENTS IN NURSING HOMES: THERE IS NO SAFE PLACE*. New York: The Haworth Pastoral Press, 2006. Harris and Benson provide a comprehensive discussion of elder abuse, focusing on incidents and issues specific to the nursing home setting. Their book further contains analysis from the first nationwide study of theft from elderly residents and recommends means to address this type of criminal behavior. The authors offer several suggestions to prevent the various types of elder abuse such as neglect, physical and sexual abuse, psychological mistreatment, and financial exploitation.

NERENBERG, LISA. *ELDER ABUSE PREVENTION: EMERGING TRENDS AND PROMISING STRATEGIES*. New York: Springer Publishing Co., 2008. Nerenberg states that her goal in writing this book is to help make communities safe for the rapidly growing elderly population. She explains eight trends in the practice of elder abuse prevention, controversies in defining elder abuse, various service models, and factors affecting intervention. The society stakeholders and their roles to prevent elder abuse are explored, along with a range of service,

ethical, cost, and cultural challenges. Nerenberg advocates a collaborative plan that includes several disciplines, alliances with all stakeholders, and open communication.

2. Articles

- AARON, RICHARD. *Bankruptcy to Thwart Responsibility for Financial Abuse of the Elderly*. 9 MARQUETTE ELDER'S ADVISOR 299 (2008). Aaron exposes the problems raised by predators who financially abuse the elderly and then avoid responsibility by filing for bankruptcy protection and obtaining discharges of restitution orders. He criticizes the limited discharge exceptions provided by the Bankruptcy Code and the narrow timeframe in which victims must act to prevent such discharges. As elder financial abuse is becoming more frequent, Aaron argues that the possibility of such bankruptcy outs should be considered early on when deciding the best ways to protect victims and ensure full restitution.
- ABRAMSON, BETSY J. & OTHERS. *Isolation as a Domestic Violence Tactic in Later Life Cases: What Attorneys Need to Know*. 3 NATIONAL ACADEMY OF ELDER LAW ATTORNEYS JOURNAL 47 (2007). The authors analyze the various isolation tactics used against the elderly in order to gain and maintain relationship or financial power and control. They present case examples from the National Clearinghouse on Abuse in Later Life to illustrate coercive tactics and show their impacts on the elderly. To overcome isolation, the authors recommend various interventions, including personal, emotional, and housing support, legal assistance, effective Adult Protective Services, and more criminal prosecutions. They urge elder law attorneys to know the legal options to stop isolation and promote safety, how to increase the victim's income, and the process for seeking support orders, legal separations, and divorce.
- BURGESS, ANN W. & OTHERS. *Comparing Routes of Reporting in Elder Sexual Abuse Cases*. 20(4) JOURNAL OF ELDER ABUSE & NEGLECT 336 (2008). To determine the similarities and differences of reporting elder sexual abuse incidences to criminal justice systems versus Adult Protective Services, the researchers studied 284 cases of alleged sexual abuse of individuals age sixty and older. The cases were gathered nationwide and included elder sexual abuse by five groups: (1) strangers or acquaintances, (2) unrelated care providers, (3) family members, (4) spouse or partners, and (5) fellow residents in facilities. Among numerous statistical findings, the authors found relatively equal

numbers of reports to criminal justice systems and Adult Protective Services but differences existed in the victims' residences, the victims' cognitive abilities, the administration of rape exams, the characteristics of the alleged perpetrators, and in the rates of prosecution and convictions. The authors conclude by recommending routine rape exams by well-trained personnel, more prosecutions of abuse, and the inclusion of elder sexual abuse statistics in national crime reporting.

DESMARAIS, SARAH L. & REEVES, KIM A. *Gray, Black, and Blue: The State of Research and Intervention for Intimate Partner Abuse Among Elders*. 25 BEHAVIORAL SCIENCES & THE LAW 377 (2007). The authors explore the overlooked and underreported problem of intimate partner abuse among the elderly. They explain the intervention problems of insufficient screening and assessment tools, obstacles to prosecution, reporting challenges, and services and programs that are not tailored to address elderly intimate partner abuse. They suggest additional research into this specific problem in order to develop better policies and programs to reduce such abuse in the growing elderly population.

DUBBLE, CHRISTOPHER. *A Policy Perspective on Elder Justice Through APS and Law Enforcement Collaboration*. 46 JOURNAL OF GERONTOLOGICAL SOCIAL WORK 35 (2006). Dubble presents a comprehensive analysis of various federal, state, and local policy issues in the area of elder abuse. He examines the history, competing ideologies, politics, economics, and social movements of the policies that encourage collaboration between Adult Protective Services ("APS") and law enforcement. He specifically discusses and favors the Elder Justice Act that was introduced in 2002.

DUNLAP, EMILY E. & OTHERS. *Perceptions of Elder Physical Abuse in the Courtroom: The Influence of Hearsay Witness Testimony*. 19(3-4) JOURNAL OF ELDER ABUSE & NEGLECT 19 (2007). In this study, the researchers investigated how mock jurors are impacted by hearsay witness testimony on behalf of a victim of elder physical abuse. They found allegations of abuse supported by testimony of a forty-five-year-old hearsay witness led to more convictions than the testimony of a seventy-five-year-old hearsay witness. Furthermore, guilty verdicts were found to be higher in female jurors, increased with the age of the jurors, and were more likely from jurors who had been prior victims of abuse themselves.

HARKNESS, DONNA S. *When Over-the-Limit Is Over the Top: Addressing the Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly*. 16 ELDER LAW JOURNAL 1 (2008). Harkness uses a case of an eighty-seven-year-old woman sued by a collection agency for credit card debt to illustrate how predatory lending practices are affecting elderly individuals. She discusses the existing laws that regulate the credit card industry and how the Truth in Lending Act provides inadequate protections for the elderly. She proposes the Act be revised to eliminate excessive late fees, require creditors to mitigate damages, and prohibit the assessment of over-the-limit fees where the consumer has not requested additional credit.

HOFFMAN, DAVID R. *Failing to Care: How Effective Compliance Prevents Institutional Elder Neglect*. 10 MARQUETTE ELDER'S ADVISOR 1 (2008). Hoffman begins his article with a call for a standardized and operational definition of institutional elder neglect. He analyzes the federal and state criminal statutes and civil fraud theories used to fight such neglect, but notes that such remedies are implemented only after harms have already occurred. In order to prevent institutional elder neglect, Hoffman asserts that effective compliance programs need to be implemented, which would include elements of background screening, training, external reporting, monitoring, peer review, investigation, and management oversight.

JAYAWARDENA, K. MAYA & LIAO, SOLOMON. *Elder Abuse at End of Life*. 9 JOURNAL OF PALLIATIVE MEDICINE 127 (2006). Jayawardena and Liao examine studies of physical mistreatment, neglect, and financial exploitation of elderly patients at the end of life in order to determine the best approach to address such abuses. They provide statistics on epidemiology, identify the risk factors for abuse, and discuss assessment and reporting challenges. They found a multidisciplinary team approach is the most effective way to prevent elder abuses and offer three areas for future research.

KINSTLE, TERRI L. & OTHERS. *The Impact of Juror Characteristics and Victim Health Status on the Perception of Elder Physical Abuse*. 23 JOURNAL OF INTERPERSONAL VIOLENCE 1143 (2008). Mock juror perceptions in a case of elder physical abuse were evaluated from a sample of 206 men and women ranging in ages from eighteen to eighty-eight years. The researchers investigated the influence of juror gender and accuser health status (described as healthy, frail, or confused) on conviction rates and believability ratings. As expected, women had higher conviction rates than men. The accuser health

status, juror age, and attitude toward the elderly affected other ratings such as accuser and defendant believability, accuser inaccuracy, and verdict confidence.

LIANG, BRYAN A. *Elder Abuse Detection in Nursing Facilities: Using Paid Clinical Competence to Address the Nation's Shame*. 39 JOURNAL OF HEALTH LAW 527 (2006). Liang acknowledges the dedication of long-term care ombudsman lay volunteers, but notes their low rates of detecting and reporting elder abuse. Thus, he argues for joint collaboration among volunteers and paid clinical case managers who would have expertise in the health care matters and legal issues of elder abuse. Liang suggests policy and legislative reforms in order to meet the priority of elder abuse detection.

MAXFIELD, BRETT D. *Ripping Off Grandma and Grandpa Without Hurting the Banks of America: Allowing the Elderly and Other Easy Prey to Pay for the Crimes of Immoral Individuals and Institutions*. 33 OKLAHOMA CITY UNIVERSITY LAW REVIEW 505 (2008). Maxfield begins this article by detailing his elderly client's story of being a victim of identity theft and immoral collection practices. He discusses how current federal laws regulating credit cards and debt collections do not have specific provisions that apply to the vulnerable population of senior citizens. Periodically drawing on Biblical perspectives, Maxfield recommends that public policies and laws regarding the credit card industry should afford special protections for the elderly.

MORGAN, ETTA & OTHERS. *Public Definitions and Endorsement of the Criminalization of Elder Abuse*. 34 JOURNAL OF CRIMINAL JUSTICE 275 (2006). The researchers engaged in a ten-year longitudinal study of the public's attitudes about the definition of elder abuse and preferred punishments. Data was collected in the years 1986–1987, 1991–1992, and 1996–1997 from adult residents in Tuscaloosa, Alabama who evaluated different types of behaviors as never, sometimes, or always constituting elder abuse. The researchers found participants endorsed a broad definition of elder abuse and their support for criminalizing elder abuse increased over the ten-year period. They recommend further research to determine the perceptions of other stakeholders involved in elder care and opine that community-based programs are needed for the treatment and prevention of elder abuse.

PARKER, JOHNNY. *Company Liability for a Life Insurance Agent's Financial Abuse of an Elderly Client*. 2007 MICHIGAN STATE LAW

REVIEW 683 (2007). Parker describes the reasons why the elderly are so susceptible to life insurance fraud and how widespread the problem is in the United States. He contends that insurance companies should be held liable for their agent's acts of financial elder abuse and discusses four doctrines of employer tort liability that can be utilized: respondeat superior, direct liability, nondelegable duty, and apparent authority.

RABINER, DONNA J. & OTHERS. *Financial Exploitation of Older Persons: Challenges and Opportunities to Identify, Prevent, and Address It in the United States*. 18(2) JOURNAL OF AGING & SOCIAL POLICY 47 (2006). In 2002, RTI International conducted a study to better understand elder financial exploitation and make recommendations for future policies on prevention and remediation. This article summarizes the findings of this study, including the nature and scope of financial exploitation and the challenges and barriers in addressing this type of elder abuse. The recommendations fall into four categories: (1) research, (2) public awareness and education, (3) training and coordination of multidisciplinary professionals, and (4) state legal protections.

RAMSEY-KLAWSNIK, HOLLY & OTHERS. *Sexual Predators Who Target Elders: Findings from the First National Study of Sexual Abuse in Care Facilities*. 20(4) JOURNAL OF ELDER ABUSE & NEGLECT 353 (2008). The authors report on the first national study of 119 alleged sexual predators that targeted elders living in care facilities. Findings include perpetrator characteristics, victim vulnerabilities, types and locations of abusive acts, and the different consequences that perpetrators faced. The authors offer several proposals to prevent elder sexual abuse, such as immediate and comprehensive investigation of suspected abuse and collaboration between civil and criminal investigators.

RIFFE, PAUL. *Mandatory Reporting in Texas for Domestic Violence Against Vulnerable Adults: The Need for Changes in Statutory Enforcement*. 10 SCHOLAR: ST. MARY'S LAW REVIEW OF MINORITY ISSUES 1 (2007). Riffe criticizes the permissive language in Texas statutes that require mandatory reporting of elder abuse and the interchangeable use of the terms "elderly" and "disabled." He argues that such language undermines the enforcement power of the statutes and fails to acknowledge the unique needs of the elderly. Riffe urges for a change in terminology, an elimination of the permissive language, and an expansion of the scope of individuals who are mandatory reporters.

RODRIGUEZ, MICHAEL A. & OTHERS. *Mandatory Reporting of Elder*

Abuse: Between a Rock and a Hard Place. 4 ANNALS OF FAMILY MEDICINE 403 (2006). The purpose of this study was to better comprehend why physicians have such low rates of reporting elder abuse. In-depth interviews of twenty primary care physicians practicing in Los Angeles were transcribed and then analyzed via a grounded theory approach and constant comparative method. Three paradoxes were identified, showing that physicians unconsciously perceived mandatory reporting was related to both increases and decreases in physician-patient rapport, patient quality of life, and physician control to decide the best interests for patients. The authors conclude that physicians need to be better educated about mandatory elder abuse reporting laws and suggest that such training be a requirement for medical licensure.

SCHUYLER, DONNA & LIANG, BRYAN A. *Reconceptualizing Elder Abuse: Treating the Disease of Senior Community Exclusion*. 15 ANNALS OF HEALTH LAW 275 (2006). Schuyler and Liang begin their article with an overview of elder abuse, including the different types, applicable federal and state legislation, civil and criminal remedies, mandatory reporting laws, and the funding of elder abuse programs. They then critically examine two reactive models of providing services to victims: a multidisciplinary team approach and elder abuse centers with or without case managers. What they propose in the alternative is a community-oriented model, where an actual physical location with supporting infrastructure is created for seniors to become active participants, educated and empowered to prevent abuses.

THOMPSON, EDWARD H. & OTHERS. *Gendered Policies and Practices that Increase Older Men's Risk of Elder Mistreatment*. 19(1-2) JOURNAL OF ELDER ABUSE & NEGLECT 129 (2007). The authors discuss how prior studies of elder abuse are focused on the individuals without consideration of gender. Their article reveals how social policies and gendered practices cause men to be more at risk of elder abuse. Some of these policies and practices include the construction of masculinity, doctrine of family privacy, feminization of residential settings, and de facto sexism and rough handling of men by nursing home staff. They opine that the mistreatment of elderly men cannot be prevented effectively until gender issues are taken into account.

TOBEN, BRADLEY J.B. & CORDON, MATTHEW C. *Legislative Stasis: The*

Failures of Legislation and Legislative Proposals Permitting the Use of Electronic Monitoring Devices in Nursing Homes. 59 BAYLOR LAW REVIEW 675 (2007). Toben and Cordon analyze the development of laws in various states that permit electronic monitoring devices in the rooms of nursing home residents, known as “granny cam” laws, and examine legislative efforts that have failed. They explore the issues raised by the use of such devices, including increased lawsuits and insurance rates, staff recruiting and retention challenges, privacy concerns, and the ongoing debate of the effectiveness of electronic monitoring to deter elder abuse and neglect. They call for statistical evaluations on the use of the devices and urge the federal government to provide guidance to the states about how to best implement policies on electronic monitoring.

WHITTON, LINDA S. *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection.* 1 PHOENIX LAW REVIEW 343 (2008). The Uniform Power of Attorney Act (“UPAA”), superseding the Uniform Durable Power of Attorney Act, provides greater guidance to principals, agents, and third persons affected by power of attorney relationships. Whitton, the reporter for the UPAA, explains its provisions as they relate to financial planning and protection of the elderly. The UPAA is intended to prevent three types of financial abuse: (1) transactions that exceed the scope of the agent’s authority, (2) transactions for the agent’s benefit without the principal’s permission to self-deal, and (3) transactions in contravention of the principal’s expectations.

WIGLESWORTH, AILEEN & OTHERS. *Findings from an Elder Abuse Forensic Center.* 46 GERONTOLOGIST 277 (2006). The authors report on an investigation of the country’s first Elder Abuse Forensic Center (“EAFC”) launched in 2003 by the University of California, Irvine’s Program in Geriatrics. Through both quantitative and qualitative methods of using outcome surveys and case studies, they found significantly better efficiency and effectiveness of the EAFC’s collaborative approach in addressing elder abuse. They advocate more creative, victim-centered remedies, in addition to research that assesses the cost effectiveness of the EAFC’s approach.

C. AGED OFFENDERS

1. Articles

- ADAY, RONALD H. & KRABILL, JENNIFER J. *Aging Offenders in the Criminal Justice System*. 7 MARQUETTE ELDER'S ADVISOR 237 (2006). Beginning with statistics showing the growing number of elderly persons in the criminal justice system, the authors discuss the need to consider the issues unique to this group. They critically examine these issues for all stages of the criminal system, starting with the elderly person's first encounter with the police and ending with being released from prison. The authors explain that policies and programs for the elderly are still developing and vary widely among jurisdictions, and conclude with suggestions to effectively handle geriatric issues.
- FAZEL, SEENA & OTHERS. *Elderly Homicide in Chicago: A Research Note*. 25 BEHAVIORAL SCIENCES & THE LAW 629 (2007). Using data from the Chicago Homicide Dataset over a thirty-one-year period, the authors conducted the largest study to date of elderly persons who committed homicide, consisting of 443 individuals that were sixty years and older. Compared to younger offenders, the authors found that elderly perpetrators were more likely to be white and to commit suicide after the homicide. The victims were more likely to be spouses, women, and also over the age of sixty. Routine activity theory is used to explain the relatively low numbers of elderly persons involved in homicides, wherein the elderly are not often involved in activities that put them at risk of being perpetrators or victims of crime.
- FELDMEYER, BEN & STEFFENSMEIER, DARRELL. *Elder Crime: Patterns and Current Trends, 1980–2004*. 29 RESEARCH ON AGING 297 (2007). In order to investigate patterns and trends of elderly persons committing crimes, Feldmeyer and Steffensmeier analyzed arrest statistics from the Federal Bureau of Investigation's *Uniform Crime Reports* from 1980 to 2004. They reviewed data from the elderly group itself and also compared it to younger age groups. Figures and tables are included to support their conclusions that elderly arrest rates have either declined or remained the same, that the small proportion of crime committed by the elderly did not change or decreased in the twenty-five years examined, and that the majority of elder arrests are for minor or alcohol-related offenses.

- GAYDON, L. BETH & MILLER, MONICA K. *Elders in the Justice System: How the System Treats Elders in Trials, During Imprisonment, and on Death Row*. 25 BEHAVIORAL SCIENCES & THE LAW 677 (2007). Gaydon explains the increasing involvement of elders in the criminal justice system as witnesses, victims, civil plaintiffs, defendants, prisoners, and death row inmates. She analyzes how the elderly are treated in each of these positions and the special issues that arise because of their age, such as discrimination at trial, increased health care costs for correctional institutions, and whether the execution of elders is cruel and unusual punishment. Gaydon offers policy recommendations to ensure fairer treatment of the elderly and areas for future research that would enlighten new policies.
- HEISLER, CANDACE J. & BOLTON, QUENTIN D. *Self-Neglect: Implications for Prosecutors*. 18(4) JOURNAL OF ELDER ABUSE & NEGLECT 93 (2006). This article reports on the data of a pilot study conducted by the Consortium for Research in Elder Self-Neglect of Texas. Elderly persons who self-neglect by failing or refusing to attend to their basic needs to the point of threatening their health and safety are having more frequent encounters with the criminal justice system. Heisler and Bolton suggest that legal interventions, such as prosecutors partnering with professionals, local government, and community members, may be required to protect the elderly and their communities from the harms resulting from self-neglect. The authors propose further research to better analyze the link between self-neglect and the prosecution function in order to respond to and prevent this growing problem.
- KERBS, JOHN J. & JOLLEY, JENNIFER M. *Inmate-on-Inmate Victimization Among Older Male Prisoners*. 53 CRIME & DELINQUENCY 187 (2007). In this study of inmate-on-inmate victimization, data was obtained from interviews of male prisoners age fifty and older. Rates of psychological, property, physical, and sexual abuses are presented in tables, along with narrative descriptions (quotes) to provide a greater understanding of each type of victimization. Age-segregated living arrangements are recommended to increase the safety of elderly prisoners, help reduce costs by centralizing health care services for this growing population, and prevent lawsuits of medical neglect and violations of the Americans with Disabilities Act.
- LEWIS, CATHERINE F. & OTHERS. *A Study of Geriatric Forensic Evaluatees: Who Are the Violent Elderly?* 34 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY & THE LAW 324 (2006). The purpose of this research was to assess any differences between violent and nonviolent

elderly forensic evaluatees in an effort to determine primary risk factors for violent charges. The sample consisted of individuals over age sixty who had been referred to a state psychiatric institute for evaluations of criminal responsibility or competency to stand trial. Data was obtained through chart reviews and coding. Analyses showed race, outpatient treatment status, crime location, and paranoia at the time of the alleged offense were all associated with violent charges.

LINDER, JOHN F. & MEYERS, FREDERICK J. *Palliative Care for Prison Inmates "Don't Let Me Die in Prison."* 298 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 894 (2007). Using the case of an inmate suffering from stage IV cancer and disclosures from interviews of the inmate, the prison doctor, and the prison hospice caregiver coordinator, the authors explore the various issues of palliative care in the correctional setting. These issues are especially important with the increasing number of elderly inmates. The authors explain the need for palliative care and challenges to providing such care. Their recommendations for improvements include using telemedicine, recruiting hospice volunteers, developing interdisciplinary teams, and improving physician-patient relationships. A list of resources for correctional hospice information and the organizations' websites are provided in a Web-only supplement.

STOJKOVIC, STAN. *Elderly Prisoners: A Growing and Forgotten Group Within Correctional Systems Vulnerable to Elder Abuse.* 19(3-4) JOURNAL OF ELDER ABUSE & NEGLECT 97 (2007). Stojkovic scrutinizes two specific problems affecting the quality of life of elderly prisoners: (1) health care and (2) reentry into the community. After providing an operational definition of an "elderly" prisoner, he discusses the varied issues and challenges of these two problems. He advocates increased collection of systemic information on elderly prisoners, improved management of chronic illnesses, consideration of age-segregated housing, discussion of early release of nonthreatening elderly prisoners, and tailoring reentry programs for this aging group.

VII. ELDER PRACTICE

A. BOOK

PAMPEL, FRED C. *RIGHTS OF THE ELDERLY.* New York: Facts on File, 2008. Part of the Facts on File Library in a book series, this volume provides an overview of the history of elder rights. Pampel divides the

subject into three parts: (1) an overview, including introduction and background; (2) a guide to further research, with bibliographic and contact information; and (3) an appendix containing reprinted information from several regulatory sources. The author assesses current issues while providing insight into the future of the rights of elders.

B. ARTICLES

DE ST. AUBIN, ED & OTHERS. *Elders and End-of-Life Medical Decisions: Legal Context, Psychological Issues, and Recommendations to Attorneys Serving Seniors*. 7 MARQUETTE ELDER'S ADVISOR 259 (2006). The authors examine the psychological factors associated with end-of-life medical decisionmaking and discuss how psychology and law can influence relations between attorneys and clients. The article reviews the law of self-government and medical decisions and then analyzes the manner in which autonomy and legacy building affect the psychological well-being of the elderly and their perceived quality of life. The authors conclude by providing recommendations for assisting clients in these areas.

HARKNESS, DONNA S. "Whenever Justice Requires": *Examining the Elusive Role of Guardian Ad Litem for Adults with Diminished Capacity*. 8 MARQUETTE ELDER'S ADVISOR 1 (2006). When representing a client with diminished capacity, attorneys might normally appoint an attorney-in-fact or petition for appointment of a guardian or conservator for the client. Another alternative is the appointment of a guardian ad litem, which Harkness discusses in this article. She concludes that guardian ad litem appointment laws lack guidance, standards, and protections for the elder litigant; in light of the importance of the role, these deficiencies must be addressed.

HURME, SALLY B. *Crossing State Lines: Issues and Solutions in Interstate Guardianships*. 37 STETSON LAW REVIEW 87 (2007). As elderly Americans increase in number and change residence more frequently than ever before, the necessity for interstate guardianships grows. This article discusses the resulting challenges, such as where guardianship petitions should be filed, the extent of out-of-state authority, and problems with monitoring and effectuating transfers. Hurme concludes that uniform interstate law is necessary to address these issues, and she suggests several elements that should be included in such a law.

- MORGAN, REBECCA C. *Elder Law in the United States: The Intersection of the Practice and Demographics*. 2 JOURNAL OF INTERNATIONAL AGING, LAW & POLICY 103 (2007). In this article Morgan first analyzes the demographics of America both currently and in the near future, when more Americans will begin to age. She then explains the inception and development of elder law in the United States, examining laws specific to elder practice. In conclusion, she explores the futures of elder practice and of elder law in legal education.
- RUSTAD, MICHAEL L. *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*. 14 ELDER LAW JOURNAL 331 (2006). Recent proposals have suggested a \$250,000 cap on noneconomic damages awarded in medical malpractice lawsuits. Rustad examines evidence from states that have adopted similar laws and concludes that such caps produce a disparate effect on elderly residents of nursing homes because of the common lack of meaningful economic damages among such claimants. He also contends that arbitrary caps would eliminate incentives for attorneys to accept meritorious lawsuits on behalf of nursing home residents.
- SISSON, PETER C. *Life Care Planning: The Comprehensive Elder Law Approach to Planning for the Chronic Care Needs of Seniors*. 44 IDAHO LAW REVIEW 481 (2008). The Deficit Reduction Act of 2005 limits the asset preservation choices available for elders facing the costs of long-term care. In this article, Sisson analyzes the remaining options available for elder law attorneys assisting clients. He discusses the role of care coordinators in elder law practice and outlines major issues on which attorneys should focus. He concludes that by approaching planning in an elder-centered manner, attorneys can meet clients' needs and still accomplish asset protection goals.

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