

Preface

Typically, reality outpaces law and legal institutions. Certainly that is the case with the aging of America. As the number of older Americans rises, both in absolute numbers and as a percentage of the population, society, acting through law and legal institutions, must respond. For the most part, however, the law has been playing a "catch-up" game. While the aging of America creates social, political, and legal problems, our laws and legal institutions respond only after the fact. Of course "the law" doesn't respond to anything; rather individuals, legislators, and policy-makers respond. Collectively we create the kind of law and society that we deserve. Thus, we are all to blame for our failure to create laws and social policies that deal forthrightly and effectively with the problems of older Americans.

This book is an attempt to help close the gap between reality and the law. I have gathered here portions of articles, essays, and books that address many of the social, political, and legal problems occasioned by having an increasing number of older Americans. My hope is not to persuade readers of this book to any particular solution, but only to convince them that the problems exist and will not disappear absent some action on our part. What solutions, what actions, I leave to the reader.

To be sure, aging is foremost an individual event, and each individual will respond differently. For society, however, our aging population creates social and political issues that must be addressed politically. This is not to say that society must, in fact, take action. It is possible to take a very libertarian approach and simply allow each individual to meet the problem of aging as best as he or she can. But for most of us, such a hands-off policy seems either impractical, immoral, or cruel. As a society we want to alleviate the problems of our older members and make their later years more comfortable. But we cannot do so unless we first understand the variety of economic, legal, political, and social issues that accompany aging. This book attempts to do that.

For the most part, I have let the writings speak for themselves, and so have provided only the briefest introductions. For some issues for which I was unable to find material that I could reprint, I have written short introductory essays.

While the book attempts to address many of the problems, space did not permit

them all to be addressed. The book is only a beginning. Readers are urged to seek out the original sources of these articles to find the full import of the writers' thoughts. Moreover, this is an area in which articles are frequently published. Indeed, if the past is prologue, there will continue to be an outpouring of essays, articles, and books on the issue of aging and the law that will enrich our collective understanding of the area. Though they may yet be supplanted, I hope that these materials serve as a foundational introduction and put other readings in perspective.

The materials in this collection have been severely edited, though without, I trust, affecting their message. Some textual footnotes have been eliminated for the sake of brevity. The institutions listed to identify the authors are where the authors were located at the time of original publication.

For the past decade, I have found aging and the law to be a fascinating topic. I hope the reader of this material will also find it stimulating and yet unsettling, which is so often the case when law and public policy intersect.

Part I

Introduction

As recently as twenty years ago, lawyers did not refer to themselves as practicing elder law. They did not even perceive themselves as primarily serving an older population. A lawyer might have a number of older clients, particularly if he or she specialized in writing wills and probating estates, but such lawyers called themselves estate planners. In contrast, today there is a recognized field of elder law, a national association of elder law attorneys (the National Academy of Elder Law Attorneys), and a law review devoted to elder law issues (the Elder Law Journal), and every year hundreds of law students take courses, seminars, and clinics in elder law. The how and why of this rapid growth of a new area of law is the subject of the following article, which was the first article in the initial volume of the Illinois College of Law Elder Law Journal.

CHAPTER 1

What Is Elder Law?

Lawrence A. Frolik

The Developing Field of Elder Law: A Historical Perspective

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Elder law owes its existence to the convergence of two social and intellectual forces: the desire of lawyers to create legal practices that have come to be called elder law, and the simultaneous growth of academic interest in the topic of the elderly and the law.¹ Of course, elder law would exist even if not identified as such. For example, tax attorneys and tax law would exist even if there were no collective name for them. The names are, after all, only shorthand descriptions of a number of complex tasks lawyers perform that are known as "tax law." Similarly, elder law exists whether or not it has a label.²

Most law practice labels arise naturally out of the lawyer's activity. Criminal and securities law arise, respectively, out of dealing with persons associated with crime and clients who have legal problems with securities. Occasionally, however, a particular constellation of legal work that lacks an obvious title nevertheless acquires a label. The term *estate planning*, for example, gradually became the umbrella description of activities that in an earlier time had been called "wills and trusts" or "probate work."³ The term *estate planning* does not eliminate these older terms. Instead, it binds them together and identifies them as part of a larger practice. In a similar manner, the term *elder law*⁴ bundles together a variety of legal work. The term, however, does not only aggregate a group of existing activities. It implies something more, a

new kind of legal practice, a new way to perceive what the lawyer does. The term *elder law* is both a collective title for existing activity and a new category of legal work, which creates new practice possibilities for lawyers.

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Elder law can be roughly divided into two categories: (1) health law issues and (2) income and asset protection and preservation. Older clients have a higher incidence of legal problems associated with their health than do younger persons for two reasons. First, they are in poorer health. In particular, the elderly suffer more chronic illness, and they suffer more severe incidents of acute illness than those younger.⁵ In addition, the elderly suffer the inevitable physical decline associated with aging. Loss of aerobic capacity, muscle, and flexibility are unavoidable as one grows older.⁶ Most older persons also experience a decline in their hearing and vision.⁷ Perhaps most significantly, many elderly eventually require long-term care whether at home, in a personal care home, or in a nursing home.⁸

As a result of their medical needs, many elderly require legal assistance. They may need a living will or an advanced directive for health care, or they may require advice regarding how to make health care decisions for an incapacitated spouse. Payment for health care can cause problems with Medicare reimbursement.⁹ Poor elderly clients may have Medicaid eligibility difficulties. Middle-class clients with concerns about paying for long-term nursing home care seek advice about how they can become eligible for Medicaid. Other clients need assistance in protecting the rights of a relative in a nursing home or advice on what to do about an elderly person who appears to be the victim of abuse or neglect. A decline in the mental capacity of a client may require an attorney to file a guardianship petition, represent an allegedly incapacitated person, or support or challenge the acts of a guardian or conservator.

The elderly also have financial concerns. Some elderly will think that they were the victim of age discrimination in their employment. Many have questions about their rights under an employer-provided pension plan, or they are concerned about the income and estate tax implications of their pension plan distributions. Lower income elderly may have difficulty establishing eligibility for Supplemental Security Income or may have questions concerning veterans' benefits. Of course, traditional client needs for testamentary planning are also part of an elder law practice. Estate planning, including tax planning, the traditional drafting of wills and trusts, and the newer drafting of durable powers of attorney, constitutes an important aspect of elderly legal needs.

Elder law, then, is a legal practice that combines something old (e.g., estate planning) with something new (e.g., Medicaid planning). By calling themselves "elder law attorneys," lawyers identify themselves with this particular legal practice. But why should a lawyer want to do so? Why are lawyers not content with being traditional general practitioners with a concentration on matters dealing with the elderly? The answers to these questions are found in the changing composition of private practice.

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The practice of elder law benefits from specialization arising from advertising. Lawyers who want to advertise and distinguish themselves from other lawyers can

use the description "elder law specialist" as a means of attracting attention and, hopefully, clients. Although somewhat limiting, the term is expansive enough to encompass a fairly broad spectrum of legal practice. Yet advertising oneself as an elder law attorney does not necessarily exclude younger clients. Once in the office, the lawyer can, in effect, advertise his or her general availability for all types of legal consultations.

Many elder lawyers, however, are in fact elder law specialists whose practice is limited to legal problems of the elderly. For these lawyers, the use of advertising is often critical. Although some specialists, such as tax attorneys, can depend upon referrals from other attorneys, accountants, individuals in corporations served by the firm, and former clients, elder law attorneys depend more upon direct contact with the potential client.

By its nature, the elder law practice often deals with individuals who have no "family" lawyer. Often the last time a prospective client saw a lawyer was when he or she bought a house. In need of legal advice, such people seek an attorney versed in the relevant law. Most likely, they quickly discover that many lawyers lack the necessary ability or skill to help them. For example, a lawyer who is a traditional estate planner may prove inadequate when trying to establish eligibility for Medicaid. Given the relatively small number of elder law attorneys compared to the total number of practicing attorneys, finding an elder law attorney is a daunting task.¹⁰ That is where advertising comes into play. By targeting potential clients and advertising specialized knowledge of elder law, an attorney creates a practice by direct contact with potential clients.

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Subject to practical realities, lawyers are free to choose the form of legal practice in which they engage. A lawyer must have the skill, the training, and the interest in the area of law in which he or she elects to practice. Even more fundamental to the practice of law, however, is the necessity of clients. Wanting to develop a practice is not enough; a sufficient number of potential clients who need that particular type of legal assistance must exist. No one, for example, can practice elder law unless clients who need an elder law attorney exist. The fact that clients do need an elder law attorney partly explains the growth of the field.¹¹

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For those lawyers who gravitate toward what is sometimes called "people law," elder law is a natural fit. By definition, it is the practice of solving an individual's legal problems that arise from elemental human experiences: aging, loss of loved ones, loss of health, and death. For some attorneys, this is why they went to law school: to help people, to be involved in their most intimate problems, and, most importantly, to solve those problems. The lawyer's self-image of being a savior-in-pinstripes is well served by the tasks of the elder law attorney. These lawyers, at the end of the day, reflect upon the "good" deeds that they have performed. They might, for example, have assuaged clients' fears about the future by drawing up an advance health care directive, a durable power of attorney, or a will, or more importantly, they may have helped preserve the family assets through timely transfers to qualify for Medicaid. In

short, an elder law practice translates into doing "good" by being on the "right side of the law."¹²

Identifying elder law with the more idealistic aspects of law practice should not be discounted. The coming of age of elder law as the baby boomer lawyers entered maturity was not accidental.¹³ Touched intellectually by the radical idealism of the late 1960s, often attracted to law as a perceived instrument of social change, the boomers, initially in law school and then in the "real world," met the reality of law, which was being transformed from a profession to a business. Far from being some sort of domestic Peace Corps,¹⁴ the practice of law revealed itself to be "nasty, brutish, and short."¹⁵ For some of these disillusioned lawyers, elder law appeared to offer a plausible mix of earning a living while doing good. Within an elder law practice, attorneys solved problems of the middle and working class (not the poor, however, for they could not afford an attorney). In addition, they had little affinity with the upper-class clients who were identified with traditional estate planning. They preferred to work for the middle class: fighting for statutorily-promised government benefits; assisting their clients through stressful times, such as physical infirmity, mental incapacity, or death of a loved one; and doing battle with "bad" institutions, such as nursing homes and bureaucratic, unresponsive public agencies. In short, the elder law attorney was on the side of the angels.¹⁶

In addition, elder law attracts those lawyers who prefer counseling to litigation. Emotionally, these lawyers are just not cut out to fight and scrap for their clients. The tumult of the courtroom, the frustration of litigation, or the anxiety of a trial is not for them. These lawyers measure success not in how many adversaries they vanquish but in how many satisfied clients they serve. The world of planning and advising, of helping clients avoid problems, of reducing stress rather than creating it, and of a future orientation rather than an attempt to rectify the past, typifies these attorneys. Elder law allows them to practice law in a manner that plays to their professional strengths, while avoiding what they perceive to be the less desirable aspects of legal practice.

Elder law also attracts less experienced lawyers who believe that the practice is dependent more on knowledge than experience. A lawyer's inexperience even may help by permitting the lawyer to be more open to the new realities presented by state and federal statutory entitlements and entrapments. A determined individual, even a sole practitioner, who is willing to master the arcane ways of bureaucracy can acquire the necessary knowledge.¹⁷ Being tutored in an established law office, although desirable, is not required for an attorney who wishes to establish an elder law practice. Elder law can be learned on one's own, always an appealing prospect to an inexperienced attorney.¹⁸

Elder law may attract female attorneys, whose numbers have risen sharply over the last twenty-five years.¹⁹ Perhaps because female attorneys, on the average, are less experienced than male attorneys, a less traditional practice may attract them more than one dominated by the "old guard."²⁰ Opportunities for professional success may appear greater in a developing field such as elder law. If, as it is suspected, women

continue to be victims of sex discrimination in hiring and promotion, they well might prefer to strike out on their own. What better area of the law than one which is relatively "unoccupied territory"? Elder law also might appeal especially to women if it is true, as some claim, that women are more effective than men in skills such as reconciliation, counseling, and negotiation that are so essential for the elder law attorney.²¹ Finally, women might prefer a legal practice that in theory allows them more control over their time. Unlike many other attorneys, particularly litigators, the elder law attorney should be able to control his or her calendar—even to the point, if desired, of limiting hours in order to attend to family responsibilities. Although female attorneys probably do not take advantage of that relative possibility of control any more than their male counterparts, the thought that they might be able to do so if they desire may attract some women to the practice.

Elder law should also attract those who come to the law as a second career. As any law professor can attest, many older law students come to law school after careers as nurses, social workers, doctors, stockbrokers, and any other number of occupations. Some attend law school with the desire to renounce completely their past and forge new lives as attorneys. Others prefer to make use of their past training and to integrate the practice of law with their professional experience. They see in the practice of elder law the opportunity to avoid a complete break with the past, to build upon it. For these older law students, elder law offers the hope of drawing upon and giving value to their work prior to attending law school. The former nurses and doctors perceive that they can rely upon their medical expertise in advising clients about health care decisions. Former social workers see continuity in advising clients faced with difficult life choices. The former hospital administrator realizes the value of his or her knowledge of Medicare and Medicaid. For these individuals, and many more, elder law offers a special opportunity.

Changes in the economics of law, legal work opportunities, and lawyers' emotional needs coincided with a sharp rise in the number of older Americans and in their corresponding need for legal assistance. The result of the emergence and convergence of all these factors was the rise of elder law.²²

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Notes

1. The rise of elder law obviously is also dependent upon the growth in the number and relative wealth of the elderly. My purpose in this essay is to consider the other, less obvious factors, that help explain the growth of elder law and, thus, this journal.

2. At a conference I attended a lawyer asked me what was *elder law*. After I explained the kind of practice to which I thought the term applied, she responded: "Oh, that's what I do. I guess that I've been an elder law attorney for years and never knew it."

3. I have not been able to discover just when the term *estate planning* came into general usage. Certainly it was well established by 1953 when James Casner published his widely influential volume, *A. JAMES CASNER, ESTATE PLANNING, CASES, STATUTES, TEXT, AND OTHER MATERIALS* (1953).

4. There is no common agreement on whether the preferred term is *elderly law* or *elder law*. One group, the National Academy of Elder Law Attorneys, selected the term *elder law*. Yet, some books that advise lawyers on how to assist older clients use the term *elderly*. See, e.g., LAWRENCE A. FROLIK & MELISSA BROWN, *ADVISING THE ELDERLY OR DISABLED CLIENT* (1992); JOHN J. REGAN, *TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY* (1993). Others use a single-word term, *elderlaw*. See, e.g., LAWRENCE A. FROLIK & ALISON P. BARNES, *ELDERLAW: CASES AND MATERIALS* (1992); and some authors still use the term *aging*. See, e.g., PETER STRAUSS ET AL., *AGING AND THE LAW* (1990); The American Civil Liberties Union helped publish ROBERT N. BROWN ET AL., *THE RIGHTS OF OLDER PERSONS* (1979). The American Association of Law Schools has a section devoted to the issues of the elderly with the title, Aging and the Law. Time alone will determine the preferred term.

5. ROBERT C. ATCHLEY, *SOCIAL FORCE AND AGING* 91 (5th ed. 1988).

6. DAVID A. TOMB, *GROWING OLD* 15 (1984).

7. Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 694-96 (1991).

8. See generally HOUSE SELECT COMM. ON AGING, *EXPLODING THE MYTHS: CAREGIVING IN AMERICA*, 100TH CONG., 2D SESS. (1988).

9. FROLIK & BROWN, *supra* note 4, at 9-18.

10. Although I live in Pittsburgh, individuals throughout Pennsylvania, including Philadelphia, call me seeking an expert in elderly legal affairs. They either ask to employ me (I usually decline), or they hope that I can refer them to a specialist or at least a knowledgeable attorney. With the exception of Philadelphia, I am often at a loss as to whom to refer them, not for the lack of capable attorneys, but because I simply do not know a qualified attorney in their area of the state. Like the client, often I have no way of locating elder law attorneys. With the exception of the members of National Academy of Elder Law Attorneys, I know of no list of lawyers who consider themselves to have expertise in the legal rights of the elderly.

11. [The rapid growth in the number of Americans age sixty-five or older supports the growth of elder law. In 1990, those age sixty-five or older constituted 12.6 percent of the population, up from 9.9 percent in 1970. The total number in 1990 was over 31 million out of a total population of approximately 248 million. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE U.S.*, table no. 13, at 73 (111th ed. 1991).]

12. As Professor John Langbein wrote about the field of estate planning, "The notion that what you are doing is good for everybody you touch is tremendously gratifying." [John Langbein, *Taking a Look at the Pluses and Minuses of the Practice*, TR. & EST., Dec. 1989, at 10.]

13. The term *baby boomer* refers to the 69 million Americans born between 1943 and 1960. Neil Howe & William Strauss, *The New Generation Gap*, ATLANTIC, Dec. 1992, at 67.

14. One of my favorite cartoons from the mid-1960s showed two young white men lolling at the beach. By their appearances, they were college students, probably at some elite institution. One said to the other, "I'd like to be of service to humanity and still have a piece of the pie." I suspect that sentiment was shared by many would-be social activists who helped swell law school enrollments.

15. See THOMAS HOBBS, *LEVIATHAN* 91-100 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) (writing about life in a natural state).

16. This description will embarrass many elder law practitioners who would not put such a self-serving glow on their practices. Nevertheless, I think that many do believe it even if they would not feel comfortable expressing it in these terms.

17. If not a sole practitioner, perhaps a law firm's sole elder law attorney. In 1992, NAELA reported that out of a membership of nearly 1800, only 122 of its members belonged to a firm with two or more members of NAELA. Robert B. Fleming, *NAELA Membership Update*, NAELA NEWS (National Academy of Elder Law Attorneys, Tucson, Ariz.), Oct. 1992, at 15.

18. I stress *appears* to be masterable by the individual. As they gain experience, elder law attorneys soon learn just how complex and difficult a practice it can be.

19. By 1988, women constituted approximately 30 percent of all lawyers, up from 2.8 percent in 1970. [AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 18 (1992) [hereinafter LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT].]

20. Compare the make-up in 1992 of the Board of Directors of NAELA for 1992 (7 women, 8 men) with that of the ABA Real Property, Probate and Trust Council (9 women, 16 men).

21. This view of the different talents of women finds much of its basis in the work of the psychologist Carol Gilligan. She claims, *inter alia*, that by their nature women are nurturers and men are combative. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

22. The growth of interest in the practice of elder law, or at least of an interest in the legal problems of the elderly, is symbolized by the number of state bar journals that have dedicated an issue to the legal problems of the elderly. See, e.g., J. KAN. B. ASS'N, May 1990; 69 MICH. B.J. 493-620 (1990); WIS. LAW., Aug. 1991. The July 1991 issue of *Trust & Estates* (a magazine directed to bank trust counsel) was devoted to the topic—Symposium, *Addressing the Problems of Elder Care*, TR. & EST., July 1991. At least two law reviews have put out special issues on elderly legal problems. Symposium, *Legal Issues Relating to the Elderly*, 42 HASTINGS L.J. 683, 683-937 (1991); Symposium, *Housing and Home Care for the Elderly*, 10 ST. LOUIS U. PUBLIC L. REV. 437, 437-564 (1991).

List of Contributors

DAVID ABROMOWITZ is Director of Goulston & Storrs and Chair of the Forum on Affordable Housing and Community Development Law.

WILLIAM E. ADAMS is Assistant Professor of Law at Shepard Broad Law Center, Nova Southeastern University, Fort Lauderdale, Florida.

RONALD H. ADAY is Professor of Sociology at Middle Tennessee State University.

ANNE ALSTOTT is Associate Professor at Columbia University School of Law.

WILLIAM M. ALTMAN is an Attorney with Lewin-VHL, Washington, DC.

ALISON P. BARNES is Professor of Law at Marquette University.

SANDRA BARON is Elder Abuse Trainer and Outreach Coordinator with the Elderly Crime Victims' Resource Center, New York City Department for the Aging.

TOM L. BEAUCHAMP is Professor of Philosophy and Senior Research Scholar at the Kennedy Institute of Ethics, Georgetown University.

ROY E. BEAUCHENE is Professor Emeritus of Nutrition at the University of Tennessee.

ANNE E. BERDAHL is Associate Editor of *Health Systems Review*.

MERIS L. BERGQUIST is a staff attorney with Vermont Senior Citizens Law Project, Springfield, Vermont.

MERTON C. BERNSTEIN is Professor of Law at Washington University.

DAN BLAZER is Gibbons Professor of Psychiatry, Director of the Affective Disorders Program, and Head of the Division of Geriatric Psychiatry at Duke University Medical Center, Durham.

ERIC CARLSON is an Attorney and Director of the Nursing Home Advocacy Project at Bet Tzedek Legal Services.

CHRISTINE CASSEL is Chief of the Section of General Internal Medicine; Director of the Center on Aging, Health and Society; and Director of the Center for Health Policy Research and Professor of Medicine and Public Policy at the University of Chicago.

NINA J. CRIMM is Professor of Law and Director of the Project for Socially Responsive Taxation, Center for Law and Public Policy, St. John's University School of Law.

WILLIAM G. DAUSTER is Democratic Chief of Staff and Chief Counsel, Committee on the Budget, United States Senate.

DAVID M. ENGLISH is Professor of Law at the University of South Dakota.

RICHARD A. EPSTEIN is James Parker Hall Distinguished Service Professor of Law at the University of Chicago.

LOIS K. EVANS is with the School of Nursing, University of Pennsylvania.

MARK FALK is Executive Director of Black Hills Legal Services, Inc., Rapid City, South Dakota.

LINDA C. FENTIMAN is Associate Professor of Law, Suffolk University Law School.

PETER J. FERRARA is Associate Professor of Law at George Mason University School of Law and Senior Fellow, Cato Institute.

LEONARD M. FLECK is Professor of Philosophy and Medical Ethics, Philosophy Department, Center for Ethics and Humanities in the Life Sciences, Michigan State University.

W. EDWARD FOLTS is Associate Professor of Sociology at Appalachian State University.

VICKI A. FREEDMAN is on the RAND Health Staff, Washington, D.C.

LAWRENCE M. FRIEDMAN is Marion Rice Kirkwood Professor of Law at Stanford University.

LAWRENCE A. FROLIK is Professor of Law at the University of Pittsburgh.

BOB GRAHAM is Senior U.S. Senator from Florida.

PETER J. GRECO is with the School of Medicine, Case Western Reserve University.

JEANE ANN GRISSO is with the Center for Clinical Epidemiology and Biostatistics, Division of General Internal Medicine, University of Pennsylvania.

THOMAS L. HAFEMEISTER is Senior Staff Attorney with the National Center for State Courts' Institute on Mental Disability and the Law, Williamsburg, Virginia;

Project Director for the National Probate Court Standards Project; and Adjunct Professor of Law at the Marshall-Wythe School of Law, College of William and Mary.

DANIEL I. HALPERIN is Professor of Law at Georgetown University.

JOEL F. HANDLER is Professor of Law at the University of California at Los Angeles.

PAULA L. HANNAFORD is a Research Associate with the National Center for State Courts, Williamsburg, Virginia.

MICHAEL C. HARPER is Professor of Law at Boston University.

FAY WILSON HOBBS is Institution Rehabilitation Counselor with the Virginia Department of Youth and Family Services.

STEVEN H. HOBBS is Professor of Law at Washington and Lee University.

GEOFFREY T. HOLTZ was a 1997 J.D. Candidate at California State University, San Diego.

HOWARD M. IAMS is with the Social Security Administration.

ROBIN M. JACOBSON is a second year law student at the University of South Dakota School of Law.

MOLLY F. JAMES is a third year law student at Georgetown University.

CHRISTINE JOLLS is Assistant Professor of Law at Harvard University and Faculty Research Fellow.

YALE KAMISAR is Clarence Darrow Distinguished University Professor at the University of Michigan Law School.

RICHARD L. KAPLAN is Professor of Law at the University of Illinois at Urbana-Champaign.

MARSHALL B. KAPP is Professor in the Department of Community Health and Director of the Office of Geriatric Medicine and Gerontology, Wright State University School of Medicine.

NAOMI KARP is Associate Staff Director of the American Bar Association Commission on Legal Problems of the Elderly.

ELEANOR D. KINNEY is Professor of Law and Director of the Center for Law and Health, Indiana University School of Law, Indianapolis.

MAYA KRAJCI NOVIC is a second year law student at the University of Wisconsin, Madison.

KAROL P. KROTKI is with the Institute for Survey Research, Temple University.

CLIFTON B. KRUSE, JR. is an Attorney with Kruse & Lynch, P.C., Colorado Springs.

KARIN LAPANN is with the Center for Clinical Epidemiology and Biostatistics, Division of General Internal Medicine, University of Pennsylvania.

DEAN R. LEIMER is with the Division of Economic Research, Office of Research and Statistics, Social Security Administration.

MICHAEL V. LEONESIO is with the Division of Economic Research, Office of Research and Statistics, Social Security Administration.

BERNARD LO is Associate Professor of Medicine and Acting Chief of the Division of Medical Ethics, University of California, San Francisco.

KATHERINE M. LOGAN is Assistant Professor of Sociology at Appalachian State University.

GREG MAISLIN is with the Center for Clinical Epidemiology and Biostatistics, Division of General Internal Medicine, University of Pennsylvania.

PETER MARGULIES is Associate Professor at St. Thomas University School of Law.

DOROTHY I. MEDDAUGH is Assistant Professor in the Department of Family and Community, School of Nursing, Ohio State University.

ALAN MEISEL is Professor of Law at the University of Pittsburgh and Director of the University's Center for Medical Ethics.

VICKI MICHEL is Associate Director of the Pacific Center for Health Policy and Ethics, University of Southern California, Los Angeles.

LINDA O'BRIEN is with the Center for Clinical Epidemiology and Biostatistics, Division of General Internal Medicine, University of Pennsylvania.

ANDREA D. PANJWANI is an Attorney with Legal Services of Greater Miami, Inc.

PATRICIA A. PARMELEE is Senior Research Psychologist at Polisher Gerontological Research Institute of the Philadelphia Geriatric Center.

ANNE K. PECORA is Associate Professor at the University of Baltimore School of Law.

REBECCA PLAUT is Special Assistant to the Administrator of the Boston Housing Authority.

DAVID PRYOR is United States Senator from Arkansas.

DANIEL B. RADNER is with the Division of Economic Research, Office of Research and Statistics, Social Security Administration. Ramona C. Rains is a third year law student at Cumberland School of Law, Samford University.

JAN ELLEN REIN is Professor of Law at the McGeorge School of Law, University of the Pacific.

VIRGINIA P. RENO is with the Office of Policy and External Affairs, Social Security Administration.

ROBERT P. ROCA is Director of Geriatric Services at the Sheppard and Enoch Pratt Hospital in Baltimore and Associate Professor of Psychiatry at the Johns Hopkins University School of Medicine.

JOHN ROTHER is Director of the Division of Legislation and Public Policy, American Association of Retired Persons.

STEVEN H. SANDELL is with the Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services.

RANJANA SARDANA lives in Houston.

CHRISTINE S. SELLERS is Assistant Professor of Criminology at the University of South Florida.

CHRISTINE A. SEMANSON lives in Michigan.

ELISABETH A. SIEGERT is with the University of Medicine and Dentistry of New Jersey, Robert Wood Johnson Medical School at Camden.

ANDREW H. SMITH is a Research Analyst with the Public Policy Institute, American Association of Retired Persons.

LINDA F. SMITH is Clinical Program Director and Associate Professor of Law at the University of Utah.

MICHAEL A. SMYER is Professor of Human Development at Pennsylvania State University and President of the Division of Adult Development and Aging, American Psychological Association.

JEFFREY SPITZER-RESNICK is a solo practitioner in Madison, Wisconsin.

JUNE O. STARR is Associate Professor of Law at Indiana University School of Law, Indianapolis.

T. HOWARD STONE is a Consultant with the World Health Organization, Regional Office for the Western Pacific.

GEORGE J. TICHY, II is a Partner with Littler Mendelson, P.C., San Francisco.

CHARLES TIEFER is Associate Professor of Law at the University of Baltimore.

PHILIP B. TOR is a J.D. candidate at the College of Law, University of Arizona.

DELLMAR WALKER is Professor of Human Sciences at Middle Tennessee State University.

CARLA T. WALLS is a Staff Member with the Philadelphia Health Management Corporation.

SIDNEY D. WATSON is Associate Professor at Mercer University School of Law.

ADELE WELTY is with the Institute on Law and Rights of Older Adults, Brookdale Center on Aging, Hunter College, CUNY.

LINDA S. WHITTON is Associate Professor at Valparaiso University School of Law.

WILLIAM J. WINSLADE is James Wade Rockwell Professor of Philosophy in Medicine, Institute for the Medical Humanities, University of Texas Medical Branch, Galveston, and Professor of Law at the Health Law and Policy Institute, University of Houston Law Center.

KEVIN R. WOLFF is a second-year law student at the University of Georgia School of Law.

ERICA WOOD is Associate Staff Director of the American Bar Association Commission on Legal Problems of the Elderly.

BARBARA W. K. YEE is Developmental Psychologist in the School of Allied Health Sciences, University of Texas Medical Branch, Galveston, Texas.