

SEGREGATION OF A DIFFERENT SORT: AGE-SEGREGATION IN THE HOUSING AND ACCOMMODATIONS OF OLDER AMERICANS

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Older Americans often dislike the places in which they live during the final months and years of their lives. By necessity or choice, many move into rooms, apartments, and homes that are unappealing and even dangerous. What's more, the housing and accommodations routinely reflect the spatial segregation of the young and the old which is widespread in modern societies. Unfortunately, living with only people who are one's own age contributes to loneliness and feelings of worthlessness among older Americans.

This Article explores age-segregated housing and accommodations in nursing homes, public housing for the elderly, and private retirement communities, with special attention to the law and government policy in each area. One partial remedy for the debilitating age-segregation would be so-called "aging in place." With legislation and programs that enable older Americans to age in their current homes, seniors would be more likely to continue growing intellectually and personally and to contribute to the society around them.

I. Introduction

While fortunate older Americans are able to remain in the homes in which they have lived for decades, many move into rooms, apart-

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ments, and houses that can be dangerous, rundown, and/or extraordinarily costly during the later months and years of their lives. In keeping with the spatial separation of young and old which is widespread in modern societies, much of this housing is also age-segregated.¹

Segregation of this sort—living only with people who are one’s own age—is harmful for older Americans and for society as a whole. Age-segregated housing and accommodations contribute to feelings of loneliness and isolation among seniors and lead many to internalize the idea that they are weak or even unworthy of residing in the larger community.² Age-segregation of seniors makes them less visible and obscures the important role they might play in the development of younger generations.³ Younger Americans, meanwhile, lose a sense of the lives and experiences of their elders and are less prepared for the days when they, too, will become elderly.⁴

The first three parts of this Article scrutinize age-segregated housing and accommodations in three areas. The first area is long-term care, especially nursing homes. In recent decades, a huge for-profit industry has come to dominate the operation of nursing homes and almost all residents of contemporary nursing homes are elderly.⁵ The second area includes government or government-funded housing for older Americans who are poor or near-poor. Programs in this area are underfunded, and existing housing is usually second-rate.⁶ The third area features apartments, condominiums, and houses specifically designed for older Americans in private retirement communities. Developers and others

1. See Glenda Laws, *“The Land of Old Age”: Society’s Changing Attitudes toward Urban Built Environments for Elderly People*, 83 *ANNS. ASS’N. AM. GEOGRAPHERS* 672, 675 (1993).

2. See Elana Portacolone & Jodi Halpern, *“Move or Suffer”: Is Age Segregation the New Norm for Older Americans Living Alone?*, 35 *J. APPLIED GERONTOLOGY* 836, 848 (2016).

3. See *id.*

4. Barbara Rogoff et al., *Children’s Integration in Communities and Segregation from People of Differing Ages*, 5(4) *PERSP. ON PSYCH. SCI.* 431 (2010).

5. Charlene Harrington et al., *Marketization in Long-Term Care: A Cross-County Comparison of Large For-Profit Nursing Home Chains*, 10 *HEALTH SERVS. INSIGHTS* 1, 1 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5467918/pdf/10.1177_1178632917710533.pdf.

6. Candace Robinson & Amy Herr, *Affordable Housing Integrated with Social Services Creates a Lifeline for Older Adults to Age in Community*, *CAP. IMPACT PARTNERS* (July 24, 2019), <https://www.capitalimpact.org/affordable-housing-integrated-services-vital-older-adults/>.

tout the idea that “55 and Better” retirement communities are something that seniors should want and enjoy.⁷ Housing and accommodations in these three areas rest on the assumption that older Americans should live with people of their own age.

Current law and policy, in general, shape and stabilize age-segregated housing and accommodations for older Americans. As a result, confident investing in long-term care, affordable housing, and retirement communities is possible, and American businesses have most certainly taken advantage of these opportunities. The existing law and policy, however, do not recognize the problem of age-segregation for seniors, nor do anything to address it.

What might be done to reduce age-segregated housing and accommodations for older Americans? The final Section of this Article addresses the possibility of what is called “aging in place.” Legislators could enact laws and develop programs that would enable more seniors to age in place. If senior Americans were able to age in place, they would have housing that is familiar and in which they could feel safe, entertain friends and relatives, and share what they learned in life with the young. More importantly, if enabled to “age in place,” seniors could continue to live in intergenerational neighborhoods and communities and enjoy the rewards they offer.

II. Nursing Homes

Many older Americans spend their final months and years living with other older Americans in long-term care.⁸ Specific choices can include independent living, assisted living, memory care, nursing homes, and hospices. Stays in these facilities are often longer than initially anticipated.⁹ Weeks can become months, and months can become years. According to one study, a person over sixty-five who begins long-term care will spend, on average, 4.5 years as a resident, perhaps switching from one specific type of facility to another over time.¹⁰

Within the realm of long-term care, nursing homes have the largest number of residents, longest history, and most developed business

7. See Portacolone & Halpern, *supra* note 2, at 841.

8. See Robert Friedland, *Selected Long-Term Care Statistics*, FAM. CAREGIVER ALL. (Jan. 31, 2015), <https://www.caregiver.org/selected-long-term-care-statistics>.

9. See generally Brad Breeding, *So I'll Probably Need Long-Term Care, But for How Long?* MY LIFESITE BLOG (July 6, 2016), www.mylifesite.net/post/so-i'll-probably-need-long-term-care-but-for-how-long/.

10. See *id.*

model.¹¹ Ranging from the immense to the tiny, nursing homes number approximately 15,400 and house a surprising 1.5 million people—roughly the population of Philadelphia or Dallas.¹² One need not be elderly to live in a nursing home, but the great majority of residents are seniors. Roughly 85 percent of the residents are sixty-five or older, and 43 percent are over seventy-five.¹³ Those under sixty-five are almost always rehabilitating from surgery or from an injury and are unlikely to remain in their nursing homes for long stays.¹⁴ The older residents, by contrast, make up nursing homes' semi-permanent community.¹⁵ Sadly, only a handful of older nursing home residents will ever return to their prior homes and resume their normal lives, and 30 percent of those who enter nursing homes stay in those nursing homes until death comes calling.¹⁶

The history of nursing homes reflects the nation's growing inclination to segregate the older Americans from the rest of the population. The precursors of nursing homes were the earlier almshouses and poor-houses, which housed a conglomeration of society's least fortunate—the insane, the alcoholic, the infirm, the orphaned, and, last but certainly not least, the elderly.¹⁷ Around the turn of the twentieth century, self-styled humanitarians began to argue that the elderly had different needs than the other unfortunate residents of almshouses and poor-houses and that the elderly should have their own facilities.¹⁸ These reformers were altruistic for the most part, but society's gradual acceptance of their arguments also reflected a growing acceptance of the

11. See generally U.S. DEP'T OF HEALTH & HUM. SERVS., *Long-term Care Providers and Services users in the United States, 2015-2016*, 3(43) VITAL & HEALTH STAT. (Feb. 2019), https://www.cdc.gov/nchs/data/series/sr_03/sr03_43-508.pdf.

12. See Matthew Goldstein et al., *Pandemic's Costs Stagger the Nursing Home Industry*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/business/coronavirus-nursing-home-finances.html> (last updated on Sept. 10, 2020).

13. See Elaine K. Howley, *Nursing Home Facts and Statistics*, U.S. NEWS (Nov. 2, 2020, 3:54 PM) <https://health.usnews.com/health-news/best-nursing-homes/articles/nursing-home-facts-and-statistics>.

14. *Id.*

15. See *id.*

16. See Robert G. Schwemm & Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act*, 90 IOWA L. REV. 121, 139 (2004).

17. *What is a nursing home and a brief history of nursing home origins in the United States*, AM. MED. FACILITY MGMT. (Jan. 23, 2018), <https://www.amfmwv.com/blog/what-nursing-home-and-brief-history-nursing-home-origins-united-states>.

18. See *id.*

idea that older adults could and should be segregated from other people.¹⁹

The popularity of age-segregated, long-term care for the elderly grew strikingly during the Great Depression of the 1930s. By this point in time, “retirement” had become accepted as a phase of life, and the plight of many retired people led to the creation of the Social Security program.²⁰ What’s more, aging parents and older relatives no doubt struck some as especially burdensome, and the idea that older Americans could reside in facilities other than the home grew increasingly appealing. These facilities initially went by different names—board-and-care homes, convalescent homes, rest homes, and old people’s homes—but following World War II the label “nursing home” came to dominate for facilities housing seniors with medical problems that did not require hospitalization.²¹

The number of nursing homes continued to grow gradually during the 1950s and early 1960s as state and federal governments cautiously became willing to pay for residents’ stays.²² Then, after Medicare and Medicaid were enacted and began partially paying for stays in nursing homes in 1965, the growth in the number, capacity, and revenues of nursing homes accelerated.²³ The number of nursing homes grew by 140 percent between 1960 and 1976.²⁴ Beds increased by 302 percent, and revenues rose by a remarkable 2000 percent.²⁵

Medicare, the primary health insurance program for those over sixty-five, presently pays for the part of nursing-home care which immediately follows a period of hospitalization. Medicaid, the health-care

19. See Olivia Gentile, *What Is Age Segregation and Why Is It Bad?*, GRANDPARENT EFFECT (May 17, 2017), <http://www.grandparenteffect.com/what-is-age-segregation-and-why-is-it-bad/>.

20. *Id.*

21. See Jeff Hoyt, *Senior Living History: 1940–1949*, SENIOR LIVING, <https://www.seniorliving.org/history/1940-1949/> (last updated Apr. 29, 2019).

22. See Harrington et al., *supra* note 5, at 2 (explaining historical growth of nursing homes in the United States).

23. Jeff Hoyt, *1950-1970: Nursing Home Population and Cost*, SENIOR LIVING, <https://www.seniorliving.org/history/1950-1970-nursing-home-population-and-costs/> (last updated Apr. 29, 2019).

24. See *The History of Nursing Homes*, FOUND. AIDING ELDERLY 1, 4, <https://www.4fate.org/history> (last visited on Feb. 1, 2021).

25. *Id.*

program for low-income individuals and families, then picks up the remainder of the tab—assuming a resident is eligible.²⁶ This approach creates problems because the actions and standards of one program may affect costs and outcomes for residents covered by the other program.²⁷ In reality, the majority of Medicare recipients receive care in nursing homes that also house Medicaid recipients, and the majority of Medicaid recipients receive care in the same facilities that house Medicare recipients.²⁸ But, neither program has much incentive to establish payment policies that recognize the impact of these policies on residents covered by the other program.²⁹

The chief concern for many elderly nursing home residents is that they must “spend down” their assets in order to become eligible for Medicaid payments. The exact rules vary from state to state, but in general an elderly nursing home resident must “spend down” savings and checking accounts, cash out retirement funds, sell a second home, and even turn over prepaid funeral expenses.³⁰ Giving up assets acquired through decades of saving and careful planning is, to say the least, extremely painful for the average senior.³¹

Regardless of the problems in coordinating the two programs, the availability of Medicare and Medicaid payments for nursing home residents led to the development of a huge nursing home industry in the final decades of the twentieth century.³² While nonprofits and government agencies continued to operate nursing homes, large for-profit businesses came to operate over three quarters of the country’s nursing homes.³³ As of 2020, the biggest nursing home operator in the country

26. See David G. Grabowski, *Medicare and Medicaid: Conflicting Incentives for Long-Term Care*, 85 *MILBANK Q.* 579, 581–83 (2007).

27. *Id.* at 579–80.

28. *Id.* at 585.

29. *Id.* at 580.

30. See Geoff Williams, *How a Medicaid Spend Down Works*, *U.S. NEWS* (May 17, 2019, 1:43 PM), <https://www.money.usnews.com/money/retirement/baby-boomers/articles/how-a-medicaid-spend-down-works>.

31. When my own late father faced the possibility of entering a nursing home, I recall him saying he would “pull the plug” before he would “spend down” his assets in order to be eligible for Medicaid coverage.

32. See *FOUND. AIDING ELDERLY*, *supra* note 24.

33. See *Goldstein et al.*, *supra* note 12.

was Genesis HealthCare.³⁴ It runs over 500 nursing homes with over 42,000 beds in twenty-six states, and it is publicly traded.³⁵

The for-profit nursing home industry has developed a little-known but quite successful business model. The for-profit companies often rent the sites for their homes under long-term leases from investment firms and specialized investment trusts. Presently, six major investment trusts are the “landlords” for more than 1,500 nursing homes.³⁶ The investment firms and trusts view nursing homes as a real estate venture and also as an opportunity to cross-sell medical services to the operators that rent the facilities.³⁷ The individual operators or chains, meanwhile, profit from what residents pay for their housing and care through Medicare and Medicaid, personal savings, or private insurance benefits.³⁸ When residents cannot make their payments to the individual operators or chains, nursing homes may evict them.³⁹

While this business model has yielded large profits, the model has done little to improve the quality of care in nursing homes or to reduce the high concentration of older Americans in those homes. In fact, a 2019 study found that for-profit nursing homes were on average of poorer quality than nonprofit nursing homes and for-profit nursing homes were more likely to neglect their senior residents.⁴⁰ The for-profit nursing home industry, after all, is profit-driven, and it is forever looking for ways to cut or hold down costs in order to increase profits. Cost-cutting, in turn, can adversely affect the quality of care.

Indeed, the very design of contemporary nursing homes relates to the interest in cutting or holding down costs.⁴¹ Many nursing homes are hospital-like, with lounges, recreation areas, and eating spaces where clusters of senior residents interact, with long corridors along which

34. See Matthew Goldstein, *Nursing Home Operator Genesis Details Coronavirus Aid*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/business/genesis-earnings-nursing-homes-coronavirus.html>.

35. See *id.*

36. See *id.*

37. See *id.*

38. See Laws, *supra* note 1, at 683.

39. See *Don't Abandon Nursing Home Residents*, JUST. AGING, <http://www.justiceinaging.org/wp-content/uploads/2018/06/Abandoning-Nursing-Home-Residents-Kit.pdf> (last visited Mar. 2, 2021).

40. See *Nursing Home Abuse*, NURSING HOME ABUSE CTR., <https://www.nursing-homeabusecenter.com/nursing-home-abuse/#content-heading-0> (last visited Mar. 2, 2021).

41. See Iane Margolies, *As Death Toll in Nursing Homes Climbs, Calls to Redesign Them Grow*, N.Y. TIMES, <https://www.nytimes.com/2020/05/12/business/nursing-homes-coronavirus.html> (last updated Sep. 10, 2020).

private rooms line up like stubby growths on a stalk.⁴² Apartment-like units and suites, in which small groups of seniors could interact in mutually supportive ways, would be preferable, but units and suites of this sort would also be much more expensive to build and, ultimately, to rent.⁴³ Over 90 percent of nursing homes continue to employ the traditional design, and the semi-permanent population of seniors often feels like it is not only hospitalized but also severely restricted.⁴⁴

The nursing home industry has also tried to cut costs associated with staffing. The nursing assistants who tend to the senior residents in nursing homes are usually minimum-wage employees with no benefits; not surprisingly, they receive very little in the way of training.⁴⁵ According to one commentator, the big long-term care corporations seem particularly likely to “sacrifice proper staff training and other quality measures to make a profit at the residents’ expense.”⁴⁶ A study from the federal Centers for Medicare and Medicaid rated three quarters of New York City’s nursing homes “below average” or “much below average” when it came to staffing.⁴⁷ Because of the shortages and limitations of staff, friends and family members of the older residents often become crucial caregivers—helping with personal hygiene, washing clothes, and changing bedding.⁴⁸ Sometimes these friends and family members are themselves elderly.

With older residents largely unable to come to one another’s defense, the abuse of residents by nursing-home staff has become a problem. This abuse can be physical, sexual, emotional, financial, or combinations of one type and another, and the abuse of seniors residing in nursing homes is more widespread than one might think.⁴⁹ Two out of three nursing-home staff members admit they have abused residents; one in three nursing homes in the United States has been cited for abuse.⁵⁰ A 2014 survey of over 2,000 nursing-home residents found that

42. *Id.*

43. *Id.*

44. *Id.*

45. See E. Tammv Kim, *13 Hours Pau for a 24-Hour Shift*, N.Y. TIMES (June 30, 2020) <https://www.nytimes.com/2020/06/30/opinion/coronavirus-nursing-homes.html>.

46. NURSING HOME ABUSE CTR., *supra* note 40.

47. See John Leland, *She’s Alone, 105 and in a Nursing Home Threatened by the Virus*, N.Y. TIMES, <https://www.nytimes.com/2020/03/31/nyregion/coronavirus-nursing-homes-nyc.html> (last updated Apr. 14, 2020).

48. *See id.*

49. See NURSING HOME ABUSE CTR., *supra* note 40.

50. *Id.*

44 percent of those surveyed had been abused and that 95 percent had either experienced or witnessed neglect.⁵¹ One wonders if these are examples of gerontophobic aggression, that is, fearful attacks on older people chiefly because they are older people.

Years of complaints about the nursing-home industry's shoddy facilities, poor care, and abuse problems finally spurred Congress to act.⁵² The Nursing Home Reform Act (NHRA) of 1987, which to this day remains the most important federal nursing-home legislation, lists the services nursing homes must provide for residents.⁵³ These services include periodic assessments, comprehensive care plans, nursing, social counseling, rehabilitation, and dietary advice.⁵⁴

In hopes of guaranteeing these services, lawmakers also articulated a disjointed Residents' Bill of Rights (RBR).⁵⁵ The listed "rights" are not comparable to constitutional rights but rather identify options and protections residents in nursing homes should have.⁵⁶ According to the RBR, residents should have the "right to voice grievances" and the "right to participate in the review of one's care plan, and to be fully informed in advance about any changes in care, treatment, or change in status in the facility."⁵⁷ The RBR also says more generally that seniors should have the "right to be treated with dignity."⁵⁸

Federal law also establishes a monitoring process conducted by state authorities, particularly state health departments.⁵⁹ The process requires states to conduct unannounced surveys and resident interviews at nursing homes at least every fifteen months, and the states might also conduct so-called "target investigations" in response to complaints

51. Richard Weinmeyer, *Statutes to Combat Elder Abuse in Nursing Homes*, 16 AM. MED. ASS'N J. ETHICS 359, 360 (May 2014), <https://journalofethics.ama-assn.org/article/statutes-combat-elder-abuse-nursing-homes/2014-05>.

52. See Martin Klauber & Bernadette Wright, *The 1987 Nursing Home Reform Act*, AARP PUB. POL'Y INST. (Feb. 1, 2001), https://www.aarp.org/home-garden/livable-communities/info-2001/the_1987_nursing_home_reform_act.html (discussing the particularly influential 1986 report to Congress from the Institute of Medicine about the inadequate care and widespread abuse in nursing homes).

53. Nursing Home Reform Act, Pub L. No. 100-203, 101 Stat. 1330 (1987) (codified as amended in scattered sections of 42 U.S.C.) (passed as a part of Omnibus Budget Reconciliation Act of 1987).

54. See 42 U.S.C. § 1395i-3.

55. 42 C.F.R. §§ 483.10-12 (2017).

56. 42 C.F.R. § 483.10 (2017).

57. *Id.*

58. See *id.*

59. See Klauber & Wright, *supra* note 52.

about specific nursing homes.⁶⁰ If a survey or investigation reveals that a nursing home is out of compliance, a nursing home has an opportunity to correct the deficiency before sanctions are imposed.⁶¹

Has the monitoring system proven successful in improving the quality of care for older Americans in nursing homes? On one hand, observers have noted the reduction of some problems especially worrisome for seniors: untreated bed sores, involuntary physical restraint, and excessive use of urinary catheters.⁶² But on the other hand, the monitoring process appears *not* to have eliminated substandard care.⁶³ State surveys are often sporadic and incomplete, and serious problems often go undetected.⁶⁴ According to David Stevenson, a health policy analyst at the Vanderbilt University School of Medicine, "Because of its orientation, nursing home quality assurance is better equipped to assure a minimal floor than it is able to incentivize excellent care."⁶⁵

Despite what struck many as a faulty quality assurance system and a failure to protect nursing home residents, the Trump Administration actually proposed easing nursing-home regulations and reducing fines for violations.⁶⁶ In particular, the Trump Administration wanted to drop requirements for infection control specialists, a policy the Obama Administration instituted in 2016.⁶⁷ These deregulation efforts preceded the COVID-19 pandemic and have apparently ground to a halt.⁶⁸ How, after all, could one continue to argue for reducing infection

60. *See id.*

61. *See* David G. Stevenson, *The Future Of Nursing Home Regulation: Time For A Conversation?*, HEALTH AFFS. BLOG (Aug. 23, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180820.660365/full/>.

62. *See* Xinzhi Zheng & David Grabowski, *Nursing Home Staffing and Quality Under the Nursing Home Reform Act*, 44 GERONTOLOGIST 13, 13 (2004).

63. *See id.*

64. *Id.* at 15.

65. Stevenson, *supra* note 61.

66. *See* Jordan Rau, *Trump Administration Announces New Scrutiny of Nursing Homes*, SHOTS: HEALTH NEWS FROM NPR (Mar. 5, 2020, 5:00 AM), <https://www.npr.org/sections/health-shots/2020/03/05/812359226/trump-administration-announces-new-scrutiny-of-nursing-homes>.

67. *See* Suzy Khimm & Laura Strickler, *Amid outbreak, Trump admin's proposed rollback of nursing home regulations faces criticism*, NBC NEWS (Mar. 3, 2020, 1:48 PM), <https://www.nbcnews.com/news/us-news/amid-coronavirus-outbreak-trump-administration-s-proposed-rollback-nursing-home-n1147661>.

68. *See* Dylan Matthews, *Trump reduced fines for nursing homes that put residents at risk. Then Covid-19 happened.*, VOX (July 14, 2020, 5:00 AM), <https://www.vox.com/2020/7/14/21323279/nursing-home-coronavirus-covid-deaths>.

control when infections spreading in seniors' common spaces have proven incredibly disastrous?⁶⁹

Overall, a large, for-profit industry relying on payments for the housing and treatment of older Americans dominates nursing-home care. Older Americans are jammed together with other older Americans in what are often substandard conditions, and the very concentration of seniors increases their loneliness, alienation, susceptibility to abuse, and vulnerability to spreading diseases and infections. Pronounced age-segregation is an underlying problem in American nursing homes.

III. Public Housing

A second age-segregated type of housing older Americans might occupy during the final years of their lives is publicly owned or publicly funded housing. While many of the seniors who live in public housing do in fact have serious medical problems, the primary reason seniors turn to public housing is poverty.⁷⁰ Unfortunately though, government programs for public housing are underfunded, and public housing programs specifically designed for seniors are in particular decline.⁷¹ Since the 1950s, the federal government has thought it appropriate to situate impoverished older Americans with other impoverished older Americans, but neither lawmakers nor the general public has cared enough about the well-being of older Americans to make their public housing satisfactory, much less copacetic.⁷²

Many assume—incorrectly, as it turns out—that impoverished seniors and poor people in general have a right to housing, but while some countries formally recognize such a right in their constitutions and elsewhere, the United States does not.⁷³ The absence of a right to

69. See Leland, *supra* note 47 (quoting New York Governor Andrew M. Cuomo, “[c]oronavirus in a nursing home can be like fire through dry grass.”).

70. See William A. Vega & Steven P. Wallace, *Affordable Housing: A Key Lever to Community Health for Older Americans*, 106 AM. J. PUB. HEALTH 635, 635–36 (Apr. 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4815997/> (noting that public housing as areas of concentrated poverty reinforce barriers to healthier living).

71. See Mica O'Brien & Susan J. Popkin, *Our Aging Public Housing Puts Older Americans at Risk*, URBAN INST. (Jan. 30, 2020), <https://www.urban.org/urban-wire/our-aging-public-housing-puts-older-americans-risk>.

72. See Nena Perry-Brown, *How public housing was destined to fail*, GREATER WASH. (June 23, 2020), <https://ggwash.org/view/78164/how-public-housing-was-destined-to-fail>.

73. See Michael Kolocek, *The Human Right to Housing in the 27 Member States of the European Union*, 7 EUR. J. HOMELESSNESS 135, 137 (2013), https://www.feantsa.org/download/mk_paper7127266673428107546.pdf; see also Lisa T. Alexander,

housing in the United States is underscored in Justice White's Opinion of the Court in the 1972 *Lindsey v. Normet* decision.⁷⁴ The case involved a challenge to Oregon's landlord-tenant laws, which at the time greatly favored the interests of landlords.⁷⁵ Late in his opinion, Justice White turned from landlord-tenant concerns to housing rights in general.⁷⁶ In a condescending tone, he reminded us that "the Constitution does not provide judicial remedies for every social and economic ill."⁷⁷ He then stated:

We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.⁷⁸

In keeping with *Lindsey v. Normet*, housing for the poor has to be provided through legislation, and the federal government has in fact authorized and funded such public housing ever since the Great Depression in the 1930s.⁷⁹ Franklin D. Roosevelt's Housing Division under the leadership of Colonel Horatio B. Hackett constructed fifty-two housing projects for the poor, and then in 1937 Congress passed the Wagner-Steagall Housing Act to support public housing.⁸⁰ The Act provided subsidies to local governments and their housing authorities to build and manage housing projects.⁸¹ Thousands of public housing units became available well before World War II began. According to one commentator:

A key to the rapid expansion and general success of the early public housing program was the pervasive sense that the housing was for average Americans down on their luck. Only later in time would the public come to see the nation's public housing as a residential dumping ground for society's least fortunate and least respected.⁸²

Occupying the Constitutional Right to Housing, 94 NEB. L. REV. 245, 252 (2015), <https://core.ac.uk/download/pdf/193248434.pdf>.

74. See *Lindsey v. Normet*, 405 U.S. 58, 74 (1972).

75. See *id.* at 58–59.

76. See *id.* at 74.

77. *Id.*

78. *Id.*

79. See JENNIFER A. STOLOFF, A BRIEF HISTORY OF PUBLIC HOUSING 1–4 (2004).

80. See *id.* at 33.

81. See *id.*

82. DAVID RAY PAPKE, CONTAINMENT AND CONDEMNATION: LAW AND THE OPPRESSION OF THE URBAN POOR 55 (2019).

Legislators, of course, revisited the federal public housing program from time to time, dropping or adding particular options for local housing authorities. In 1956, federal legislators created the possibility of age-segregated public housing for low-income seniors.⁸³ This step seems not to have been prompted only by the type of thinking that led to the growth in nursing homes during the 1930s, that is, the idea that older people were unproductive, retired, or otherwise a burden.⁸⁴ To be sure, that kind of thinking did not disappear, but as of the late 1950s rampant suburbanization geared to young, mobile families with children had left many seniors behind in the inner city.⁸⁵ The thinking was that public housing for the elderly could accommodate low-income portions of that population.⁸⁶

The oldest public housing program, specifically for older Americans, is administered by the Department of Housing and Urban Development (HUD) and managed by local housing authorities.⁸⁷ Participating seniors are assigned to particular units in modest apartments in uninspired, boxlike apartment buildings or in unadorned, rounded towers, most of which are located in urban settings.⁸⁸ Despite the settings, meanwhile, this type of public housing is often set back from the street and surrounded by lawns, seating areas, and parking lots.⁸⁹ The apartment buildings and towers are like isolated islands, and this can in fact be dangerous when the residents have medical emergencies.⁹⁰

To the extent age-segregation breaks down in these buildings and towers, it is due to a particular variation allowed to local housing authorities. Under federal law, they can construct projects or portions of projects to be occupied by the elderly, the disabled, or the elderly and the disabled combined.⁹¹ Public housing combining the elderly and the disabled would not, generally speaking, be age-segregated, but unfor-

83. Prior to this legislation, low-income seniors were able to reside in public housing only if they were members of families. See Laws, *supra* note 1, at 681.

84. See *id.*

85. See *id.*

86. See *id.*

87. See Jon Pynoos, *The Future of Housing for the Elderly: Four Strategies that Can Make a Difference*, 28 PUB. POL'Y & AGING REP. 35, 36 (2018).

88. See *id.*

89. See *id.*

90. See *id.*

91. See 42 U.S.C. § 1437e (2019).

tunately discontent has been audible in projects for the elderly and disabled combined.⁹² In particular, disabled residents with drug and alcohol problems have caused fear and anxiety among some of the elderly residents. One scholar who studied public housing for seniors in Massachusetts reported that “mixed-housing” arrangements create “a sense of confinement” for many seniors.⁹³

In theory, the units designated for the elderly could also be occupied by the “near-elderly.”⁹⁴ Yet the truly elderly are prioritized, and the “near-elderly” have little opportunity to get on waiting lists, much less to have their names drawn from such lists.⁹⁵ Indeed, even the elderly have trouble finding public housing. The program is underfunded,⁹⁶ and many local authorities have no spaces to offer.⁹⁷ Furthermore, the actual stock of public housing for the elderly is shrinking due to efforts to demolish older projects and to convert public housing into private rental properties whenever possible.⁹⁸

As with public housing in general, residents in public housing for the elderly must have incomes less than 80 percent of the area’s median income, and at least 40 percent of new admissions must have incomes at or below 30 percent of the area’s median income.⁹⁹ Tenants can pay up to 30 percent of their household income toward the rent, assuming there is household income.¹⁰⁰ Many of the elderly, of course, have no income other than, perhaps, Social Security.¹⁰¹

Beyond the core public housing program for older Americans, the federal government has a range of programs that, by design or de facto,

92. See Christine M. Cedrone, *Public Housing for the Elderly in Massachusetts: How Federal and State Disability Laws and Regulations Have Created a Sense of Confinement*, 8 ELDER L. J. 337, 337–38 (2000); see also *Housing for Seniors: Challenges and Solutions*, HUD: OFF. POL’Y DEV. AND RSCH. (2017), <https://www.huduser.gov/portal/periodicals/em/summer17/highlight1.html> (discussing the challenges facing elderly and disabled persons in HUD residences and posing possible solutions).

93. See Cedrone, *supra* note 92, at 337–38.

94. See 42 U.S.C. § 1437e(3) (2019).

95. See *id.*

96. See Pynoos, *supra* note 87, at 35.

97. *Id.*

98. See Lisa Sitkin, *Affordable Housing Needs Projected to Grow for Seniors*, 41 BIFOCAL 204, 205 (2020).

99. See *id.*

100. See *id.*

101. *Sources of Income for Older Adults*, PENSION RTS. CTR., <http://www.pension-rights.org/publications/statistic/sources-income-older-adults#:~:text=Today's%20older%20adults%20typically%20have,assistance%20programs%20and%20veterans%20benefits> (last visited Mar. 1, 2021).

provide some housing and accommodations for older Americans. Congress, for example, established the “Section 202 Housing Program” in 1959,¹⁰² and the modern-day Supportive Housing for the Elderly Program (SHEP) is a descendent of that earlier program.¹⁰³ Under this program, the federal government could provide low-interest loans and capital advances to developers prepared to acquire, rehabilitate, or construct housing for seniors.¹⁰⁴ The original thinking was that this housing could accommodate moderate-income elderly tenants—those who had too much income for traditional public housing but not enough to pay for suitable private housing.¹⁰⁵ Later amendments changed Section 202’s focus to very low-income tenants.¹⁰⁶

With modern-day SHEP, older Americans would look for housing not through local housing authorities but through the rental offices of the developers that rehabilitated or constructed the housing.¹⁰⁷ This search is a difficult one because, as with traditional public housing, overall units are declining in number.¹⁰⁸ What’s more, Congress has ceased to support the very program it created and has not appropriated funding for new projects since 2012.¹⁰⁹ Only the older supportive housing projects continue to operate and to receive federal funding for rent subsidies.¹¹⁰

Another program that at least provides some housing for older Americans is known formally as the “Housing Choice Voucher Program,” although it used to be named and is still colloquially called “Section 8.”¹¹¹ Run by the same local housing authorities that build and manage traditional public housing, the voucher program provides vouchers to individuals and families for rental housing in privately owned houses and apartment buildings.¹¹²

Although Congress did not create the voucher program exclusively or even primarily for seniors, approximately 27 percent of the

102. National Housing Act of 1959, Pub. L. No. 86-372, tit. II, § 202, 73 Stat. 667, 667 (1959); *see* Laws, *supra* note 1, at 682.

103. 12 U.S.C. § 1701q (2014).

104. *Id.*

105. LIBBY PERL, CONG. RSCH. SERV., RL33508, SECTION 202 AND OTHER HUD RENTAL HOUSING PROGRAMS FOR LOW-INCOME ELDERLY RESIDENTS 2 (2010).

106. *See id.*

107. *See* Sitkin, *supra* note 98, at 210.

108. *Id.* at 205.

109. *Id.* at 207.

110. *See id.*

111. 42 U.S.C. § 1437f(o).

112. *Id.*

nation's 2.2 million voucher households are headed by a person sixty-two or older.¹¹³ The voucher program, in other words, has a significant number of senior residents. Indeed, it might even have a larger senior presence if more of the available units had special modifications such as ramps and bathroom fixtures that many seniors would want or need.

Then, too, seniors might also be able to find housing through a privatized program which has no connection to HUD. Privatized housing programs, it bears mentioning as a sidebar, have become all the rage not only among neoliberals but also in general government circles.¹¹⁴ As Professor Jaime Alison Lee has pointed out, "Federal policy has increasingly encouraged privatization, shifting stewardship of public housing out of the hands of government and into the hands of private, for-profit companies."¹¹⁵ Buildings and units within those buildings are for the most part owned not by the government but rather by private landlords, developers, and banks.¹¹⁶ The privatized housing programs are not as disturbingly profit-driven as the nursing home industry, but market considerations are clearly more important in these programs than the needs of impoverished seniors.¹¹⁷

Since 1986, builders and developers have been able to finance the preservation, rehabilitation, and construction of mixed-income housing projects with tax credits *if* their projects contain a certain percentage of supposedly "affordable" units.¹¹⁸ The federal government provides the so-called "Low-Income Housing Tax Credits" (LIHTC), but designated state offices allocate the credits through an annual competitive process.¹¹⁹ Tenants become eligible for affordable units if their household income falls below local averages, and rent for affordable units is held below market levels.¹²⁰

113. See Sitkin, *supra* note 98, at 206.

114. See Jaime Alison Lee, *Rights at Risk in Privatized Public Housing*, 50 TULSA L. REV. 759, 762 (2015).

115. *Id.* at 760, 767.

116. *Id.* at 764.

117. See Steve Coma, *For-Profit Senior Living: Its Impact on the Not-for-Profit Sector*, BRANCH BANKING & TR. CO. CAP. MRKTS. (2016), https://www.bbtcapitalmarkets.com/assets/docs/capmarkets/downloadable/healthcare-finance/bbtcm_hc_for_profit_sr_lvg.pdf.

118. See Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 993 (2010); CORIANNE PAYTON SCALLY, AMANDA GOLD & NICOLE DUBOIS, *THE LOW-INCOME HOUSING TAX CREDIT: HOW IT WORKS AND WHO IT SERVES* (Urb. Inst. 2018) [hereinafter SCALLY, GOLD & DUBOIS].

119. SCALLY, GOLD & DUBOIS, *supra* note 118, at 3.

120. *Id.* at 2.

Developers need not necessarily make “affordable” units available to seniors, but data indicate that approximately 26 percent of the low-income households include at least one senior.¹²¹ One wonders, however, how eager owners of new and spiffy housing complexes are to have seniors as tenants. My goodness, if seniors clustered at poolside, the ambience would surely suffer. Furthermore, seniors might die before their leases end, creating the “hassle” of finding new tenants. Some seniors rely on the previously mentioned Section 8 program to subsidize their rent in affordable housing.¹²² Yet Section 8 funds usually prove insufficient when, after the initial ten-year period has ended, landlords take advantage of the statutorily created opportunity to raise the rents to market levels.¹²³

As noted above, the age-segregation problem is most severe not in Section 8 rental housing or in affordable units funded by tax credits, but rather in traditional public housing. Ironically, at least for older Americans, the Delaware Supreme Court has said that units in public housing can be considered a home.¹²⁴ In an opinion concerning firearm regulation, the Court compared the work of a housing authority to that of a private landlord and asserted that a publicly owned unit was not only a government facility but also a “home.”¹²⁵ The key, the Court thought, is not who owns a building or how the rent is paid, but rather how the tenant uses the property.¹²⁶ If a tenant uses the publicly owned unit as a home, it is, legally speaking, just that.¹²⁷

Well-intentioned pronouncements of the courts notwithstanding, few seniors in public housing would consider their dwelling places to be their “homes,” assuming they can find such dwelling places in the first place.¹²⁸ In general, impoverished seniors in public housing are like infirm seniors in nursing homes in that they are conveniently placed out of sight.¹²⁹ Stacked on top of one another and separated from

121. See Sitkin, *supra* note 98, at 208.

122. See *id.* at 206.

123. See generally *id.*; 42 U.S.C. § 1437f(o).

124. See *Doe v. Wilmington Housing Authority*, 88 A.3d 654, 668 (Del. 2014).

125. See *id.*

126. See *id.*

127. See *id.*

128. Cf. *id.*

129. See *Public Housing: Image Versus Facts*, HUD: OFF. POL’Y DEV. AND RSCH. (May 1995), <https://www.huduser.gov/periodicals/ushmc/spring95/spring95.html> (comparing the myth of lack of seniors in public housing to true significant percentages).

younger people and from the larger community, seniors in public housing have almost no opportunity to share their concerns or what they have learned in life with younger people.¹³⁰ Their largely unsatisfactory housing projects and accommodations feel almost like loosely patrolled internment facilities.

IV. Private Retirement Communities

Developments beyond their control force many older Americans into age-segregated nursing homes or public housing. For seniors in nursing homes, medical problems are the driving force; for seniors of limited means, poverty or near-poverty prompts the move into public housing.¹³¹ Other older Americans, by contrast, freely *choose* to rent or buy age-segregated apartments, condominiums, and houses, and they then spend their final years or decades living willingly in “retirement communities” or “senior living communities.”¹³² But alas, the residents of retirement communities frequently have the gnawing feeling that something important is missing from what they have rented or purchased.¹³³

Age-segregated retirement communities in the United States date from the 1920s, with Ryderwood in Washington claiming to be the oldest one still operating.¹³⁴ Despite dating back to the Roarin’ Twenties, though, retirement communities were small and few in number in the first half of the twentieth century—at least when compared to the sizes and numbers of more recent times.¹³⁵ The most famous or infamous re-

130. See generally *id.*

131. See *Aging in Place: Facilitating Choice and Independence*, HUD: OFF. POL’Y DEV. AND RSCH. (2013), <https://www.huduser.gov/portal/periodicals/em/fall13/highlight1.html> (explaining how financial stressors may force seniors into public housing).

132. See *id.*

133. See generally Marc Freedman & Trent Stamp, *The U.S. Isn’t Just Getting Older, It’s Getting More Segregated by Age.*, HARV. BUS. REV. (June 6, 2018), <https://hbr.org/2018/06/the-u-s-isnt-just-getting-older-its-getting-more-segregated-by-age> (explaining the social costs of age segregated housing).

134. See Tom Banse, *Lawsuit Leaves Wounds in Seniors-Only Retirement Haven*, NW NEWS NETWORK (May 29, 2014), <https://www.nwnewsnetwork.org/post/lawsuit-leaves-wounds-seniors-only-retirement-haven> (commentating on challenges to Ryderwood’s exclusiveness).

135. See Ellickson, *supra* note 118, at 988.

retirement communities are in Arizona, California, and Florida, but retirement communities can be found in every state.¹³⁶ The residents are typically fifty-five or older or, as some advertisements put it, “55 or Better.”¹³⁷

The recent growth of retirement communities is often linked to the baby boomer generation, that is, people born after the World War II Generation and prior to the birth of so-called “Gen X.”¹³⁸ Baby boomers number approximately 80 million, and many are now retiring and restructuring their living arrangements for the final stages of their lives in what some consider typically selfish ways.¹³⁹ Quipsters have metaphorically characterized baby boomers as a “silver tsunami,” that is, a dangerous and deadly tidal wave.¹⁴⁰ The enormous number of baby boomers is thought to be a drain on the rest of society, especially when it comes to support, social services, and medical expenses.¹⁴¹

As for baby boomers and other older Americans who live in retirement communities, meanwhile, they tend *not* to be a drain on the younger parts of the population.¹⁴² Those moving into retirement communities are actually paying out rather than taking in. The housing and services in retirement communities are expensive. For the most part, only those older adults who are financially secure can afford to live in such communities.¹⁴³

What do these communities offer? The primary attraction is the opportunity to live only with older people, and, along with this, there is the opportunity to regularly participate in leisure activities such as

136. See, e.g., Kent Allen, *Arizona Narrows Gap With Florida as Retirement Destination*, AARP (May 8, 2019), <https://www.aarp.org/retirement/planning-for-retirement/info-2019/retirement-most-popular-states-florida-arizona.html>.

137. See Marcelle Sussman Fischler, *Resort-Style Living for Graying Boomers*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/realestate/resort-style-living-for-graying-baby-boomers.html>.

138. See Alissa Sauer, *The Impact The Baby Boomers Have on Senior Living*, LEISURECARE, <https://www.leisurecare.com/resources/baby-boomers-and-senior-living/> (last visited Feb. 1, 2021).

139. See Sean Illing, *How the baby boomers—not millennials—screwed America*, VOX, <https://www.vox.com/2017/12/20/16772670/baby-boomers-millennials-congress-debt> (last updated Oct. 26, 2019, 10:01 AM).

140. Sitkin, *supra* note 98, at 220.

141. See Stephen J. Bartels & John A. Naslund, *The Underside of the Silver Tsunami—Older Adults and Mental Health Care*, 368 NEW ENG. J. MED. 493, 496 (2013); Amanda Barusch, *The Aging Tsunami: Time for a New Metaphor?*, 56 J. GERONTOLOGICAL SOC. WORK 181, 181 (2013).

142. See Bartels & Naslund, *supra* note 141; Barusch, *supra* note 141.

143. See Fischler, *supra* note 137 (showing condo flats and townhouses in new retirement communities on Long Island range in price from \$650,000 to \$1.3 million).

book clubs, exercise classes, golf, swimming, and tennis.¹⁴⁴ These activities theoretically provide a way to escape the complications and turmoil of everyday life, but in the words of one scholar, retirement communities are “Peter Pan housing,” places where you can refuse to grow up or, to put it more precisely, refuse to grow old.¹⁴⁵

The major legal question that haunted the development of retirement communities for some time involved whether the developers and owners of retirement communities were engaging in various forms of housing discrimination.¹⁴⁶ Enacted in 1968, the federal Fair Housing Act (FHA) prompted consideration of this issue.¹⁴⁷ The FHA seeks to restrict and eliminate housing discrimination against members of designated groups by allowing them to bring civil actions against alleged discriminators.¹⁴⁸ Would one be able to sue a retirement community claiming housing discrimination?

Especially relevant are 1988 amendments to the FHA spawned by discrimination against families with children.¹⁴⁹ Congress became concerned about protecting this group because the growth of adults-only housing during the 1970s and 1980s left many families with children, and especially single mothers with children, scrambling to find housing.¹⁵⁰ According to a study conducted in 1988, 25 percent of all rental units barred children, 50 percent of housing complexes had policies which made it difficult for children to live in the complexes, and 20 percent of all families were living in places they did not like because of the

144. *See id.*

145. *See* Mark D. Bauer, “Peter Pan” as Public Policy: Should Fifty-Five-Plus Age-Restricted Communities Continue to be Exempt from Civil Rights Laws and Substantive Federal Regulation?, 21 *ELDER L.J.* 33, 36 (2013).

146. *See* *Should Age-Restricted Communities Be Exempt From Civil Rights Laws?*, U.S. DEP’T HOUS. & URB. DEV., https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_071213.html (last visited Feb. 1, 2021).

147. 42 U.S.C. §§ 3601–3619.

148. *See* 42 U.S.C. § 3604 (showing that when originally enacted, the FHA barred discrimination in the sale and rental of housing based on race, color religion, and national origin. An amendment to the FHA from 1974 added sex to the list of protected groups, and amendments in 1988 added disability and familial status).

149. *Id.*

150. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 88 Stat. 633 (1974).

discrimination against families with children.¹⁵¹ The 1988 Congressional amendments to the FHA were designed to address this multifaceted problem.¹⁵²

Developers of retirement communities, meanwhile, were concerned that amendments of this sort could put the brakes on what had become a very lucrative enterprise.¹⁵³ These developers had come to realize that seniors could be redefined as consumers and that possibilities existed for “the commodification of the elderly lifestyle.”¹⁵⁴ Lobbying ensued, and Congress weakened the amendment by adding various exemptions that allowed certain senior retirement communities to discriminate on the basis of age and, in particular, keep out families with children.¹⁵⁵ The most important of these exemptions for the purposes at hand involved communities that did in fact provide “significant facilities and services” for seniors and in which at least 80 percent of the units in the complex housed at least one person over fifty-five years of age.¹⁵⁶

Some remained concerned that the development of retirement communities would still be impeded and argued that the “significant facilities and services” requirement was vague and difficult to meet.¹⁵⁷ Hence, Congress acted once again. In 1995, it enacted the Housing for Older Persons Act (HOPA), which, among other things, completely eliminated the “significant facilities and services” requirement.¹⁵⁸

The chief beneficiaries of HOPA were real estate interests, in particular the developers and owners of the retirement communities.¹⁵⁹ In the first decades of the twenty-first century these interests expanded their development and marketing to include “niche” or “affinity” communities.¹⁶⁰ These complexes are designed to appeal to those who not only prefer older people in their own age group but also older people who share a given characteristic or hobby.¹⁶¹ Thus, niche communities predictably exist for vegetarians, same-sex couples, members of racial

151. See Carl A.S. Coan & Sheila C. Salmon, *The Fair Housing Act and Seniors' Housing*, 27 URB. LAW. 826, 826–27 (1995).

152. Bauer, *supra* note 145, at 55.

153. *Id.* at 3.

154. Laws, *supra* note 1, at 683.

155. Bauer, *supra* note 145, at 38.

156. 42 U.S.C. § 3607(b)(2) (2018).

157. Coan & Salmon, *supra* note 151, at 835.

158. See generally Jonathan I. Edelman, *Family Values: Prevention of Discrimination and the Housing for Older Persons Act of 1995*, 52 U. MIA. L. REV. 947 (1998).

159. See Bauer, *supra* note 145, at 36.

160. *Id.* at 38.

161. *Id.*

and ethnic groups, and immigrants from particular countries or regions.¹⁶² Somewhat less predictable are retirement communities for those with certain political orientations or loyalty to particular universities, most likely their alma maters.¹⁶³ Niche communities have also been established for those who enjoy book discussions, board games, amateur theater, and even country music.¹⁶⁴

The sale of housing in contemporary niche communities or general retirement communities is promoted by sophisticated advertising.¹⁶⁵ As is the case with advertising for other consumer goods and services, advertising for retirement communities promotes the idea that if you buy a particular good or commodity, you will find happiness.¹⁶⁶ Buy the right hair coloring and revel in a rich and romantic life. After all, you are worth it. Buy the right type of car and glide through twisting and majestic mountain curves. As everyone knows, real men love a hint of danger. And buy a condo or house in a retirement community and get away from it all. You deserve it. If you put together all of the available promises of happiness, historian and social critic Christopher Lasch has argued, they collectively promote “consumption as a way of life.”¹⁶⁷ If we could just make all the right consumer choices, our lives could be truly lovely.

Beyond merely promising joy and happiness, advertisements for private retirement communities more subtly mediate self-understanding among the senior buyers.¹⁶⁸ That is, advertisements for private retirement communities transcend the actual product, in this case a condo or a house in a retirement community. The advertisements serve up a metaphorical story about personal freedom and liberation.¹⁶⁹ The marketing “scripts” suggest that buying a place in a retirement community and moving into it brings you into touch with your true inner self.¹⁷⁰

162. See generally *id.*

163. See generally *id.*

164. See Anne Glass, *Aging in a Community of Mutual Support*, 23 J. HOUS. FOR ELDERLY 283 (2009); Mary Umberger, *The Next Generation of Retirement Centers: Niche Communities Target Like-Minded Boomers*, CHI. TRIB., June 3, 2011, at C1.

165. See Bauer, *supra* note 145, at 42.

166. See generally *id.*

167. Christopher Lasch, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* 72 (1978).

168. See generally Joseph E. Davis, *The Commodification of Self*, 5 HEDGEHOG REV. 41, 41 (2003).

169. See *id.* at 44.

170. See *id.* at 46.

If one took seriously the promise of happiness, freedom, and personal liberation that advertising for retirement communities holds out, one might assume these communities were heaven on earth. But just how heavenly are retirement communities, and how delighted should the buyers be with what they have purchased? Unfortunately, the apartments, condominiums, and houses in retirement communities often present serious physical and personal problems for the residents.

For one thing, golf and tennis players, even those “55 or Better,” age. As that happens, many of the residents of private retirement communities come to realize that their doors and hallways are not suitable for wheelchairs and walkers and that their bathrooms lack grab bars, reachable light switches, and tubs and showers that could be used without having to step up over assorted barriers.¹⁷¹ And what about services as opposed to physical facilities? Located in suburban or even rural areas, retirement communities often lack access to buses and other forms of public transportation.¹⁷² This can present a serious problem for seniors who had to give up driving but need a way to get to doctors, nurses, therapists, and social workers.¹⁷³

Moreover, condos and townhouses in retirement communities are often, with the benefit of twenty-twenty hindsight, bad investments because of their declining resale value.¹⁷⁴ Often, housing in retirement communities not only fails to appreciate in value over time but rather depreciates.¹⁷⁵ The seniors who purchased the housing expended a good portion of their assets to “buy in,” and that leaves them with little cash or savings to rehab or retrofit their properties.¹⁷⁶ When the senior owners die, meanwhile, their children and/or executors tend to sell the properties for whatever price they can get, further contributing to the depreciation of the properties.¹⁷⁷

Most importantly for purposes at hand, the age-segregation on which the retirement communities are built can spawn disappointment

171. See Bauer, *supra* note 145, at 36.

172. *Id.* at 35.

173. See *id.*

174. See *id.* at 37.

175. *Id.* at 53.

176. Maurie Backman, *Here's What the Average Retiree Spends on Housing Each Year*, MOTLEY FOOL, <https://www.fool.com/retirement/2019/06/10/heres-what-the-average-retiree-spends-on-housing-e/> (last updated Jan. 11, 2021, 4:21 PM).

177. Pamela Babcock, *A parent dies, leaving you the house. Now what?*, WASH. POST (May 16, 2019, 12:00 AM), https://www.washingtonpost.com/realestate/with-proper-planning-selling-a-parents-house-can-be-a-relatively-painless-process/2019/05/16/0577b4fc-71a2-11e9-9f06-5fc2ee80027a_story.html.

and frustration. To be sure, not every resident of American private retirement communities would admit to these feelings. Some seniors live out their lives fully enamored with the type of lifestyle retirement communities symbolize—blissful, free from turmoil, and enjoying the company of people similar to oneself.¹⁷⁸ Others experience what might be characterized as “buyer’s remorse,” that is, a post-purchase dissonance and disappointment.¹⁷⁹ This unreflective remorse might result in unduly eager efforts to justify the purchases well after the fact. How could my purchase of a condominium or house in a retirement community, after all, be anything but prudent?

These possibilities having been acknowledged, the fundamental age-segregation of the retirement communities stunts some of the residents. Despite the proud age-group narcissism that is evident in many retirement communities, age-segregation can increase loneliness and angst.¹⁸⁰ Separating oneself from what is swirling about in society leads to superficiality and narrowness.¹⁸¹ Impoverished Latinos might be fighting to enter the United States just down the highway from one’s idyllic Arizona retirement community, but tee times register as a more pressing concern.¹⁸² Additionally, those noisy, rambunctious, and often disrespectful younger people whom residents have eluded, turn out to be more appealing than anticipated.¹⁸³ Chances to teach the young and to share what one has learned in the course life are few and far between for residents of retirement communities.

Retirement communities are a third type of age-segregated housing and accommodations for older Americans during the final months and years of their lives. They are almost always more luxurious than nursing homes and public housing, but retirement communities are problematic for other reasons. The escapist age-segregation on which they are built can be stunting and limiting. Like other age-segregated housing and accommodations, retirement communities do not invite

178. Bethesda Health, *Seniors Live Longer and Happier at Retirement Communities*, BETHESDA HEALTH GRP. (Oct. 8, 2020), <https://www.bethesdahealth.org/blog/2020/10/08/seniors-live-longer-happier-retirement-communities/>.

179. See Kelli B. Grant, *Five cases when buyer’s remorse will cost you big*, CNBC (July 30, 2014, 9:38 AM), <https://www.cnbc.com/2014/07/30/five-cases-when-buyers-remorse-will-cost-you-big.html>.

180. MICHAEL J. LEITNER ET AL., *LEISURE IN LATER LIFE* 69 (Sagamore Publishing 2012).

181. *Id.*

182. See generally *id.*

183. *Id.*

residents to think more deeply or imaginatively, to grow in mind and spirit. The greatest irony, or perhaps tragedy, is that older Americans pay large amounts of money to live in age-segregated retirement communities.

V. Solutions to Age-Segregation Problems

This Article has scrutinized three varieties of housing and accommodations for older Americans: nursing homes, public housing, and private retirement communities. Each variety rests on an assumption that seniors are better off living with seniors and *only* with seniors. The resulting age-segregation, as noted frequently in this article, has detrimental ramifications both for the seniors who are affected and also for the population as a whole.

A partial solution to the age-segregation problems in housing and accommodations for older Americans exists in the growing “aging in place” movement.¹⁸⁴ The basic premise of this movement is that older people should be allowed, if possible, to remain in the homes and neighborhoods in which they have lived during the immediately preceding years.¹⁸⁵ The idea has been promoted by organizations such as the National Aging in Place Council.¹⁸⁶ An Annual Aging in Place week is celebrated in mid-October of each year, and a serious, thoughtful secondary literature regarding “aging in place” has appeared.¹⁸⁷ The movement has some special degree of viability because an estimated 70 percent of seniors live in single-family detached homes, and almost 90 percent would like to remain in those homes until they die.¹⁸⁸ Most importantly for concerns at hand, “aging in place” offers relief from age-segregation problems because seniors “aging in place” would typically live in age-integrated neighborhoods and communities.¹⁸⁹

184. See Sabrina Akhtar et al., *Aging at Home: A Portrait of Home-Based Primary Care Across Canada*, 22 HEALTH Q. 30, 30–35 (2019) (the Canadian name for the aging in place movement is “aging at home.”).

185. NPR staff, *Series Overview: Growing Old, At Home*, NPR (Aug. 22, 2010, 12:08 AM), <https://www.npr.org/templates/story/story.php?storyId=129086147>.

186. NAT’L AGING IN PLACE COUNCIL, <https://ageinplace.com/glossary/national-aging-place-council/> (last visited Mar. 1, 2021).

187. See e.g., STEPHEN M. GOLANT, *AGING IN THE RIGHT PLACE* (Health Professions Press 2015); MARY A. LANGUIRAND & ROBERT F. BORNSTEIN, *HOW TO AGE IN PLACE* (Ten Speed Press 2013); AARON D. MURPHY, *AGING IN PLACE* (PublishNext 2014).

188. See NICHOLAS FARBER, ET AL., *AGING IN PLACE: A STATE SURVEY OF LIVABILITY POLICIES AND PRACTICES* 7 (Dec. 2011).

189. See *id.* at 50.

Personal initiative, private enterprise, and especially changes in government policy and law reform could facilitate “aging in place.” On the first score, the most important thing for interested seniors to bear in mind is that using parts of the home, purchasing food, and transportation to places other than the home will become more physically challenging as one ages.¹⁹⁰ It is sometimes difficult for a healthy, active senior, especially one who does not really relish old age, to imagine, but aging in place and especially aging alone in a detached home are going to become harder as the years go by.¹⁹¹

The most important consideration is usually home modification. For many older Americans, it is indeed helpful to have a walk-in shower, bathroom support bars, sturdier railings, attached carpeting, wide corridors, and reachable light switches.¹⁹² Seniors should contemplate these modifications as early as possible,¹⁹³ but of course limited income and assets make home modification almost impossible for some individuals.¹⁹⁴ Bills offering seniors tax credits for home modifications have failed to find traction in Congress,¹⁹⁵ but some assistance might be available through local agencies serving older Americans.¹⁹⁶ The Administration for Community Living (ACL) in the Department of Health and Human Services (DHHS) catalogues and coordinates these agencies.¹⁹⁷ The ACL also considers grant proposals for projects that promote aging in place by enhancing access to home modifications.¹⁹⁸

190. See generally Danielle Myers, *Grocery shopping: A frustrating task for some elderly*, GILROY DISPATCH (Nov. 29, 2007), <https://gilroydispatch.com/grocery-shopping-a-frustrating-task-for-some-elderly/>.

191. Claire Samuels, *Facts About Senior Isolation and the Effects of Loneliness That Will Stun You*, PLACE FOR MOM (Jan. 7, 2021), <https://www.aplaceformom.com/care-giver-resources/articles/senior-isolation-facts>.

192. *Home Modifications*, AGING IN PLACE, <https://aginginplace.org/home-modifications/> (last visited Mar. 1, 2021).

193. Kelly L. Faloon, *Living in Place vs. Aging in Place: What's the Difference?*, LIVE PLACE DESIGNS, <https://liveinplacedesigns.com/aging-in-place-lifestyle/living-in-place-home-modifications/> (last visited Mar. 1, 2021).

194. *Id.*

195. See Jenni Bergal, *Tax Credits for Ramps, Grab Bars to Help Seniors Stay at Home*, PEW: STATELINE (Aug. 24, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/08/24/tax-credits-for-ramps-grab-bars-to-help-seniors-stay-at-home>.

196. See *id.*

197. See *Older Americans Act*, NAT'L COMM. TO PRES. SOC. SEC. & MEDICARE, <https://www.ncpssm.org/documents/older-americans-polic-papers/older-americans-act> (last updated Mar. 19, 2021).

198. See *Promoting Aging in Place by Enhancing Access to Home Modifications*, ADMIN. FOR CMTY. LIVING, <https://acl.gov/grants/promoting-aging-place-enhancing-access-home-modifications> (last updated Sept. 21, 2020).

In addition to individual private efforts to make existing homes easier places in which to live, real estate developers and home builders could construct new homes which could accommodate older Americans' hope to age in place. So-called "smart homes," for example, can have the locks, lighting, sensors, and alarms that seniors will ultimately want.¹⁹⁹ Special health and security monitors can also be installed.²⁰⁰

On a larger scale, real estate developers and home builders could construct genuinely age-integrated communities rather than age-segregated retirement communities. As noted earlier in this Article, even the latter have to be modified when residents "55 or Better" age. Unfortunately, though, seniors often squander their assets when they move into private retirement communities, leaving little available to spend on the expensive retrofitting of condominiums and homes.²⁰¹

New age-integrated communities could resemble what has come to be known in the secondary literature as a Naturally Occurring Retirement Community (NORC).²⁰² Normally, a NORC is not built for a certain age demographic but rather takes shape over time as seniors residentially congregate within a neighborhood or community.²⁰³ The seniors often assist one another and provide services to the community such as babysitting and neighborhood security watches.²⁰⁴ The community in turn takes special note of the concentration of seniors and offers social services and special activities for the seniors within the community.²⁰⁵ Starting from scratch, meanwhile, real estate developers and home builders could develop and market intergenerational communities with special room for seniors to congregate. Seniors could age in place within what is in effect a designed NORC and thereby avoid the isolation and self-doubt so common in age-segregated communities.²⁰⁶

199. *Id.*

200. See Jamie Gold, *Boomers and Seniors Finding Great Benefits from Smart Home Technology*, FORBES (Dec. 6, 2019, 1:55 PM), <https://www.forbes.com/sites/jamiegold/2019/12/06/boomers-and-seniors-finding-great-benefits-from-smart-home-technology/#1209bbef683c/?sh=37831bba68ec>.

201. See Bauer, *supra* note 145, at 44.

202. See Tim Parker, *What Is a Naturally Occurring Retirement Community?*, THE BALANCE, <https://www.thebalance.com/what-is-a-naturally-occurring-retirement-community-4585208> (last updated Oct. 21, 2020).

203. See *id.*

204. See *id.*

205. See *id.*

206. See Paul J. Masotti et al., *Healthy Naturally Occurring Retirement Communities: A Low-Cost Approach to Facilitating Healthy Aging*, 96 AM. J. PUB. HEALTH 1164, 1165 (2006).

Most importantly, government policies and concomitant laws could be changed and expanded to facilitate “aging in place.” This change could involve adjustments in existing federal programs and legal standards related to nursing homes, public housing, and private retirement communities as well as in the enactment of new laws reflecting more modern attitudes and commitments.

Instead of encouraging seniors with medical problems to take up residence in nursing homes, for example, Medicaid could make it easier for these seniors to obtain home health care. At present, seniors must affirmatively show a medical need for home health care and, even more ominously for many, spend down their assets to surprisingly low, state-determined levels.²⁰⁷ Perhaps medical need could be demonstrated by a simple affidavit, and spend-downs could be limited or even eliminated for home health care. After all, the latter, on average, costs states much less than nursing-home stays.²⁰⁸

Home health care for older Americans, incidentally, could also be facilitated by increased funding for equipment and for home health aides. Unfortunately, home health care aides, who help seniors bathe, dress, and use the toilet, are usually underpaid and often dissatisfied with their jobs. Mostly female, over fifty-five years of age, and members of ethnic and racial minority groups, the aides at present receive on average only \$11.52 per hour without benefits.²⁰⁹ Many seek public assistance to stretch their incomes and struggle to support their own families.²¹⁰ For-profit home health care businesses report a turnover of 70 percent nationally, a certain sign of severe workplace alienation.²¹¹ Better training programs for home health care aides, higher minimum wages, and perhaps even wage subsidies could increase the appeal of employment in this sector of the workforce. If more home health care aids were available, more seniors could remain in their intergenerational communities instead of entering nursing homes.

207. See *Medicaid and Home Health Care & Non-Medical, In-Home Care*, AM. COUNCIL ON AGING, <https://www.medicaidplanningassistance.org/in-home-care/> (last updated Jan. 28, 2021).

208. See *id.*

209. See Paula Span, *Navigating Home Care During the Pandemic*, N.Y. TIMES, (June 6, 2020), <https://www.nytimes.com/2020/06/06/health/coronavirus-home-care-nursing.html>.

210. *Id.*

211. *Id.*

As for public housing, no convincing reason exists for it to be age-segregated. Virtually no money is being allocated for new public housing,²¹² but public housing for the elderly could be combined with other types of public housing. This combination need not be limited to the current combination of public housing for the elderly and the handicapped, a combination that, as noted earlier in this Article, has caused fear and dissatisfaction among the elderly.²¹³ Federal law could be amended to discourage and even block age-segregation. Instead of age-segregated public housing for the elderly, lawmakers could fold seniors into regular public housing and also let the poor who live in the latter move into public housing for the elderly. Truly intergenerational public housing could be beneficial to young and old alike.

And as for private retirement communities, they should lose their exemption under the federal Fair Housing Act.²¹⁴ This exemption was a boon to real estate developers, who could then build, advertise, and sell condominiums and houses in settings free of younger people and of children, but the exemption is problematic. Private retirement communities are in fact engaging in various forms of housing discrimination. Many seniors apparently took the age-segregation bait but living in an age-segregated retirement community does not truly enhance the emotional and intellectual well-being of seniors. What's more, seniors who literally buy into age-segregated retirement communities as well as their heirs often suffer major losses when their properties depreciate.

Beyond changes in existing federal policies regarding nursing homes, public housing, and retirement communities—federal, state, and local governments could take steps to help older Americans remain in their homes and neighborhoods and age in place. On the federal level, the time is at hand to update and expand the Older Americans Act.²¹⁵ Reauthorized through 2024, the Act provides grants to the states for services to seniors including home-delivered meals, in-home assistance, transportation, and abuse counseling.²¹⁶ As Dr. Patricia Ann Watts Kelley has observed, “The mandated services provided to older Americans by the Act are critical and essential to ensuring that elders

212. See Lee, *supra* note 114, at 767.

213. See Cedrone, *supra* note 92, at 337.

214. See generally Edelstein, *supra* note 158.

215. 42 U.S.C §§ 3001–3058 (1965).

216. *Id.*

can 'Age in Place' safely and to the best of their abilities."²¹⁷ Yet the Act itself neither endorses intergenerational living nor deplors age-segregation.²¹⁸ The services anticipated in the Act are delivered to residents of age-segregated public housing and even to people living in age-segregated private retirement communities.²¹⁹

State and local governments could also legislate and regulate in ways that could facilitate aging in place. In New York City and elsewhere, for example, government officials have formally established so-called "aging improvement districts."²²⁰ These districts include lowered curbs, walk lights with more time to cross the street, street signs with bigger letters, and abundant places to sit down and rest.²²¹ Such steps might seem minor, but collectively they can help seniors to age in place and to remain in their intergenerational neighborhoods.

VI. Conclusion

Enhancing and promoting "aging in place" is not a complete panacea for age-segregated housing and accommodations for older Americans. Many of the current problems derive from ageist attitudes that include "a frequent distaste for, and demeaning of, the old."²²² Some gerontophobes even wish that older Americans would keep to themselves and out of sight.²²³ Many seniors themselves internalize these attitudes, begin disliking the very demographic group to which they belong, and accept age-segregated housing and accommodations.²²⁴ But "aging in place" is at least one possibility for reducing contemporary age-segregation in housing and accommodations for older Americans.

217. Patricia Ann Watts Kelley, *How the Older Americans Act Facilitates Aging in Place*, HCPLIVE (June 1, 2017), <https://www.hcplive.com/view/how-the-older-americans-act-facilitates-aging-in-place>.

218. See 42 U.S.C §§ 3001–3058 (1965).

219. See *id.*

220. See Jane E. Brody, *Aging in Place*, N.Y. TIMES (May 2, 2016, 5:45 AM), <https://well.blogs.nytimes.com/2016/05/02/aging-in-place/?mtrref=www.google.com&gwh=B6501F5F770D2164BE676210C046E5CB&gwt=regi&assetType=REGIWALL>.

221. See *id.*

222. HOWARD EGLIT, *ELDERS ON TRIAL: AGE AND AGEISM IN THE AMERICAN LEGAL SYSTEM* 9 (2004).

223. See Lawrence R. Samuel, *Why Do Younger People Dislike Older People?*, PSYCH. TODAY (Jan. 24, 2019), <https://www.psychologytoday.com/us/blog/boomers-30/201901/why-do-younger-people-dislike-older-people>.

224. See Elias S. Cohen, *The Complex Nature of Ageism: What Is It? Who Does It? Who Preserves It?* 41 GERONTOLOGIST 576, 577 (2001); see also Mayumi Karasawa et al., *Cultural Perspectives on Aging and Well-Being: A Comparison of Japan and the United States*, 73 INT'L J. AGING & HUM. DEV. 73, 77 (2011).

NUMBER 1

SEGREGATION OF A DIFFERENT SORT

125

Segregation of this sort is disempowering for seniors and undermines the collective humanity of American society.

