

FOUNDING FACULTY ADVISOR'S PERSPECTIVE

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This issue begins the 25th volume of *The Elder Law Journal* and accordingly provides an appropriate occasion for some reflections of how the *Journal* has evolved during the preceding quarter-century in the context of the field it considers. The *Journal* began as the happy convergence of several distinct forces:

- Some students at the University of Illinois College of Law observed that Illinois was alone among law schools of comparable prominence in having only one student-edited scholarly law review;
- I had recently created an experimental law school course on Elder Law as a result of dealing with the travails of a dear family member in her final year of life; and
- The then very-new field of Elder Law had a professional organization of practicing attorneys who specialized in this area but lacked a mechanism for sustained scholarly attention to the critical issues of this field.

Against this backdrop, *The Elder Law Journal* was created to fill this gap and offer practitioners and scholars in Elder Law and allied disciplines an venue for exploring questions that would increase in importance as the U.S. population aged and more Americans attained "senior" status. Indeed, its arrival was noticed by no less a prominent publication than the *Wall Street Journal*, which observed that "[t]he ex-

panding field of law affecting the elderly gets its own law review”¹

From the outset, the *Journal* faced several challenges some of which were unique to its scholarly focus. First, while almost all students knew some older people, most students had no prior background in terms of undergraduate concentration or work experience that could possibly inform their understanding of the field. This challenge was made more difficult still by virtue of Elder Law’s being an upper-level offering so that no second-year law students, who typically write the Notes that comprise a significant portion of every edition of the *Journal*, had any prior coursework exposure at the law school to Elder Law issues. Nonetheless, the Notes selected for publication have covered an enormous range of topics with erudition and insight, a testament to their authors’ dedication and determination to make the *Journal* a national forum of significance.

A second major challenge was that very few full-time law professors, the natural source of law review articles generally, taught a course on Elder Law or devoted any significant portion of their scholarly attention to this field. To be sure, Elder Law has long been the focus of numerous law school clinics and seminars, but many of these offerings were staffed by adjuncts or others whose responsibilities often precluded devoting the time necessary to write articles of the type that law reviews generally publish. I once saw a wry comment² about the law of the sea that more people were interested in writing about that subject than in reading about it, but Elder Law presented the opposite situation—namely, more people were interested in reading about it than in writing about it.

As a partial response to that dilemma, the College of Law initiated an annual Elder Law lecture which would form the basis of an article for the *Journal*.³ This series was subsequently endowed by the family of Ann F. Baum as a memorial to her and has from the outset attracted major scholars from the legal academy and cognate disciplines to provide insights on key problems facing an aging population. Thus far, those lecturers have included the following analysts:

1. Law Notes, WALL ST. J., May 4, 1993. A similar notice appeared in THE NATIONAL LAW JOURNAL, Oct. 11, 1993, at 4, as well as in various practitioner-oriented elder law publications.

2. I believe that the commenter was Michael Kinsley in THE NEW REPUBLIC.

3. See also Paul Simon, *Elder Law Journal Lecture: Seniors and Minorities in America*, 6 ELDER L.J. 153 (1998), which is a transcribed version of former Senator Simon’s remarks rather than a formal article as such.

- Robert Eisner (Northwestern Economics, former president of the American Economics Association) on Social Security's trust funds and their future solvency prospects;⁴
- Joshua Wiener from the Urban Institute on federal and state incentives for long-term care insurance;⁵
- Mark Weisbrot, co-director of the Center for Economic and Policy Research in Washington, D.C. on the demographics of Social Security and Medicare;⁶
- Fernando Torres-Gil, the first Assistant Secretary of HHS for Aging (now UCLA Gerontology), on societal responses to aging;⁷
- Daniel Halperin (Harvard Law) on employer-based retirement income;⁸
- Marilyn Moon, the vice-president of the American Institutes for Research, on the future of Medicare;⁹
- James Poterba (M.I.T. Economics), on the risks in defined contribution plans;¹⁰
- Laura Watts, director of the Canadian Centre for Elder Law Studies, on comparative responses of elder abuse;¹¹
- Dr. Sally Satel (American Enterprise Institute) on how organ transplantation policies discriminate against older Americans;¹²
- Jon Pynoos (Southern California Gerontology) on housing needs of the elderly;¹³
- Olivia Mitchell (Wharton School) on private retirement financing;¹⁴

4. Robert Eisner, *Elder Law Journal Lecture: Don't Sock the Elderly, Help Them: Old Age Is Hard Enough*, 5 ELDER L.J. 181 (1997).

5. Joshua M. Wiener et al., *Federal and State Initiatives to Jump Start the Market for Private Long-Term Care Insurance*, 8 ELDER L.J. 57 (2000).

6. Mark Weisbrot, *Demographic Tidal Waves and Other Myths: Social Security and Medicare*, 9 ELDER L.J. 1 (2001).

7. Fernando M. Torres-Gil, *The New Aging: Individual and Societal Responses*, 10 ELDER L.J. 91 (2002).

8. Daniel Halperin, *Employer-Based Retirement Income—the Ideal, the Possible, and the Reality*, 11 ELDER L.J. 37 (2003).

9. Marilyn Moon, *The Future of Medicare as an Entitlement Program*, 12 ELDER L.J. 225 (2004).

10. James M. Poterba, *Individual Decision Making and Risk in Defined Contribution Plans*, 13 ELDER L.J. 285 (2005).

11. Laura Watts & Leah Sandhu, *The 51st State—The "State of Denial": A Comparative Exploration of Penal Statutory Responses to "Criminal" Elder Abuse in Canada and the United States*, 14 ELDER L.J. 207 (2006).

12. Sally L. Satel & Benjamin E. Hippen, *When Altruism Is Not Enough: The Worsening Organ Shortage and What It Means for the Elderly*, 15 ELDER L.J. 153 (2007).

13. Jon Pynoos et al., *Aging in Place, Housing, and the Law*, 16 ELDER L.J. 77 (2008).

- Peter Schuck (Yale Law) on rationing health care by age;¹⁵
- Jacob Hacker (Yale Political Science) on societal changes that have concentrated risk and responsibility on individual Americans;¹⁶
- Martha Fineman (Emory Law) on vulnerability theory and how that framework applies to older people;¹⁷
- Daniel Shaviro (New York University Law) on whether Social Security and Medicare should be more market-based;¹⁸
- Lawrence Gostin (Georgetown Law) on global challenges for healthy lifespans in aging societies;¹⁹
- Robert Sitkoff (Harvard Law) on mismatches of trust reform and guardianship avoidance mechanisms;²⁰
- Henry Greely (Stanford Law) on developments in biotechnology law as they relate to cognitive diseases;²¹ and
- Ian Ayres (Yale Law) on allowing rollovers of retirement savings into Social Security.²²

The *Journal* has also published major articles by sitting United States Senators, including:

- Carol Moseley-Braun (D-Illinois) on women's retirement security;²³
- Charles Grassley (R-Iowa) on nursing home reform;²⁴
- John Breaux (D-Louisiana) and Orrin Hatch (R-Utah) on elder abuse and neglect.²⁵

14. Olivia S. Mitchell, *Retirement Risk Management in Times of Turmoil*, 17 *ELDER L.J.* 439 (2010).

15. Peter H. Schuck, *The Golden Age of Aging, and Its Discontents*, 18 *ELDER L.J.* 25 (2010).

16. Jacob S. Hacker, *Restoring Retirement Security: The Market Crisis, the "Great Risk Shift," and the Challenge for Our Nation*, 19 *ELDER L.J.* 1 (2011).

17. Martha Albertson Fineman, "Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 20 *ELDER L.J.* 71 (2012).

18. Daniel Shaviro, *Should Social Security and Medicare Be More Market-Based?*, 21 *ELDER L.J.* 87 (2013).

19. Lawrence O. Gostin & Anna Garsia, *Governing for Health as the World Grows Older: Healthy Lifespans in Aging Societies*, 22 *ELDER L.J.* 111 (2014).

20. David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*, 24 *ELDER L.J.* 1 (2016).

21. Henry Greely, *Neuroprediction: Ethical, Legal, and Social Implications for the Elderly*, 24 *ELDER L.J.* (forthcoming 2017)

22. Ian Ayres & Jacob Hacker, *Social Security Plus*, 25 *ELDER L.J.* (forthcoming 2018).

23. Carol Moseley-Braun, *Women's Retirement Security*, 4 *ELDER L.J.* 493 (1996).

24. Charles Grassley, *The Resurrection of Nursing Home Reform: A Historical Account of the Recent Revival of the Quality of Care Standards for Long-Term Care Facilities Established in the Omnibus Reconciliation Act of 1987*, 7 *ELDER L.J.* 267 (1999).

The *Journal*, moreover, has also published important contributions from very prominent Elder Law practitioners, including such giants of the elder law bar as Peter Strauss,²⁶ Clifton Kruse²⁷ and Frank Johns,²⁸ among others.

Looking over the preceding twenty-four volumes of the *Journal* reveals that interdisciplinary perspectives have always been welcome and that major policy proposals have existed alongside very focused and practical examinations. Of course, the field of Elder Law has evolved and the *Journal* has mirrored those developments as it should. Same-sex couples have seen enormous legal change in their status as a result of the U.S. Supreme Court's landmark decision in *Obergefell*,²⁹ though difficult issues certainly remain.³⁰ And the democratization of personal finance continues apace such that more options and opportunities are being diffused across professions and devices while more responsibility for paying for extended life is devolving to elders and their families and away from comprehensive governmentally organized solutions.

Probably no future development will be more consequential for Elder Law and for *The Elder Law Journal* than the increasing ethnic diversification of the older persons cohort. With each passing year, this age grouping looks more like the rest of America and is losing its predominantly Caucasian character, a phenomenon that is likely to affect virtually every aspect of Elder Law, such as:

- who should be the default choice for a health care surrogate;
- how family caregivers should be treated in terms of Medicaid eligibility;
- perceptions of, and remedies for, family-centered patterns of elder abuse and neglect; and
- institutional housing arrangements for older persons.

In short, the legal regimes affecting older people embody the values and perspectives of the previously dominant culture, which may no longer work for newer groups of "aged" folks. Certain aspects of this

25. John B. Breaux & Orrin G. Hatch, *Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation*, 11 ELDER L.J. 207 (2003).

26. Peter J. Strauss, *Elder Law in the Nineties*, 1 ELDER L.J. 19 (1993).

27. Clifton B. Kruse, Jr., *The Elder Law Attorney: Working with Grief*, 3 ELDER L.J. 99 (1995).

28. A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L.J. 33 (1999).

29. *Obergefell v. Hodges*, 576 U.S. ---, 135 S. Ct. 2584 (2015).

30. See, e.g., *LGBT Aging*, 40 GENERATIONS No. 2 (2016) (entire issue of the journal of the American Society on Aging devoted to LGBT issues).

phenomenon have already appeared in the *Journal*,³¹ but much more needs to be done in this regard.

When the *Journal* began, I explained its “vision” as:

[T]he first scholarly periodical devoted to the major policy debates and legal challenges occasioned by America’s aging population. As such, it intentionally cuts across virtually all legal specialties in addressing issues of particular significance to older Americans. It further seeks to tap disciplines beyond the law, such as economics, gerontology, social work, medicine, and other areas that affect older persons as well. Indeed, this journal seeks to facilitate the ongoing evolution of elder law, as changing times and sociopolitical circumstances dictate.

That “mission” seems only more timely today and continues to provide an appropriate guidepost going forward.

To that end, an independent study of scholarly-oriented elder law publications concluded that *The Elder Law Journal* “has the most impact . . . is the most likely to have its articles cited in other law review articles and the most likely to have its articles cited in court cases. In addition, its articles tend to be cited more rapidly in other legal publications.”³³ May it ever be so!

31. See, e.g., Alvin Williams, *Reforming Our Ailing Social Security System: The State of the Current System and Its Impact on African Americans*, 8 *ELDER L.J.* 221 (2000); Heather K. Aeschleman, Note, *The White World of Nursing Homes: The Myriad Barriers to Access Facing Today’s Elderly Minorities*, 8 *ELDER L.J.* 367 (2000); Sonia Gipson Rankin, Note, *Why They Won’t Take the Money: Black Grandparents and the Success of Informal Kinship Care*, 10 *ELDER L.J.* 153 (2002); Roaa M. Al-Heeti, Note, *Why Nursing Homes Will Not Work: Caring for the Needs of the Aging Muslim American Population*, 15 *ELDER L.J.* 205 (2007); Justin Seigler, Note, *Injustice in Indian Country: The Need for a Serious Response to Native American Elder Abuse*, 19 *ELDER L.J.* 415 (2012).

32. Richard L. Kaplan, *Foreword*, 1 *ELDER L.J.* vii (1993).

33. Nina A. Kohn & Edward D. Spurgeon, *Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field*, 59 *J. LEGAL EDUC.* 414, 427 (2010).