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Aging America

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FOREWORD

AGING AMERICA

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Professor Sarah Harper's assessment of the legal, political, medical, and economic issues associated with old age in the United States heralded the theme for this Symposium, "Aging America." Her analysis turns, as she puts it, on "a fundamental shift in the demographic structure of society. No longer will it be the norm to have large numbers of young and small numbers of old,"[1] as it was when I was a boy (age 11 on V.J. Day, 1945). "Rather, we are entering a world where age groups will be distributed more or less equally across society—an age-symmetric society."[2] Soon, America will have not *three* generations interacting and competing among themselves, but *five.* Some people inheriting from their parents will be in their eighties when they get the money.[3] This symposium is obviously timely and important. And, I am happy to say, remarkably substantial as well.

Ms. Jennifer Morris's astute assessment of the economic dimensions of the changes Professor Harper describes demonstrates that the burden of aging will fall–*does fall*–on older women, who live longer than men, have less retirement income, have lower savings and poorer health insurance than men, and incur greater medical expense than their younger sisters.[4] Professor Peggie Smith's discussion of the situation of those who care for the home-bound elderly shows that many of the women on whom the burden falls are not themselves elderly but are "workplace casualties" employed at low wages with poor benefits

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1. Sarah Harper, *Youth–A Scarce Commodity Within An Ageing World,* 21 NOTRE DAME J.L.ETHICS & PUB. POL'Y 479, 484 (2007).

2. *Id.* at 484–85.

3. *Id.* at 486 (emphasis added).

4. Jennifer Morris, Note, *Explaining the Elderly Femininization of Poverty: An Analysis of Retirement Benefits, Health-Care Benefits, and Elder Care-Giving,* 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 571 (2007).

and crippling conditions as they care at home for aging America.[5]

Much of the situation of the elderly and those who care for them, described in economic terms by many of our contributors, invites the wisdom of Kin Hubbard, writing as the fictional Hoosier philosopher Abe Martin, whose column once appeared on the front page of the *Indianapolis Star*. He said, "When a feller says 'It hain't the money, but the principle o'th'thing,' it's the money."[6] The Martin principle explains much of what concerns Ms. Morris and Professors Harper and Smith, as it seems to me to explain much of the concern expressed in the valuable articles in this Symposium by Stephen Moses, Professors Richard Kaplan, and Professor Lawrence Frolik (much, but perhaps not quite all.)

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Professor Kaplan addresses the issue of long-term care.[7] He focuses on the nation's failure to live up to what we owe our parents in that regard on the federal Medicare program—a program that seems at present more concerned with periodic illness in retired people than with the burden of caring for their health at home or in assisted living facilities or nursing homes. These away-from-home arrangements cost from about $20,000 a year to nearly $200,000 a year, and very little of it is covered by either the Medicare program or the vaunted array of fourteen "Medigap" insurance programs. He describes a significant disarray in the pervasive private (pension) and governmental (Social Security Retirement) regimes. Neither of those (or both of them taken together) manage, in his allusion, to be a collective American response to the biblical imperative: "Honor your father and your mother, that your days may be long in the land which the Lord your God gives you."[8]

In practice, as any Legal Aid lawyer will tell you, if it were not for the federal-state welfare program (Medicaid), most of the expense of coping with the disabilities that "cast a baleful haze over the prospect of extended life"[9] would be left–as they were when I was a boy–to charity, to neighbors, and to relatives. The

5. Peggie Smith, *Home Sweet Home? Workplace Casualties of Consumer-Directed Home Care for the Elderly*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 537 (2007).

6. Ben G. Henneke, *Further Sayings of Abe Martin*, TULSA WORLD, Aug. 8, 1991, at 15A.

7. Richard Kaplan, *Honoring Our Parents: Applying the Biblical Imperative in the Context of Long-Term Care*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 493 (2007).

8. *Exodus* 20:12.

9. Kaplan, *supra* note 7, at 493.

Kaplan solution is to broaden the Medicare program's coverage of nursing home care, remove the inadequacies and inflexibilities of Medicare, pay for nursing-home care through Medicare, and leave to us old folks ourselves and to our children payment for health care at home or in long-term care institutions that are milder than nursing homes (what one scholar refers to as "places to live").[10]

Mr. Moses, who works for an advocacy group called the Center for Long-Term Care Reform, focuses not on the biblical metaphor for the aged person but on an image from Shakespeare by way of Aldous Huxley's brave new world. He proposes to replace what he calls "the 'Pusillanimous Old World of Long-Term Care,' that is, the status quo"[11] with a neo-conservative solution based on insurance programs sold in the free market. He recognizes the array of deficiencies Professor Kaplan describes but attributes them more to the failures of what used to be called "socialized medicine" than to the changes in the population documented by our other authors. Mr. Moses criticizes the efforts of us legal aid lawyers ("and other advisors who specialize in artificially 'impoverishing people'"[12]) to help our clients get Medicaid coverage— the only pervasive system there is for the unwell poor—because of the damage that the Medicaid program, and our efforts to get at it, have done to the private insurance market. As much as ninety percent of the potential market for long-term care insurance, he says, "has been crowded out by Medicaid."[13] He also criticizes proposals such as Professor Kaplan's and Professor Frolik's for new or broader governmental support for health care for old folks: "If excessive public financing has caused the problems we have now, then trying to solve them by adding more government financing would be like trying to put out a fire by dousing it with gasoline."[14]

The dean of American elder law scholars, Professor Frolik, directs his attention to *mandatory* long-term care insurance.[15] His analysis typifies the puzzlement that drove our student-editors to the subject of this Symposium in the first place, and then drove

10. *Id.* at 514 (citing Aida Rogers, *Continuing Care Retirement Communities: "You're not going there to die; you're going there to live,"* SHEPARD'S ELDER CARE/LAW NEWSL., Dec. 1991, at 7; Melynda Dovel Wilcox, *Not a Place to Sit and Watch the Traffic*, KIPLINGER'S PERS. FIN., June 1996, at 68–69)).

11. Stephen Moses, *The Brave New World of Long-Term Care*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 561, 561 (2007).

12. *Id.* at 564.

13. *Id.*

14. *Id.* at 568.

15. Lawrence Frolik, *An Essay on the Need for Subsidized, Mandatory Long-Term Care Insurance*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 517 (2007).

our authors to devote their attention to it: The lives of the elderly in America are no nearer being transparent than are the lives of the twenty-somethings we teach. We old folks are no doubt somewhat more vulnerable to physical failure than we once were, a vulnerability Professor Frolik calls "an uncertain risk,"[16] but much of the uncertainty is that the promise of governmental rescue–a promise that goes back at least to the "old age pension" that barely sustained elderly neighbors in my youth–is no longer something a sensible citizen can depend on. And some of the uncertainty traces to our gradual discovery that rescue by risk-spreading (i.e., insurance) is less dependable for our care in old age than the risk-spreading we depend on when we drive automobiles, fear fire in our homes, or worry about injuries incurred by the mail carriers who slip on the ice at the front door. It is just possible that risk-spreading for medical care in old age is more like a scam than the insurers and their capitalistic cheerleaders try to get us to believe.

"What is needed," Professor Frolik writes, "is a fresh source of funding of long-term care. The answer is to compel the public to save for the possible need for long-term care through mandatory long-term care insurance. While insurance is not normally thought of as a form of savings, when viewed in the aggregate, it is."[17] He imagines a program of risk-spreading required and supervised by the federal government, the outcome of which would be that "[c]ollectively the group will have saved enough over their respective lifetimes to pay for the cost of their long-term care. Of course, some of the group will not need long-term care and hence, they will never collect benefits. For them, the cost of the premiums will be an expense rather than a form of savings. But for the group,"–that is, all of us old folks–"the premiums represent savings held and invested to meet an actuarially predictable need–payment for the costs of long-term care."[18] I think of the original New Deal proposal that led to the federal Social Security program, the ancestor of the Medicare program. (I suppose it may have helped my parents' generation to think of Social Security as insurance, as it may help some of our contemporaries to avoid thinking of "socialized medicine" when they encounter such appealing suggestions as Professor Frolik's.)

Professor Margaret Brinig uses the automobile as a vehicle for assessing the situation of elderly people.[19] (A reader is

16. *Id.* at 519.
17. *Id.* at 533.
18. *Id.*
19. Margaret Brinig, *The Public Choice of Driving Competence Regulations*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 405 (2007).

tempted to make the relationship between us older Americans and our cars as a metaphor for aging in modern America; Professor Brinig does not invoke the metaphor, but my guess is that she thought about it.)

An occasional tragic accident, evidently caused by an elderly driver, tends to turn the object of this Symposium from a patient or a victim (his or her status in most of these papers) to a threat. Because she or he is impaired by memory loss, difficulty keeping things straight (time, geography, etc.), impaired vision and hearing, and weakened ability to solve problems quickly, the elderly driver threatens other drivers and their passengers, people on crosswalks and near the street–even, in one sad, recent example, shoppers in an outdoor market.[20]

The factors and solutions Professor Brinig documents teem with distinctions based on age or disability or both—distinctions that, in other contexts, raise concerns about discrimination. Those that seem to me more interesting than discrimination involve incentives to train elderly drivers to be more careful: proposals from Judge Richard Posner and the American Association of Retired Persons, for example, would reward the elderly driver's enrollment in driver training courses with lowered automobile insurance rates.[21] Such "private" solutions[22] tend to keep elderly drivers behind the wheel, though, while rules that require drivers to report their own misdeeds, or rules that require healthcare givers to report on their patients' ailments, and more stringent, more frequent testing, tend to reduce the numbers of elderly drivers. The "policy" question becomes whether "we" want more or fewer elderly drivers on the road.

One way to ask that policy question, building on the suggestion that special rules for the elderly are illegal or immoral discrimination, is suggested in the "Dear Annie" column (what us old folks think of as Ann Landers): A writer who self-designated as "No Senior Citizen in Salem, Oregon," demanded of Annie, "When are you going to quit buying into this claptrap that all people over a certain age are falling apart and going downhill? . . . Don't use adjectives like 'elderly' and 'aging,' which are

20. *See* Robert Jablon, *Elderly man convicted of manslaughter in farmer's market crash*, SFGate.com, Oct. 20, 2006, http://sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/10/20/state/n112352D88.DTL (stating that the driver was found guilty of ten counts of vehicular manslaughter on October 20, 2006 and faced a maximum of eighteen years in prison.

21. Brinig, *supra* note 19, at 432.

22. *Id.*

more appropriate for a block of molding cheese."[23] Annie was a bit defensive (as I suppose the reformers Professor Brinig writes about would have been): "[T]he truth is, certain problems crop up more often as we hit those years and it serves no purpose to deny the reality. We think getting older should be embraced and cherished, and if that means designer bifocals and larger labels, why pretend otherwise?"[24]

An even more positive approach might ask the (policy) question whether "we" are willing, for familiar, humanistic reasons, to loosen up and tolerate the risks and inconveniences of having elderly drivers. "We" might want that because, for the example relevant to Professor Brinig's contribution, driving a car in America, since before the days of Henry Ford, has a lot to do with life, liberty, and the pursuit of happiness, or with, as Professor Brinig shows, "independence," "connection with others," and "physical and mental well-being."[25] She says that "continuing to drive has enormous and growing significance."[26] I sure do hope so.

Professors Karen Eilers Lahey and T. Leigh Anenson assess the pension system–a direct approach to taking up Abe Martin's advice here, to focus not on the principle but on the money.[27] That issue is whether old folks will have enough money to live in what Professor Brinig calls "physical and mental well-being."[28] And the risk, which Lahey and Anenson peg to the extensive 2005 Wilshire report on funding for state employment systems, is that the sources for providing those pensions are insecure. The Lahey-Anenson contribution focuses the pension issue on people who have retired from public employment–teachers, firefighters, police officers,[29] and clerks in the courthouse. (It invites focus elsewhere, of course.)

Like so many of the aspects of providing for old folks in America, the pension-funding phenomenon, they report, has been tried and found wanting–"in jeopardy," to use their phrase.[30] Neither of the dominant models of providing pen-

23. Kathy Mitchell and Marcy Sugar, *Finding Solutions Part of Aging: Annie's Mailbox*, DESERET MORNING NEWS, Mar. 24, 2007, at E06.

24. *Id.*

25. Brinig, *supra* note 19, at 407.

26. *Id.*

27. Karen Eilers Lahey & T. Leigh Anenson, *Public Pension Liability: Why Reform Is Necessary to Save the Retirement of State Employees*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307 (2007).

28. Brinig, *supra* note 19, at 407.

29. Lahey & Anenson, *supra* note 27, at 307.

30. *Id.*

sions—"defined benefit," which places market risk on the employer and plan administrator, nor "defined contribution," which puts the risk on the pensioner—does the job.[31] The problem is aggravated by the fact that public-employee retirement from jobs in state or local government is not regulated by the federal government, as business employers and administrators are.

The Lahey-Anensen solution is to combine the two benefit-plan approaches, to move public funding from bond issues ("a wager that markets will perform"[32]), and to insist that employers and pension managers take greater pains to make sure public employees know what they are getting into when they decide when and how to retire, and what they can do about what they are already into. They would include broader and deeper mandatory disclosure by employers and pension administrators.[33] The issue, as they see it, considering the fact that the ten largest retirement plans in the United States are for public employees,[34] is a public policy issue–that is, an issue for young and old, employed by the government or not, retired or not. And it is significant.

Half of the articles in this Symposium are concerned with money needed by old folks who are in long-term care–assisted living, nursing home, skilled care, and care at home. Eric M. Carlson's contribution looks at the same situation, not as a matter of payment for care but as an issue involving discrimination against the handicapped.[35] He focuses his argument on disclosures required by long-term care institutions from potential patients (requests and demands) that seek to be intrusive, so that the facility can eliminate its exposure to expense in providing care to those who are already ill or already disabled. Caring for healthy old folks costs less, and so the facility initiates inquiry, before the patient becomes its responsibility, to eliminate the expense in advance.

Mr. Carlson directs the National Senior Citizens Law Center in Los Angeles. His law-centered position on intrusive inquiry by institutions considering applications for care is that such intrusion violates federal statutory law against discrimination against the handicapped as well as statutory (federal, state, local) open-

31. *See id.* at 307–08.
32. *Id.* at 321.
33. *Id.* at 309.
34. *Id.* at 332.
35. Eric M. Carlson, *Disability Discrimination in Long-Term Care: Using the Fair Housing Act to Prevent Illegal Screening in Admissions to Nursing Homes and Assisted Living Facilities*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 363 (2007).

housing law (because a place in a nursing home is a "dwelling").[36] His argument is that legal safeguards against discrimination extend to inquiry and should be enforced more than they are, and earlier in the history of these situations, so that the facilities will not have the means to illegally discriminate later, at the time decisions are made to admit or refuse each applicant. An important result of his approach to enforcement is that applicants [will] be protected without need of litigation.[37]

Mr. Carlson's recommended approach would mean, of course, regulators intervening–by direct attention to the facility's practices, rather than to particular applications for admission–to prevent the intrusive inquiry before it becomes an issue with the applicant who is turned down because of what is disclosed in response to the intrusive inquiry. "No-inquiry regulation" is what Mr. Carlson calls it.[38] His insistence on enforcement at the application stage (which, he demonstrates, is already provided for in the law) would, of course, reflect back to (and would undermine) discriminatory practices in deciding whom to admit, and perhaps also discrimination in providing care. Mr. Carlson's carefully argued case in these respects analyzes state and federal statutory provisions, administrative regulations, an array of published articles (including some of his own), and a number of relevant judicial decisions.

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An Abe Martin analysis of long-term care ("it's the money") does not reach quite as directly two of the subjects of this Symposium: Dr. Monique M. Williams' discussion of health disparities among the elderly,[39] and Professor Smith's compassionate consideration of the situation (not of the elderly being cared for, but of the workers who come into their homes to help them and their families to avoid or delay care in nursing homes).[40]

The workers Professor Smith writes about are hired by elderly patients themselves or by their families. They do not enjoy the protections agency employees enjoy; they are not employed by the government. They are as vulnerable to exploitation as some of our immigrant ancestors were when they came to labor for the robber barons in the nineteenth century: they are poorly

36. *Id.* at 364.
37. *Id.* at 365.
38. *Id.* at 364.
39. Monique M. Williams, *Invisible, Unequal, and Forgotten: Health Disparities in the Elderly*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 441 (2007).
40. Smith, *supra* note 5.

paid (thirty percent less than if they worked for agencies, few covered by minimum-wage statutes), overworked, exposed to serious injury (when, for example, they lift patients). They are usually denied the pension and insurance benefits employees in business now routinely enjoy–denied even workers compensation for their injuries–and they are virtually without the "workplace rights" enjoyed by members of unions and people who work for employers who compete with unionized businesses.[41] As Professor Smith sees it, "This disadvantageous state of affairs offers little hope for a workforce that is dominated by low-income women and disproportionately home to members of racial ethnic groups, especially African Americans or Hispanics."[42]

The situation of home health-care workers is not really, of course, immune from an Abe Martin analysis: It really *is* the money. Most of the plight of home-health-care workers can be traced to the fact that they are not paid enough, and not enough money is devoted to give them what other workers enjoy–workers who do the same work, for example, but who are paid by agencies or by government. It is hardly surprising, Professor Smith says, that these privately employed health-care workers are looking for better jobs "so that they can leave behind a job that is physically demanding, often injurious, and characterized by low wages and few benefits."[43] Abe Martin would appreciate the promise of progress that is suggested by the statutory extension of collective bargaining rights to home care workers in four states.[44]

Dr. Williams, a physician and teacher of physicians, does not write so much about money—although, I suspect, money has a lot to do with what she writes about–but about medical care and her view that the elderly get poorer care than the rest of us in the United States. "[A]geism in the medical profession is a manifestation of ageist attitudes in society at large, a society that gives preference to youth over age."[45] Much of the disadvantage is prejudice: "epithets for the elderly," used among doctors, "that are unique to the medical profession"[46]; the abiding myth in the medical community that old age means senility; mistreatment; mild forms of what we elderlaw lawyers have come to call "elder-abuse," psychological mostly, I suppose, but too often physical as well. A subtle cultural example is the fact that those who con-

41. *Id.* at 539.
42. *Id.* at 542.
43. *Id.* at 557.
44. *Id.* at 558–59.
45. Williams, *supra* note 39, at 452.
46. *Id.* at 443.

duct clinical trials and other clinical research within the academic medical profession and in the prelude to federal approval of medications disproportionately recruit young, white men—not women, not black people, nor Latinos of any age, and not the elderly who will be taking most of the medications.

Psychological and psychiatric care for depression is less available to the elderly than to younger people, because, as prejudice has it, depression in an elderly patient "is a natural and anticipated consequence of aging and thus does not warrant clinical attention"[47]; physicians are thus reluctant to prescribe antidepressants to their elderly patients.

The elderly and members of minority groups (and, at the bottom of the heap, no doubt, the elderly who are members of minority groups) are treated worse when they have conditions that afflict most people (cancer, diabetes, pneumonia, influenza) and even worse than that when their conditions are those that afflict mostly the elderly (heart disease, stroke, Alzheimer disease).

The prejudice–which is, I think, the right word for it–extends to para-medical callings such as pharmacy and medical social work; the few in those fields who choose to work among the elderly (e.g., five percent of social workers)[48] rarely seek available certification in geriatrics. Old folks fare less well in civic emergencies such as floods, freezing cold, and heat waves. (One thinks of the elderly people in the hospital in New Orleans during the Katrina episode.) And end-of-life care (the pain of it, the cost of it, planning for it) is poorest when the subjects of it are not only dying but old as well.

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Professor Sarah Moses, a theologian and social ethicist, weighs these matters on the scales of Jewish and Christian social justice.[49] She takes the issue back to Professor Kaplan's invocation of the Commandment and to the possibility that the days of fathers and mothers, as they "may be long in the land," will be days of growth and usefulness, not days of being set aside even if we are also cared for. That issue, she writes, is about *justice*, and, in her reckoning (which is also the reckoning of modern Catholic social teaching), justice is about *participation*, about (here she quotes Father David Hollenbach, S.J.) an enhanced opportunity

47. *Id.* at 449.

48. *Id.* at 450.

49. Sarah Moses, *A Just Society for the Elderly: The Importance of Justice as Participation*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335 (2007).

among the elderly in creating and benefiting from the common good.[50]

Professor Moses would focus on the situation of the elderly in America, not so much in terms of their protection as in terms of their capacity–their capacity even for participation in such things as the AmeriCorps program and for being put to work in church-based programs of assistance to the poor. (She discusses at length the "Shepherd's Center" movement, founded in 1971, in Kansas City, and its recognized need "to redefine and restructure the way Americans approach aging."[51]) She surveys an impressive array of sources, concepts, and ideas about *membership* and says, "The elderly should no longer be confined to the image of passive recipients of public aid but rather should be viewed as persons who continue to desire dignified inclusion in the community."[52]

The concepts of membership and participation enrich and bring us back to Professor Harper's description of a changed society—no longer three generations living and working together, but *five* generations—[53]none of them discounted by being merely cared for. The concepts also allow us to think about people in their eighties receiving not only inheritances but money they are entitled to collect and use as able, dignified, responsible and responding children of God.

50. *Id.* at 345.

51. *Id.* at 352 (citing Shepherd's Centers of America, http://www.shepherdcenters.org/aboutUs.aspx (last visited Apr. 14, 2007).

52. *Id.* at 341

53. Harper, *supra* note 1, at 485.