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BIBLIOGRAPHY

GERONTOLOGY AND THE LAW: A SELECTED ANNOTATED BIBLIOGRAPHY: 2009–2011 UPDATE

COMPILED BY

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I. INTRODUCTION

This bibliography serves as the 2009–2011 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 nine times between 1982 and 2010 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 briefly describing the source after each citation.

For this update, the bibliographers chose a selection of scholarly books and articles discussing legal issues related to gerontology, aging, and

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, JESSICA. *Gerontology and the Law: A Selected Annotated Bibliography: 2002–2005 Update*. 80 SOUTHERN CALIFORNIA LAW REVIEW 1077 (2007); DAVIS, JUDY & OTHERS. *Gerontology and the Law: A Selected Annotated Bibliography: 2006–2008 Update*. 84 SOUTHERN CALIFORNIA LAW REVIEW 251 (2010).

the elderly in the United States published between the years 2009–2011. 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 2009–2011 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 are included if they were published between 2009–2011; 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 February 2013 to April 2013:

- Ageline (produced by the American Association of Retired Person; searched via OvidSP or EBSCO)
- Journals and Law Reviews (Westlaw Classic database)
- Legal Resource Index (produced by the Information Access Company; searched via Westlaw Classic)
- 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 the 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

FROLIK, LAWRENCE A. & WHITTON, LINDA S. EVERYDAY LAW FOR SENIORS. Boulder, CO: Paradigm Publishers, 2010. This book focuses on everyday law for the aging population. The authors identify the

group they call “seniors” and discuss issues such as population trends, vulnerability, support, and values. Other broad issues discussed include age discrimination, Social Security, retirement benefits, Medicare, Medicaid, and long-term care. Housing, capacity issues, and elder abuse are also explored.

HEGLAND, KENNEY F. & FLEMING, ROBERT B. *NEW TIMES, NEW CHALLENGES: LAW AND ADVICE FOR SAVVY SENIORS AND THEIR FAMILIES*. Durham, NC: Carolina Academic Press, 2010. Hegland and Fleming cover a wide range of legal issues that affect the elderly. Many issues related to financing retirement are discussed including Social Security, pensions, housing, Medicare, and long-term care. The authors also include chapters on elder abuse, age discrimination, appropriate legal documents to protect health and financial assets, and end-of-life issues.

HUDSON, ROBERT B., ED. *THE NEW POLITICS OF OLD AGE POLICY*, 2ND ED. Baltimore, MD: Johns Hopkins University Press, 2010. This book discusses a multitude of issues related to the policies and politics of aging. Organized into three main sections, the book takes the reader through theoretical perspectives on aging policy, the standing of persons considered aged or aging, and specific aging policies, like Social Security, Medicare, and Medicaid, for instance, including trends and prospects.

NILES-YOKUM, KELLY & WAGNER, DONNA L. *THE AGING NETWORKS: A GUIDE TO PROGRAMS AND SERVICES*, 7TH ED. New York, NY: Springer, 2011. The authors of this book provide an overview of the networks and services available to the aging American population. They discuss many topics related to aging including the Older Americans Act legislation, retirement and income, such as Social Security and pensions, health care including Medicare and Medicaid, housing, transportation, and the rights of the elderly.

O'REILLY, JAMES T. *HOW TO PROTECT ELDERS FROM HARM*. New York, NY: Oceana, 2009. O'Reilly provides that there are remedies for elderly Americans in our legal system, but they are not easy to obtain. He offers this book as a guide to those seeking to navigate these complex judicial and regulatory systems. He discusses many different types of “harms” including home injury, traffic related harms, hospital harms, risks in nursing homes, elder abuse, and financial harms. Case studies and strategy considerations are also included.

ROGNE, LEAH & OTHERS, EDS. *SOCIAL INSURANCE AND SOCIAL JUSTICE: SOCIAL SECURITY, MEDICARE, AND THE CAMPAIGN AGAINST ENTITLEMENTS*. New York, NY: Springer, 2009. The editors of this book bring together scholars to discuss U.S. social insurance programs. They write on the history, background, and politics of Social Security and Medicare, how these programs have supported Americans through the years, the possibilities of reform, and teaching social insurance as part of U.S. history.

WISE, DAVID A, ED. *RESEARCH FINDINGS IN THE ECONOMICS OF AGING*. Chicago, IL: University of Chicago Press, 2010. This book continues an ongoing series by the National Bureau of Economic Research (NBER) on the "Economics of Aging." This collection of NBER studies looks at a number of topics related to aging including work, retirement, disability, and education. The editor also brings together studies on the economics of health care, retirement saving, Social Security, and Medicare.

III. INCOME MAINTENANCE AND FINANCIAL / RETIREMENT PLANNING

A. GENERAL WORKS / MISCELLANY (INCLUDING PRIVATE PENSIONS)

1. Books

BERTOCCHI, MARIDA & OTHERS. *OPTIMIZING THE AGING, RETIREMENT, AND PENSIONS DILEMMA*. Hoboken, NJ: John Wiley & Sons, 2010. This book is intended as a tool for financial education on retirement issues. It examines retirement income issues such as Social Security, pensions, and private savings and looks at the current economic crisis. Additionally, both U.S. and European issues are explored and a number of financial models are analyzed.

GUSTMAN, ALAN L. & OTHERS. *PENSIONS IN THE HEALTH AND RETIREMENT STUDY*. Cambridge, MA: Harvard University Press, 2010. The Health and Retirement Study (HRS), which started in 1992, is a study of households that have at least one person who was born from 1931 to 1953 and provides data on a number of topics related to the aging population. The authors of this book use the HRS to study and analyze pensions and their role in retirement income. They look at the major features of pensions, how the value of pensions influences retirement decisions, how well people understand pensions, and the effect of economic crises on pensions, among other topics.

TURNER, JOHN A. *PENSION POLICY: THE SEARCH FOR BETTER SOLUTIONS*. Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2010. There are a number of issues that affect retirement income security. We have seen a shift from defined benefit plans to defined contribution plans. Defined contribution plans are less understood by the American worker and often these employees make poor financial decisions such as not opting into the plan or selecting the wrong types of investments when they do opt in. Defined benefit plans also have problems. Those that participate in defined benefit plans lack portability when they move from employer to employer. Turner discusses the concept that pensions were meant to provide retirement income security. He examines private-sector pension plans and attempts to come up with better solutions for private pensions.

WIEDENBECK, PETER J. *ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW*. New York, NY: Oxford University Press, 2010. The author provides an overview of the Employee Retirement Income Security Act (ERISA) including ERISA's coverage, conduct controls—like disclosure and fiduciary obligations—for welfare and pension plans, and enforcement. Retirement savings and health care are also discussed.

2. Articles

BLAHOUS, CHARLES. *The Private-Sector Pension Predicament*. 170 *POLICY REVIEW* 15 (2011–2012). While much attention as of late has been paid to public pension shortfalls, relatively less attention has been given to private sector pensions and the possibility that they are also underfunded. The Pension Benefit Guaranty Corporation, which governs private pensions, estimates a \$23 billion shortfall for private pensions with another \$170 billion in possible plan terminations. This article discusses the policy decision that lawmakers will need to make regarding whether public sector pensions should only be employer-sponsored or whether the government should step in when there is a failure to pay plan benefits. In other words, the policy question is should state and federal governments bail out private pension plans if necessary.

BUDDE, STEVEN A. *Empty Promises: Can the Welfare Benefits of Current Retirees Be Saved?* 17 *ELDER LAW JOURNAL* 309 (2009). Budde looks at retiree health insurance benefits sponsored by employers and concerns that these promised benefits will not actually be available to current retirees due to economic conditions. ERISA provides three

possible legal theories for denial of benefits. Those legal theories are contracted benefits have vested, breach of fiduciary duty, and estoppel. However, Budde believes that these theories do not provide real world remedies and that changes are necessary. Several proposals are offered to ensure protection to retirees.

BUTRICA, BARBARA A. & OTHERS. *What the 2008 Stock Market Crash Means for Retirement Security*. 22 JOURNAL OF AGING & SOCIAL POLICY 339 (2010). The stock market crash that began in 2007 lost trillions of dollars in retirement assets. This is a large problem given the move away from traditional pensions to 401(k)-type retirement plans that are heavily invested in the stock market. The authors determine that these defined contribution plans put near retirees at greater risk because they will have less time to recover assets lost in the stock market crash. Mid-career workers will fare better as they have lower balances in their retirement accounts and have more time to recover any lost assets. High-income workers are also expected to be more affected by stock market fluctuations than low-income workers as they have more assets in retirement accounts. The authors also look at how market fluctuations affect retirement savings based on a number of different groups including groups based on sex, marital status, race / ethnicity, and education.

CAMPBELL, JOHN L. & OTHERS. *Equity Valuation Effects of the Pension Protection Act of 2006*. 27 CONTEMPORARY ACCOUNTING RESEARCH 469 (2010). Highlighting the United Airlines pension default in 2005 and the Pension Benefit Guaranty Corporation's inability to protect pensions, this article discusses the Pension Protection Act of 2006 (PPA). The PPA requires pensions to be fully funded within seven years rather than the previously required 90 percent over thirty years. Focusing on the PPA, the authors explore the equity valuation effects of the law using a multivariate model.

FROLIK, LAWRENCE A. *Protecting Our Aging Retirees: Converting 401(k) Accounts into Federally Guaranteed Lifetime Annuities*. 47 SAN DIEGO LAW REVIEW 277 (2010). Frolik argues that 401(k) accounts are facing an impending failure, which is causing retirees to face financial disaster. He argues that retirees will see a rise in the inability to properly manage their 401(k) accounts as they age and face physical and mental decline and the answer to these problems is federally guaranteed lifetime annuities.

- GENTRY, WILLIAM M. & ROTHSCHILD, CASEY G. *Enhancing Retirement Security Through the Tax Code: The Efficacy of Tax-Based Subsidies in Life Annuity Markets*. 9 JOURNAL OF PENSION ECONOMICS & FINANCE 185 (2010). The authors of this article suggest that current annuity markets and the trend away from traditional pensions may leave many retirees with insufficient retirement funds. They propose changes in the tax code that may incentivize Americans into more retirement savings, or to “encourage annuitization.” Through an analysis, they determine that tax-exemption based policies could potentially increase savings by tens of thousands of dollars for each retiree. However, tax credits may work better.
- HACKER, JACOB S. *Restoring Retirement Security: The Market Crisis, The “Great Risk Shift,” and the Challenge for Our Nation*. 19 ELDER LAW JOURNAL 1 (2011). Hacker discusses how retirement and health care security for aging Americans, already in decline prior to the recent recession, are being exacerbated by the economic climate. He explores how people are less able to rely on pensions, one of the prongs of the “three-legged stool” that Americans have largely relied on for retirement security. Furthermore, the author examines health care and the role it plays in retirement planning. He provides reforms that will restore retirement income security and address rising health care costs.
- MITCHELL, OLIVIA S. *Retirement Risk Management in Times of Turmoil*. 17 ELDER LAW JOURNAL 439 (2010). The author of this article notes that fully understanding retirement risks is of growing importance as more and more people become responsible for planning for their own retirement. She identifies and discusses four types of risks: individual, institutional, national, and global. And, Mitchell provides advice on mitigating those risks.
- ROSENBURGH, MARTIN & SPIELER, ANDREW C. *21st Century Pensions: The Risk, the Hedge and the Duty to Consider*. 8 JOURNAL OF INTERNATIONAL BUSINESS & LAW 45 (2009). This article discusses how defined benefit plans have gone from fully funded to operating at a deficit level in the United States. The authors note that this is particularly troublesome given that this has occurred in one of the more highly regulated countries in the world given the legal and regulatory framework provided by ERISA. ERISA’s “prudent man standard of care” and enforcement of fiduciary duties are discussed, as well as whether there were safeguards that could have been taken and who should have done so.

STAUB, CLARE. *Fiduciary Liability Issues in ERISA Pension Plan Terminations*. 11 HOUSTON BUSINESS & TAX LAW JOURNAL 427 (2011). Given the current economic crisis, many employer defined benefit plans are being terminated or are in distress. This article discusses the full range of issues surrounding the termination of single-employer defined benefit plans and duties under ERISA. Claims that plan participants might have against the employer are also explored.

STROUD, MARVIN H. “*Don’t Put Your Eggs in One Basket*”: *Reforming 401(k) Pensions to Address the Educational and Psychological Issues That Drive Good Employees to Make Bad Investment Decisions*. 41 MCGEORGE LAW REVIEW 437 (2010). The financial services sector has seen a major decline since 2008 leading many to call for pension plan reforms to ensure retirement security for Americans. While ERISA protects employees from losing their jobs and their pensions, the fact that employees can still invest in their company’s stock in their pension plans is an important concern. In looking at this issue, the author reviews the history of pensions, the laws that govern pensions and retirement plans, and the different types of pension and retirement plans. Problems with 401(k) plans are discussed from both the employee and employer viewpoint. Two changes to the portion of the Internal Revenue Code that deals with 401(k) plans are proposed to protect employee retirement investments.

TRIGG, ANDREW B. & LOWE, JONQUIL T. *Comparing Pension Systems in the Circular Flow of Income*. 70 AMERICAN JOURNAL OF ECONOMICS & SOCIOLOGY 1248 (2011). The authors provide that public pension programs appear to be unsustainable over the time given declining longevity and fertility. Many believe that private pension programs are the solution to the problem. These systems are compared using the “circular flow of income as an organizing framework.” According to the authors, the circular flow of income examines the “flow of wages from firms to households and the flow of consumption from households to firms.” The authors, in discussing private pensions, explore several disadvantages.

B. SOCIAL SECURITY / PUBLIC PENSIONS

1. Books

ASEN, ROBERT. *INVOKING THE INVISIBLE HAND: SOCIAL SECURITY AND THE PRIVATIZATION DEBATES*. East Lansing, MI: Michigan State

University Press, 2009. The author of this work looks at the Social Security debates that occurred from 1995 to 2005, including the privatization debates of President George W. Bush's administration. The author argues that these debates destabilized Social Security as an insurance-based system with a push toward a market-based system instead.

BROWN, JEFFREY R. & OTHERS, EDS. *SOCIAL SECURITY POLICY IN A CHANGING ENVIRONMENT*. Chicago, IL: University of Chicago Press, 2009. The editors bring together research studies on Social Security conducted through the Center for Retirement Research at the National Bureau of Economic Research. In examining Social Security, these studies also explore personal retirement plans, in particular the move from defined benefit plans to defined contribution plans, and health care costs as they have an effect on Social Security. Studies in this work include reform approaches to Social Security, individual savings behavior, the market risk those that invest in personal retirement accounts face, trends in retirement asset flows and the effects on markets, and mortality rates as affected by trends in health care.

GOKHALE, JAGADEESH. *SOCIAL SECURITY: A FRESH LOOK AT POLICY ALTERNATIVES*. Chicago, IL: University of Chicago Press, 2010. Gokhale discusses issues in financing Social Security by specifically looking at demographic issues such as mortality rate, gender, race, age, education, and marital status. He also looks at issues surrounding Social Security reform proposals. In particular, Gokhale examines several liberal, centrist, and conservative proposals for Social Security reform.

GRAHAM, JED. *A WELL-TAILORED SAFETY NET: THE ONLY FAIR AND SENSIBLE WAY TO SAVE SOCIAL SECURITY*. Santa Barbara, CA: Praeger, 2010. The author summarizes his plan to reform and save Social Security. The book lays out aspects of that plan including old-age risk-sharing, raising the earliest retirement age, phased-in benefit eligibility, taxing employer-provided health coverage, and delayed retirement accounts, among other ideas.

MITCHELL, OLIVIA S. & ANDERSON, GARY, EDS. *THE FUTURE OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS*. New York, NY: Oxford University Press, 2009. This book discusses public employee retirement plans including benefits / costs and trends given economic and demographic issues. Financial aspects of public pensions, the political economy of the management of public pensions, and an

international comparison of public pensions in the United States, Japan, Canada, and Germany are also discussed.

TURNER, JOHN A. *LONGEVITY POLICY: FACING UP TO LONGEVITY ISSUES AFFECTING SOCIAL SECURITY, PENSIONS, AND OLDER WORKERS*. Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2011. The author, the director of the Pension Policy Center, writes about the policy responses to aging and longevity issues in this book. He takes readers through the labor market for older workers, Social Security policy, how longevity affects private pension policy, and concludes with recommendations.

2. Articles

AARON, HENRY J. *Social Security Reconsidered*. 64 NATIONAL TAX JOURNAL 385 (2011). The Social Security program provides older Americans with a base income that has served our country well. Over 60 percent of Americans rely on Social Security for most if not all of their retirement income. Furthermore, Social Security is the most popular government program. Yet, there are issues regarding Social Security's solvency that must be addressed. The author of this article explores three of these issues: the projected Social Security funding gap, federal budget deficits threatening the stability of the federal government, and continued disagreement on the structure and purpose of Social Security.

BURNS, DEBRA BRUBAKER. *Too Big To Fail and Too Big to Pay: States, Their Public-Pension Bills, and the Constitution*. 39 HASTINGS CONSTITUTIONAL LAW QUARTERLY 253 (2011). For a number of reasons, the recent recession has focused attention on the real possibility that states will default on their public pension obligations. The author reviews the history and current status of state public pensions and examines the legality of states defaulting or repudiating pension obligations while also proposing two possible solutions to their continually expanding liabilities. She looks at court treatment of pension obligations, specifically exploring Contract Clause claims, and proposes a federal bailout for state public pensions. She also looks at what she calls a more radical solution, Congress instituting bankruptcy for states under a similar scheme to that used in Chapter 9 of the Bankruptcy Code.

DILLEY, PATRICIA E. *Through the Doughnut Hole: Reimagining the Social Security Contribution and Benefit Base Limit*. 62 ADMINISTRATIVE LAW REVIEW 367 (2010). This article discusses the wage base limit

nature of the Federal Insurance Contributions Act tax, otherwise known as the Social Security payroll tax, and that this tax cap seems to be unfair in that tax payers with more income pay the same as those tax payers at the wage base. While this has meant a more stable tax base for Social Security, there are still funding issues that will cause the Social Security program to eventually run out of money to pay beneficiaries. The author states that part of the problem is that many Americans consider Social Security theirs because they paid into it. She argues that this view of Social Security is wrong. In so deciding, she reviews the history of the Social Security program, why the contribution and benefit base was selected, and uses the Medicare Part D prescription gap (otherwise known as the doughnut hole) to analyze possible alternatives.

ELLMAN, JEFFREY B. & MERRETT, DANIEL J. *Pensions and Chapter 9: Can Municipalities Use Bankruptcy to Solve Their Pension Woes?* 27 EMORY BANKRUPTCY DEVELOPMENTS JOURNAL 365 (2011). With the current economic climate, governments are finding it increasingly difficult to keep the public pension promises they made to public sector employees. Funding levels of public pension plans have dropped dramatically over the last several years leaving public employees in fear that their pensions will not be available when they retire. This article considers the use of Chapter 9 of the Bankruptcy Code to gain relief from pension liabilities. While Chapter 9 is not available to municipalities in states that have opted out of it, it may be an alternative option for cities in states that have not opted out. The author cautions, however, that this is a largely untested method and there is little authority to suggest that it is a viable alternative method.

FORMAN, JONATHAN BARRY. *Funding Public Pension Plans*. 42 JOHN MARSHALL LAW REVIEW 837 (2009). As opposed to private pension plans, public pensions have fewer minimum funding regulations and the accounting standards used to calculate valuation can vary dramatically. The stock market crash and government budgeting issues are causing a good deal of concern over public pension funding and public sector employees should be concerned. This article provides background on the operation and funding of public pensions and discusses financial, accounting, and legal issues that currently affect pension funding. The article concludes by looking at methods for ensuring public employee retirement benefits. This article is included as part of an Employee Benefits Law symposium.

GHILARDUCCI, TERESA. *How to Supplement Social Security Fairly and Effectively*. 22 JOURNAL OF AGING & SOCIAL POLICY 222 (2010). Retirees cannot rely on Social Security benefits alone for retirement income and therefore must turn to alternative retirement programs like 401(k) accounts. Ghilarducci argues that 401(k)s are a failure and envisions guaranteed retirement accounts as an alternative to supplement Social Security. Guaranteed retirement accounts are accounts that would make money paid into them inaccessible until retirement but would provide a specific rate of return guaranteed by the government. The author's plan is compared to other proposals for increasing retirement income.

HECK, HANNAH. *Solving Insolvent Public Pensions: The Limitations of the Current Bankruptcy Option*. 28 EMORY BANKRUPTCY DEVELOPMENTS JOURNAL 89 (2011). The author takes a look at Chapter 9 bankruptcy as an option for municipalities in avoiding public pension payments. She reviews the current economic status that led municipalities to consider Chapter 9 as an option, reviews municipal bankruptcy law, and provides a legal framework for managing pension obligations. Additionally, Chapter 9 and Chapter 11 bankruptcy are compared and contrasted to explore possible options for municipalities. Recommendations are offered to change current law so that municipalities will be better able to manage pension obligations in the future.

KASPAR, DANIEL J. *Defined Benefits, Undefined Costs: Moving Toward a More Transparent Accounting of State Public Employee Pension Plans*. 3 WILLIAM & MARY POLICY REVIEW 129 (2011). Kaspar discusses the challenges in valuing public pension plans arguing that a lack of information presents policy challenges. He provides that lack of uniformity has been a drawback to the Public Employee Pension Transparency Act and the Government Accounting Standards Board and proposes the Uniform Pension Valuation and Reporting Act as a solution.

MONAHAN, AMY B. *Public Pension Plan Reform: The Legal Framework*. 5 EDUCATION FINANCE & POLICY 617 (2010). There is significant concern about the costs of public pension plans and how they affect state budgets. These concerns are causing a great deal of interest in reforming public pensions, particularly for current plan participants. The author provides an overview of the legal approaches taken by states to modify public pensions and provides an analysis of the legal limitations of such modifications. She concludes by proposing

contractual protection of accrued benefits, which she feels will be more readily understood by the parties involved and will protect participant interests in the pension while also allowing the employer flexibility in responding to changing economic conditions.

RAUH, JOSHUA D. *Are State Public Pensions Sustainable? Why the Federal Government Should Worry About State Pension Liabilities*. 63 NATIONAL TAX JOURNAL 585 (2010). This article examines state public pension liabilities and assets noting that if obligations remain the same many states will simply not have enough money to pay pension obligations in a 10–20 year time frame. The author provides that the federal government will have to consider a bailout of state public pensions if states become insolvent.

REINKE, GAVIN. *When a Promise Isn't a Promise: Public Employers' Ability to Alter Pension Plans of Retired Employees*. 64 VANDERBILT LAW REVIEW 1673 (2011). The recession had a tremendous effect on state public pension funding, so much so that some states may not be able to meet their pension obligations as early as 2020. While most states are reducing the pension benefits of future employees, four states have taken the step to reduce the pensions of retired employees who are already receiving pension payments. The author analyzes the alteration of public pension benefits to retired employees under the Constitution. In particular, constitutionality under substantive due process, the Takings Clause, and the Contracts Clause is examined. He also offers a potential solution, minimum state public pension funding legislation similar to the Employee Retirement Income Security Act for private plans, which would ensure solvency of public pension funds.

SECUNDA, PAUL M. *Constitutional Contracts Clause Challenges in Public Pension Litigation*. 28 HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL 263 (2011). In the current economic climate, states are looking to cut back on public employee pensions to balance the budget. This article examines whether states can alter pension promises by looking at challenges to contract rights under the federal and state constitutions. The author covers an overview and comparison of public pensions and private retirement plans, explores the status of public pension funding, discusses pension litigation, and offers a framework for possible Contracts Clause legal challenges.

SORRENTINO, KRYSTAL L. *The Social Security Caste System and the Family Benefit: Whose Family Is It Really Benefiting?* 24 QUINNIPIAC

PROBATE LAW JOURNAL 137 (2011). Social Security retirement and survivor benefits are administered by the Social Security Administration in a manner that favors married heterosexual couples. The author argues this is an antiquated system that creates castes of Social Security beneficiaries with single-income, married couples at the top of the list. The author notes that this system does not reflect modern family structures disadvantaging many. She does offer proposals for remedying these deficiencies in the future.

TEMPLIN, BENJAMIN A. *Social Security Reform: Should the Retirement Age Be Increased?* 89 OREGON LAW REVIEW 1179 (2011). Templin states that 2010 was the first year that Social Security taxes did not cover Social Security benefits. There are a multitude of reasons that the situation will continue to get worse. One possible partial solution that has been offered numerous times is raising the minimum retirement age. The author reexamines this argument by looking at longevity studies and poverty rates, among other types of data. The Social Security funding crisis and the history of the retirement age issue are reviewed. Additionally, Templin analyzes the advantages and disadvantages of raising the retirement age and whether it would really affect Social Security's solvency. He concludes with policy recommendations.

WILSON, MICHAEL R. *The Policymaker's Handbook to Entitlement Reform: A New Approach to Saving Our Seniors*. 18 ELDER LAW JOURNAL 159 (2010). Both Social Security and Medicare face future funding problems due to the number of anticipated beneficiaries for both programs. The author offers four steps to address these problems that face retired persons: combine Medicare and Social Security into one account that the author calls a "Senior Assistance Personal Retirement Account," at least partial individual account investment in private markets, a federal choice of law statute that would increase competition and decrease costs, and finally assurances that the intent behind the Social Security and Medicare safety nets be maintained.

IV. AGE DISCRIMINATION

A. AGE DISCRIMINATION, GENERALLY

1. Book

WIENER, RICHARD L. & WILLBORN, STEVEN L. *DISABILITY AND AGING DISCRIMINATION: PERSPECTIVES IN LAW AND PSYCHOLOGY*. New

York, NY: Springer, 2011. This collection of essays presents research in the areas of aging employees and the negative attitudes toward them, especially toward those who also have disabilities. The book uses Social Analytic Jurisprudence to test legal theories about behavior. It also highlights debates and areas in age-discrimination and disability law where information is lacking. The authors present the history of age and disability discrimination, along with current context. They address medical issues, along with psychosocial concepts, so that legal and workplace policy can provide a better environment for older and disabled employees.

2. Articles

FRANCIS, LESLIE PICKERING & SILVERS, ANITA. *Bringing Age Discrimination and Disability Discrimination Together: Too Few Intersections, Too Many Interstices*. 11 MARQUETTE ELDER'S ADVISOR 139 (2009–2010). U.S. jurisprudence has tended to give different treatment to discrimination based on different biological qualities such as skin color, sex, sentience, or physical impairments. Particularly, discrimination based on age has been tolerated to some extent based on the theory that the aged have already had their fair shot at life. This article challenges the view that discrimination based on age and discrimination based on disability are so different that they deserve different treatment under the law. The authors use several examples from housing policy, access to public services, and other areas to illustrate the point that the law has misapplied the concept of "meaningful access."

NOLAN, LAURENCE C. *Dimensions of Aging and Belonging for the Older Person and the Effects of Ageism*. 25 BYU JOURNAL OF PUBLIC LAW 317 (2011). All humans need to belong, in the sense that they are part of a group and not isolated from others. This article focuses on two aspects of aging and belonging. The author first examines the concept that having a sense of belonging is important to aging well. He then looks at that idea in the context of health care. He contends that when ageism interferes with the delivery of health care, older people feel like outsiders and do not age well. The article outlines the evolution of ageism in the U.S., analyzes it from a health care perspective and offers approaches to eliminate ageism.

SCHUCK, PETER H. *The Golden Age of Aging, and Its Discontents*. 18 ELDER LAW JOURNAL 25 (2010–2011). Today's older Americans receive more benefits than at any time in the past. A large part of

government spending goes toward programs that benefit seniors, such as Medicare and Medicaid. The author contends that much of the current spending is inefficient and ineffective. This article states that the U.S. needs to make medical care more efficient for seniors, even if that entails rationing of certain care and procedures. He argues for the use of quality-adjusted-life-years to determine what procedures patients are able to receive.

WILLIAMS, PHOEBE W. *Age Discrimination in the Delivery of Health Care Services to Our Elders*. 11 MARQUETTE ELDER'S ADVISOR 1 (2009–2010). Physicians sometimes refuse to provide treatment to patients based on their age. For example, a patient in his 90s diagnosed with cancer might have difficulty finding a provider who would offer him anything other than hospice care. This article addresses such age discrimination. The author reviews examples of age discrimination in medicine and clarifies the concept of ageism. She then analyzes the Age Discrimination Act of 1975, which purports to prohibit health care age discrimination, and determines that so far it has not really addressed the type of medical ageism described in this article. Finally, she takes theories used for demonstrating unlawful discrimination in employment and applies them to the medical context. She concludes with suggestions and recommendations for alleviating the problem.

B. AGE DISCRIMINATION IN EMPLOYMENT

1. Articles

JOHNSON, JUDITH J. *Reasonable Factors Other Than Age: The Emerging Specter of Ageist Stereotypes*. 33 SEATTLE UNIVERSITY LAW REVIEW 49 (2009). The ADEA allows employers to offer the defense that their actions were based on reasonable factors other than age. Courts, however, have been allowing employers to use defenses that correlate so strongly with age, such as greater seniority, higher health care costs and retirement status, that the defenses risk being used as thin veils for discrimination. The author contends that the Court should interpret the “reasonable factor other than age” defense as requiring employers to justify adverse actions that use criteria strongly related to age.

KATZ, MARTIN J. *Gross Disunity*. 114 PENN STATE LAW REVIEW 857 (2010). The Supreme Court has historically interpreted different employment discrimination statutes that use identical language as imposing identical requirements. This has led to similar requirements under statutes like the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act of 1964. In recent years,

the Court has begun moving away from uniformity, and finally, in 2009, the Court completely abandoned that ideal in *Gross v. FBL Financial Services*. This article contends that the Court's rejection of unification presents several problems, such as inconsistent assumptions about legislative intent and a flawed definition of discrimination. The author closes by calling upon Congress to intervene and apply a consistent definition to all disparate treatment statutes.

NEUMARK, DAVID. *The Age Discrimination in Employment Act and the Challenge of Population Aging*. 31 RESEARCH ON AGING 41 (2009). The population aging that will face the U.S. economy in coming years will pose a particular challenge in the area of age discrimination. In this article, the author reviews the ADEA and evaluates its success at accomplishing what it set out to do. He addresses changes to the population and economy in the coming years, and forecasts how well-equipped the ADEA is to operate effectively in the new environment. Finally, he makes recommendations for policies and enforcement to make the ADEA more useful and possibly alleviate some of the negative consequences of population aging.

PASHLER, CHRISTOPHER E. & LAMBERT, BRIAN C. *At the Crossroads of Age and Disability: Can Practitioners Rely on the Amended ADA and the ADEA to Provide Adequate Recourse for the Older Disabled Individual?* 10 MARQUETTE ELDER'S ADVISOR 183 (2008–2009). Often, age and disability are not distinct categories; thus more than one basis may be invoked to more effectively advocate for an individual's rights. The Americans with Disabilities Amendments Act of 2008 (ADAAA) changed the ADA and could broaden its scope. This article examines the potential impact of the ADAAA on disabled individuals who bring age-related ADA claims. It outlines strategic considerations in bringing similar claims under the ADEA and considers possible obstacles the ADEA presents. The authors analyze courts' treatment of impairments such as arthritis, vision loss, and heart disease. They conclude by discussing whether the lack of instruction as to what constitutes a reasonable accommodation under the ADA or ADAAA will negatively impact older disabled people.

TRACEY, ANN MARIE. *Still Crazy After All These Years? The ADEA, the Roberts Court, and Reclaiming Age Discrimination as Differential Treatment*. 46 AMERICAN BUSINESS LAW JOURNAL 607 (2009). Although the ADEA is old enough that if it were a person, it would be a Baby Boomer, it is still as confusing, convoluted, and problematic as it ever was. It has not evolved gracefully like similar statutes such as Title VII. Some of its protections are practically meaningless, and the requirements for non-retaliatory claims are confusing, for example. If

the ADEA is ever going to be useful and straightforward, it will require a better theory of discrimination. In this article, the author provides an analysis of the statute that addresses the jurisprudence, legislative intent, and other considerations that warrant overhauling the ADEA's approach to discrimination.

WOOD, STEPHEN G. & OTHERS. *The American Experience with Age Discrimination Through the Lens of Nine Supreme Court Cases (2004–2009)*. 58 AMERICAN JOURNAL OF COMPARATIVE LAW 377 (2010). In this article, the authors use nine recent Supreme Court cases to analyze the developing area of age discrimination under the ADEA. The cases cover issues like disparate impact, disparate treatment, and retaliation, as well as basic concepts such as what constitutes age discrimination under the ADEA. Other cases address pension eligibility, alternative dispute resolution in discrimination disputes, and reverse discrimination. The authors conclude by providing suggestions they hope will prevent practitioners from finding themselves on the wrong side of new precedent in this developing area of law.

V. HEALTH CARE

A. GENERAL WORKS / MISCELLANY

1. Books

BARR, DONALD A. *INTRODUCTION TO U.S. HEALTH POLICY: THE ORGANIZATION, FINANCING, AND DELIVERY OF HEALTH CARE IN AMERICA*, 3RD ED. Baltimore, MD: Johns Hopkins University Press, 2011. This book introduces health policy in the U.S., discussing how forces affect the organization, financing, and delivery of health care. The discussion includes chapters on the Patient Protection and Affordable Care Act and health care reform, Medicare, Medicaid, and long-term care, among other topics.

KAPP, MARSHALL B. *LEGAL ASPECTS OF ELDER CARE*. Sudbury, MA: Jones and Bartlett Publishers, 2010. This book aims to be an educational tool for future elder service and policy professionals. It provides selections from sources such as statutes, regulations, judicial opinions, and legal and health care journals. The work also offers commentary and discussion questions to further understanding about the legal aspects of elder care. Topics covered include informed consent and refusal, legal aspects of death and dying, intervention mechanisms for the incapacitated, regulation of financing, privacy

issues, family law, and age discrimination. The author also addresses research participation and consumer protection for elders.

SATIN, DAVID G., ED. *HEALTH MANAGEMENT FOR OLDER ADULTS: DEVELOPING AN INTERDISCIPLINARY APPROACH*. Oxford, UK: Oxford University Press, 2009. This book was written to accompany an interdisciplinary care of aged persons course at the Harvard Medical School. There are chapters on how the health care system is financed, consumer directed care, health law, long-term care, community based care, and making and changing social policy.

2. Articles

BEVERLY, CLAUDIA & OTHERS. *Aging Issues: Nursing Imperatives for Healthcare Reform*. 34 *NURSING ADMINISTRATION QUARTERLY* 95 (2010). Health care costs have constrained economic growth, and significant reform is taking place. Just whether and how that reform extends to the elderly is a question still to be answered, however. This article, primarily directed at nurses, provides useful information by analyzing the makeup of elders, the elder care workforce, and the piecemeal finance system currently in place. The authors note that while health care reform is addressing some important areas, others are being omitted. The authors also encourage nurses to advocate at both national and local levels for policy changes to meet the needs of the older population.

BLUM, JOHN D. *Variables of Health Reform and Their Impacts on the Elderly*. 12 *MARQUETTE ELDER'S ADVISOR* 85 (2010). Practically every aspect of the Patient Protection and Affordable Care Act affects the future of elder care in some way. This article deals with several issues linking the recent health reform to elder care. It addresses how the realities of Medicare will affect the reform, how primary care and prevention will improve the health of elders, and how shifts in health care markets resulting from health care reform will affect elder care. It also looks at the increasing shift to coordinated care and at e-technologies that can improve seniors' health care. The author concludes that elder care will meet considerable challenges with the new system, and that flexibility and efficiency will help meet elders' health care needs.

BOULT, CHAD & OTHERS. *Successful Models of Comprehensive Care for Older Adults with Chronic Conditions: Evidence for the Institute of Medicine's "Retooling for an Aging America" Report*. 57 *JOURNAL OF THE AMERICAN GERIATRICS SOCIETY* 2328 (2009). The chronic

care system in the U.S. needs improvement, both to increase the quality of care and reduce the cost. This article seeks to assist in efforts to improve this aspect of the health care system by identifying potentially successful health care models from prior high-quality research. The authors highlight 15 models that could improve health care for older Americans and recommend that policymakers and health care leaders consider including them in plans to reform the U.S. health care system. Although some of the models will save money, statutory changes to the Medicare payment system would be necessary to implement them. In addition, more research, as well as public and private insurers' willingness to participate are necessary for the models' success.

CANCELOSI, SUSAN E. *The Bell is Tolling: Retiree Health Benefits Post-Health Reform*. 19 ELDER LAW JOURNAL 49 (2011). In the wake of dramatically increasing costs of health care and insurance, many employers have stopped providing health care insurance to their retirees. Those that continue to provide coverage transfer much of the cost burden to the retirees. In this article, the author looks at the future of employment-based retiree health insurance in light of the Patient Protection and Affordable Care Act. She concludes that the Act's expansion of Medicare coverage, along with increased access to insurance, may somewhat offset the demise of employment-based plans.

CERMINARA, KATHY L. *Hospice and Health Care Reform: Improving Care at the End of Life*. 17 WIDENER LAW REVIEW 443 (2011). The Patient Protection and Affordable Care Act addresses end-of-life care by focusing primarily on hospice care. Although the Act allows patients to access hospice early, Congress's apparent suspicion of hospices has resulted in over-regulation that could affect continued access. This article analyzes the portions of the Act that deal with hospice care. The author then explains how the over-regulation of hospice care, which requires a face-to-face visit, could have a chilling effect on hospice recertification and deprive deserving elders of this valuable service.

KAPLAN, RICHARD L. *Analyzing the Impact of the New Health Care Reform Legislation on Older Americans*. 18 ELDER LAW JOURNAL 213 (2011). This article analyzes the effect of the Patient Protection and Affordable Care Act on older people. Despite making many changes to the health care system, it probably will not significantly improve the situation of most elders. Professor Kaplan discusses

several changes the new reforms have made to prescription drug coverage, long-term care financing, managed care plans, and employer coverage for those who retire early. He concludes that the reforms ultimately have little effect on health care financing for seniors, although the overall impact of the reforms on the older population remains unknown.

KAPLAN, RICHARD L. & OTHERS. *Retirees at Risk: The Precarious Promise of Post-Employment Health Benefits*. 9 YALE JOURNAL OF HEALTH POLICY, LAW & ETHICS 287 (2009). The concept of retirement has changed significantly in recent years. Many employers have eliminated or frozen pension plans; others use defined contributions instead of pensions, and even Social Security is no longer seen as infallible. This article reviews the availability of health care in retirement and outlines some reasons for its drastic decline. The authors then examine the options for retirees who have lost their health care benefits and discuss possible alternatives. Finally, they explore the possibility of making Medicare available to those under the age of 65.

O'REILLY, JAMES T. *Elders Falling Through a Loophole in Quality: Impacts of "Off-Label" Drug Promotion*. 6 NAELA JOURNAL 25 (2010). Federal law allows a doctor to prescribe any approved drug for any purpose and at any dosage, even if there is no evidence that the intended use is either safe or effective. This is called off-label use of drugs. Sometimes off-label use works, and sometimes it does not. Sometimes it can even worsen a patient's condition. Physicians sometimes rely on promotional information in making these prescription decisions. This article examines these issues and asks what legal remedies should be available to elders when drug marketers manipulate the system in order to profit from off-label use of expensive drugs. The author concludes that the off-label loophole is large and is not likely to be closed without significant policy efforts on behalf of elders.

RAPPAPORT, ANNA M. & OTHERS. *The Impact of Health Care Reform on Older Workers, Retirees and Employers*. 27 BENEFITS QUARTERLY 26 (2011). The Patient Protection and Affordable Care Act will affect older workers' options for health care as they move into retirement. This article discusses the major issues related to the changes older workers will encounter. The authors address areas including retiree health benefits and benefits available to those who are and are not yet eligible for Medicare. The authors conclude by recommending that

employers sponsoring retiree health plans consider waiting to make major changes until regulations related to health care reform are issued and the health plans for active employees have been more thoroughly scrutinized.

B. LONG-TERM CARE / NURSING HOMES

1. Book

WAN, THOMAS T. H & OTHERS. *IMPROVING THE QUALITY OF CARE IN NURSING HOMES: AN EVIDENCE-BASED APPROACH*. Baltimore, MD: Johns Hopkins University Press, 2010. Although the Nursing Home Care Reform Act of 1987 set out basic requirements to ensure the well-being of residents, few changes have occurred since its enactment. The better facilities remain good, and the poorer ones have not improved. The authors set out to provide information for improving the quality of nursing homes. They review many quality-related factors and offer a solution based on their research. They advocate the general, systematic implementation of information and education technology and computational science to improve decision making processes in nursing homes. They conclude by recommending several areas in which additional research could further improve the quality of care.

2. Articles

BERN-KLUG, MERCEDES & OTHERS. *Characteristics of Nursing Home Social Services Directors: How Common Is a Degree in Social Work?* 10 JOURNAL OF THE AMERICAN MEDICAL DIRECTORS ASSOCIATION 36 (2009). Social workers are an important part of the interdisciplinary team in nursing homes. They are responsible for the psychosocial health of residents. Confusion exists about the terms “social services” and “social worker” in the context of nursing homes. The National Association of Social Workers states that nursing home social workers should have a college degree in social work. The federal government, however, does not require a degree in social work to be considered a qualified nursing home social worker. This article reports the findings of a study on the percentage of nursing homes whose social service director has a degree in social work and describes the features of nursing homes most likely to hire a degreed social worker. In its conclusion, the article suggests that the federal government should reconsider allowing staff without a social work degree to be “qualified social workers” in nursing homes.

- BREEN, GERALD-MARK & OTHERS. *The Use of Public Policy Analysis to Enhance the Nursing Home Reform Act of 1987*. 48 SOCIAL WORK IN HEALTH CARE 505 (2009). The Nursing Home Reform Act of 1987 addressed abuse and neglect in institutional settings. Problems with nursing home service remain, however. This article discusses methods of using policy to increase compliance with the Act and reduce shortcomings in nursing homes. The authors seek to accomplish this by analyzing the elements of the Act, demonstrating how its policy is weak and explaining why. Their analysis indicates that some aspects of the Act may be irreversibly flawed, however. To address that problem, they present social scientific theories that could generate new techniques to show how nursing home staff can improve job performance and increase motivation.
- CHAO, SHIRLEY Y. & OTHERS. *What Food and Nutrition Services Should Be Regulated in Assisted-Living Facilities for Older Adults?* 109 JOURNAL OF THE AMERICAN DIETETIC ASSOCIATION 1048 (2009). Many older people use the services of assisted-living facilities. The quality of food and nutrition provided at these facilities is unknown, however. This article presents the results of a survey of national aging and health experts and practicing registered dietitians (RDs) about which key quality indicators from the Food and Nutrition Care Indicators checklist should be regulated in assisted living facilities. The results indicated that both the experts and RDs believed that regulation is crucial in a significant number of areas, especially those related to facilities and staffing. Many of the important areas are unregulated in the majority of states. The author discusses the findings and potential policy implications of regulating food and nutrition.
- CROSSEN-SILLS, JACKIE & OTHERS. *Technology and Home Care: Implementing Systems to Enhance Aging in Place*. 44 NURSING CLINICS OF NORTH AMERICA 239 (2009). While lawmakers call for better health care, the disjointed structure of our current system contributes to lack of quality. Meanwhile, issues associated with an aging population are causing the pool of qualified resources to shrink. Although institutional care will remain a necessary element of the system, home and community-based care have better potential to meet the growing need for skilled professional care in an economical manner. This article describes how a visiting nurse association implemented technologies such as electronic documentation and telehealth systems that positively affected home health care services for patients in their community. The authors conclude that diligent

monitoring of current technologies can allow many patients to live safely at home.

DOTY, PAMELA & OTHERS. *New State Strategies to Meet Long-Term Care Needs*. 29 HEALTH AFFAIRS 49 (2010). Consumer-directed long-term care service programs allow people greater choice and control over the publicly funded long-term services they receive. For example, they can hire, fire, and supervise assistants as they choose, or even manage an allowance used to employ aides or purchase items not normally covered by Medicaid, such as ramps and home modifications. Despite the desirability of such programs, states that have tried them have encountered multiple obstacles including costs, staff, and leadership issues, the necessity of creating the required infrastructures to manage the programs, and resistance from traditional providers. After evaluating examples from several states, however, the authors conclude that it is possible to implement and successfully maintain consumer-directed long-term care service programs. Other states can use these examples as models to build their own programs.

KONETZKA, R. TAMARA & WERNER, RACHEL M. *Applying Market-Based Reforms to Long-Term Care*. 29 HEALTH AFFAIRS 74 (2010). Americans have three main goals for long-term care—better quality of life, reduced fragmentation of delivery and financing, and increased use of home and community-based care. Market-based reforms, the use of policies to change the underlying incentive structure of long-term care providers, could be one way to meet these goals. More research is necessary, however, into the intended effects and potential unintended consequences of market-based reforms. Some of the needed changes may be less straightforward than others. Ultimately, market-based reforms could be useful to improve quality, but they will need to be applied carefully, and with the bigger picture in mind.

LEHNING, AMANDA J. & AUSTIN, MICHAEL J. *Long-Term Care in the United States: Policy Themes and Promising Practices*. 53 JOURNAL OF GERONTOLOGICAL SOCIAL WORK 43 (2009). This article reviews major policy issues related to the U.S. long-term care system. It discusses issues related to finance, the difficulty of maintaining skilled workers, and the movement away from an institution-based system to one involving more community-based service. The authors also discuss encouraging techniques that have evolved in recent years, such as a move to change the way long-term care is delivered to a more holistic approach. Other ideas include combining services to include both medical and social care, and creating a more home-like

environment in which to deliver services. Finally, the authors recommend that policymakers provide funding for experimental and innovative approaches to long-term care so that the health care system can not only provide accessible and appropriate care to older adults, but also improve the health and well-being of all individuals so as to reduce the need for long-term care as people age.

MILLER, EDWARD A. *Flying Beneath the Radar of Health Reform: The Community Living Assistance Services and Supports (CLASS) Act*. 51 GERONTOLOGIST 145 (2011). The Patient Protection and Affordable Care Act attempts to address problems with long-term care financing through the Community Living Assistance Services and Supports (CLASS) Act. This act is a national voluntary long-term care insurance program run by the federal government. Unfortunately, enrollment in the plan has been low, especially by those in the low-risk pool. This may result in premiums becoming so high that they further discourage participation by most of the population. The author asserts that by making some minor changes, policymakers could strengthen the risk pool, although that would likely further discourage those at higher risk, who need the program most. He concludes that although the CLASS Act has some benefit, it may have limited effect on long-term care affordability for most Americans.

MORGAN, LESLIE A. *Balancing Safety and Privacy: The Case of Room Locks in Assisted Living*. 23 JOURNAL OF HOUSING FOR THE ELDERLY 185 (2009). Assisted living facilities must balance residents' expectations of privacy with the quality of life that comes by providing services and guaranteeing safety. Door locks are a key issue in this balancing act. This article indicates that a lack of consensus exists among residents, family, and facility staff as to the importance of locks. Residents may insist on privacy, while family members prefer that staff have access to living quarters for nightly bed checks, for example. Broadly written state regulations, ownership rules, local market dynamics, and residents' evolving needs as they age further complicate matters. The debate about the priorities of assisted living continues, and likely will become more complex as greater segments of the population age.

PARK, JEONGYOUNG & STEARNS, SALLY C. *Effects of State Minimum Staffing Standards on Nursing Home Staffing and Quality of Care*. 44 HEALTH SERVICES RESEARCH 56 (2009). This article reports the results of a survey of the effects of minimum state staffing requirements on long-term care facilities. Increasing the requirements

caused small staffing increases in facilities that already had staffing levels near the minimum. A larger effect occurred in the use of restraints and in overall deficiencies at facilities. Based on these findings, the authors conclude that staffing requirements have small effects, and then only on facilities that have low staffing and face potential sanctions. Finally, the authors observe that staffing standards cannot fix all the problems associated with nursing homes. Other approaches, such as training and retention strategies, better monitoring and enforcement techniques, and appropriate government funding are needed to achieve broad improvements in the quality of long-term care.

ROSENBLATT, CAROLYN L. *Mediating Elder Disputes in Assisted Living Facilities*. 19 EXPERIENCE 27 (2009). When people live in close proximity, especially older people who may have varying levels of dementia or other cognitive issues, disputes invariably arise. Assisted living facilities are no exception to this rule, and when disputes get out of control, residents can threaten to sue, or law enforcement and Adult Protective Services can become involved. Facility managers are focused on providing a high quality of life for all residents and often have neither the time nor the legal knowledge to deal with disputes between residents. The authors contend that experienced mediators could provide a needed leadership and service by resolving many conflicts quickly and economically.

SALKIN, PATRICIA E. *A Quiet Crisis in America: Meeting the Affordable Housing Needs of the Invisible Low-Income Healthy Seniors*. 16 GEORGETOWN JOURNAL ON POVERTY LAW & POLICY 285 (2009). By 2030, seniors are expected to comprise 20 percent of the U.S. population. In anticipation of this, the construction industry has experienced a boom in senior housing. The majority of this new housing, however, is designed for those who can afford a higher range of accommodations. Those who lack the resources have been largely ignored. This article discusses the impending crisis and outlines the problems and potential solutions for seniors who are able-bodied but lack the finances to obtain appropriate housing. The author concludes that although state and federal programs can help, local governments are in a good position, through zoning and other regulatory methods, to provide a range of housing options for lower-income seniors.

SEHRAWAT, SEEMA. *The Omission of Comprehensive Care: An Analysis of the Nursing Home Reform Act of 1987*. 53 JOURNAL OF GERONTOLOGICAL SOCIAL WORK 64 (2010). The Nursing Home

Reform Act of 1987 was intended to ensure that older adults and people with disabilities have a comfortable and safe environment. Although it strengthened existing federal nursing home standards, some areas, such as mental health services, still need improvement. This article analyzes the needs of nursing home residents for mental health services and discusses the contributions that qualified social workers can make in this area. The author concludes that updated legislation requiring more training and more qualified social workers, as well as standards that address the number of residents in need of social services, would greatly improve the lives of many nursing home residents.

SPIEGEL, DAVID R. *Consumer Protection for Prospective Assisted Living Facility Residents: Gordian Knot or Solvable Problem?* 24 JOURNAL OF HOUSING FOR THE ELDERLY 44 (2010). Despite much recent state legislation in the area, the regulation of assisted living facilities remains inconsistent and confusing. Meaningful data about such facilities, including what the exact costs will be, is difficult for consumers to obtain. Consumers also have little assurance as to what services assisted living facilities actually provide. The author concludes that although reaching an acceptable level of regulation is possible, it could be difficult. People tend to deny that they or those they love will ever need a long-term care facility. This collective denial leads to lack of political will. That, combined with the competing industry and consumer needs means that achieving meaningful regulation will be a challenge.

STEVENSON, DAVID G. & GRABOWSKI, DAVID C. *Sizing Up the Market for Assisted Living.* 29 HEALTH AFFAIRS 35 (2010). The nursing home sector has traditionally received the bulk of public financing earmarked for long-term care. Assisted living has emerged as an important long-term choice for many older people, however. This article relates a study on assisted living facilities nationwide. The study discovered that since they rely on private resources, assisted living facilities are located disproportionately in affluent areas. As more Americans age and assisted living facilities evolve, law and policy makers must deal with issues of access, financing, quality, and oversight of such facilities. Additional research to track the growth of assisted living facilities, services provided, and populations served will be a necessary part of establishing this policy.

TRIPP, LISA. *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home*

Admission Contracts. 31 CAMPBELL LAW REVIEW 157 (2009). A number of scholars condemn pre-dispute binding arbitration agreements, and many argue that similar agreements related to nursing home admissions are especially heinous. These agreements can allow nursing homes to hide serious cases of mistreatment, neglect, and abuse, some of which result in death. In this article, the author argues that the Secretary of the U.S. Department of Health and Human Services should declare such agreements unconscionable and ban federal funding of nursing homes that use them. She sets out several reasons for her arguments, including the need to recognize the vulnerability of the individuals affected by them, and consistency with existing legislation, such as the Nursing Home Reform Act.

WERNER, RACHEL M. & KONETZKA, R. TAMARA. *Advancing Nursing Home Quality Through Quality Improvement Itself*. 29 HEALTH AFFAIRS 81 (2010). More than 1.5 million Americans reside in nursing homes, yet the quality of care tends to be low overall. Attempts at regulation, oversight, and accountability through reporting have all produced only modest improvements. The authors contend that much of the existing attempts at improvements focus more on documenting problems than on finding solutions. They therefore suggest changing the current initiatives to a systematic approach that focuses on the process of improving care. This new model would require dramatic transformation at many nursing homes, but the authors believe that it could generate meaningful and lasting improvement to the quality of care that residents receive.

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

1. Books

GRANNEMANN, THOMAS W. & PAULY, MARK V. *MEDICAID EVERYONE CAN COUNT ON: PUBLIC CHOICES FOR EQUITY AND EFFICIENCY*. Washington, DC: The AEI Press, 2010. In this book, the authors discuss the purpose of Medicaid and how it is supposed to work, while noting that it has failed since the beginning to meet these aims. The authors present a framework for improvement based on public choice. In other words, they believe the program should be based on tax-payer choices and the promises tax-payers are willing to make to the poor.

OLSON, LAURA KATZ. *THE POLITICS OF MEDICAID*. New York, NY: Columbia University Press, 2010. Olson's book is an attempt to look at Medicaid as a whole. She notes that due to Medicaid's very

complicated history and structure, few have attempted such a wide look at the program. Olson starts by looking at the story of Medicaid. She examines its introduction, looking at a variety of issues including cost shifting, provider reimbursement, and fraud, and discusses how the Medicaid program came into question during the Reagan administration. Modern welfare medicine, how the program is currently structured, and the issue of long-term care are also discussed.

2. Articles

BOTHE, CHADWICK. *The Stigma of Survival: Medicaid Estate Planning*. 51 SOUTH TEXAS LAW REVIEW 815 (2010). The author explores the use of Medicaid estate planning as a legitimate financial and retirement planning tool. The history of Medicaid estate planning is discussed along with the fact that this type of estate planning has been made necessary by the rising costs of long-term care. The author believes that Medicaid estate planning is a moral choice in light of health care costs. The author further believes that the “monopolistic prices of elder care” are the problem and offers potential solutions.

BRENDEL, MARTINA. *When a Door Closes, a Window Opens: Using Preemption to Challenge State Medicaid Cutbacks*. 86 CHICAGO-KENT LAW REVIEW 925 (2011). Many states are making cuts to Medicaid funding and this will continue to be a problem even though the federal government will bear the bulk of the Medicaid expansion funding as enacted by the Patient Protection and Affordable Care Act. Recent court activity has severely limited the ability of Medicaid recipients and providers to challenge the reasonable standards and the equal access provisions of the Medicaid Act under 42 U.S.C. § 1983. The author looks at federal preemption, specifically challenges under the Supremacy Clause, as a new alternative for Medicaid beneficiaries. While Supremacy Clause litigation offers new hope, there are disadvantages to this type of litigation including the lack of private damages and whether federal law preempts the types of informal rules that states use to set reimbursement rates. The author concludes by noting that litigation is not the sole answer to state Medicaid funding issues.

COFFEY, GENE. *The Affordable Care Act's Changes to Medicaid's Coverage for Long-Term Services and Supports*. 7 NAELA JOURNAL 93 (2011). The author reviews changes to Medicaid's coverage of long-term care brought about by the passage of the Patient Protection

and Affordable Care Act. The Patient Protection and Affordable Care Act allowed for the enhancement of existing programs and the creation of new programs that would allow Medicaid recipients to receive long-term care services. However, some issues remain like the fact that Medicaid still favors institutional services rather than community based services.

CONTINI, CHRISTAL. *The Deficit Reduction Act of 2005—Reducing the Number of Recipients and Applicants Eligible to Receive Medicaid Benefits*. 22 JOURNAL OF LAW & HEALTH 405 (2009). The Deficit Reduction Act of 2005 requires states to obtain documentation of citizenship in order to hand out Medicaid benefits. The author states that this requirement acts as an eligibility requirement and adds regulatory and financial burdens to states already struggling with financial woes. Since this requirement also affects more than people with actual citizenship issues, for instance the mentally ill or people who are disaster victims, the author argues that it violates the 5th Amendment's Due Process Clause and provides that statutory and regulatory amendments should be made to alleviate what ultimately acts as a denial of rightful benefits.

GUILTINAN, ROSEMARY B. *Enforcing a Critical Entitlement: Preemption Claims as an Alternative Way to Protect Medicaid Recipients' Access to Healthcare*. 51 BOSTON COLLEGE LAW REVIEW 1583 (2010). When states cut provider reimbursement rates under Medicaid in order to balance budgets, they affect provider participation in Medicaid. Previously, providers and beneficiaries sued under 42 U.S.C. § 1983 to prevent this reduction, challenging on the basis that the reduction in reimbursement rates violates equal access required under Medicaid. However, the United States Supreme Court closed that avenue in 2002. This article discusses how the Ninth Circuit has indicated in a series of decisions that the Supremacy Clause may be a new avenue for Medicaid providers and beneficiaries and highlights the pros and cons of the alternative path.

HERMER, LAURA D. *Medicaid, Low Income Pools, and the Goals of Privatization*. 17 GEORGETOWN JOURNAL ON POVERTY LAW & POLICY 405 (2010). The author uses Medicaid's Disproportionate Share Hospital program to examine efforts during the George W. Bush administration to subsidize private health coverage for Medicaid recipients. She explores whether privatization efforts fit into Medicaid's history and purpose and argues that this type of privatization is counter to Medicaid's purpose.

HERMER, LAURA D. *The States' Challenge to the Affordable Care Act's Medicaid Expansion*. 33 WHITTIER LAW REVIEW 1 (2011). Hermer discusses *Florida ex rel. Bondi v. United States Department of Health and Human Services*, the states' lawsuit against the federal government based on the Medicaid expansion called for under the Patient Protection and Affordable Care Act. In addition to specifically looking at this case, she looks at the larger issues that she argues led to tensions between the federal government and state governments. Furthermore, she argues that federalizing Medicaid is a possible solution to these tensions.

HUBERFELD, NICOLE. *Federalizing Medicaid*. 14 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 431 (2011). This article discusses the background and development of Medicaid, focusing on its current federal-state partnership. The author proposes federalizing the Medicaid program as a method for modernizing the program in light of the push for more federal funding by the states and the state resistance to additional federal rules and regulations.

JESSEE, SEAN. *Fulfilling the Promise of the Medicaid Act: Why the Equal Access Clause Creates Privately Enforceable Rights*. 58 EMORY LAW JOURNAL 791 (2009). Jessee, in this article, discusses Medicaid's equal access provision, provider reimbursement, and the ability of Medicaid beneficiaries to sue to protect their rights under 42 U.S.C. § 1983. Some circuit courts have held that the right is enforceable while others have held that it is not. The author discusses the analysis on both sides and provides possible alternatives.

KRAIEM, DANIELA. *Consumer Direction in Medicaid Long Term Care: Autonomy, Commodification of Family Labor, and Community Resilience*. 19 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW 671 (2011). Initially, Medicaid only paid for institutional care. However, the demand for Medicaid to pay for long-term care arose. There is currently some consumer direction in how Medicaid covers long-term care and the author lays out advantages and disadvantages of this type of system. Of particular interest is a shortage of labor in the home health care industry. Additionally, consumer direction can be a costly proposition.

LANDERS, RENEE M. & LEEMAN, PATRICK A. *Medicaid Expansion Under the 2010 Health Care Reform Legislation: The Continuing Evolution of Medicaid's Central Role in American Health Care*. 7 NAELA JOURNAL 143 (2011). Landers and Leeman look at Medicaid before

enactment of the Patient Protection and Affordable Care Act and the reforms to Medicaid after enactment. The article discusses expanded Medicaid eligibility, and specific reforms to Medicaid under the Patient Protection and Affordable Care Act are outlined. Also, challenges to the Medicaid expansion under the Act are discussed including the state challenges in court and political opposition.

- MCKENNAN, MATTHEW. *Medicaid Access After Health Reform: The Shifting Legal Basis for Equal Access*. 7 SETON HALL CIRCUIT REVIEW 477 (2011). This overview of Medicaid analyzes Medicaid's equal access provision. The article looks at early enforcement actions under 42 U.S.C. § 1983 and the circuits that appear to be open to actions under the Supremacy Clause. The author proposes that Congress extend a private right of action to Medicaid beneficiaries and providers and offers a proposal for states to avoid liability. Furthermore, the author would like to see implementation of the accountable care organization concept at the state level to help ensure access to quality care.
- NG, TERENCE & OTHERS. *Medicare and Medicaid in Long-Term Care*. 29 HEALTH AFFAIRS 22 (2010). Long-term care, like institutional care and home care, spending, and services are analyzed under both Medicare and Medicaid. The authors determine that coordination between both programs is poor and inefficient for a number of reasons including lack of coordination and wide variation in how Medicaid programs are administered across states. This leaves many groups of recipients without rightful benefits.
- O'MALLEY WATTS, MOLLY & OTHERS. *Future Challenges Facing Medicaid's Role as a Provider of Long-Term Care*. 5 NAELA JOURNAL 105 (2009). There are millions of Americans in need of long-term care services and the need is expected to continue growing with the aging of the population. Currently, Medicaid provides coverage for long-term care for many Americans. This article provides background on long-term care and discusses Medicaid's role in providing those services. A number of challenges to Medicaid's coverage of long-term care services are analyzed looking into the future.
- RAO, DEVI M. "Making Medical Assistance Available:" *Enforcing the Medicaid Act's Availability Provision Through § 1983 Litigation*. 109 COLUMBIA LAW REVIEW 1440 (2009). The Medicaid act has a provision that requires states to make medical assistance available to

all who qualify for Medicaid benefits. This provision is known as the “availability provision” and has traditionally been enforced through 42 U.S.C. § 1983 litigation. Recently, this ability to enforce the availability provision through § 1983 litigation has been questioned. The Supreme Court issued a more stringent test for § 1983 litigation meaning that some courts have ruled that Congress did not intend to infer an enforceable right on Medicaid beneficiaries. Additionally, the Deficit Reduction Act may also indicate that Congress did not intend to confer a right on Medicaid recipients to enforce Medicaid benefits through § 1983 litigation. The author argues that Congress did intend to confer an enforceable right on Medicaid recipients despite recent court and legislative activity.

REAGAN, MARK E. & JOHNSON, MARK A. *Taming the Medicaid Beast: The Federal Government's Ambitious Attempt to Combat Medicaid Fraud, Waste, and Abuse*. 3 JOURNAL OF HEALTH & LIFE SCIENCES LAW 1 (2010). The federal government established the Medicaid Integrity Program (MIP) in hopes that it would combat Medicaid fraud and abuse much as the Medicare Integrity Program has done for Medicare. However, given that each state's Medicaid program varies widely from state-to-state, the MIP has had significantly more challenges than the program for Medicare. The structure of the MIP and Medicare Integrity Contractors are discussed. Strategies for both Medicaid providers and counsel are also discussed.

REIF, CATHERINE M. *A Penny Saved Can Be a Penalty Earned: Nursing Homes, Medicaid Planning, the Deficit Reduction Act of 2005, and the Problem of Transferring Assets*. 34 NEW YORK UNIVERSITY REVIEW OF LAW & SOCIAL CHANGE 339 (2010). The author of this article discusses the transfer of financial assets by the elderly before and after the Deficit Reduction Act noting how much more difficult it is for seniors to qualify for Medicare's long-term care benefits now. Essentially, seniors who have given away assets in the last five years are required to recover those assets before they qualify for Medicare. Whether the Deficit Reduction Act furthers the policies underlining Medicare is discussed and the author provides a strategy that would allow the elderly to transfer assets but also claim the Medicare benefit.

RICE, J. BRADFORD & OTHERS. *A Comparative Analysis of Medicaid Long-Term Care Policies and Their Effects on Elderly Dual Enrollees*. 18 HEALTH ECONOMICS 275 (2009). The authors look into the policies that affect one of America's most vulnerable groups, those that receive both Medicaid and Medicare benefits for long-term care. They

provide that because these dual enrollees are very costly for both federal and state governments, policymakers have been reexamining the very policies that cover services to this population. Using economic modeling, the authors look at current policies and alternative policies to discover their effectiveness. They determine that the best policy is one that spends more on community care and spreads out among recipients.

SAYLES, BRADLEY J. *Preemption or Bust: A Review of the Recent Trends in Medicaid Preemption Actions*. 27 JOURNAL OF CONTEMPORARY HEALTH LAW & POLICY 120 (2010). When states face budget issues they often turn to reduced Medicaid provider reimbursement rates to help balance the budget. Providers have little recourse when this occurs. Sayles claims that there may be an avenue of recourse using the Supremacy Clause. He provides background on Medicaid and reviews previous methods of recourse. The current state of the law is discussed and the Supremacy Clause and Preemption Doctrine are explored. The article also specifically discusses the Supreme Court's decision in *Pharmaceutical Research and Manufacturers of America v. Walsh*.

SOMERS, SARAH & PERKINS, JANE. *Sunshine and Accountability: The Pursuit of Information on Quality in Medicaid Managed Care*. 5 SAINT LOUIS UNIVERSITY JOURNAL OF HEALTH LAW & POLICY 153 (2011). There is some evidence that Medicaid providers, due to lower payments for Medicaid patients, limit care to reduce costs. This article describes the current state of Medicaid and looks at the need for more openness about Medicaid payments and the quality of care that Medicaid patients receive including the National Health Law Program's Sunshine and Accountability Project. The authors argue that this information is vital for Medicaid beneficiaries, policymakers, and the public as a whole to ensure both cost containment and quality of care.

D. MEDICARE

1. Books

COULAM, ROBERT F. & OTHERS. *BRING MARKET PRICES TO MEDICARE: ESSENTIAL REFORM AT A TIME OF FISCAL CRISIS*. Washington, DC: The AEI Press, 2009. Coulam and his co-authors look at how the government determines how much to contribute to premiums for Medicare coverage for older Americans in light of financial

difficulties for the entire Medicare program. Medicare determines contributions to premiums for private plans based on the costs of providing fee-for-service coverage. The authors argue that this is inefficient and propose that the federal government move Medicare to a “market-like arrangement,” which they believe would bring competitive pricing to Medicare and lower overall costs. Furthermore, they believe that Medicare recipients should be entitled to Medicare benefits and not to the finance or delivery of those benefits.

FRANCIS, WALTON. *PUTTING MEDICARE CONSUMERS IN CHARGE: LESSONS FROM THE FEHBP*. Washington, DC: The AEI Press, 2009. The author focuses on the Federal Employees Health Benefits Program (FEHBP) as a model for what it calls “original Medicare” noting its superiority despite its seemingly accidental design. The background and history of both Medicare and the FEHBP are discussed and performance is compared. The author also provides a discussion of “competitive Medicare” and how it has taken lessons from the FEHBP.

MORGAN, KIMBERLY J. & CAMPBELL, ANDREA LOUIS. *THE DELEGATED WELFARE STATE: MEDICARE, MARKETS, AND THE GOVERNANCE OF SOCIAL POLICY*. New York, NY: Oxford University Press, 2011. This book discusses how the federal government delegates governing authority over U.S. social programs to private entities. The concept of delegated governance is introduced with a look at its evolution over time and consequences. The authors use Medicare as a case study and in particular, examine delegated authority in light of the Medicare Modernization Act of 2003.

2. Articles

ATHERLY, ADAM & YANG, ZHOU. *The Economics of Prevention and Medicare: The Challenge, Potential Solutions and Current Results*. 12 *MARQUETTE ELDER'S ADVISOR* 67 (2010). Projections demonstrate that Medicare is underfunded and the authors of this article have identified three challenges that need to be overcome. First, the number of Medicare beneficiaries will increase given that the Baby Boom generation is reaching retirement age. Second, the difference between health care costs and wages continues to grow. Third, the demographic make-up of Medicare recipients will be quite different from previous generations. As an example, future recipients will have fewer children and more of those children will not live near their parents. The authors explore prevention of health care issues as a

means for controlling Medicare costs in the future. This article is included as part of a symposium titled *The Push to Institutionalize Prevention: We Win, We Lose*.

- CHAHO, AMY J. *To Pay or Not to Pay: Medicare and the Preventable Adverse Event: A Rational Decision or Dangerous Philosophical Change?* 22 JOURNAL OF LAW & HEALTH 91 (2009). Chaho discusses Congress's decision to refuse Medicare payment for ten "events" it considers caused by provider actions and, therefore, preventable. These events include, for example, urinary tract infections associated with catheterization, surgical site infections, air embolisms, and events associated with foreign objects left in the body after surgery. The author believes that while Congress is doing this as a means to control costs and to ensure quality care, it is in fact endangering Medicare patients' access to health care. Furthermore, she believes that Congress is using faulty data to classify these events as preventable and therefore unreimbursable. She argues that Congress should change this new philosophy and should continue to pay for health care costs regardless of cause.
- COLEMAN, ROBERT. *The Independent Medicare Advisory Committee: Death Panel or Smart Governing?* 30 JOURNAL OF THE NATIONAL ASSOCIATION OF THE ADMINISTRATIVE LAW JUDICIARY 235 (2010). Coleman takes a look at health care reform legislation and the establishment of the Independent Medicare Advisory Committee (IMAC), which would handle rates for Medicare providers. He reviews the history of health care in the United States, looks at how Medicare spending is currently controlled, and focuses on the specifics of IMAC's charge. IMAC is also compared to several other types of boards that oversee provider payments. And, Coleman explores a "snapshot" of the current health care system and how it operates today looking at costs, quality, and accessibility.
- COULAM, ROBERT F. & OTHERS. *Competitive Pricing and the Challenge of Cost Control in Medicare*. 36 JOURNAL OF HEALTH POLITICS, POLICY & LAW 649 (2011). The authors look at the mostly unsuccessful attempts to control Medicare costs through competitive pricing. They examine twelve attempts to limit costs by introducing competitive pricing into Medicare. Most of these attempts faced challenges from either Congress or courts that ultimately led to their failure. These challenges are addressed and possible alternatives for future attempts are provided.

- FOSTER, RICHARD S. & CLEMENS, M. KENT. *Medicare Financial Status, Budget Impact, and Sustainability—Which Concept Is Which?* 30(3) HEALTH CARE FINANCING REVIEW 77 (2009). The authors argue that policymakers and the general public hold common misunderstandings about Medicare. In particular, three big areas that are confused are “the financial status of the Medicare trust funds, the impact of Medicare on the federal budget, and the long-run sustainability of Medicare.” They further argue that policymaking would improve if there was a clearer understanding of Medicare issues and, therefore, attempt to clarify these issues.
- FOX, JACQUELINE. *The Hidden Role of Cost: Medicare Decisions, Transparency and Public Trust.* 79 UNIVERSITY OF CINCINNATI LAW REVIEW 1 (2010). Fox indicates that costs place much pressure on the health care system and often shape the laws meant to legislate and regulate health care. She looks at this phenomenon by scrutinizing the Medicare system and offers what she calls a “blueprint” for analyzing the same dynamic in the wider health care system. She also calls for the Centers for Medicare and Medicaid Services to be given the ability to study the costs of medical treatments before approving them as a means of cost control.
- GOLDING, ELLIOT. *Medicare Part D: Rights Without Remedies, Bars to Relief, and Miles of Red Tape.* 77 GEORGE WASHINGTON LAW REVIEW 1044 (2009). This article reviews the structure of Medicare and specifically examines Medicare Part D coverage after the enactment of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. Lack of communication between the Centers for Medicare and Medicaid Services and the Social Security Administration caused a severe gap in coverage leaving many seniors without prescription coverage or having to pay for prescriptions out of pocket. Furthermore, Medicare beneficiaries were left without a remedy when benefits were denied. The author looks at the creation of a right without remedy and proposes that the situation could be rectified if Congress eased restrictions on Medicare beneficiaries seeking to redress agency errors.
- GOTTLICH, VICKI & OTHERS. *Health Care Changes: Challenges to Medicare.* 7 NAELA JOURNAL 11 (2011). Gottlich and her co-authors focus on the reforms to Medicare that were enacted with passage of the Patient Protection and Affordable Care Act. Reforms specifically discussed include payments to providers, delivery systems, prevention and wellness, Medicare Advantage and prescription drugs, and

changes that impact low-income and high-income Medicare beneficiaries.

- JOST, TIMOTHY STOLTZFUS. *The Independent Medicare Advisory Board*. 11 YALE JOURNAL OF HEALTH POLICY, LAW & ETHICS 21 (2011). Political forces influence Medicare spending, often more so than evidence of a scientific or economic nature. Efficiency also does not seem to come into play even though it should. Many have proposed an independent federal advisory board to make the kinds of decisions necessary for efficient administration of Medicare apart from political considerations and the influence of special interest groups. This article discusses the Independent Payment Advisory Board that was enacted by the Patient Protection and Affordable Care Act.
- KOLBER, MICHAEL S. *Opacity and Cost Effectiveness Analysis in Medicare Coverage Decisions: Health Policy Encounters Administrative Law*. 64 FOOD & DRUG LAW JOURNAL 515 (2009). The Centers for Medicare and Medicaid Services (CMS) does not make cost effectiveness analyses public. The author argues that that this lack of transparency is both a policy problem and a legal problem. CMS has been instructed to make these criteria public by both courts and Congress, yet CMS refuses. The article concludes that without publication of this information, the utility of cost effectiveness analysis cannot be thoroughly reviewed and discussed. Finally, the author argues that courts, Congress, and CMS can all act to remedy this situation.
- LAUGESSEN, MIRIAM J. *Siren Song: Physicians, Congress, and Medicare Fees*. 34 JOURNAL OF HEALTH POLITICS, POLICY & LAW 157 (2009). Medicare regulations regarding physician fees are updated each year using a formula called the Sustainable Growth Rate. For a number of years, Congress has actually stepped in to countermand cuts in provider payments under the Sustainable Growth Rate. The author argues this has affected cost containment and that physicians are at least partially responsible for that. This article looks at why this previously stable issue became so controversial and suggests reforms for not only cost containment but also to ensure higher quality care.
- MCCLELLAN, FRANK. *Health Disparities, Health Care Reform, Morality, and the Law: "Keep Your Government Hands off My Medicare."* 82 TEMPLE LAW REVIEW 1141 (2010). McClellan discusses social justice and morality as they relate to health care reform. He believes that basic human dignity is the value at stake in the health care reform

debates and that it cannot exist in a system that has great disparities in the benefits that various groups and communities are provided. He ponders whether Americans are truly willing to protect and promote human dignity as it relates to health care.

MCGUIRRE, THOMAS G. & OTHERS. *An Economic History of Medicare Part C*. 89 MILBANK QUARTERLY 289 (2011). Private sector insurance plans were introduced into the Medicare program some time ago. Giving seniors more choice in their Medicare coverage and moving efficiencies of the private sector to Medicare were the two stated goals on the enactment of Medicare Part C, currently known as Medicare Advantage. This article reviews the background of Medicare Part C and focuses on the major impacts of the program. Also, Medicare Advantage is compared and contrasted with employer-sponsored health insurance plans that involve managed care. The authors found that access to private plans was inconsistent and that Medicare Advantage has generally cost more than traditional Medicare. They urge reforms to the Medicare Advantage program to reduce costs, improve quality, and encourage participation in private plans.

PRECHT, PAUL & OTHERS. *Informed Choice: The Case for Standardizing and Simplifying Medicare Private Health Plans*. 10 CARE MANAGEMENT JOURNALS 151 (2009). This article compares Medigap plans and Medicare private health plans. There are wide-ranging differences in the amounts of coverage provided to seniors through Medicare private health plans making it very difficult for Medicare beneficiaries to compare plans. The authors believe that there needs to be some standardization among these plans, much like what occurred for Medigap plans, to better protect seniors and to ensure appropriate levels of benefits. This standardization will also have the by-product of protecting against fraud and deceptive marketing tactics.

RUBIN, JOSHUA. *The Effects of Medicare's Donut Hole and Congress's Solution*. 20 ANNALS OF HEALTH LAW ADVANCE DIRECTIVE 148 (2010). The Medicare Prescription Drug, Improvement and Modernization Act created a gap in prescription coverage after \$2830 was spent by the Medicare beneficiary that many refer to as the "donut hole." Congress corrected its mistake in 2010 by enacting the Health Care and Education Reconciliation Act, which ends the "donut hole" in 2020. Rubin addresses the issues surrounding the coverage gap and Congress's attempt to close the gap. Additionally, he discusses health care reform and alternatives for seniors to utilize until the gap closes in 2020.

TANENBAUM, SANDRA J. *Pay for Performance in Medicare: Evidentiary Irony and the Politics of Value*. 34 JOURNAL OF HEALTH POLITICS, POLICY & LAW 717 (2009). This article discusses pay for performance in the Medicare program and the wide-spread support it receives. Pay for performance pays providers when they meet performance indicators. It is looked to as a method to not only improve the quality of care but to control costs. Tanenbaum argues that this wide-spread support of pay for performance exists despite the lack of empirical evidence of its effectiveness, which is problematic given that legislators make decisions and policies based on this information. She discusses the “politics of value,” or the concept that a thing has value relative to another thing, as the cause for the popularity of pay for performance in Medicare.

E. COMPETENCY / CAPACITY FOR DECISIONMAKING (INCLUDING GUARDIANSHIPS)

1. Book

DROGIN, ERIC YORK & BARRETT, CURTIS L. *EVALUATION FOR GUARDIANSHIP*. Oxford, UK: Oxford University Press, 2010. This book addresses guardianship for adults in a context that looks at both personal and financial needs. The authors begin by laying the foundation for adult guardianship. They outline the history of guardianship, explain the basic process and compare various state approaches to this area. They then move on to forensic mental health concerns and devote a chapter to empirical matters. The second half of the book deals with application issues and addresses preparation for evaluation, collection, and interpretation of data, and concludes with testimony and report writing.

2. Articles

ELLOR, JAMES W. & OTHERS. *Guardianship of Frail Elders: Student-Supported Process for Legislative Change*. 35 EDUCATIONAL GERONTOLOGY 596 (2009). In 2004, a group of social work students, law students, faculty, guardianship professionals, and judges in Texas convened to draft new legislation and close major gaps in guardianship services in that state. This article is based on their experience. The authors provide a model for students to become involved in policy in a way that can change laws and provide valuable hands-on experience in research and community organization. The authors observe that Texas is not the only state in need of

improvement of its guardianship laws; others may use the information in this article to both learn and join forces with other groups to create change.

IVASHKOV, YULIA & VAN NORMAN, GAIL A. *Informed Consent and the Ethical Management of the Older Patient*. 27 ANESTHESIOLOGY CLINICS 569 (2009). Informed consent for elderly patients can pose both legal and ethical dilemmas. This article discusses the history and elements of informed consent, addresses issues specifically facing elders in the consent process, and provides information on evaluating the competence of an older patient. The authors touch briefly on surrogate consent, informed refusal and do-not-resuscitate orders. They conclude by stressing that doctors should avoid bias toward older patients and their wishes and promote the patient's autonomy.

KAPP, MARSHALL B. *Legal Issues Arising in the Process of Determining Decisional Capacity in Older Persons*. 11 CARE MANAGEMENT JOURNALS 101 (2010). Disorders like dementia, depression and other mental issues among the elderly can require an assessment of capacity. The author observes that a major difference often exists between a general psychological assessment for diagnostic or therapeutic purposes and one conducted to determine a person's capacity to make decisions related to medical care and legal or financial transactions, for example. He discusses common issues that arise in capacity assessments and reviews the process that these evaluations follow. He then addresses confidentiality and practice standards. In conclusion, the author states that forensic evaluation of decisional capacity involves ambiguity and at least some risk of liability and therefore requires a careful approach.

KAPP, MARSHALL B. *Medical Decision-Making for Incapacitated Elders: A "Therapeutic Interests" Standard*. 33 INTERNATIONAL JOURNAL OF LAW & PSYCHIATRY 369 (2010). When elders lack sufficient capacity to make and express decisions, health care providers often rely on surrogates who seek to apply the best interests standard in making decisions for the incapacitated individual. In this article, the author observes that defining the best interests standard in terms of best or ideal choices often sets out an unrealistic requirement for surrogates to meet. The author contends that instead, a standard based on the incapacitated person's "therapeutic" interests is more attainable and thus better to use with regard to legal, ethical, and medical standpoints.

- KAPP, MARSHALL B. *Older Clients with Questionable Legal Competence: Elder Law Practitioners and Treating Physicians*. 37 WILLIAM MITCHELL LAW REVIEW 99 (2010). When working with elderly clients, capacity issues can arise in many situations, including medical treatment choices, decisions about where to reside, and financial and legal transactions. Competence is an interdisciplinary determination, and that determination involves legal issues, behavioral science, and medical evaluation. Friction often exists in the interaction of attorney and physician in competency matters. This article outlines the major reasons for such interprofessional discord and recommends approaches for dealing with the disagreement in a way that benefits the client.
- ROSENBERG, JOSEPH A. *Poverty, Guardianship, and the Vulnerable Elderly: Human Narrative and Statistical Patterns in a Snapshot of Adult Guardianship Cases in New York City*. 16 GEORGETOWN JOURNAL ON POVERTY LAW & POLICY 315 (2009). This article elucidates the guardianship process by presenting an analysis of 20 adult guardianship cases in New York City. The author uses these cases to help show the human side of adult guardianship and illustrate how the process affects society's vulnerable elderly. He concludes with several recommendations including increased funding for social services and professional guardians, as well as a requirement that institutional petitioners show they took steps to avoid guardianship prior to initiating proceedings. He places particular importance on avoiding and limiting guardianships whenever possible in order to retain the dignity of autonomy.
- SKELTON, FELICIA & OTHERS. *Determining If an Older Adult Can Make and Execute Decisions to Live Safely at Home: A Capacity Assessment and Intervention Model*. 50 ARCHIVES OF GERONTOLOGY & GERIATRICS 300 (2010). Determining an older person's capacity to live safely and self-sufficiently in the community is a complex process that involves clinical evaluations, bioethical concerns, and often legal declarations of capacity. An interdisciplinary team of clinicians developed a capacity assessment and intervention model to address critical gaps in the process. This article details the experience of one patient through the capacity assessment process and explains the typical procedures involved. The authors then look at two additional cases that involve additional common issues one might encounter during a capacity assessment.

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

1. Articles

BOMBA, PATRICIA. *Landmark Legislation in New York Affirms Benefits of a Two-Step Approach to Advance Care Planning Including MOLST: A Model of Shared, Informed Medical Decision-Making and Honoring Patient Preferences for Care at the End of Life*. 17 WIDENER LAW REVIEW 475 (2011). This article discusses the development of two advance care planning laws in New York State and their integration with the Family Health Care Decisions Act and the Palliative Care Information Act. The author notes that some of this legislation could be used as a model for the rest of the nation. The article discusses the history, development, and implementation of the legislation and reports results from a related pilot study. She states that professional training, consumer education, and implementation in advance care planning are crucial in making sure patient wishes are honored. Finally, the author recommends additional policies to improve end-of-life care.

NACHMAN, DOROTHY D. *Living Wills: Is It Time to Pull the Plug?* 18 ELDER LAW JOURNAL 289 (2011). Although many Americans value the right to self-determination at life's end, most do not have their medical wishes honored when the time comes. The procedures currently in place—particularly the use of forms—are not adequate to ensure that a patient's prior choices are followed once he or she is no longer competent to make decisions. This article discusses the failures of the current methods used to express final life choices and suggests a better and more consistent process to ensure that a patient's desires for care are met. Specifically, the author recommends open discussions among the patient, the patient's health care provider, and care agent. This, she states, will result in more effective advocacy to ensure the patient's wishes are carried out.

PLAWECKI, LAWRENCE H. & AMRHEIN, DAVID W. *When "No" Means No: Elderly Patients' Right to Refuse Treatment*. 35 JOURNAL OF GERONTOLOGICAL NURSING 16 (2009). One right that is especially important to geriatric patients is the right to refuse treatment. This article addresses the issue of when a geriatric patient may refuse care without the nurse caregiver facing legal liability. The authors review this legal history of the right to refuse treatment and then discuss issues related to evaluating competency and capacity. Finally, they

outline the circumstances under which a caregiver may accept a patient's consent or refusal of treatment.

POPE, THADDEUS MASON & ANDERSON, LINDSEY E. *Voluntarily Stopping Eating and Drinking: A Legal Treatment Option at the End of Life*. 17 WIDENER LAW REVIEW 363 (2011). Patients have the right to refuse life-sustaining medical treatment through various means of instruction. Many ill patients who are not dependent on life-sustaining treatment do not have this option, however, because, although they are suffering, there is no treatment to refuse. This article addresses another right these patients have. They may voluntarily stop oral eating and drinking in order to hasten the process of dying. The authors set out to fill a gap in legal analysis of voluntarily stopping eating and drinking (VSED), since many health care providers are uncertain of the legality of the process.

SCHWARTZ, ROBERT. *End-of-Life Care: Doctors' Complaints and Legal Restraints*. 53 SAINT LOUIS UNIVERSITY LAW JOURNAL 1155 (2009). Historically, the first goal of medicine has been to save lives. On the other hand, doctors agree that it is sometimes appropriate to withhold treatment and allow patients to die, but the law often does not allow them to do so. The author contends that similar scenarios have created a need to refine the law with regard to end-of-life care. He reviews the history of legislation aimed at clarifying the complex issues associated with end-of-life care and also briefly discusses physician-assisted death. He concludes that lawmakers should listen to suggestions made by doctors. Although they may not fully understand the law, they do appreciate the consequences of the law in a way that lawyers cannot.

SCHWARZ, JUDITH K. *Death by Voluntary Dehydration: Suicide or the Right to Refuse a Life-Prolonging Measure?* 17 WIDENER LAW REVIEW 351 (2011). Health care professionals increasingly discuss voluntarily stopping eating and drinking (VSED) as an acceptable palliative choice for competent, suffering patients who desire to speed the process of death. Palliative care professionals tend to consider VSED an ethical and legal option. Opinions differ, however, as to the value of discussing this option with patients who are suffering and clearly want to control the circumstances of their death. In this article, the author relates a case of a patient who requested hospice support of her choice for VSED.

SONDERLING, KEITH E. *POLST: A Cure for the Common Advance Directive—It's Just What the Doctor Ordered*. 33 NOVA LAW REVIEW

451 (2009). Advance directives are a way for patients to control end-of-life medical decisions. They stipulate the care patients want to receive or refuse, as well as specify the people authorized to make decisions if the patient becomes incapacitated. For many reasons, the original intent of advance directives may not be accomplished, however. Medical and legal professionals have worked together to remedy this problem. One solution they have created is the POLST, or Physician Orders for Life-Sustaining Treatment form. The POLST is a medical document that translates the patient's end-of-life choices into physician orders. This article outlines the history of the POLST form and discusses similar legislation in several states including Florida, which has recently failed to pass POLST legislation.

TUCKER, KATHRYN L. *When Dying Takes Too Long: Activism for Social Change to Protect and Expand Choice at the End of Life*. 33 WHITTIER LAW REVIEW 109 (2011). Modern medicine is so advanced that it can sometimes delay death to the extent that death takes too long, and suffering becomes unbearable. This article discusses efforts to provide dying patients with more end-of-life care choices. The author analyzes major cases and legislation directed at expanding or reducing end-of-life choices. She explains each approach and makes several suggestions to make aid in dying more widely available, such as government by medical professional practice standards rather than by traditional legal standards. She concludes by observing that terminally ill patients have more access to information and more choices available to them today than in the past, and choices will continue to expand in the future.

VI. SOCIAL POLICY / SOCIAL ISSUES

A. SOCIAL POLICY

1. Books

HUDSON, ROBERT B., ED. *BOOMER BUST?: ECONOMIC AND POLITICAL ISSUES OF THE GRAYING SOCIETY*. Westport, CT: Praeger, 2009. Seventy-six million Baby Boomers are reaching or approaching retirement age in the U.S., while life expectancy increases and birth rates decline. Hudson has compiled articles from several scholars and leaders in economics, political science, and finance to address the debate over what this population shift means to the future of the U.S. Topics covered include expected subjects such as the economics of retirement and health care, and the impact of aging Boomers in

politics. The book also addresses less traditional topics like financial gerontology, continuing education for older people, and new definitions of work for an aging labor force.

LEVINE, MARTIN LYON, ED. *THE ELDERLY: LEGAL AND ETHICAL ISSUES IN HEALTHCARE POLICY*. Burlington, VT: Ashgate, 2009. This collection of articles is divided into four parts and covers various areas related to health care policy for the elderly, beginning with demographics, medical and cultural models, and ethical choices. Part II focuses on decisionmaking. It includes the topics of consent and full disclosure, competence, and decisionmaking for the incompetent. Also included are end-of-life topics such as decisionmaking at life's end, advance directives, and choices for deliberate death. Part III addresses the health care system, including long-term care. The fourth and final section is titled "Distributive Justice" and includes articles about ethnicity, discrimination, and age-based rationing.

2. Articles

ADLER, GERI & ROTTUNDA, SUSAN J. *Mandatory Testing of Drivers on the Basis of Age and Degenerative Diseases: Stakeholder Opinions*. 22 *JOURNAL OF AGING & SOCIAL POLICY* 304 (2010). Recent concerns about safety issues and the abilities of aging drivers have resulted in discussions about policies such as requiring certain assessments in order to retain a driver's license. The authors report research examining the mindsets of aging adults, licensing authorities, and law enforcement on such requirements for drivers who have Alzheimer's disease and Parkinson's disease. Results of the study indicate that most study participants were in favor of testing drivers diagnosed with Alzheimer's disease. Some supported testing for drivers with Parkinson's disease and those over the age of 90. Based on the results, the authors make several recommendations for legislators, including in-person renewals and vision testing.

APLIN, GARRICK F. D. *Elderly Drivers: Balancing Public Safety with Permanent Personal Mobility*. 87 *WASHINGTON UNIVERSITY LAW REVIEW* 379 (2009). A current and growing problem is elderly drivers causing car accidents that are often deadly. A higher percentage of the population will be at least sixty-five years of age with the aging of the Baby Boom generation. The author discusses the importance of the issue and the possibilities for strengthening elderly driver regulations in states. Additionally, alternative sources for transporting the elderly are considered.

BYOCK, IRA R. & OTHERS. *Beyond Polarization, Public Preferences Suggest Policy Opportunities to Address Aging, Dying, and Family Caregiving*. 26 AMERICAN JOURNAL OF HOSPICE & PALLIATIVE MEDICINE 200 (2009). Despite documented problems with the end-of-life health care system, policymakers have been reluctant to address such issues. This article discusses the findings of a survey about end-of-life issues showing 80 percent of respondents care about matters such as having their dignity respected, wishes honored, pain managed, and families left financially secure. Other common issues, such as sustaining life as long as possible or options such as assisted suicide or prayer, appealed to less than 50 percent of respondents. Based on this information, the authors advocate devoting resources to the areas important to the greatest number of people. By avoiding polarizing issues, officials can advance substantive, broadly supported actions that expand access and improve the quality of end-of-life services.

CHOI, SUNHA. *Longitudinal Changes in Access to Health Care by Immigrant Status Among Older Adults: The Importance of Health Insurance As a Mediator*. 51 GERONTOLOGIST 156 (2011). This article reports the results and implications of a study on the role that health insurance plays in older immigrants' access to health care. The study indicated that recent immigrants are less likely than longer-term immigrants and U.S.-born individuals to have Medicare and private insurance over time. The author explains the study and results and contends that policymakers should increase affordable health care insurance options to increase later-life immigrants' coverage. Doing this would likely prevent the need to use more expensive forms of health care over time.

GAGE, SUSAN & MELILLO, KAREN DEVEREAUX. *Substance Abuse in Older Adults: Policy Issues*. 37 JOURNAL OF GERONTOLOGICAL NURSING 8 (2011). The number of older adults who need treatment for drug and alcohol addiction is expected to increase significantly by 2020. Even with Medicare coverage, copayments can make such care unaffordable for many. The Positive Aging Act could alleviate this situation in two ways. It could provide ways of integrating mental health services for elders into primary care, and it could promote mental health outreach teams in community settings where older adults spend time. Another potentially useful approach would be to increase funding to states to educate primary care providers about substance abuse issues in the older population so that they can help recognize it and provide treatment options.

- HINRICHSSEN, GREGORY A. & OTHERS. *Influencing Public Policy to Improve the Lives of Older Americans*. 50 GERONTOLOGIST 735 (2010). This article outlines the formal and informal processes by which public policy is shaped in the U.S. Congress so that gerontologists who choose to do so can take steps to affect aging-related policy. Based on their experience in the U.S. Senate and similar arenas, the authors offer suggestions as to how gerontologists can establish long-term relationships with policymakers, both to offer their expertise and to influence future policy. For example, gerontologists can work to dispel stereotypes and help members of Congress and their staff understand how aging relates to wider policy concerns. By collaborating with advocacy groups and drawing upon the experience of other researchers, gerontologists can help improve the lives of aging Americans.
- HORTON, SHALONDA & JOHNSON, REGINA J. *Improving Access to Health Care for Uninsured Elderly Patients*. 27 PUBLIC HEALTH NURSING 362 (2010). This article analyzes the barriers that limit access to health care among the elderly uninsured. In addition to insurance, barriers include lack of transportation, limited family support, culture or ethnicity, and inadequate numbers of health care providers with geriatric experience and education. The authors make several suggestions to improve health care access among the elderly uninsured. They recommend that the federal government work proactively to address barriers and decrease disparities for elders. They also suggest assigning case managers for new users of the public health system, collaborating with community organizations to provide outreach, and using training programs to increase cultural competency for providers. In closing, the authors assert that additional research is necessary to better assess the health care needs of the growing elderly population.
- HOUDE, SUSAN CROCKER & MELILLO, KAREN DEVEREAUX. *Caring for an Aging Population: Review of Policy Initiatives*. 35 JOURNAL OF GERONTOLOGICAL NURSING 8 (2009). The aging of the U.S. population means that a larger workforce will be needed to care for elders. Educating this new workforce may prove problematic, however. Faculty and training opportunities are scarce, and curricula are inconsistent. The authors make suggestions to address these issues, including ways to improve the competence of the geriatric workforce and enhance recruitment and retention. They observe that several different models of care, along with appropriate financing, will be

required to meet the diverse needs of older adults. Finally, they review several policy initiatives that also address geriatric workforce concerns.

KNAPLUND, KRISTINE S. *The Right of Privacy and America's Aging Population*. 86 DENVER UNIVERSITY LAW REVIEW 439 (2009). The constitution has long protected privacy, including the choice to have intimate relationships. Moreover, several studies have recognized the human need for intimacy and physical contact. Recent studies indicate that this need extends to the elderly. Elders may face particular problems when they wish to have relationships in nursing homes and other facilities, both from their families and from the nursing homes. This article addresses two privacy issues for the elderly: the lack of freedom for those in assisted living facilities and nursing homes, and the lack of social support that elders often face if they choose to remain in their own homes. The authors conclude by offering some possible solutions based on enforcing current federal laws and providing education to families and nursing home staff.

MCELDOWNEY, RENEE & TEASTER, PAMELA B. *Land of the Free, Home of the Brave: Voting Accommodations for Older Adults*. 21 JOURNAL OF AGING & SOCIAL POLICY 159 (2009). Although the fundamental right to vote generally continues throughout life, elderly people can face specific concerns that need to be addressed. For example, difficulty seeing or hearing, dementia, and other age-related conditions may affect one's ability to vote. What is the future of Americans who may become physically or mentally impaired, and what are state governments doing to ensure voting access for these individuals? This article considers these issues by looking at several areas, including the history of voting accommodations in the U.S., current policies for accommodating elderly voters, and the effects that recent legislation has had on these accommodations. The authors conclude that although elders do receive some help, more progress must be made to ensure that older voters remain enfranchised.

KOHN, NINA A. *The Lawyer's Role in Fostering an Elder Rights Movement*. 37 WILLIAM MITCHELL LAW REVIEW 49 (2010). The author notes that lawyers have been important and significant members of previous civil rights movements. This article argues that there should be a civil rights movement on behalf of elderly rights and that attorneys should play an important role in that movement as they have in the previous movements.

MYERS, MICHAEL J. *Old Lawyers, Blue Eyes, and the Medicalization of Aging*. 11 MARQUETTE ELDER'S ADVISOR 105 (2009). In this somewhat philosophical article, the author argues that old age has come to be thought of as a disease. The treatment of this disease is highly profitable to those who promise that aging can be slowed, stopped, or even reversed. Chronic health conditions like arthritis used to be accepted as part of growing old, but now they are symptoms of the aging disease. He recommends a health care reform that would include fixed, competitively earned compensation for providers and monetary rewards for patients who do not use medical service. Independent commissions would oversee fees and insurance rates, as well as implement a national health care education program. He would also extend scope-of-practice boundaries to include personnel like nurse practitioners and physician assistants.

OKAFOR, MARIA C. *Avenues and Barriers to Access of Services for Immigrant Elders: State and Local Policies for OAA Units on Aging*. 52 JOURNAL OF GERONTOLOGICAL SOCIAL WORK 555 (2009). The U.S. population is both aging and diversifying, and the role and rights of elder immigrants in this society is the subject of extensive debate. This article discusses the types of services older immigrants can access, along with those areas that still need improvement. The author outlines the history of the older immigrant issue and then discusses current policies and problems. She concludes by proposing several recommendations on federal, state, and local levels, aimed at eliminating barriers that elder immigrants face in accessing services.

RADWAN, THERESA J. PULLEY & MORGAN, REBECCA C. *The Elderly in Bankruptcy and Health Reform*. 18 GEORGETOWN JOURNAL ON POVERTY LAW & POLICY 1 (2010). Repeated studies have indicated that at least half of bankruptcy filings result from medical expenses, and some suggest that health-related expenses are particularly likely to cause bankruptcy for older people. The issue needs further examination as legislators consider issues related to health care, credit card debt, and unemployment. The authors' previous study showed that elder bankruptcy was related much more to credit card debt than to medical expenses, but it did not find the reason for the credit card debt. This article reports their most recent study about the nature of the credit card debt that leads to bankruptcy for older people. The study produced mixed results but indicated that although medical expenses played a role in the bankruptcies, limited income and daily

living expenses, such as groceries and automobile expenses, may play just as large a role.

REESE, PETER P. & KARLAWISH, JASON H. *How Should We Use Age to Ration Health Care? Lessons from the Case of Kidney Transplantation*. 58 JOURNAL OF THE AMERICAN GERIATRICS SOCIETY 1980 (2010). Due to a limited supply of organs, kidney transplantation has always involved an element of rationing. One proposed rationing system would allocate kidneys to those who would get the greatest survival benefit from transplantation. Although this would extend the lives of transplant recipients, it would also limit the ability of older patients to obtain a transplant. The authors contend that using studies based on cost effectiveness will put elders at a disadvantage. They propose additional research to help determine which patients actually benefit most from treatment, along with allocation principles that result in more just apportionment of resources.

ROBINSON, KAREN M. *Policy Issues in Mental Health Among the Elderly*. 45 NURSING CLINICS OF NORTH AMERICA 627 (2010). Twenty-five percent of older adults suffer from depression, anxiety, or other psychiatric issues, yet the pervasiveness of mental health disorders among elders is frequently overlooked. This article discusses policy issues related to chronic mental health problems in the elderly. The author first addresses mental health parity, a recent legal development in which private health insurers must provide an equivalent level of coverage for the treatment of mental health disorders that is provided for physical disorders. In the second part of the article, the author analyzes issues of the mental health workforce as they relate to nurses, the largest segment of health care workers.

WINICK, BRUCE J. & PEREZ, ALINA M. *Aging, Driving, and Public Health: A Therapeutic Jurisprudence Approach*. 11 FLORIDA COASTAL LAW REVIEW 189 (2010). By 2030, 46 million drivers, or 25 percent of the total driving population, will be over the age of 65. Aging and related factors are connected to a higher rate of automobile accidents. State practices for addressing issues associated with aging drivers vary and are not always effective. This article uses therapeutic jurisprudence as a public health approach to analyze existing policies regarding elder drivers. This approach considers the psychological and social consequences to the elderly of restricting or revoking their driving privileges. As a solution, the authors propose a model called the Save Driving Center that provides screening, assessment, education, and

counseling to better balance the community's health and safety with the emotional well-being of older drivers.

YEO, GWEN. *How Will the U.S. Healthcare System Meet the Challenge of the Ethnogeriatric Imperative?* 57 JOURNAL OF THE AMERICAN GERIATRICS SOCIETY 1278 (2009). By 2050, one-third of older Americans are projected to be members of minority populations. Health care providers and policymakers will need to understand the diverse needs of the different groups, in order to ensure they receive effective services. Issues such as English proficiency, culturally related health beliefs, and preferences about end-of-life care all must be considered. This article makes several recommendations for policy and practice in ethnic-specific and multiethnic programs to provide better service to ethnically diverse elders.

B. VICTIMIZATION OF THE ELDERLY

1. Book

PAYNE, BRIAN K. *CRIME AND ELDER ABUSE: AN INTEGRATED PERSPECTIVE*. 3RD ED. Springfield, IL: Charles C. Thomas Publisher, 2011. Crime against elders is a serious and growing problem. Only by understanding the issues can lawmakers, health care providers, and others contribute to alleviating this problem. The author addresses a wide range of victimization, such as physical, emotional, and financial abuse. Perpetrators of abuse can be family, health care providers, companies, or professional criminals. Each chapter describes the victimization experience of one elder and then discusses the ramifications of the event. The author also talks about current legislation, regulations, and other safeguards intended to protect the elderly. He concludes by making recommendations for additional research and policy changes.

2. Articles

ANETZBERGER, GEORGIA J. *The Evolution of a Multidisciplinary Response to Elder Abuse*. 13 MARQUETTE ELDER'S ADVISOR 107 (2011). Elder abuse is a complex and pervasive problem, with a wide range of settings and perpetrators. The consequences of this problem are overwhelming, both in monetary cost and in the human damage inflicted. For years, many professionals have taken a multidisciplinary approach to solving this problem. Although the values of such a response are well known, little research has been done on the

challenges of this method. This article details the history of the multidisciplinary response, examines the various forms this method takes, and evaluates the outcomes and potential limitations of such an approach. The author concludes that, like the problem itself, a multidisciplinary approach is complicated and challenging and needs more research to fully examine its potential.

ANETZBERGER, GEORGIA J. & BALASWAMY, SHANTHA. *Elder Abuse Awareness and Action: The Role of State Summits*. 22 JOURNAL OF ELDER ABUSE & NEGLECT 180 (2010). The problem of elder abuse has prompted many states to convene summits to address the issue and determine effective responses. This article details the first nationwide research conducted on these state-level summits. The authors analyze factors that precipitate the formation of such summits, outline what they accomplish and outline what elements determine a successful summit. To date, 40 percent of U.S. states have held summits, with those numbers increasing since 2000. The summits appear to be having some success; 50 percent of survey respondents believed that summit goals were met and 60 percent stated that the resulting recommendations were implemented. Since elder abuse is such a complex problem, action such as this, on every level of government, is necessary if society has any hope for a solution.

ANETZBERGER, GEORGIA J. & TEASTER, PAMELA B. *Future Directions for Social Policy and Elder Abuse: Through the Looking Glass of Generational Characteristics*. 22 JOURNAL OF ELDER ABUSE & NEGLECT 207 (2010). This article examines various facets of the complex future of elder abuse social policy in the light of generational characteristics. Using the characteristics of, the authors first define the demographics, values, personalities, and major shared experiences for Baby Boomers, Gen Xers and Nexters. They then examine the potential patterns of elder abuse as these generations age. Finally, they forecast the future social policy attitudes of the generations and analyze how each will deal with the problem of elder abuse.

ANSELLO, EDWARD F. & O'NEILL, PEGGY. *Abuse, Neglect, and Exploitation: Considerations in Aging with Lifelong Disabilities*. 22 JOURNAL OF ELDER ABUSE & NEGLECT 105 (2010). Like any older person, people with disabilities run some risk of mistreatment. Individuals with dementia are especially vulnerable. In this article, the authors review the characteristics of people with disabilities and discuss why those members of society are at greater risk of abuse and neglect. They describe the special role that family plays in the safety

and well-being of those with disabilities. They conclude that the prevalence of abuse and neglect among these people is uncertain, in part because this is a relatively new segment of the population. Finally, the authors make several recommendations for practice and policy, such as multiple concurrent initiatives to address the deficiencies in research and information. Through these and other policies, identification and prevention of abuse may occur.

ANTHONY, ELIZABETH K. & OTHERS. *Assessing Elder Mistreatment: Instrument Development and Implications for Adult Protective Services*. 52 JOURNAL OF GERONTOLOGICAL SOCIAL WORK 815 (2009). Assessing mistreatment of elders is a complex procedure requiring great skill and experience. Many factors further complicate the process, including limited research and attention to the problem, inconsistent definitions, and untested causation theories. The authors review the properties of fifteen potential assessment tools. They discuss their findings and make recommendations for practice, policy, and future research. Their suggestions include implementation of a multidisciplinary approach involving professionals in Adult Protective Services, the criminal and civil justice systems, and medical settings.

BRYAN, CLARISSA. *Beyond Bedsores: Investigating Suspicious Deaths, Self-Inflicted Injuries, and Science in a Coroner System*. 7 NAELA JOURNAL 199 (2011). Studies indicate that between 1 million and 1.5 million elderly are abused or neglected every year. One study estimates that only one in 14 occurrences of elder abuse is reported. With such high rates of abuse and low levels of reporting, it is likely that many deaths attributed to natural or self-inflicted causes may actually be the result of abuse or neglect. Since most coroners are not trained medical professionals, many such deaths likely go unnoticed. This article addresses the problem of the lay coroner system and offers a solution by way of medicolegal investigations to help ensure that these incidents do not go undetected.

CONNOLLY, MARIE-THERESE. *Where Elder Abuse and the Justice System Collide: Police Power, Parens Patriae, and 12 Recommendations*. 22 JOURNAL OF ELDER ABUSE & NEGLECT 37 (2010). The complex problem of elder abuse requires an integrated response involving health care, social service, and law. This article addresses the third aspect—the juncture of elder abuse and the law. The author focuses on elder abuse prosecutions, legal actions to protect older people, and the elder abuse initiatives that some courts have undertaken. She also presents twelve recommendations to improve the justice system's

response to elder abuse, including enhancing victim assistance and conducting additional research. The article repeatedly emphasizes that the best way to address elder abuse is through a multidisciplinary approach.

COOK-DANIELS, LOREE. *Lesbian, Gay, Bisexual, and Transgender Aging Issues Become Federal Concerns*. 13 VICTIMIZATION OF THE ELDERLY & DISABLED 67 (2011). After decades of work by advocates, LGBT issues have finally seen progress in the past several years. Favorable results for LGBT elders have been fewer and farther apart. The author reports that despite a dearth of research in this area, progress is gradually occurring, however, including the appointment of two high-level officials in the Obama Administration who are gay and out. A number of projects have gained funding, and LGBT couples are receiving more benefits than ever before. Significant work remains, though, and a new administration could easily reverse much of the recent progress. The author concludes with some predictions for the future of LGBT elder abuse victims in light of the recent policy changes.

DONG, XINQI & SIMON, MELISSA A. *Enhancing National Policy and Programs to Address Elder Abuse*. 305 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 2460 (2011). The number of older Americans is increasing rapidly, and many of these individuals are at risk for abuse. Recent studies indicate that about one in ten elders is subject to some form of abuse, but only a small fraction of the abuse is ever reported. This article outlines two elder abuse laws—the Older American Act and the Violence Against Women Act. The authors also highlight four areas in which the system still needs improvement—funding, policy, research, and training and education. They conclude that the Elder Justice Act, part of the Patient Protection and Affordable Care Act and which authorizes federal response to elder abuse, must be fully utilized to address the gaps in the current system.

DORE, MARGARET K. *“Death with Dignity”: A Recipe for Elder Abuse and Homicide (Albeit not by Name)*. 11 MARQUETTE ELDER’S ADVISOR 387 (2010). Washington and Oregon have statutes allowing physicians to write life-ending prescriptions for patients. Although both acts purportedly provide choice and control for end-of-life situations, the laws have several flaws. For example, neither law requires the patient’s consent for administration of the lethal dose. Dore examines the two laws in detail and concludes that rather than providing

benefits, they actually allow people to pressure others into an early or even involuntary death.

HARKNESS, DONNA S. "*Just Let Me Borrow Your Charge Card, Ma*": *How the Enlightened Borrower Paradigm and the Improvident Extension of Credit Facilitate Exploitation of the Elderly by Those Nearest and Dearest to Them*. 16 GEORGETOWN JOURNAL ON POVERTY LAW & POLICY 367 (2009). Due to a lifetime of living frugally and paying bills on time, many elderly are debt-free homeowners. This position, combined with the relative ease with which they can obtain credit, sometimes leads younger relatives who are struggling financially to approach their elders and request the use of their credit. If the younger relative's circumstances worsen, he or she may not repay the debt, leaving the elder to deal with the consequences. This article follows three cases of this nature and explains how credit companies and current law exacerbate the problem. The author concludes by proposing a possible solution.

HODELL, EMILY C. & OTHERS. *The Perception of Elder Sexual Abuse in the Courtroom*. 15 VIOLENCE AGAINST WOMEN 678 (2009). Elder mistreatment includes any deliberate action or inaction that causes physical or emotional harm to an elder, including sexual abuse by someone in a trusting relationship. Because of the growing older population and recent legislation enabling prosecution of elder abuse cases, awareness of elder mistreatment has risen in recent years. This article reports findings of a study on juror perception of elder sexual mistreatment. The study indicates that jurors tend to question the credibility of elders in such cases. Further research is necessary to determine what factors affect the believability of elders in sexual assault cases, especially in light of the increasing number of elder mistreatment cases filed each year.

HOWZE, KAREN A. & WHITE, JENNIFER L. *Judicial Response to Elder Abuse*. 61 JUVENILE & FAMILY COURT JOURNAL 57 (2010). Reported cases of elder abuse are growing, while the courts' response remains fair to poor. The justice system must take a coordinated approach to addressing elder abuse. Areas that need improvement include the various forms of abuse that currently lack proper definition, the dearth of research and reliable data, and the overall absence of effective laws, remedies, or precedent. Issues involving victim capacity as well as limited community resources further complicate matters. The authors address these and other complex issues and offer a number of

strategies for both courts and law enforcement to enhance the justice process in elder abuse matters.

LANDREY, MARGARET M. & LEAHY, MONIQUE C. M. *Proof of Elder Abuse in Civil and Criminal Actions*. 57(4) MEDICAL TRIAL TECHNIQUE QUARTERLY 1 (2011). The authors observe that a significant percentage of older Americans have been subjected to abuse and neglect—as much as 10 percent of the elderly population. Moreover, up to 80 percent of cases go unreported. This article reviews the various laws designed to protect elders from abuse. The authors review the various definitions of abuse, explain several state and federal laws designed to prevent abuse, and review bases for civil actions on elder abuse. They conclude by offering multiple resources for practitioners, such as model interrogatories and several litigation checklists.

LINDBERG, BRIAN W. & OTHERS. *Bringing National Action to a National Disgrace: The History of the Elder Justice Act*. 7 NAELA JOURNAL 105 (2011). The Elder Justice Act was part of the Patient Protection and Affordable Care Act signed into law by President Obama in 2010. The Act is the first federal law to explicitly state that that older people have the right to be free of abuse, neglect, and exploitation. This article details the history of the elder justice movement and explains the language and effects of the Act. The authors conclude by analyzing the Act's impact on elder law practice and asserting that concerned advocates can make a lasting difference.

LOWENSTEIN, ARIELA. *Elder Abuse and Neglect—“Old Phenomenon”:* *New Directions for Research, Legislation, and Service Developments*. 21 JOURNAL OF ELDER ABUSE & NEGLECT 278 (2009). After asking whether elder abuse and neglect is a social problem, the author argues that it is. With its many facets, elder abuse is crucial to government policies addressing the issues of an aging population. One of the most important strategies in preventing abuse is raising awareness of the problem, such as has been done by INPEA, the International Network for the Prevention of Elder Abuse. Lowenstein addresses elder abuse as stemming from factors like the aging of the world's population, and she highlights the need for additional work to draw attention to this important issue.

MALKS, BETTY F. & OTHERS. *Changing Systems to Address Elder Abuse: Examples from Aging Services, the Courts, the Long-Term Care Ombudsman, and the Faith Community*. 22 JOURNAL OF ELDER

ABUSE & NEGLECT 306 (2010). “Systems change,” or altering the way a community makes decisions about policies, programs, and resource allocation, can be an effective approach to alleviating elder abuse. The authors first evaluated the needs of their target audiences and then devised several strategies to deal with the problems. Their tactics included offering new practices for courts, creating elder law clinics, and educating older adults about issues such as predatory lending. Clergy and other community leaders also participated and learned how to make a difference. The authors share their strategies and offer advice to those interested in taking a similar approach.

MIXSON, PAULA M. *Public Policy, Elder Abuse, and Adult Protective Services: The Struggle for Coherence*. 22 JOURNAL OF ELDER ABUSE & NEGLECT 16 (2010). Elder abuse is a complex and evolving issue, and the best approach for addressing it may be by a generalized policy that allows for interpretation in specific circumstances. The policy must be sound, however. This article reviews the history of Adult Protective Services (APS) and discusses policy issues that affect APS, such as mandatory reporting and lack of consistent definitions. The author proposes some major policy changes that could improve services, such as caseload limits, improved infrastructure, and revised reporting laws. She concludes by quoting a fable on the importance of community involvement to illustrate the argument that everyone should care about APS because eventually any of us could need it.

PAYNE, BRIAN K. *Understanding Elder Sexual Abuse and the Criminal Justice System's Response: Comparisons to Elder Physical Abuse*. 27 JUSTICE QUARTERLY 206 (2010). Although significant research has considered sexual assault and the manner in which the criminal justice system handles the cases, little of it focuses on elderly victims. This article details a study of elder sexual and physical abuse cases in an effort to determine how the justice system processes such matters. The results indicate that elder sexual abuse cases cover a wide range, and the courts treat them differently than elder physical abuse cases. The cases tend to involve certain patterns, such as female, impaired victims and repeat offenders. The authors offer several suggestions to address the issue, such as prevention strategies and training for those who work with the elderly.

PIETSCH, JAMES H. *Who's Afraid of Protecting Older Persons?—Addressing the False Illusion of Having to Keep “Elder” out of Elder Abuse Laws*. 16 GEORGETOWN JOURNAL ON POVERTY LAW & POLICY 391 (2009). Although few would argue with the concept that society

needs to protect vulnerable elders from abuse, attempts at passing legislation to that effect meet with a surprising amount of resistance. In this article, the author analyzes opposition to the inclusion of age criteria in elder abuse statutes and discusses the debate about whether older people deserve special protection by the law. Using Hawaii as an example, he outlines the interaction of the federal and state legal systems in addressing elder abuse. Finally, he concludes with an overview of recent attempts to enhance protections for the elderly in Hawaii.

SCHecter, MARA & DOUGHERTY, DONNA. *Combating Elder Abuse Through A Lawyer / Social Worker Collaborative Team Approach: JASA Legal / Social Work Elder Abuse Prevention Program (LEAP)*. 10 CARE MANAGEMENT JOURNALS 71 (2009). This article describes the Legal / Social Work Elder Abuse Program of the Jewish Association for Services for the Aged. The authors detail the history and mission of the Program and outline some of its successes. The interdisciplinary team, comprised of attorneys and social workers, improves the likelihood that clients will take action to change their lives and stay safe. The Program collaborates with local court personnel and judges to help enhance its service. It also educates those likely to encounter abused elders, such as hospital staff, so that they can refer appropriate clients for help. These tactics help the Program respond to the needs of the vulnerable elderly and fight elder abuse.

SCHMIDT, WINSOR C. & OTHERS. *Study Finds Certified Guardians with Legal Work Experience Are at Greater Risk for Elder Abuse Than Certified Guardians with Other Work Experience*. 7 NAELA JOURNAL 171 (2011). Guardianship is a cost-effective method to assist elders who lack the capacity to manage their own affairs but can live without institutionalization. This article provides an overview of the guardianship process and related issues and reports on the authors' research regarding certified guardians in Washington. Results presented include a positive relationship between guardians having legal work experience and the likelihood of having received sanctions. The study also indicates an uneven geographical distribution of certified legal guardians. This information may be useful in many ways, such as in determining the need for more effective judicial oversight and auditing of guardians in order to increase guardian quality and performance.

TEASTER, PAMELA B. & OTHERS. *A Glass Half Full: The Dubious History of Elder Abuse Policy*. 22 JOURNAL OF ELDER ABUSE & NEGLECT 6

(2010). The 30-year history of U.S. elder abuse policy is irregular and piecemeal, and federal legislation has never thoroughly addressed the issue. This article discusses the scope of elder abuse policy, focusing on the Social Security Block Grant, the only source of federal funding for Adult Protective Services programs. The authors observe that because the population is steadily aging, elder abuse has garnered increasing attention. Such initiatives as early Congressional reports and hearings, White House Conferences on Aging, and work by several activists whose efforts have led to repeated introductions of the Elder Justice Act into Congress, but without a successful passage to date.

VANARELLI, DONALD D. *Financial Exploitation of the Elderly: Impact on Medicaid Eligibility*. 6 NAELA JOURNAL 39 (2010). Older or disabled people commonly entrust their finances to third parties for various reasons. The person to whom the elder has entrusted her affairs sometimes misuses those resources, however, and with the increasing numbers of elderly in the U.S., such abuse is a serious problem. In addition to the common issues that accompany financial abuse, such activities can also affect elders' Medicaid eligibility; for example, a transfer of property without her knowledge could render an elder ineligible for benefits. This article explains Medicaid eligibility rules, discusses several applicable cases, and outlines the elements that an elder can expect to establish during an application or appeal.

C. AGED OFFENDERS

1. Book

ADAY, RONALD H. & KRABILL, JENNIFER J. *WOMEN AGING IN PRISON: A NEGLECTED POPULATION IN THE CORRECTIONAL SYSTEM*. Boulder, CO: Lynne Rienner Publishers, 2011. The "graying of America" is having a large effect on the prison population. Many women enter prison after years of mistreatment and unhealthy living to find that imprisonment works to accelerate aging. Furthermore, prisoners generally exhibit the health of someone ten years older so that a 50 year-old inmate is considered elderly. There are a variety of reasons why the health and well-being of older female prisoners has been largely ignored, this work aims to illuminate those issues, what prison is like for the older female inmate, and policy issues that affect future concerns.

2. Articles

GAVIN, STACY L. *What Happens to the Correctional System when a Right to Health Care Meets Sentencing Reform*. 7 NAELA JOURNAL 249 (2011). What happens when the constitutional right to health care for prisoners and the refusal of Medicare to pay for services rendered during incarceration collide? This article addresses how the aging prison population will require more and more medical care and who pays for that medical care. States pay for the vast majority of prisoner health care despite a push for prisoners to pay for their own health care costs while incarcerated. The history and current status of the problem is reviewed and several possible solutions are enumerated and analyzed. The author finds that most solutions will be difficult to implement leaving no real solution to the problem of health care costs for elderly prisoners.

HABES, HEATHER. *Paying for the Graying: How California Can More Effectively Manage Its Growing Elderly Inmate Population*. 20 SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL 395 (2011). California's "three-strikes" law and "truth-in-sentencing" legislation has led to more inmates with longer sentences. More inmates serving longer sentences means a greater number require health services, both physical and mental, as they age. In addition, California has been required by federal court to reduce the number of inmates in its current prison system because the lack of proper health care for those prisoners was ruled as cruel and unusual punishment. The author of this article proposes the release of elderly prisoners as a way to comply with the court-ordered reduction of the prison population as they are the costliest prisoners to care for and they have lower rates of recidivism.

MILLER, DAWN. *Sentencing Elderly Criminal Offenders*. 7 NAELA JOURNAL 221 (2011). This article examines the types of sentences that are given to elderly offenders and whether elderly offenders should receive shorter sentences due to their age. The author looks at empirical evidence of elderly offender sentencing and the theories associated with sentencing policies. Arguments on both sides of whether elderly offenders should get lighter sentences are explored and the author also addresses whether long sentences for elderly offenders violate the Cruel and Unusual Punishment Clause of the Constitution. The author concludes by looking at solutions and offering recommendations for dealing with aging offenders.

- TAYLOR, ELIZABETH. *Elderly Sex Offenders: What Should Be Done?* 18 ELDER LAW JOURNAL 419 (2011). The author examines the sentences handed down to elderly sex offenders and how that punishment differs from younger offenders. The treatment of elderly offenders is analyzed and the author makes several proposals in light of her analyses that include more prison time, mandatory minimums, and rehabilitation tailored to the elderly offender.
- VANDIVER, MARGARET & GIACOPASSI, DAVID J. *Geriatric Executions: Growing Old and Dying on Death Row.* 46(3) CRIMINAL LAW BULLETIN Article 4 (2010). Elderly prisoners have been executed in recent years and the number of future elderly prisoners executed is likely to grow given the numbers of current death row inmates over the age of sixty and the fact that some prisoners can be on death row for decades before execution. This article explores the confinement on death row of elderly prisoners and ultimately their execution by examining legal and philosophical issues raised. Of particular concern is the concept that decades on death row may be considered unconstitutional as cruel and unusual punishment. Furthermore, as prisoners age they may develop health issues, such as Alzheimer's and dementia, that make them incompetent to be executed.

VII. ELDER PRACTICE

A. BOOKS

- BRASHIER, RALPH C. *MASTERING ELDER LAW.* Durham, NC: Carolina Academic Press, 2010. This accessible book explains the major aspects of elder law. Covered topics include public benefits, retirement systems, age discrimination, and health-related decisions. The author also addresses more theoretical concepts such as the conflict between protecting the vulnerable elderly while preserving their independence. The work sets forth and explains the current law while addressing issues about the future of this area.
- DORON, ISRAEL, ED. *THEORIES ON LAW AND AGEING: THE JURISPRUDENCE OF ELDER LAW.* Berlin, Germany: Springer, 2009. This book presents a collection of theoretical essays by prominent experts in law and aging. They address issues such as whether common features of older adults exist to the extent that a special theoretical approach is even warranted. They also ask whether describing the group is possible without invoking sweeping, detrimental stereotypes. The authors set out to develop the theoretical

framework for elder law that they contend has become necessary in order to justify its existence as a distinct field. They intend for the book to serve as a starting point for a new process of viewing law and aging as a rich, exciting area with a sound and varied foundation for growth.

FROLIK, LAWRENCE A. & KAPLAN, RICHARD L. *ELDER LAW IN A NUTSHELL*, 5TH ED. St. Paul, MN: West, 2010. Topics covered in this edition of the Nutshell on Elder Law include the new Elder Justice Act, health care, major changes to Medicare, Medicaid, new Medigap plan options, nursing homes, housing alternatives, guardianship, Social Security, Supplemental Security Income, veteran's benefits, pensions, age discrimination, and the new federal long-term care insurance program.

KROOKS, BERNARD & OTHERS. *RECENT DEVELOPMENTS IN ELDER LAW: LEADING LAWYERS ON UNDERSTANDING THE LATEST ELDER LAW TRENDS, NAVIGATING THE PLANNING PROCESS, AND COUNSELING CLIENTS*. Boston, MA: Aspatore, 2011. This thin volume is a collection of essays from experienced practitioners around the U.S. and provides an inside look at current issues confronting elder law attorneys. It incorporates such matters as the economic crisis, new regulations and health care reform, developments in retirement planning, and taxes and tax planning. It also addresses unprecedented legal issues developing as a result of the cognitive decline of the aging population. The authors discuss the role of the elder law attorney in these new and developing landscapes and provide tips for effective legal strategies.

B. ARTICLES

DORON, ISRAEL. *Municipal Elder Law: An Exercise in Legal Futurism*. 37 WILLIAM MITCHELL LAW REVIEW 80 (2010). A legislative gap exists in elder law in that the national government often fails to recognize that most useful ideologies can be materialized and implemented at the local level. The author of this article has conducted previous studies on this topic in his home country of Israel and more recently in Canada. At the time of publication, he planned a third study based in the U.S., to explore the use of American municipalities to protect the rights of elders. Based on his research, the current article presents a model for municipal bylaws and ordinances that could serve as a base for local governments to design legislative initiatives to promote the rights of older residents.

- KAPLAN, RICHARD L. *Elder Law as Proactive Planning and Informed Empowerment During Extended Life*. 40 STETSON LAW REVIEW 15 (2010). Kaplan has been teaching an elder law course for many years and this article explains what he teaches in his course and how pedagogical decisions affect the scope of the course. He notes that elder law is not a set of specifically defined laws but a culmination of laws from many different practice areas.
- KNAUER, NANCY J. *LGBT Elder Law: Toward Equity in Aging*. 32 HARVARD JOURNAL OF LAW & GENDER 1 (2009). Although much progress has been made toward LGBT rights in the past several decades, many LGBT elders live solitary and closeted lives, fearful of exposure and resulting financial insecurity. They are often isolated from family and the larger LGBT community, and mainstream aging policies ignore them. Ageism within the LGBT community and homophobia among the aged population often exacerbate their position. This article urges broad policy reform to ensure justice in aging without regard to sexual orientation or gender identity.
- MORGAN, REBECCA C. *The Future of Elder Law Practice*. 37 WILLIAM MITCHELL LAW REVIEW 1 (2010). In this article the author discusses the definition and history of elder law practice and outlines the general demographics of elder clients. She then provides her ideas about the future of elder law and presents the results of a survey of elder law attorneys on their opinions of the future of the practice. Elder law is subject to changes in laws, programs, and policies, but the article predicts that it will continue to be a vibrant area of practice. In addition to the laws that steadily become more complicated, clients' planning needs are expanding, and their needs will continue to evolve.
- SABATINO, CHARLES P. *Elder Law: A Perspective on the Present and Future*. 20 EXPERIENCE 26 (2010). Elder law is different in many ways from traditional areas of practice; it involves a more holistic approach that incorporates not only law but core cultural values like autonomy, dignity, and quality of life. Attorneys form interdisciplinary alliances with social workers, geriatricians and medical professionals to achieve effective planning strategies. Elder law is an evolving field in which specific benefits, planning options, and health care issues change over time. Some trends, such as diversification, are useful in predicting the direction this practice will take. Other trends, like new practice niches, are harder to foresee. Society's aging makes it likely, however, that elder law will continue to mature into a complex and established field.

WRIGHT, JENNIFER L. *Practical Concerns in Elder Law Mediation*. 80 HENNEPIN LAWYER 21 (2011). Elder law mediation can be faster and more economical than traditional litigation. It can also protect privacy and offer creative solutions that protect the welfare of elders and their loved ones. This article explores the definition of this relatively new concept and addresses concerns that are specific to this area, such as the various barriers to effective participation by the elder, mental capacity issues, and family dynamics that may prevent the elder's full participation. Although many of these issues present challenges to elder law mediation, the author argues that mediation has several advantages, such as the supportive environment it can provide, as well as the potential for addressing problems before they grow into crises.

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