

Elder Law Teaching and Scholarship: An Empirical Analysis of an Evolving Field

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I. Introduction

Within the next year, the first Baby Boomers will reach traditional retirement age and over forty million Americans—more than 13 percent of the American population—will be at least sixty-five years old.¹ As the legal profession faces the serious challenge of responding to the needs of this burgeoning elderly population, the field of elder law is poised to play a key role.

Elder law is a specialty focused on counseling and representing older persons or their representatives on later-in-life planning and other legal issues of particular importance to older adults.² Although elder law is still a young field,³ today many American law schools offer elder law courses and attorneys across the country hold themselves out as elder law specialists.

Despite the field's growth and the prospect of a dramatic increase in the need for its services and insight, relatively little is known about the state of elder law teaching and scholarship. While scholars and practitioners have described

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1. U.S. Census Bureau, Projections of the Resident Population by Age, Sex, Race, and Hispanic Origin: 1999 to 2100 (2000), *available at* http://www.census.gov/population/projections/nation/detail/d2011_20.pdf (these figures are estimates based on 2000 census figures).
2. For a full discussion of this definition, *see infra* note 63.
3. The first elder law course we could find evidence of was a short-lived elder law clinic founded in 1972 at Syracuse University College of Law by now-Emeritus Professor Travis H.D. Lewin. Elder law courses remained a rarity well into the 1980s. *See* Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 *Elder L.J.* 1, 4 (1993) [hereinafter *Frolik, Historical*] (stating that “[t]en years ago, if you asked a lawyer if he or she was an elder law attorney, you would have been met with a blank stare, a laugh, or a frown.... I doubt if any lawyer in 1980 ever used the term elder law, far less did they consider themselves properly identified by the term.”). *Accord* Legal Counsel for the Elderly, 1993 *Elderlaw Directory of Seminars, Courses, and Clinics for U.S. Law Schools* (1993).

the field from a normative perspective,⁴ empirical information describing the field is meager.⁵ Thus, although increasing numbers of law schools offer elder law instruction, questions abound: What types of courses are taught? What is taught in them? Who teaches them? What challenges and opportunities do they face? What kinds of scholarship are in production, by whom, and with what impact? These are important questions because their answers will shape how this field of law develops, and ultimately, its impact on the legal academy, legal practice, and policy.

This study seeks to answer these questions, providing a full view of the state of elder law teaching and scholarship and paving the way for future efforts to shape the field. Specifically, it aims to give an account of elder law faculty, the relationship between their teaching and scholarship, the impact of their scholarship, and the availability, content, and format of elder law courses in U.S. law schools.⁶ These findings, though subject to multiple interpretations, suggest that elder law is on the brink of becoming a mainstream part of the American legal academy, but that significant barriers to the field's growth and development remain. The study's findings are based, in part, on a survey conducted in the 2008–2009 academic year of those teaching in the field. The survey was performed under the auspices of the Elder Law Study Group,⁷ a group of legal academics and elder law experts brought together to serve as study advisors.

4. See, e.g., Lawrence A. Frolik, *The Developing Field of Elder Law Redux: Ten Years After*, 10 *Elder L.J.* 1, 2 (2002) [hereinafter *Frolik, Redux*]; Frolik, *Historical*, *supra* note 3, at 2. Rebecca C. Morgan, *Elder Law in the United States: The Intersection of Practice and Demographics*, 2 *J. Int'l Aging, Law & Pol'y* 103, 107 (2007); Paul Premack, *Elder Law Practice: An Overview*, 45 *S.D. L. Rev.* 461 (2000).
5. To date, the most significant empirical effort has been Stetson University School of Law's effort to collect information about elder law course offerings. See *Elder Law Course Survey*, available at <http://justice.law.stetson.edu/excellence/elderlaw/ElderLawCourseSurvey.htm>.
6. The study focuses on the United States, though elder law education is gaining momentum in other countries, too.
7. The Elder Law Study Group was convened by Edward ("Ned") D. Spurgeon and includes: Betsy Abramson (attorney, Madison, Wisconsin), Mary Jane Ciccarello (Borchard Foundation Center on Law & Aging; adjunct faculty, University of Utah S.J. Quinney School of Law), A. Kimberly Dayton (professor, William Mitchell College of Law), Lawrence A. Frolik (professor, University of Pittsburgh School of Law), Richard Kaplan (professor, University of Illinois College of Law), Nina A. Kohn (associate professor, Syracuse University College of Law), Kate Mewinney (clinical professor, Wake Forest University School of Law), Rebecca C. Morgan (professor, Stetson University College of Law), Charlie Sabatino (director, ABA Commission on Law & Aging), Edward ("Ned") D. Spurgeon (Executive Director, Borchard Foundation Center on Law & Aging), and Linda Whitton (professor, Valparaiso University School of Law).

II. Methodology

Three types of studies were conducted to provide a comprehensive view of elder law's status and role in academia.

First, we conducted two direct response surveys. In fall 2008, a ten-page "Professor's Survey" of thirty-five questions (with many sub-questions) was mailed to all 177 members of the Association of American Law Schools' Section on Aging and the Law, those who were identified by the Association as elder law teachers, and those who fell in both categories. A follow-up postcard was sent two months after the original mailing; recipients were asked to complete the mailed survey or to download a copy from a website. Announcements about the survey, its purpose, and its availability also were published in the fall 2008, Section on Aging and the Law newsletter and the "Elder Law Prof Blog."⁸ Surveys were also sent to those identified by the Association as deans of academic affairs at U.S. law schools. The deans were asked to (1) help identify persons teaching and writing in the field of elder law, and (2) give an enclosed copy of the Professor's Survey to "persons who teach elder law at your school."

Fifty-four Professor's Surveys were completed and returned, forty-seven of them by those who currently teach or previously taught elder law (hereinafter referred to as "respondents").⁹ The majority (twenty-six) were tenured,¹⁰ but many (40 percent) were not in tenured or tenure-track positions.¹¹ Only two respondents were in tenure-track positions and both were in doctrinal teaching. Comparing the respondents to the Professor's Survey with the overall staffing demographics determined in the Overview Study discussed below indicates that adjunct professors were significantly under-represented in the response to the Professor's Survey.

Second, we conducted an Overview Study to determine the extent of elder law course offerings and to assess the representativeness of responses to the Professor's Survey. As part of this overview, we examined online course catalogs or schedules from ABA-accredited law schools in all fifty states to determine (1) if the school offered an elder law course, and (2) the academic status of the person or persons teaching that course. We also sought to identify, if possible, how frequently the school offered an elder law course to achieve a better sense of the depth and frequency of such offerings. We contacted school registrars and individual teachers where we could not determine the academic status of a course's teacher from publicly available information or from one of our surveys.

8. The Elder Law Prof Blog is administered by A. Kimberley Dayton, a member of the Elder Law Study Group, and is available at http://lawprofessors.typepad.com/elder_law.
9. Survey responses of those who had never taught elder law were not included in analyses of the survey data.
10. Specifically, twenty were tenured doctrinal faculty, five were tenured clinical faculty, and one was tenured both as a doctrinal and clinical faculty member.
11. Specifically, ten were in non-tenure-track clinical positions, eight were adjuncts, and one was in a non-tenure-track doctrinal position.

Third, we sought to assess the impact of elder law scholarship. We tapped the Washington and Lee University Law Journal Submissions and Rankings Database, which contains comparative information and rankings of law reviews based on data about citations to articles in the preceding eight years of publication.¹² We used the database to conduct a citation study of specialized elder law reviews to determine the comparative impact of these law reviews relative to one another and relative to other specialized law reviews.¹³ In addition, we examined the “top twenty” general law reviews to see the extent to which elder law scholarship appears in these publications.¹⁴ Whether articles published in such journals are superior to those appearing in less prestigious journals is a subject of considerable debate and disagreement within the legal

12. In recent years, some scholars have suggested that the frequency at which an article is downloaded from the Social Sciences Research Network (SSRN) is a good measure of the impact of scholarship. *See, e.g.*, Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 *Ind. L.J.* 83 (2006) (arguing that SSRN downloads can be used to compare law schools because they are a useful indicator of the scholarly performance of law school faculty). We believe it is premature to try to evaluate the impact of elder law scholarship this way. To date, only a relatively small portion of elder law scholarship has been uploaded to SSRN, and the SSRN Elder Law Studies subject matter journal was not begun until 2009. Moreover, SSRN download statistics do not indicate whether or how the reader used the article, and suffer from biases that undermine their utility. *See id.* at 113-17 (cataloging biases manifested in download counts); Carol A. Parker, *Institutional Repositories and the Principle of Open Access: Changing the Way We Think About Legal Scholarship*, 37 *N.M. L. Rev.* 431, 466 (2007) (“Download counts provide scholars with a means to partially quantify the impact of their work, but they do not capture readers who access articles via commercial databases or print, nor do they provide a measure of quality comparable to citation counts.”); Lawrence A. Cunningham, *Scholarly Profit Margins: Reflections on the Web*, 81 *Ind. L.J.* 271, 276 (2006) (describing SSRN download counts as a less informative measure of impact than citation counts as they do not indicate how the downloaded article has been used or whether it has expanded the knowledge base); Ronen Perry, *The Relative Value of American Law Reviews: Refinement and Implementation*, 39 *Conn. L. Rev.* 1, 7-8 (2006) (explaining why citation counts provide a better basis for evaluating law review articles than download statistics).
13. The database is available at <http://lawlib.wlu.edu/LJ/index.aspx>. Although imperfect, the frequency with which an article is cited can be used as a proxy for the article’s impact. In the scientific arena, article citation indexes are frequently treated as a measure of articles’ impact.
14. Top twenty law reviews were considered to be those general journals published by law schools ranked among the top twenty in 2009 by U.S. News & World Report. Using these rankings in no way represents an endorsement of them or even an endorsement of law school rankings in general. Rather it is recognition that the magazine’s rankings are a powerful symbol of prestige and that the perception of the prestige of an institution’s law review is highly correlated with its magazine ranking. Moreover, other methods of rating law reviews tend to result in rankings largely consistent with the magazine’s rankings. *Cf.* Alfred L. Brophy, *The Relationship Between Law Review Citations and Law School Rankings*, 39 *Conn. L. Rev.* 43, 48 (2006) (noting that “[Law school f]aculty commonly use the rank of the law school associated with the review as a proxy for the review’s quality” and finding a close correlation between the citation scores of law reviews at top schools and those schools’ U.S. News & World Report ranking).

academy.¹⁵ Nevertheless, publication in these elite forums is informative as it is an indicator of the relative prestige associated with the article, the extent to which it is likely to be cited by subsequent articles,¹⁶ and perhaps more importantly, the likelihood that it will be considered by those outside the specialty.

III. Findings

Based on our survey, overview, and scholarship impact study, we are able to provide a portrait of the current state of elder law teaching and scholarship in U.S. law schools. Specifically, as related in this section, we can describe the types of elder law courses available to law students, the characteristics of faculty teaching such courses, the content and format of such courses, and student interest in taking them. In addition, we are able to describe the relationship between scholarship and teaching, and provide insight into the impact of elder law scholarship.

A. Availability of Elder Law Courses

The Overview Study found that 112 out of 192 law schools have an elder law course listed as part of their curriculum. This represents a dramatic change over the past twenty years. A 1988 survey of elder law offerings found that only thirty-seven schools offered elder law courses,¹⁷ and a 1993 survey identified only fifty schools that did so.¹⁸ The fact that a majority of schools include elder law in the curriculum does not necessarily mean, however, that in any given year a majority offer an elder law course. Not all schools that have added the subject to their curriculum currently offer an elder law course, and even those that plan to offer one regularly may not have run one in several years.¹⁹

Elder law courses tend to be small to mid-sized. On average, respondents' elder law courses enrolled twenty-three students. Only three respondents reported enrolling fewer than ten students. By contrast, six reported ten to

15. This debate, of course, occurs in non-legal academic circles as well. *See, e.g.*, Andrew J. Oswald, An Examination of the Reliability of Prestigious Scholarly Journals: Evidence and Implications for Decision-Makers, 74 *Economica* 21 (2007); M. H. Medoff, Article Placement and Market Signaling, 10 *Applied Econ. Letters* 601 (2003).
16. *See* Alfred L. Brophy, The Signaling Value of Law Reviews: An Exploration of Citations and Prestige, 36 *Fla. St. U. L. Rev.* 229 (finding a relationship between journal prestige and the citation frequency).
17. Legal Counsel for the Elderly, *supra* note 3, at 1 (stating the dates when many of the elder law programs identified began).
18. *See id.* (noting that while the directory's editor characterized sixty schools as providing elder law offerings, a review of the study indicates that, at most, fifty schools provided an offering that meets the definition of elder law used in this report).
19. Not surprisingly, the Overview Study found that many law schools with elder law in their curriculum do not offer it annually, and in some cases appear to have no plans for offering it at all.

fifteen students enrolled; nine, sixteen to twenty students; eight, twenty-one to thirty students, five, thirty-one to forty students; and six, more than forty students.

While most law schools offering an elder law course offer only one, approximately a quarter of such schools offer more than one course on the subject.²⁰ Typically, schools with multiple elder law courses offer both a doctrinal and a clinical course. In addition to an elder law course for juris doctorate (J.D.) degree students, a handful of schools offer specialty instruction aimed at students in non-legal fields and two offer a masters of laws (LL.M) degree in elder law.²¹

It should be noted, however, that the fact that a school does not offer an elder law course—or that a student does not take an elder law course—does not necessarily mean that he or she will not have the opportunity to engage with elder law issues. In spring 2008, the Center for the Applied Study of Legal Education (CSALE) conducted the first in what it hopes to be a series of longitudinal studies of applied legal education.²² As part of its work, CSALE identified persons with primary responsibility for or considerable knowledge of the applied legal programming at every U.S. law school. When asked to identify legal fields in which law students at their schools were placed as interns or externs, sixty-nine such persons responded and ten identified “elderly law” as a field in which students were placed. Notably, a few of these respondents were affiliated with schools that lack elder law course offerings.²³

B. Faculty Characteristics

Elder law courses routinely are taught by persons who are not part of a law school’s regular faculty. Only approximately half of law schools offering elder law use a tenured or tenure-track faculty member to teach the course.²⁴

20. The Overview Study identified twenty-seven law schools listing more than one elder law offering. However, in some cases, one or more such courses was not currently offered.
21. The University of Kansas School of Law offers an LL.M. degree in elder law that includes a required clinical component, while Stetson University College of Law offers an LL.M. degree through distance learning. See Kansas Univ. Sch. of Law, LL.M. Program in Elder Law, *available at* <http://www.law.ku.edu/academics/elderlaw/llm/index.shtml> (last visited Oct. 18, 2009); Stetson Univ. College of Law, Elder Law LL.M., *available at* <http://www.law.stetson.edu/tmpl/academics/elder/llm/internal-1-sub.aspx?id=592> (last visited Oct. 18, 2009). While it is important to recognize the existence of post-J.D. elder law education, this study is focused on J.D. level education. In the next phase of our study, in which we intend to explore recommendations for further developing the field, it is anticipated that graduate level education and post-J.D. elder law education will be given more consideration.
22. For more information about the center’s study, see <http://www.csale.org/AboutTheStudy.html>.
23. We are grateful to CSALE for sharing its data. Due to restrictions on the use of that data, CSALE respondents cannot be identified by name or school.
24. The Overview Study identified fifty-three schools in which at least one tenured or tenure-track faculty member teaches an elder law course; it identified another fifty-one schools in which there was no tenured or tenure-track faculty member teaching an elder law course.

Moreover, approximately one-third of law schools offering an elder law course rely exclusively on adjunct faculty to teach it.²⁵ The reliance on adjuncts to teach elder law may be a growing trend. Respondents who began teaching elder law within the past decade are more likely to be adjuncts than those who began earlier. Specifically, roughly equal numbers of Professor's Survey respondents began teaching elder law in the 1980s, 1990s, and 2000s.²⁶ However, three-quarters of adjunct respondents began teaching in the 2000s.

Many who are teaching elder law came to the field later in their careers. Respondents with tenure teaching doctrinal courses typically did not become involved in teaching elder law until well into their teaching careers. Of the tenured strictly doctrinal respondents, approximately two-thirds began teaching it at least six years into their teaching careers, commonly waiting until ten to twenty years into their careers.²⁷ By contrast, clinical faculty members who were not adjuncts, regardless of tenure status, tended to begin teaching elder law earlier in their careers—typically within the first six years.²⁸ Similarly, three-quarters of adjunct respondents started teaching by teaching elder law.²⁹ This phenomenon of doctrinal faculty coming to elder law teaching later in their careers may, however, be changing. Both tenure-track respondents began teaching elder law at the beginning of their careers: one reported teaching it in the first year of teaching, the other, one to three years into teaching. In addition, our overview study identified several additional tenure-track doctrinal faculty members who teach elder law.

The academic status of professors at five schools that included elder law in their curricular listings could not be reasonably ascertained, and three additional such schools clearly had no person assigned to teaching the course.

25. In the Overview Study, thirty-six schools were identified as using exclusively adjunct faculty to staff elder law offerings.
26. Of the respondents, fourteen started in the 1980s, sixteen in the 1990s, and seventeen in the 2000s. The earliest year reported was 1981.
27. One began teaching it in the first year of teaching; one began teaching one to three years in; four began teaching three to six years in; five began teaching six to ten years in; seven began teaching ten to twenty years in; and two began teaching more than twenty years in. The respondent who self-identified as being tenured both as a clinical professor and a doctrinal professor is not included in these figures.
28. Of the tenured clinical professors, four out of five began to teach it within six years of teaching. Specifically, two reported teaching elder law in their first year of teaching, one reported teaching it in years one to three; one in years three to six; and one after more than twenty years of teaching. The respondent who identified as both a tenured clinical and doctrinal professor began teaching elder law one to three years into the respondent's teaching career. Of the non-tenure-track clinical faculty, most began teaching elder law within their first six years of teaching. Specifically, three began in the first year; four began in years three to six; one began in years six to ten; one began in years ten to twenty; and one began after more than twenty years.
29. Six out of eight adjunct respondents began teaching it in their first year.

It appears that those teaching elder law generally have experience practicing in the field. More than three-quarters of respondents reported having experience representing clients on elder law issues. Since adjunct faculty were under-represented in the Professor's Survey responses, it seems likely that the actual percentage of elder law teachers with practice experience in the field is somewhat higher.

C. Student Interest

Our survey findings indicate that there is significant student interest in taking elder law classes. On average, respondents currently teaching elder law teach it to thirty-two students a year.³⁰ Since some respondents were not the only person teaching elder law at their school, the average number of students enrolled in elder law courses at law schools that offer them is likely somewhat higher.

Lack of student interest rarely was cited as a reason for exiting elder law teaching. Seven respondents reported that they had stopped teaching elder law. Personal reasons, such as retirement or being needed to teach other courses, seemed to be the primary causes. Only one cited a lack of student interest as a reason.

One reason for such significant student interest may be that students see elder law courses as preparing them for elder law-related careers. Respondents indicated that they believed that some of their students were pursuing careers in elder law, with thirty-one respondents reporting that at least 10 percent of their students were doing so and some estimating that upwards of 30 percent were.³¹

D. Course Format and Content

Elder law courses assume a wide variety of forms. While most respondents said their elder law course had a final examination, as is traditional for upper-level law courses, other less traditional components are often included as well. For example, nearly half of the respondents reported requiring students to complete exercises,³² and a distinct minority incorporated speakers from other

30. To calculate the number of students enrolled annually in respondents' elder law courses, we totaled the number of students that respondents currently teaching elder law reported were enrolled annually in their elder law courses and divided the resulting figure by the number of respondents currently teaching elder law. Where respondents reported their enrollment as a range, we used the average of the range (rounded to the nearest whole integer) as their enrollment figure.

31. It is possible that some respondents interpreted "elder law careers" as including traditional trusts and estates practices, although this would be somewhat inconsistent with how the Elder Law Study group defined "elder law" for purposes of the study.

32. Specifically, twenty-one respondents reported requiring exercises in one or more elder law course.

disciplines into the classroom experience.³³ Experiential learning also plays an important role in many elder law courses. The majority of respondents reported that they taught elder law courses with an experiential component.³⁴ A sizeable portion of this experiential learning is direct client representation, although it also takes the form of an elder law focused externship, or simply a visit to a local senior center.³⁵

There is great consistency among schools as to what topics are included in an elder law course. All respondents with the exception of one cover ethics, determination of capacity, and guardianship and its alternatives in their courses.³⁶ Almost all respondents include Social Security, Medicaid coverage, Medicare coverage, end-of-life care, advance directives, and elder abuse. Nearly three-quarters of respondents cover the demographics of aging, pensions, Medicaid planning, nursing home rights, and senior housing. The majority of respondents also report covering age discrimination, estate planning, other health coverage, and local/regional aging services. In addition, significant numbers of respondents cover grandparents' rights and disability rights.³⁷

Despite the apparent agreement about the subjects to be included in an elder law course,³⁸ there is significant diversity in the texts used to teach those subjects. Although there are two well-established casebooks available to elder

33. Specifically, ten respondents reported requiring students to listen to talks by speakers from other disciplines.
34. Specifically, twenty-four respondents reported offering a course that required a supervised representation in an in-house clinic, supervised client representation in an externship setting, or a visit to a senior facility.
35. When asked to describe the primary and secondary formats of their courses, sixteen respondents reported that they taught a course where the primary format was clinical client representation, and three respondents reported that they taught a course where the primary format was experiential learning but not client representation. In addition, three respondents reported teaching a class where clinical client representation was the secondary format, and seven respondents reported teaching a class where the secondary format was experiential learning not involving client representation.
36. A subject area was counted as included in the course offerings if included in any elder law course offered by the respondent. In some cases, respondents offered more than one elder law course and covered different subjects in different offerings.
37. The number of respondents who reported teaching each subject is as follows: ethics (46); guardianship and its alternatives (46); determination of capacity (46); advance directives (45); Medicaid coverage (45); Social Security (42); Medicare coverage (42); end-of-life issues (42); elder abuse (42); Medicaid planning (37); demographics of aging (37); nursing home rights and/or litigation (36); senior housing (35); pensions (34); age discrimination (30); other health care coverage (30); estate planning (30); local/regional aging service providers (25); grandparents' rights (19); disability rights (15); and international/comparative elder law (8).
38. It should be noted that many of these subjects are, to some degree, covered in courses other than elder law. Elder law courses tend to package diverse subjects together in a holistic, practice-centered model of legal education.

law teachers, only approximately half of respondents use either,³⁹ and those who do use them typically supplement them with other materials. Indeed, it is common for teachers to use their own materials to teach elder law: of respondents currently teaching elder law, ten said they use exclusively their own materials and nearly half said they supplement published materials with their own. Other common teaching materials include the handbook *Elder Law in a Nutshell*, relied on by ten respondents,⁴⁰ and statutory supplements.⁴¹

The diversity of teaching materials appears to reflect both a mismatch between clinical teaching needs and published materials, and some dissatisfaction with existing published materials among those teaching doctrinal courses. While many respondents praised the breadth of coverage offered by existing casebooks and teaching materials, they expressed desire for works with more in-depth discussions of policy issues and for a more problem-oriented approach in teaching materials—including more questions based on hypothetical scenarios and more policy-oriented questions that could be used to engage students in robust classroom discussion. Other complaints about existing materials included that they were poorly suited for experiential learning and that they would benefit from more focus on litigation.

E. Connections Between Teaching and Scholarship

The fact that an individual teaches elder law does not mean that he or she writes in the field. Only slightly over half of respondents currently write in the field.⁴² The likelihood of writing in the field varies with academic status. The sizeable majority of tenured faculty (both doctrinal and clinical) currently

39. When asked what reading materials they use, eighteen respondents reported using Lawrence A. Frolik & Alison McChrystal Barnes, *Elder Law: Cases and Materials* (LexisNexis 2007), and five reported using A. Kimberley Dayton, Molly M. Wood, & Julia Belian, *Elder Law: Readings, Cases, & Materials* (LexisNexis, 3rd ed. 2007).
40. Cf. Lawrence A. Frolik & Richard L. Kaplan, *Elder Law in a Nutshell* (West, 4th ed. 2006).
41. Six respondents reported using Lawrence A. Frolik & Alison McChrystal Barnes, *Elder Law: Selected Statutes and Regulations* (LexisNexis 2007), and three reported using A. Kimberley Dayton, Molly M. Wood, & Julia Belian, *Elder Law: Statutes and Regulations* (LexisNexis 2007).
42. Twenty-six respondents reported they currently write in the field, nine reported that they previously published in the field, and ten reported that they had never done so.

write in the field, as was the case—although to a lesser degree—for other non-adjunct faculty.⁴³ By contrast, adjuncts typically do not currently write in the field.⁴⁴

Those writing in the field of elder law tend to see practicing attorneys and policymakers as their key audiences, although other legal academics are also a commonly cited target audience.⁴⁵ It is open to debate whether this preference to target practitioners—either in the legal field or in the policy field—is consistent with the publication preferences of those writing. When respondents were asked what their preferred forum for publication was, the most common response was a specialty law review.⁴⁶ By contrast, general law reviews, practitioner-oriented periodicals, and books, were less likely to be preferred publication fora.⁴⁷ The extent to which articles published in specialty elder law reviews reach practitioners—and the extent to which they are more or less likely to reach practitioners than scholarship published in other fora—likely varies on a myriad of factors, including the review itself. For example, the *NAELA Journal*, a publication of the National Academy of Elder Law Attorneys (NAELA), tends to focus on issues of direct relevance to elder law practice and is distributed to the Association’s membership of practicing

43. Of the tenured doctrinal respondents, fourteen currently write in the field, and six never have. Of the tenured clinical respondents, four currently write in the field and one previously did so. The respondent who identified as being tenured in both doctrinal and clinical fields reported formerly writing in the field. Of the non-tenure-track clinical respondents, seven said they currently write in the field, three had; none reported never doing so. Of the tenure-track clinical respondents, one reported currently writing in the field and the other reported never writing in the field.
44. Only one adjunct reported currently writing in the field, four reported formerly writing in the field, and three said they never had.
45. When respondents who currently write or previously wrote in the field were asked to rank their primary audiences, nine identified practicing attorneys, six identified policymakers, five identified other legal academics, one identified students, one identified another audience, and five did not respond. As for secondary audiences, seven identified practicing attorneys, five identified policymakers, three identified the judiciary, two identified other legal academics, one identified non-legal academics, and six did not respond. As for tertiary audiences, two respondents identified practicing attorneys, two identified the judiciary, four identified policymakers, two identified other legal academics, two identified non-legal academics, two identified students, three identified the public, and eight did not respond. A number of respondents checked multiple preferences but did not rank them; these responses were not included in the above figures. However, a review of their responses suggests that their preferences are likely not meaningfully different from those of respondents who provided ranking as requested.
46. Of those respondents who ranked their publication forum preferences, ten of twenty-six cited a specialty law review as their preferred forum for publication.
47. Of those who ranked their preferences, four picked general law reviews, three picked a book or book chapter, and six picked practitioner-oriented periodicals. Another five chose multiple forums: of these, three included books, and three included general law reviews. Only one picked an interdisciplinary or non-legal journal though one of the respondents who chose multiple forums did include this on his or her list.

attorneys at no additional charge. *The Elder Law Journal*, a specialized law review published by students at the University of Illinois, by comparison tends to have a somewhat broader focus and is aimed at a more academic audience.

Respondents are more likely to publish in practitioner-oriented periodicals or books than their apparent preference for specialized law reviews might suggest. Roughly equal numbers of respondents who have published in elder law reported that they did so in a specialty law review, practitioner-oriented journal, general interest law review, or a book.⁴⁸ By contrast, respondents were less likely to have published in an interdisciplinary or non-legal academic journal.⁴⁹

As is the case with publication preferences, where respondents actually publish also differs by academic status. Tenured and tenure-track doctrinal faculty are far more likely to publish in general interest law reviews than other elder law teachers.⁵⁰ Not surprisingly, adjunct faculty and faculty who are not part of the tenure system disproportionately publish in practitioner-oriented periodicals.⁵¹

48. Of respondents who reported that they currently publish in elder law, in the past five years, eighteen had done so in a specialty law review, thirteen in a practitioner-oriented periodical, seventeen in a book or book chapter, and fourteen in a general interest law review.
49. Of respondents who reported that they currently publish in elder law, six reported publishing in an interdisciplinary or non-legal academic journal during the past five years.
50. Only four respondents who were not tenured or tenure-track doctrinal faculty said they published in a general interest law review in the past five years, whereas seven such respondents reported publishing in a specialty law review in that period.
51. Of respondents who reported publishing in a practitioner-oriented periodical in the past five years, eight were tenured doctrinal faculty members, three were tenured clinical faculty members, one was a non-tenure-track doctrinal teacher, three were non-tenure-track clinical teachers, and two were adjuncts.

F. Impact of Elder Law Scholarship

One way to evaluate the impact of elder law scholarship⁵² is to determine the extent to which leading general law reviews have published it. By that measure, elder law scholarship fares poorly.⁵³ A review of the articles published between 2004 and 2008 in the general law reviews of “top twenty” law schools indicates that elder law scholarship has had relatively little penetration.⁵⁴

52. The Elder Law Study Group defined “elder law scholarship” as “a written work published in a publicly accessible, edited forum that provides a learned, disinterested, and significant analysis of one or more legal issues of particular importance to older adults. Like other forms of scholarship, elder law scholarship synthesizes and critiques existing knowledge and generates and communicates new knowledge.” In generating this definition, the following sources proved valuable: Larry Cata Backer, *Defining, Measuring, and Judging Scholarly Productivity: Working Toward a Rigorous and Flexible Approach*, 52 *J. Legal Educ.* 317, 327-28 (2002) (arguing that attempts to “define scholarship as a particular and narrow ‘thing’” should be abandoned in favor of focusing “on meaningful contributions to the scholarly enterprise as evidence of a specific product termed ‘scholarship’” and then providing guidance as to what should constitute a “meaningful contribution”); Ernest L. Boyer, *Scholarship Reconsidered: Priorities of the Professoriate* (Jossey-Bass 1990); Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 *J. Legal Stud.* 517 (2000); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 *Harv. L. Rev.* 926, 935-36 (1990) (“For purposes of promotion and tenure, ‘scholarship’ means written and published materials which meet all of the following criteria: they are ‘analytical,’ ‘significant,’ ‘learned,’ ‘well-written,’ and ‘disinterested.’...Law schools generally consider scholarship to be an amalgam of research, analysis, and writing.”); Michael J. Madison, *The Lawyer as Legal Scholar*, 65 *U. Pitt. L. Rev.* 63, 70 (2003) (reviewing Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes, and Seminar Papers* (Foundation Press 2003)) (“Like a valid patent, a worthwhile piece of legal scholarship, regardless of the professional status of its author, should make (i) a claim, that is (ii) novel, (iii) nonobvious, (iv) useful, and (v) sound.”); Deborah L. Rhode, *Legal Scholarship*, 115 *Harv. L. Rev.* 1327, 1330 (2002) (arguing that in describing the objectives of scholarship “[r]arely does anyone get much beyond ‘the discovery of truth and the promotion of knowledge.’...As an abstract proposition, that goal is difficult to dispute, but it leaves all the most important questions unanswered: Knowledge for what? For whom? To what end?”); Marin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, 48 *Santa Clara L. Rev.* 353, 368 (2008) (identifying three traditional functions of legal scholarship: (1) “to describe the history and the current state, and to monitor the future development of, legal doctrine”; (2) “to evaluate the degree to which existing doctrine, and proposed new doctrine, expresses and advances the optimal set of legal principles in a given area and to suggest possible improvements”; and (3) “to serve the needs of the practicing bar and the legal academic profession.”); and Conrad J. Weiser, *The Value System of a University—Rethinking Scholarship*, available at www.adec.edu/clemson/papers/weiser.html.
53. Similar concerns have been raised by academics examining publication patterns in other legal specialties. See William J. Turnier, *Tax (and Lots of Other) Scholars Need Not Apply: The Changing Venue for Scholarship*, 50 *J. Legal Educ.* 189 (2000) (arguing that tax scholarship is at a disadvantage in general law reviews); cf., Leo P. Martinez, *Babies, Bathwater, and Law Reviews*, 47 *Stan. L. Rev.* 1139, 1142-43 (1995) (discussing the problems in how law review editors select articles more generally); James Lindgren, *An Author’s Manifesto*, 61 *U. Chi. L. Rev.* 527, 532-33 (1994) (arguing that law review editors’ interests drive article selection, resulting in journal content being skewed toward interests that disproportionately serve elite segments of the corporate bar and the federal courts.”).
54. For an explanation of the “top twenty” category, see *supra* note 14.

Other than articles published in the *Cornell Law Review* as part of a one-time symposium on Social Security, no article focusing on elder law was published in these journals during that five year span.⁵⁵ These findings, however, do not mean that such journals did not publish any elder law-relevant articles during that time. Elder law covers a broad range of substantive subject matter areas and brings them together under a holistic practice model. Articles looking at these substantive issues outside of the elder law context were not identified in our review.⁵⁶

Another way to measure the impact of elder law scholarship is to look at the impact of specialized elder law journals. This approach is valuable for three key reasons. First, as the survey data indicated, specialized law reviews are a preferred forum for publication for elder law authors. Second, specialized elder law journals are in many ways the public face of the field. Thus, both the quality and nature of the work these journals publish has the potential to send a powerful signal about the field in general. Third, the specialized law reviews appear to publish a significant portion of elder law related articles.

There are currently three specialized elder law reviews.⁵⁷ They provide plentiful opportunities for academics, practitioners, and students to communicate about important issues and developments in the field. In addition, by soliciting articles and by conducting symposia, such journals encourage the production of elder law scholarship as well as dialogue within the elder law community. Moreover, especially to the extent that they are distributed to elder law practitioners,⁵⁸ they serve as a conduit for communication between the academic community and the practicing elder law bar.

A review of the three specialized journals indicates that the *Elder Law Journal*, published by the University of Illinois, has the most impact. Compared with the others, the *Elder Law Journal* 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.⁵⁹

55. In searching for articles squarely focused on the legal needs of older adults, the review uncovered one review of a recent book on Medicare, and one student note discussing protections against age discrimination in employment.

56. Indeed, such articles may create a bit of a paradox: as the field of elder law grows and raises consciousness of aging issues, the more likely elder law concerns will be discussed in scholarship that is not elder-law focused and thus the more difficult it may be to document the impact of elder law scholarship.

57. The three are the *Elder Law Journal*, the *NAELA Journal*, and the *Marquette Elder's Advisor*.

58. The *NAELA Journal*, for example, is distributed at no extra charge to all *NAELA* members.

59. This conclusion was reached using the information contained in the Washington and Lee University School of Law's Law Journal Submissions and Rankings Database discussed in the next paragraph of the main text. It reflects three key figures calculated by the database: (1) the "Journals Figure," which represents the number of articles (available through the Westlaw database "Journals and Law Reviews" (JLR)) citing to a law review; (2) the "Cases Figure," which represents the number of U.S. cases (available through the Westlaw

While it is clear that the specialized journals play a valuable role in the field of elder law, comparing the leading elder law journal to other leading specialized law journals suggests that elder law scholarship may not be having the level of impact that scholarship in other specialized legal fields has. The Washington and Lee University School of Law's Law Journal Submissions and Rankings Database (the "WL Database"),⁶⁰ the leading source for comparative information and rankings of law reviews, assigns journals an "impact rating" based on the average number of citations each of its articles receives annually. According to this system, while the *Elder Law Journal* has an "impact rating" of .38 (more than three times that of the next specialized elder law journal), its score is far less than those of other leading subject-specific law reviews. For example, leading subject matter specific law reviews such as the *Harvard Negotiation Law Review*, the *Tax Law Review* (published by New York University), the *Georgetown Journal of Legal Ethics*, and the *Administrative Law Review* (published by American University) have impact ratings of 1.5, .98, .78, and .66 respectively.⁶¹ That said, the *Elder Law Journal* is not the only leading specialized law review with a lower rating. For example, the *Connecticut Insurance Law Review* has an impact rating of .33 despite being the leading specialized insurance law review.⁶²

database) in the past eight years that cite to a law review; and (3) the "Currency Factor," which evaluates journals on the speed with which articles contained in them become cited. The "Impact Factor Score," the average number of annual citations to articles in each journal and the "Combined-Score Ranking," a composite of each journal's impact factor and citation count, also indicate that the *Elder Law Journal* is the leading specialized elder law review. For more information about this ranking system, see Ranking Methodology, available at <http://lawlib.wlu.edu/LJ/method.asp>.

60. The database is available at <http://lawlib.wlu.edu/LJ/index.aspx>.
61. Other leading journals were identified by looking to a leading ranking of specialized law reviews. See Tracey E. George & Chris Guthrie, An Empirical Evaluation of Specialized Law Reviews, 26 Fla. St. U. L. Rev. 813 (1999). Since these rankings (although frequently cited and still influential) are no longer new, experts in each specialty were consulted to confirm their continued validity. To ensure that other leading journals were appropriate comparisons, only those with narrow subject matter areas and that clearly were leaders in their fields were considered.
62. It is possible that the fact that elder law is still a young field, the fact that the *Elder Law Journal* did not begin until 1993, or some combination of the two may influence the *Journal's* impact by affecting its ability to attract authors as well as the overall availability of elder law articles from which it can select. The *Elder Law Journal* is somewhat younger than the *Georgetown Journal of Legal Ethics*, which began in 1987, and far younger than *Tax Law Review* and the *Administrative Law Review*, which both began in the 1940s. However, it is older than either the *Harvard Negotiation Review* or the *Connecticut Insurance Law Review*, which began in 1996 and 1995, respectively.

V. Discussion

At the outset of the study, the Elder Law Study Group developed a working definition of elder law.⁶³ Specifically, the group defined “Elder Law”

63. In developing this definition, the Elder Law Study Group looked to a number of previous descriptions of the field of elder law, including those offered by leading practitioner organizations and those found in earlier academic articles. The National Academy of Elder Law Attorneys (NAELA) defines elder law as

a specialized area of law that involves representing, counseling and assisting seniors, people with disabilities and their families in connection with a variety of legal issues, from estate planning to long term care issues, with a primary emphasis on promoting the highest quality of life for the individuals. Typically, elder law attorneys address the client’s perspective from a holistic viewpoint by addressing legal, medical, financial, social and family issues.

See National Academy of Elder Law Attorneys, National Elder Law Month Press Release, available at http://www.naela.com/Media_ElderLawMonth.aspx. By comparison, the National Elder Law Foundation (NELF) defines elder law as

the legal practice of counseling and representing older persons and their representatives about the legal aspects of health and long term care planning, public benefits, surrogate decision making, older persons’ legal capacity, the conservation, disposition and administration of older persons’ estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.

See National Elder Law Foundation, NELF Rules and Regulations, available at <http://www.nelf.org/rulesreg.htm#howis>. NELF also includes as part of its description substantive areas of legal services that should be considered central to the practice. *See id.* Other definitions can be found in various law review articles including:

- Lawrence A. Frolik, *The Developing Field of Elder Law Redux: Ten Years After*, 10 *Elder L.J.* 1, 2 (2002) (“I believe that elder law has deviated from its original path, and is evolving into a field that is best termed later life planning.”);
- Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 *Elder L.J.* 1, 2 (1993) (“Elder law is the practice of law that impacts upon the elderly, by whom is commonly meant persons age sixty-five or older.... [T]he precise age is not important because the nature of the work an attorney performs defines an elder law practice rather than the chronological age of the client.... Elder law can be roughly divided into two categories: (1) health law issues and (2) income and asset protection and preservation.”);
- Rebecca C. Morgan, *Elder Law in the United States: The Intersection of Practice and Demographics*, *J. Int’l Aging, Law & Pol’y* 103, 107 (2007) (“[E]lder law has come to be recognized not only by the legal tasks performed by the lawyers, but by the attorney’s function as a counselor to the client and/or the client’s family, the attorney’s knowledge of the aging services network and the nature of the representation of the clients in the later years of their lives.”);
- Paul Premack, *Elder Law Practice: An Overview*, 45 *S.D. L. Rev.* 461 (2000) (noting that elder law is a “service-based practice” that “primarily serves senior citizens.” Elder law is “defined by the client who is served rather than by its technical, legal distinctions.” An elder law practice “should be holistic—one should be able to examine the broad needs of the client in an effort to find solutions.”); and

as “a specialized area of law focused on counseling and representing older persons or their representatives on later-in-life planning and other legal issues of particular importance to older adults. Unlike many other areas of the law, elder law is defined primarily by the client population to be served, not by a distinct set of legal doctrines.”

Our findings indicate that this definition is consistent with how elder law is taught in U.S. law schools. Elder law courses typically cover a broad range of legal issues of importance to seniors. Many embrace the client-focused nature of the field by providing direct representation to seniors or providing hands-on engagement with older adults through other means. The interdisciplinary nature of the field is also reflected in classroom practices such as incorporating speakers from non-legal disciplines.

For those interested in increasing the understanding and awareness of the legal needs of older adults, our teaching-related findings may be cause for celebration. In the past few decades, elder law has transitioned from being a largely unknown field,⁶⁴ to being part of the curriculum at the majority of U.S. law schools. Student interest in elder law courses appears to be substantial. Indeed, it is sufficient for many law schools to support multiple elder law courses. Students in elder law courses, moreover, are likely to be exposed to creative teaching approaches and learning opportunities that give them first-hand experience interacting with the elderly.

Our findings related to elder law scholarship, however, are potentially troubling. Although specialized elder law journals play a critical role in encouraging analysis and discussion within the field, the absence of elder law articles in top general law reviews suggests that the field may have difficulty reaching a wider audience and, thus, have a more limited impact than would otherwise be possible. Similarly, the rarity with which elder law professors publish in interdisciplinary and non-legal forums may undermine the field’s ability to have an impact across disciplines. Moreover, the apparent trend toward adjuncts teaching elder law courses may further reduce the field’s scholarly impact—or, at the very least, impede efforts to enhance it—as adjuncts are significantly less likely to publish, and, when they do so, tend not to publish in general law reviews or other forums likely to reach persons not already part of the specialty.

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- Monte L. Schatz, *The Elder Law Attorney: Is Knowledge of the Law Enough?*, 45 S.D. L. Rev. 554, 555 (2000) (“Elder law practice emphasizes a holistic, interdisciplinary approach to the practice of law. Many specialized law practices lend themselves to solving legal problems that occur after the fact. Elder law, however, in its finest form, looks prospectively toward the remaining life and post mortem issues by anticipating the problems in advance of their occurrence. The underlying paradox of elder law as a specialty is that, in its fullest sense, it is a practice defined not by its narrow focus but by its substantive breadth and non-legal extensions. It is cross cutting, cross disciplinary, and oriented toward the goal of achieving a holistic quality of life for the client.”).

64. See *supra* note 3.

The tendency of schools to staff elder law courses with adjuncts and other faculty who are not part of the tenure system also raises concerns that extend beyond scholarship. For example, having core doctrinal faculty members teach in this field appears to facilitate the integration of elder law issues into other areas of the law school curriculum. Excluding adjunct faculty, the majority of respondents teaching doctrinal elder law courses reported that they integrate age-related issues into non-elder law courses. By contrast, most respondents teaching in clinical settings and most adjuncts reported that they do not do so. This is troubling, as it suggests that exposure to elder law issues and considerations may be limited to the relatively small subset of law school students who elect to receive specialized instruction in elder law. It also raises the question of whether those interested in promoting the integration of aging issues into law school curricula should focus on developing new elder law courses or should instead (or in combination) focus on creating aging-related modules to be integrated into other courses.⁶⁵

V. Conclusion

Our findings suggest that the field of elder law is at a critical point in its development. With the number of course offerings more than doubling in the past fifteen years and significant student interest in taking elder law courses, the field is on the threshold of becoming a mainstream part of law school curricula. Still, it remains marginalized by a number of factors, including the failure of almost half of U.S. law schools—including the vast majority of law schools commonly identified as “thought leaders”—to include it in their curricula, by the decision of many schools offering elder law to staff it with persons not part of the regular faculty, and by the failure of elder law scholarship to penetrate elite law reviews.

Assessing the current state of the field and recognizing its critical position is, however, merely a first step. Subsequent, thoughtful work is needed to formulate good ideas for guiding and supporting the field’s development during this critical period. We therefore intend to build upon this study—and the expertise of those practicing, teaching, and writing in elder law—with a second phase of inquiry aimed at generating concrete, manageable recommendations that can be used to help shape the future of elder law positively and productively.⁶⁶

Time is, of course, of the essence. The American population will not wait to age until law schools and legal professionals learn how to meet the needs of elderly clients. If U.S. law schools are to help prepare law students and the legal system to meet the challenges posed by an aging population, law schools must make quality elder law education and knowledge a priority today.

65. It is anticipated that the next phase of this project will examine this question.

66. The expertise of the Elder Law Study Group is expected to play an important role in this second phase of inquiry.