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AGING, HEALTH, EQUITY, AND THE LAW: FOREWORD

*Joan C. Foley**

We are aging as individuals and as a nation.¹ The United States is undergoing a demographic transformation with a rapidly aging population.² A robust discussion of the experiences of older adults and how law can promote healthy and equitable aging is critical. United States Census data provides that 16.5% of the U.S. population is sixty-five years and older.³ In a dozen years, older adults are expected to outnumber children for the first time in our nation's history.⁴ Baby boomers will continue to increase the number of older adults as they age.⁵ Starting in 2030, when all boomers will have reached sixty-five, older adults are projected to comprise 21% the U.S. population.⁶ By 2035, the elderly population in the United States is expected to rise to 78 million.⁷ And by 2060, nearly one in four Americans will be sixty-five years and older.⁸

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¹ *Why Population Aging Matters: A Global Perspective*, NAT'L INST. ON AGING, U.S. DEP'T OF HEALTH AND HUM. SERV., PUB. NO. 07-6134, 2 (2007), <https://www.nia.nih.gov/sites/default/files/2017-06/WPAM.pdf>.

² Jonathan Vespa, *The U.S. Joins Other Countries with Large Aging Populations*, U.S. CENSUS BUREAU LIBR. (Mar. 13, 2018), <https://www.census.gov/library/stories/2018/03/graying-america.html>.

³ *Older Americans Month: May 2022*, U.S. CENSUS BUREAU NEWSROOM (Apr. 22, 2022), <https://www.census.gov/newsroom/stories/older-americans-month.html>.

⁴ Vespa, *supra* note 2.

⁵ Stella U. Ogunwole, Megan A. Rabe, Andrew W. Roberts, & Zoe Caplan, *Population Under Age 18 Declined Last Decade*, U.S. CENSUS BUREAU LIBR. (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html> (identifying baby boomers as those born between 1946 and 1964).

⁶ Vespa, *supra* note 2.

⁷ *Id.*

⁸ *Id.*

The need to understand how law and policy can support or impede healthy and equitable aging became dire with the onset of the COVID-19 pandemic. In spring 2020, the New York City region became the global epicenter of the COVID-19 pandemic.⁹ Images from overwhelmed hospitals in Queens and Brooklyn are fresh in our minds. In March 2020, the city and its suburbs accounted for approximately five percent of global cases.¹⁰ The first wave of the coronavirus in New York infected nearly a quarter of the city and killed more than 22,000 residents.¹¹ The highest rates of cases, hospitalizations, and deaths were concentrated in communities of color, neighborhoods with high poverty, and among persons seventy-five years and older or with underlying conditions.¹² To date, the New York metro area faced successive waves, which killed an additional 16,000 and infected several million.¹³ Furthermore, the risk for severe illness due to COVID-19 increases with age with older adults at highest risk.¹⁴

The COVID-19 pandemic has revealed and amplified health inequities.¹⁵ Many social determinants of health – including age, race,

⁹ Joseph Goldstein and Sharon Otterman, *What New York Got Wrong About the Pandemic, and What it Got Right*, N.Y. TIMES (Mar. 17, 2022), <https://www.nytimes.com/2022/03/17/nyregion/new-york-pandemic-lessons.html>; see also Corinne N. Thompson et al., *COVID-19 Outbreak — New York City, February 29–June 1, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1725 (Nov. 20, 2020), <http://dx.doi.org/10.15585/mmwr.mm6946a2>.

¹⁰ Jesse McKinley, *New York City Region is Now an Epicenter of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 22, 2020), [nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html](https://www.nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html).

¹¹ Goldstein & Otterman, *supra* note 9.

¹² Thompson et al., *supra* note 9; Goldstein & Otterman, *supra* note 9.

¹³ Goldstein & Otterman, *supra* note 9.

¹⁴ *COVID-19 Risks and Vaccine Information for Older Adults*, CTR. FOR DISEASE CONTROL & PREVENTION: ALZHEIMER'S DISEASE AND HEALTHY AGING PROGRAM (Aug. 4, 2021), [https://www.cdc.gov/aging/covid19/covid19-older-adults.html#:~:text=Increased%20Risk%20of%20Severe%20Illness%20from%20COVID%2D19,-Older%20adults%20are&text=The%20risk%20increases%20for%20people,having%20certain%20underlying%20medical%20conditions](https://www.cdc.gov/aging/covid19/covid19-older-adults.html#:~:text=Increased%20Risk%20of%20Severe%20Illness%20from%20COVID%2D19,-Older%20adults%20are&text=The%20risk%20increases%20for%20people,having%20certain%20underlying%20medical%20conditions;); *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTR. FOR DISEASE CONTROL & PREVENTION (last updated Jan. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

¹⁵ *Health Equity Considerations and Racial and Ethnic Minority Group*, *supra* note 14.

ethnicity, poverty, and physical environment like housing – can have a considerable impact on COVID-19 outcomes.¹⁶ Social determinants of health are conditions in places where people are born, grow, live, work, and age that affect a wide range of health and quality-of-life outcomes.¹⁷ The World Health Organization states “[h]ealth inequities are differences in health status or in the distribution of health resources between different populations, arising from the social conditions in which people are born, grow, live, work and age.”¹⁸

In this context of the pandemic and in a region hard hit, the Touro College Jacob D. Fuchsberg Center hosted the virtual Aging, Health, Equity, and the Law Conference on September 13, 2021. The conference theme focused on structural and systemic questions about discrimination and equity that older adults experience, and on policies recognizing these different challenges and promoting equity. The conference featured individual presentations, panel presentations, and discussion groups. The presentations highlighted the intersection of elder law with a wide array of fields, including health law, employment law, property law, civil rights law, and family law. Conference presenters offered perspectives from the academy, healthcare providers, and practicing lawyers. Recordings of the plenary session and presentations can be found on the conference webpage at www.tourolaw.edu/ahelc.

¹⁶ Elissa M. Abrams & Stanley J. Szeffler, *COVID-19 and the Impact of Social Determinants of Health*, 8 LANCET RESPIRATORY MED. 659 (2020), [https://doi.org/10.1016/S2213-2600\(20\)30234-4](https://doi.org/10.1016/S2213-2600(20)30234-4); *Risk of Severe Illness or Death from COVID-19L Racial and Ethnic Health Disparities*, CTR. FOR DISEASE CONTROL & PREVENTION (last updated Dec. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/disparities-illness.html>.

¹⁷ *Social Determinants of Health*, WORLD HEALTH ORG., https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1 (last visited May 4, 2022); *Social Determinants of Health: Know What Affects Health*, CTR. FOR DISEASE CONTROL & PREVENTION (Sept. 30, 2021), <https://www.cdc.gov/socialdeterminants/index.htm>. (“Social determinants of health are conditions in the places where people live, learn, work, and play that affect a wide range of health and quality-of life-risks and outcomes.”); *Social Determinants of Health*, HEALTHY PEOPLE, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health> (last visited May 4, 2022).

¹⁸ *Health Inequities and Their Causes*, WORLD HEALTH ORG. NEWSROOM (Feb. 22, 2018), <https://www.who.int/news-room/facts-in-pictures/detail/health-inequities-and-their-causes>.

Conference participants hailed from multiple disciplines – faculty from law schools across the nation, public health leaders, healthcare providers, attorneys, and policy makers. As Law Center Dean Elena Langan relayed in her welcoming remarks, the Law Center is committed to employing an interdisciplinary approach to understanding the needs of the elderly, including legal needs. In opening remarks, Patricia Salkin, Touro University System Provost of Graduate and Professional Divisions and Professor of Law, highlighted that the conference served to broaden the dialogue to ensure that aging and health equity remain on the forefront of the law and policy agenda.

The keynote address was delivered by Nina A. Kohn, David M. Levy Professor of Law, Syracuse University College of Law, and Distinguished Scholar of Elder Law, Solomon Center for Health Law and Policy, Yale Law School. Professor Kohn advanced that healthy and equitable aging should be treated as a civil rights issue so that we can identify and advocate for the legal reforms needed to create a more equitable aging experience. Professor Kohn stated that as Americans progress through old age, their fundamental civil rights and civil liberties come under attack and state and private actors are more willing to burden individual liberty when the person whose liberty is being burdened is old. Professor Kohn provided examples from the employment, health care, and social welfare contexts. She highlighted that age-based discrimination and ageist policies do not affect older adults equally, describing the ways in which they affect those who are disabled, those who are poor, and the disproportionate effect on people of color. Professor Kohn called for conference participants to foster systems for a healthier and more equitable aging experience.

Conference presentations ran in concurrent tracks, one of which featured presentations on access to health care in the COVID-19 response. Presentations included the following.¹⁹ Professor Lior Strahilevitz, University of Chicago Law School, presented on “Property Law for the Ages.” Professors Naomi Cahn, University of Virginia Law School, Clare Huntington, Fordham University School of Law, and Elizabeth Scott’s, Columbia Law School, presentation was entitled “Health, Equity, Opportunity, and Vulnerability in the 100-Year Life.” Assistant Professor Elizabeth Chen, New York University School of Law, discussed “Anti-Racism in Nursing Homes.”

¹⁹ For the full conference program, see https://www.tourolaw.edu/pdf/aging_health_equity_and_the_law_schedules.pdf.

Professor Richard Kaplan, Illinois College of Law, discussed “Incorporating Cultural Sensitivity in Elder Law Courses.” Several presentations addressed the pandemic response including Professor Jessica Montel’s, University of Houston Law Center, “Allocating Scarce Resources During a Public Health Crisis: Should Age Matter?,” Jessica Gunder’s, University of Idaho College of Law, “Last in Line: Vaccine Scarcity and the Deprioritization of Individuals with Disabilities,” and Barbara Pfeiffer Billauer’s, University of Porto, Portugal, “How Policy Pariah-tizing the Elderly Increased COVID Deaths.” Assistant Professor Mira Edmonds, University of Michigan Law School, discussed “Eliminating the Medicaid Inmate Exclusion Policy to Improve the Health of Aging Prisoners.”

The conference provided opportunities for community building with a networking session and a speed-mentoring session. In the mentoring session, attendees, including law students, lawyers, and faculty, spoke with designated mentors on professional development: Jean Accius, Senior Vice President for AARP Thought Leadership and International Affairs; Denny Chan, Directing Attorney, Justice in Aging; Touro Law alum Robin Burner Daleo, Law Offices of Robin Burner Daleo; Professor Nina A. Kohn; Tiffany Graham, Associate Dean for Diversity and Inclusion and Associate Professor of Law, Touro Law; and Touro Law alum Joan Robert, Robert Legal Group.

The Aging, Health, Equity, and the Law Conference was part of continuing efforts to foster interdisciplinary collaboration in elder law teaching and research.²⁰ The publication of articles from conference presenters in this Symposium Issue of the *Touro Law Review* serves to extend the discussion of the conference themes.²¹

²⁰ See Nina A. Kohn, Maria T. Brown & Israel Doran, *Identifying Connections Between Gerontology and Elder Law: Implications for Teaching, Research, and Practice*, 25 ELDER L.J. 69, 82-83 (2017) (describing the benefits of interdisciplinary collaboration in teaching elder law, including that it may help identify non-legal solutions to client’s problems, and provide better outcomes when working with professionals from multiple disciplines).

²¹ In addition to the Symposium articles, this Issue of the *Touro Law Review* includes the following articles: Nicolas D. Lawson’s *Fat Rights, Public Health Oppression and Prejudice*, and the “*Obesity Epidemic*,” Sharona Aharoni-Goldenberg and Gerry Leisman’s *Weighting Clashing Scholars’ Academic Freedom*, and J.R. Rothstein and Shlomo Pill’s *Roadmap to Reconciliation: A Legal & Theological Primer for Jewish and Muslim Engagement*, as well as the student Note by Michele Abantangelo *Predation and Exploitation: For-Profit Institutions and the Fair Labor Standards Act*.

The lead article in this Symposium Issue, *Safeguarding the Public: Why Workers' Rights Education Should Be Required Learning for Nurses* by Esperanza Sanchez, Esq., R.N.,²² recommends that boards of nursing should prioritize workers' rights education in pre-license curriculum and post-licensure continuing education as a public health and safety measure. She explores the public health emergency caused by the nursing shortage and analyzes the multifactorial issues contributing to that shortage. She describes the impact of the COVID-19 pandemic on the nursing shortage, including nurse-led innovation and the experiences of nurses in acute care settings. She advances that failing to require worker rights' education is a grave regulatory oversight that results in a nursing workforce ripe for exploitation. Esperanza Sanchez shared her insights at the Aging, Health, Equity, and the Law Conference in the discussion group "Equity in Elder Care: When Age Factors into the Rationing of Resources in the Delivery of Care" along healthcare providers, leaders, and educators — Lindsey Betsill, R.N.,²³ Assistant Professor Nicole Dillard, Esq.,²⁴ Dr. Nelda Godfrey,²⁵ Dr. Katrina Hawkins,²⁶ and Patricia Horgas.²⁷ Among the issues the discussion group addressed was how the nursing shortage has affected the rationing of care during the COVID-19 pandemic.

In the article *End of Life, Elder Abuse, and Guardianship: An Exploration of New York Surrogate Decision-making Framework*, Tristan Sullivan-Wilson, Esq.,²⁸ Deirdre Lok, Esq.,²⁹ and Joy Solomon, Esq.,³⁰ offer specific strategies to align end-of-life care with the wishes of an incapacitated older adult involved in a guardianship

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³⁰ Director and Managing Attorney, The Harry and Jeanette Weinberg Center for Elder Justice.

proceeding. They describe the complexity of guardianship for older adults experiencing abuse. In spotlighting New York Article 81 Guardianship,³¹ they explain the framework established by New York's Family Health Care Decisions Act (FHCDA)³² concerning surrogate authority to make health care decisions for a person without decisional capacity or advance directives. They highlight special considerations when end of life decisions are made in the context of elder abuse and the practical barriers to aligning end of life care wishes with clinical care. Deirdre Lok and Tristan-Sullivan Wilson's presentation at the Aging, Health, Equity, and Law Conference mirrored this article's title.

It was an honor to organize the Aging, Health, Equity, and the Law Conference. I thank the faculty, staff, and students at Touro Law Center for their support. I am grateful for the time and creativity of fellow Program Committee Members, Professors Deseriee Kennedy and Melina Healey, as well as the insights of each of the Touro faculty moderators. I am appreciative of the efforts of those in our Development Office. I thank Dean Elena Langan and Provost Patricia Salkin for their support. I also thank the editors and staff of *Touro Law Review* for their work on this Symposium Issue, including Editor-In-Chief Ariel Berkowitz and Articles Editor Christopher Palmieri.

These Symposium articles and the recorded presentations serve as a resource for faculty, students, healthcare providers, attorneys, advocates, and policy makers to promote and support healthy and equitable aging.

³¹ New York Mental Hygiene Law Article 81, N.Y. Mental Hygiene Law §81 (McKinney 2020 & Supp. 2022).

³² N.Y. Pub. Health Law § 2994-D (McKinney Supp. 2022).