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State Governments Face the Realities of Aging Populations

INTRODUCTION: GOVERNING CHOICES IN THE FACE OF A GENERATIONAL STORM

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Despite Congressional passage of the Older Americans Act,¹ state governments continue to be the laboratories of choice to address how we care for, protect, and recognize the autonomy of our elder citizens. The 2013 Program on Law and State Government Fellowship Symposium examined various state government approaches to their growing elderly populations.² As state legislatures respond to the array of public policy issues arising from the influence of the new relationships between state governments and their respective elderly populations, the symposium provided a space for our legal community to explore the implications of those decisions on our work, our worldview, our budgets, and our futures.

Some states are aiming to protect their elderly citizens through aggressive sentencing enhancements for those convicted of crimes against the elderly,³ state sponsored Silver Alerts,⁴ or filial responsibility laws.⁵ Other states are trying to

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1. The Older Americans Act, 42 U.S.C. §§ 3001-3058ff (1965) (amended 2006).

2. The U.S. Census Bureau projects the fraction of the elderly (defined as sixty-five or older) in the total population to increase from its 2010 level of thirteen percent to nineteen percent by 2030. U.S. CENSUS BUREAU, THE NEXT FOUR DECADES: THE OLDER POPULATION IN THE UNITED STATES: 2010 TO 2050 3 (May 2010), *available at* <http://www.census.gov/prod/2010pubs/p25-1138.pdf>.

3. *See, e.g.*, CAL. PENAL CODE § 368 (West 2014).

4. *See, e.g.*, Missing Persons Investigations, FLA. STAT. ANN. § 937 (West 2013). A “Silver Alert” is like an Amber Alert, except targeted toward missing persons who are over a certain age, usually sixty or sixty-five.

5. *See, e.g.*, PA. CONS. STAT. ANN. §4603 (West 2005) (statute imposes liability on spouses, children, and parents of indigents unless statutory exceptions apply).

create new revenue streams from this growing population.⁶ Some states are recognizing the legal implications of “professional guardians”—those who take care of the elderly in families where none in the younger generations can or care to.⁷ Every state confronts the realities of managing state pension funds with the pensioners living longer than ever before.⁸ Whatever the approach, whatever the policy goal, state governments’ relationships with their elderly citizens are changing and present sometimes difficult choices.

The symposium’s exploration underscored that each of these choices comes with costs, public and private, that shape other policy choices by our state government. Each reminds us that “the elderly” are not a homogenous group: they live in mansions and mobile homes; some are surrounded by generations who adore them and some are alone. Some of the policy and legal choices diverge at the most basic level. For example, individuals, families, immigrant groups, and certainly state governments, have very different ideas of what age even counts as “old.”⁹ As Professor Orentlicher notes in his article, the legal and policy choices of some states that recognize legal physician assisted suicide are evolving to better reflect long held moral views on end-of-life laws.¹⁰ As Professor Rebecca Morgan emphasizes, this country’s “silver tsunami” presents an awesome opportunity for legal development across the legal spectrum—zoning, transportation, health care, housing, disability, family, land use, tax, and banking law, to name just a few.¹¹

6. See, e.g., *Minnesota’s Snowbird Tax: Spend Most of the Year in St. Pete, Pay the Government in St. Paul*, WALL ST. J., Feb. 1, 2013, at A12. If passed into law, such taxes would be paid by state residents who travel to warmer climates during the winter months.

7. See, e.g., Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 UTAH L. REV. 1207. Indiana and other states have adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). E.g., IND. CODE. §§ 29-3.5-1-1 to -5-3 (2014).

8. See, e.g., CONGRESSIONAL BUDGET OFFICE, ECONOMIC AND BUDGET ISSUE BRIEF: THE UNDERFUNDING OF STATE AND LOCAL PENSION PLANS (2011), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12084/05-04-pensions.pdf>; see also Olivia S. Mitchell, *Public Pension Pressures in the United States*, in WHEN STATES GO BROKE: THE ORIGINS, CONTEXT, AND SOLUTION FOR THE AMERICAN STATES IN FISCAL CRISIS 57, 60-61 (Peter Conti-Brown & David Skeel, Jr. eds., 2012) (author includes rising Medicaid expenditures due to aging populations and the retirement of record numbers of public sector employees as among the “exigencies . . . now competing with the need to hike contributions to meet public pension funding requirements.”).

9. For example, Indiana’s senior consumer protection law was amended in 2013 to reduce the age in the definition of “senior consumer” from sixty-five to sixty years old. IND. CODE § 24-4.6-6-3(5) (2013); 2013 Ind. Legis. Serv. 250 (West).

10. David Orentlicher, *Aging Populations and Physician Aid in Dying: The Evolution of State Government Policy*, 48 IND. L. REV. 111, 113 (2014) (stating that “we are seeing an evolution in moral and legal thinking about physician-assisted suicide”).

11. Rebecca C. Morgan, *What the Future of Aging Means to All of Us: An Era of*

This year's event, *State Governments Face the Realities of Aging Populations*, brought together an impressive faculty from around the state and nation.¹² The twelfth Fellowship Symposium since the Program on Law and State Government's inception in 1997, this event embodied the Program's mission of fostering the study and research of critical legal issues facing state governments. A vital component of the Program on Law and State Government, the Fellowships offer an extra curricular academic opportunity for students interested in contributing to the contemporary scholarship of law and state government. As the custodian of this Fellowship experience at this school, I deeply appreciate the passion and professionalism that this year's fellows, Tarah Baldwin and Sean Deneault, brought to this year-long endeavor.¹³

The 2013 Fellowship Symposium began with Fellow Sean Deneault's presentation, *Medicare Fraud: The State Enforcement Option*.¹⁴ Mr. Deneault first described the Medicare system and its vulnerabilities to fraud.¹⁵ He described various categories of fraud—phantom billing, billing individually for services that should have been provided as a bundle, providing unnecessary medical services, and “upcoding.”¹⁶

Mr. Deneault then described current federal enforcement of anti-fraud statutes¹⁷ and the more recent implementation predictive payment analytics to flag

Possibilities, 48 IND. L. REV. 125, 127 (2014).

12. This year's symposium faculty is comprised of Dean Andrew R. Klein, Professor David Orentlicher, Professor Linda Whitton, Adjunct Professor and Attorney Rebecca Geyer, Attorney Claire Lewis, Professor Rebecca Morgan, Deputy Attorney General Allen Pope, Attorney George Slater, and Attorney Dennis Frick. Special thanks to Professors Jennifer Drobac, Mike Pitts, and Diana Winters and additional thanks to Deputy Attorney General Allen Pope, all of whom helped critique the fellows' presentations as they prepared for the symposium.

13. Program on Law and State Government Fellowship responsibilities include developing and sharing scholarship addressing the fellows' collaboratively chosen fellowship topic. Fellowships are designed to support students in their research and study of critical legal issues facing state and local governments. *See Program on Law & State Government*, ROBERT H. MCKINNEY SCHOOL OF LAW, <http://mckinneylaw.iu.edu/law-state-gov/fellowships/index.html> (last visited July 14, 2014).

14. *Events*, ROBERT H. MCKINNEY SCHOOL OF LAW, <http://mckinneylaw.iu.edu/events/current.cfm?eid=146> (last visited Sept. 18, 2014) (providing a schedule of events for the 2013 Program on Law and State Government Fellowship Symposium, *State Governments Face the Realities of Aging Populations*).

15. Sean Deneault, *Medicare Fraud: The Potential to Cut Fraudulent Expenditures by Incentivizing State Governments* 3-6 (Sept. 20, 2013) (unpublished manuscript) (on file with author).

16. When a provider assigns a higher coding rate to the treatment of a patient than the treatment that was actually administered, the provider has “upcoded.” *See, e.g.*, Reed Abelson & Julie Creswell, *U.S. Warning to Hospitals on Medicare Bill Abuses*, N.Y. TIMES, Sept. 25, 2012, at B1.

17. *See, e.g.*, False Claims Act, 31 U.S.C. § 3729 (2014); Anti-Kickback Statute, 42 U.S.C. § 1320a-7b (2014); Stark Law, 42 U.S.C. § 1395nn (2014) (prohibiting physician referrals of

suspected fraudulent payments.¹⁸ Pointing to the smaller geopolitical sphere of state governments, their large role in regulating the day-to-day operations of the health care industry and existing successes in state-run Medicaid fraud efforts, Mr. Deneault suggested that “[s]tates are the perfect solution to the deterrence problems plaguing the federal government.”¹⁹ The crux of Mr. Deneault’s presentation was that the confluence of aging demographics, increasing Medicare recipients, and the current federal budget deficit supports his proposal to recalibrate how states interact with the health systems that care for their elderly.²⁰

Next, Professor David Orentlicher shared remarks entitled, *Aging Populations and State Government Policy: Physician Assisted Suicide*.²¹ In his book, *Matters of Life and Death: Making Moral Theory Work in Medical Ethics and the Law*, Professor Orentlicher explores the philosophical debates over the fundamental principles that guide life and death medical decisions.²² Professor Orentlicher’s address joined his impressive body of academic work in opening doors to important conversations—in courtrooms, hospital rooms, dinner tables, and legislative houses—about palliative care, hospice, and other important choices regarding health care, human dignity, and the law. Specifically, he addressed, as he does in the article contained in this issue, “the trend toward legalization of physician aid in dying and what it tells us about societal morality regarding medical decisions at the end of life.”²³

As Professor Orentlicher does so well, and does with such grace and clarity, he contrasted the evolution of moral and legal thinking about physician aid in dying with transitions on the issues of abortion in the 1960s and 1970s, and more recently with same sex marriage.²⁴ After he explained how the law uses proxies to distinguish between right and wrong, he described how society’s fundamental understandings of “morally unjustified death” and “morally justified death” came to be expressed in the law.²⁵ Then, Professor Orentlicher traced the origins of

designated health services for Medicare and Medicaid patients if the physician has a financial relationship with that entity); Criminal Health Care Fraud Statute, 18 U.S.C. § 1347 (2014).

18. See generally Press Release, Centers for Medicaid and Medicare Services, CMS Fraud Prevention System Identified or Prevented \$210 Million in Improper Medicare Payments in 2nd Year of Operations (June 24, 2014) (*available at* <http://perma.cc/9VK4-KWGG?type=source>) (“In its second year of operations, CMS’ state-of-the-art Fraud Prevention System, that employs advanced predictive analytics, identified or prevented more than \$210 million in improper Medicare fee-for-service payments, double the previous year.”).

19. Deneault, *supra* note 15, at 11.

20. See generally *id.*

21. Professor David Orentlicher holds the Samuel R. Rosen Professorship and is the Co-director for the Hall Center for Law and Health at the Indiana University Robert H. McKinney School of Law.

22. DAVID ORENTLICHER, *MATTERS OF LIFE AND DEATH: MAKING MORAL THEORY WORK IN MEDICAL ETHICS AND THE LAW* (2001).

23. Orentlicher, *supra* note 10, at 112.

24. *Id.* at 112-13.

25. *Id.* at 114.

how physician assisted suicide and the withdrawal of life-sustaining medical treatment became legal proxies for each, respectively.²⁶ Professor Orentlicher pointed to the legal choices of Oregon, Washington, Vermont, Montana, and New Mexico as examples of how states are refining “legal rules for end-of-life law so they better reflect the public’s long-standing moral views about death-hastening actions for patients.”²⁷

Tarah M.C. Baldwin’s fellowship address, *Bilking the Elderly: A Fight for Financial Autonomy and Review of the Use and Misuse of Powers of Attorney and Guardianships*, began with a personal example of how powers of attorneys and guardianships can be misused.²⁸ Ms. Baldwin’s example, involving a caregiver abusing both power of attorney and guardianship authority to deprive a parent of long protected savings for basic care, came from her *pro bono* work for the Senior Law Project.²⁹ Ms. Baldwin made clear that her experience representing her elderly client fanned the flame of her passion to use her fellowship experience to explore and improve Indiana’s guardianship laws and policies.³⁰ The example poignantly highlighted President Obama’s comments calling for state and federal government collaboration to combat elder abuse:

Victims of elder abuse are parents and grandparents, neighbors and friends. Elder abuse cuts across race, gender, culture, and circumstance, and whether physical, emotional, or financial, it takes an unacceptable toll on individuals and families across our Nation. Seniors who experience abuse or neglect face a heightened risk of health complications and premature death, while financial exploitation can rob men and women of the security they have built over a lifetime. Tragically, many older Americans suffer in silence, burdened by fear, shame, or impairments that prevent them from speaking out about abuse.³¹

26. *Id.* at 121-22.

27. *Id.* at 123.

28. *See Events*, *supra* note 14; *see also* Tarah M.C. Baldwin, A Brief Essay on Federal and State Responses to Elder Abuse, 1-8 (unpublished manuscript) (on file with author) [hereinafter Responses to Elder Abuse].

29. The Senior Law Project is an initiative of Indiana Legal Services, a nonprofit law firm that provides free civil legal assistance to eligible low-income people throughout the state of Indiana. *See Indiana Legal Services—Senior Law Project*, IND. LEGAL SERVS. <http://www.indianalegalservices.org/provider/588> (last visited July 14, 2014).

30. *See Responses to Elder Abuse*, *supra* note 28; *see also* Tarah M.C. Baldwin, The Delineating Dilemma: The Challenges in Defining Elder Abuse, 1-6 (unpublished manuscript) (on file with author); *see also* Tarah M.C. Baldwin, Current Indiana Criminal Laws Regarding Elder Abuse and a Proposal for an Elder Protection Act, 1-12 (unpublished manuscript) (on file with author) [hereinafter Elder Protection Act].

31. President Barack Obama, *Presidential Proclamation—World Elder Abuse Awareness Day, 2012*, THE WHITE HOUSE (June 14, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/14/presidential-proclamation-world-elder-abuse-awareness-day-2012>; *see also* Responses to

Ms. Baldwin urged that symposium attendees, lawyers generally, our state, every state, and especially vulnerable elderly citizens could benefit from more consistent application and monitoring of state court granted powers of attorney and guardianships.³² Ms. Baldwin then explained how state governments could protect our elderly from falling victim to careless or unscrupulous “caregivers” who assume rights they do not necessarily have.³³ Specifically, she suggested more broadly accessible education for all involved and affected by the guardianship, more judicial oversight of certain guardianships, and state-wide guardianship registration as low cost, effective ways to deter fraud and abuse under the legal auspices of powers of attorney and guardianship.³⁴

The morning panel of the symposium, *Legal Tools for Balancing Autonomy and Protection: Advocacy, Scholarship, and Practice*, brought together three terrific lawyers, scholars, and advocates for the elderly. Professor Linda Whitton,³⁵ Adjunct Professor and Attorney Rebecca Geyer,³⁶ and Attorney Claire Lewis³⁷ shared experiences and insights on how the law is evolving to, in Professor Linda Whitton’s words, “facilitate a principal’s autonomous choices as well as . . . protect[ing] principals who later become incapacitated.”³⁸ Moderated by Fellow Tarah Baldwin, the panel discussed specific examples of when elderly clients’ or citizens’ autonomy might trump what is deemed “the best choice” by children or other caregivers, and how the law supports or challenges such situations. The panel also entertained a wide variety of questions from the audience, gave different perspectives, and shared their collective experiences, to help us understand the changing landscape of what we call Elder Law.

The symposium’s keynote address was presented by Professor Rebecca Morgan³⁹ in a room filled to capacity with symposium attendees, plus law students and others who could not attend the full symposium, but made time to join us for Professor Morgan’s address. She did not disappoint! She arrived in Indianapolis between presentations in Alaska (the prior week) and Vancouver and Hawaii (the next week) to share from her vast scholarship, practice, and leadership about how we, as lawyers, can address important issues of autonomy

Elder Abuse, *supra* note 28, at 2.

32. See Responses to Elder Abuse, *supra* note 28, at 1.

33. *Id.*

34. See generally Elder Protection Act, *supra* note 30.

35. Professor of Law, Valparaiso University School of Law; Reporter, Uniform Power of Attorney Act.

36. Attorney, Rebecca W. Geyer & Associates, PC and Adjunct Professor of Law, Indiana University Robert H. McKinney School of Law.

37. Attorney, Law Offices of Claire E. Lewis and founding member and the first President of the Indiana Chapter of the National Academy of Elder Law Attorneys (IN-NAELA).

38. Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHOENIX L. REV. 343, 344 (2008).

39. Boston Asset Management Chair in Elder Law, Director, Center for Excellence in Elder Law, Director, LL.M. in Elder Law, Stetson University, College of Law.

and protection as we shape laws reaching our older citizens and, as she convinced us, all of us.

The article based on Professor Morgan's symposium presentation, *What the Future of Aging Means to All of Us: Policies and Practicalities*, is included in this issue,⁴⁰ but even it fails to convey not only the energy and enthusiasm that accompanied her keynote address but also her boundless generosity in answering my and the fellows' questions throughout the 2013 fellowship year. As she does in her article, Professor Morgan first pointed out that Elder Law is unlike most other areas of the law in that its practice is defined by the client, rather than the subject matter of the law.⁴¹

Using examples from current research, history, scholarship, technology, health care, and the law, Professor Morgan persuasively conveys a holistic view of how our legal structure must change to keep up with the demands of what it means to age today, tomorrow, and well into the future.⁴² As she notes, "Aging is [e]verybody's [b]usiness."⁴³ How law chooses to support or challenge ideas like universal design, remote health care delivery, the changing caregiver support ratio, housing and zoning issues, transportation issues, and pension issues are questions that she poses with insight and optimism.

The final panel discussion of the symposium, *Recent Developments in Indiana Elder Law*, as its name suggests, turned the day's dialog to Indiana and its unique elderly population and laws. Moderated by Fellow Sean Deneault, the panel comprised Indiana attorneys Allen Pope,⁴⁴ George Slater,⁴⁵ and Dennis Frick.⁴⁶ Topics included Indiana's newly implemented guardianship registry,⁴⁷ Indiana's Physician Order for Scope of Treatment (POST) form,⁴⁸ and the recently passed amendments to Indiana's Senior Consumer Protection laws.⁴⁹

40. Morgan, *supra* note 11.

41. *Id.* at 125.

42. *See generally id.*

43. *Id.* at 147 (citing Celeste Headlee, *Are We Ready for a Massive Aging Population?*, NPR NEWS (Aug. 12, 2013), <http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=211370947&m=211370940> (transcript available at <http://www.npr.org/templates/story/story.php?storyId=211370947>) (discussing Boomer's impact on culture, among other things)).

44. Chief Counsel and Director, Medicaid Fraud Control Unit, Office of the Indiana Attorney General.

45. Senior Attorney, Slater Law Office, LLC.

46. Attorney and Director, Senior Law Project, Indiana Legal Services, Inc.

47. *See* The Hon. Susan Orr Henderson, *How a Guardianship Registry Benefits the Citizens of Indiana*, IND. CT. TIMES, July 3, 2012.

48. *See* links to the POST form and other advance directive forms at the website for Indiana's State Department of Health, *Advanced Directives Resource Center*, IND. STATE HEALTH DEP'T, <http://www.in.gov/isdh/25880.htm> (last visited July 14, 2014). A POST form helps people keep control over medical care at the end of life and can provide other information about end-of-life health care.

49. IND. CODE §§ 24-4.6-6-24-4.6-6-6 (2012) (amended 2013); *see also* Dave Stafford, *Lawmakers Put More Teeth into Consumer Protection of Indiana Seniors*, IND. LAW., June 19,

Together, the panelists shared their experiences representing the legal interests of elderly clients and citizens of Indiana and answered a wide variety of questions, including, “What will be the biggest elder law challenge in the coming years?” The answer: Getting our laws to keep pace with the changing needs and expectations of a growing, elderly population.

As state governments confront the so-called generational storm, the storm continues to touch our workplaces, our families, and our lawmakers every day. As medical advances, debt, and health care costs increase, so must our awareness of what these forces bring to our clients and our communities. State and local governments have been identified by the United Nations General Assembly as critical players toward an effective elder law structure.⁵⁰ However, as our symposium faculty reminded us, we are much better poised to shape state government policy than the United Nations General Assembly. My sincere hope is that the dialog begun at the beginning of the 2013 Fellowship year, and continuing with the publication of this introduction and accompanying scholarly articles, informs and shapes better state government policy with respect to the growing, elderly population in our state, and across this nation.⁵¹

In closing, I urge us all to take the advice, paraphrased here, of the famous centenarian, George Burns: “Look to the future, because that is where you will spend the rest of your life.”⁵²

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50. Second World Assembly on Ageing, April 8-12, 2002, *Political Declaration and Madrid International Plan of Action on Aging*, Art. 13 (2002), available at http://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf; see also Responses to Elder Abuse, *supra* note 30, at 3.

51. My thanks, again, to the Indiana Law Review for continuing the dialog between state governments and the academic community by including the symposium pieces in this issue. Great appreciation, too, goes to Ms. Kyle Galster, Coordinator for the Program on Law and State Government, for her hard work and care in making the 2013 Program on Law and State Government Fellowship Symposium an unqualified success. Ms. Galster’s professionalism and dedication to the Program and our guests made the event a joy to anticipate and a memory to treasure. The Program on Law and State Government celebrates the dedication and hard work of the 2013 Fellows, Ms. Tarah Baldwin and Mr. Sean Deneault.

52. QUOTES.COM, <http://www.quotes.net/quote/54907> (last visited Aug. 31, 2014).