SILVER TSUNAMI OR SILVER RUSH? EXTRACTING VALUE FROM ELDERS

Andrew Milne

This Article examines how the United States finances elder care, arguing that the legal processes structuring elder care tend to widen economic inequality and divide the interests of lower-income people against each other along generational, gendered, and racialized lines. I begin with two case narratives drawn from my practice experience as a poverty lawyer for older adults. One narrative involves an elder homeowner, while the other involves an elder renter. Both face crises of unmet care needs, the threat of homelessness, and ultimately the outcome that many older people dread most: institutionalization in a nursing home. I use these narratives as a jumping off point to explain how lower-income elders become, effectively, commodities for health care and housing entities to extract profit from.

This Article argues these stories are not exceptional, but typical, because they play out the logic of legal processes governing elder care. I examine the increasing privatization of Medicare, especially focusing on how Medicare Advantage plans convert age-related subsidies into profit at an unjustifiable cost to elders, their caregivers, and taxpayers. Regarding elder homeowners in particular, I show how Medicaid law sets up a race between for-profit actors in the long-term care industry, on the one hand, and elders' potential heirs, on the other, to see who can seize elders' home equity before the other

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does. And regarding elder renters, I examine how even older people without assets present valuable age-related revenue streams for the housing and long-term care industries to extract.

Lastly, this Article considers proposed legal reforms and finds none of them satisfying, arguing the crisis of elder care in our increasingly unequal society requires transformation of underlying social conditions, rather than superficial reforms. However, using the framework of "non-reformist reforms," I ultimately argue for a strategy of struggling for incremental reforms to help build solidarity and power among oppressed classes and point the way toward an end goal of decommodified housing and health care.

I. Introduction

The narrative around old age in the United States is frequently one of boom and doom. As Baby Boomers have aged into retirement, life expectancies have lengthened and younger generations' fertility rates have declined.[1] As a result, elders are the fastest growing age group, giving rise to fears of a "Silver Tsunami," a mounting demographic crisis in which the burden of caring for silver-haired elders will soon overwhelm the younger workforce and federal budget.[2] Over the same period, the economic prospects of working generations have precipitously declined, fanning the flames of intergenerational conflict on the premise that earlier-born generations have deprived younger generations of the opportunities they enjoyed.[3] The narrative's premise of workforce scarcity and looming Social Security insolvency dovetails easily with the ethnonationalist sentiment that "our people aren't

1. American Counts Staff, *2020 Census Will Help Policymakers Prepare for the Incoming Wave of Aging Boomers*, U.S. CENSUS BUREAU (Dec. 19, 2019), https://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html [https://perma.cc/4WET-WZDP].

2. *See, e.g.*, PEW, THE LONG-TERM DECLINE IN FERTILITY—AND WHAT IT MEANS FOR STATE BUDGETS (2022), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/12/the-long-term-decline-in-fertility-and-what-it-means-for-state-budgets [https://perma.cc/RD7E-UCMC]; James R. Knickman & Emily K. Snell, *The 2030 Problem: Caring for Aging Baby Boomers*, 37 HEALTH SERVS. RES. 849, 849–84 (2002). For an example of the use of the term "silver tsunami," *see* John D. Blum & Shawn R. Mathis, *Forgotten on the Frontlines: The Plight of Direct Care Workers During COVID-19*, 98 U. DET. MERCY L. REV. 325, 346.

3. Stephane P. Francioli, Felix Danbold & Michael S. North, *Millennials Versus Boomers: An Asymmetric Pattern of Realistic and Symbolic Threats Drives Intergenerational Tensions in the United States*, 50 PERSONALITY & SOC. BULL. 1546, 1547 ("Baby Boomers occupy a clear position of economic, social, and political dominance . . . on average about 10 times wealthier than Millennials," who portray Baby Boomers "as greedy, complacent, wasteful, and taking advantage of economic, environmental, and political resources at the expense of other generations.").

having enough children to replace themselves,"[4] in the words of J.D. Vance, eliding the abundance of young people in the Global South seeking to migrate to the U.S.[5]

I weave a different narrative. What has followed the Baby Boom is another kind of boom. Elder care is a booming array of industries offering massive profits.[6] The more apt characterization is not a Silver Tsunami,[7] but a Silver Rush. The commodity to be extracted in this rush is not a precious metal, but the value contained in elders' assets, entitlements, and subsidies.[8] The means of extraction is our system for financing elder care, a legally structured system that federal law has equipped with numerous mechanisms for appropriating value streams from elders for private profit.[9] As with prior commodity booms, the labor to extract this value is performed largely by an overworked and underpaid segment of the working class, especially racialized and immigrant workers on whom the industry heavily depends for suppressing the wages of all care workers.[10]

While my telling is indeed premised on older generations' greater access to wealth and benefits,[11] it is a misreading of the story to

4. Adriana Gomez Licon, *JD Vance Has Long Been on a Quest to Encourage More Births in the United States*, ASSOCIATED PRESS (Aug. 16, 2024), https://apnews.com/article/jd-vance-childless-cat-ladies-birth-rates-555c0f78ef8dd4c13c88b9e8d5f0024a [https://perma.cc/G5SL-NNXD].

5. *Compare* Mary Whitfill Roeloffs, *America's Declining Birth Rate Has Become A Hot-Button Political Issue—Here's What To Know*, FORBES (May 25, 2023), https://www.forbes.com/sites/maryroeloffs/2024/10/03/americas-declining-birth-rates-have-become-a-hot-button-political-issue-heres-what-to-know [https://perma.cc/HGB6-3Q9A] (reporting on warnings of pronatalist advocates including J.D. Vance, Donald Trump, and Elon Musk) *with* WILLIAM H. FREY, *New Census Projections Show Immigration Is Essential to the Growth and Vitality of a More Diverse US Population*, BROOKINGS (Nov. 29, 2023), https://www.brookings.edu/articles/new-census-projections-show-immigration-is-essential-to-the-growth-and-vitality-of-a-more-diverse-us-population [https://perma.cc/Y4FG-6EPM] ("[I]mmigration levels are crucial in leading to national growth . . . and countering what would otherwise be extreme aging.").

6. Adam Grundy, *Aging Population Linked to Increased Need for Select Health Care and Social Assistance Services*, U.S. CENSUS BUREAU (Aug. 9, 2022), https://www.census.gov/library/stories/2022/08/revenues-for-home-care-elderly-services-increase.html [https://perma.cc/F2MA-GXTY].

7. *See* Blum & Mathis, *supra* note 2, at 346.

8. *See* discussion *infra* Part III.

9. *See* discussion *infra* Part IV.

10. Elise Gould, Marokey Sawo & Asha Banerjee, *Care Workers Are Deeply Undervalued and Underpaid*, ECON. POL'Y INST. (July 16, 2021), https://www.epi.org/blog/care-workers-are-deeply-undervalued-and-underpaid-estimating-fair-and-equitable-wages-in-the-care-sectors/ [https://perma.cc/QBD8-2SDL].

11. *See* Francioli et al., *supra* note 3, at 1547.

conclude that earlier-born generations have deprived younger-born generations. The salient conflict is not between generations, but classes. Through the extractive matrix of elder care financing, the working class is precluded from building intergenerational wealth while simultaneously subsidizing wealthier families and private industries. The result, I argue, is widening of economic inequality and an upward redistribution of value.

I demonstrate this process by closely examining the conditions producing two representative legal case narratives, closely based on my experience providing free legal services to working-class elders as an attorney with Legal Services for Maine Elders (LSE).[12] These stories, which I describe in Part II, feature patterns and dynamics that became wearisomely familiar to me while practicing at LSE.[13] Both elders in the narratives,[14] whom I call Francis and Holly,[15] offer multiple value streams for the elder care industry to extract: Francis, a retired mill worker with Social Security income and home equity, and Holly, an impoverished renter with means-tested income supports and housing subsidies.

Notably, both cases involve legal issues not only of health care, but also of housing. I follow the critical public health scholars who emphasize that housing is paramount among the "social determinants of health," not only because housing quality impacts health but more

12. LSE's mission is "to provide free, high quality legal services to people who are 60 and older when their basic human needs are at stake and advocate for people facing challenges accessing Medicare benefits." *Our Mission and Programs*, LEGAL SERVS. FOR ME. ELDERS, https://mainelse.org/content/our-mission-and-programs [https://perma.cc/Q7Z2-4T3X] (last visited Mar. 11, 2025).

13. *See infra* Part I.

14. I use the term "elder" throughout this Article, while eschewing the term "elderly." In this choice, I follow the example of Legal Services for Maine Elders, which recently engaged in a thoughtful process to change its name from Legal Services for the Elderly. Some anti-ageism advocates object to using the word "elder," as well as "old" and "senior" and especially "elderly," based on perceived pejorative connotations, preferring the terms "older adults" or "older people." *See, e.g.*, Julie Sweetland, *Biased Language Paints an Unfair, Incomplete Picture of "Old People" Today*, MIAMI HERALD (May 11, 2020), https://www.miamiherald.com/opinion/op-ed/article242651941.html [https://perma.cc/A5LB-794J]; *see also* AM. PSYCH. ASSOC., PUBL'N MANUAL OF THE AM. PSYCH. ASSOC. 135 (7th ed. 2020). However, in my view and that of many of my former colleagues at LSE, the word "elder" carries a positive connotation of respect while also calling attention to the reality that older age undeniably brings on age-differentiated vulnerabilities. *See* discussion *infra* Section II.B.

15. Names and other details have been fictionalized throughout this Article to protect client confidentiality. In addition, some details are drawn from multiple cases and blended into a highly realistic composite for the sake of clarity.

fundamentally because housing security is a prerequisite for health.[16] The relationship between health care and housing is especially inextricable for elders, who often need to receive care where they live, or live where they receive care, in the forms of home health or facility care, respectively.[17] The term "elder care" should be read to include housing throughout this Article. Within this capacious understanding of elder care, we can also think of the tireless work done by elder rights lawyers, social workers, and others providing free services to keep vulnerable elders' lives intact.[18]

While Francis's and Holly's stories humanize the process of extraction, I caution the reader against vilifying the particular adversaries involved. The legal form tends to reify social processes into individual cases of plaintiffs versus defendants, obscuring how broader conditions produce individual cases that play out an underlying social logic over and over again.[19] My argument focuses on the way that economic and legal conditions incentivize the extractive behavior to which Francis and Holly are subjected. In other words, what sustains the dynamic I critique is not merely the greed of individual bad actors, but the economic and legal structure presenting irresistible opportunities, incentives, and even mandates to extract value from elders.

The cases of Francis and Holly, then, are not just sad individual stories. They represent a systemic, legally structured, historically unfolding social process. Today's elders benefitted, albeit unevenly across identity categories,[20] from federal programs and policies created from the 1930s to 1960s that built a modicum of broad-based economic security through homeownership subsidies, social welfare programs,

16. *See* THE NETWORK FOR PUB. HEALTH L., THE PUB. HEALTH IMPLICATIONS OF HOUS. INSTABILITY, EVICTION, AND HOMELESSNESS 1–3 (2024), https://www.networkforphl.org/wp-content/uploads/2025/01/The-Public-Health-Implications-of-Housing-Instability-Eviction-and-Homelessness.pdf [https://perma.cc/A345-U456]; *see generally* Carolyn B. Swope & Diana Hernández, *Housing as a Determinant of Health Equity: A Conceptual Model*, 243 SOC. SCI. & MED. (2019), Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES (2015).

17. *See* Grundy, *supra* note 6.

18. Besides legal services providers like LSE, these social services providers include Long-Term Care Ombudsman Programs created under 42 U.S.C. § 3058g.

19. *See generally* SONJA BUCKEL, SUBJECTIVATION AND COHESION: TOWARDS THE RECONSTRUCTION OF A MATERIALIST THEORY OF LAW 213 (2021) (describing law's tendency to reify social processes, producing subjects "isolated in relation to each other").

20. *See* MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATIVISM 143–49 (2017).

unionized manufacturing jobs, and the family wage.[21] In the decades since then, these pillars of relative, though uneven, economic security have eroded, especially during the crucial era of deindustrialization and welfare reform in the 1990s.[22] I describe historical predicates of today's elder care crisis in Part III, categorizing them as (a) age-related value, (b) age-related vulnerability necessitating care provision, and (c) commodification of care provision.

In Part IV, I show how these predicate conditions have produced a matrix for extracting age-related value through elder care provision, in order to redistribute value to an ever wealthier and more concentrated capitalist class. To do so, I reveal how routine legal processes convert a vulnerable adult's need for care into economic value. By treating working-class elders and their caregivers as fungible commodities, the long-term care industry capitalizes on elders' age-related access to value streams, age-related vulnerabilities, and the devaluation of care labor.[23] In particular, I examine the increasing privatization of Medicare, especially focusing on how Medicare Advantage plans convert age-related subsidies into profit, at an unjustifiable cost to elders, their caregivers, and taxpayers.[24] Regarding elder homeowners in particular, I show how Medicaid law sets up a race between for-profit actors in the long-term care industry, on the one hand, and elders' potential heirs, on the other, to see who can seize elders' home equity before the other does.[25] And regarding elder renters, I examine how even older people without assets present valuable age-related revenue streams for the housing and long-term care industries to extract.[26] Part V considers potential reforms to address this dynamic, ultimately concluding we cannot reform our way out of it, but must instead transform the underlying social conditions producing it, suggesting a path of "non-reformist reforms" toward a horizon of decommodified universal care.

21. *Id.*; Nancy Fraser, *Contradictions of Capital and Care*, 100 NEW L. REV. 99 (2016); GABRIEL WINANT, THE NEXT SHIFT: THE FALL OF INDUSTRY AND THE RISE OF HEALTH CARE IN RUST BELT AMERICA 222 (2021).
22. *See infra* note 61 and accompanying text.
23. *See* discussion *infra* Section III.B.
24. *See* discussion *infra* Section III.C.
25. *See* discussion *infra* Section IV.B.
26. *See* discussion *infra* Section III.C.

II. Isn't This Elder Abuse?[27]

A. Francis

"I worked in the mills for thirty-five years," Francis tells me from his bed at a skilled nursing facility in Lewiston, Maine. "I made a good living. We had a union," Francis says, pride in his voice, looking somewhere past me into his memory of this once bustling mill town. He continues: "Joan stayed home and took care of the kids. We bought the house and paid it off on my salary. We sent the kids to college, too." Then Francis locks eyes with me, and the pride gives way to sudden fierceness: "*I own that house free and clear*."

But, according to the registry of deeds, he does not. I show Francis a warranty deed signed several years ago, soon after his wife Joan passed away. It conveyed the house to their son Scottie.

Francis's case came to me initially as a Medicare matter, not a real estate issue. A month earlier, he suffered a spinal cord injury in a car accident. Francis's hospitalization and surgery were covered by his Medicare Advantage (MA) plan. Following surgery, Francis was transferred to the skilled nursing facility (SNF), which is an acute-care rehabilitative facility, as opposed to a long-term care nursing home. Under Medicare law, Francis was entitled to coverage for skilled nursing and therapies for up to 100 days.[28]

But after just a few weeks of what would be a months-long rehabilitation process, the facility received a boilerplate denial notice from Francis's MA plan, abruptly terminating his coverage—despite Francis still receiving most of his calories from a feeding tube, which requires daily management by a nurse, and still needing daily skilled therapies from a physical therapist. These needs are two independent bases on which Francis qualified for continuing SNF coverage under federal law.[29] Francis's medical records, which his team had dutifully provided to the MA plan, documented these treatment needs very clearly, and made the stakes of continuing treatment known: "Without skilled

27. The narrative details included in this Section are based on my reviewing of client records and interviews with clients, their care providers, and their family members during the course of representation between 2019 and 2023.

28. 42 C.F.R. § 409.33(b)(2) (2024); *see also* CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE BENEFIT POLICY MANUAL: CHAPTER 8 - COVERAGE OF EXTENDED CARE (SNF) SERVICES UNDER HOSPITAL INSURANCE § 30.3 (2023) [hereinafter CTRS. FOR MEDICARE & MEDICAID SERVS.].

29. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 28, §§ 30.2.1, 30.6.

therapy intervention, Francis is at risk of requiring continued skilled nursing for the rest of his life." Yet, the MA plan denied coverage, without any meaningful explanation for overruling Francis's care providers.

Francis could not begin to afford private payment for skilled nursing services. Facility staff helped Francis file an appeal with his plan—and another after the first appeal was swiftly rejected. But the second appeal was denied, too, despite Francis's straightforward eligibility. At an impasse, Francis's care team suggested he get legal help, which he also could not afford to pay for. A staff member suggested he try calling LSE for free help, where his case would eventually find its way to me. In the meantime, Francis's team began working on a discharge plan.

Like most elders, Francis was adamant he would not go into a long-term care nursing home, insisting instead he return to his house in rural Maine. Staff prepared to discharge him with a referral for home health services. Because Medicare's coverage for skilled services at home is far more limited than what can be provided in the facility,[30] Francis would be at risk of aspiration and falls when left alone, if home health aides could even be found to staff any limited hours his Medicare plan would pay for—a questionable prospect, particularly in the rural area where Francis lived.[31]

But when the facility social worker called Francis's son Scottie to arrange for transportation home, Scottie informed them Francis did not have a home to return to. Scottie claimed that the house actually belonged to him, and it was now under contract for sale. Moreover, Scottie insisted he could not take care of Francis, who belonged in a nursing home instead. When the social worker relayed this conversation to Francis, he erupted in anger, arguing the house is his and he would never move to a nursing home. Francis started verbally abusing his staff, accusing them of mishandling his appeal, purposely trying to send him to a nursing home, and coordinating with his son behind his back.

30. *Id.* §§ 30–40; CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE BENEFIT POLICY MANUAL: CHAPTER 7—HOME HEALTH SERVICES §§ 40, 50.7 (2023) (describing various eligibility restrictions for home health coverage, including that the beneficiary must be chronically homebound and require no more than 28 hours of skilled nursing services per week).

31. *See generally* Janette Dill, Carrie Henning-Smith, Rongxuan Zhu & Elizabeth Vomacka, *Who Will Care for Rural Older Adults? Measuring the Direct Care Workforce in Rural Areas*, 42 J. OF APPLIED GERONTOLOGY 1800 (2023).

When I arrived at the skilled nursing facility to meet with Francis, I brought a copy of the deed and tax declaration I had located in public records. They showed that Francis had signed over the house to Scottie for nothing, a red flag suggesting undue influence.[32] Now, sitting by his bed, I show Francis the papers and confirm his signature. Francis looks away. "I didn't read them," says Francis. "Scottie said the house was still mine. The papers were just for after I'm gone." The anger returns to his voice. "*This is elder abuse!*"

B. Holly

"They can't evict me," Holly insists. "I have nowhere to go. I'm disabled. I'm a senior citizen. The judge won't allow it."

But she can and almost certainly will be evicted. Holly's landlord of twelve years declined to renew the lease this year because he is selling the building, no doubt to capitalize on the skyrocketing real estate prices of the post-pandemic era.[33] Sitting across from Holly at her kitchen table, I reviewed the lease agreement and the papers she had been served, confirming the landlord followed the legally prescribed procedure for giving Holly notice and filing the eviction suit in court. There are few legal defenses to eviction, and Holly's seemingly compelling arguments—*I have nowhere to go, I'm disabled, I'm a senior citizen*—are not among them.[34] I need her to accept that to give her the best chance of making a safe transition and avoiding homelessness.

But it is hard to persuade someone who has lived in the same apartment for twelve years without so much as a lease violation or late payment that she has no choice but to pick up and leave in a matter of weeks.

32. Undue influence is "[t]he improper use of power or trust in a way that deprives a person of free will and substitutes another's objective; the exercise of enough control over another person that a questioned act by this person would not have otherwise been performed, the person's free agency having been overmastered." *Undue Influence*, BLACK'S LAW DICTIONARY (12th ed. 2024).

33. *See* Lauri Scherer, *Pandemic-Induced Remote Work and Rising House Prices*, NBER (July 1, 2022), https://www.nber.org/digest/202207/pandemic-induced-remote-work-and-rising-house-prices [https://perma.cc/G3YF-UPKZ]; Alex Ramiller, *Displacement Through Development? Property Turnover and Eviction Risk in Seattle*, 59 URB. STUDS., 1148, 1166 (2022).

34. *See Rights of Maine Renters: Eviction*, PINE TREE LEGAL SERVS., https://www.ptla.org/rights-maine-renters-eviction#toc-common-eviction-defenses-in-maine [https://perma.cc/DDW6-XTCY] (last visited Mar. 11, 2025).

And besides the imminent prospect of eviction, I also need to advise Holly of the long-term risks. Holly has a coveted Section 8 voucher,[35] meaning that most of her market-rate rent is paid to the private landlord by the federal government,[36] limiting Holly's share to thirty percent of her modest income.[37] Vouchers are limited to recipients who meet a strict array of criteria, including an income at or below the federal poverty level.[38] Holly clearly qualified financially as a recipient of a mere $794 per month in Supplemental Security Income (SSI), a welfare benefit for elders and people with disabilities who lack other income sources.[39] But the housing voucher is a "use it or lose it" benefit,[40] so if Holly cannot quickly find a new apartment—a dubious prospect for a mobility-impaired elder in an extremely competitive rental housing market[41]—she could become permanently homeless. Even though Section 8 vouchers are limited to very low-income applicants, there are still far more eligible applicants than the meager supply of vouchers, resulting in years-long waiting lists.[42]

"They can't evict me," Holly repeats. "I have COPD." Holly gestures at the oxygen tank sitting next to us at her kitchen table, tethered to the electrical outlet that powers it. She relies on supplemental oxygen twenty-four hours a day. On the streets, she would be unable to power the machine, and her portable oxygen supply would not last long. Moreover, supplemental oxygen is hazardous, increasing the risk of

35. 42 U.S.C. § 1437f.

36. In fact, rent may be up to 110% of fair market value. *See id.* § 1437f(c).

37. *Id.* § 1437a(a).

38. 24 C.F.R. §§ 5.603, 982.201 (2024).

39. 20 C.F.R. § 416 (2024). SSI beneficiaries usually receive a modest annual cost of living adjustments to account for inflation. *Id*. § 416.405. Holly's benefit was $794 in 2021 after years of modest COLAs ranging from 0% to 2.8%. *See* SOC. SEC. ADMIN., *SSI Federal Payment Amounts, SSI Monthly Payment Amounts, 1975-2025* (last visited Mar. 11, 2025), https://www.ssa.gov/oact/cola/SSIamts.html [https://perma.cc/S6BG-Z2WA]. In the high inflation context of the pandemic, the COLA jumped to the highest rates in 40 years, 5.9% and 8.7% in 2022 and 2023, respectively. *Id*. In 2025, the monthly maximum SSI payment for an individual is $967. *Id*.

40. Lucy Tompkins, *Voucher Program is Supposed to Help Poor Families Rent a Home. Nearly Half the Time It Fails*, USA TODAY (Aug. 14, 2024, 12:59 PM), https://www.usatoday.com/story/news/investigations/2024/08/13/federal-housing-vouchers-fail-low-income-families/74499904007/ [https://perma.cc/XG4G-K7J2].

41. *Id.*

42. HOUSING AMERICA'S OLDER ADULTS, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., 8, 17 (2023), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Housing_Americas_Older_Adults_2023_Revised_040424.pdf [https://perma.cc/J44B-3GT7] [hereinafter HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS]; *see* Tompkins, *supra* note 40.

fire.[43] Later in this case, after unavailing searches for alternative housing and failed efforts to negotiate with the landlord for more time, I would report Holly's situation to Adult Protective Services (APS).[44] The APS investigator would immediately understand the seriousness of the safety risk, memorably stating that putting Holly out on the streets "would be a death sentence."

And yet, the APS investigation would be closed without a finding of abuse. There would be no action taken against the landlord, no state intervention to protect Holly beyond giving her a list of emergency shelters (which are chronically at or near capacity)[45]—and no change to my advice that Holly would indeed be evicted no matter what she said to the judge. Without sufficient supports, Holly is likely to end up homeless and hospitalized.[46] Once stabilized, a hospital social worker would likely seek a placement for her in a long-term care bed, although Holly, too, like most adults, would prefer to live in the community.

"*This is elder abuse*," Holly insists. "*Isn't this elder abuse?*"

C. Cleaning up the Mess

I had variations on these conversations countless times in five years representing low-income elders. While clients like Francis and Holly were justifiably frustrated and confused, their plights came as no surprise to me, fitting patterns of eviction, exploitation, and institutionalization that I saw over and over again in my practice.[47] The point of this Article is to explain why these patterns come as no surprise: because our legally structured system for financing elder care produces them.

43. Brendan G. Cooper, *Home Oxygen and Domestic Fires*, PUBMED CENT. (Mar. 2015), https://pmc.ncbi.nlm.nih.gov/articles/PMC4487390 [https://perma.cc/C7DW-T7NU].

44. *See About Us*, STATE OF ME. DEP'T OF HEALTH & HUM. SERVS., https://www.maine.gov/dhhs/oads/about-us [https://perma.cc/9C8D-2DF7] (last visited Mar. 11, 2025).

45. *See* Molly Bryant, *Homeless Shelters Don't Have Enough Beds in Many Communities*, STREET LIGHT NEWS (Apr. 29, 2024), https://streetlightnews.org/homeless-shelters [https://perma.cc/RM3Y-RTMT].

46. *See* AM. HEALTH CARE ASS'N, ACCESS TO CARE REPORT (2024), https://www.ahcancal.org/Advocacy/IssueBriefs/AHCA_Access_to_Care_Report_2024_20FINAL.pdf [https://perma.cc/LU5W-XZXU]; Robert Collinson & Davin Reed, *The Effects of Evictions on Low Income Households* 30–31, (NYU Furman Ctr. Working Paper, 2018), https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf [https://perma.cc/PDY8-T9MV].

47. *See infra* Part IV for elaboration of these patterns.

First, I will share how the stories above conclude. They turn out to have relatively happy endings, thanks to the elders' good fortunes to be connected to free social workers and legal services providers who worked tirelessly to clean up the mess created by our health care and housing systems' drive to extract profits from their vulnerability.

I would go on to represent Francis in his third appeal, a months-long, paperwork-intensive process to obtain a hearing before one of the Administrative Law Judges employed by the U.S. Department of Health and Human Services (DHHS).[48] I gave the MA plan notice of the appeal, copied the plan on all the filings I submitted, called them in an effort to clarify their position and possibly settle the matter—and never received a response. Nor did the MA plan submit any filings to the judge. Not knowing whether a representative for the plan would appear at hearing and elicit testimony from one of the doctors who rubber-stamped their denial in the first two rounds of appeal, I pored through hundreds of pages of medical records, obtained a letter from Francis's doctor, and prepared Francis's nurse and physical therapist to testify. When the hearing finally came, no representative of the plan appeared. If no one on Francis's side of the case appeared, the appeal would be dismissed, but the MA plan is not subject to the same requirement.[49] I still had to present sufficient evidence, including the live testimony of two treatment providers taking time out of their overworked day.

After taking the case under advisement for another thirty days, the judge ultimately reversed the MA plan's baseless denial. But it cost the MA plan nothing at all to deny the claim. They hired no attorney and sent no representative to the hearing, not even by phone. Instead, Francis's overworked care providers, his publicly-funded poverty lawyer, and a federal agency bore all the costs and time required to reverse the denial. The MA plan never offered a meaningful explanation for their baldly incorrect and costly decision.

In the long course of this ordeal, I also worked on Francis's real estate issue. Undue influence cases are difficult to prove and litigation would likely take years,[50] practically an eternity for an elder

48. *See generally* OFF. OF MEDICARE HEARINGS & APPEALS, OMHA CASE PROCESSING MANUAL ch. 7.1–.2 (2021) (describing adjudication timeframes and delays thereto).

49. *See* 42 C.F.R. § 405.1022 (2024).

50. Anthony J. Enea, *Understanding the "Undue" in "Undue Influence*," 40 WESTCHESTER B. J. 29, 32 (2015).

experiencing a crisis of health care and housing. But Maine, with a higher proportion of seniors than any other state,[51] has a unique law making it easier to reverse below-market transfers by vulnerable seniors.[52] Through a demand letter threatening litigation, with the leverage provided by this law, I was able to persuade Scottie to stop the sale and deed the property back to Francis.

In Holly's case, I attempted to negotiate with the landlord for more time for Holly to make a safe transition, insisting her life was in danger. I pointed out she now had my help to connect her with social services and assist her housing search. But without a legal defense to eviction, I had no negotiating leverage,[53] and the landlord refused to budge.

Fortunately, I was also able to help Holly avoid the direst of outcomes, not through the legal process but by a combination of luck and non-legal work. By sharing Holly's story with other elder rights advocates, I was alerted that one organization in my service area had access to a federal grant for emergency homelessness prevention and, likely thanks to how difficult it is to access, some of that funding had not yet been used up.[54] Following a breadcrumb trail along a circuitous path to connect Holly with this funding, the crucial breakthrough was finding a social worker with the capacity and experience to help Holly access and use the emergency funds. This precious social worker, in turn, leaned on his hard-won network of relationships to find Holly a hotel room and, months later, a new apartment.

These relatively happy endings were never assured. They would have been practically unattainable without the intervention of underpaid and overworked public servants providing free services to elders in crisis. For every Francis and Holly who find their way to the right

51. *See* Mikee Schneider, *Maine Continues to be the Oldest State in Aging America*, SPECTRUM NEWS (May 25, 2023, 7:55 AM), https://spectrumlocalnews.com/me/maine/news/2023/05/25/maine-continues-to-be-the-oldest-state-in-an-aging-america [https://perma.cc/KHX5-BY7A].

52. The Improvident Transfer of Title Act creates a rebuttable presumption of undue influence when a dependent adult over 60 years old transfers a substantial portion of their estate for less than fair market value to someone with whom they have a confidential relationship. *See* ME. STAT. tit. 33, §§ 1021–24; *see also* Denis T. Culley & Hannah Sanders, *Exploitation and Abuse of the Elderly During the Great Recession: A Maine Practitioner's Perspective*, 62 ME. L. REV. 429, 445 (2010).

53. *See infra* Section IV.C.

54. *See* Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009, Pub. L. No. 111-22, 123 Stat. 1664, § 1001.

resources, there are a number of others who go unrepresented,[55] unhoused,[56] and uncared for.[57] And, more to the point of this Article, even the relatively happy endings for the individual clients likely ultimately benefitted for-profit corporations most of all, as I will explain in Part IV below. In the meantime, I will summarize how our elder care system took the distorted shape it has.

III. Predicate Conditions

A. Age-related Value

Today's elders occupy a distinct historical position compared to later-born generations, as a result of which they hold a greater share of wealth and have disproportionate access to various income streams and subsidies—a phenomenon I call "age-related value."[58] This assertion may seem counterintuitive in light of Francis's and especially Holly's stories of privation. Both live on modest fixed incomes, Francis through Social Security Retirement Income and Holly through SSI, a means-tested poverty program. Yet, while a fixed income is a source of vulnerability as described in Section III.B below, it is a reliable income stream not available to working-age adults who bear the risk of losing precarious employment-contingent income sources.[59] It is because of

55. *See* LEGAL SERVS. CORP., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* 47 (June 2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/KT2F-4DHX] (reporting eighty-seven percent of seniors with income below 125% of federal poverty level (FPL) receive inadequate or zero professional help for their civil legal needs); Daniel Connolly, *Growing US Senior Population Faces Unmet Legal Needs*, LAW360 (Apr. 21, 2023), https://www.law360.com/articles/1599108/growing-us-senior-population-faces-unmet-legal-needs [https://perma.cc/N9RU-NGBJ] (reporting on unmet legal needs of seniors below and above 125% of FPL).

56. Nearly thirty percent of unhoused individuals were over age 55 in 2021, in the height of a pandemic most fatal to elders. HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS, *supra* note 42, at 16.

57. *See* Jessica Forden & Teresa Ghilarducci, *U.S. Caregiving System Leaves Significant Unmet Needs Among Aging Adults*, SCHWARTZ CTR. FOR ECON. POL'Y ANALYSIS 2 (Dec. 2023), https://www.economicpolicyresearch.org/images/Retirement_Project/Policy_Notes/2023/December_Caregiving/Unmet_Care_Needs_Among_Aging_Adults.pdf [https://perma.cc/3RNE-BJ9Q] (reporting over forty percent of adults in need of help with daily activities do not receive it).

58. Christina M. Gibson-Davis & Christine Percheski, *Children and the Elderly: Wealth Inequality Among America's Dependents*, 55 DEMOGRAPHY 1009, 1009 (2018).

59. *See* Martha Albertson Fineman, *"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L.J. 101, 104–05, 105 n.17 (2012).

their age that Francis and Holly are entitled to these income sources. Francis is over the Social Security retirement age of sixty-two with more than ten years of wage history.[60] Holly is over the SSI eligibility age of sixty-five with no other income source.[61] Notably, working-age adults in poverty cannot rely on income supports since the bipartisan gutting of welfare in the 1990s.[62]

Similarly, Holly and Francis also have age-related advantages in securing housing. As a Section 8 voucher holder, Holly has an affordable monthly rent, unlike half of renters nation-wide.[63] Holly's age and disabilities give her priority for the chronically over-subscribed housing voucher waiting list.[64] And Francis, as a homeowner (at least until recently), is "house-rich, cash-poor," like many older adults.[65] Roughly eighty percent of elders own a home.[66]

Today's older adults are more likely to have access to greater assets or income streams because they came up in the tail end of the mid-century industrial welfare state that has been gradually eroded in recent decades.[67] In contrast to later-born generations, many working families in Francis's generation, especially white heteronormative ones,[68] enjoyed relatively high wages in unionized jobs and purchased homes with low-interest mortgage loans subsidized by the U.S. government, then retired with significant home equity, stable retirement income, and low-cost health insurance through automatic enrollment in Medicare at age sixty-five.[69]

60. 20 C.F.R. § 404.310 (2024).

61. *Id.* § 416.202(a)–(b).

62. NANCY FOLBRE, FOR LOVE AND MONEY: CARE PROVISION IN THE UNITED STATES xi (Nancy Folbre ed., 2012); COOPER, *supra* note 20, at 143.

63. *See Nearly Half of Renter Households Are Cost-Burdened, Proportions Differ by Race*, U.S. CENSUS BUREAU (Sept. 12, 2024), https://www.census.gov/newsroom/press-releases/2024/renter-households-cost-burdened-race.html [https://perma.cc/WZ5T-5DRX].

64. *See* 24 C.F.R. § 982.207(b)(5) (2024).

65. HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS, *supra* note 42, at 6.

66. *Id.*

67. *See* COOPER, *supra* note 20, at 143–49.

68. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019); Fraser, *supra* note 21, at 111.

69. *See* COOPER, *supra* note 20, at 143–49; Francioli et al., *supra* note 3, at 9; Michael S. Carliner, *Development of Federal Homeownership "Policy"*, 9 HOUS. POL'Y DEBATE 299, 299 (1998).

This past should not be idealized, as it was also characterized by uneven distribution across racial, sexual, and national divides.[70] Moreover, "the economic security of the postwar era was premised on a tightly enforced sexual division of labor that relegated women to lower-paid, precarious forms of employment and indexed the wage of the Fordist worker to the costs of maintaining a wife and children at home."[71] Yet, even as today's working class remains segmented into higher and lower strata with outcomes differentiated by gender, sexuality, race, and citizenship, it still compares unfavorably to the relatively broad-based economic security substantial cohorts of earlier-born generations enjoyed.[72]

For today's working generations, paths to building economic security are mostly blocked by the insurmountable costs of student debt, health care, and especially housing.[73] Dual-earner households have supplanted the family wage and today's workers toil longer hours for lower wages with less security and little chance of homeownership or escape from debt.[74] This historical transformation has been an ongoing process for over fifty years, so today's elders have lived through it, enjoying to a diminishing extent the vestiges of the former paradigm.[75] As a result, the modicum of social surplus belonging to the working class

70. *See* COOPER, *supra* note 20, at 143–49.

71. *Id.*

72. *See* Gibson-Davis & Percheski, *supra* note 58, at 1009.

73. *See The Affordable Housing Crisis Grows While Efforts to Increase Supply Fall Short*, GAO (Oct. 12, 2023), https://www.gao.gov/blog/affordable-housing-crisis-grows-while-efforts-increase-supply-fall-short, [https://perma.cc/CRP7-C6YJ] (noting decline in federal subsidization of first-time home purchases); Eylul Tekin, *A Timeline of Affordability: How Have Home Prices and Household Incomes Changed Since 1960?*, CLEVER (Aug. 7, 2022), https://listwithclever.com/research/home-price-v-income-historical-study/ [https://perma.cc/7GRY-PEMJ]; John Cassidy, *Piketty's Inequality Story in Six Charts*, NEW YORKER (Mar. 26, 2014), https://www.newyorker.com/news/john-cassidy/pikettys-inequality-story-in-six-charts [https://perma.cc/RJ38-E4L5]; COOPER, *supra* note 20, at 146–47; Fraser, *supra* note 21, at 112.

74. Fraser, *supra* note 21, at 111–12.

75. *See* COOPER, *supra* note 20, at 143–49; Clare Thornton, *Millions More Older Adults Won't be Able to Afford Housing in the Next Decade, Study Warns*, USA TODAY (Dec. 1, 2024), https://www.usatoday.com/story/news/nation/2023/11/30/assisted-living-costs-housing-elderly-older-americans/71751928007/ [https://perma.cc/685S-UXK2] ("Among adults ages 50-64, homeownership rates have been decreasing steadily for more than a decade, pointing to a future scenario where more adults in their 70s and 80s will be renters."). HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS, *supra* note 42, at 12 ("Between 1989 and 2022, the share of homeowners aged 65–79 with a mortgage on their primary home, including home equity loans and home equity lines of credit, increased from 24 to 41 percent.").

today is disproportionately concentrated in elders' assets, entitlements, and subsidies,[76] especially in the form of older adults' homes.[77]

I characterize government-provided entitlements and subsidies to be a form of working-class wealth because they are funded largely by individual income and payroll taxes, which are progressive, i.e., designed to redistribute value from higher to lower-income brackets.[78] The appropriation of this value by the increasingly for-profit, corporate, financialized health insurance and housing industries reverses this progressive redistribution.[79] In the aggregate, there is a significant amount of value contained in both the private wealth and public benefits that working-class seniors have at higher rates than younger people.[80] But, as demonstrated in this Article, the legal processes structuring elder care facilitate the appropriation of this age-related value, resulting in a systemic redistribution of wealth away from the working class.[81] This long-term social process, while taking the form of individual legal conflicts, crises, and tragedies, represents a clawing back of the mid-20th century working class's share of the social surplus it created and has been largely precluded from passing down to subsequent generations of the working class.[82]

B. Age-related Vulnerability

Extracting value from elders takes advantage not only of what they have, but also of what they are losing: their physical, psychological, social, and cognitive capacities. As demonstrated throughout this Article, age-related vulnerability acts as a wedge for separating elders from age-related value streams.

As physical and cognitive abilities tend to decline with age, older adults tend are generally more in need of care and more vulnerable to

76. *See* Fineman, *supra* note 59, at 104–05.

77. According to the National Reverse Mortgage Lenders Association, homeowners over 62 years old possess $14 trillion dollars in home equity. Darryl Hicks, *Senior Home Equity Hits $14 Trillion in Q2*, NRMLA (Oct. 7, 2024), https://www.nrmlaonline.org/about/press-releases/senior-home-equity-hits-14-trillion-in-q2 [https://perma.cc/3LRA-7JG9].

78. *See, e.g.*, *Progressive Tax*, TAX FOUND., https://taxfoundation.org/taxedu/glossary/progressive-tax/ [https://perma.cc/P59W-T2VF] (last visited Mar. 11, 2025).

79. *See* COOPER, *supra* note 20, at 27–34.

80. *See* Fineman, *supra* note 59, at 78.

81. *See* discussion *infra* Section III.C.

82. *See* Fineman, *supra* note 59, at 104–05.

harm.[83] While there is a high degree of uncertainty and variability with regard to the specific abilities an individual loses, the timing and severity of the losses, the development of coping strategies, and the role that an individual's social position plays, there is nonetheless an undeniable tendency to age into decline and frailty.[84] In a recent study based on self-reports from Americans over age sixty-five, "22% reported trouble seeing (even if wearing glasses), 31% reported difficulty hearing (even if wearing hearing aids), 40% reported trouble with mobility (walking or climbing stairs), 8% reported difficulty with communication (understanding or being understood by others), 27% reported trouble with cognition (remembering or concentrating), and 9% reported difficulty with self-care (such as washing all over or dressing)."[85] Despite being the only age group in the country with nearly universal health insurance, elders spend more on out-of-pocket health expenses than any other age group.[86]

Age-related vulnerability, though based in biology, is socially constructed. For example, Holly's most disabling condition, chronic obstructive pulmonary disease (COPD), is most commonly caused by smoking tobacco cigarettes, and today's elders lived through a time when this addictive habit was far more common,[87] in no small part due to the tobacco industry's conspiracy to defraud consumers about smoking's health risks.[88]

83. ADMIN. FOR CMTY. LIVING, 2020 PROFILE OF OLDER AMERICANS 12, 17 (2021), https://acl.gov/sites/default/files/aging_and_Disability_In_America/2020Profileolderamericans.final_.pdf [https://perma.cc/UZ7L-DLXB].

84. *Id.* at 12.

85. *Id.* at 18–19.

86. ADMIN. FOR CMTY. LIVING, 2023 PROFILE OF OLDER AMERICANS 13 (2024), https://acl.gov/sites/default/files/Profile_of_OA/ACL_ProfileOlderAmericans2023_508.pdf [https://perma.cc/6XJV-4QJN].

87. NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 19 (2014).

88. In the U.S.'s RICO case against Big Tobacco, the court found "overwhelming evidence" to support the allegations that:

> for approximately fifty years, the Defendants have falsely and fraudulently denied: (1) that smoking causes lung cancer and emphysema (also known as chronic obstructive pulmonary disease ("COPD")), as well as many other types of cancer; . . . (3) that nicotine is a highly addictive drug which they manipulated in order to sustain addiction; (4) that they marketed and promoted low tar/light cigarettes as less harmful when in fact they were not; . . . (6) that they concealed evidence, destroyed documents, and abused the attorney-client privilege

Perhaps the most biologically damaging but socially constructed vulnerability is social isolation. The longer we live, the more likely we are to lose loved ones who predecease us. Elders are roughly twice as likely as younger adults to live alone.[89] Both Francis and Holly live alone, like approximately one-third of elders, and a startling forty-three percent of women over age seventy-five, who tend to outlive men.[90] Accordingly, one in three older adults report interacting with people outside their home only once a week or less (eleven percent once a month or less).[91] Social isolation is "strongly associated with poorer physical and mental health among older adults."[92] Such isolation is not inevitable, but a byproduct of political choices such as investing in automobile infrastructure, single-family housing, and normative families, rather than public transportation, high-density housing, and communities.[93]

Older adults also bear financial vulnerability due to the tendency to age out of the workforce, whether because of planned retirement or perceived unemployability, exposing them to the double-edged sword of fixed incomes.[94] While Social Security and SSI provide more reliable income than many younger people enjoy,[95] they pose the risk that an

> to prevent the public from knowing about the dangers of smoking and
> to protect the industry from adverse litigation results.

United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 27 (D.D.C. 2006).

89. *See* Naomi Cahn, Clare Huntington & Elizabeth Scott, *Family Law for the One-Hundred Year Life*, 132 YALE L.J. 1691, 1712–13 (2023).

90. PAUL F. HEMEZ, CHANELL N. WASHINGTON & ROSE M. KREIDER, U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2022 7 (2024), https://www2.census.gov/library/publications/2024/demo/p20-587.pdf [https://perma.cc/RJ4T-8XAY].

91. JEFFREY KULLGREN, ERICA SOLWAY, SCOTT ROBERTS, DIANNE SINGER, MATTHIAS KIRCH, PREETI MALANI, EMILY SMITH & LAUREN HUTCHENS, UNIV. OF MICH. INST. FOR HEALTHCARE & INNOVATION, NATIONAL POLL ON HEALTHY AGING: TRENDS IN LONELINESS AMONG OLDER ADULTS FROM 2018-2023 (2023), https://deepblue.lib.umich.edu/handle/2027.42/175971 [https://perma.cc/GY59-6Q6G].

92. *See id.*; *see also* HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS, *supra* note 42, at 21, 24.

93. *See, e.g.*, Kelly A. Warzinik, *Suburban Families*, *in* 4 THE SOCIAL HISTORY OF THE AMERICAN FAMILY 1292–94 (Marilyn Coleman & Lawrence H. Ganong eds., 2014); RAYMOND A. MOHL, PRRAC, THE INTERSTATES AND THE CITIES: HIGHWAYS, HOUSING, AND THE FREEWAY REVOLT 2 (2002), https://www.prrac.org/pdf/mohl.pdf [https://perma.cc/H57D-MN4E].

94. HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS, *supra* note 42, at 11; Timothy E. Simmons, *Medicaid as Coverture*, 26 HASTINGS WOMEN'S L.J. 277, 278 (2015).

95. *See* SUPPLEMENTAL SECURITY INCOME (SSI), JUST. IN AGING 1, https://www.justiceinaging.org/wp-content/uploads/2017/03/F_SSI-Fact-Sheet.pdf [https://perma.cc/BE87-WQ95]; Gibson-Davis & Percheski, *supra* note 58, at 1009.

elder's income will not keep up with inflationary or unexpected expenses, especially the exorbitant costs of housing and health care.[96] Almost fifty percent of elders lack adequate income to cover their basic needs,[97] incentivizing many an elder homeowner to leverage home equity to survive.[98] Federal law has even created a particular vehicle for doing so, only available to homeowners over age sixty-two, the Home Equity Conversion Mortgage, commonly called a "reverse mortgage," which enables banks to appropriate elders' homes after they die in exchange for a modest income stream while they live.[99] Reverse mortgages and other forms of home equity loans thus redistribute wealth from lower-income elders and their potential heirs to finance capital.

Moreover, physical and cognitive decline tends to make older adults more reliant on others to help meet their needs. While commodified care labor is more central to the focus of this Article, it is important to recognize the magnitude of unpaid informal elder care, commonly performed by elders' adult children and spouses, overwhelmingly by women.[100] This unpaid labor is especially common in low-income families, which means disproportionately by people of color, due to the often prohibitive cost of hiring paid care workers.[101] This unpaid care provision comes at a cost, disproportionately borne by women who sacrifice their own health, income, and lifetime earning potential.[102] As Nancy Folbre explains, "[w]hen adult children are able and willing to care for elderly parents, costs to public health insurance systems for nursing home expenses are reduced. Yet, our economic accounting

96. *See* HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS, *supra* note 42, at 9, 27; Simmons, *supra* note 94, at 270 n.22, 279 n.20.

97. *80% of Older Adults Face Financial Insecurity (2024)*, NCOA (Sept. 26, 2024), https://www.ncoa.org/article/80-percent-of-older-adults-face-financial-insecurity/ [https://perma.cc/FK92-27SK].

98. *Reverse Mortgages (2022)*, FED. TRADE COMM'N, https://consumer.ftc.gov/articles/reverse-mortgages [https://perma.cc/WC46-L87B] (last visited Mar. 11, 2025).

99. *Id. See also* HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS, *supra* note 42, at 12–13.

100. *See* Cahn et al., *supra* note 89, at 1718–20; Jessica Forden, Siavash Radpour, Eva Conway & Teresa Ghilarducci, *Reducing the Unequal Burden of Unpaid Eldercare Work*, SCHWARTZ CTR. FOR ECON. POL'Y ANALYSIS 1–3 (May 3, 2023), https://www.economicpolicyresearch.org/resource-library/research/reducing-the-unequal-burden-of-unpaid-eldercare-work [https://perma.cc/S8NR-4SMV]; NAT'L ALL. FOR CAREGIVING & AARP, CAREGIVING IN THE U. S. 2020 (2020), 4–6, https://www.caregiving.org/caregiving-in-the-us-2020/ [https://perma.cc/CLS5-476V].

101. *See* Cahn et al., *supra* note 89, at 1720.

102. *See* FOLBRE, *supra* note 62, at xi.

systems do not measure, much less credit, unpaid family care."[103] Like other dynamics explored in this Article, unpaid caregiving represents yet another way in which our elder care system affirmatively widens existing economic inequalities—and does so unevenly along identity-based divisions.

C. Commodification of Care

Care labor has been commodified at least since post-enslaved women of color were widely employed as domestic servants in rich white households.[104] But caregiving for average Americans has become increasingly commodified since the erosion of the industrial welfare state and transition in the Global North from manufacturing-based economies to healthcare-based economies.[105] Prior to this erosion, in the brief post-war settlement between capital and an empowered labor movement, the Fordist family wage produced the normative family where household, child, and elder care needs were met primarily by unpaid housewives.[106] In contrast, the falling wages and rising costs of the last fifty years mostly ended the family wage and the housewife as full-time unpaid care worker.[107] As Gabriel Winant documents, "rising economic pressure on single-breadwinner households to bring in more wages, push[ed] women into the labor market and decoupl[ed] the rising demand for care from the supply of nonwaged care work."[108] While women still perform a disproportionate share of unpaid care work today,[109] they commonly do waged work, too,[110] becoming less available for unpaid care and leaving a void of care provision in homes and communities.

103. *See id*.

104. *See* Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 1, 20 (1992).

105. *See generally*, WINANT, *supra* note 21, at 180.

106. *See* FOLBRE, *supra* note 62, at xi–xiii; CYNTHIA HESS, TANIMA AHMED & JEFF HAYES, INST. FOR WOMEN'S POL'Y RSCH. PROVIDING UNPAID HOUSEHOLD AND CARE WORK IN THE UNITED STATES: UNCOVERING INEQUALITY 1–2 (2020), https://iwpr.org/wp-content/uploads/2020/01/IWPR-Providing-Unpaid-Household-and-Care-Work-in-the-United-States-Uncovering-Inequality.pdf [https://perma.cc/7JYU-JDWZ].

107. *See* Fraser, *supra* note 21, at 111; WINANT, *supra* note 21, at 17.

108. *See* WINANT, *supra* note 21, at 17.

109. *See* HESS ET AL., *supra* 106, at 1.

110. *See* FOLBRE, *supra* note 62, at xi–xiii.

This void set the stage for dramatically expanding the commodification of care work. The intensifying "pressure to warehouse the huge elderly population" led to a boom in for-profit nursing home chains and home-care agencies.[111] The privatization trend has increased over time, to the point that over seventy percent of nursing homes are for-profit today.[112] The industry has capitalized on steady funding streams: seniors' assets and Medicare, Medicaid, and Social Security benefits.[113] Indeed, federal reimbursements make up seventy-five percent of nursing home revenue, which does not even account for other age-related value streams such as Social Security income and the proceeds of home equity liquidation.[114] As disability scholar Marta Russell explains, "[t]he corporate solution to disablement—institutionalization in a nursing home . . .—evolved from the realization that disabled people could be made to serve profit because public financing guaranteed the revenue."[115]

During this transitional period, "reduced real wages [have raised] the number of hours of paid work per household needed to support a family and prompt[ed] a desperate scramble to transfer carework to others" by "import[ing] migrant workers from poorer to richer countries."[116] Women are commonly seen as natural care workers, especially immigrants and women of color, with gendered, racialized assumptions about the value of care work justifying systemically low wages.[117] The long-term care industry exploits this devaluation of care workers, who are overwhelmingly women, disproportionately people of color and migrants.[118]

111. WINANT, *supra* note 21, at 234.

112. *See Distribution of Certified Nursing Facilities by Ownership Type*, KAISER FAM. FOUND., https://www.kff.org/other/state-indicator/nursing-facilities-by-ownership-type [https://perma.cc/7GSU-6KDB] (last visited Mar. 11, 2025).

113. *See* MARTA RUSSELL, *Introduction*, *in* CAPITALISM AND DISABILITY: SELECTED WRITINGS BY MARTA RUSSELL 5 (Keith Rosenthal ed., 2019).

114. Atul Gupta, Sabrina T. Howell, Constantine Yannelis & Abhinav Gupta, *Owner Incentives and Performance in Healthcare: Private Equity Investment in Nursing Homes*, 7 (NAT'L BUREAU OF ECON. RSCH., WORKING PAPER NO. 28474, 2023).

115. RUSSELL, *supra* note 113, at 5.

116. *See* Fraser, *supra* note 21, at 114.

117. Shiloh Krupar & Amina Sadural, *COVID "Death Pits": US Nursing Homes, Racial Capitalism, and The Urgency of Antiracist Eldercare*, 40 EPC: POL. & SPACE 1106, 1113–14 (2022).

118. *See* Gould et al., *supra* note 10; NICOLA YEATES, GLOB. COMM'N ON INT'L MIGRATION, GLOBAL CARE CHAINS: A CRITICAL INTRODUCTION 1, 3 (2005), https://www.iom.int/sites/g/files/tmzbdl2616/files/2018-07/gmp44.pdf [https://perma.cc/DF4R-26SW].

Both international and U.S. law incentivize and facilitate this labor exploitation. Structural adjustment programs imposing economic austerity on Global South countries produce "global care-chains," as Global South women leave their homes to perform care labor in the Global North, in order to send back remittances to support their communities starved by austerity budgets.[119] In the U.S., migrants are accorded second-class status as workers largely unprotected by labor laws and vulnerable to immigration enforcement.[120]

Recall the first COVID-19 outbreak in the U.S. spread between nursing homes.[121] Underpaid care workers, forced to work at multiple facilities to survive, unintentionally spread the virus between facilities.[122] Most care workers are not unionized and not entitled to hazard pay, overtime pay, or paid sick leave, "prompt[ing] workers to juggle multiple jobs at different facilities, at even higher risk to themselves and to residents."[123] Forty-two percent of direct care workers in facility and home settings depend on public assistance to survive, revealing these low wages as effectively a subsidy of industry profits.[124]

119. *See* ARLIE RUSSELL HOCHSCHILD, GLOBAL CARE CHAINS AND EMOTIONAL SURPLUS VALUE, *in* JUSTICE, POLITICS, AND THE FAMILY 249, 250 (Routledge 2014); YEATES, *supra* note 118, at 2, 5, 10. *See also* Manoj Dias-Abey, *Migrant Domestic Workers in Europe: Law and the Construction of Vulnerability Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labour Law*, 52 INDUSTRIAL L.J. 273 (2023); SARA R. FARRIS, IN THE NAME OF WOMEN'S RIGHTS: THE RISE OF FEMONATIONALISM 1, 20–21 (Duke Univ. Press 2017).

120. *See, e.g.*, T. Edelman, *Nursing Home Staffing and Immigration*, CTR. FOR MEDICARE ADVOC. (Apr. 28, 2022), https://medicareadvocacy.org/nursing-home-staffing-and-immigration/ [https://perma.cc/CQ8X-MAK8]; Josselyn Andrea Garcia Quijano, *Workplace Discrimination and Undocumented First-Generation Latinx Immigrants, Advocate's Forum*, U. OF CHI., https://crownschool.uchicago.edu/student-life/advocates-forum/workplace-discrimination-and-undocumented-first-generation-latinx [https://perma.cc/KHL4-LU72] (last visited Mar. 11, 2025).

121. In fact, the Kirkland Life Care Center facility, a for-profit nursing home where twenty-five percent of residents died in the first U.S. outbreak, received a deficiency in an April 2019 inspection for its non-existent infection control program, but still received five stars on CMS's Nursing Home Compare website because the deficiency, with tragic irony, was deemed to pose "minimal harm or potential for actual harm." Michael L. Barnett & David C. Grabowski, *Nursing Homes Are Ground Zero for COVID-19 Pandemic*, 1 JAMA HEALTH F. 1 (2020).

122. Mike Davis, *The Coronavirus Crisis Is a Monster Fueled by Capitalism*, IN THESE TIMES (Mar. 20, 2020), https://inthesetimes.com/article/coronavirus-crisis-capitalism-covid-19-monster-mike-davis [https://perma.cc/GS4X-TK93].

123. Krupar & Sadural, *supra* note 117, at 1113–14.

124. *See* CTR. FOR MEDICARE ADVOC., SPECIAL REPORT: NURSING HOME INDUSTRY IS HEAVILY TAXPAYER-SUBSIDIZED (2021); PHI, DIRECT CARE WORKERS IN THE UNITED STATES: KEY FACTS 1 (2022).

Understaffing has long plagued nursing homes, to the detriment of workers and residents.[125] Even before the pandemic, nursing homes were among the most dangerous workplaces in the country, with high rates of worker injury attributed to understaffing, high staff turnover, and lack of proper equipment.[126]

The conditions of care labor afflicting workers are also the conditions of care afflicting elders. "Countless studies have documented that residents who live in understaffed nursing homes are more likely to suffer harm and neglect."[127] In a recent survey of nursing home residents, "88% report they do not have adequate staff in their facilities to meet the care needs of all residents and 74% report that they, or someone they know in their facility, have been neglected or hurt because of understaffing."[128] The impact of such understaffing ranges from daily frustrations[129] to gruesome instances of neglect,[130] often involving severe infections and even death resulting from bed sores because staff did not regularly help residents mobilize in bed.[131] Advocates for elders and their caregivers point out that understaffing, including the

125. Julia Rock & David Sirota, *How Wall Street Kills Grandma*, THE LEVER (Feb. 22, 2021), https://www.levernews.com/how-wall-street-kills-grandma/ [https://perma.cc/T8KA-28S6].

126. Kate L. Lapane, Catherine E Dubé & Bill M Jesdale, *Worker Injuries in Nursing Homes: Is Safe Patient Handling Legislation the Solution?*, 2 J. NURS. HOME RSCH. SCI. 110, 110–11 (2016).

127. THE NAT'L CONSUMER VOICE FOR QUALITY LONG-TERM CARE, THE IMPACT OF UNDERSTAFFING ON THE DAILY LIVES OF NURSING HOME RESIDENTS 1 (2024).

128. *Id*.

129. *See, e.g.*, *id*. ("72% wait longer than they would like to get out of bed in the morning . . . 73% miss activities because there are not enough staff to help them participate.").

130. *See, e.g.*, Kindred Nursing Ctrs. v. Leffew, 398 S.W.3d 463, 470 (Ky. Ct. App. 2013) (no valid arbitration agreement because a patient was unable to ratify the signature due to incompetence); Blackmon v. LP Pigeon Forge, LLC, No. E2010-01359-COA-R3CV, 2011 WL 9031313 1, 50 (Tenn. Ct. App. Aug. 25, 2011) (trial court properly denied nursing home's motion to compel arbitration pursuant to an arbitration agreement signed by the son because the son was not the mother's agent and did not have authority to sign on her behalf); Estate of Anna Ruszala, *ex rel.* Mizerak v. Brookdale Living Cmtys., Inc., 1 A.3d 806, 819–823 (N.J. Super. Ct. App. Div. 2010) (residency agreements were contracts of adhesion); Tarpeh v. U.S., 62 A.3d 1266, 1268 (D.C. Cir. 2013) (stroke patient transported while underclothed in winter, screaming and moaning, and foot was bleeding profusely); Estate of Boulier v. Presque Isle Nursing Home, 86 A.3d 1169, 1171 (Me. 2014) (resident died from a fall on the premises).

131. *See, e.g.*, Hazard Nursing Home, Inc. v. Ambrose, No. 2012-CA-000636-MR, 2013 LEXIS 596 (Ky. Ct. App. July 19, 2013); Beverly Healthcare Kissimmee v. Agency for Health Care Administration, 870 So. 2d 208, 210 (Fla. Dist. Ct. App. 2004).

astonishing staff turnover ratio of fifty-two percent per year, reflect not a workforce shortage crisis but a *job quality* crisis.[132]

The degrading conditions of care work help explain why Francis and Holly, and most elders, dread the prospect of admission to a nursing home. Yet, forty percent of elders are admitted to a nursing home at some point in their lives and twenty-five percent die in one,[133] even though at any one time, only about five percent of elders are admitted to a nursing home.[134] This discrepancy indicates how brief elders' life expectancies become once admitted: fifty-percent of residents die within six months of admission.[135] These numbers do not merely reflect a natural tendency to die when one is at an advanced age, but an increased risk of death due to poor conditions of care, particularly understaffing.[136]

Prompted by COVID-19 putting the spotlight on nursing home "death pits,"[137] there have been attempts at reform. Following exposure of Governor Andrew Cuomo's attempt to conceal the magnitude of COVID-19 deaths in nursing homes,[138] New York state passed a law setting a floor for the percent of reimbursement revenue that facilities must spend on patient care and on care worker wages, while also setting a ceiling on "excess profits."[139] In the industry's unavailing lawsuit to overturn the new law the complaint revealed that nursing facilities in New York state in 2019 alone received $824 million in

132. THE NAT'L CONSUMER VOICE FOR QUALITY LONG-TERM CARE, HIGH STAFF TURNOVER: A JOB QUALITY CRISIS IN NURSING HOMES 1, 9 (2022).

133. NINA A. KOHN, ELDER LAW: PRACTICE, POLICY, AND PROBLEMS 396 (Aspen, 2d ed. 2020).

134. Jason Neufeld, *How Many Older Adults Will Wind Up in Skilled Nursing Homes?*, ELDER NEEDS L., https://www.elderneedslaw.com/blog/how-many-older-adults-will-wind-up-in-skilled-nursing-homes [https://perma.cc/FDE4-4QES] (last visited Mar. 11, 2025).

135. KOHN, *supra* note 133, at 396.

136. Robert J. Brent, *Life Expectancy in Nursing Homes*, 54 APPLIED ECON. 1877, 1886 (2021).

137. *See* Krupar & Sadural, *supra* note 117, at 1107.

138. Jesse McKinley & Luis Ferré-Sadurní, *New Allegations of Cover-Up by Cuomo over Nursing Home Virus Toll*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/02/12/nyregion/new-york-nursing-homes-cuomo.htm [https://perma.cc/HE7B-LRJ6].

139. N.Y. PUB. HEALTH LAW § 2828 (McKinney 2024) (requiring facilities to spend seventy percent of their reimbursement on resident care, including forty percent on "resident-facing staff," and requiring facilities whose "total operating revenue exceeds total operating and non-operating expenses by more than five percent" to "remit such excess revenue" to the state).

reimbursements that were not spent on resident care and would qualify as "excess profits" under the law.[140]

The magnitude of excess profits available in the industry, New York's recent efforts aside, begins to explain why nursing homes are increasingly owned by private equity investors seeking maximal profits, with deadly results.[141] A pre-pandemic study concluded that purchase of a nursing home by private equity increases short-term mortality rates by ten percent, correlated with reduced staffing, reduced help with activities of daily living (ADLs), and increased reliance on antipsychotic medications.[142] The death rate spiked markedly during the pandemic, when nursing home residents accounted for fifteen percent of COVID-19-related documented deaths despite making up under 0.5% of the U.S. population, and has remained elevated since.[143] Nursing homes owned by private equity fared even worse.[144] As summarized by the National Consumer Voice for Quality Long-Term Care, "[w]hen nursing home owners and operators divert money away from workers to profits, the result is poverty level wages, high turnover, and poor care for residents."[145]

140. T. Edelman, *How Do Nursing Homes Spend the Reimbursement They Receive for Care?*, CTR. FOR MEDICARE ADVOC. (Jan. 26, 2022), https://medicareadvocacy.org/how-nursing-homes-spend-public-money/ [https://perma.cc/Y6A6-WM83].

141. Maureen Tkacik, *The Nursing Home Slumlord Manifesto*, THE AM. PROSPECT (Jan. 26, 2022), https://prospect.org/health/nursing-home-slumlord-manifesto/ [https://perma.cc/CE82-WM9E]; LAURA KATZ OLSON, WHO EVEN ARE THEY? *in* ETHICALLY CHALLENGED: PRIVATE EQUITY STORMS US HEALTH CARE 20, 41–43 (Johns Hopkins Univ. Press 2022); Merrill Goozner, *Where Nursing Homes Hide their Profits*, THE LEVER (Apr. 8, 2024), https://www.levernews.com/where-nursing-homes-hide-their-profits/ [https://perma.cc/TB8W-9WJ5]; Krupar & Sadural, *supra* note 117, at 1111–12.

142. Gupta et al., *supra* note 114, at 58; *How Patients Fare When Private Equity Funds Acquire Nursing Homes*, THE DIGEST (Apr. 1, 2021), https://www.nber.org/digest/202104/how-patients-fare-when-private-equity-funds-acquire-nursing-homes [https://perma.cc/G5JV-6MCF].

143. Max Weiss, Sharon-Lise T. Normand, David C. Grabowski, Deborah Blacker, Joseph P. Newhouse & John Hsu, *All-Cause Nursing Home Mortality Rates Have Remained Above Pre-Pandemic Levels After Accounting for Decline in Occupancy*, 2 HEALTH AFFS. SCHOLAR 11, 1 (2024).

144. AFR, *The Deadly Combination of Private Equity and Nursing Homes During a Pandemic* (Aug. 6, 2020), https://ourfinancialsecurity.org/2020/08/report-3-private-equity-nursing-homes-coronavirus/ [https://perma.cc/9YNB-D8BP].

145. THE NAT'L CONSUMER VOICE FOR QUALITY LONG-TERM CARE, COMMENTS TO CMS RE: MEDICARE AND MEDICAID PROGRAMS; MINIMUM STAFFING STANDARDS FOR LONG-TERM CARE FACILITIES AND MEDICAID INSTITUTIONAL PAYMENT TRANSPARENCY REPORTING, CMS-3442-P 1, 5 (2023).

Under the Biden administration, the Centers for Medicare and Medicaid Services (CMS) attempted to respond to the trifecta of rising mortality rates, staffing shortages, and private equity takeovers through new rules to establish minimum staffing standards and improve transparency of facility ownership structures.[146] But these incremental reforms are likely to be short-lived, already facing a plethora of lawsuits from the industry and state attorneys general.[147]

Private equity investors are drawn to nursing homes not only for the subsidized inputs from Medicaid reimbursements, Social Security checks, and home equity liquidation, but also by other mechanisms the industry has devised to maximize profits.[148] Facilities "scale up the number of Medicaid payments by raising their acceptance of Medicaid-beneficiary residents, while minimizing the operational costs of the facility," thus "inflating the number of lower-paid nurse practitioners and aides, decreasing the number of on-site registered nurses, and often having no doctors on staff.[149] The inevitable decline in quality of care of these for-profit 'Medicaid Mills' has prompted some facilities to simply account for regulatory sanctions and government fines as part of the normal cost of business."[150]

In addition to cutting costs through devaluing care labor, nursing homes "employ a vast array of accounting practices that allow them to siphon billions of dollars each year through a web of related companies that they own."[151] The practice originated as a mechanism for nursing home ownership to "protect assets that would otherwise be subject to civil judgment" by "separating the ownership of the real estate from the ownership of the operating entity that holds the license and

146. *See* Priya Chidambaram & Alice Burns, *A Look at Nursing Facility Characteristics Between 2015 and 2024*, KAISER FAM. FOUND. (Dec. 6, 2024), https://www.kff.org/medicaid/issue-brief/a-look-at-nursing-facility-characteristics/ [https://perma.cc/P3B8-MG2K].

147. *Id.*

148. *See* Gupta et al., *supra* note 114, at 1, 26; NEW CENTURY STAFF, *How to Pay for Nursing Home Care with Social Security* (Oct. 12, 2024), https://www.newcenturypa.com/knowledge-base/how-to-pay-for-nursing-home-care-with-social-security/ [https://perma.cc/5CE6-T6UG]; *Medicaid Treatment of the Home: Determining Eligibility and Repayment for Long-Term Care*, ASPE (Mar. 31, 2005), https://aspe.hhs.gov/reports/medicaid-treatment-home-determining-eligibility-repayment-long-term-care-0 [https://perma.cc/M6D2-AP2L].

149. Krupar & Sadural, *supra* note 117, at 1111–12.

150. *Id.*

151. THE NAT'L CONSUMER VOICE FOR QUALITY LONG-TERM CARE, *supra* note 145, at 4.

Medicare and Medicaid provider agreements . . . even where there is identical ownership and control between and among the real-property entity and the operating entity."[152] The practice also enables the real-property entity to charge the operating entity for rent, enabling "them to show a loss to the facility itself, while at the same time obscuring how [taxpayer] money was used.[153] This practice has proliferated to include not only real estate, but also companies owned or controlled by nursing home owners that provide virtually every aspect of nursing home operations," resulting in a proliferation of "management companies, staffing companies, insurance companies, and therapy companies," all effectively owned and operated by the same overarching business.[154] This proliferation of "related party transactions" enables the nursing home industry to funnel billions of taxpayer dollars into its increasingly capacious coffers.[155]

Given the manifold reasons why many elders wish to avoid nursing home admission, one may wonder where home health care fits into this picture. The Americans with Disabilities Act (ADA), as interpreted by the U.S. Supreme Court in *Olmstead* and in subsequent case law, recognized admission to a nursing home as a form of institutionalized segregation from the community.[156] The law nominally entitles people with disabilities to receive services in the least restrictive setting appropriate to their needs, thereby theoretically giving elders the right to "age in place" with appropriate home- and community-based services (HCBS), rather than being unnecessarily institutionalized in a nursing home.[157] But in-home care is often not an available, affordable, or

152. THE NAT'L CONSUMER VOICE FOR QUALITY LONG-TERM CARE, WHERE DO THE BILLIONS OF DOLLARS GO? A LOOK AT NURSING HOME RELATED PARTY TRANSACTIONS 1, 3 (2023).

153. *Id.*

154. *Id.* at 3–4.

155. *See id.* at 2.

156. *See* Olmstead v. L.C. by Zimring, 527 U.S. 581 (1999) (interpreting 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d) (1998)); Simmons v. Baker, No. 1:22cv11715 (D. Mass. filed Oct. 11, 2022); Kenneth R. v. Hassan, No. 12-cv-53-SM, 2013 LEXIS 132648 (D.N.H. Sept. 17, 2013); Blue v. Koren, 72 F3d 1075 (2d. Cir. 1995); Press Release, U.S. Att'y's Off., D.N.D., Department of Justice Reaches Major Olmstead Settlement Agreement with North Dakota (Dec. 14, 2020), https://www.justice.gov/usao-nd/pr/department-justice-reaches-major-olmstead-settlement-agreement-north-dakota [https://perma.cc/ECS9-3D9Z].

157. Mary Jean Duckett & Mary R. Guy, *Home and Community-Based Services Waivers*, 22 HEALTH CARE FIN. REV. 123-125 (2000).

sustainable alternative, notwithstanding the "community integration mandate" the Court recognized in *Olmstead*.[158]

Elders face many barriers when trying to access home health care that could prevent the need for institutionalization in a nursing home. More than sixty percent of elders cannot afford to pay for long-term care at home,[159] including eighty-six percent of those over seventy-five living alone.[160] Federal funding for states to provide in-home care requires HCBS programs to "cost states in total no more than what they would have spent on nursing home care," even though far more seniors seek home care than nursing facility care.[161] To restrict funding, "states have developed these programs with gaps, including exclusion of some disabling conditions, limits on enrollment, or prohibitions on aides or assistants from helping with certain personal care activities, such as bathing or dressing."[162]

As a result, HCBS is dramatically underfunded, leaving many people wallowing at home in unsafe conditions or unnecessarily institutionalized.[163] Waitlists for coverage are long.[164] Even elders who are no longer waitlisted often have to fight for coverage of adequate number of hours of home health services.[165] And even hours that are awarded can be exceedingly hard to staff due to systemic understaffing, which is unsurprising in a profession that pays a poverty wage[166] for hard, draining, dangerous work.[167]

158. *Id.*

159. *80% of Older Adults Face Financial Insecurity*, *supra* note 97.

160. HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS, *supra* note 42, at 27.

161. Allison K. Hoffman, *Winners and Losers in the Debate over the Expansion of Medicare*, 31 ELDER L.J. 51, 79 (2023).

162. *Id.*; *see also* RICHARD W. JOHNSON, ASPE RESEARCH BRIEF: WHAT IS THE LIFETIME RISK OF NEEDING AND RECEIVING LONG-TERM SERVICES AND SUPPORTS? 1 (2019).

163. Hoffman, *supra* note 161, at 78.

164. JOHNSON, *supra* note 162, at 1.

165. *Id.*

166. *See* Julia Wolfe, Jori Kandra, Lora Engdahl & Heidi Shierholz, *Domestic Workers Chartbook: A Comprehensive Look at the Demographics, Wages, Benefits, and Poverty Rates of the Professionals Who Care for Our Family Members and Clean Our Homes*, ECON. POL'Y INST. (May 14, 2020), https://files.epi.org/pdf/194214.pdf [https://perma.cc/Y2UX-ZVT3].

167. Amanda R. Kreider & Rachel M. Werner, *The Home Care Workforce Has Not Kept Pace with Growth in Home and Community-Based Services*, 42 HEALTH AFF. 650, 656 (2023); PHI, DIRECT CARE WORKERS IN THE UNITED STATES, KEY FACTS 2023 1, 9–10 (2023). As Marta Russell aptly wrote, "[d]espite the efforts of the disability rights

Low-income rental housing, too, has become increasingly commodified over time. Whereas the Housing Act of 1937 invested in building affordable housing owned by the federal government,[168] investment was curtailed from the 1950s onward in favor of promoting homeownership.[169] Subsequent affordable rental housing legislation subsidized private development rather than building truly public housing.[170] And in 1998, welfare reformers delivered the *coup de gras* to public housing in the Qualified Housing and Work Responsibility Act.[171] Known as the Faircloth Amendment, the new law restricted the number of public housing units to 1999 levels, effectively mandating that the supply of public housing units fall farther and farther short of demand.[172] As a result of such policies, the U.S. today has only one affordable unit for every three extremely low-income renters, defined as having an income at or below the federal poverty level or thirty percent of the area median income.[173]

Thirty-one percent of seniors in rental housing are extremely low-income, including a disproportionate number of elder people of color.[174] Yet today, affordable housing is largely a for-profit industry.[175] Like the nursing home industry, for-profit low-income housing capitalizes on government subsidies.[176] Some subsidies are lucrative tax breaks given to private developers such as the Low Income Housing Tax Credit (LIHTC) established in 1986.[177] Another is the Section 8

movement to deinstitutionalize disabled populations . . . the logic of capital reasserts itself via the recommodification of the disabled body in the home . . . . Corporations have taken an interest in the money-making potential of the in-home services field." RUSSELL, *supra* note 113, at 5.

168. *See* 42 U.S.C. § 1437.

169. *See* Molly Rockett, *Private Property Managers, Unchecked: The Failures of Federal Compliance Oversight in Project-Based Section 8 Housing*, 134 HARV. L. REV. 286, 288–89 (2021); Jaime Alison Lee, *Rights at Risk in Privatized Public Housing*, 50 TULSA L. REV. 759, 764–65 (2015); Anne Marie Smetak, *Private Funding, Public Housing: The Devil in the Details*, 21 VA. J. SOC. POL'Y & L. 1, 18 (2014).

170. *See* sources cited *supra* note 169.

171. 42 U.S.C. § 1437g(g); *see also* COOPER, *supra* note 20, at 140–41.

172. *Faircloth-to-RAD Guide*, U.S. DEP'T OF HOUS. (Nov. 2023), https://www.hud.gov/sites/dfiles/PIH/documents/FairclothToRADGuideRev2023.11.03.pdf [https://perma.cc/T2RM-DVHS].

173. NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOME 6-8 (2024); *see also* HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS, *supra* note 42, at 18.

174. NAT'L LOW INCOME HOUS. COAL., *supra* note 173, at 4, 13–16.

175. Smetak, *supra* note 169, at 20.

176. *Id.*

177. *See* Lee, *supra* note 169, at 765; Smetak, *supra* note 169, at 20.

program, the most common form of affordable rental housing today, covering market-rate units mostly owned by private landlords benefitting from the guaranteed revenue stream of rent paid directly by the government on behalf of abundant low-income tenants.[178] There are only 1.5 million residents living in truly public housing, while there are over 4 million Section 8 voucher-funded private units and another 3.6 million LIHTC units.[179] Social Security is the primary income source for nearly sixty percent of seniors in voucher-funded housing, meaning that even the limited share of rent not directly paid by the government is largely indirectly paid by it, into the pockets of for-profit landlords.[180] Unsurprisingly given this arrangement, housing development that extracts private profit from public entitlements is another industry attracting private equity investment.[181]

IV. Extraction of Value

The combination of age-related value, age-related vulnerability, and commodified care makes elders ripe for extraction. While scams and opportunistic family members are more likely to garner headlines and stoke outrage,[182] much of the appropriation of elders' assets and

178. *See* JANOVER MULTIFAMILY LOANS, *Section 8 Investing: A Comprehensive Guide*, https://www.multifamily.loans/apartment-finance-blog/section-8-investing-a-comprehensive-guide [https://perma.cc/FA5W-Y9GQ] (describing Section 8 program's advantages for landlords, including "a regular payment from the U.S. government each and every month that their unit is rented," annual rent increases, and a long wait list of tenants, so "marketing expenses are basically zero"). Condescendingly, the advice goes on to state, "if you are renting to Section 8 tenants, you will generally not need to make large capital investments in upgrading your property's aesthetic nature. Things like fancy landscaping, brand-new appliances, and new flooring can be incredibly expensive—and, since the Section 8 program brings tenants to you, you will not need to invest in these things in order to keep your units rented."

179. NAT'L. CTR. FOR HEALTH IN PUB. HOUS., DEMOGRAPHIC FACTS: RESIDENTS LIVING IN PUBLIC HOUSING 1, https://nchph.org/wp-content/uploads/2022/08/Demographic-Facts-Residents-Living-in-Public-Housing-v2.pdf [https://perma.cc/JWD9-9UCM]; HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS, *supra* note 42, at 19. Another subsidized housing program, exclusively for elder renters, is Section 202, but it only has 400,000 units. *Id.* at 21.

180. NAT'L CTR. FOR HEALTH IN PUB. HOUS., *supra* note 179, at 3.

181. *See* Lee, *supra* note 169, at 767; *see also* Heather Vogell, *When Private Equity Becomes Your Landlord*, PROPUBLICA (Feb. 7, 2022), https://www.propublica.org/article/when-private-equity-becomes-your-landlord [https://perma.cc/26LB-DQ2X].

182. Marc Ramirez, *Scammers Accused of Preying Upon Worried Grandparents. What Happened?*, USA TODAY (Mar. 5, 2025), https://www.usatoday.com/story/

entitlements occurs lawfully, rather than through the malfeasance of individual bad actors.[183] This Part examines the complex legal mechanisms for doing so under the law structuring Medicare, Medicaid, and housing subsidies.

A. Medicare Advantage: Whose Advantage?

Enacted in 1965, original Medicare now consists of Medicare Parts A and B, which cover inpatient and outpatient care respectively.[184] Part A services include hospitalization, hospice, and post-hospitalization rehabilitation in a skilled nursing facility or at home, in both cases sharply limited in eligibility and duration.[185] Part B primarily covers physician's services.[186] Both Parts A and B exclude long-term care, whether in facilities or in households.[187] This exclusion operates not only on the duration of services but also their nature: no form of Medicare will cover "custodial" care, such as help with ADLs like bathing, toilet use, bed mobility, transfers, walking, dressing, eating, hygiene, shopping, and so on—precisely the sorts of routine care that elders are most likely to need ongoingly as they age.[188]

These gaping limitations notwithstanding, original Medicare offers elders something exceptional in the history of U.S. health care: single-payer health insurance.[189] Part A is especially noteworthy because it is universal: almost every adult over sixty-five is automatically enrolled and cannot opt out, and there are no monthly premiums (though there are other forms of "cost-sharing," including deductibles and copays, for beneficiaries above poverty level).[190] Part B, by contrast, is optional: seniors can choose whether to receive it; if they do so, they generally pay monthly premiums in addition to deductibles and co-insurance.[191]

news/nation/2025/03/05/grandparent-scam-canadian-nationals-arrested-charged/81603596007/ [https://perma.cc/YA69-R7WR].

183. *See* discussion *infra* Sections IV.A–C.

184. *See* 42 U.S.C. § 1395c, 1395j.

185. *See generally* CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE BENEFIT POLICY MANUAL, ch. 1–3, 7–9 (2023).

186. *Id.* at ch. 6.

187. *See* Hoffman, *supra* note 161, at 67–68.

188. *See id*.

189. *See* CMS, *History* (Sept. 10, 2024), https://www.cms.gov/about-cms/who-we-are/history [https://perma.cc/L5DL-ZAKR].

190. *See* 42 U.S.C. § 1395c.

191. *See id.* § 1395j.

But in 1997, in the era of welfare reform, the Balanced Budget Act diverted a portion of Medicare funding to private, for-profit insurance companies under a new Medicare Part C.[192] The new program, initially called "Medicare+Choice," was rebranded as Medicare Advantage in 2003 and amended to pay plans more, costing Medicare billions more dollars.[193] Medicare Advantage Organizations (MAOs) are private corporations that offer MA plans to seniors.[194] These for-profit plans are required by federal law to provide all the same coverage as traditional Medicare, but they are also permitted to cover more, including the vision, hearing, dental, and some home health care benefits conspicuously absent from traditional Medicare.[195] However, even MA plans do not cover long-term care.[196]

Like Francis, over half of seniors are now enrolled in an MA plan,[197] drawn by the promise of superior coverage.[198] Yet, this promise is routinely betrayed. What MAOs offer in excess of traditional coverage, they take back in myriad other ways.

MAOs routinely issue baseless denials of needed care. Investigations conducted by DHHS's Office of Inspector General have repeatedly found "widespread and persistent problems related to inappropriate denials of services and payment."[199] MAOs issue tens of millions of

192. *See* Pub. L. No. 105-33, 111 Stat. 276 (1997). I omit discussion of Medicare Part D, covering prescription drugs, as beyond the scope of this Article, but it reproduces the same problems as Medicare Part C. *See* Hoffman, *supra* note 161, at 55–56.

193. Thomas G. McGuire, Joseph P. Newhouse & Anna D. Sinaiko, *An Economic History of Medicare Part C*, 89 MILBANK Q. 289, 292 (2011).

194. U.S. DEP'T OF HEALTH & HUM. SERVS. CTR. FOR MEDICARE & MEDICAID SERVS., UNDERSTANDING MEDICARE ADVANTAGE PLANS 1 (Nov. 2024), https://www.medicare.gov/publications/12026-understanding-medicare-advantage-plans.pdf [https://perma.cc/CDL5-XA3N].

195. *Id.* at 5.

196. *See id.* at 14–15 (requiring those who want long-term care coverage to opt into Special Needs Plans which are not available in most MA plans).

197. *See* CTR. FOR MEDICARE ADVOC., *Medicare Advantage Needs More Oversight, Less Overpayment* (2024), https://medicareadvocacy.org/medicare-advantage-needs-more-oversight-less-overpayment/ [https://perma.cc/DFA7-LFAB].

198. *See* Hoffman, *supra* note 161, at 62.

199. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., SOME MEDICARE ADVANTAGE ORGANIZATION DENIALS OF PRIOR AUTHORIZATION REQUESTS RAISE CONCERNS ABOUT BENEFICIARY ACCESS TO MEDICALLY NECESSARY CARE 2 (2022), https://www.regrelief.org/wp-content/uploads/2022/04/OIG-Report.pdf [https://perma.cc/UR8S-GJLX].

denials each year for both prior authorizations and reimbursements.[200] The denial of Francis's claim for SNF coverage is a case in point. Recall that Francis was, by law, *per se* eligible for continued SNF coverage.[201] But MA plans are structurally incentivized to deny meritorious claims. Although they are heavily subsidized by federal tax revenue, they are for-profit businesses.[202] Like most private health insurers, an MAO's purpose is not to provide health care but to maximize value for shareholders.[203] "With a rapidly aging population in the US . . . the MA sector has provided ample opportunity for investors seeking quick profits."[204]

MAOs have several techniques for extracting those profits. MA plans provide "managed care," meaning they "manage" costs by erecting more barriers to access services, particularly by limiting coverage to a network of pre-approved providers and requiring prior authorization from the plan for hospitalization and specialists' services.[205] Perhaps most importantly, whereas original Medicare reimburses health care providers on a fee-for-service (FFS) basis,[206] MA plans use a capitation system, covering a fixed amount per patient treated per month, rather than covering the actual cost of services provided.[207] DHHS's Inspector General investigated the industry because "capitated payment models—including the model used in Medicare Advantage" give rise to a "potential incentive for insurers to deny access to services and payment in an attempt to increase profits,"[208] "including some services and payment that would not have been denied in original Medicare."[209] The

200. *See* Reed Abelson & Jordan Rau, *Facing Financial Ruin as Costs Soar for Elder Care*, N.Y. TIMES (Apr. 28, 2022), https://www.nytimes.com/2022/04/28/health/medicare-advantage-plans-report.html [https://perma.cc/QR7G-UDTE]; *see also* CTR. FOR MEDICARE ADVOC., *How Do Nursing Homes Spend the Reimbursement They Receive for Care?* (2022), https://medicareadvocacy.org/how-nursing-homes-spend-public-money/ [https://perma.cc/QR7G-UDTE].

201. *See* discussion *supra* Section II.A.

202. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* 199, at 5.

203. *See* MARY BUGBEE, HOW PRIVATE EQUITY GETS ITS CUT FROM MEDICARE ADVANTAGE 15 (2024), https://pestakeholder.org/wp-content/uploads/2024/02/PESP_Report_Medicare_Advantage_Feb2024.pdf [https://perma.cc/N6LS-T6AB].

204. *See id*.

205. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 199, at 2.

206. *See id*.

207. *See* CHRISTI A. GRIMM, OFF. OF INSPECTOR GEN., OEI-09-18-00260, SOME MEDICARE ADVANTAGE ORGANIZATION DENIALS OF PRIOR AUTHORIZATION REQUESTS RAISE CONCERNS ABOUT BENEFICIARY ACCESS TO MEDICALLY NECESSARY CARE 9 (2022).

208. *Id.* at 2.

209. *Id.* at 20.

report specifically mentions what happened to Francis: "[t]o reduce their costs, MAOs may have an incentive to deny more expensive services, such as inpatient rehabilitation facility stays . . . ."[210] In summary, capitation payments incentivize providers to provide *less treatment* to *more patients*.

The U.S. Department of Justice initiated several investigations and lawsuits against MAOs for defrauding the federal government by inflating purported costs to receive excessive reimbursements,[211] a practice that skilled nursing facilities are prone to as well.[212] Reforms to stop this systematic siphoning of billions of taxpayer dollars do not appear to be forthcoming.[213]

Despite all their strategies for cost-cutting, MA plans cost the federal government more money per patient.[214] Congress's own Medicare Payment Advisory Commission (MedPAC)[215] has reported as much, stating:

210. *Id.* at 14.

211. *See* Press Release, U.S. Dep't of Justice, U.S. Att'y's Off., S.D.N.Y., United States Reaches $37 Million Settlement of Fraud Lawsuit Against Cigna for Submitting False and Invalid Diagnosis Codes to Artificially Inflate Its Medicare Advantage Payments (Sept. 30, 2023), https://www.justice.gov/usao-sdny/pr/united-states-reaches-37-million-settlement-fraud-lawsuit-against-cigna-submitting [https://perma.cc/75FX-ZCLU]; Press Release, U.S. Dep't of Justice, Off. of Pub. Affs., False Claims Act Settlements and Judgments Exceed $2.68 Billion in Fiscal Year 2023 (Feb. 22, 2024), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023 [https://perma.cc/74UN-T6GR] ("In addition to securing these settlements, the Justice Department continued to litigate a number of other cases involving the Medicare Advantage program, including actions against UnitedHealth Group, Independent Health Corporation, Elevance Health (formerly Anthem), and the Kaiser Permanente consortium.").

212. CTR. FOR MEDICARE ADVOC., *supra* note 200; Press Release, U.S. Att'y's Off., S.D.N.Y, Manhattan U.S. Attorney Files Suit Against Eleven Skilled Nursing Facilities and Their Management Company, Owner, and A Senior Employee for Fraudulently Billing Medicare for Unnecessary Services (June 2, 2021), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-files-suit-against-eleven-skilled-nursing-facilities-and-their [https://perma.cc/PJC3-GL4F].

213. *See* Fred Schulte, *Feds Killed Plan to Curb Medicare Advantage Overbilling After Industry Opposition*, KFF HEALTH NEWS (Aug. 27, 2024), https://kffhealthnews.org/news/article/medicare-advantage-overbilling-diagnostic-codes-cms-killed-rule/ [https://perma.cc/8EJR-TZ4N].

214. *See* Hoffman, *supra* note 161, at 62; CTR. FOR MEDICARE ADVOC., *supra* note 200.

215. *See* MEDICARE PAYMENT ADVISORY COMM'N, REPORT TO THE CONGRESS: MEDICARE PAYMENT POLICY xi (2023), https://www.medpac.gov/wp-content/uploads/2023/03/Mar23_MedPAC_Report_To_Congress_v2_SEC.pdf [https://perma.cc/W4G2-LH86].

> [T]he benefits from MA's lower cost relative to FFS spending are shared exclusively by the companies sponsoring MA plans (in the form of increased enrollment and revenues) and MA enrollees (in extra benefits). The taxpayers and FFS Medicare beneficiaries who help fund the MA program through Part B premiums do not realize any savings from MA plan efficiencies. Instead, Part B premiums are higher for all beneficiaries than they otherwise would be. Further, Medicare spends 6 percent more for MA enrollees than it would spend if those beneficiaries were enrolled in FFS Medicare, a difference that translates into a projected $27 billion in 2023. This amount would be even larger if the favorable selection of beneficiaries in MA plans were taken into account because beneficiaries who choose to enroll in an MA plan tend to be more profitable than beneficiaries who remain in FFS Medicare.[216]

In effect, Medicare Part C is little more than a boon to insurance companies, such as UnitedHealth Group, the country's largest private insurer in both the private and MA markets.[217]

Similar to the nursing home industry, the opportunity to profit from public subsidies and elder misfortune has increasingly attracted private equity investors to the MA industry, which has "contributed to consolidation among MA plans by selling smaller plans to mega-insurers . . . ."[218] Similar to private equity's *modus operandi* in the nursing home industry, investors pursue vertical integration to covertly increase profits, acquiring "marketing and brokerage companies that enroll Medicare beneficiaries into private plans" and "in-home health assessment . . . companies that work to optimize risk scores so private Medicare Advantage plans can collect higher payments" from CMS.[219] As with long-term care, acute elder care increasingly redistributes beneficiary and taxpayer money into the coffers of finance capital.

B. Medicaid Impoverishment and the Race to Exploit Homeowners

Recall that Francis faces the dreaded prospect of admission to a nursing home not only because of the MA plan's baseless denial of skilled services, but also because he handed over title of his house to his son, who wants to liquidate it. One may wonder why Francis

216. *See id.* at 322.

217. *See* AM. MED. ASS'N, COMPETITION IN HEALTH INSURANCE: A COMPREHENSIVE STUDY OF U.S. MARKETS, 11–14 tbls.5 & 7 (2024), https://www.ama-assn.org/system/files/competition-health-insurance-us-markets.pdf [https://perma.cc/3XAH-RJXW].

218. *See* BUGBEE, *supra* 203, at 3.

219. *Id*.

executed a deed transferring his house to his son even though he intended to live out the rest of his life there. The answer requires understanding the perverse incentives created by the law structuring our system for long-term care financing.

One might assume that Francis, as a Medicare beneficiary, would have adequate insurance coverage for elder care. But Medicare is a limited benefit. Its most glaring exclusion is long-term care coverage,[220] even though Medicare's *raison d'être* is health care for people over sixty-five or with severe disabilities,[221] precisely the people who most need long-term care. By legislative design, Medicare is limited to outpatient and acute care, covering stays in a nursing facility only up to 100 days, only if the beneficiary requires skilled nursing or therapy at least five days per week, and only if admission to the SNF follows a hospitalization of at least three days.[222] Sociologist Melinda Cooper argues these duration restrictions, instituted during the Reagan administration, were intended to shift the burden of care provision from facilities employing paid care workers, including some high-income professionals, to the home, where care provision becomes the responsibility of a "feminized work force of home health workers," including unpaid family members.[223] Yet, as Cooper points out, this shift occurred at precisely the same time that affordable housing was becoming increasingly inaccessible,[224] suggesting a more complicated geography of care redistribution that includes nursing homes, where most care is provided by low-income, feminized, racialized care workers such as nurse assistants.[225]

As health law expert Allison K. Hoffman puts it, "[i]n providing coverage for extended hospitalizations rather than long-term institutionalized care, the legislation addressed a problem experienced by few of the elderly and left unaddressed a 'catastrophic' situation dreaded by many."[226] The catastrophe Hoffman refers to is the expense of paying

220. *See* Hoffman, *supra* note 161, at 64–65.
221. *See* 42. U.S.C. § 1395c.
222. *Skilled Nursing Care*, MEDICARE.GOV, https://www.medicare.gov/coverage/skilled-nursing-facility-care [https://perma.cc/NTQ4-7J7Z] (last visited Mar. 11, 2025).
223. COOPER, *supra* note 20, at 190, 197–98.
224. *Id*. at 199.
225. *See id.* at 190.
226. *See* Hoffman, *supra* note 161, at 73.

for nursing home care, at an average cost over $100,000 per year.[227] Considering the median senior's income is only $50,000 per year,[228] the prospect of admission to a nursing home is characterized by another scholar as "the single greatest threat to financial security for older Americans."[229] As the United States is an exceptionally expensive place to get old,[230] it is no surprise then that the primary insurer of long-term care in the U.S. is one that requires poverty for eligibility, Medicaid.[231]

A Medicaid beneficiary's income generally must fall below the federal poverty level (FPL) or below 138% of FPL in states that expanded Medicaid under the Affordable Care Act.[232] And beneficiaries are subject to strict asset limits that effectively prevent them from owning more than a few thousand dollars in assets, except for "exempt" assets that nominally include one vehicle and their homestead (we will soon see how describing these assets as "exempt" is misleading).[233] As Hoffman puts it, "[m]ost Americans are neither poor enough to qualify for Medicaid nor wealthy enough to privately insure."[234]

But anyone receiving long-term care can become eligible rather quickly: privately paying for long-term care is so expensive that fixed incomes, savings, and other assets can be rapidly depleted, making a formerly middle-income elder into an impoverished one over a relatively short period.[235] Approximately six million Americans currently rely on Medicaid to fund long-term care.[236] An estimated ninety percent

227. *See Calculate the Cost of Long-term Care near You*, GENWORTH, https://www.genworth.com/aging-and-you/finances/cost-of-care [https://perma.cc/M2T5-NHFJ] (last visited Mar. 10, 2025); Abelson & Rau, *supra* note 200; Hoffman, *supra* note 161, at 71–74.

228. Gloria Guzman & Melissa Kollar, *Income in the United States: 2022*, U.S. CENSUS BUREAU, 3 fig.1, https://www.census.gov/content/dam/Census/library/publications/2023/demo/p60-279.pdf [https://perma.cc/Y5DW-YKLV].

229. Simmons, *supra* note 94, at 279.

230. *See generally id.*

231. Hoffman, *supra* note 161, at 78–81.

232. *See* 42 U.S.C. § 1396a(10); *Federal Poverty Level*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/federal-poverty-level-fpl/ [https://perma.cc/8QTJ-GQJP] (last visited Mar. 11, 2025).

233. *See*, *e.g.*, 42 U.S.C. § 1396a(a)(10); *id.* § 1382b(a)(1) (the Medicaid Act incorporates these exemptions from the SSI program).

234. Hoffman, *supra* note 161, at 78.

235. *See* Abelson & Rau, *supra* note 200; *see also* Hoffman, *supra* note 161, at 71–74.

236. *See* Priya Chidambaram & Alice Burns, *How Many People Use Medicaid Long-Term Services and Supports and How Much Does Medicaid Spend on Those People?* KAISER FAM. FOUND. (Aug. 14, 2023), https://www.kff.org/medicaid/issue-brief/how

of older adults cannot afford nursing care when they need it,[237] and so would have to rely on Medicaid eventually.

Once a formerly economically secure elder impoverishes themselves by liquidating any non-exempt assets and handing the proceeds over to the facility, as well as paying over all but a tiny allowance of their Social Security or other income,[238] only then will Medicaid pick up the balance of long-term care costs.[239] But, even then, Medicaid law requires extracting more value from already impoverished beneficiaries. One reason why describing a vehicle and homestead as "exempt" is misleading is because if a senior resides in a nursing facility without intent to return home, Medicaid can require them to liquidate their residence and vehicle, and pay the proceeds to the facility.[240] The second reason is that, upon death, the estate of any elder who required long-term care through Medicaid is subject to Medicaid estate recovery.[241] In yet another piece of welfare reform, the Omnibus Budget Reconciliation Act of 1993 amended the Medicaid Act to require states to recover the costs of long-term care from an elder's estate once the elder and any surviving spouse die or become permanently institutionalized in a nursing home.[242] Because the elder's home equity is commonly the only significant asset in their estate, and because long-term care is exorbitantly expensive, Medicaid estate recovery can easily erase the value of

-many-people-use-medicaid-long-term-services-and-supports-and-how-much-does-medicaid-spend-on-those-people/ [https://perma.cc/X44F-A7UF].

237. Liz Hamel & Alex Montero, *The Affordability of Long-Term Care and Support Services: Findings from a KFF Survey*, KFF (Nov. 14, 2023), https://www.kff.org/health-costs/poll-finding/the-affordability-of-long-term-care-and-support-services [https://perma.cc/2L4H-8TTL].

238. *See* 42 C.F.R. § 435.832(c)(1)–(2) (2024) (stating if there is a community spouse, the spouse is entitled to continue receiving a portion of marital income up to a limit).

239. *Id.* § 435.832(a).

240. 42 U.S.C. § 1396p(a)–(b).

241. *Id.*; 42 C.F.R. § 433.36(a) (2024).

242. 42 U.S.C. § 1396(b)(1)(C)(i); Letter from Cindy Mann, Director, Ctr. for Medicare & Medicaid Servs., to State Medicaid Director (Feb. 21, 2014), https://www.medicaid.gov/federal-policy-guidance/downloads/smd-14-001.pdf [https://perma.cc/QX53-ASE6]; *see, e.g.*, W. Vir. v. U.S., 289 F.3d 281 (4th Cir. 2002) (rejecting West Virginia's 10th Amendment challenge to the estate recovery requirement); Idaho Dep't of Health & Welfare v. Jackman, 970 P.2d 6, 8–10 (Idaho 1998); North Dakota Dep't of Human Servs. v. Thompson, 586 N.W.2d 847 (N.D. 1998); *In re* Estate of Jobe, 590 N.W.2d 162 (Minn. Ct. App. 1999) (the requirement extends to elders made eligible through Medicaid expansion as well).

an elder's estate and eliminate any meaningful inheritance for their heirs.[243]

There are two important incentives flowing from the estate recovery mandate. The first is that it means elders may as well sell their house in order to liquidate its value into proceeds that they can use to privately pay for nursing home care. By doing so, they may be able to afford a private room and/or a better nursing home, as long as the proceeds last.[244] They would gain nothing from the house's value, which instead goes to the government to pay back long-term care costs for a "semi-private" room, i.e., one with a roommate separated by a curtain, at a nursing home that accepts Medicaid.[245] This incentive benefits the private long-term care industry, which gobbles up the proceeds of liquidated home equity.

The second incentive created by the prospect of Medicaid estate recovery wiping out the chance of inheritance is to move assets out of the elder's estate before Medicaid can lay claim to them, whether voluntarily by the elder[246] or involuntarily through financial exploitation.[247] Such exploitation can take many forms, from the undue influence suggested by Francis's case to outright seizure of the elder's decision-making ability through guardianship.[248]

Moreover, federal law requires states to conduct a review of all the elder's financial transactions for the last five years before beginning

243. *See Congress Should End Mandatory Estate Recovery*, JUST. IN AGING (Oct. 16, 2024), https://justiceinaging.org/congress-should-end-mandatory-estate-recovery/ [https://perma.cc/7XRV-7BZS].

244. *See* Abelson & Rau, *supra* note 200.

245. *See CMS Issues Significant Updates to Improve the Safety and Quality Care for Long-Term Care Residents and Calls for Reducing Room Crowding*, CMS (June 29, 2022), https://www.cms.gov/newsroom/press-releases/cms-issues-significant-updates-improve-safety-and-quality-care-long-term-care-residents-and-calls [https://perma.cc/8YJW-KCT7]; *see also* Terry T. Fuller, Christopher F. Koller & John W. Rowe, *Reimagining Nursing Homes in the Wake of COVID-19*, NAT'L ACADEMY OF MED. (Sept. 21, 2020), https://nam.edu/reimagining-nursing-homes-in-the-wake-of-covid-19/ [https://perma.cc/K6FQ-L2Q8] (noting the design of U.S. elder care through Medicare and Medicaid created an "economic preference for institutional long-term care. The majority of nursing homes constructed as a result were with a distinctly institutional design—with double occupancy rooms—which has been an especially challenging factor during the COVID-19 pandemic").

246. *See* John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J.L. & PUB. POL'Y 81, 100–01 (2003).

247. *See, e.g.*, Culley & Sanders *supra* note 52, at 437–41 (showing examples of financial exploitation).

248. *See, e.g.*, In the Matter of Mildred Keri, 853 A.2d 209 (N.J. 2004); SunTrust Bank, Middle Georgia v. Harper, 551 S.E.2d 419 (Ga. Ct. App. 2001).

to receive long-term care.[249] If the state Medicaid agency finds any transfers of assets for below market value, they are presumed to be for the purpose of concealing assets from Medicaid.[250] The elder bears the burden of rebutting the presumption, which is frequently difficult to do and may take months or years for an appeal process to play out.[251] Those transferred assets are deemed available to the elder, even if they are in the control of a third party who may refuse to give them back and may have already liquidated them and spent the proceeds.[252] As a result, the elder can be disqualified from Medicaid coverage for the period of time that the value of those assets would have covered their long-term care costs, even if in reality they have no way to pay for long-term care.[253]

Medicaid law thereby gives children an incentive to persuade or even dupe their parents into handing over their assets and financial decision-making, and to do so well in advance of any need for long-term care. This incentive is especially powerful today, when younger generations face higher living costs and lower wages, with markedly diminished prospects of homeownership or escape from debt.[254]

Higher-income families can hire an estate planning attorney and insulate themselves from this outcome through "asset preservation" techniques.[255] They can, for example, fund trusts meeting certain technical criteria to fall within a loophole from Medicaid recovery.[256] But families without the means or savviness to hire a "Medicaid planning" attorney either lose what little wealth the family had or, worse, subject

249. Deficit Reduction Act of 2005, Pub. L. No. 109–171, 120 Stat. 4; 42 U.S.C. § 1396p(c). In 2005, the look-back period was expanded from three to five years.

250. *See, e.g.*, Godown v. Dep't of Pub. Welfare, 813 A.2d 954 (Pa. Commw. Ct. 2002).

251. *See*, *e.g.*, Connors v. Berlin, 105 A.D.3d 1208 (N.Y. App. Div. 2013)

252. *See* Culley & Sanders, *supra* note 52, at 440–41.

253. *See id*.

254. *See id*. at 434–51.

255. *See* Timothy L. Takacs & David L. McGuffey, *Medicaid Planning: Can It Be Justified? Legal and Ethical Implications of Medicaid Planning*, 29 WM. MITCHELL L. REV. 111, 151 (2002).

256. *See id.* at 152; Hoffman, *supra* note 161, at 76 ("[T]he long-term care partnership program created as part of the Deficit Reduction Act of 2005 . . . allows someone who buys a qualifying private long-term care policy a larger Medicaid asset disregard—which means they can retain more of their assets while qualifying for long-term care benefits under Medicaid—and protects those additional assets from Medicaid estate recovery when they die.").

their elders to financial exploitation as a form of self-help (and ultimately self-defeating) estate planning.[257]

In sum, elder care is so expensive that even middle-income elders either become impoverished paying for it, or become impoverished on purpose to preserve resources for loved ones rather than spend on their own care.[258] People with the means to hire lawyers and successfully shelter their wealth get to pass that wealth on to future generations—while low-income families are precluded from building multi-generational wealth.[259] Notably, this dynamic disproportionately harms people of color, who are more likely to lack the means for legal asset preservation.[260]

In this context, the actions of children like Francis's son Scottie unfairly persuading parents into giving away their real estate are revealed as not just a matter of ungrateful, opportunistic kids. Rather, such actions are structurally incentivized by law. In an effort to avoid the legalized appropriation of a working-class family's modicum of wealth to finance elder care, it is common for family members to engage in shadow estate planning that easily blurs into financial exploitation of elders.[261] Denis Culley, a veteran attorney with LSE, describes long-term care Medicaid as "the handmaiden of financial exploitation."[262] Medicaid law sets up a race between the long-term care industry and

257. *See* Richard L. Kaplan, *Cracking the Conundrum: Toward a Rational Financing of Long-Term Care*, 2004 U. ILL. L. REV. 47, 71–72 (2004); Culley & Sanders, *supra* note 52, at 437–41.

258. Simmons, *supra* note 94, at 279.

259. *See* John A. Miller, *Medicaid Spend Down, Estate Recovery and Divorce Doctrine, Planning and Policy*, 23 ELDER L.J. 41, 78–79 (2015). Scholars argue that inherited wealth, rather than income, increasingly shapes class inequality. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 377–429 (2014); COOPER, *supra* note 20, at 119–65.

260. *See Medicaid Estate Claims: Perpetuating Poverty & Inequality for a Minimal Return*, JUST. IN AGING (2021), https://justiceinaging.org/wp-content/uploads/2021/04/Medicaid-Estate-Claims.pdf [https://perma.cc/24NR-8AYB]; REETU PEPOFF, THE INTERSECTION OF RACIAL INEQUITIES AND ESTATE PLANNING 87 (2021) (examining racial inequities in the trusts and estates field and, in particular, the lack of estate planning by Black, Indigenous, and people of color and its corresponding impact on the racial wealth gap).

261. *See* Kaplan, *supra* note 257, at 52, 69–70; Culley & Sanders, *supra* note 52, at 437–38 (in fact, this pattern of legally incentivized financial exploitation is so common that Maine, the U.S. state with the highest proportion of seniors, passed a law attempting to make it easier to reverse below-market transfers); *see also id.* at 445–46.

262. *See* Culley & Sanders, *supra* note 52, at 438 (referring to MaineCare, which is the name that Maine gives to its long-term care Medicaid program).

children to be the first to appropriate elders' home equity, savings, and income.

Above, I described helping to restore Francis's ownership of the house that Scottie had appropriated. But even this seemingly happy outcome is ultimately likely to benefit the long-term care industry at the expense of the working class. As mentioned, elders like Francis face many barriers to accessing adequate home health care,[263] so there is a high risk he will ultimately need nursing facility care and the house will sooner or later be liquidated to pay for it or claimed by the state to reimburse Medicaid; after all, the likelihood of this prospect is what motivated Scottie to dispossess Francis to begin with. Moreover, home health care provided by Medicaid is subject to Medicaid estate recovery claims, too, requiring states to reimburse Medicaid agencies for in-home long-term care costs.[264] In other words, even effective legal help may not change—and may, in fact, only facilitate—the ultimate end result of redistributing wealth away from lower-income families.

Moreover, because long-term care in the United States is largely privatized,[265] the primary beneficiaries of Medicaid estate recovery are not future Medicaid beneficiaries but extremely profitable health care companies. As discussed above, rather than investing those profits in ensuring full staffing of care labor, the industry tends to understaff and underpay the women, people of color, and migrants who disproportionately perform care labor.[266] Stepping back and reflecting on the aggregate outcomes of how the U.S. finances elder care, we can see that the biological inevitability of decline as we age has become a means to systematically widen economic inequality, including gendered and racialized wealth and income gaps.

C. Subsidies All the Way Down

While Francis's case demonstrates a pathway for health care companies to extract value from the home equity and entitlements of working-class retirees, Holly's demonstrates how even a propertyless elder can be a source of value extraction for private industry. As I show below, Holly's age-related sources of value are converted for the

263. *See* discussion *supra* Section II.A.
264. 42 U.S.C. § 13396p(b)(1)(B)(i).
265. *See* discussion *supra* Section III.C.
266. *See supra* Section III.B.

pecuniary benefit of the landlord in the private market, and this is accomplished not by flouting of the law, but by design of the law.

While Holly's rent is subsidized, recall it is a *market-rate* rent paid to a *private* landlord—meaning the landlord is receiving a competitive rate for this unit in order to accumulate profit.[267] Like the system for providing health care to those who cannot afford it, the system for providing affordable housing involves subsidizing private profits.[268] Even Holly's portion of the rental payment, in the amount of thirty percent of her income, is publicly subsidized through the SSI program.[269] About sixty percent of seniors in subsidized housing rely on some form of Social Security income.[270]

Not only does this arrangement enable landlords to collect rent for more units than working-class people's income could support, it also provides landlords with added insurance against the risk of defaulting tenants.[271] Even if Holly were to miss a rental payment, the landlord is guaranteed the government's payment anyway,[272] significantly reducing the landlord's responsibility for the risk that all landlords otherwise face.

But recall that Holly's eviction is a no-fault eviction, meaning that she has not defaulted on a rental payment nor violated the lease in any actionable way. Most states permit no-fault eviction,[273] and even those that purport not to will allow it, at the landlord's discretion, for sale, conversion, or renovation of the building.[274] The same is true under federal law governing Section 8 vouchers, despite the fact that these vouchers are a public subsidy for private landlords to provide safe dwellings for housing-insecure individuals.[275]

267. *See* discussion *supra* Section II.B.

268. Kyle Giller, *The Fight for NYCHA: RAD and the Erosion of Public Housing in New York*, 23 CUNY L. REV. 283, 286 (2020); *Brief History of HUD-Subsidized Mortgage Preservation Issues*, NAT'L HOUS. L. PROJECT, https://www.nhlp.org/wp-content/uploads/Brief-History-of-HUD-Subs-Mortgage-Pres-Issues-for-CW.pdf [https://perma.cc/8NBY-PHJ2].

269. *See supra* notes 38–39 and accompanying text.

270. NAT'L CTR. FOR HEALTH IN PUB. HOUS., *supra* note 179, at 3.

271. *See* JANOVER MULTIFAMILY LOANS, *supra* note 178.

272. 24 C.F.R. § 982.311 (2024); *see* discussion *supra* Section II.B.

273. *See* Eloisa C. Rodriguez-Dod, *"But My Lease Isn't Up Yet!": Finding Fault with "No- Fault" Evictions*, 35 U. ARK. LITTLE ROCK L. REV. 839, 839–45 (2013).

274. *See, e.g.*, CAL CIVIL CODE § 1946.2 (West 2024); COLO. REV. STAT. § 38-12-1303 (2024); N.J. STAT. § 2A:18-61.3 (West 2024); OR. REV. STAT. § 90.427 (2024).

275. *See* 24 C.F.R. § 982.310(a)–(d) (2024).

There is almost no way to defend against a no-fault eviction. Only a few states provide enhanced protections for elders against no-fault eviction.[276] Notably, Massachusetts is one of them, where eviction judges have discretion to stay an eviction order for up to a year for vulnerable adults who demonstrate they cannot find alternative housing and are not in violation of the lease.[277] With the rare exception aside, the commodity nature of housing is so strong that it must be alienable at the owner's will, no matter how many people rely on the building to live. The legal system would sooner render a vulnerable elder homeless than restrict the exchange of property rights.

Section 8 vouchers are valuable subsidies to private landlords that cost taxpayers, yet the public receives little in return for the gift of this insured revenue stream. Seniors and persons with disabilities like Holly are often prioritized for Section 8 vouchers.[278] In exchange for extracting profit from subsidized revenue streams, however, the landlord has little to no meaningful responsibility to vulnerable tenants. The landlord has roughly the same duties to Holly as he has to any abstract tenant: "[R]enters are entitled only to a minimum level of safe and healthy housing . . . Notably, the [warranty of habitability] doctrine tends to consider neither a particular tenant's needs nor expectations. Rather, it generally speaks to what a 'reasonable person' would consider to be necessary or fit for habitation. This results in troubling outcomes in cases involving tenants with disabilities . . . . [and] older tenants."[279]

Moreover, the landlord can evict Holly as if she were any other tenant, even as he pockets the subsidy that is provided by the state precisely because she is *not* any other tenant. There is no effective requirement that some portion of the subsidy be used for tenancy supports to help an older, more vulnerable renter maintain her tenancy or ensure she can relocate safely before losing possession of the unit.[280] Rather,

276. *See* Rodriguez-Dod, *supra* note 273, at 839–45.

277. *See* MASS. GEN. LAWS ch. 239, §§ 9–10 (2024).

278. *See* 24 C.F.R. § 982.207 (2024); NAT'L CTR. FOR HEALTH IN PUB. HOUS., *supra* note 179, at 2 ("Nearly 292,443 or 19% of residents in public housing are seniors (age 62 and above), and approximately 674,411 or 16% of residents receiving voucher funded assistance for housing are seniors.").

279. Michael C. Pollack & Lior Jacob Strahilevitz, *Property Law for the Ages*, 63 WM. & MARY L. REV. 561, 606–07 (2021).

280. *See* Lee, *supra* note 169, at 784-96 (arguing private landlords receive valuable benefits from public subsidies without effective legal enforcement mechanisms to protect renters' housing security).

the landlord is allowed to accumulate rental revenue from the subsidized income stream as long as he wants beyond the initial lease term, using the subsidy revenue to pay down the debt on the building; then, he can abruptly terminate her tenancy for no reason other than the profit opportunity created by rising property values—effectively capitalizing on her subsidy while forcing her into crisis.[281] In other words, although it is in part elders' vulnerability that drives spending of public money on housing assistance, this spending is legally permitted to fail elders while enriching elites.

But Holly, as a working-class elder, needs more support than the imaginary abstract tenant. At the very least, she needs support to relocate safely,[282] for example, a social worker who can help her navigate the process of applying for alternative housing and ensuring any need for transitional housing is met in the meantime. This task is not easy in a housing market where "demand from renters for federal housing support dramatically exceeds supply, especially for older renters . . . ."[283] Nearly four million older renter households are financially eligible for federal housing assistance but do not receive it, instead languishing on years-long waiting lists.[284]

The landlord who appropriated Holly's age-related value streams need not provide or pay for services to help Holly relocate.[285] She must find them elsewhere, or not. Finding social workers, case managers, or others able and willing to navigate the patchwork of social services—and piece them together to meet a vulnerable elder's needs—is a daunting, draining, and often unavailing task. That burden is borne by public servants like the social worker and me, as well as many others (e.g., other workers, family members, neighbors, and strangers—those who provide elder care in bigger and smaller acts of service),[286] another way of externalizing onto the public the costs of private profit-making.

281. *See* 24 C.F.R. § 982.310(d)(1)(iv), (2) (2024) (permitting Section 8 landlord to terminate tenancy after the initial lease term for "[a] business or economic reason . . . such as sale of the property, renovation of the unit, or desire to lease the unit at a higher rental").

282. *See* Pollack & Strahilevitz, *supra* note 279, at 610 ("Because older tenants tend to be less mobile than others, they are especially vulnerable to their housing conditions.").

283. HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS, *supra* note 42, at 18.

284. *Id.*

285. *See* Pollack & Strahilevitz, *supra* note 279, at 618.

286. HARVARD REPORT ON HOUSING AMERICA'S OLDER ADULTS, *supra* note 42, at 18.

While dedicated social workers and lawyers can profoundly change the life of a vulnerable elder like Holly or Francis, often this harm reduction or poverty amelioration does not change the redistributive result. Similar to the way that my advocacy for Francis would probably not ultimately keep his home equity within the working class, if I were to help Holly retain her housing, transition to a new apartment, or transition to long-term care facility, a landlord or facility would still receive the benefit of her age-related value streams. The stories of both Francis and Holly, and the multitude of elders whom they represent, likely conclude in a nursing home. The legal system enables elder care and housing providers to effectively make elders like Holly and Francis into commodities, objects exchanged among themselves to extract the value contained in their age-related entitlements.

V. Reform or Transform

The identification of legal processes facilitating the dynamic of extraction invites consideration of what legal reforms would arrest it. I consider several potential reforms to Medicare, Medicaid, and housing below.

A. Medicare

As discussed above, MA companies deny more claims than original Medicare, while costing the federal government more money per beneficiary.[287] The MAO's motivation is not providing health care to elders and people with disabilities, but rather maximizing value for shareholders.[288] This explains not only why Francis's MA plan denied his claim despite its straightforward validity, but also why it did not bother to defend its denial, as it would cost money to pay an attorney or other representative to do so. In fact, MA plans increasingly do not even pay employees to do the work of denying claims, instead utilizing algorithms and artificial intelligence to do so.[289]

287. *See supra* notes 199–210 and accompanying text.

288. *See supra* notes 199–210 and accompanying text.

289. *See, e.g.*, First Amended Class Action Complaint at 2, Estate of Gene B. Lokken v. UnitedHealth Group, 2024 WL 2853368 (D. Minn.) ("This putative class action arises from Defendants' illegal deployment of artificial intelligence (AI) in place of real medical professionals to wrongfully deny elderly patients care owed to them under Medicare Advantage Plans by overriding their treating physicians'

One incremental reform measure would be to increase an MA plan's cost for meritless denials from its current cost of nothing to a cost that would eliminate the pecuniary motive to issue such denials. For example, if an Administrative Law Judge reverses the denial and determines it was meritless, the MA plan could be liable to pay damages to the beneficiary and/or CMS, including attorney's fees and other costs.

But this proposal would not address the fundamental problem: the MA plan's profit motive is fundamentally in conflict with the Medicare beneficiary's interest in receiving needed care. If the MA plan can no longer maximize profit through meritless denials, it will need to find another way to maximize it. MA plans already have several other ways of doing so at their disposal, such as restricting coverage, requiring prior authorizations, negotiating lower reimbursement rates, lobbying for higher subsidies, and charging higher premiums or other cost-sharing.[290] The way out of this bind is to remove the profit motive, that is, to end MA altogether.

Merely ending MA by itself is inadequate, however, because beneficiaries will continue to lack coverage for long-term care unless they qualify for Medicaid long-term care on the basis of poverty. Long-term care coverage must be incorporated into original Medicare. The framework for doing so has been laid out in the Medicare for All bill sponsored by U.S. Senator Bernie Sanders and Representative Pramila Jayapal, which "includes universal coverage of long-term care with no cost-sharing for older Americans and individuals with disabilities and prioritizes home and community-based care over institutional care."[291]

But a reality check is in order. The political trend is moving in the opposite direction. Medicare has become increasingly privatized over the decades, and MA plans recently became the insurer of more than

determinations as to medically necessary care based on an AI model that Defendants know has a 90% error rate.").

290. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., SOME MEDICARE ADVANTAGE ORGANIZATION DENIALS OF PRIOR AUTHORIZATION REQUESTS RAISE CONCERNS ABOUT BENEFICIARY ACCESS TO MEDICALLY NECESSARY CARE 11 (2022).

291. *Jayapal, Dingell, Sanders Introduce Medicaid for All Act of 2023*, PRAMILA JAYAPAL (May 17, 2023), https://jayapal.house.gov/2023/05/17/jayapal-dingell-sanders-introduce-medicare-for-all-with-record-number-of-house-cosponsors [https://perma.cc/N3H9-CDCE]; *see* H.R. 3421, 118th Cong. (2023); S. 1655, 118th Cong. (2023).

fifty percent of beneficiaries.[292] Project 2025, widely regarded as a policy blueprint for Donald Trump's second presidential term[293], advocates for increased use of AI for denying claims and for MA to become the default form of Medicare, suggesting a replacement of "legacy" Medicare altogether.[294] While many Democrats have voiced support for Medicare for All, the party failed to rally around it at key moments when its chance of success was not yet foreclosed, such as the 2020 primary campaign and the ensuing Biden presidency during which Democrats controlled the House and Senate.[295]

B. Medicaid

Every state has a property exemption statute that protects debtors from destitution.[296] If an individual cannot pay a health care bill, a credit card bill, or other unsecured debt, the creditor can file a lawsuit and get a court order requiring them to pay the debt, but cannot enforce the order on property within the exemption statute.[297] These statutes commonly protect the debtor's homestead, at least up to a certain amount of equity.[298] In some states, like Maine, the protected amount of equity is very low, generally $80,000,[299] while in other states it is unlimited or much higher, e.g., in Massachusetts, $500,000 generally.[300] Notably,

292. Meredith Freed, Jeannie Fuglesten, Biniek, Anthony Damico & Tricia Neuman, *Medicare Advantage in 2024: Enrollment Update and Key Trends*, KFF (Aug. 8, 2024), https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2024-enrollment-update-and-key-trends/ [https://perma.cc/JV7J-QA92].

293. *See, e.g.*, Franco Ordoñez, A Martínez, *Trump Enacts Project 2025 Policies, Which He Distanced Himself from While Campaigning*, NPR (Jan. 31, 2025), https://www.npr.org/2025/01/31/nx-s1-5280364/trump-enacts-project-2025-policies-which-he-distanced-himself-from-while-campaigning [https://perma.cc/83RK-ZM36]; Mike Wendling, *Project 2025: The Right-wing Wish List for Trump's Second Term*, BBC NEWS (Feb. 13, 2025), https://www.bbc.com/news/articles/c977njnvq2do [https://perma.cc/ZG3L-PPZT].

294. Roger Severino, THE HERITAGE FOUND, MANDATE FOR LEADERSHIP THE CONSERVATIVE PROMISE 463-65 (2023) (project 2025 advocates for tightening eligibility even further).

295. Noah Weiland, *Despite Trump's Accusations, Democrats Have Largely Avoided Medicare for All*, N.Y. TIMES (Aug. 22, 2024), https://www.nytimes.com/2024/08/22/us/politics/harris-medicare-for-all.html [https://perma.cc/ACP8-UUM6].

296. CAROLYN CARTER, NO FRESH START IN 2019: HOW STATES STILL ALLOW DEBT COLLECTORS TO PUSH FAMILIES INTO POVERTY, NAT'L CONSUMER L. CTR. 4 (2019).

297. *Id.* at 9.

298. *See id.* at 16–17.

299. ME. STAT. tit. 14, § 4422(1)(A) (2022).

300. Mass. GEN. LAWS ch. 188, § 1 (2011).

both Maine and Massachusetts double the exemption protection for older adults.[301]

And yet, Medicaid long-term care costs are exceptional. There is no homestead protection from Medicaid estate recovery,[302] even though Medicaid beneficiaries are by definition poor, and so if they own a home at all, liquidating it will likely wipe out their estate's value—unless they took advantage of asset preservation loopholes that generally only those wealthy enough to hire an estate planning lawyer could have done. This lack of a homestead exemption for beneficiaries of long-term Medicaid, as discussed above, systematically inhibits the building of intergenerational wealth for the working class, while access to asset preservation techniques for wealthier prospective Medicaid beneficiaries means that the wealth gap between wealthier and poor families grows.

The natural solution to this problem would be to add homestead protection to Medicaid Estate Recovery. Homesteads are exempt from asset limits to qualify for Medicaid,[303] so if estate recovery over homesteads were eliminated, an otherwise impoverished beneficiary with home equity could pass down some intergenerational wealth. But even for modest reforms to Medicaid, the political headwinds are fierce.[304]

Moreover, ending Medicaid estate recovery over homesteads would only begin to address the problems with long-term care. Like MA plans, nursing homes are mostly for-profit corporations that maximize profits by minimizing costs, especially care labor costs, irrespective of the human consequences.[305] That returns us to the issue of nursing home conditions plagued by deprivation and neglect due to understaffing. Requiring nursing homes to spend more of their profits on meeting minimum staffing standards, and effectively enforcing that

301. *Id.* §§ 1, 5; ME. STAT. tit. 14, § 4422(1)(A) (2022).

302. *See supra* notes 240-43 and accompanying text; *Medicaid Estate Recovery Programs: When Medicaid Can and Cannot Take One's Home*, AM. COUNCIL ON AGING (Dec. 16, 2024), https://www.medicaidplanningassistance.org/can-medicaid-take-my-home/ [https://perma.cc/7RM7-6H72].

303. *Understanding Medicaid's Estate Recovery Program (MERP) & How to Protect the Home*, AM. COUNCIL ON AGING (Apr. 24. 2024), https://www.medicaidplanningassistance.org/medicaid-estate-recovery-program/ [https://perma.cc/6CJ6-XX76].

304. *See, e.g.*, Jason DeParle, *Trump Drive to Cut Safety Net Could Hit His Voters*, N.Y. TIMES (Jan. 23, 2025), https://www.nytimes.com/2025/01/23/us/politics/trump-social-safety-net.html [https://perma.cc/2A6T-EYYA]; Severino, *supra* note 294, at 466–69.

305. *See supra* notes 111–15 and accompanying text.

requirement, would be a "critical step in creating better jobs and reducing turnover."[306]

But as it is, most elders do not want to end up in a facility and would strongly prefer to live out their days at home,[307] and Medicaid eligibility requires poverty, leaving a tremendous number of people who are too poor to afford long-term care but not poor enough to be on Medicaid until they hand over most of their modest wealth to the industry. Project 2025 advocates for tightening eligibility even further.[308] Again, the preferable response would be making Medi*care* the funder of long-term care, with an emphasis on home- and community-based care provision. While more politically plausible than improving Medicaid (because it would benefit middle- and higher-income elders, too), it is nonetheless subject to the same concern that the political will is trending in the opposite direction toward privatization through MA plans, which would add another layer of profit motive beyond that of the nursing facilities and home-care companies.

C. Eviction

Eviction is an extraordinary remedy, the ability to eject someone from their home in a matter of weeks or even days.[309] While landlord-tenant law includes some protections for renters,[310] they pale in comparison to protections for homeowners in foreclosure, who can only be dispossessed for cause (primarily, defaulting on mortgage payments) and are generally entitled to retain possession of the house, with the possibility of redeeming it, for months or even years.[311] In contrast, renters can be evicted for many reasons, from non-payment of rent to repeated minor lease violations to, like Holly, the landlord's completely

306. NAT'L CONSUMER VOICE FOR QUALITY LONG-TERM CARE, *supra* note 145, at 5.

307. *Aging in Place: Growing Older at Home*, NAT'L INST. ON AGING (Oct. 12, 2023), https://www.nia.nih.gov/health/aging-place/aging-place-growing-older-home [https://perma.cc/49YQ-BAGN].

308. Severino, *supra* note 294, at 467.

309. *See, e.g.*, ME. STAT. tit. 14, § 6002(1) (2022) (providing for 7-day eviction notices).

310. *See, e.g.*, The Fair Housing Act, 42 U.S.C. § 3605.

311. *See* FED. HOUS. FIN. AGENCY, OFF. OF INSPECTOR GEN., *An Overview of the Home Foreclosure Process*, 5–9, 14–16, https://www.fhfaoig.gov/Content/Files/SAR_Home_Foreclosure_Process.pdf [https://perma.cc/X74P-V77H].

discretionary decision to not renew the lease—such as to raise rents or sell the building.[312]

Enhanced no-fault eviction protections for elders, as in Massachusetts,[313] would be a positive incremental change. But landlords will still seek profits, e.g., by raising rents, so rent-control would have to be part of any serious reform program. Moreover, it is not difficult for landlords to find fault-based grounds for evicting many tenants, such as through lease requirements that are designed to be difficult for tenants to comply with.[314] Furthermore, landlords have tremendous power over tenants' lives, such as by refusing to make repairs, making highly disruptive renovations, or otherwise making tenants' lives miserable.[315] They can stop investing in a building's upkeep, leaving tenants to live in unsafe conditions, conditions that renters are disincentivized to report because of fear of landlord retaliation or even condemnation of the property forcing them to vacate.[316]

An alternative is to eliminate for-profit low-income housing in favor of truly public housing, developed and managed without a need to maximize extraction of value from occupants. Models exist in the form of social housing. Social housing, more common in Europe, is a "public option for housing" that is owned by the public or under democratic community control, permanently affordable, permanently decommodified, and socially financed, produced, and maintained.[317]

Again, a reality check is in order. In 2021, the House passed the Build Back Better Act which, thanks to provisions introduced by progressive Democrats, would have set aside the Faircloth Amendment and lowered other barriers to expanding the supply of affordable rental housing, including expanding Medicaid home-care benefits.[318] The Democrat-controlled Senate rejected the bill, ultimately passing the Inflation Reduction Act instead, which invested in energy efficiency

312. *See supra* notes 32–42 and accompanying text.
313. Bill H. 1255, 191st Cong. (2020 Mass.).
314. Rodriguez-Dod, *supra* note 273, at 843.
315. *See, e.g.*, Ezra Rosser, *Exploiting the Poor: Housing, Markets, and Vulnerability*, 126 YALE L.J. F. 458, 471–72 (2017) (reviewing MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016)).
316. Rodriguez-Dod, *supra* note 273, at 843.
317. Amee Chew & Abby Ang, *Social Housing for All: A Vision for Thriving Communities, Renter Power, and Racial Justice*, CTR. FOR POPULAR DEMOCRACY (Mar. 2022), https://populardemocracy.org/sites/default/files/Social_Housing_for_All_-_English_-_FINAL_3-21-2022.pdf [https://perma.cc/XWJ4-LTS8].
318. H.R. 5376, 117th Cong. (2022).

improvements to rental housing but did nothing to expand the supply of affordable housing.[319] And if the political will were mustered, the courts might thwart even modest reforms. Recall that in the height of the pandemic, the Centers for Disease Control under Trump issued a partial moratorium on no-fault evictions in high-transmission areas.[320] The Supreme Court invalidated it as an unauthorized use of agency power infringing on landlords' property rights.[321] Again, the legal system privileges profits over the health and housing of vulnerable people.

D. Non-reformist Reforms

The reality checks above asserting that political will is absent for any meaningful reforms are not defeatist. Rather, they require us to focus our attention on the right places. As indicated in Part II, the crisis of elder care reflects broader social conditions. These underlying conditions require us not to reform but to *transform* our system of elder care from one designed to maximize extraction of value to one designed to meet needs for vulnerable people, i.e., everyone who lives to old age.[322] In other words, the task is no less than decommodification of care in favor of age-integrated, universal health care and housing provided by well-compensated and empowered care workers.

This perspective need not mean discarding legal reforms as critical tools in transformation. Incremental reforms can be important steps along the way, so long as they are the right kinds of reforms and the struggles for achieving them are the right kinds of struggles. I invoke here the framework of "non-reformist reforms"[323] to assess what incremental reforms might help to build political power toward the ambitious horizon of decommodified universal quality care.

Legal scholar Amna Akbar explains the seeming oxymoron of non-reformist reforms as a framework that transcends the dichotomy

319. *See* Inflation Reduction Act of 2022, Pub. L. No. 117-369, 136 Stat. 1818 (2022).

320. Amna Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2023, 2547 (2023).

321. Alabama Ass'n of Realtors v. DHHS, 594 U.S. 758 (2021); *see also id.* at 2547 ("The Supreme Court's rebuke of the CDC's issuance of a limited moratorium speaks to the central problem of the courts for projects aiming to undermine the state's fidelity to landlords, private property, and the real-estate industry.").

322. *See* Fineman, *supra* note 59, at 112.

323. *See* ANDRE GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 7 (Martin A. Nicolaus & Victoria Ortiz trans., Beacon Press ed. 1967) (1964); Akbar, *supra* note 320, at 2497.

between violent revolution on the one hand and liberal reformism on the other.[324] Liberal reformism seeks to ameliorate harms arising in the existing social order but, as disability scholar Marta Russell put it, "liberalism fails to expose . . . that the mode of production plays the chief causal role in determining oppressive social outcomes."[325] As the foregoing parts of this Article indicate, our mode of production is commodity-based, turning the labor and resources to meet social needs into objects of exchange from which to extract value for profit.[326] Thinking within the framework of non-reformist reforms raises the question of how we can begin to transform a major, ever growing part of this commodity-based system, commodified care, without resigning ourselves to ameliorative reforms.

Akbar offers a desiderata for what qualify as non-reformist reforms: "They require a horizon beyond legalism; they embrace antagonism and conflict rather than depoliticization and neutrality; they aim to shift the balance of power; and they build mass organization and prepare the people to govern."[327] Whereas "[r]eformism fosters continual reliance on the ruling class, attempting to foreclose contesting fundamental questions of the shape of the state or the economy,"[328] non-reformist reforms seek to undermine the prevailing system while gesturing at a new one and building organized power among the working class.[329] The framework "facilitates strategic and tactical questions that 'reformist reforms' do not: it requires engaging with systems as they are, allows one to hold in view bold and radical horizons, and facilitates the identification of strategic battles that might serve as a bridge through popular agitation."[330]

Akbar includes struggles for the decommodification of housing and health care in the framework, discussing campaigns that "call for the state to suspend its loyalty to the market and capital in favor of popular need."[331] One instructive example Akbar describes is the "cancel rent" campaign organized by a Kansas City tenants union.[332] KC

324. Akbar, *supra* note 320, at 2562.
325. RUSSELL, *supra* note 113, at 13.
326. *See* discussion *supra* Section IV.C.
327. Akbar, *supra* note 320, at 2562.
328. *Id.* at 2523.
329. *Id.* at 2527.
330. *Id.* at 2523.
331. *Id.* at 2545.
332. *Id.* at 2497.

Tenants' objectives ranged over a spectrum from legal reforms (a tenants' bill of rights, right to counsel in eviction proceedings, a local eviction moratorium, a referendum to build more affordable housing) to more sweeping and aspirational political goals of developing social housing "outside the scope of the private market, not available for profit or speculation."[333]

KC Tenants illustrate Akbar's desiderata in action. The aspiration for social housing is a horizon beyond legal reforms, while the immediate legal reforms they fought for were calculated to shift the balance of power by fortifying renters against housing insecurity, not as an end in itself but as a step toward the horizon of decommodified housing.[334] That step required direct conflict with the privileged class of landlords and housing developers. But this antagonism against one class can only be sustained through solidarity within the masses. Crucially, the people engaging in this campaign were "a multigenerational, multiracial, antiracist base of poor and working-class tenants."[335]

Throughout this Article, I have indicated ways that our system for financing elder care divides the working class against itself along generational, gendered, and racialized lines. For example, Medicaid-impoverishment and Medicaid estate recovery pit elders against their children.[336] MA pits elders against care providers by incentivizing less treatment for more patients.[337] Furthermore, care workers organizing for higher wages and better treatment have met resistance from some disability rights advocates for fear that higher wages will make care less accessible.[338]

These divides must be transcended in order to build the mass power required for meaningful progress. The path toward the horizon of decommodified care must be a convergence of the fragmented paths that struggles for health care and housing justice currently tread, divided according to different identity groups based on race, gender, age, disability, citizenship status, and so on. Besides KC Tenants, other models exist thanks to radical organizing often led by people of color who, historically excluded from the family wage, have longer histories of

333. *Id.* at 2548–49.
334. *Id.*
335. *Id.* at 2547.
336. *See supra* notes 248–50 and accompanying text.
337. *See supra* notes 205–10 and accompanying text.
338. Samuel R. Bagenstos, *Disability Rights and Labor: Is This Conflict Really Necessary?*, 92 IND. L.J. 277, 289 (2016).

working and organizing in commodified care.[339] For example, the Young Lords and Black Panthers notably organized health practitioners and patients together across class and racial divides to advance the common cause of care providers and communities in need of care.[340]

Several of the reforms I mention above are unsatisfying on their own but, when assessed using the non-reformist reform framework, may be seen as strategic advances that build working-class solidarity, power, and will. For example, adding a long-term care benefit to Medicare Part A would represent a substantial step toward decommodification of health care not for a particular identity group but for everyone who grows old. Adding a homestead exemption to Medicaid estate recovery would slow the widening of economic inequality and unite the interests of older and younger family members in the financing of older members' long-term care. Empowering care workers with labor protections would improve the conditions of their work and therefore the conditions of care for elders. Ending no-fault eviction would undercut the alienability and therefore the commodity nature of rental housing, giving the broad cross-section of the working class who rent more power and security. While highly ambitious in today's political conjuncture, such reforms are critical first steps to struggle for because doing so would help undermine the dynamic by which our system of financing elder care currently divides us.

VI. Conclusion

In this Article, I have argued the elder care system upwardly redistributes wealth away from the working class, widening economic inequality and enriching elites while delivering inadequate care under exploitative working conditions. Crucially, I have argued the law structures and facilitates this process, which suggests that legal reforms can help to arrest it. At a moment when the very existence of Social Security, original Medicare, and Medicaid appear to be under threat, it may seem

339. *See, e.g.*, Premilla Nadasen, *Domestic Workers' Rights, the Politics of Social Reproduction, and New Models of Labor Organizing*, VIEWPOINT MAG. (Oct. 31, 2015), https://viewpointmag.com/2015/10/31/domestic-workers-rights-the-politics-of-social-reproduction-and-new-models-of-labor-organizing/ [https://perma.cc/6U3Q-YDFT].

340. *See, e.g.*, *This Day in History, July 14, 1970: Young Lords Occupy Lincoln Hospital*, ZINN EDUC. PROJECT, https://www.zinnedproject.org/news/tdih/young-lords, [https://perma.cc/9FYN-8PBP] (last visited Mar. 11, 2025); COOPER, *supra* note 20, at 181–82.

out-of-step with the needs of our time to critique existing programs and advocate for progressive reforms that would be ambitious even in a less hostile political environment. However, the narrative that population aging is leading us inevitably to workforce and budget shortfalls, as reflected in the trope of a Silver Tsunami, helps to make those programs vulnerable to such attacks. I have countered this narrative by shedding light on some of the myriad ways that our aging population and its care workforce are sources of tremendous profit for an increasingly concentrated set of private interests, a dynamic more aptly compared to a Silver Rush, a frenzied race to extract as much value as possible from elders and their care providers. This counter-narrative casts elders not as a burden on the young but as a bonanza for private capital. Building on this insight, and recognizing its legally-constructed nature, enables us to fight the prevailing political headwinds more effectively. It points us in a different direction, redirecting the distribution of value streams underwriting the elder care system away from private capital and toward care workers. This change of orientation enables us to envision a future in which older adults and those who care for them enjoy the security and dignity they deserve.