

Journal of Aging Law & Policy



STETSON LAW

Stetson University College of Law

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Letter from the Editor

Dear Readers,

It is my absolute honor and privilege to bring you the 17th Volume of the Journal of Aging Law and Policy, brimming with new ideas and creative solutions to the problems faced by many of our country's older adults. In this volume we cover a variety of topics, including treatment of older adults released from the prison system; implications of the law on caregivers, including protecting individuals from caregiver abuse; and the ever-present issues presented by social security.

It is our aim to provide timely, thoughtful, and practical scholarship in aging to have conversations focused on protecting some of the most vulnerable people in our society. It is my sincere belief that the articles in this volume do just that, and I am thrilled that you now have the chance to read them.

Here is a preview of the featured articles in this issue:

Failing Aging: Congress, the Social Contract, and "Saving" Social Security and Medicare

The prolific Professor Rebecca Morgan turns her attention to Social Security and Medicare, arguing that we should analyze the government's obligations through the lens of social contract. The article begins with a granular analysis of social contract, expanding to its application to the context at hand, and finding that promises made in the past created a binding contract by our government to the people.

Upon Further Consideration: The Case for Trusts as Contracts

This article discusses and advocates for the proposition that trusts should be treated like contracts. If we can treat trusts like contracts, the door is opened for options that ordinarily would not be available through solely the lens of trust law, such as alternative means of modification and additional enforceable trust provisions.

Beyond the Sentence: The Constitutional Crisis of End-of-Life Care for Incarcerated Individuals

This article discusses the issue of end-of-life care within prisons, arguing that the lack thereof is a systematic crisis. This is analyzed through an ethical lens, highlighting lack of human dignity, and a legal lens, discussing the barriers created by statute and Supreme Court jurisprudence on prisoners bringing Eighth Amendment claims.

Barriers to Reintegration: The Socioeconomic Marginalization of Elderly Former Inmates

This article focuses on the challenges and interconnected issues facing elderly former inmates as they attempt to reintegrate into society, arguing that the law should do more to provide services and assistance. The article emphasizes that there is a cycle of hardship created by the stigma of a conviction, leading to a higher likelihood of reincarceration without proper support.

Aging in the Eye of the Storm: Addressing the Need for Stronger Disaster Preparedness for Older Adults in Long-Term Care Facilities

This article makes the case that disaster preparedness in long term care facilities such as nursing homes fall woefully short, discussing noncompliance with existing regulations and lack of coordination between regulators. Herrera discusses several potential fixes, such as a more active Center for Medicare and Medicaid Services, and additional judicial remedies.

The Caregiver Burden: The Impact of the Current Bureaucratic System on Caregivers and Older and Disabled Individuals

This article discusses unpaid family caregivers, and the inadequate government programs currently in place to help support them as they make sacrifices to care for a loved one. Martin recommends that these processes be streamlined to make them accessible and further suggests tax incentives and workplace benefits for caregivers.

Home Is Where the Heart Is: Protecting Older Adults From Financial Abuse in the Place They Love

Using California as a template, this article discusses the implications and impact of financial abuse on aging individuals, and advocates for broader protections in this field. Mickleburgh discusses the limitations of elder abuse restraining orders, emphasizing the importance of the return of real property when it is taken by fraud or undue influence.

Restorative Justice, Elder Mistreatment, and Cognitive Impairment: Toward Expanding Current Frameworks

Adding to the burgeoning field of scholarship that is restorative justice, this article discusses the implications of a restorative justice approach on older adults, with an emphasis on cognitively impaired individuals. The article argues that restorative justice is appropriate for this purpose, showing a real-world example of efficacy and advocating for further research and development.

Each of these articles represents a step forward in scholarship on each of their respective topics, reflective of this Journal's commitment to supporting and publishing forward-thinking and practical scholarship.

I am deeply grateful to all our student editors and faculty advisors; this would not have been possible without your support. Thank you for giving your time to our journal. Thank you to our authors, I appreciate the time and dedication it takes to present your ideas in this way. A final thank you to the support of our readers, I hope you enjoy Volume 17.

Sincerely,

Logan Culp

Editor-in-Chief

Journal of Aging Law & Policy

FAILING AGING: CONGRESS, THE SOCIAL CONTRACT, AND “SAVING” SOCIAL SECURITY AND MEDICARE

Rebecca C. Morgan*

Abstract

Social Security and Medicare are part of the retirement security social contract the government has with the American people, but without action from Congress, Trustees of Social Security and Medicare predict shortfalls within the next decade. This Essay begins with a look at the social contract generally, then as applied to Social Security and Medicare. Focusing on Social Security, the Essay explores the reasons for the creation of Social Security and its foundational importance to Americans of all ages, the economy, and social policy. The Essay examines the promises made by various U.S. presidents to the American people, arguing that those promises create an obligation to the American people and are not just political posturing. After examining the addition of Medicare to the retirement security social policy, the Essay considers the forces contributing to the coming shortfalls, including how prior administrations had responded, and argues that when Congress makes changes to the programs, Congress must be guided by the purposes and principles of the programs and the social contract between the government and the people.

I. Introduction

Social Security is in financial trouble—again.¹ So is Medicare.² “Millions of Americans worry about Social Security—whether they will get the full retirement paychecks promised to them in years to come. And many younger people believe . . . that by the time they are ready to retire, Social Security will no longer be there for them.”³

According to the 2025 Social Security Trustees Report, the Social Security Trustees estimate that, without any changes, Social Security will have to pay reduced benefits to beneficiaries starting in 2034.⁴ Medicare Part A is also projected to be unable to pay its obligations starting in 2033.⁵ These financial challenges are of no surprise. As has happened more than once since its inception,⁶ Social Security is headed toward a shortfall. The high cost of health care in the United States makes it hard for Medicare Part A to stay solvent.⁷ The popularity of these programs among Americans⁸ coupled with politicians’ need to win and stay in office, as well as cultural and health

* © 2026, All rights reserved. Professor of Law, Stetson University College of Law. This Essay was written as the Author’s 2024 sabbatical project. The Author would like to thank Elizabeth Campbell and Sofia Herrera for their helpful research, the Honorable Michael P. Allen for his insights and comments, her colleagues who read this Essay and offered comments and edits, and Professor Sally Waters, the Queen of Reference, for her amazing research skills. Because of the passage of time to publication, some references have been updated to reflect more current reports.

¹ THE BD. OF TRUSTEES, FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS, THE 2025 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUND, H.R. DOC. NO. 119-62, at 2–7 (2025) [hereinafter 2025 SSA TRUSTEES].

² THE BDS. OF TRUSTEES, FED. HOSP. INS. & FED. SUPPLEMENTARY MED. INS. TR. FUNDS, THE 2025 ANNUAL REPORT OF THE BOARDS OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUNDS, H.R. DOC. NO. 119-63, at 1–5 (2025) [hereinafter 2025 MEDICARE TRUSTEES].

³ Jeff Sommer, *The Social Security Fix Nobody Wants to Talk About*, N.Y. TIMES (June 4, 2024), <https://www.nytimes.com/2024/05/31/business/social-security-trust-funds.html>.

⁴ 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62, at 3.

⁵ 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63, at 6–8, 26.

⁶ *Id.* at 25 (“[T]he HI trust fund [has] experienced various periods of surpluses and deficits.”); 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62, at 175 (“The 1983 report was the last report for which the actuarial balance was positive for the OASDI program.”).

⁷ 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63, at 26.

⁸ See, e.g., Lydia Saad, *Americans Fairly Satisfied with Social Security System*, GALLUP (Feb. 24, 2023), <https://news.gallup.com/poll/470894/americans-fairly-satisfied-social-security-system.aspx>.

changes, makes it easy to lose sight of the original purpose of these programs, especially when it comes time to “save” them.

This Essay will discuss the retirement security social contract between the government and the American people, the representations made by certain presidents regarding Social Security and Medicare, the importance of these programs in providing retirement financial security to older Americans, and how congressional actions to “save” the programs further the intent of these programs—or not.

First, this Essay will briefly examine the concept of the social contract between the U.S. government and older Americans. Then it will give a brief overview of Social Security as it pertains to the social contract, emphasizing the promises to older Americans made by various presidents regarding the purpose of Social Security. Next, the Essay discusses the enactment of Medicare after many efforts, with a focus on Medicare Part A. There is a brief discussion of the impact, if any, made by the retirement of the baby boomers on the solvency of the programs.

This Essay then argues that this retirement security social contract creates moral and political obligations between Congress and the American people, and that Congress must consider these obligations in any actions it takes regarding Social Security and Medicare. To support this thesis, the Essay turns to an analysis of whether congressional action or inaction, as the case may be, is failing older Americans through the changes to Social Security and Medicare. These changes may be done to make the programs more financially secure, but are made seemingly without an acknowledgement of the government’s social contract with older Americans. There is no doubt that Congress has the authority to change these programs,⁹ but in order to fulfill the intent of these programs, this Essay argues that what matters are the ways the programs are changed and that without these considerations, Congress is, in fact, failing aging.

II. The Social Contract Generally

Black’s Law Dictionary defines social contract as “[t]he express or implied agreement between citizens and their government whereby individuals agree to surrender certain freedoms in exchange for mutual protection; an agreement forming the foundation of a political society.”¹⁰ Jean-Jacques Rousseau advanced the concept of the social contract in his writings.¹¹ Rousseau’s political philosophy was that “[t]he point of the Social Contract theory . . . is that legitimate society exists by the agreement of the people, and acts by popular will.”¹²

As is true with a contract, both parties enter a bargain of sorts. In the case of a social contract between the government and its citizens, there is an “agreement” where citizens give up freedoms in return for something from the government that brings protections of some kind to those citizens. There is a common need, problem, or interest of citizens that can be met through government action or programs. A social contract gives a framework

⁹ 42 U.S.C. § 1304; *see also infra* text accompanying note 29.

¹⁰ *Social Contract*, BLACK’S LAW DICTIONARY (12th ed. 2024). For a detailed discussion of social contract theory, see Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1 (1999).

¹¹ *See, e.g.*, JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (G.D.H. Cole trans., J.M. Dent & Sons 1913). For an in-depth discussion of the social contract, its evolution, and application in the United States, see Brian Gilmore, *American Rousseau: Barack Obama and the Social Contract*, 35 T. MARSHALL L. REV. 9 (2009).

¹² ROUSSEAU, *supra* note 11, at xxxv. In his book Rousseau writes:

[If] the State is a moral person whose life is in the union of its members, and if the most important of its cares is the care for its own preservation, it must have a universal and compelling force, in order to move and dispose each part as may be most advantageous to the whole . . . [T]he social compact gives the body politic absolute power over all its members also; and it is this power which, under the direction of the general will, bears, as I have said, the name of Sovereignty.

But, besides the public person, we have to consider the private persons composing it, whose life and liberty are naturally independent of it. We are bound then to distinguish clearly between the respective rights of the citizens and the Sovereign, and between the duties the former have to fulfil as subjects, and the natural rights they should enjoy as men.

Id. at 24. As far as the impact a social contract has on citizens, Rousseau offers that “[e]ach [person] alienates . . . by the social compact, only such part of [their] powers, goods, and liberty as it is important for the community to control; but it must also be granted that the Sovereign is sole judge of what is important.” *Id.*

for understanding the relationship of the government to its citizens vis-à-vis a specific program, and provides an understanding of the reasons for such program.¹³

Compare the social contract with a private contract between two citizens or their representatives. With the private contract, these citizens would be actively involved in crafting the terms of the agreement to which they will be bound, and both would benefit from the bargain and bind themselves to the obligations.¹⁴ However, with a social contract, citizens are not actively involved in the crafting of the agreement except in a limited way—their vote regarding the election or retention of their representative or senator, or through a constituent communication. The citizens would benefit from the programs and services provided through the social contract¹⁵ but have no direct impact on the obligations to which they find themselves bound, and are unlikely to have any remedies, contractual or otherwise, regarding their actions under the social contract.

With the creation of the Social Security program, the government assumed a duty to citizens who paid taxes into the system.¹⁶ At the time of enactment, the country was fighting through the Great Depression and poverty was widespread.¹⁷ As part of the New Deal, congressional enactment of Social Security created a social contract to ensure retirement security. Under this contract, individuals would give up part of their earnings through the payment of taxes on covered employment, and, on their retirement, they would have a guaranteed income that would keep them from destitution.¹⁸ The program would ultimately serve the greater good, protect older individuals from forces outside their control,¹⁹ garner significant support in Congress,²⁰ and be extremely popular

¹³ Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1414–15 (2001); see also ROUSSEAU, *supra* note 11, at 24. Rousseau explains the reciprocal obligations between the government and citizens as follows:

The undertakings which bind us to the social body are obligatory only because they are mutual; and their nature is such that in fulfilling them we cannot work for others without working for ourselves . . . It proves that the general will, to be really such, must be general in its object as well as its essence; that it must both come from all and apply to all; and that it loses its natural rectitude when it is directed to some particular and determinate object . . .

Id. at 24–25.

¹⁴ See, e.g., *Contract*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“[A]greement between two or more parties creating obligations that are enforceable or otherwise recognizable at law . . .”).

¹⁵ See, e.g., Fineman, *supra* note 13.

¹⁶ See, e.g., Charles A. Reich, *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor*, 71 CHI.-KENT L. REV. 817, 817 (1996) (“Under the New Deal increased constitutional powers were assumed by the government in return for societal responsibility to the individuals who gave up their economic independence in recognition of the greater efficiency of large organizations. . . . [i]f the new social contract was to be respected, welfare state protections and benefits for the middle class and the poor must be treated as *entitlements*—a substitute for old forms of property.”); see also Randall G. Holcombe, *The Continuing Social Contract*, 53 SOC. SCI. 211, 211 (1978) (“The basis of the social contract theory of government is that all individuals in a free society are bound in their interactions by an implicit social contract, which dictates the rights and responsibilities of the individual within society.”).

On March 25, 2024, Justice Stephen Breyer appeared on the Late Show with Steven Colbert, discussing his new book, *READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM*. As part of their discussion regarding judicial philosophy, Justice Breyer mentioned the New Deal and how the Supreme Court had to change its view of the Constitution and property, resulting in allowing more control to Congress and federal agencies to govern. See The Late Show with Steven Colbert, *Justice Breyer: You Don’t Want a Judge to be Influenced by Popular Opinion when Judging a Case*, YOUTUBE, at 30:01–55 (Mar. 25, 2024), <https://www.youtube.com/watch?v=j6H8jgBg2Bc>; see also STEPHEN BREYER, *READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM* 237–41 (2023). In Chapter 19, titled *Three Paradigm Shifts*, Justice Breyer discussed the “New Deal Court” and explained a change in the Court’s direction, especially that of the approach in “interpreting the Constitution.” *Id.* at 238.

¹⁷ See *infra* Part III(A).

¹⁸ Fernando M. Torres-Gil, *The New Aging: Individual and Societal Responses*, 10 ELDER L.J. 91, 95 (2002) (discussing the New Deal and Social Security); see also *Flemming v. Nestor*, 363 U.S. 603, 610 (1960) (quoting *Helvering v. Davis*, 301 U.S. 619, 641 (1937)) (“The ‘right’ to Social Security benefits is in one sense ‘earned,’ for the entire scheme rests on the legislative judgment that those who in their productive years were functioning members of the economy may justly call upon that economy, in their later years, for protection from ‘the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey’s end is near.’”).

¹⁹ See, e.g., *FDR’s Statements on Social Security*, SOC. SEC., <https://www.ssa.gov/history/fdrstmts.html> (last visited Mar. 24, 2026) (Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration) [hereinafter *FDR’s Statements*]; *id.* (Presidential Statement Signing the Social Security Act).

²⁰ *Birth and Early Days of Social Security in the U.S.: Edwin Witte*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/ew25.html> (last visited Mar. 24, 2026) (noting overwhelming bipartisan support in passing the law).

with the American people.²¹

Congress, in enacting the Social Security and Medicare programs, imbued them with several core principles as part of this social contract: to give Americans retirement and health security through payment of taxes that are tied to employment; to recognize that the government's obligation to protect citizens from impoverishment in their later years is tied to taxation; and to provide that Americans who meet the requirements of the programs are entitled to benefits. In other words, "Social Security has come to symbolize a social contract and an expectation by all Americans that they will have a measure of protection from the vicissitudes of old age."²² There is a benefit of this contract for Americans—mandatory saving for their future retirement, and an obligation—paying taxes into Social Security, but as discussed later, very little remedy for those who will or are receiving the benefit. Congress makes the laws; it can change them.²³

III. The Social Contract and Social Security²⁴

Social Security is a multi-faceted, complex program of great importance to recipients. Three points about Social Security are discussed in this section: first, why Social Security was created when it was, next, why it was changed so soon after its enactment, and finally, Social Security's importance to recipients, the economy, and the country.

A. Why Social Security?

As explained in Section II, on the heels of the Great Depression and the Dust Bowl,²⁵ Congress and President Roosevelt moved to pass the Social Security Act.²⁶ There had been many wide-ranging proposals for some kind of economic security for older Americans.²⁷ The traditional informal way of providing economic security was and is through support of family and other relatives.²⁸

Hopefully older Americans had worked and saved, but unforeseen circumstances may have rendered their resources insufficient or nonexistent. Before the passage of the Social Security Act, charity was an important, and perhaps the only, option for some.²⁹ Thus, prior to President Roosevelt assuming office, it seemed the primary

²¹ See, e.g., Emerson Sprick, *Social Security: On Autopilot and Heading Toward a Cliff*, BIPARTISAN POL'Y CTR. (May 6, 2024), <https://bipartisanpolicy.org/article/social-security-autopilot-heading-toward-cliff/> (describing Social Security as the "nation's most effective and most popular federal program").

²² Torres-Gil, *supra* note 18; see also *Future of Government: The Social Contract*, WORLD BANK GRP., <https://www.worldbank.org/en/programs/futureofgovernment/social-contract-role> (last visited Mar. 24, 2026) (social contract relies on broader society and citizens benefiting from the bargain with the state, recognizing impact of imbalance of power and resources).

²³ *Supreme Court Case: Fleming v. Nestor*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/nestor.html> (last visited Mar. 24, 2026) ("More so than general federal income taxes can be said to establish 'rights' to certain government services. [It] is often expressed . . . that Social Security benefits are 'an earned right.' This is true enough in a moral and political sense. But like all federal entitlement programs, Congress can change the rules regarding eligibility . . . The rules can be made more generous, or they can be made more restrictive. Benefits which are granted at one time can be withdrawn . . .").

²⁴ For an in-depth discussion of the politics of Social Security from President Roosevelt to President George W. Bush, see NANCY J. ALTMAN, *THE BATTLE FOR SOCIAL SECURITY: FROM FDR'S VISION TO BUSH'S GAMBLE* (2005). For a more general discussion, see R. DOUGLAS ARNOLD, *FIXING SOCIAL SECURITY: THE POLITICS OF REFORM IN A POLARIZED AGE* (2022).

²⁵ See, e.g., Larry DeWitt, *The Development of Social Security in America*, 70 SOC. SEC. BULL., no. 3, 2010, at 4 (discussing the country's recovery and actions yet to be taken).

²⁶ The catalyst for its passage was the Great Depression, but the "reason" for it was individuals' economic insecurity. *Id.*

²⁷ See, e.g., *Historical Background and Development of Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/briefhistory3.html> (last visited Mar. 24, 2026) (discussing proposals and development of programs to provide economic security including guilds in Europe, "Poor Laws", fraternal organizations in the U.S., military pensions, company pensions, state aid, "Share Our Wealth", the Townsend Plan, and the Bigelow Plan, to name a few); see also Reich, *supra* note 16, at 817–18 (discussing "economic citizenship" and the importance of treating benefits as "legally protected rights").

²⁸ *Historical Background and Development of Social Security*, *supra* note 27; see also ALTMAN, *supra* note 24, at 7 (older Americans would live with children where possible; otherwise, the option was living in "poorhouse").

²⁹ See, e.g., ALTMAN, *supra* note 24, at 16.

way of providing economic security to those in need was an ad hoc welfare approach at the local or state level.³⁰ Creating Social Security was a major change in the government’s approach to retirement security, shifting the focus for retirement security to an organized, proactive one. Americans, in partnership with the government, could plan for, and be forced to save toward, their own financial security for when they became older.

With President Roosevelt’s approach, the provision of economic security turned from welfare to social insurance,³¹ using traditional insurance principles.³² As an explanation for the need for this program of economic security, President Roosevelt noted the importance of providing “security against the hazards and vicissitudes of life.”³³ President Roosevelt went on to note that “[f]ear and worry based on unknown danger contributed to social unrest and economic demoralization. If, as our Constitution tells us, our Federal Government was established among other things, ‘to promote the general welfare,’ it is our plain duty to provide for that security upon which welfare depends.”³⁴ But this was only part of the solution to providing financial security.

The Social Security program lasts through the life of the beneficiary, although the role of the beneficiary changes once they reach retirement age. They start as workers paying taxes into the program and then they become beneficiaries of the program, receiving benefits for the remainder of their lives.³⁵

B. Design the Contract, Then Change the Terms Through Congressional Action?

The program as initially designed was not without flaws,³⁶ which to some extent are contributing to the solvency problem today. Nor was there unanimous support for the bill.³⁷ Yet today, the importance of Social Security and Medicare cannot be overstated.³⁸

Almost from the start, the viability of the Social Security program was destined to change. The 1939 Amendments to the Social Security Act³⁹ added, among other changes, the Social Security Trust fund.⁴⁰ Before

³⁰ *Historical Background and Development of Social Security*, *supra* note 27. The Social Security Administration noted that prior to the Great Depression, states were faced with citizens experiencing economic insecurity. *Id.*; see also James P. Cooney & H. David Prior, *Social Welfare—An Emerging Doctrine of Statutory Entitlement*, 44 NOTRE DAME L. REV. 606–07 (1969) (noting Social Security amounted to major change in how the United States approached the issue of poverty by moving the focus to the federal government for solutions).

³¹ *Historical Background and Development of Social Security*, *supra* note 27. Social Insurance is defined as “[i]nsurance provided by a government to persons facing particular perils (such as unemployment) [or disability] or to persons who have a certain status [such as the elderly or the blind]. Social insurance, such as that created by the Social Security Act of 1935, is typically part of a government’s broader social policy.” BLACK’S LAW DICTIONARY (12th ed. 2024); see also *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (“general welfare” spending as social policy).

³² *Historical Background and Development of Social Security*, *supra* note 27 (discussing the significance of social insurance in the design of the program, its historical development, and its flexible application); see also, e.g., ARNOLD, *supra* note 24, at 23; DeWitt, *supra* note 25, at 1–2 (“Social insurance provides a method for addressing the problem of economic security The concept of social insurance is that individuals contribute to a central fund managed by governments, and this fund is then used to provide income to individuals when they become unable to support themselves through their own labors. Social insurance differs from private insurance in that governments employ elements of social policy beyond strict actuarial principles, with an emphasis on the social adequacy of benefits as well as concerns of strict equity for participants.”); MITCHELL BARNES ET AL., THE HAMILTON PROJECT, THE SOCIAL INSURANCE SYSTEM IN THE U.S.: POLICIES TO PROTECT WORKERS AND FAMILIES 2–16 (2021) (discussing social insurance protections and support).

³³ *FDR’s Statements*, *supra* note 19 (Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration); see also *id.* (Message to Congress on Social Security); *id.* (Presidential Statement Signing the Social Security Act).

³⁴ *Id.* (Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration). *But see*, e.g., Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 737 (1964) (discussing that the money paid by workers into Social Security, for example, cannot be used by the worker for “savings or insurance”).

³⁵ *Flemming v. Nestor*, 363 U.S. 603, 609 (1960).

³⁶ See, e.g., Alicia H. Munnell, *Social Security’s Financial Outlook: The 2023 Update in Perspective*, 23 CTR. RETIREMENT RSCH. BOS. COLL., no. 9, Apr. 2023, at 1 (“This financing approach is the result of a policy decision in the late 1930s to pay benefits far in excess of contributions for the early cohorts of workers. The decision essentially gave away the trust fund that would have accumulated and, importantly, gave away the interest on those contributions.”).

³⁷ TAMAR B. BRESLAUER & WILLIAM R. MORTON, CONG. RSCH. SERV., RL30920, SOCIAL SECURITY: MAJOR DECISIONS IN THE HOUSE AND SENATE SINCE 1935, at 3–4 (2025) (discussing some objections to the retirement program, including preference for a charity model, or reliance on employer pensions); see also ALTMAN, *supra* note 24. Some objections from Republicans noted by Altman included the preference for a welfare system and concerns about competing against and putting an untenable burden on the private sector. *Id.* at 68–70.

³⁸ Perhaps President Roosevelt foresaw how they would be a critical part of our economy, culture, and social structure. See *FDR’s Statements*, *supra* note 19 (Presidential Statement Signing the Social Security Act).

³⁹ Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360 (codified as 42 U.S.C. §§ 401–433).

⁴⁰ *Id.* § 201, 53 Stat. at 1362 (Federal Old-Age and Survivors Insurance Trust Fund); 42 U.S.C. § 401(a).

the 1939 Amendments, the vision for Social Security was the buildup of the trust fund, but with the 1939 Amendments it was basically turned into a “pay as you go” system, resulting in the situation where retirees received benefits that exceeded the amount of their contributions.⁴¹ The slowly growing problems with the program’s long-term solvency had begun.

C. Social Security’s Importance

Unfortunately, Social Security has taken on increasing importance in providing financial security to older Americans.⁴² With widespread support for the program from their constituents,⁴³ Social Security has been viewed as untouchable by politicians,⁴⁴ and for some time viewed as “the *third rail* of American politics.”⁴⁵

How important are Social Security retirement benefits not only in fulfilling the goals of President Roosevelt through this social contract but as an income source for retired Americans? According to Social Security, almost 100% of older adults (60 to 89 years of age) currently draw funds or will in the future.⁴⁶ It is the biggest income source for the majority of beneficiaries; in 2015, forty percent of beneficiaries received more than fifty percent of their income from Social Security and for a smaller number of beneficiaries, it was ninety percent.⁴⁷ The benefits, provided in an effective and efficient way, are clearly integral to retirement security.⁴⁸

Although Social Security data shows the importance of Social Security in providing some form of retirement security for older Americans,⁴⁹ Social Security is not only important to individual beneficiaries;⁵⁰ it is also important to the economy, the federal government, and the states. Without Social Security, many people would be at risk for financial insecurity.⁵¹ Many recipients might fall below the poverty line,⁵² likely resulting in a greater reliance on state aid for services and supports. According to the 2025 SSA Trustees’ Report, approximately 54 million retired older Americans and dependents received benefits, with 6 million receiving survivors’ benefits.⁵³

⁴¹ Munnell, *supra* note 36; *see also* ARNOLD, *supra* note 24, at 2–5.

⁴² *See, e.g.*, Torres-Gil, *supra* note 18, at 94 (“The politics of aging in the year 2002 have led to an interesting and important debate over the future of Social Security, the bedrock of the New Deal. This program has become the basic income security for persons over sixty-five.”); KATHLEEN ROMIG, CTR. BUDGET & POL’Y PRIORITIES, SOCIAL SECURITY LIFTS MORE PEOPLE ABOVE THE POVERTY LINE THAN ANY OTHER PROGRAM 1–2 (2025) (citing *Policy Basics: Top Ten Facts About Social Security*, CTR. BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/social-security/policy-basics-top-ten-facts-about-social-security> (last updated May 31, 2024)); *see also, e.g.*, Reich, *supra* note 16, at 734 (noting that government benefits are the primary income source for many Americans.); *Keeping Our Promise to Older Adults and People with Disabilities: The Status of Social Security Today: Hearing Before the S. Spec. Comm. on Aging*, 118th Cong. 19 (2024) (statement of Martin O’Malley, Comm’r, Soc. Sec. Admin.) (eighty percent of Americans support Social Security).

⁴³ *See, e.g.*, Saad, *supra* note 8.

⁴⁴ *See* Karen Kornbluh & Rachel Homer, *The New Family Values Agenda: Renewing Our Social Contract*, 4 HARV. L. & POL’Y REV. 73, 79–80 (2010) (“By making these programs automatic and tying them not only to contributions but also to past work, FDR ensured that they would become the large, politically sacrosanct programs they are today. Indeed, FDR famously stated that he created the payroll tax so that ‘no damn politician can ever scrap my social security program.’”) (citing 2 ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 309 (Mariner Books 1st ed., 2003)).

⁴⁵ William Safire, *Third Rail*, N.Y. TIMES (Feb. 18, 2007), <https://www.nytimes.com/2007/02/18/magazine/18wwlnsafire.t.html> (emphasis in original) (discussing the origin of the phrase as applied to Social Security during the Reagan administration and attribution of it to Kirk O’Donnell, counsel to House Speaker Tip O’Neill).

⁴⁶ ROMIG, *supra* note 42; *Policy Basics: Top Ten Facts About Social Security*, *supra* note 42 (noting in Fact #3 that Social Security provides a foundation of retirement protection for nearly all people in the U.S.).

⁴⁷ *Policy Basics: Top Ten Facts About Social Security*, *supra* note 42 (citations omitted); *see also* ROMIG, *supra* note 42.

⁴⁸ *Policy Basics: Top Ten Facts About Social Security*, *supra* note 42 (citations omitted); *see also* DeWitt, *supra* note 25, at 1 (explaining that insurance principle is the strategy of reducing a person’s economic risk through paying into a fund from which payments are made).

⁴⁹ *Fact Sheet*, SOC. SEC. ADMIN, <https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf> (last visited Mar. 24, 2026); Irena Dushi & Brad Trenkamp, *Improving the Measurement of Retirement Income of the Aged Population* 14, 18 (Soc. Sec. Admin., ORES Working Paper No. 116, Jan. 2021), <https://www.ssa.gov/policy/docs/workingpapers/wp116.pdf>.

⁵⁰ *Fact Sheet*, *supra* note 49.

⁵¹ *See, e.g.*, ROMIG, *supra* note 42.

⁵² *Id.*

⁵³ 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62, at 2; *see also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-106667, SOCIAL SECURITY SERIES PART 1: THE DILEMMA 1 (2023).

Regarding the monthly payments a recipient receives, the Government Accountability Office (“GAO”) reported that the benefits replace some lost income when the worker retires or dies.⁵⁴ With Social Security’s periodic funding issues, it is unfortunate that a significant number of social security recipients receive most of their retirement income from their Social Security benefits.⁵⁵ Beneficiaries rely on those benefits for their normal living expenses.⁵⁶ The Center for Budget and Policy Priorities⁵⁷ described the received benefits as “modest,” but a significant source of income for many.⁵⁸

Because of this, the financial stability of the program has become even more important. Although Congress has the power to amend or even eliminate Social Security,⁵⁹ their importance to America means Congress and the courts should be giving great deference to these programs before changes are made. Congress has a special responsibility to older Americans to consider the promises made to them over the years about these programs and to view any proposed changes to these programs through the lens of the social contract⁶⁰ as originally outlined by President Roosevelt.⁶¹

D. The Promise of Retirement Security for Older Americans:

President Roosevelt, in a message to Congress reflecting on the Nation’s recovery from the Great Depression and tasks remaining for recovery, identified three objectives or factors for the nation’s recovery. The first was security for Americans, the second, “economic circumstances and the forces of nature,” and the third, setting the stage for the argument for passage of Social Security.⁶² Roosevelt was looking for an insurance solution to give solid protection against the financial limitations of aging; the solution would be a joint partnership between the federal government and the states.⁶³

Not too long after the program’s establishment, questions about Social Security were brought to the Supreme Court of the United States. Recall President Roosevelt’s insistence that Social Security be social insurance.⁶⁴ The Court recognized this in *Flemming v. Nestor*,⁶⁵ pointing out that a worker’s benefits were “noncontractual . . . [and] cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.”⁶⁶

But for one of the most compelling questions—whether Social Security beneficiaries had any property rights in the money they paid through taxes into the Social Security Trust Fund—the Supreme Court made clear that a recipient had *no* property right in their Social Security benefits; the program’s need for flexibility was paramount.⁶⁷

⁵⁴ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 53.

⁵⁵ *Id.* (“In 2023, Social Security benefits will replace just over 71 percent of pre-retirement earnings for newly entitled beneficiaries with relatively low career average earnings of about \$15,900 per year—these beneficiaries will receive about \$11,300 in benefits for the year. Social Security benefits also represent a substantial percentage of some workers’ total retirement income, ranging from 83 percent of income for the lowest income quintile (with a median income of about \$14,400 per year) to 30 percent for the fourth income quintile (with a median income of just over \$81,500 per year) in 2017. Of those receiving benefits in January 2023, 74 percent were retired workers who received an average annual benefit of nearly \$22,000.”) (citations omitted).

⁵⁶ *Id.*

⁵⁷ CTR. BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org> (last visited Mar. 24, 2026).

⁵⁸ KATHLEEN ROMIG, CTR. BUDGET & POL’Y PRIORITIES, RAISING SOCIAL SECURITY’S RETIREMENT AGE WOULD CUT BENEFITS FOR ALL NEW RETIREES 2 (2025)

⁵⁹ *Supreme Court Case: Fleming v. Nestor*, *supra* note 23.

⁶⁰ Thank you, Judge Allen, for this point.

⁶¹ *FRD’s Statements*, *supra* note 19 (Presidential Statement Signing the Social Security Act) (framing the Act as “protection to the average citizen and to his family . . . against poverty-ridden old age” and “tak[ing] care of human needs . . .”).

⁶² *Id.* (Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration); *see also Great Depression Facts*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM, <https://www.fdrlibrary.org/great-depression-facts> (last visited Mar. 24, 2026).

⁶³ *FRD’s Statements*, *supra* note 19 (Presidential Statement Signing the Social Security Act).

⁶⁴ *Id.*

⁶⁵ 363 U.S. 603 (1960); *see also Supreme Court Case: Fleming v. Nestor*, *supra* note 23.

⁶⁶ *Flemming*, 363 U.S. at 609–10 (citations omitted).

⁶⁷ *Id.* at 610.

The complexity of the program design demanded flexibility that would be lost if beneficiaries had property rights in prospective benefits.⁶⁸ It was doubtless that Congress, aware of the need for such flexibility, included in the original Act, and has since retained, a clause expressly reserving to it “[t]he right to alter, amend, or repeal any provision of the Act.”⁶⁹

E. The Social Contract Expanded: Medicare⁷⁰

Social Security retirement benefits were only one-half of the promise by President Roosevelt. The other half was insurance to cover medical care.⁷¹ As President Johnson commented, the advantage of Social Security could not be fully attained without a concomitant health care program.⁷²

In President Johnson’s 1965 message to Congress, he repeatedly referred to the proposal that became Medicare as health insurance, although beneficiaries pay taxes for Part A during the working phase of their lives.⁷³ Although President Johnson was successful in securing the Medicare program, he was not the first or only President to see its need. For example, in 1945, President Roosevelt spoke to Congress about adding health insurance to the Social Security program.⁷⁴ President Truman followed up in November of 1945, urging Congress to adopt a national health insurance program.⁷⁵

Prior to the adoption of Medicare, older Americans had few options. Private insurers thought them to be a “bad risk,” and insurers found themselves unable to provide “comprehensive, affordable health care coverage” for this cohort of the population.⁷⁶ Originally, Medicare was intended to cover the expenses from hospitalization since that seemed to be the most pressing issue in financing such health care.⁷⁷ Nowadays, there are many more problems in health care financing for older Americans, including prescription drug coverage and drug prices,⁷⁸

⁶⁸ *Id.*

⁶⁹ *Id.* at 611 (citing 42 U.S.C. § 1304).

⁷⁰ For an excellent discussion of the history of Medicare up until 1965, see PETER A. CORNING, THE EVOLUTION OF MEDICARE . . . FROM IDEA TO LAW (Soc. Sec. Admin., ORS Rsch. Rep. No. 29, 1969), <https://www.ssa.gov/history/corning.html>.

⁷¹ In his chapter titled *Who Makes Social Welfare Policy?*, Peter A. Corning discussed this half of the promise, noting that there was agreement on certain ideas and debating society’s duty to provide for it. *Id.* at 118–19.

⁷² *Special Message to the Congress: “Advancing the Nation’s Health”*, THE AM. PRESIDENCY PROJ., <https://www.presidency.ucsb.edu/documents/special-message-to-the-congress-advancing-the-nations-health> (last visited Mar. 24, 2026); see also *Historical Background and Development of Social Security*, *supra* note 27 (“Since World War II, there has been increasing awareness of the fact that the full value of Social Security would not be realized unless provision were made to deal with the problem of costs of illnesses among our older citizens . . . Compassion and reason dictate that this logical extension of our proven Social Security system will supply the prudent, feasible, and dignified way to free the aged from the fear of financial hardship in the event of illness.”).

⁷³ *Special Message to the Congress: “Advancing the Nation’s Health”*, *supra* note 72.

⁷⁴ ALTMAN, *supra* note 24, at 146; see also *State of the Union Address*, THE AM. PRESIDENCY PROJ., <https://www.presidency.ucsb.edu/documents/state-the-union-address> (last visited Mar. 24, 2026) (“An expanded social-security program and adequate health . . . programs must play essential roles in a program designed to support individual productivity and mass purchasing power.”).

⁷⁵ ALTMAN, *supra* note 24, at 147; see also Howard Markel, *How Medicare Came to Be, Thanks to Harry S. Truman*, PBS NEWS (July 30, 2014, 12:50 PM EDT) (noting that even though there were some attempts with the Eisenhower and Kennedy administrations, it was Truman’s efforts in 1945, 1947, and 1949 that gave the impetus for the Johnson administration to achieve success); *Special Message to the Congress Recommending a Comprehensive Health Program*, HARRY S. TRUMAN LIB. & MUSEUM, <https://www.trumanlibrary.gov/library/public-papers/192/special-message-congress-recommending-comprehensive-health-program> (last visited Mar. 24, 2026); *Special Message to the Congress on Health and Disability Insurance*, HARRY S. TRUMAN LIB. & MUSEUM, <https://www.trumanlibrary.gov/library/public-papers/98/special-message-congress-health-and-disability-insurance> (last visited Mar. 24, 2026); *Special Message to the Congress on the Nation’s Health Needs*, HARRY S. TRUMAN LIB. & MUSEUM <https://www.trumanlibrary.gov/library/public-papers/85/special-message-congress-nations-health-needs> (last visited Mar. 24, 2026); *Medicare and Medicaid (1965)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/medicare-and-medicaid-act> (last updated Feb. 8, 2022) (critics claimed this would result in “socialized medicine”).

⁷⁶ *Medicare and Medicaid (1965)*, *supra* note 75.

⁷⁷ See NAT’L ACAD. OF SOC. INS., MEDICARE AND THE AMERICAN SOCIAL CONTRACT ch. 2 (1999).

⁷⁸ See, e.g., Craig Palosky, *3 Charts: Drug Prices in the United States*, KFF (Feb. 7, 2024), <https://www.kff.org/health-costs/press-release/3-charts-about-drug-prices-in-the-united-states/> (discussing concerns about the costs of prescription drugs); see also Dan Witters, *In U.S., 66% Report Increase in Cost of Prescription Drugs*, GALLUP (Apr. 28, 2020), <https://news.gallup.com/poll/308036/report-increase-cost-prescription-drugs.aspx>.

the high cost of health care in the U.S.,⁷⁹ the cost of long-term care,⁸⁰ and the availability of, and costs for, caregivers.⁸¹

Medicare has long been considered part of the social contract the government has with older Americans⁸² and, like Social Security, has its own solvency struggles.⁸³ For example, the panel of the National Academy of Social Insurance offered criteria for considering Medicare in upcoming years.⁸⁴ The criteria included financial security of beneficiaries.⁸⁵ Another criterion addressed political accountability, which is the ability to measure the completion of goals and to identify and rectify problems in a way that is equitable to providers, beneficiaries, and taxpayers.⁸⁶ Given the high cost of health care, it makes sense to have Medicare structured as a social insurance program, since the program provides protection to those not able to be otherwise insured.⁸⁷

Medicare is certainly part of the social contract that supports the promise, made by President Roosevelt, to provide financial security to older Americans.⁸⁸ This program not only provides a level of financial security by providing some coverage for health care costs, but it also demonstrates the government’s commitment to older Americans.

Finally, with the passage of the Medicare Act, older Americans had access to health care coverage tied to Social Security.⁸⁹ This combination of the two programs completed the plan to provide retirement security to older Americans.

⁷⁹ See, e.g., Grace Sparks et al., *Americans’ Challenges with Health Care Costs*, KFF (Apr. 30, 2026), <https://www.kff.org/health-costs/issue-brief/americans-challenges-with-health-care-costs/>.

⁸⁰ See, e.g., 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/>; see also Ben Harris & Liam Marshall, *Immigration to Address Caregiving Shortfall*, BROOKINGS INST. (Apr. 2, 2024), <https://www.brookings.edu/articles/immigration-to-address-the-caregiving-shortfall/> (warning of a significant caregiver shortage in the future); RICHARD W. JOHNSON, U.S. DEPT. HEALTH & HUMAN SERV., ASPE RESEARCH BRIEF: WHAT IS THE LIFETIME RISK OF NEEDING AND RECEIVING LONG-TERM SERVICES AND SUPPORT? 8 (2019).

⁸¹ See Harris & Marshall, *supra* note 80; JOHNSON, *supra* note 80.

⁸² See NAT’L ACAD. OF SOC. INS., *supra* note 77, at I (executive summary noting the design of Medicare included components of both social insurance and social welfare).

⁸³ See THE BDS. OF TRUSTEES, FED. HOSP. INS. & FED. SUPPLEMENTARY MED. INS. TR. FUNDS, THE 2023 ANNUAL REPORT OF THE BOARDS OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUNDS, H.R. DOC. NO. 118-22, at 6, 64 (2023) [hereinafter 2023 MEDICARE TRUSTEES]; THE BDS. OF TRUSTEES, FED. HOSP. INS. & FED. SUPPLEMENTARY MED. INS. TR. FUNDS, THE 2024 ANNUAL REPORT OF THE BOARDS OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUNDS, H.R. DOC. NO. 118-136, at 5, 44 (2024) [hereinafter 2024 MEDICARE TRUSTEES]; 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63, at 4–5 (2025); see also Alessandra Malito, *Forget the Social Security Crisis. Medicare Funding Could Be a Much Bigger Problem*, MARKETWATCH (May 9, 2024, 7:00 AM EDT), <https://www.marketwatch.com/story/forget-the-social-security-crisis-medicare-funding-could-be-a-much-bigger-problem-ab192c99> (discussing options for “fix[ing]” Medicare, its importance, and political ramifications).

⁸⁴ The elements of social insurance vis-à-vis Medicare include mandatory participation, government control, financing through mandatory contributions, eligibility tied to contributions, benefit determination by statute, and the benefits are not specifically tied to the beneficiary’s contributions. NAT’L ACAD. OF SOC. INS., *supra* note 77.

⁸⁵ *Id.* at I.

⁸⁶ *Id.*

⁸⁷ *Id.* ch. 2 (the program also works as insurance since it “pools” risk) (citation omitted); see also *Special Message to the Congress: “Advancing the Nation’s Health”*, *supra* note 72.

⁸⁸ See *FDR’s Statements*, *supra* note 19 (Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration).

⁸⁹ Both Presidents Truman and Johnson spoke at the signing ceremony. ALTMAN, *supra* note 24, at 205.

IV. Trouble on the Horizon? The Boomers Start to Retire⁹⁰

It may seem logical that the sheer number of baby boomers has an impact on today's shortfall to Social Security⁹¹ and Medicare,⁹² given the actuaries' analysis of those programs.⁹³ It is undisputed that Social Security is in financial trouble.⁹⁴ In fact, as one expert stated, "[t]he depletion of the OASI trust fund is not news. Virtually since the year the trust fund began accumulating assets, the Trustees have projected its demise."⁹⁵ The programs' precarious financial position was foreseeable when considering the cost of health care, outside forces, and population fluctuations.

The retirement of the baby boomers certainly contributed to these financial stresses.⁹⁶ It was not so much that the Social Security Actuaries failed to account for the baby boomers retiring.⁹⁷ Their existence has been known and considered for some time.⁹⁸ In fact, Social Security Commissioner Martin O'Malley, in testimony to the Senate Select Committee on Aging, relayed a discussion he had with the Actuary about the program's long-term solvency.⁹⁹ The error that was made was not in ignoring the baby boomers. Instead, the error was underestimating the scope and length of the recession as well as congressional revisions to the Tax Code after the 1982 Amendments, resulting in an insolvency date of 2034 instead of 2050.¹⁰⁰

One reason Medicare's finances are precarious is the cost of health care in the United States.¹⁰¹ One expert compared the differences between Medicare and Social Security, vis-à-vis their financial stability, noting Social Security's increased payouts are due to the U.S. aging population (e.g., baby boomers): half of Medicare's increased expenditures can be explained by the aging population, with the other half from the costs for U.S. health care.¹⁰²

Reviewing Social Security Trustee reports show how outside forces, such as congressional action, the economy, inflation, birth rates, and the occurrence of major events, impact the long-term financial stability of the

⁹⁰ It is likely that some years passed after their births before Kathleen Casey-Kirschling and Carlos Barientos III found their birthdays remarkable. In reality, their birthdays marked the beginning and end of the baby boomer generation. Casey-Kirschling was born one minute past midnight on January 1, 1946. Walecia Konrad, *America's First Baby Boomer Retires Her Own Way*, NEXT AVE. (Jan. 25, 2012), https://www.huffpost.com/entry/americas-first-baby-boomer_n_1761710. Barientos, born on December 31, 1964 at 6:45 p.m., is likely the last of the baby boomers. Brigitte Miksa, *The Last of the Baby Boomers*, WORLD ECON. F. (Dec. 15, 2014), <https://www.weforum.org/agenda/2014/12/the-last-of-the-baby-boomers/>.

Casey-Kirschling became somewhat famous due to being the first boomer. *Kathleen Casey-Kirschling: Biography*, IMDB, <https://www.imdb.com/name/nm2465556/bio/> (last visited Mar. 24, 2026). An article from Hawaii, Barientos' birthplace, featured his standing as the last boomer. Michael Tsai, *Graying of Hawaii*, HONOLULU STAR-ADVISER (Nov. 15, 2010), <https://www.staradvertiser.com/2010/11/15/hawaii-news/graying-of-hawaii/>.

⁹¹ For an in-depth analysis see ARNOLD, *supra* note 24.

⁹² 2023 MEDICARE TRUSTEES, H.R. DOC. NO. 118-22, at 23 (2023).

⁹³ For the most current actuarial analysis and discussion, see 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62 (2025); 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63.

⁹⁴ See 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62 at 27.

⁹⁵ Munnell, *supra* note 36, at 4; see also, e.g., *Detailed Reports on the Financial Outlook for Social Security's Old-Age, Survivors, and Disability Insurance (OASDI) Trust Funds*, SOC. SEC. ADMIN., <https://www.ssa.gov/OACT/tr/> (select year) (last visited Mar. 24, 2026) (recognizing correlation between taxes collected and payments made since the reports' inception).

⁹⁶ See BRESLAUER & MORTON, *supra* note 37, at 55. In discussing the 1983 amendments and solvency issues, the report noted that "beginning about 2025, the effects of the retirement of the baby-boom were projected to plunge the system into deficit again." *Id.*; see also Torres-Gil, *supra* note 18, at 97 ("The fuel for these burning debates [about privatization of Social Security] hinges on the aging of the baby boomer cohort and the reality that, although Social Security is running big surpluses today and can cover the forty-five million disabled and retired persons now living in the United States, those surpluses will disappear and turn into annual deficits after 2038, when all of the baby boomers will have retired.") (citations omitted); 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62, at 4 (2025).

⁹⁷ See ALTMAN, *supra* note 24, at 250 (discussing proposals from the National Commission on Social Security Reform).

⁹⁸ AM. ACAD. ACTUARIES, ISSUE BRIEF: AN ACTUARIAL PERSPECTIVE ON THE 2023 SOCIAL SECURITY TRUSTEES REPORT 1 (2023).

⁹⁹ *Keeping Our Promise to Older Adults and People with Disabilities*, *supra* note 42, at 9–10 (statement of Martin O'Malley, Comm'r, Soc. Sec. Admin.).

¹⁰⁰ *Id.* at 20.

¹⁰¹ See Alicia H. Munnell & Michael Wicklein, *Medicare Finances: A 2023 Update*, 23 CTR. RETIREMENT RSCH. BOS. COLL., no. 11, May 2023, at 1 (identifying expensive health care costs in U.S. as a reason for Medicare's high costs).

¹⁰² *Id.*

program.¹⁰³ From the first trustees report in 1941,¹⁰⁴ the Trustees have emphasized the correlation between the program’s solvency and the worker-to-retiree ratio.¹⁰⁵ Although the 1941 report struck a cautiously optimistic tone regarding the solvency, the tone was tempered with a recognition of various outside factors that influence the program’s viability.¹⁰⁶ The third Trustees’ report, issued during World War II, explained how the financial solvency is impacted by outside forces.¹⁰⁷ In another example, economic conditions led the Trustees to report a deficit in 1973, as the country experienced double-digit inflation, significant unemployment, and slow job growth.¹⁰⁸

Although it seems that small population fluctuations may be foreseeable, it would be hard to imagine that Social Security could have anticipated the baby boom after World War II, at least until it happened. Surely, once the baby boom ended in 1964, the Social Security Trustees would have acted to shore up the Trust Fund in contemplation of what was going to happen to disbursements once the leading edge of baby boomers reached full retirement age. The 1955 Trustees’ report (which would be the report half-way through the boomer cohort), discussed the increase in population post-World War II.¹⁰⁹

The 1964 Trustees’ report, marking the last year of the boomers’ birth era, did not address the specific population issues presented by the boomers.¹¹⁰ Previous and subsequent Trustees’ reports discussed various changes and impacts,¹¹¹ but the baby boomers were here and headed to the workforce.

Today’s solvency issues are not solely because of the baby boomers, nor is it the first time this has happened, but what is important is that this problem—this shortfall—did not just occur overnight.¹¹² In fact, as previously discussed, issues with Social Security’s solvency have been identified for some time, with Congress previously addressing shortfalls on several occasions, resulting in changes to the program.¹¹³

¹⁰³ For example, the 2023 Trustees Report discussed some of these changes including the financing structure, birth rates, and wage growth. THE BD. OF TRUSTEES, FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS, THE 2023 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUND, H.R. DOC. NO. 118-21, at 172 (2023) [hereinafter 2023 SSA TRUSTEES]; THE BD. OF TRUSTEES, FED. OLD-AGE & SURVIVORS INS. & DISABILITY INS. TR. FUNDS, 1982 ANNUAL REPORT, FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND DISABILITY INSURANCE TRUST FUND, H.R. DOC. NO. 97-163, at 31 (1982) [hereinafter 1982 SSA TRUSTEES].

¹⁰⁴ Unlike subsequent Trustee’s Reports, the first Annual Report in 1941 was transmitted to Congress as a letter and unpublished. *Reports & Studies: Trust Fund Reports*, Soc. Sec. Admin., <https://www.ssa.gov/history/reports/trust/tf1941.html> (unpublished report) (last visited Mar. 24, 2026).

¹⁰⁵ *Id.* (discussing the correlation between contributions and the economy).

¹⁰⁶ *Id.* (“The primary consideration with respect to the size of the trust fund is its role in relation to the financial integrity of the social insurance program. In addition, the Board of Trustees must have regard for the relationship of the fund to the fiscal position of the Government and the economic position of the Nation.”). An example of outside influences is discussed in the 1943 Trustees Report referencing the influence of World War II on the Trust Fund. STAFF OF S. COMM. ON FIN., 78TH CONG., THIRD ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE TRUST FUND 1–5 (Comm. Print 1943) [hereinafter 1943 SSA TRUSTEES].

¹⁰⁷ 1943 SSA TRUSTEES.

¹⁰⁸ ALTMAN, *supra* note 24, at 216.

¹⁰⁹ BD. OF TRUSTEES OF THE FED. OLD-AGE & SURVIVORS INS. TR. FUNDS, PURSUANT TO LAW THE FIFTEENTH ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE TRUST FUND, S. DOC. NO. 39, at 24–25 (1955) (rapid rise in birth rates starting in 1946).

¹¹⁰ BD. OF TRUSTEES OF THE FED. OLD-AGE & SURVIVORS INS. & DISABILITY INS. TR. FUNDS, THE 24TH ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE TRUST FUND AND THE FEDERAL DISABILITY INSURANCE TRUST FUND, PURSUANT TO THE PROVISIONS OF SECTION 201(C) OF THE SOCIAL SECURITY ACT, AS AMENDED, H.R. DOC. NO. 236 (1963).

¹¹¹ For example, the 1951 Trustees Report noted how changes in the laws regarding eligibility and outside forces (military) affect viability. BD. OF TRUSTEES OF THE FED. OLD-AGE & SURVIVORS INS. TR. FUND, PURSUANT TO LAW THE ELEVENTH ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE TRUST FUND, S. DOC. NO. 44, at 2 (1951). In fact, the Trustees in the 1951 report considered the 1950 changes to be the first significant revisions since the program was amended in 1939. *Id.* at 3.

¹¹² *See, e.g.*, BRESLAUER & MORTON, *supra* note 37, at 74 (noting program was “perennially [] in deficit”).

¹¹³ *Id.* at 40–46, 55–57. *See generally* Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509 (1977) (codified as 42 U.S.C. § 1305) (addressing significant financial issues emerging in the middle of the 1970s); Social Security Disability Amendments of 1980, Pub. L. No. 96-403, 94 Stat. 1709 (1980) (codified as 42 U.S.C. § 401) (transferring revenues from the Disability Trust Fund to the OASDI Trust Fund to keep sufficient reserves); Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983) (codified as 42 U.S.C. § 1305) (gradually raising full retirement age to 67, among other things).

V. The 1983 Changes to Social Security

Perhaps the biggest changes to the Social Security program came in 1983, as a result of the issues identified in the previous year's report.¹¹⁴ The conclusion of the 1982 Trustees' report laid it all on the line: "The actuarial cost estimates presented in this report confirm the warning in last year's report that, without legislation, the OASI trust Fund would be exhausted in *the latter half of 1982.*"¹¹⁵ To underscore the dire situation, the Trustees declined to make any recommendations for change, given that President Reagan had created the National Commission on Social Security Reform.¹¹⁶ A summary of the law published in the Social Security Bulletin noted trouble had been brewing for some time, with payments exceeding contributions, and without Congressional change, the program would have significant financial problems.¹¹⁷

During President Reagan's administration, Congress responded to the Social Security solvency crisis by enacting Public Law 98-21.¹¹⁸ This law made important changes to the Social Security program by adding additional groups of workers to be covered, making some administrative changes, and increasing the age of eligibility by increments from 65 to 67.¹¹⁹ During the bill signing, President Reagan reiterated President Roosevelt's promise¹²⁰ and expanded on it, saying:

This bill demonstrates for all time our Nation's iron-clad commitment to Social Security. It assures the [older Americans] that America will always keep the promises made in troubled times a half a century ago. It assures those who are still working that they, too, have a pact with the future. From this day forward, they have our pledge that they will get their fair share of benefits when they retire. . . .

. . . .

[Older Americans] need no longer fear that the checks they depend on will be stopped or reduced. These amendments protect them. Americans of middle age need no longer worry whether their career-long investment will pay off. These amendments guarantee it. And younger people can feel confident that Social Security will still be around when they need it to cushion their retirement.

. . . .

[A]ll of us can look each other square in the eye and say, "We kept our promises." We promised that we would protect the financial integrity of social security. We have. We promised that we would protect beneficiaries against any loss in current benefits. We have.¹²¹

The National Commission on Social Security Reform (NCSSR), appointed by President Reagan, gave a nod to that promise by President Reagan, noting unanimously that the solution to the funding problem should not change Social Security's basic structure and preserving its principles.¹²² The 1983 law made changes, but the fact

¹¹⁴ 1982 SSA TRUSTEES, H.R. DOC. NO. 97-163 (1982).

¹¹⁵ *Id.* at 74 (emphasis added) (discussing insufficiency of prior congressional action).

¹¹⁶ *Id.* at 76 (report due by December 31, 1982).

¹¹⁷ *See, e.g.*, John A. Svahn & Mary Ross, *Social Security Amendments of 1983: Legislative History and Summary of Provisions*, 46 SOC. SEC. BULL., no. 7, July 1983, at 3.

¹¹⁸ Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (signed by President Reagan on April 20, 1983).

¹¹⁹ *Id.*; *see also* Svahn & Ross, *supra* note 117, at 3-5.

¹²⁰ *FDR's Statements*, *supra* note 19 (Presidential Statement Signing the Social Security Act).

¹²¹ *Remarks on Signing the Social Security Amendments of 1983*, RONALD REAGAN PRESIDENTIAL LIB. & MUSEUM, <https://www.reaganlibrary.gov/archives/speech/remarks-signing-social-security-amendments-1983> (last visited Mar. 24, 2026); *see also* Svahn and Ross, *supra* note 117. The presidential commitment to the promise of Social Security President Reagan confirmed was echoed by his predecessors. *See* ALTMAN, *supra* note 24, at 271-72.

¹²² Svahn & Ross, *supra* note 117, at 6-7.

is that they did not have the longevity anticipated when enacted.¹²³ And 40-plus years later, Social Security is again at risk.

VI. Failing Aging?

A. An Optimistic or a Pessimistic View of the Future of the Program?

As emphasized repeatedly in this Essay, there is no doubt that Social Security and Medicare are in a precarious financial situation.¹²⁴ Although a vast majority of older Americans who are receiving Social Security are optimistic about their benefits,¹²⁵ some younger Americans are not convinced that Social Security will be there for them when they reach retirement age.¹²⁶ In one poll, current Social Security recipients were a bit more optimistic that their benefits will continue as is, compared to those not yet receiving benefits.¹²⁷ That same poll found that the optimism of younger Americans varies by cohort.¹²⁸ Yet, Social Security still has broad support both among citizens and elected officials.¹²⁹ Large majorities of Americans say they oppose cuts to Social Security because they value it for themselves, their families, and millions of others who rely on it.¹³⁰

Conditions, especially economic ones, are much different today than at the inception of the Social Security and Medicare programs.¹³¹ Torres-Gil noted in 2002 the generational differences and needs—what worked in the New Deal may not work for boomers and beyond.¹³² Generational differences have significant impact on shared views about the government and politics, and those views in turn impact social policy and the public’s support of programs for older adults.¹³³

Attitudes about older Americans,¹³⁴ as well as about the government’s social contract with Americans,

¹²³ AN ACTUARIAL PERSPECTIVE ON THE 2023 SOCIAL SECURITY TRUSTEES REPORT, *supra* note 98, at 1–3 (discussing insufficient buildup of the Trust fund due to economic factors, such as interest rates, wage growth, inflation, and productivity gains); *see also* 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62 (2025); 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63 (2025).

¹²⁴ 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62; 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63.

¹²⁵ *See* Saad, *supra* note 8.

¹²⁶ *See, e.g.*, John A. Turner & David Rajnes, *Workers’ Expectations About Their Future Social Security Benefits: How Realistic Are They?*, 81 SOC. SEC. BULL., no. 4, 2021. The authors reviewed 18 different surveys concerning workers’ thoughts on receiving Social Security. *Id.* at 2. For example, an unpublished 2016 survey from the American Academy of Actuaries they examined notes workers’ optimism correlated to age. *Id.* at 6. They also cited to another survey from 2019 examining how the generations were counting on Social Security as part of their retirement income. *Id.* at 7. The authors concluded that optimism depends on age, race and ethnicity, and gender. *Id.* at 10. *But see* Jeffrey M. Jones, *Americans More Upbeat About Future Social Security Benefits*, GALLUP (Dec. 8, 2023), <https://news.gallup.com/poll/546890/americans-upbeat-future-social-security-benefits.aspx> (“Among U.S. nonretirees, 50% expect the Social Security system to pay them a benefit when they retire, while 47% do not. In three readings taken between 2005 and 2015, nonretirees were more inclined to predict they would not receive Social Security retirement benefits.”).

¹²⁷ *Id.* (“53% of current U.S. retirees believe they will continue to receive their full Social Security benefits, up from 37% in 2010 and 49% in 2015. 43% of retirees currently believe their benefits will eventually be cut.”).

¹²⁸ *Id.* The majority of the next cohort to reach retirement age believes they will get benefits, the majority of the middle cohort does not, and the youngest cohort splits 50-50 on their confidence in receiving benefits. *Id.*

¹²⁹ *Policy Basics: Top Ten Facts About Social Security*, *supra* note 42.

¹³⁰ *Id.*

¹³¹ *See, e.g.*, Josh Freedman & Michael Lind, *The Past and Future of America’s Social Contract*, THE ATLANTIC (Dec. 19, 2013), <https://www.theatlantic.com/business/archive/2013/12/the-past-and-future-of-americas-social-contract/282511/>. The authors note, among other things, that significant changes to the social contract started to occur in the 1980s, fueled by “[d]eregulation of industry, increasing global competition, and the increasing cost and volatility of raw materials all led companies to move away from the New Deal era consensus. In its place grew what we term the ‘low-wage social contract’ that has dominated through the current day.” *Id.*; *see also, e.g.*, 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62 (2025); 2025 MEDICARE TRUSTEES, H.R. DOC. NO. 119-63 (2025).

¹³² Torres-Gil, *supra* note 18, at 105.

¹³³ *Id.* (“[T]he New Deal cohort includes today’s [older Americans] and the greatest proponents for Social Security and Medicare. The baby boomer cohort has greater antipathy toward big government, big business and big labor and has greatly influenced popular culture. Generation X (those currently in their twenties and thirties) and the baby boomlet cohort (those in kindergarten through twelfth grade) are today’s youth and tomorrow’s workers.”).

¹³⁴ *See, e.g.*, Raqota Berger, *Aging in America: Ageism and General Attitudes Toward Growing Old and the Elderly*, 5 OPEN J. SOC. SCIS. 183, 193 (2017); PEW RSCH. CTR., *GROWING OLD IN AMERICA: EXPECTATIONS VS. REALITY* 7 (2009); Kristen Weir, *A New Concept of Aging*, 54 MONITOR ON PSYCH., no. 2, Mar. 2023, at 36.

have also changed.¹³⁵ For example, in signing the 1983 Amendments, President Reagan remarked on the split of views regarding Social Security.¹³⁶ In speaking about the amendments, Reagan went on to lower expectations about the program's future:

[S]ocial [S]ecurity cannot do as much for us as we might have hoped Time and again, benefits were increased far beyond the taxes and wages that were supposed to support them. [W]e have struck the best possible balance between the taxes we pay and the benefits paid back. Any more . . . would be an unfair burden Any less would threaten the commitment already made to this generation of retirees¹³⁷

Reagan finished with a somber and perhaps prescient warning about the program's future and what beneficiaries can expect to receive when factoring in increased longevity and productivity balanced again the potential drain on future generations.¹³⁸

B. Can the Programs Be Changed?

The government previously reformed these programs to ensure longer term viability.¹³⁹ Congress absolutely has the power to amend the program and even repeal them,¹⁴⁰ within limits.¹⁴¹ Change is inevitable if the Social Security program is to continue paying 100% of benefits. The more important question is *how* Congress should reform these programs.¹⁴²

Congress has both moral and political obligations to the American people arising from this social contract and any changes to the programs should be in fulfillment of, not contrary to, that contract. One could argue that the 1983 Social Security Amendments, which incrementally raised the full retirement age from 65 to 67,¹⁴³ breached the government's contract with those affected recipients.¹⁴⁴ These beneficiaries had to work longer to

¹³⁵ See, e.g., Neera Tanden, *A New Social Contract for the 21st Century*, DEMOCRACY J. IDEAS (June 23, 2020, 11:30 AM EDT), <https://democracyjournal.org/magazine/a-new-social-contract-for-the-21st-century/> (discussing the New Deal, shared risk, and making recommendations for a new social contract); BRUCE STOKES, NEW AM. FOUND., PUBLIC ATTITUDES TOWARD THE NEXT SOCIAL CONTRACT 7–8 (2013) (discussing skepticism about government fulfilling its part of the social contract); see also, e.g., ARNOLD, *supra* note 24, at 197–223 (discussing President George W. Bush's plans to privatize Social Security).

¹³⁶ *Remarks on Signing the Social Security Amendments of 1983*, *supra* note 121. Reagan continued by noting that President Roosevelt “[believed] that the system can furnish only a base upon which each one of our citizens may build [their] individual security through [their] own individual efforts.” *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ In fact, Congress twice thought it had made changes to ensure long-term solvency. ARNOLD, *supra* note 24, at 225. See BRESLAUER & MORTON, *supra* note 37, at 40, 55; see also *Keeping Our Promise to Older Adults and People with Disabilities*, *supra* note 42, at 19 (statement of Martin O'Malley, Comm'r, Soc. Sec. Admin.) (discussing long-term solvency is within the purview of Congress).

¹⁴⁰ 42 U.S.C. § 1304 (“The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress.”); see also *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

¹⁴¹ See *Flemming*, 363 U.S. at 611 (“This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause. . . . ‘Our concern here, as often, is with power, not with wisdom.’ Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.” (citation omitted)).

¹⁴² See, e.g., NAT'L ACAD. OF SOC. INS., *supra* note 77, ch. 3 (opposition to raising eligibility age); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106778, SOCIAL SECURITY SERIES PART 2: CRITERIA FOR EVALUATING REFORM PROPOSALS 1 (2023). The GAO offered a framework for evaluating reform options, including “Financing Sustainability Solvency,” “Considering Adequacy and Equity,” “Modernizing the Program to Respond to Societal Changes,” and “Implementing and Administering Proposed Changes.” *Id.* at 2–6.

¹⁴³ Social Security Amendments of 1983, Pub. L. No. 98-21, § 201, 97 Stat. 65, 108 (1983) (codified as 42 U.S.C. § 416).

¹⁴⁴ See, e.g., Alicia H. Munnell, *There Are Only Two Ways to Fix Social Security: Cut Benefits or Increase Revenues*, CTR. RETIREMENT RSCH. BOS. COLL. (Feb. 22, 2023), <https://crr.bc.edu/there-are-only-two-ways-to-fix-social-security-cut-benefits-or-increase-revenues/>.

From 1980-2008, it was the goal of the Republican Party and its conservative wing to dismantle the social contract formed by Roosevelt with the people during the Great Depression and the implementation of the New Deal.

reach their full retirement age compared to what was promised when they first entered the workforce. Congress would be well advised to consider the purpose and core principles of these programs when making changes, rather than being guided by political pressures or zero-sum actions between the political parties.

VII. Social Security and Medicare Taxes

President’s Roosevelt was committed to basing Social Security on an insurance model.¹⁴⁵ Social Security and Medicare are funded by taxes,¹⁴⁶ even though there are references to it as social insurance.¹⁴⁷ Because these payments into the system are taxes, the Government has a far easier time making changes to the program whether by raising taxes or cutting benefits.

The promises and representations made by President Roosevelt and others may give older Americans a false sense of security regarding their benefits when considering the power of Congress over the structure, terms, and existence of the program.¹⁴⁸ Although older Americans have a property interest in their benefits once lawfully *paid*, there is very little recourse for recipients with respect to actions Congress may take concerning the program. As the Court in *Flemming v. Nestor* held, “the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.”¹⁴⁹

What it boils down to is this: Social Security retirement benefits “are not contractual and may be altered or even eliminated at any time.”¹⁵⁰ Further, “[s]ocial security benefits are not property rights or contractual rights, and Congress may ‘alter, amend, or repeal any provision’ of the Social Security Act.”¹⁵¹ The Court in *Richardson*

Nearly three decades have led to this moment where a social contract is under reconstruction, and President Barack Obama is the person who will do the rebuilding, if it is to be done. However, before understanding what is being attempted, it is appropriate to understand what happened since the rise of conservatism and the assault upon Roosevelt’s covenant.

Brian Gilmore, *American Rousseau: Barack Obama and the Social Contract*, 35 T. MARSHALL L. REV. 9, 30–31 (2009) (citations omitted).

¹⁴⁵ *FDR’s Statements*, *supra* note 19 (Address to Advisory Council of the Committee on Economic Security on the Problems of Economic and Social Security).

¹⁴⁶ *See, e.g.*, *Helvering v. Davis*, 301 U.S. 619, 641, 645 (1937) (determining Social Security constitutional and Congress was correct that the “award of [Social Security retirement] benefits would be conducive to the general welfare”); *see also*, CHARLES E. ROUNDS JR., PROPERTY RIGHTS: THE HIDDEN ISSUE OF SOCIAL SECURITY REFORM 6 (Cato Inst., Project on Soc. Sec. Privatization No. 19, 2000). Rounds describes the Social Security program as a welfare program. *Id.* at 4.

¹⁴⁷ “Title II of the Social Security Act . . . ‘is an insurance program’ that ‘provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need.’” *Culbertson v. Berryhill*, 586 U.S. 53, 55 (2019) (citations omitted). For a discussion of the misnomer that is “social insurance,” *see* ROUNDS, *supra* note 146, at 2 (“In reality, however, all those terms are misleading to the point of dishonesty. The U.S. Supreme Court has ruled that payroll taxes are not ‘contributions’ but are taxes like any others. Social Security has nothing to do with ‘insurance’ contracts or any other type of contract, and nothing to do with segregated ‘accounts.’ Paying Social Security taxes does not give rise to any contractual right to Social Security benefits. In the Social Security Trust Fund, no property is held in trust for any worker or collection of workers.”); *see also* *Flemming v. Nestor*, 363 U.S. 603, 623 (1960) (Black, J., dissenting) (“Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect.”) (quoting *Social Security Act Amendments of 1956—Conference Report*, 102 CONG. REC. 15110 (1956) (statement of Sen. George). Justice Black continued:

The Court consoles those whose insurance is taken away today, and others who may suffer the same fate in the future, by saying that a decision requiring the Social Security system to keep faith ‘would deprive it of the flexibility and boldness in adjustment to everchanging conditions which it demands.’ People who pay premiums for insurance usually think they are paying for insurance, not for ‘flexibility and boldness.’ I cannot believe that any private insurance company in America would be permitted to repudiate its matured contracts with its policyholders who have regularly paid all their premiums in reliance upon the good faith of the company.

Id. at 624. *But see Helvering*, 301 U.S. at 634–35 (discussing Social Security withholding as a tax).

¹⁴⁸ *Supreme Court Case: Fleming v. Nestor*, *supra* note 23 (noting some believe that paying taxes means they have “earned” those benefits and Congress can’t take them away).

¹⁴⁹ *Flemming*, 363 U.S. at 610–11 (discussing the program’s need for flexibility and complex structure).

¹⁵⁰ *U.S. R.R. Ret. Bd. v. Fritz*, 499 U.S. 166, 174 (1980).

¹⁵¹ *Bowman v. Barnhart*, 218 F. Supp. 2d 960, 964 (N.D. Ill. 2002) (citations omitted).

v. Belcher also noted that although Social Security benefits come from taxes on their earnings, Congress can still change criteria and eligibility for the program.¹⁵² Workers have little recourse as far as not paying these taxes. There is no contract; there is no property right; there is only an obligation to pay their taxes.¹⁵³

VIII. The Future of Benefits: How Does Congress “Save” the Programs?

Americans not yet receiving Social Security are worried regarding receipt of their Social Security benefits once they reach retirement age.¹⁵⁴ Yet, as noted earlier, they have little recourse to enforce the social contract. Compared to the 1983 congressional actions¹⁵⁵ there is time for Congress to act, since it is estimated that SSA can pay 100% of benefits until 2034.¹⁵⁶ It would be prudent for Congress to act sooner rather than later.¹⁵⁷

Acting earlier is more fair to beneficiaries and gives them time to plan their retirement strategies around the changes.¹⁵⁸ It also gives Congress more maneuverability with options to make Social Security solvent for the long-term.¹⁵⁹ The closer to insolvency, the fewer the options.¹⁶⁰ The longer Congress waits to act, the less opportunity they will have to choose the option of slowly increasing the full retirement age, as was done in 1983, and even raising the tax rate will have limitations.¹⁶¹ Not only is there an advantage to Congress in acting now rather than later, but acting now provides beneficiaries some comfort regarding their benefits.¹⁶² It would provide beneficiaries with more predictability and certainty, and maybe even peace of mind. Of course, waiting until the last minute has some advantages politically, perhaps giving one party more leverage over the other to pass their proposals.¹⁶³ And given the politicization of the issue, acting later, rather than sooner, unfortunately seems more likely.¹⁶⁴ Although the politicization of the future of these programs is antithetical to their purpose and core functions, political parties have used them to gain political advantage.¹⁶⁵

¹⁵² 404 U.S. 78, 80 (1971).

¹⁵³ *Flemming*, 363 U.S. at 610 (no contractual rights); see, e.g., *Supreme Court Case: Fleming v. Nestor*, *supra* note 23; *Must I Pay Social Security Taxes on My Earnings After Full Retirement Age?*, SOC. SEC. ADMIN. (June 30, 2025), <https://www.ssa.gov/faqs/en/questions/KA-02525.html>.

¹⁵⁴ Aliss Higham, *Social Security Cuts Worry Most Americans*, NEWSWEEK (Feb. 16, 2024, 11:17 AM EST), <https://www.newsweek.com/social-security-cuts-poll-1870732> (“When asked ‘to what extent, if at all, are you concerned that Social Security payments will be reduced before you retire?’, 50 percent of those surveyed said they were ‘very concerned.’ The poll found that 28 percent were ‘fairly concerned’ and that 14 percent were ‘slightly concerned.’ Only eight percent of those queried said they were ‘not at all concerned’ about a drop in benefit amounts when they retire.”); see also Sommer, *supra* note 3.

¹⁵⁵ See DeWitt, *supra* note 25, at 16 (trust fund depletion in four months).

¹⁵⁶ 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62, at 26 (2025).

¹⁵⁷ See *id.* at 28; see also Higham, *supra* note 154 (citing AM. ACAD. ACTUARIES, ISSUE BRIEF: REFORMING SOCIAL SECURITY SOONER RATHER THAN LATER I (2023)).

¹⁵⁸ 2025 SSA TRUSTEES, H.R. DOC. NO. 119-62, at 29 (discussing advantages of earlier action); see also, e.g., REFORMING SOCIAL SECURITY SOONER RATHER THAN LATER, *supra* note 157, at 1–2; ARNOLD, *supra* note 24, at 12 (noting costs for fixing the program spreads the costs of doing so amongst more beneficiaries); 2023 MEDICARE TRUSTEES, H.R. DOC. NO. 118-22, at 12 (2023) (“The sooner solutions are enacted, the more flexible and gradual they can be. The early introduction of reforms increases the time available for affected individuals and organizations—including health care providers, beneficiaries, and taxpayers—to adjust their expectations and behavior. The Trustees recommend that Congress and the executive branch work closely together to expeditiously address these challenges.”).

¹⁵⁹ REFORMING SOCIAL SECURITY SOONER RATHER THAN LATER, *supra* note 157; see also 2023 MEDICARE TRUSTEES, H.R. DOC. NO. 118-22, at 12; Sprick, *supra* note 21 (passage of time reduces options).

¹⁶⁰ ARNOLD, *supra* note 24, at 12.

¹⁶¹ *Id.*

¹⁶² REFORMING SOCIAL SECURITY SOONER RATHER THAN LATER, *supra* note 157, at 2. In addition, any benefit cuts would be smaller compared to cuts enacted closer to the insolvency date.

¹⁶³ See, e.g., ARNOLD, *supra* note 24, at 12.

¹⁶⁴ See *id.* at 13–14. Arnold discusses five options available to Congress including incremental steps, some type of privatization, applying general funds to cover benefits, passing a “short-term” solution, and doing nothing. *Id.* at 224–225; see also ROUNDS, *supra* note 146, at 2 (“As a result, a worker’s retirement security is entirely dependent on political decisions made by the president and Congress. Benefits may be reduced or even eliminated at any time. Indeed, Congress has already arbitrarily reduced the benefits of some groups of workers.”).

¹⁶⁵ See *supra* notes 44–45; *infra* notes 180–84.

As discussed earlier, there are many outside variables that impact the viability of Social Security.¹⁶⁶ Because Social Security is such a significant part of retirement security,¹⁶⁷ beneficiaries’ planning decisions will be impacted by Congress’ actions.¹⁶⁸

Interestingly, one recent poll found that Americans would prefer “raising payroll taxes” as an answer to the solvency issue.¹⁶⁹ The options could be divided into two categories, raising taxes or changing benefits.¹⁷⁰ Within those two categories are various options, some of which will affect a smaller group of people, while others affect a larger one.¹⁷¹ If the social contract is going to be changed, Congress has to consider who is affected by the changes, and the number of those affected.

Congress must act before the solvency issue becomes a solvency crisis. Although Congress can take various actions,¹⁷² reform efforts will likely be met with mixed views.¹⁷³ Benefits can be cut, or revenues can be raised through changes to taxes.¹⁷⁴ Cutting benefits carries the risk of older Americans’ retaliation at the ballot box.¹⁷⁵ Raising the retirement age, as was done when President Reagan was in office,¹⁷⁶ is a cut in benefits for those affected by the increase in the full retirement age.¹⁷⁷ As one expert explains it, raising the age is not just delaying the receipt of benefits. Instead, it is fewer years of benefits or a decrease in benefits for those who cannot delay until the new full retirement age.¹⁷⁸ And will a twenty-eight-year-old worker understand the implications when learning that their full retirement age has been increased to age seventy?¹⁷⁹

As the proposals emerge to save Social Security and Medicare this time, expect partisan politics for various proposals.¹⁸⁰ For example, the Republican Study Commission report on the Fiscal Year 2025 Budget, released March 24, 2024, made two points relevant to this Essay: specifically, changing Medicare¹⁸¹ and reforming Social

¹⁶⁶ Jeffrey Brown et al., *Social Security and Financial Security at Older Ages*, 80 SOC. SEC. BULL., no. 1, 2020, at 31. Additional factors include that the “economic and demographic environment surrounding Social Security has changed considerably in ways that influence people’s broader financial well-being. The growth of defined contribution 401(k)-type savings plans, and the associated decline in traditional defined benefit pension income, is one important trend.” *Id.* at 34; *see also* SOCIAL SECURITY SERIES PART 2: CRITERIA FOR EVALUATING REFORM PROPOSALS, *supra* note 142, at 5; BARNES ET AL., *supra* note 32, at 6–7 (discussing demographic changes, health cost increases, and changes made by Congress). For information about life expectancy in the United States, *see U.S. Life Expectancy (1950-2025)*, MACROTRENDS, <https://www.macrotrends.net/global-metrics/countries/usa/united-states/life-expectancy> (last visited Mar. 24, 2026).

¹⁶⁷ *See, e.g.*, TERESA GHILARDUCCI, *WORK, RETIRE, AND REPEAT* ch.1 (2024) (discussing living arrangements for older people prior to Social Security).

¹⁶⁸ Brown et al., *supra* note 166, at 38 (“First, Social Security policy and the way it is communicated to covered workers strongly influences work, retirement, and claiming behavior. Second, the relationships between socioeconomic status, health, and financial well-being in retirement are strong and persistent, making them important considerations in informing Social Security policy. And third, the extent to which people prepare for their financial needs in later life, beyond Social Security, is strongly influenced by the psychological paths of least resistance that powerfully influence saving and other decisions over the life course.”).

¹⁶⁹ Jones, *supra* note 126 (noting that a majority of respondents indicated support for an increase in taxes for Social Security while others preferred a restriction on benefits). The poll did show a breakdown by political party, with more Democrats favoring the increase in payroll taxes while more Republicans favored “curbing” benefits. *Id.*; *see also* Sommer, *supra* note 3.

¹⁷⁰ The Republican Study Committee offered three categories for change: taxes, benefits, and program costs. REPUBLICAN STUDY COMM., *FISCAL SANITY TO SAVE AMERICAN: REPUBLICAN STUDY COMMITTEE FY 2025 BUDGET PROPOSAL 106* (2024).

¹⁷¹ *See, e.g.*, REFORMING SOCIAL SECURITY SOONER RATHER THAN LATER, *supra* note 157, at 3 (noting how different approaches to tax increases impact different segments of the population).

¹⁷² 42 U.S.C. § 1304.

¹⁷³ Giulia Carbonaro, *Social Security Reform Splits Young Americans and Boomers*, NEWSWEEK (Feb. 28, 2024, 6:24 AM EST), <https://www.newsweek.com/young-americans-boomers-clash-social-security-reform-1873646> (expressing differences of opinions by age on reform options).

¹⁷⁴ Munnell, *supra* note 144.

¹⁷⁵ Sommer, *supra* note 3 (“The benefits for people who are already retired—or about to be—aren’t likely to be cut, because older people vote in large numbers. Taking away money that they have been promised would be political dynamite . . .”).

¹⁷⁶ Social Security Amendments of 1983, Pub. L. No. 98-21, § 201, 97 Stat. 65 108 (1983) (codified as 42 U.S.C. § 416).

¹⁷⁷ Munnell, *supra* note 144. Munnell notes that “progressive pricing” would also result in benefits cut. *Id.*

¹⁷⁸ *Id.*; *see also* ZHE LI, CONG. RSCH. SERV., R44670, *THE SOCIAL SECURITY RETIREMENT AGE* (2022) (Summary) (noting that, while some elected officials support raising the retirement age, others point to a disparate impact on specific individuals based on finances, or those who perform manual labor and may be physically unable to work longer to reach the full retirement age).

¹⁷⁹ Munnell, *supra* note 144 (“[W]e at least have to label the proposed changes to Social Security correctly. Trying to trick people into thinking that they are not being hurt by an increase in the FRA is not a legitimate way to make policy.”).

¹⁸⁰ *See, e.g.*, ROUNDS, *supra* note 146, at 1 (retirement security relies on “political decisions of the president and Congress”); ARNOLD, *supra* note 24, ch. 6. Arnold also notes that since 2016, no Republican legislator presented a bill to address Social Security’s insolvency issue. *Id.* at 185.

¹⁸¹ REPUBLICAN STUDY COMM., *supra* note 170, at 98–101; *see also, e.g.*, Sprick, *supra* note 21 (calling for political “courage” and “bipartisan leadership”).

Security.¹⁸² The President's proposal does not reduce benefits but would raise taxes for certain wealthy individuals.¹⁸³ The Project 2025¹⁸⁴ proposal addresses changes to Medicare¹⁸⁵ which would shift the focus and design of the program. Political rhetoric is infused in the documents, with little attention given to the promises and principles of these programs.

The American Academy of Actuaries¹⁸⁶ analyzed the 2023 Social Security Trustees Report¹⁸⁷ and looked at raising retirement age as a solvency assist.¹⁸⁸ The Actuaries report makes some excellent points regarding increasing the full retirement age. For example, the solvency issues for Social Security reflect several underlying causes including the increasing longevity of older Americans, who concomitantly receive retirement benefits for a longer time.¹⁸⁹ One might consider this a design issue, or a lack of foresight, but the reality is that this longevity development is expected to continue for some time.¹⁹⁰ The full retirement age phase-in as a result of the Social Security Amendments of 1983 took 20 years to complete.¹⁹¹ If Congress chooses to again increase the full retirement age, it is important to realize that an increase in the age is tantamount to a reduction in benefits.¹⁹² But more importantly, Congress must realize that increasing the full retirement age results in inequities amongst older workers.¹⁹³ For example, asking a professional who mainly works at a desk to work until age 70 may be a completely different ask than for someone who works in manual labor to do the same.¹⁹⁴ Further, not all older Americans have benefited from longevity gains.¹⁹⁵ And the worker-to-retiree ratio will not change in the near term, since birth rates fell after the boomer cohort.¹⁹⁶ If Congress were to address the solvency issue by adjusting the retirement age, it should explore not applying any increase to the full retirement age to certain groups that would be more adversely affected by such action.¹⁹⁷

¹⁸² REPUBLICAN STUDY COMM., *supra* note 170, at 103–08. The study committee recommends changes to Medicare such as moving to a “Premium Support Model,” “Reform[ing] Graduate Medical Education (GME) Payments,” and “Implement[ing] Site Neutral Payment Policies.” *Id.* at 100–01. As far as Social Security, the proposals focus on “General Fund Transfers,” “Tax Hikes,” and “Program Savings.” *Id.* at 106–07.

¹⁸³ *Fact Sheet: The President's Budget Protects and Strengthens Social Security and Medicare*, THE AM. PRESIDENCY PROJECT (Mar. 11, 2024), <https://www.presidency.ucsb.edu/documents/fact-sheet-the-presidents-budget-protects-and-strengthens-social-security-and-medicare>; *see also* Sommer, *supra* note 3.

¹⁸⁴ While no longer operational, the “about” page of the Project 2025 website described it in part by setting out “four pillars that will, collectively, pave the way for an effective conservative administration: a policy agenda, personnel, training, and a 180-day playbook.” *About Project 2025*, PROJECT 2025: PRESIDENTIAL TRANSITION PROJECT, <https://www.project2025.org/about/about-project-2025/> [<https://web.archive.org/web/20240408042320/https://www.project2025.org/about/about-project-2025/>] (last updated Feb. 11, 2026).

¹⁸⁵ Roger Severino, *Department of Health and Human Services*, in THE HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 449–501 (Paul Dans & Steven Groves eds. 2023). The proposed changes to Medicare are to be guided by “four goals and principles: Increase Medicare beneficiaries’ control of their health care. . . . Reduce regulatory burdens on doctors. . . . Ensure sustainability and value for beneficiaries and taxpayers. . . . [and] Reduce waste, fraud, and abuse” *Id.* at 463.

¹⁸⁶ AM. ACAD. ACTUARIES, <https://www.actuary.org/homepage> (last visited Mar. 24, 2026).

¹⁸⁷ AN ACTUARIAL PERSPECTIVE ON THE 2023 SOCIAL SECURITY TRUSTEES REPORT, *supra* note 98.

¹⁸⁸ AM. ACAD. ACTUARIES, ISSUE BRIEF: RAISING THE SOCIAL SECURITY RETIREMENT AGE 1 (2022).

¹⁸⁹ *Id.* at 1–2. Table 2 compares expected life span after age 65 starting in 1940 (when male was 11.9 and female was 13.4) through several time frames. *Id.* at 3. In 2019 the expected life span after age 65 was 18.1 for male and 20.7 for female, and by 2035 is projected to be 19.1/21.6 respectively. *Id.*; *see also* ARNOLD, *supra* note 24, at 2.

¹⁹⁰ RAISING THE SOCIAL SECURITY RETIREMENT AGE, *supra* note 188, at 4 (as to the increase in longevity).

¹⁹¹ *Id.* at 2.

¹⁹² *Id.* at 4; *see also* Munnell, *supra* note 144; ROMIG, *supra* note 58, at 1 (“Raising the retirement age cuts benefits for all new retirees—that is, those claiming Social Security benefits for the first time. These cuts could be deep, and they would fall hardest on lower- and middle-income beneficiaries because they rely most heavily on Social Security benefits. Moreover, they have not seen the life expectancy gains that higher-income people have experienced and that are often used as the rationale for raising the retirement age.”).

¹⁹³ RAISING THE SOCIAL SECURITY RETIREMENT AGE, *supra* note 188, at 4–5. “[I]mplementation of Social Security program change based upon a presumption of longer work is complicated by the fact that work demands differ across types of occupations, and health status and life expectancies vary across socioeconomic groups.” *Id.* at 5; *see also, e.g.*, GHILARDUCCI, *supra* note 167, at 14–15 (discussing how full retirement age affects benefits).

¹⁹⁴ RAISING THE SOCIAL SECURITY RETIREMENT AGE, *supra* note 188, at 5.

¹⁹⁵ ARNOLD, *supra* note 24, at 91 (discussing disparities in longevity increases).

¹⁹⁶ RAISING THE SOCIAL SECURITY RETIREMENT AGE, *supra* note 188, at 7 (pointing out the worker-to-retiree ratio started falling in the 2000s); AN ACTUARIAL PERSPECTIVE ON THE 2023 SOCIAL SECURITY TRUSTEES REPORT, *supra* note 98, at 4 (discussing the drop in fertility rates post-boomers, thus the smaller number of workers).

¹⁹⁷ *See* LI, *supra* note 178, at 16–17.

Given the purpose of and statements about Social Security and, to some extent, Medicare, and the importance they play to the economy, social policy, and income security,¹⁹⁸ they should be considered to be more than just garden variety statutory programs;¹⁹⁹ they are so ingrained in our culture and so important to individuals,²⁰⁰ as well as the economy and the government, they are not “average” statutes, and instead it can be argued that they more, that they are “super statutes.”²⁰¹ They are considered the third rail in American politics, and cuts to benefits will likely see a backlash in the next election.²⁰² There are not that many statutes that would cause that kind of reaction in American society. Unlike other statutes, these apply to everyone at some point—they are all-inclusive. Taken together, the impact of these programs and their inclusive scope requires Congress and the courts not to just consider the words in the statutes, but read those words through the focus of the promises, principles, and the purposes of the programs.

As an example, the United Nations has discussed Social Security in terms of a human right.²⁰³ The Social Security Administration echoed the human rights aspect, in considering how to address the projected shortfall.²⁰⁴ “Economic security is a universal human problem, encompassing the ways in which an individual or a family provides for some assurance of income” due to inability to work or death.²⁰⁵ Just automatically opting to raise the retirement age, an option opposed by the vast majority of citizens,²⁰⁶ will not have the same impact on each beneficiary, suggesting that the better solution would be to raising taxes or developing additional revenues sources, such as those wealthy Americans.²⁰⁷ There have been many proposals to save the program, and there will be more.²⁰⁸

IX. Conclusion

So where does this leave the promises made to older Americans? “As the only official who owes his mandate to the entire American electorate, a President uniquely embodies the will of the people. He, more than anyone else, is obligated to speak and act for the Nation as a whole.”²⁰⁹ The presidential promises quoted in this Essay, made during the creation of these programs, and periodically thereafter, should not be seen as not hollow promises made during an election. It could be said that those who are paying into the system or who are receiving the benefits of these programs do not view these promises as political rhetoric, but instead as moral and political

¹⁹⁸ See, e.g., ROMIG, *supra* note 58, at 2 (discussing Social Security importance for retirement security and economy).

¹⁹⁹ See, e.g., William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1218 (2001).

²⁰⁰ See, e.g., Laura D. Quinby et al., *Does Social Security Serve as an Economic Stabilizer?*, at 2–3 (Ctr. Retirement Rsch. Bos. Coll., Working Paper No. 2021-9, July 2021) (discussing, among other things, Social Security’s impact on economy).

²⁰¹ Eskridge and Ferejohn describe a “super statute” as:

A law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute. Super-statutes are typically enacted only after lengthy normative debate about a vexing social or economic problem, but a lengthy struggle does not assure a law super-statute status. The law must also prove robust as a solution, a standard, or a norm over time, such that its earlier critics are discredited and its policy and principles become axiomatic for the public culture. Sometimes, a law just gets lucky, catching a wave that makes it a super-statute. Other times, a thoughtful law is unlucky, appearing at the time to be a bright solution but losing its luster due to circumstances beyond the foresight of its drafters.

Eskridge & Ferejohn, *supra* note 199, at 1216. The authors note that super statutes developed importance as a result of the New Deal. *Id.* at 1218, 1227.

²⁰² Sommer, *supra* note 3.

²⁰³ Off. High Comm. Hum. Rts., *About the Rights to Social Security and Human Rights*, UNITED NATIONS, <https://www.ohchr.org/en/social-security/about-right-social-security-and-human-rights> (last visited Mar. 24, 2026).

²⁰⁴ DeWitt, *supra* note 25, at 1.

²⁰⁵ *Id.* (alteration in original).

²⁰⁶ ROMIG, *supra* note 58, at 8 (citations omitted).

²⁰⁷ *Id.*

²⁰⁸ See, e.g., Mark Miller, *Fixing Social Security and Medicare: Where the Parties Stand*, N.Y. TIMES (Feb. 18, 2023), <https://www.nytimes.com/2023/02/18/business/fixing-social-security-and-medicare-where-the-parties-stand.html>.

²⁰⁹ CORNING, *supra* note 70, ch. 5 (discussing the various Presidents’ roles in passing Medicare). “But perhaps the most important contributors were the four Presidents of the United States who had made health insurance under social security one of their goals.” *Id.* at 120.

obligations to all Americans. Although a social contract may be revised over time to respond to changes in society and needs of people, this social contract is not only still relevant, it is *the* critical, stable component in providing retirement security.

The significance of, reliance on, and acceptance of Social Security and Medicare, both socially and economically, to individuals as well as the government, is an example of a successful social contract at work. Americans have accepted, supported, and relied upon the promises and principles of these programs. To not fulfill the social contract now would have disastrous consequences to older Americans, the American economy, and Congress. It is possible that President Roosevelt foresaw the size the program would become, but it is unlikely that at Social Security's passage, anyone could have foreseen the consequential nature of the program to the Nation's economy and to millions of people's retirement security.

In conclusion, the best way to view these social contracts is that they create a moral and a political obligation to Americans from Congress and the administration. Congress thus should commit to honoring these obligations by considering the promises made almost 95 years ago. When Congress acts to "save" these programs, Congress should implement changes that affirm, rather than gut, those promises. To paraphrase President Reagan from 1983, promises have been made, and now, promises should be kept.

UPON FURTHER CONSIDERATION: THE CASE FOR TRUSTS AS CONTRACTS

*Krystian Seebert**

I. Introduction

Every year, first-year law students, or “1Ls” as they are known within the legal community, arrive on campus wide-eyed, ready to begin their studies and embark on a legal career. During this first year of coursework, most law schools offer no instruction on niche areas of law.¹ Similarly, fun or intersectional electives (e.g., “Law and Economics”) are non-existent for a great majority of 1Ls.² Instead, 1Ls dive headfirst into the foundational subjects that form the elements of legal knowledge and, presumably, cultivate skills that will transfer into other practice areas.³ Most attorneys and law students know these core “doctrinal courses” by heart: Torts, Criminal Law, and Constitutional Law are the names of a few.

Out of all the doctrinal courses, Contracts may be the most fundamental, as the field of contracts arguably forms the cornerstone of the American legal system. The field of torts touches on settlement agreements, which are contracts.⁴ Criminal Law teaches students about plea deals, which are contracts.⁵ Even constitutions are social contracts between governments and their people.⁶

Viewing contracts as the backbone of nearly all areas of law can drastically change the understanding of the area of trust law, which, in addition to being an upper-level elective for law students, provides today’s clientele with many vehicles for estate planning. This Article will argue that trusts are, at their core, contracts between a trust maker (a “settlor”) and a trust manager (a “trustee”). Finally acknowledging this reality of trust law will necessarily create many reforms in the field, such as alternative methods of challenging trusts, and allow for more innovations in trust law practice.

II. Background

This Part provides a basis for understanding current trust and contract law notions in U.S. jurisprudence and explains how the legal system developed these understandings.

A. History of Trusts

Trusts are arrangements where a trustee holds the legal title to property, subject to a duty to maintain the property for the benefit of other individuals (the “beneficiaries”).⁷ They are a common law concept dating back to Medieval times, when Crusaders would “trust” their close friends to provide for their loved ones while

* © 2026, All rights reserved. Krystian Seebert is an estate planning and tax attorney based in the Chicago area. He is grateful to his wife and family for their unwavering support throughout the writing of this Article. He is also indebted to Attorney Lily A. Jarzabkowski, whose thoughtful question as a law clerk sparked the idea for this work. She mentioned that the standard “ten dollars cash” revocable living trust funding clause sounded familiar to her from when her 1L professor gave a lecture on peppercorn consideration. That remark piqued the Author’s curiosity—and this Article would not exist without it.

¹ See Samantha Weller, *First Year Law School Curriculum: What to Expect*, BARBRI L. PREVIEW, <https://lawpreview.barbri.com/law-school-curriculum/> (last updated May 1, 2024).

² *Id.*

³ *Id.*

⁴ *Meade v. City of Rockford*, 40 N.E.3d 141, 151–52 (Ill. App. Ct. 2015).

⁵ *United States v. Bownes*, 405 F.3d 634, 636 (7th Cir. 2005).

⁶ *Cruz-Guzman v. State*, 998 N.W.2d 262, 287 (Minn. 2023).

⁷ *Definition of a Trust*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/definition-of-a-trust> (last updated Jan. 30, 2025).

they were away and if they did not return from battle.⁸ Over time, the concept of trusts made its way across the pond to the United States of America; however, the motivation of creating trusts to provide for the care of friends and family after death has remained a driving force for settlors.⁹ Currently, trusts are often used as substitutes for last wills and testaments (hereinafter, “wills”). Trusts allow individuals to dispose of property upon their death without some of the disadvantages of wills, such as being subject to a court proceeding called probate.¹⁰

Frequently, will substitutes take the form of “revocable living trusts,” rather than other varieties of trusts.¹¹ In the case of a revocable living trust, a settlor can undo or amend the terms of the trust during their lifetime and serve as trustee while living, managing the assets in manners in the same way they would manage the assets if there were no trust at all.¹² Then, upon the death of the settlor, the trust becomes irrevocable and is afforded treatment that is similar to a will.¹³

While revocable living trusts do not offer all of the estate tax mitigation benefits of those trusts that cannot be revoked or amended (“irrevocable trusts”), revocable living trusts do allow the settlor to maintain control over the assets while living, in the same way he or she would with a simple will, *with* an added benefit of avoiding probate as to those assets that are properly titled to the trustee.¹⁴ Naturally, there are requirements to establish a valid trust. Trusts must have: (1) a settlor; (2) a trustee; (3) property held in trust (a “corpus” or “res”); (4) beneficiaries; (5) defined natures and qualities as to each beneficiary’s interest; and (6) a defined manner and time in which the trust is to be performed.¹⁵

Over the centuries, the basic arrangement and requirements of trusts have remained unchanged, and law has developed on how to treat trusts. Theoretically, a trust could be viewed as a legally distinct entity from the trustee and the beneficiaries. To be sure, American law has created a robust set of precedent in viewing business entities in this way, especially as to corporations, which have even been afforded some constitutional rights that are given to so-called “natural persons.”¹⁶

Certainly, support for viewing trusts as akin to corporations exists. This was especially true during the American Gilded Age, when ultra-wealthy industrialists like John D. Rockefeller had trustees hold their business interests in trusts (“corporate trusts”) in ways similar to how major corporations would be managed.¹⁷ During this period, corporate trusts and big business were practically synonymous, thus creating a new field of law: antitrust.¹⁸ Over time, the use of corporate trusts fell out of favor in American business law practice, with Standard Oil, the vanguard of the corporate trust, abandoning this structure in 1892.¹⁹ However, the use of corporate trusts did persist through the middle of the twentieth century.²⁰

Further supporting an entity-type understanding of trusts, the vernacular sometimes casually, but incorrectly, refers to trusts as though they were entities separate from the trustee (similar to corporations).²¹

⁸ Robert Whitman, *Can Estate Planners and Trust Administrators Offer Help to Trust Beneficiaries Who Want to Learn to Make Positive Life Planning Decisions?*, 1 EST. PLAN. & CMTY. PROP. L.J. 387, 389–90 (2009).

⁹ Danielle Pierce, *The History of Trusts: A Journey from Roman “Fideicommissum” to Modern Asset Management*, PIERCE LEGAL GRP. (July 26, 2023), <https://pierce-legal.com/2023/07/26/history-of-trusts/>.

¹⁰ *Miller v. Commonwealth*, 84 A.3d 620, 621, 624 (Pa. 2013).

¹¹ *Your Guide to a Living Trust*, ILL. STATE BAR ASS’N (2017), <https://www.isba.org/public/guide/livingtrust>.

¹² *Id.*

¹³ *See Turner v. Blue (In re Estate of Edwards)*, 120 N.E.2d 10, 12 (Ill. 1954) (“[A] joint will of a husband and wife with reciprocal provisions is presumed to be executed pursuant to a contract and therefore irrevocable upon the death of one of the testators.”).

¹⁴ *Your Guide to a Living Trust*, *supra* note 11.

¹⁵ *Albrecht v. Brais*, 754 N.E.2d 396, 398 (Ill. App. Ct. 2001).

¹⁶ *Citizens United v. FEC*, 558 U.S. 310, 342–43 (2010) (holding that corporations have a right to free speech).

¹⁷ Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 610–11 (2012).

¹⁸ *Id.* at 606–07.

¹⁹ *Id.* at 616.

²⁰ *Victor v. Hillebrecht*, 90 N.E.2d 751, 752 (Ill. 1950) (describing litigation between holders of trust certificates and their trustee).

²¹ Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, in *THE WORLDS OF THE TRUST* 428, 436 (Lionel Smith ed., 2013).

Despite the similarities between corporations and trusts, American courts have resisted the reification of trusts.²² Instead, for legal classification purposes, courts treat trusts as special relationships between trustees and beneficiaries, not as separate entities or legal persons.²³ For example, while a corporation can own property,²⁴ a trustee, not the trust, holds the legal title to trust property, with the beneficiary owning the equitable title (that is, the right to enjoy the trust property).²⁵

B. Overview of Contracts

The development of trust law can be compared with another common law area: contract law. Contracts, or legally enforceable mutual promises between parties,²⁶ are ubiquitous and have existed around the world for thousands of years.²⁷

In the American legal system, a promise needs to meet certain requirements to be a legally enforceable contract. As any passing 1L can recite from memory, an enforceable contract under common law²⁸ must have: (1) an offer, (2) acceptance, and (3) consideration.²⁹ Offer and acceptance are two sides of the same coin—one party’s proposition will form a contract once accepted by the other party, *if* there is consideration.³⁰

Consideration is perhaps the hardest to comprehend of all contractual requirements. It may be viewed as a detriment to one party, a benefit to another party, or the exchange of mutual promises.³¹ Because of the mutual nature of a contract, as opposed to the one-way nature of a generally unenforceable gratuitous promise, consideration is best thought of as a two-way street between the contracting parties. As the Supreme Court of New Jersey has written, “No contract is enforceable, of course, without the flow of consideration—both sides must ‘get something’ out of the exchange.”³²

However, American courts do not generally like to decide whether a contract has “enough” consideration—doing so would have the effect of undoing the bargained-for exchanges to which contracting parties agreed. Therefore, many courts have held that any amount of consideration is acceptable for a valid contract, even a mere “peppercorn.”³³

Some older authority describes how contracts require a “meeting of the minds” to be valid, meaning that the parties to the contract must come to the same understanding of the contract.³⁴ However, the modern trend is to find the presence of a meeting of the minds if the parties to a contract make the outward manifestations of mutual assent,³⁵ thus blurring the line between a meeting of the minds and the respective components of offer and acceptance.

Note that the parties to the contract do not actually need to be the parties benefiting from the contract.³⁶ In the case of third-party beneficiary contracts, the third party’s benefit is the consideration that is bargained for.³⁷ Thus, most jurisdictions recognize not only the validity of third-party beneficiary contracts, but also the rights of third-party beneficiaries to maintain legal action against the promisors under such contracts.³⁸

²² Swartz v. Sher, 184 N.E.2d 51, 53–54 (Mass. 1962).

²³ Jimenez v. Corr, 764 S.E.2d 115, 122 (Va. 2014). However, note that trusts are treated as separate entities for federal income tax purposes. See 26 U.S.C. § 641.

²⁴ Boshernitsan v. Bach, 276 Cal. Rptr. 3d 109, 115 n.8 (Cal. Ct. App. 2021) (“Unlike trusts, however, corporations can hold title to property. . . .”).

²⁵ Eagle Oil & Gas Co. v. TRO-X, L.P., 619 S.W.3d 699, 706 (Tex. 2021).

²⁶ 1 CORBIN ON CONTRACTS § 1.3 (2024).

²⁷ Tim Harford, *How the World’s First Accountants Counted on Cuneiform*, BBC (June 12, 2017), <https://www.bbc.com/news/business-39870485> (describing written contracts from Ancient Mesopotamia).

²⁸ Note that contracts for the sale of goods may be different under the Uniform Commercial Code. *E.g.*, 810 ILL. COMP. STAT. 5/2-105 (2025).

²⁹ Runzheimer Int’l, Ltd. v. Friedlen, 862 N.W.2d 879, 885 (Wis. 2015).

³⁰ *Id.*

³¹ *Id.* at ¶ 21.

³² Cont’l Bank of Pa. v. Barclay Riding Acad., 459 A.2d 1163, 1171 (N.J. 1983).

³³ *E.g.*, Lucht’s Concrete Pumping, Inc. v. Horner, 255 P.3d 1058, 1061 (Colo. 2011).

³⁴ Sweeten v. Trade Envelopes, 938 S.W.2d 383, 386 (Tenn. 1996).

³⁵ *Meeting of the Minds*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/meeting_of_the_minds (last updated July 2023).

³⁶ *Third-Party Beneficiary*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/third-party_beneficiary (last updated January 2025).

³⁷ *Id.*

³⁸ Cleveland Trust Co. v. Elbrecht, 30 N.E.2d 433, 435 (Ohio 1940).

III. Analysis

This Part will first analyze trusts under contract law principles to determine whether they meet the contractual requirements. Then, this Part will consider counterarguments to a contractual understanding of trusts.

A. Viewing Trusts as Contracts

To be sure, trusts do resemble corporations to the naked eye.³⁹ It is well-documented, however, that courts have resisted expanding corporate treatment to trusts; instead, courts categorize trusts as special relationships between trustees and beneficiaries, rather than separate legal entities.⁴⁰ Certainly, the disparate treatment of trusts and corporations may be preferable in the wake of *Citizens United*.⁴¹

It would be circular to say that a trust is a trust because trustees and beneficiaries share a trust relationship. The *essence* of a trust must be determined. Thus, the natural question is as follows: How should the legal community view the special trust relationship? It is not an entirely new idea that the trustee/beneficiary relationship is contractual. Acclaimed trust law expert Professor John H. Langbein argued as much in his 1995 article *The Contractarian Basis of the Law of Trusts*, providing that a trust is essentially a contract between the settlor and the trustee.⁴² Langbein argued that the powers and responsibilities of the trustee are the consideration that the trustee offers in the contract.⁴³

Expanding on this view, one can see that the settlor also gives consideration, as each trust must have a corpus⁴⁴ and the trustee may compensate himself or herself from said corpus for their services as trustee.⁴⁵ Thus, the common legal fiction of initially funding revocable living trusts with ten dollars cash⁴⁶ creates a *res*, which in turn allows the trustee to receive a fraction of that *res* for services rendered.⁴⁷ Assuming that the trust is actually funded, the right to compensation is only a “peppercorn” of consideration, but only a “peppercorn” is needed to make a valid contract.⁴⁸

Accordingly, as Professor Langbein noted, the offer, acceptance, and consideration between the settlor and trustee makes trusts virtually indistinguishable from modern third-party beneficiary contracts.⁴⁹ This makes sense: third-party beneficiaries can bring actions to enforce their rights under a contract like beneficiaries can bring actions to enforce their rights under a trust.⁵⁰

There is a complication regarding revocable living trusts. In a common revocable living trust scenario, the settlor and the trustee are often the same individual during the settlor’s life and capacity, with a new individual assuming the role of trustee only upon the settlor’s death or incapacity.⁵¹ This variation on the standard fact pattern does not make trusts any less contractual than ordinary, dime-a-dozen contracts. Clearly, individuals can contract with themselves in other capacities; for example, as owner of a wholly owned corporation.⁵² Thus, it should follow that an individual, as settlor, may contract with himself or herself, as trustee.

³⁹ *Swartz v. Sher*, 184 N.E.2d 51, 53 (Mass. 1962).

⁴⁰ *Jimenez v. Corr*, 764 S.E.2d 115, 121 (Va. 2014).

⁴¹ *Citizens United v. FEC*, 558 U.S. 310, 343 (2010) (holding that corporations have freedom of speech under the U.S. Constitution).

⁴² See generally John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995).

⁴³ See *id.* at 627.

⁴⁴ *Albrecht v. Brais*, 754 N.E.2d 396, 398–99 (Ill. App. Ct. 2001).

⁴⁵ *Parker v. Day*, 49 N.E. 1046, 1047 (N.Y. 1898).

⁴⁶ See *Suggested Language for Trusts (per Publication 557)*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/suggested-language-for-trusts-per-publication-557> (last updated Oct. 9, 2025).

⁴⁷ *Parker*, 49 N.E. at 1047.

⁴⁸ *Lucht’s Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1061 (Colo. 2011).

⁴⁹ Langbein, *supra* note 42, at 627.

⁵⁰ *Salina Canyon Coal Co. v. Klemm*, 290 P. 161, 167 (Utah 1930) (“All courts hold that a beneficiary under a trust may sue to protect his rights, especially in a case where his interests are hostile to those of the trustee.”).

⁵¹ *Your Guide to a Living Trust*, *supra* note 11.

⁵² See *Baker v. McDel Corp.*, 191 N.W.2d 846, 851 (Wis. 1971) (describing how an individual assigned his rights in a lease to his wholly-owned corporation).

Similarly, it is an uncontroversial tenet of contract law that contractual rights and obligations can be assigned to new parties, who then “step into the shoes” of the assignor.⁵³ Hence, the successor trustee, by virtue of his or her assent to the terms of the trust, steps into the shoes of the initial trustee, giving the trust a new manager, but leaving the terms of the trust otherwise unchanged. In the event that an individual who is nominated as successor trustee under the trust instrument does not wish to serve, the next individual under the instrument who accepts trusteeship would step into the initial trustee’s shoes. Accordingly, even the revocable living trust is still a contract under contract law principles, notwithstanding its somewhat unusual surrounding circumstances.

B. Viewing Trusts as Non-Contracts

To a certain extent, the contractual nature of trusts is implicitly acknowledged by the trust law bar. For example, practitioners commonly refer to the instruments that govern trusts as trust “agreements.”⁵⁴ In this way, the trust law field adopts the language of written contracts, which are also known as agreements.⁵⁵

Nonetheless, the legal community has avoided explicitly acknowledging this seemingly inherent truth, maintaining that trusts are distinct from contracts. For example, the highly persuasive Restatement (Third) of Trusts maintains that there are differences between trusts and contracts, conceding that these differences are “matters of detail,” but remaining agnostic as to what precisely these details are.⁵⁶ Some courts have gone even further, explicitly holding that trusts are not contracts.⁵⁷

What exactly are these supposed details that separate trusts and contracts? As discussed above, a trust is essentially a trustee’s promise to care for a settlor’s property, and this promise meets all the legal formalities to be legally enforceable (i.e., a contract).⁵⁸ In an attempt to unpack these amorphous differences between trusts and contracts, the remainder of this Section will (1) address some supposed contractual deficiencies that trusts have and (2) raise counterpoints to prove trusts’ contract-worthiness.

i. Consideration

As discussed above, trustees receive consideration in the form of compensation for their services as trustee.⁵⁹ However, some courts have held that trusts are legally enforceable, even if the trustee “receives no consideration.”⁶⁰ Presumably, this refers to how a trustee may refuse compensation for services rendered, even if he or she is entitled to it.⁶¹ A trustee might decide to do this for a number of reasons: for example, to preserve family harmony when serving as trustee of a trust created by a deceased loved one.

Yet refusing to take compensation does not invalidate that the trustee had a contractual right to compensation. Rather, it is an example of a contractual waiver, yet another basic principle of contract law that is taught in the first year of law school.

⁵³ See generally *LFP Consulting, LLC v. Leighton*, 543 P.3d 188 (Wyo. 2024).

⁵⁴ See generally *In re Edmonds*, 21 N.E.3d 447 (Ill. 2014).

⁵⁵ *Agreement*, BOUVIER LAW DICTIONARY (2012) (“In many instances there is no distinction between a contract and an agreement, and many . . . written contracts are entitled ‘agreement.’”).

⁵⁶ RESTATEMENT (THIRD) OF TRUSTS § 2 (Am. L. Inst. 2012).

⁵⁷ *E.g.*, *Moore v. Kieber*, 990 P.2d 1085, 1088 (Ariz. Ct. App. 1999).

⁵⁸ See discussions *supra* Sections II(B), III(A).

⁵⁹ See discussion *supra* Section III(A); see also *Parker v. Day*, 49 N.E. 1046, 1047 (N.Y. 1898).

⁶⁰ *Moore*, 990 P.2d at 1088.

⁶¹ *Lyons v. Holder*, 163 P.3d 343, 348 (Kan. App. 2007) (“Many courts have recognized that a trustee can waive compensation under a variety of circumstances.”).

Contractual terms may be waived if a party, expressly or implicitly, chooses not to enforce a right under the contract.⁶² However, a waiver does *not* invalidate a contract as a whole—it only affects the waived rights.⁶³ Thus, although the trustee may not actually take compensation under the trust,⁶⁴ the trust is still an enforceable contract under contract law principles (like waiver), and not simply magically non-contractual because the arrangement is labeled as a “trust.”

Still, another way a trustee might receive no remuneration for services is a court denying a request for compensation. This can happen, for example, if a trustee does not keep adequate records of the time that he or she spent on trust administration.⁶⁵ However, such a poorly-organized trustee would still receive consideration in this circumstance.

Consider, for example, an employment agreement where an employer agrees to pay an employee an hourly wage. If the employee fails to meet the necessary burden in proving the hours that he or she worked, the employer may deny compensation to the employee.⁶⁶ This lack of compensation does not invalidate the employment agreement. Implicitly, the employee and the employer bargained for an arrangement where the employee would be compensated for claimed hours *that could be substantiated*. It would be inconceivable to think that the employer would want to enter into an agreement where the employee must be compensated for all hours purportedly worked, even if there were no factual support for the employee’s claims.

In the same way, a settlor creates a trust with the understanding that the trustee could only receive compensation for the hours that can be supported with proper records. Hence, when a trustee is denied compensation for this reason, the trust contract is not defeated, but rather works just as the trustee had intended.

ii. Meeting of the Minds

One may argue that the contractual “requirement” of a meeting of the minds is absent upon the creation of many trusts. After all, revocable living trusts are seemingly unilaterally created. However, note that the meeting of the minds does not describe a physical meeting between the parties to a contract. Rather the phrase means the parties should come to the same understanding of the agreement.⁶⁷ Thus, it is of no import whether the trustee physically meets with the settlor.

Still, even under a correct understanding of the meeting of the minds, one can see that any arguable deficiency would not defeat the contractual nature of a trust. Under an agreement where the settlor creates a trust with himself or herself as trustee, it is obvious that the parties are of the same mind. Legal fictions aside, they are, quite literally, the same person. Then, upon the settlor’s death or incapacity, the successor trustee takes the place of the initial trustee by stepping into his or her shoes,⁶⁸ thereby preserving the initial meeting of the minds.

Finally, a meeting of the minds is not strictly necessary under the modern trend, even if a person accepts the position of successor trustee after the resignation or removal of an earlier trustee.⁶⁹ Thus, even if the settlor and the trustee would subjectively have different understandings of the trust, the required formalities of accepting trusteeship (such as verbal assent, signing necessary documentation, etc.) would meet the requisite elements of offer and acceptance.⁷⁰ So, although the creation of many trusts involves a meeting of the minds, modern contract law renders this criticism moot in many jurisdictions.

⁶² *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 850 N.E.2d 653, 657 (N.Y. 2006).

⁶³ *See Am. Cont’l Life Ins. Co. v. Ranier Constr. Co.*, 607 P.2d 372, 374 (Ariz. 1980) (“The waiver of one right under a contract does not necessarily waive other rights under the contract.”).

⁶⁴ *Parker*, 49 N.E. at 1046, 1047.

⁶⁵ *See In re Pamela Andreas Stisser Grantor Tr.*, 818 N.W.2d 495, 508 (Minn. 2012) (providing that the trustee’s lack of record keeping left the court in no position to grant her claim for compensation).

⁶⁶ *See Barios v. Brooks Range Supply, Inc.*, 26 P.3d 1082, 1087 (Alaska 2001) (affirming the superior court’s holding that the employee did not meet her burden in proving that she had worked unpaid overtime).

⁶⁷ *Sweeten v. Trade Envelopes*, 938 S.W.2d 383, 386 (Tenn. 1996).

⁶⁸ *See generally LFP Consulting, LLC v. Leighton*, 543 P.3d 188 (Wyo. 2024).

⁶⁹ *Meeting of the Minds*, *supra* note 35.

⁷⁰ *See id.*

iii. Fiduciary Duty

One might further argue, as the *Naarden Trust* court did, that a trust is not a contract due to how trustees are fiduciaries under state law,⁷¹ meaning that the trustee must act in the best interests of the beneficiaries.⁷² However, this argument also falls apart. Other contractual relationships have fiduciary duties imposed on one party; for example, when a client hires an attorney.⁷³

Yet courts—rightly—hold that the retainer agreements that begin an attorney/client relationship are, in fact, contracts.⁷⁴ It is therefore irrational to think that trusts, despite otherwise meeting the requirements to be contracts, are somehow not contractual in nature due to the fiduciary relationships they create. Doing so could potentially create a slippery slope, unnecessarily undoing the contractual nature of many other professional relationships, like those between clients and accountants or patients and doctors.⁷⁵

As a matter of course, it is clear that a contract can create fiduciary duties under the law. In short, the fiduciary nature of the trustee/beneficiary relationship should have no effect on whether a trust is a contract—it is simply irrelevant.

IV. Recommendation

Trusts are clearly contracts for the reasons articulated above. However, one might wonder about the practical effect of recognizing this reality. Although the characterization of trusts may seem purely academic, recognizing the contractual nature of trusts could greatly alter the existing trust law jurisprudence. By applying contract law principles to trusts, the legal community would open the doors for alternative legal strategies. Additionally, this new reality would make desirable trust law innovations easier to obtain.

A. Modification

Understanding trusts as contracts would provide alternative means of modifying them and thereby undoing incorrect, misguided, or unwanted instructions.

Many settlors use trusts as will substitutes.⁷⁶ Through this lens, trusts may (erroneously) be considered more or less the same instrument as a will. Wills are not contracts, but rather legally-recognized written instructions for the posthumous disposition of property.⁷⁷ This misunderstanding can have devastating effects on beneficiaries' ability to change the terms and provisions of trusts.

To elaborate, there are many ways to modify a contract.⁷⁸ Not only can a contract be invalid for a lack of the requirements discussed above,⁷⁹ contract law also offers a lot of flexibility to modify the terms of a contract.

⁷¹ See *Moore v. Kieber*, 990 P.2d 1085, 1088 (Ariz. Ct. App. 1999).

⁷² *Moeller v. Super. Ct.*, 947 P.2d 279, 285 (Cal. 1997).

⁷³ See generally *Pippen v. Pedersen & Houpt*, 986 N.E.2d 697 (Ill. App. Ct. 2013).

⁷⁴ E.g., *Hannafan & Hannafan, Ltd. v. Bloom*, 959 N.E.2d 1280 (Ill. App. Ct. 2011) (“The retainer agreement is a contract.”).

⁷⁵ *Smith v. Sushka*, 659 N.E.2d 875, 879 (Ohio Ct. App. 1995); *Stigliano by Stigliano v. Connaught Lab`ys., Inc.*, 658 A.2d 715, 720 (N.J. 1995) (describing the relationship between doctors and patients as fiduciary in nature).

⁷⁶ *Miller v. Commonwealth*, 84 A.3d 620, 621 (Pa. 2013).

⁷⁷ E.g., *Isler v. Griffin*, 67 S.E. 854, 855 (Ga. 1910) (“A contract is an agreement between the parties to it. A will is no contract at all, but a unilateral disposition of property.”).

⁷⁸ RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. a (Am. L. Inst. 1981).

⁷⁹ See discussion *supra* Section II(B).

As previously mentioned, a party can waive its rights under the contract and choose not to enforce a certain term or provision.⁸⁰ Additionally, an unforeseeable act of God, or force majeure, can relieve a party of its obligations under a contract.⁸¹ Even lesser changes in circumstances can lead to modification in contractual terms if they make strict adherence impracticable.⁸² Sometimes, contracts can even be unenforceable because they are unconscionable, meaning that a contract (or a portion of a contract) is so unfair that a court refuses to enforce it.⁸³

On the other hand, courts afford considerable deference to wills.⁸⁴ While wills can be invalidated on certain grounds, such as not following the required statutory formalities (e.g., proper witnessing),⁸⁵ courts generally have a policy goal of respecting testamentary freedom—the idea that individuals have a right to determine who receives their property upon their deaths.⁸⁶ Thus, instructions in wills or will substitutes will often be given legal effect, even if they produce results that are arguably unconscionable, such as disinheriting relatives.⁸⁷

Again, since trusts are oftentimes will substitutes, the policy goals that govern the law of wills significantly reduce the number of legal methods available to challenge or invalidate trusts when compared to agreements that are uncontroversially contractual. Like wills, trusts can be invalidated if there is shown to be some sort of deficiency in their creation (e.g., undue influence upon the settlor or lack of capacity).⁸⁸ However, absent these issues, courts generally honor the terms of irrevocable trusts due to the policy goal of respecting testamentary freedom.⁸⁹ Accordingly, even in spite of circumstances that may not have been contemplated by the settlor, courts will generally not alter the strict terms of a trust.⁹⁰

This stubbornness can yield absurd results. Suppose a father created a revocable living trust as part of an estate plan that he created as a young parent. During this time, his three children were elementary school aged. Not being able to tell the future, the settlor restricted his children's access to the money, held by the trustee, until the children each reached 50 years of age. Tragically, the settlor died shortly thereafter. Fast-forward 15 years: all the settlor's children have proven themselves to be prodigies. They completed post-secondary schooling in their teenage years and are now doctors and engineers. However, their maturity notwithstanding, inflexibility in the name of testamentary freedom would limit all children's rights to funds held by the trustee for decades to come. However, if trusts were governed by contract law principles, the children would have some equitable arguments to allow them to access trust assets before they reach middle age.

Admittedly, there are now more options to reform irrevocable trusts than there were in the past. For example, some states allow for trust “decanting”: This, akin to the vinous term, involves pouring an old trust into a new trust.⁹¹ Furthermore, some states allow for “trust protectors,” who are designated individuals with the power to reform irrevocable trusts.⁹² Yet these options are not without their limitations. To begin, a limited number of states recognize these methods of reform: for example, only 36 states have enacted decanting statutes as of September 2022.⁹³

⁸⁰ *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 850 N.E.2d 653, 657 (N.Y. 2006).

⁸¹ *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.*, 174 P.2d 441, 448 (Cal. 1946).

⁸² *Silverman v. Charmac, Inc.*, 414 So. 2d 892, 894 (Ala. 1982).

⁸³ *Personal Finance Co. v. Meredith*, 350 N.E.2d 781, 789 (Ill. App. Ct. 1976) (“An unconscionable contract was unenforceable at common law in Illinois as were individual clauses to the extent they produced an unconscionable result . . . [and a]n unconscionable contract has been described as a one-sided contract or one which no man in his senses and not under delusion would make and no honest and fair man would accept.” (internal citations omitted)).

⁸⁴ *In re Estate of Peters*, 526 A.2d 1005, 1013 (N.J. 1987).

⁸⁵ *Id.* at 1011.

⁸⁶ *See In re Estate of Feinberg*, 919 N.E.2d 888, 895 (Ill. 2009) (“The public policy of the state of Illinois as expressed in the Probate Act is, thus, one of broad testamentary freedom . . .”).

⁸⁷ *Ladd v. Estate of Kellenberger*, 334 S.E.2d 751, 755 (N.C. 1985) (“Moreover the very freedom to make a will implies a concomitant freedom of every person to disinherit by will persons who would otherwise inherit his property if the testator had died intestate.” (internal citations omitted)).

⁸⁸ *Slosberg v. Giller*, 876 S.E.2d 228, 234 (Ga. 2022).

⁸⁹ *Estate of Feinberg*, 919 N.E.2d at 895 (applying the goal of testamentary freedom in a trust analysis).

⁹⁰ *Harris Tr. & Sav. Bank v. Donovan*, 582 N.E.2d 120, 123 (Ill. 1991).

⁹¹ *See generally* 760 ILL. COMP. STAT. 3/1201 (2025).

⁹² *See, e.g., id.* § 3/808(d).

⁹³ Roger A. McEowen, *Modifying an Irrevocable Trust – Decanting*, AGRIC. L. & TAX’N BLOG (Sept. 18, 2022), <https://www.calt.iastate.edu/taxplace-article/modifying-irrevocable-trust-decanting>.

Even if a state recognizes such opportunities for trust reform, the reformation process can be burdensome. Trust decanting involves the drafting of a new instrument (the “second trust”) which must then be executed by the trustee.⁹⁴ Then, the trustee may need to retitle the assets held in trust to show that the assets are owned by the trustee as the trustee of the second trust and not as trustee of the initial trust.⁹⁵ This may require further administrative work (communications with financial institutions, recording new deeds, etc.) which, apart from being cumbersome, may deplete the trust of its resources due to legal fees and trustee compensation.⁹⁶

However, if trusts were viewed as third-party beneficiary contracts, the modification process would be much more straightforward. If the trustee wanted to stray from the strict terms of the trust instrument, the trustee would terminate the first trust instrument, and sign a novation (really a trust amendment) between himself or herself and the trust beneficiaries.⁹⁷ While not recommended, a trustee could also potentially stray from the terms of the trust and rely on the contract defenses discussed earlier in this Section (e.g., force majeure). Finally, a trustee who is unconvinced of sufficient changes in circumstances could also choose to honor the terms set by the settlor.

To be sure, there would initially be many gray areas surrounding the limits on trust modification that courts would have to sort through after recognizing the contractual nature of trusts. Certainly, the policy goal of respecting testamentary freedom and deferring to wills (and will substitutes) would have to be balanced against the contractual principles that allow for modification. Nonetheless, contract treatment would allow for greater flexibility in the face of changed circumstances.

B. Trust Contests

Just as the recognition of trusts as contracts could lead to more flexibility in modifying trusts, it could also provide practitioners with another strategy on how to invalidate the trust upon its creation: arguing a want of consideration.

As mentioned above, a purported contract will be unenforceable if there is a lack of consideration.⁹⁸ Each side must receive something from the transaction.⁹⁹ However, courts generally dislike determining whether the amount of consideration is acceptable.¹⁰⁰ Therefore, the common law developed the general rule that even a peppercorn of nominal consideration is sufficient.¹⁰¹ Perhaps the theory of peppercorn consideration offers the strongest support for trusts being contracts, since the ten dollars cash that nominally funds many trusts gives the trustee an opportunity to earn the peppercorn.¹⁰²

However, it is questionable whether many trusts are ever actually funded with the ten dollars cash. There is a dearth of research empirically studying how many such ten-dollar transactions actually occur. It is likely that these funding provisions are, in reality, treated as “magic words” to create a trust and satisfy the requirement that a trust has a res¹⁰³ (and, by extension, that the contract has consideration). Thus, the fictitious transfer is merely a recital.

⁹⁴ See 760 ILL. COMP. STAT. 3/1202 (2025) (describing second-trust instrument as the instrument for a second trust).

⁹⁵ See *id.* (defining a decanting power to include the power to distribute a trust’s property into a second trust).

⁹⁶ See *Parker v. Day*, 49 N.E. 1046, 1047 (N.Y. 1898) (discussing trustee compensation).

⁹⁷ See *Redewill v. Matzenauer*, 255 P. 486, 487 (Ariz. 1927) (describing how the parties to an initial contract may be substituted via another contract called a novation).

⁹⁸ *Cont'l Bank of Pa. v. Barclay Riding Acad.*, 459 A.2d 1163, 1171 (N.J. 1983).

⁹⁹ *Id.*

¹⁰⁰ *Lucht's Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1061 (Colo. 2011).

¹⁰¹ *Id.*

¹⁰² See discussion *supra* Section III(A).

¹⁰³ *Albrecht v. Brais*, 754 N.E.2d 396, 398 (Ill. App. Ct. 2001).

A mere recital for consideration, not actually received, is not enough to turn an arrangement into a valid contract.¹⁰⁴ In fact, some jurisdictions even permit challengers to offer evidence to dispute whether the consideration was actually received.¹⁰⁵ Accordingly, a contract might be successfully challenged by arguing that the consideration expressed in a recital was never actually exchanged. After all, a contract with no consideration is no contract at all. While a peppercorn of consideration may be enough, a court might draw the line at imaginary consideration.

Under the current model of viewing trusts as analogous to wills, there is only a limited number of ways to invalidate a trust.¹⁰⁶ However, under this Article's proposed model (i.e., viewing trusts as contracts) challengers could bring forth evidence that the nominal initial trust funding was never actually received, thus allowing trust litigators to use a contest strategy that may be used by their contract litigator counterparts.

Note that many trusts are funded after the trust instrument is signed, thereby later satisfying the res requirement under trust law, and the consideration requirement under contract law. Imagine, however, a case where a settlor executes a trust instrument, but never actually funds the trust during the settlor's lifetime. Instead, settlors rely on "pour-over wills," common fallback options recommended in trust-based estate plans, to posthumously pour over their assets into the trust.¹⁰⁷ In this case, proving that the initial trust funding was fictitious could be fatal to the trusts that are created after setting the precedent that trusts are contractual. As a matter of public policy, this precedent should not apply retroactively, as doing so could open the door to contesting trusts that are valid under the current state of the law.

Presumably, practitioners would have a mixed reaction to such a result under contract law. While estate planners (i.e., front-end trust law practitioners) may cringe at the idea of their work product being undone by a settlor's inaction, trust litigators would likely welcome another strategy at their disposal. Both sides would have strong arguments to make.

However, the settlor would bear only a small burden to survive such a challenge—any amount of lifetime trust funding, even writing a ten-dollar check to a trust account, would defeat a challenge based on want of consideration. This low burden for the settlor, combined with another method for trust contests, means an enforced consideration requirement for trusts would net a benefit to the trust law field.

C. Enforceable Contractual Provisions

This Section describes several avenues which exist within contract law which are applicable to trusts under the proposed framework.

i. Arbitration

Trust law practitioners are always looking for ways to improve their work product. In recent years, one such way is the increasing inclusion of arbitration provisions in trust instruments.¹⁰⁸ Nevertheless, it is questionable whether courts in all American jurisdictions would honor such provisions.

¹⁰⁴ See *In re Estate of Little*, 721 P.2d 950, 959 (Wash. 1986) (discussing how some courts do not allow mere recitals to transform a gratuitous gift into a contract).

¹⁰⁵ See *Cottle v. Tomlinson*, 16 S.E.2d 555, 560 (Ga. 1941) ("Where the consideration in a deed is expressed merely by way of recital, it is permissible to show by parol testimony that the true consideration is in fact different from that expressed in the instrument.").

¹⁰⁶ See discussion *supra* Section IV(A).

¹⁰⁷ See *Pourover Will*, BOUVIER LAW DICTIONARY (6th ed. 1856) ("A pourover will is a last will and testament that includes a provision dedicating funds to be transferred to a trust . . .").

¹⁰⁸ But see Steve R. Akers et al., *Heckerling Musings 2023 and Estate Planning Current Developments*, BESSEMER TRUST, at 1 (Apr. 12, 2023), <https://www.bessemertrust.com/insights/heckerling-musings-2023-and-estate-planning-current-developments> (describing courts backing off of allowing arbitration as a current event discussed at a major estate planning conference).

Arbitration clauses in contracts (or, if the entire contract pertains to arbitration, “arbitration agreements”) are expressions that the parties thereto wish to settle their disputes under the contract through a nonjudicial process called arbitration.¹⁰⁹ Arbitration clauses are generally enforceable as part of the parties’ bargained-for exchange.¹¹⁰ In fact, from a public policy perspective, courts may favor arbitration clauses;¹¹¹ in part because arbitration reduces courts’ caseloads, thereby increasing judicial economy.¹¹²

Turning to a contract’s parties: individuals might bargain for an arbitration clause because arbitration is faster and more informal compared to litigation.¹¹³ These benefits can be especially desirable when the parties to a contract share a close, familial relationship.¹¹⁴ Since trusts are often established for the benefit of family members and loved ones, it follows that settlors would want their beneficiaries to resolve their disagreements outside of court (with hopefully less expense taken from the trust corpus).

After all, family trust disputes can turn messy, especially if there are large sums of money involved. Consider the Pritzkers, a family of multi-billionaires with interests in multiple trusts.¹¹⁵ When some members of the Pritzker family accused trustees of improperly using trust funds, litigation followed.¹¹⁶ When the litigation finally ended in a settlement agreement, the parties decided to establish arbitration procedures for future disputes to avoid such conflict in the future.¹¹⁷ One can imagine that after the litigation process, many of the Pritzkers involved, if not all of them, wished that the trusts at issue simply gave direction for beneficiaries to arbitrate upon the genesis of a conflict.

Notwithstanding family members’ desires to prevent litigation between friends and family, it is an open question whether arbitration clauses in trusts are enforceable. In part, the murkiness in this field is due to the conflation of trusts with wills, which do not have enforceable arbitration clauses in all jurisdictions.¹¹⁸ The misunderstanding of trusts being non-contractual further contributes to this lack of certainty. For example, in 2022, the Virginia Supreme Court held that neither the Virginia Uniform Arbitration Act nor the Federal Arbitration Act compel trust beneficiaries to comply with arbitration clauses because, according to the court, trusts are not contracts.¹¹⁹

For reasons discussed above, enforceable arbitration clauses in trusts would bring benefits to settlors and beneficiaries alike. Under a noncontractual understanding of trusts, there are alternative ways to make arbitration clauses in trusts enforceable. For example, jurisdictions may enact legislation expressly providing for the enforcement of arbitration clauses in trusts.¹²⁰

The American College of Trust and Estate Counsel (“ACTEC”) supports the public policy of enforcing arbitration provisions in trusts. In 2007, its Arbitration Task Force drafted a model statute in the hope that states would enact it in some form.¹²¹ In part, ACTEC endorsed the legislative path because legislation can be seen as more proactive, and therefore more desirable, than leaving issues to the courts to decide.¹²²

¹⁰⁹ Acad. of Med. of Cincinnati v. Aetna Health, Inc., 842 N.E.2d 488, 492–93 (Ohio 2006).

¹¹⁰ Rizzio v. Surpass Senior Living LLC, 492 P.3d 1031, 1034 (Ariz. 2021) (“Arbitration agreements are widely utilized for resolving a variety of disputes and are generally enforceable.”).

¹¹¹ Innovative Images, LLC v. Summerville, 848 S.E.2d 75, 81 (Ga. 2020).

¹¹² Reed v. Farmers Ins. Grp., 720 N.E.2d 1052, 1058 (Ill. 1999).

¹¹³ Forsythe Int’l., S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017, 1022 (5th Cir. 1990).

¹¹⁴ See Faherty v. Faherty, 477 A.2d 1257, 1261 (N.J. 1984) (describing how arbitration agreements can be used in the context of disputes under separation agreements).

¹¹⁵ *Inside the Pritzker Family Feud*, CHI. TRIB. (Aug. 22, 2021, 6:53 PM CST), <https://www.chicagotribune.com/2005/06/12/inside-the-pritzker-family-feud/>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *In re Estate of Hekemian*, No. A-1774-21, 2023 N.J. Super. Unpub. LEXIS 60, at *29–30 n. 6 (Jan. 13, 2023) (“Nine states have recognized either by statute or case law that arbitration clauses in trusts, as opposed to wills, are enforceable.”).

¹¹⁹ Boyle v. Anderson, 871 S.E.2d 226, 230 (Va. 2022).

¹²⁰ Stephen W. Murphy et al., *Virginia Supreme Court: Arbitration Clauses in Trusts Are Not Enforceable Against Beneficiaries*, MCGUIREWOODS (May 12, 2022), <https://www.mcguirewoods.com/client-resources/alerts/2022/5/virginia-supreme-court-arbitration-clauses-trusts-are-not-enforceable-against-beneficiaries/>.

¹²¹ Gerardo J. Bosques-Hernández, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, INDRET, at 18–19 (Oct. 2008), https://indret.com/wp-content/uploads/2008/07/559_en.pdf.

¹²² *Id.* at 19.

To date, some states have enacted such arbitration-enabling statutes.¹²³ For example, Section 401 of the Florida Probate Code expressly provides that a “provision in a [trust] requiring the arbitration of disputes [other than disputes of the validity] . . . is enforceable.”¹²⁴ Florida is not alone. Other states such as Arizona, South Dakota, and Washington have enacted similar legislation.¹²⁵

The legislative approach has drawbacks, a major one being the slow-moving process of turning bills into statutes. Only a few states have actually enacted legislation to bless arbitration clauses in trusts.¹²⁶ While awaiting such legislation, arbitration clauses remain left to judicial interpretation anyway.

However, if courts begin seeing trusts for the contracts they are, no enabling legislation would be needed. In that case, arbitration clauses would be honored either under general contract law principles¹²⁷ or under contract law legislation such as the Federal Arbitration Act.¹²⁸ Thus, recognition of trusts’ contractual nature is not only a distinction without a difference: it could expedite recognition of arbitration clauses in trusts and therefore serve the policy goals of discouraging litigation and efficiently resolving family disputes.¹²⁹

Furthermore, recognizing trusts as contracts would open the door to the enforceability of many other boilerplate contract provisions that are frequently contained in trust agreements.

ii. Mediation

One example of other standard contract provisions that could enter the trust realm is mediation. As another method of alternative dispute resolution, mediation is like a sibling to arbitration, offering alternatives to the time consuming and confrontational process of litigation.¹³⁰ This is especially true for mediation which, as a process where a third-party facilitates discussion, can be even more collaborative than arbitration.¹³¹ In the context of family disagreements, like many trust disputes, the mediation process might best preserve harmony between the opposing sides. It therefore follows that it is in the public interest to honor mediation clauses in trust instruments.

Like arbitration, legislation can “bless” mediation provisions in trusts in the absence of judicial recognition of trusts’ contractual nature. In fact, some states have recognized arbitration and mediation provisions in trusts via the same statute.¹³² However, judicial recognition of trusts as contracts would render such legislation extraneous and, perhaps, offer a quicker path to the desired result.¹³³

iii. Assignability and Restrictions

It stands to reason that, on the new frontier of a contractual understanding of trust law, beneficiaries could transfer their interests under trusts to other parties. After all, contractual beneficiaries can generally assign away their rights.¹³⁴ Yet again this new treatment could be a double-edged sword. Many beneficiaries would welcome new ways to accelerate receiving their interests, while many settlors would want to retain their rights to control the use of their assets from beyond the grave. Luckily, the settlor can avoid this scenario with proper drafting.

¹²³ *Id.* at 18.

¹²⁴ FLA. STAT. § 731.401 (2025).

¹²⁵ Leah Albert, *The Case for Arbitration of Trust and Estate Disputes*, MILES MEDIATION & ARB. (June 5, 2023) <https://milesmediation.com/blog/learn-why-arbitration-should-be-used-for-trust-and-estate-disputes>.

¹²⁶ Murphy et al., *supra* note 120.

¹²⁷ *Rizzio v. Surpass Senior Living LLC*, 492 P.3d 1031, 1034 (Ariz. 2021).

¹²⁸ *Boyle v. Anderson*, 871 S.E.2d 226, 230 (Va. 2022) (“The FAA by its plain terms applies to contracts.”).

¹²⁹ *See Reed v. Farmers Ins. Grp.*, 720 N.E.2d 1052, 1057 (Ill. 1999); *Inside the Pritzker Family Feud*, *supra* note 115.

¹³⁰ *See Berg v. Berg*, 170 N.E.3d 224, 228 (Ind. 2021) (explaining the policy reasons why Indiana courts support mediation and negotiation).

¹³¹ *Tegra Corp. v. Boeshart*, 967 N.W.2d 165, 187 (Neb. 2022) (“Mediation means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”).

¹³² *See* MO. REV. STAT. § 456.2-205 (2025).

¹³³ *See* discussion *supra* Section IV(C)(i).

¹³⁴ *Folquet v. Woodburn Pub. Schs.*, 29 P.2d 554, 555 (Or. 1934) (“As a general rule contracts and the rights growing out of them are assignable.”).

Those settlors that oppose these new opportunities can build those restrictions into the trust agreement—contracts can (and frequently do) have terms that restrict assignability.¹³⁵ For example, if a settlor did not like the idea of his grandson selling his interest in trust income for a new car, the trust agreement could easily have a few sentences either limiting or completely restricting a beneficiary's right to sell or otherwise transfer the rights under that instrument.

On the other hand, those who want to embrace the contractual nature of trusts can permit beneficiaries to sell their beneficial interest on the market. Again, the flexibility of contracts resolves a potential issue.

V. Conclusion

While trusts have been around for nearly 1,000 years,¹³⁶ American courts have struggled with identifying precisely what they are.¹³⁷ While trusts resemble corporations in some ways, and in fact have been used as alternatives to corporations,¹³⁸ they are not afforded corporation-like treatment under the law.¹³⁹ Thus, trusts are best categorized as third-party beneficiary contracts because they meet the requirements for such treatment under basic common law principles.¹⁴⁰

Judicial recognition of the contractual nature of trusts would be positive for the trust law field because it would allow for new ways to modify or contest irrevocable trusts, as well as give certainty as to the legal effect of innovative provisions in trust agreements such as arbitration and mediation clauses.¹⁴¹ However, the best reason for contractual treatment of trusts is not because it is preferable as a matter of public policy—it is because it is the logical answer under the law.

Many fields, from tort law¹⁴² to constitutional law,¹⁴³ have pieces of contract law within them. However, under the basic contract law principles of offer, acceptance, and consideration, it is not merely a 1L-level exam answer that trusts are simply another manifestation of contracts. It is elementary that they clearly are.

¹³⁵ See *Ohio Pub. Works Comm'n v. Vill. of Barnesville*, 223 N.E.3d 346, 354 (Ohio 2022) (“[N]o rule, statute, or other authority supports a complete ban on transfer restrictions.”) (quoting *Siltstone Res., L.L.C. v. Ohio Pub. Works Comm'n*, 200 N.E.3d 125, 134 (Ohio 2022)).

¹³⁶ *Whitman*, *supra* note 8, at 389–90.

¹³⁷ See, e.g., *Swartz v. Sher*, 184 N.E.2d 51, 53 (Mass. 1962).

¹³⁸ *Orbach & Rebling*, *supra* note 17.

¹³⁹ See *Swartz*, 184 N.E.2d at 53.

¹⁴⁰ *Supra* Part III.

¹⁴¹ *Supra* Part IV.

¹⁴² *Meade v. City of Rockford*, 40 N.E.3d 141, 152 (Ill. App. Ct. 2015).

¹⁴³ *Cruz-Guzman v. State*, 998 N.W.2d 262, 287 (Minn. 2023).

BEYOND THE SENTENCE: THE CONSTITUTIONAL CRISIS OF END-OF-LIFE CARE FOR INCARCERATED INDIVIDUALS

Gabriella D. Diaz*

I. Introduction

Currently, the United States has nearly two million people incarcerated, the highest incarceration rate in the world.¹ Among this population, the number of incarcerated elderly adults has increased at an alarming rate, setting the stage for a growing and overlooked crisis within the prison system. Human Rights Watch, a global non-governmental organization dedicated to researching and advocating for the protection of human rights, has determined that the total percentage of state and federal incarcerated individuals 65 and older grew 94 times faster than the total incarcerated population between 2007 and 2010.² More recently, data has even shown that the number of incarcerated individuals age 55 or older, in both state and federal prisons, increased by 280% (nearly quadrupling), while the number of all incarcerated individuals only grew by 42%.³ According to the Bureau of Justice Statistics' most recent report revised 2025, 15.7% of the current 1,185,648 incarcerated individuals are aged 55 or older, putting the number at a total of 186,146 individuals.⁴ These statistics are alarming, prompting critical questions about how prison systems will accommodate a rapidly aging population and highlighting the urgent need for correctional institutions to address these challenges.

This striking data is the result of “tough on crime” incarceration policies that date back to the 1970s, which imposed mandatory minimum sentencing laws, the incarceration of individuals at younger ages (resulting in extended periods of imprisonment), and a systemic shift away from rehabilitation in favor of prolonged confinement.⁵ One in seven incarcerated people are currently serving life sentences, meaning they will likely die in prison.⁶ Moreover, it is widely believed that aging is accelerated in incarcerated individuals due to environmental factors including poor healthcare, limited access to healthcare, and stressors from incarceration.⁷ Studies have also shown that incarcerated individuals typically experience a two-year reduction in average life expectancy compared to non-incarcerated individuals.⁸ As a result, the “aging” prison population is widely believed to start at 55 years old.⁹

Given that one in seven incarcerated individuals is serving a life sentence and that poor environmental factors are causing chronic health issues, many incarcerated individuals will presumably die alone—either in their

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¹ *United States Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/US.html> (last visited Feb. 22, 2026).

² JAMIE FELLNER, HUM. RTS. WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE U.S. 6 (2012) (pulling data directly from the U.S. Bureau of Justice Statistics), <https://www.hrw.org/report/2012/01/28/old-behind-bars/aging-prison-population-united-states?>

³ Stacia Ray, *Hospice: The Prison's Forgotten Corner*, PRISON FELLOWSHIP (Oct. 31, 2019), <https://www.prisonfellowship.org/2019/10/hospice-the-prisons-forgotten-corner/>.

⁴ E. ANN CARSON & RICH KLUCKOW, U.S. DEP'T OF JUST., PRISONERS IN 2022 – STATISTICAL TABLES 21 (2025).

⁵ Brooke Cooley Webb et al., *Dying in Prison: End-of-Life Care Services in a State Correctional Facility*, 12 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 260, 260 (2023).

⁶ ASHLEY NELLIS, THE SENTENCING PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 4 (2021).

⁷ Farah Acher Kaiksow et al., *Caring for the Rapidly Aging Incarcerated Population: The Role of Policy*, 49 J. GERONTOLOGICAL NURSING 7, 8 (2023).

⁸ Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 AM. J. PUB. HEALTH 523, 526 (2013).

⁹ Stephanie L. Stephens et al., *Palliative Care for Inmates in the Hospital Setting*, 36 AM. J. HOSPICE & PALLIATIVE MED. 321, 321 (2019).

cells or chained to a hospital bed—without receiving adequate end-of-life care.¹⁰ As such, there is a growing need for palliative care in prison. To date, only 75 state prisons—out of the approximate 1,566 state prisons found across the United States—have implemented hospice programs.¹¹

The widespread failure of U.S. prisons to provide adequate end-of-life care—including access to hospice services—for an aging prison population constitutes a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. In 1976, the Supreme Court established through the landmark case *Estelle v. Gamble* that deliberate indifference to a prisoner’s medical needs constitutes a violation of the Eighth Amendment’s cruel and unusual punishment clause.¹² This means that the basic healthcare needs of prisoners, including hospice care, should be met, regardless of age or illness. Because *Estelle v. Gamble* has been applied very narrowly and sets a difficult standard to meet, it—along with other legal barriers—has made it nearly impossible for dying incarcerated individuals to advocate for their end-of-life care.¹³

To combat this problem, programs like the California based Humane Prison Hospice Project have worked to reshape end-of-life care for incarcerated individuals through education, advocacy, and specialized training.¹⁴ The Director of the Humane Prison Hospice Project agreed to share her experiences working within the criminal justice system, implementing these programs, and handling some of the challenges she has experienced as a result.¹⁵ She shared the story of a 92-year-old woman, Jane Doe,¹⁶ serving a life sentence for a non-violent crime she committed decades ago.¹⁷ Jane is suffering from dementia; however, no official diagnosis appears in her medical records.¹⁸ Like many dementia patients,¹⁹ Jane reacts strongly to disruptions in her routine.²⁰ One day, when a peer-caregiver provided Jane with a wheelchair instead of her usual walker, she became agitated, shouting and causing a commotion.²¹ Within minutes, correctional officers swarmed her, escalating her distress.²² In response to what they perceived as disruptive behavior, the officers followed standard protocol and placed Jane in solitary confinement.²³ But Jane is not an ordinary inmate.²⁴ Jane is a 92-year-old woman with undiagnosed dementia, trapped in a system ill-equipped to address her medical needs.²⁵ Because she has not been properly diagnosed, she has not been given the proper care she so desperately needs.²⁶ Unfortunately, this is a reality many elderly inmates face daily.²⁷ The Humane Prison Hospice Project is working to address injustices that occur to elderly incarcerated individuals like Jane.²⁸ They have implemented peer-caregiver programs and training for those peer-caregivers and prison staff, allowing incarcerated individuals to provide care for elderly inmates with the support of prison staff.²⁹ While this initiative is a step in the right direction, it is only a small piece of the larger fight for systemic change and basic human rights.

¹⁰ *Humane Prison Hospice Project is Transforming the Way Terminally Ill People in Prison Die*, COMPASSION & CHOICES (Nov. 17, 2023), <https://compassionandchoices.org/news/humane-prison-hospice-project-is-transforming-the-way-terminally-ill-people-in-prison-die/>.

¹¹ *Id.*

¹² 429 U.S. 97, 106 (1976).

¹³ Philip Genty, *Confusing Punishment with Custodial Care: The Troublesome Legacy of Estelle v. Gamble*, 21 VT. L. REV. 379, 381 (1996).

¹⁴ HUMANE PRISON HOSPICE PROJ., <https://humaneprisonhospiceproject.org/> (last visited Mar. 2, 2026).

¹⁵ Zoom Interview with Laura Musselman, Dir. of Commc’ns, The Humane Hospice Project (Feb. 27, 2025).

¹⁶ Due to HIPAA restrictions, Jane Doe’s identity has been redacted.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ TANIS J. FERMAN ET AL., LEWY BODY DEMENTIA ASS’N, UNDERSTANDING BEHAVIORAL CHANGES IN DEMENTIA 8 (2026) (discussing how routine “[c]hanges—even small ones—can cause agitation”).

²⁰ *Supra* note 15.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Katie Engelhart, *I’ve Reported on Dementia for Years, and One Image of a Prisoner Keeps Haunting Me*, N.Y. TIMES (Aug. 11, 2023), <https://www.nytimes.com/2023/08/11/opinion/dementia-prisons.html>.

²⁸ Zoom Interview with Laura Musselman, *supra* note 15.

²⁹ *Id.*; HUMANE PRISON HOSPICE PROJECT, *supra* note 14.

This Article addresses the critical issue of end-of-life care in U.S. prisons, highlighting the systemic failures that leave aging and terminally ill inmates without adequate care. It begins by examining the history of the Eighth Amendment's cruel and unusual punishment clause, tracing its evolution from its original intent to its current application. This analysis includes key cases that have shaped the modern interpretation of this clause. The Article then explores the increasing need for end-of-life care in prisons, particularly as the population of individuals over the age of 55 continues to grow, and compares this trend to the aging population in the public. It then delves into the common illnesses faced by older inmates and the legal challenges associated with providing appropriate medical care, with a focus on the Eighth Amendment's requirement for adequate treatment under *Estelle v. Gamble* and the obstacles imposed by the Prison Litigation Reform Act of 1996. This Article also considers the ethical implications of providing such care, examining the moral responsibilities of both state and federal governments. Additionally, it explores key policy barriers, such as funding constraints and the financial burdens on taxpayers, families, and incarcerated individuals who must advocate for their right to proper medical treatment. Next, this Article presents a reform proposal, advocating for systemic changes that would ensure humane treatment for incarcerated individuals in need of palliative care. Finally, the Article concludes by asserting that the failure to provide adequate end-of-life care in prisons constitutes a violation of constitutional and human rights.

II. Legal Background: The History of the Eighth Amendment

The Eighth Amendment of the U.S. Constitution was ratified on December 15, 1791.³⁰ The original text of the Eighth Amendment reads “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”³¹ Over the years, the Eighth Amendment has been criticized for its vagueness and what it means to have a punishment be “cruel and unusual.”³² Even at the time of its inception, the nature of “cruel and unusual” was not wholly defined.³³ During the debates of the First Congress, Representative Livermore complained of the Eighth Amendment's vagueness, stating

[n]o cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.³⁴

At the time of its ratification, the term “cruel and unusual” was widely believed to be only in reference to torture devices and other common barbaric punishments of the time-period.³⁵

While modern day critics still hold that the Eighth Amendment is vague, they have now added a new layer of argument regarding how exactly one should interpret this famous provision: either as an originalist looking at the plain meaning of the text at the time it was written or through a modern lens as it applies to today's society.³⁶ Over time, the Supreme Court has interpreted the Eighth Amendment's meaning through case law such as *Trop v. Dulles*, where the Supreme Court expressly stated the view that the definition of “cruel and unusual

³⁰ Nicholas J. Dilley, “Constitutional Amendments” Series – Amendment VIII – “Freedom from Excessive Bail, Fines, and Cruel Punishments.”, THE REGAN LIBR. EDUC. BLOG (Aug. 22, 2022), <https://reagan.blogs.archives.gov/2022/08/22/constitutional-amendments-series-amendment-viii-freedom-from-excessive-bail-fines-and-cruel-punishments/>.

³¹ U.S. CONST. amend. VIII.

³² Bryan A. Stevenson & John F. Stinneford, *The Eighth Amendment: Common Interpretation*, NAT'L CONST. CENTER, <https://constitutioncenter.org/the-constitution/amendments/amendment-viii/clauses/103> (last visited Mar. 2, 2026).

³³ *Id.*

³⁴ 1 ANNALS OF CONG. 754 (1789).

³⁵ Stevenson & Stinneford, *supra* note 32.

³⁶ *Id.*

punishments” will change over time, taking into consideration those punishments which offend society’s “evolving standards of decency.”³⁷ The Supreme Court also sought to define “cruel and unusual” in *Weems v. United States* and *Estelle v. Gamble*, applying the “evolving sense of decency” standard.³⁸

In *Weems v. United States*, the Court held that excessive punishments disproportionate to the offense could also be “cruel and unusual.”³⁹ In *Weems*, a prisoner convicted for falsifying a public document while serving as a disbursement officer in the Philippines was sentenced to 15 years of imprisonment, a hefty fine, lifelong surveillance, and disqualification of certain rights including holding office, voting, receiving honors, and collecting retirement pay.⁴⁰ The prisoner argued that his sentence constituted cruel and unusual punishment under the Philippine Bill of Rights.⁴¹ Given that the prohibition on cruel and unusual punishment in the Philippine Bill of Rights was derived from the Eighth Amendment of the U.S. Constitution, the Court applied the same interpretive framework.⁴² Ultimately, the Court determined that the punishment was disproportionate to the offense and therefore violated the Eighth Amendment’s prohibition against cruel and unusual punishment.⁴³ As such, *Weems v. United States* became a landmark case that sets the parameters of allowable punishment under the Eighth Amendment, specifically holding that punishment must be proportionate to the crime committed to not run afoul of the amendment’s cruel and unusual punishment clause.⁴⁴

In *Estelle v. Gamble*, the Supreme Court established that the Eighth Amendment’s prohibition against cruel and unusual punishment extends to the medical treatment of incarcerated individuals. Specifically, the Court held in *Estelle* that deliberate indifference to serious medical needs constitutes the unnecessary and wanton infliction of pain.⁴⁵ On November 9, 1973, the respondent inmate was injured when a bale of cotton fell on him while unloading a truck.⁴⁶ Over the following months, he reported severe pain and was diagnosed with lower back strain by a prison doctor.⁴⁷ In January of 1974, after refusing to work due to his pain, he was threatened with being sent to the “farm” and later was placed in solitary confinement by the prison disciplinary committee.⁴⁸ On February 4, after experiencing chest pain and “blank outs,” he requested medical attention but was not examined until later that evening, when a medical assistant ordered his hospitalization.⁴⁹ A week later, on February 11, the inmate filed his § 1983 complaint.⁵⁰ In making its decision, the Court analyzed the history of the Eighth Amendment’s prohibition against cruel and unusual punishment and recognized that, while it was originally intended to prevent barbaric practices, its scope has expanded over time.⁵¹ Applying the principle that punishments must align with society’s evolving standards of decency, the Court concluded that deliberate indifference to an inmate’s serious medical needs constitutes the unnecessary and wanton infliction of pain prohibited by the Eighth Amendment.⁵²

Estelle built upon the evolving standards of decency outlined in *Trop v. Dulles*⁵³ and the principle against wanton infliction of pain from *Gregg v. Georgia*,⁵⁴ reinforcing the government’s constitutional obligation to

³⁷ *Trop v. Dulles*, 356 U.S. 86, 101 (1958); see Doug Linder, *Cruel and Unusual Punishments*, EXPLORING CONST. LAW, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/cruelunusual.html> (last updated 2025).

³⁸ *Stevenson & Stinneford*, *supra* note 32.

³⁹ 217 U.S. 349, 368 (1910).

⁴⁰ *Id.* at 358.

⁴¹ *Id.*

⁴² *Id.* at 352, 367.

⁴³ *Id.* at 382.

⁴⁴ *Id.* at 388.

⁴⁵ *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

⁴⁶ *Id.* at 99.

⁴⁷ *Id.*

⁴⁸ *Id.* at 100–01.

⁴⁹ *Id.* at 101.

⁵⁰ *Id.* A claim brought under 42 U.S.C. § 1983 provides a civil cause of action against any individual acting under color of state law who deprives another of rights, privileges, or immunities secured by the Constitution or federal law.

⁵¹ *Id.* at 103–04.

⁵² *Id.*

⁵³ 356 U.S. 86 (1958) (holding that stripping someone of U.S. citizenship as a punishment for desertion was “cruel and unusual punishment” because the punishment was out of proportion to the crime).

⁵⁴ 428 U.S. 153 (1976) (holding that a punishment of death did not violate the Eighth and Fourteenth Amendments under all circumstances).

provide adequate medical care to prisoners.⁵⁵ The Court's ruling in *Estelle* broadened the scope of the Eighth Amendment, but in doing so found that only inadequate medical treatment resulting from deliberate indifference, rather than mere negligence, violates a prisoner's constitutional rights.⁵⁶ Thus, *Estelle* has become the legal framework for incarcerated individuals to rely on when the prison system fails to provide adequate healthcare.

III. The Growing Need for End-of-Life Care in Prison, Legal Barriers, and Ethical Considerations

The aging population in prisons has increased significantly over the past decade due to punitive criminal justice policies and the accelerated aging phenomena of inmates.⁵⁷ It is widely believed that the term "elderly," as applied in the prison context to incarcerated individuals, begins with individuals ages 50 to 55, due to accelerated aging.⁵⁸ This aging population suffers from multiple chronic conditions and generally has high rates of associated symptoms of distress.⁵⁹ Several factors contribute to worse health outcomes among incarcerated individuals such as delayed diagnosis of advanced diseases, limited health literacy, restricted access to online resources, exclusion from clinical trials, inadequate hospice care, and minimal opportunities for compassionate release.⁶⁰ Terminally-ill individuals face heavy restrictions to pain and symptom control medications and a lack of communication between healthcare providers.⁶¹ Furthermore, incarcerated individuals often suffer from serious health conditions such as cancer, Alzheimer's disease, and dementia, as well as a high prevalence of infectious diseases including hepatitis and HIV/AIDS.⁶² Notably, COVID-19 has continued to pose a significant health risk to the aging incarcerated population, as its effects have disproportionately impacted them even beyond the peak of the pandemic.⁶³

A. Common Terminal Illnesses in Prisons

Cancer has been identified as the leading cause of death in the U.S. prison population.⁶⁴ For example, incarcerated individuals experience higher rates of lung and liver cancer and have shorter survival times when compared with similar groups of non-incarcerated individuals.⁶⁵ Cancer-related pain is a significant issue, with many inmates reporting inadequate pain management in prison settings.⁶⁶

Mortality data from state prisons indicate that cancer is responsible for 30% of illness-related deaths, making it the leading cause of death among incarcerated individuals.⁶⁷ Among male state prisoners, the mortality rate from cancer was twice as high.⁶⁸ Similarly, federal prison statistics show that cancer and other illnesses are the primary causes of death.⁶⁹ Lawsuits and accounts from patients show that delays and inadequate cancer treatment for incarcerated individuals are common due to the significant disparities in healthcare access available

⁵⁵ See *Estelle*, 429 U.S. at 106.

⁵⁶ *Id.*

⁵⁷ Stephens et al., *supra* note 9.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Chris McParland et al., *Caring for People in Prison with Palliative and End-of-Life Care Needs*, 17 CURRENT OP. SUPPORTIVE & PALLIATIVE CARE 224, 225 (2023).

⁶¹ *Id.*

⁶² See Stephens et al., *supra* note 9.

⁶³ McParland et al., *supra* note 60, at 227.

⁶⁴ *Id.* at 225. Comparatively, in the general population, the top categories of diagnosis for hospice care beneficiaries under Medicaid are Alzheimer's and Cancer. NAT'L ALL. FOR CARE AT HOME, NHPCO FACTS AND FIGURES 11 (2024), https://allianceforcareathome.org/wp-content/uploads/2024/09/Facts-Figures-2024_FINAL.pdf.

⁶⁵ Stephens et al., *supra* note 9.

⁶⁶ *Id.*

⁶⁷ Oluwadamilola T. Oladeru, *The Impact of Incarceration on Cancer Outcomes*, UNIV. FLA. COLL. MED., <https://radonc.med.ufl.edu/researchlabs/current-radiation-oncology-research-at-uf/the-impact-of-incarceration-on-cancer-outcomes/> (last visited Mar. 2, 2026).

⁶⁸ *Id.*

⁶⁹ *Id.*

in U.S. prisons.⁷⁰ Without meaningful judicial reform, incarceration will continue to be a key social determinant contributing to cancer disparities.

In 2018, the American Society of Clinical Oncology (“ASCO”) published an article emphasizing the rising cancer rates among incarcerated populations and the widening healthcare gap in correctional facilities.⁷¹ According to ASCO, the disparities are further exacerbated by the lack of comprehensive data on cancer-related factors such as screening rates, treatment compliance, and overall health outcomes.⁷² While advancements in oncology, including precision medicine and machine learning, are transforming cancer care, incarcerated individuals remain largely overlooked and face heightened cancer risks in remote locations with limited access to specialized treatment centers.⁷³

Many aging prisoners are also heavily at risk of developing dementia.⁷⁴ Approximately 6.2 million Americans aged 65 or older have been diagnosed with some form of dementia, although this number is expected to increase to 13.8 million by 2060.⁷⁵ As the number of dementia diagnoses increases nationwide, it can be presumed that the prison population affected by dementia is also increasing. Although comprehensive data on the prevalence of Alzheimer's disease and related dementias among incarcerated individuals is limited, one report estimates that between 70,341 and 211,020 older adults in prison will be affected by some form of Alzheimer's disease or related dementias by 2030.⁷⁶ Additionally, approximately 20% of incarcerated individuals over the age of 50 are believed to be experiencing some form of cognitive decline related to their incarceration.⁷⁷

The dementia crisis in prisons is a vastly underreported issue with no ongoing national study being done to estimate the current rate of dementia among the U.S. prison population.⁷⁸ However, one study arising from the United Kingdom found that roughly 8% of the English and Welsh aging prison population suffered from some cognitive impairment, including different forms of dementia.⁷⁹ While no comparable studies have been conducted in the United States, numerous stories which highlight incarcerated individuals' experiences with cognitive decline in the U.S. prison system exist.⁸⁰ One example of a striking story reported by the *New York Times* recounts the tale of an inmate at the Federal Medical Center Devens—a federal prison in Massachusetts—who believed he was the warden of the institution.⁸¹ A senior officer at that same institution estimates that 90% of the men he currently oversees at the center do not know why they are there or what crime they committed to put them there.⁸²

Due to the many reported experiences and other incidents focusing on incarcerated individuals living with dementia, the American Bar Association adopted a resolution specifically calling for government agencies to address these issues.⁸³ The American Bar Association urges all levels of government to implement laws, policies, and practices that address the complex needs of individuals in the criminal justice system who are living with dementia; to provide training for legal and law enforcement professionals on recognizing and understanding the effects of dementia; to establish partnerships between the criminal justice system and healthcare providers to create appropriate care settings for individuals with dementia who have a history of violence; and to prioritize diversion to community resources over commitment for restoration of capacity when a defendant with dementia

⁷⁰ *Id.*

⁷¹ Ronald Piana, *Cancer Care in the U.S. Prison System*, THE ASCO POST (Nov. 10, 2018), <https://www.ascopost.com/issues/november-10-2018/cancer-care-in-the-us-prison-system>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Rima Nathan, *Why Am I Here: Redefining Compassionate Release to Address the Dementia Crisis in Prisons*, 16 J. AGING L. & POL'Y 4, 4 (2025).

⁷⁵ ALZHEIMER'S ASS'N, 2024 ALZHEIMER'S DISEASE FACTS AND FIGURES 32–33 (2024).

⁷⁶ Erin Kitt-Lewis & Susan J. Loeb, *Emerging Need for Dementia Care in Prisons: Opportunities for Gerontological Nurses*, 48 J. GERONTOLOGICAL NURSING 3, 3 (2022).

⁷⁷ *Id.*

⁷⁸ Tina Maschi et al., *Forget Me Not: Dementia in Prison*, 52 THE GERONTOLOGIST 441, 442 (2011).

⁷⁹ Katrina Forsyth et al., *Dementia and Mild Cognitive Impairment in Prisoners Aged Over 50 Years in England and Wales: A Mixed-Methods Study*, 8 HEALTH SERV. & DELIVERY RSCH., June 2020, at 1, 14.

⁸⁰ Engelhart, *supra* note 27.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *ABA House Adopts Host of New Policies, Including Support for Ethics Code for U.S. Supreme Court*, A.B.A. (Feb. 6, 2023), <https://www.americanbar.org/news/abanews/aba-news-archives/2023/02/midyear-house-actions-recap/>.

is deemed permanently incompetent to stand trial.⁸⁴ Under the current administration, no laws have been implemented to facilitate this training.

Another major health impact on the U.S. prison system's aging population was prevalent during the COVID-19 pandemic. Even though vaccinations and different treatments now exist for COVID-19, the pandemic's impact is still very noticeable in the prison system.⁸⁵ At the height of the pandemic, incarcerated individuals experienced what felt like an additional layer of imprisonment.⁸⁶ Confined to shared cells for most of the day with little access to activities or social connections, prisoners' well-being declined and a distrust of the prison system deepened.⁸⁷ Even now there is limited research on the extent of COVID-19's impact on end-of-life care in prisons, despite incarcerated individuals being at an elevated risk of mortality.⁸⁸ Although what occurred during the height of the COVID-19 pandemic may not seem as relevant to the current need for end-of-life care, the policies and procedures—or lack thereof—brought to light how ill-equipped U.S. prisons are to care for elderly inmates.⁸⁹ It also highlighted the necessity of proactive care planning, goal setting, and facilitating a certain level of care for elderly inmates, especially those in the final stages of life.⁹⁰

B. Legal Barriers

The lack of research on how cancer, Alzheimer's, dementia, and even COVID-19 have impacted the prison population is alarming. Equally concerning is the absence of case law addressing end-of-life issues for incarcerated individuals, particularly under *Estelle v. Gamble*. The reason for this gap is straightforward: prisoners facing terminal illness often lack the time, resources, or legal advocates necessary to bring their claims forward. Even if they could, *Estelle v. Gamble* sets a high bar for proving inadequate medical care, and its application remains narrowly limited.⁹¹ Further compounding these challenges is the Prison Litigation Reform Act of 1995, which imposes additional legal hurdles for incarcerated individuals seeking relief.⁹²

Unfortunately, *Estelle v. Gamble* establishes an unreasonably high bar for incarcerated individuals seeking relief under the Eighth Amendment.⁹³ Nonetheless, courts applying *Estelle* have generally recognized a prisoner's constitutional right to healthcare in three key areas.⁹⁴ Courts following *Estelle* typically hold that deliberate indifference can be demonstrated through (1) the denial of or an undue delay in access to medical care; (2) an inadequate opportunity to receive a professional medical evaluation; or (3) the failure to provide prescribed treatments.⁹⁵

The Court in *Estelle* explicitly stated that the Eighth Amendment requires incarcerated individuals' medical treatment, living conditions, and overall standards of care to be assessed against "idealistic concepts of dignity, civilized standards, humanity, and decency."⁹⁶ However, "[t]he *Estelle* opinion suffers from a fundamental inconsistency in its reasoning."⁹⁷ To bring the denial of medical care within the Eighth Amendment's prohibition against cruel and unusual punishment, the Court relied on an impact-based standard that likened the

⁸⁴ HOUSE OF DELEGATES, AM. BAR ASS'N, RESOLUTION NO. 600 (2023).

⁸⁵ McParland et al., *supra* note 60, at 226.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Joyce Frieden, *Overcrowding, Lack of Healthcare Access Help Increase COVID Mortality in Prisons*, MEDPAGE TODAY (Nov. 23, 2022) <https://www.medpagetoday.com/infectiousdisease/covid19/101920>.

⁹⁰ McParland et al., *supra* note 60, at 227.

⁹¹ Genty, *supra* note 13, at 371.

⁹² Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, 110 Stat. 1321; see Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2025), https://www.prisonpolicy.org/reports/PLRA_25.html.

⁹³ Genty, *supra* note 13, at 371.

⁹⁴ See *Estelle v. Gamble*, 429 U.S. 97, 97 (1976).

⁹⁵ *Id.* at 104–05.

⁹⁶ *Id.* (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

⁹⁷ Genty, *supra* note 13, at 397–98.

absence of medical care to torture or lingering death—a concept firmly established in precedent.⁹⁸ The Court recognized that for a prisoner, being denied medical care feels like torture or a slow, painful demise.⁹⁹ However, rather than maintaining this impact-based approach, the Court ultimately resolved the case using an intent-based standard: requiring proof of deliberate indifference to serious medical needs.¹⁰⁰ This shift weakened the ability of incarcerated individuals to successfully challenge inadequate healthcare, as it placed the burden on them to prove not just harm but also the intent behind it.¹⁰¹

Thirty years ago, President Bill Clinton enacted the Prison Litigation Reform Act (“PLRA”), a law that significantly restricts the ability of incarcerated individuals to file and succeed in federal civil rights lawsuits.¹⁰² For over two decades, this legislation has imposed barriers at every stage of the legal process, creating an unequal standard for those behind bars.¹⁰³ It mandates the dismissal of civil rights cases over minor procedural issues before the courts even consider their merits; requires incarcerated individuals to pay filing fees that low-income individuals outside of prison are not subject to; limits access to legal representation by severely capping attorney fees; makes settlements more difficult to reach; and reduces the authority of courts to mandate reforms in prison and jail policies.¹⁰⁴ Under the PLRA, incarcerated individuals must exhaust all administrative remedies first, meaning they have to go through the correctional facility’s internal grievance policies which can be convoluted and take many years.¹⁰⁵ The PLRA’s cap on attorney’s fees and increased filing fees deters many private attorneys from taking cases unless they are taking it pro-bono.¹⁰⁶ In addition to the process being more difficult to navigate for aging individuals, the combination of their normal age limitations and their length of incarceration, education level, support system, and health status can account for additional layers of difficulty when bringing PLRA claims.

C. Ethical Considerations

The lack of adequate caregiving and the exhaustive administrative appeals process in prisons adds an extra layer of punishment to already harsh sentences. Many individuals serving life sentences are there due to nonviolent offenses, largely driven by the War on Drugs and “tough on crime” policies.¹⁰⁷ It is estimated that close to 4,000 people in federal prisons are serving life sentences for non-violent drug offenses.¹⁰⁸ Despite legal protections that theoretically guarantee adequate healthcare set forth in cases like *Estelle v. Gamble*,¹⁰⁹ aging incarcerated individuals or individuals in need of end-of-life care often lack a fair opportunity to advocate for their medical needs because of restrictive laws such as the PLRA.¹¹⁰ The rigid structure of government bureaucracy, combined with the physical and cognitive toll of terminal illnesses and age, makes it nearly impossible for these individuals to access proper care or advocate for their rights.

One of the most pressing ethical concerns is the growing population of incarcerated individuals with dementia. Prisons are rapidly becoming—if they are not already—home to elderly inmates who no longer understand why they are there.¹¹¹ Dementia introduces unique challenges in a prison setting, where confinement and rigid routines exacerbate behavioral issues and any disruption to a person’s routine can cause a visceral reaction.¹¹² A real-life example of this dilemma is the incarcerated woman discussed at the beginning of this

⁹⁸ *Id.*

⁹⁹ *Id.* at 397.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 393–94.

¹⁰² Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, 110 Stat. 1321 (1996); Fenster & Schlanger, *supra* note 92.

¹⁰³ Fenster & Schlanger, *supra* note 92.

¹⁰⁴ *Id.*

¹⁰⁵ *Know Your Rights: The Prison Litigation Reform Act*, AM. C.L. UNION,

https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf (last visited Feb. 22, 2026).

¹⁰⁶ Fenster & Schlanger, *supra* note 92.

¹⁰⁷ NELLIS, *supra* note 6, at 20.

¹⁰⁸ *Id.* at 24.

¹⁰⁹ 429 U.S. 97, 106 (1976).

¹¹⁰ Fenster & Schlanger, *supra* note 92.

¹¹¹ Zoom Interview with Laura Musselman, *supra* note 15; Engelhart, *supra* note 27.

¹¹² Lay Kodama et al., *Prioritizing Diversion and Decarceration of People with Dementia*, 25 *AMA J. ETHICS* 783, 784 (2023).

Article.¹¹³ The disruption of her routine led her to exhibit behaviors commonly seen in individuals with dementia, causing her to be perceived as a threat to other inmates and resulting in her being unfairly punished.¹¹⁴ The prison system is fundamentally unprepared to provide the level of care that is necessary for individuals experiencing severe cognitive decline.¹¹⁵

This crisis demands a serious examination of the Eighth Amendment's implications of imprisoning individuals who can no longer comprehend their punishment.¹¹⁶ When someone is incapable of understanding why they are incarcerated, their continued confinement serves neither rehabilitative nor deterrent purposes.¹¹⁷ Instead, it becomes an exercise in cruelty, stripping away any justification for their continued imprisonment beyond mere retribution.¹¹⁸ As the prison elderly population continues to grow, this issue will only become more urgent, giving rise to the need for legal and policy reforms to address the ethical and constitutional concerns at stake.¹¹⁹

IV. Funding Policies and Barriers

Now, examining the fiscal constraints that correctional institutions face, another substantial problem emerges: the structural inaccessibility of necessary healthcare, especially long-term care. Correctional systems face significant financial barriers to providing adequate healthcare, particularly end-of-life care, due to structural limitations such as the Medicaid “inmate exclusion,” which shifts the full cost of care to states and, in some cases, to incarcerated individuals through copayments despite their extremely low wages.¹²⁰ These constraints are compounded by the high cost of hospice and long-term care,¹²¹ making such services difficult to implement in already underfunded prison systems. At the same time, the aging prison population has dramatically increased overall correctional healthcare spending, with elderly individuals costing two to three times more to incarcerate due to complex medical needs.¹²² Despite these rising costs care often remains inadequate, while more cost-effective alternatives like compassionate release and prison hospice programs remain underutilized, highlighting both the economic inefficiency and ethical concerns of current practices.

A. Funding

Under federal law, Medicaid does not cover healthcare costs for incarcerated individuals due to the “inmate exclusion” provision of the Social Security Act, which bars states from receiving federal reimbursement for medical care provided to individuals during incarceration, with only limited exceptions such as inpatient care outside the prison lasting more than 24 hours.¹²³

As a result, incarcerated individuals are often required to bear the cost of medical care through copayments or similar fees. In Florida, for example, state law mandates a \$5.00 copayment for visits to a physician.¹²⁴ While this may appear minimal, such costs present a significant burden to individuals in custody, the majority of whom enter the system from impoverished backgrounds and are either unable to work while incarcerated or receive

¹¹³ Zoom Interview with Laura Musselman, *supra* note 15.

¹¹⁴ *Id.*

¹¹⁵ Kodama et al., *supra* note 112, at 786; Meg Anderson, *The U.S. Prison Population is Rapidly Graying. Prisons Aren't Built for What's Coming*, NPR (Mar. 11, 2024, 5:12 AM EDT), <https://www.npr.org/2024/03/11/1234655082/prison-elderly-aging-geriatric-population-care>.

¹¹⁶ Kodama et al., *supra* note 112.

¹¹⁷ FELLNER, *supra* note 2, at 92–94.

¹¹⁸ *Id.* at 91.

¹¹⁹ Kodama et al., *supra* note 112.

¹²⁰ 42 U.S.C. § 1396d(a)(30)(A).

¹²¹ NAT'L ALL. FOR CARE AT HOME, *supra* note 64, at 1.

¹²² *Understanding the Cost of Hospice Care*, BREEZE HOSPICE OF MO. (Feb. 25, 2025),

<https://www.breezehospiceservices.com/resources/understanding-the-costs-of-hospice-care>.

¹²³ 42 U.S.C. § 1396d(a)(30)(A).

¹²⁴ FLA. STAT. § 945.6037 (2026).

severely inadequate wages.¹²⁵ Those employed in correctional facilities often earn between \$0.14 and \$0.63 per hour, while Florida does not offer any wages to its inmates working regular prison jobs.¹²⁶ For individuals with such limited financial resources, the cumulative effect of medical copays can lead to delays in care or outright denial of medical services.¹²⁷

These economic barriers are only magnified when considering more resource-intensive care, such as hospice care. Hospice care—which includes pain management, emotional support, spiritual guidance, and palliative interventions—is substantially more expensive than routine care.¹²⁸ The National Hospice and Palliative Care Organization estimates the cost of hospice services in the United States to average between \$150 and \$200 per day, or \$10,000 to \$20,000 per month.¹²⁹ These costs, when viewed against the backdrop of prison healthcare systems that are already underfunded and often operate under crisis conditions, emphasize the structural difficulty of implementing consistent and adequate end-of-life care within prisons.

While institutional hospice care in prisons remains rare, several reform efforts have emerged. Notably, as previously discussed in this Article, The Humane Prison Hospice Project advocates for peer-led, prison-based hospice programs and provides training to incarcerated individuals to care for fellow prisoners nearing the end of life.¹³⁰ Such programs offer a more humane and cost-effective solution to the care gap and demonstrate a growing recognition of the ethical imperative to ensure dignity in death, even for those behind bars.¹³¹

B. Financial Burden of End-of-Life Care in Prisons

The financial costs of incarcerating elderly and terminally ill individuals have placed a mounting burden on correctional systems across the United States.¹³² Older incarcerated people require more intensive and frequent medical care, including treatment for chronic and life-limiting illnesses such as cancer, heart disease, and mobility impairments.¹³³ These healthcare needs significantly increase the cost of incarceration compared to younger populations.¹³⁴

State corrections departments are responsible for the entirety of incarcerated individuals' healthcare costs, as incarcerated people are excluded from federal programs like Medicaid and Medicare.¹³⁵ This leads to steep expenditures, especially in states with aging prison populations.¹³⁶ Some estimates show that annual costs for incarcerating elderly individuals are two to three times higher than for younger prisoners.¹³⁷ As a result, the nationwide total cost of prison healthcare has grown substantially, amounting to approximately \$8 billion annually.¹³⁸

Despite these growing expenses, incarcerated individuals often receive inadequate care, leading to suffering and worsening health outcomes.¹³⁹ As previously mentioned, even basic medical services in prison can

¹²⁵ Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

¹²⁶ Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

¹²⁷ Emily Widra, *New Research Links Medical Copays to Reduced Healthcare Access in Prisons*, PRISON POL'Y INITIATIVE (Aug. 9, 2024), <https://www.prisonpolicy.org/blog/2024/08/29/fees-limit-healthcare-access/>.

¹²⁸ NAT'L ALL. FOR CARE AT HOME, *supra* note 64, at 1.

¹²⁹ *Understanding the Cost of Hospice Care*, *supra* note 122.

¹³⁰ Zoom Interview with Laura Musselman, *supra* note 15; HUMANE PRISON HOSPICE PROJ., *supra* note 14.

¹³¹ Zoom Interview with Laura Musselman, *supra* note 15.

¹³² Matt Mckillop, *Prison Health Care Spending Varies Dramatically by State*, PEW (Dec. 15, 2017), <https://www.pewtrusts.org/en/research-and-analysis/articles/2017/12/15/prison-health-care-spending-varies-dramatically-by-state>.

¹³³ *Id.*

¹³⁴ AM. C.L. UNION, *AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY* 27–28 (2012).

¹³⁵ CHAD KINSELLA, *THE COUNCIL OF STATE GOV'TS, CORRECTIONS HEALTH CARE COSTS* 6 (2004).

¹³⁶ *Id.* at 14.

¹³⁷ AM. C.L. UNION, *supra* note 134, at 28.

¹³⁸ *Prison Health Care: Costs and Quality*, PEW (Oct. 18, 2017), <https://www.pew.org/en/research-and-analysis/reports/2017/10/prison-health-care-costs-and-quality>.

¹³⁹ Cecille Joan Avila, *Prison Health Care is Only Available if You Can Afford It*, PRISM REPS. (Oct. 31, 2022), <https://prismreports.org/2022/10/31/prison-health-care-hidden-costs/>.

come with a financial burden for incarcerated people themselves due to their wages. This practice can discourage prisoners from seeking timely medical attention and contributes to the accumulation of medical debt.¹⁴⁰ Some families are forced to take on the burden of paying for outside care, medications, or other support, adding to the economic strain incarceration places on low-income communities.¹⁴¹

Further, since the 1980s, corrections expenditures as a percentage of overall state budgets have surged, often at the expense of other essential services like public education and infrastructure. Over the past 25 years, 14 states have doubled their corrections spending, while 30 states have increased their budgets by at least 50%.¹⁴² From 1988 to 2008, total state spending on corrections rose dramatically from \$11 billion to \$52 billion, and when factoring in federal expenditures the total climbed to \$68 billion.¹⁴³ However, a recent report by the Vera Institute of Justice reveals that the real cost of incarceration extends beyond these allocated corrections budgets.¹⁴⁴ In states such as New York, significant portions of the costs—such as prison employees' health insurance, pensions, and hospital care for prisoners—are drawn from other areas of the state budget. According to the Vera Institute, the total taxpayer cost of incarceration is 14% higher than what is reflected in corrections budgets alone, bringing the true cost to approximately \$77 billion annually.¹⁴⁵ Furthermore, a Pew Center study estimates that 90% of correctional spending is dedicated to incarceration, as opposed to alternatives like probation or parole.¹⁴⁶ This adds up to an average annual cost of \$34,135 per prisoner.¹⁴⁷

Meanwhile, evidence shows that elderly people in prison pose minimal risk to public safety, yet they cost dramatically more to incarcerate.¹⁴⁸ The financial burden is greater for aging prisoners, whose costs can be more than double that of younger inmates.¹⁴⁹ According to a 2004 study by the National Institute of Corrections ("NIC"), taxpayers pay twice as much to incarcerate aging prisoners as they do for younger ones.¹⁵⁰ The total annual cost for an aging prisoner can vary, with estimates ranging from \$34,135 to three times that amount depending on their medical and staff needs, highlighting the growing strain on state budgets due to aging inmates.¹⁵¹ The American Civil Liberties Union has projected that releasing low-risk elderly individuals could save states billions of dollars, with little to no impact on public safety.¹⁵²

Despite this group representing a relatively low-risk portion of the prison population, aging prisoners aged 50 and older cost taxpayers a staggering \$16 billion annually.¹⁵³ This figure exceeds the federal Department of Energy's budget and surpasses federal funding for state elementary and secondary school improvements.¹⁵⁴ The primary driver of these high costs is the increased need for staffing and healthcare.¹⁵⁵ Aging prisoners require more assistance with daily activities, often have limited mobility, and are at a greater risk of mental or physical abuse from younger inmates.¹⁵⁶ As mentioned, healthcare for elderly prisoners is significantly more expensive, with many states estimating that it costs two to three times more than that for younger prisoners.¹⁵⁷ In some states,

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² MICHAEL LACHMAN ET AL., CTR. BUDGET & POL'Y PRIORITIES, IMPROVING BUDGET ANALYSIS OF STATE CRIMINAL JUSTICE REFORMS: A STRATEGY FOR BETTER OUTCOMES AND SAVING MONEY 4 (2012).

¹⁴³ JENIFER WARREN, PEW CTR. STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 11 (2009).

¹⁴⁴ CHRISTIAN HENRICHSON & RUTH DELANEY, CTR. SENT'G & CORR., THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 4 (2012).

¹⁴⁵ *Id.* at 6.

¹⁴⁶ WARREN, *supra* note 143, at 1.

¹⁴⁷ AM. C.L. UNION, *supra* note 134, at 27.

¹⁴⁸ *Elderly People in Prison Present Little Risk, but Staggering Costs*, VERA INST. OF JUST. (Jul. 6, 2015), <https://www.vera.org/news/elderly-people-in-prison-present-little-risk-but-staggering-costs>.

¹⁴⁹ *Id.*

¹⁵⁰ AM. C.L. UNION, *supra* note 134, at 27.

¹⁵¹ *Id.*

¹⁵² *Releasing Low-Risk Elderly Prisoners Would Save Billions of Dollars While Protecting Public Safety*, ACLU Report Finds, AM. C.L. UNION (June 13, 2012, 10:02 AM EDT), <https://www.aclu.org/press-releases/releasing-low-risk-elderly-prisoners-would-save-billions-dollars-while-protecting>.

¹⁵³ AM. C.L. UNION, *supra* note 134, at 28.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

like North Carolina, the cost can be as much as four times higher.¹⁵⁸ While aging prisoners make up only a small percentage of the prison population, they account for a disproportionate share of medical expenses, with some states allocating nearly a third of their correctional healthcare budgets to meet their needs.¹⁵⁹ The high costs are not due to aging prisoners receiving superior healthcare but rather stem from the inadequate prison environment for the elderly.¹⁶⁰ Prisons were designed for younger inmates and lack the facilities and trained staff necessary to address age-related health issues such as cancer, arthritis, hypertension, or dementia.¹⁶¹ Moreover, due to the lack of appropriate care on-site, prisons often need to send aging prisoners off-site for medical treatment, incurring additional costs for transportation, specialized care, and the officers required to accompany them.¹⁶² The expense of caring for elderly prisoners is further exacerbated by the need for specialized accommodations such as providing medical diets, adapted prison cells, and additional staff to assist with daily care.¹⁶³ Overall, the cost of incarcerating aging prisoners highlights the immense financial burden on the corrections system, with healthcare and staffing being the largest contributors to state correctional budgets.¹⁶⁴

States that continue to rely on incarceration for aging populations bear the dual costs of correctional security and complex medical care, while missing opportunities for fiscally and ethically sound alternatives.¹⁶⁵ Compassionate release programs and medical parole, where available, remain underutilized.¹⁶⁶ The failure to implement these alternatives at scale results in unnecessary expenditures on prisoners who could receive better and more cost-effective care in community settings.¹⁶⁷

V. Reform Proposal

Meaningful reform is necessary to address the constitutional, ethical, and fiscal failings of the current end-of-life care system in American prisons. This proposal features a multifaceted solution: (1) the establishment of a national framework for improved compassionate release or medical parole programs to eliminate the cost burden of inadequate healthcare followed by structured community reintegration supported by Medicaid, (2) mandatory integration of proper hospice and geriatric care into all correctional healthcare systems, and (3) lower legal barriers to healthcare justice for incarcerated individuals, including legislative incentives for states to comply with constitutional standards as affirmed in *Estelle v. Gamble*.

First, Congress should enact legislation that standardizes compassionate release procedures across federal and state levels. Although a provision of the Sentencing Reform Act of 1984 permits sentence reductions for “extraordinary and compelling” circumstances such as terminal illness,¹⁶⁸ the current system is impeded by arbitrary judicial discretion and fragmented application.

According to Families Against Mandatory Minimums (“FAMM”), nearly 60% of compassionate release applications are denied for procedural reasons, highlighting the need for a national standard.¹⁶⁹ FAMM proposes that the standard should require medical expert testimony, contain defined criteria (such as having a life expectancy of six months or less), and establish firm deadlines for judicial rulings.¹⁷⁰ Furthermore, California’s recent halt of its medical parole program—caused by cost concerns, limited contractor capacity, and a shift toward

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 29.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Mckillop, *supra* note 132.

¹⁶⁶ MARY PRICE, FAMS. AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 13 (2018).

¹⁶⁷ AM. C.L. UNION, *supra* note 134, at 37.

¹⁶⁸ 18 U.S.C. § 3582(c)(1)(A).

¹⁶⁹ PRICE, *supra* note 166, at 19.

¹⁷⁰ *Id.* at 21.

caring for critically ill prisoners inside prisons—also proves the urgent need for a humane, unified approach.¹⁷¹ Without federal Medicaid reimbursement, states face financial disincentives to release dying prisoners, compounding the systemic neglect of aging and terminally-ill incarcerated individuals.¹⁷² Finally, ensuring a seamless transition from incarceration to community-based care is crucial.¹⁷³ Inmates released under compassionate release often encounter significant challenges in accessing healthcare due to delays in Medicaid reinstatement or housing shortages.¹⁷⁴

To mitigate these issues, the Centers for Medicare & Medicaid Services have introduced the 1115 Reentry Demonstration Opportunity, which allows states to provide Medicaid coverage up to 30 days before release, ensuring that these individuals experience no gap in their care.¹⁷⁵ Congress should promote widespread state adoption of such initiatives through increased funding and by mandating robust transitional care coordination between correctional facilities and community health providers.

Second, correctional institutions should establish national programs like the Humane Prison Hospice Project has implemented in California. This program not only provides compassionate end-of-life care but also offers inmates the opportunity to engage in meaningful work that fosters empathy, responsibility, and personal growth.¹⁷⁶ By allowing incarcerated individuals to care for their terminally-ill peers, the project helps to humanize the prison experience and demonstrates the potential for rehabilitation.¹⁷⁷ Additionally, it has been shown to improve the quality of care for terminally-ill prisoners, ensuring they receive the dignity and respect they deserve during their final days.¹⁷⁸

Other initiatives, such as medical parole programs implemented across several states, offer partial solutions to the constitutional crisis posed by inadequate end-of-life care in prisons.¹⁷⁹ However, according to the National Conference of State Legislatures, these programs are rarely utilized.¹⁸⁰ In response to the aging prison population, some states have invested in rebuilding their facilities to better accommodate elderly individuals with serious medical conditions.¹⁸¹ For instance, California established two memory care units specifically for incarcerated men and developed a separate facility for women that provides up to 24-hour skilled nursing care for those with life-limiting illnesses, including dementia.¹⁸²

Despite these efforts, many advocates continue to push for broader compassionate release programs, arguing that they better honor the principle of allowing elderly individuals to “die with dignity.”¹⁸³ Mark Leno, the former democratic state senator who authored California’s medical parole law, sharply criticized prison officials for discontinuing the use of the statute without legislative approval.¹⁸⁴ He further denounced the return of critically ill individuals to prison facilities, calling the practice “perfectly inhumane.”¹⁸⁵ Leno questioned the underlying motivations behind the policy change, asking if it was merely an act of “cruel punishment and retribution or [a] thoughtful execution of the law put in place by the legislature?”¹⁸⁶ Importantly, the COVID-19

¹⁷¹ Don Thompson, *California Halts Medical Parole, Sends Several Critically Ill Patients Back to Prison*, KFF HEALTH NEWS (Apr. 21, 2025), <https://kffhealthnews.org/news/article/california-medical-parole-critically-ill-prisoners/>.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Connecting Recently Released Prisoners to Health Care—How to Leverage Medicaid*, NAT’L CONF. OF STATE LEGIS. (Jan. 16, 2023), <https://www.ncsl.org/civil-and-criminal-justice/connecting-recently-released-prisoners-to-health-carehow-to-leverage-medicaid>.

¹⁷⁵ *Reentry Section 1115 Demonstration Opportunity*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.medicaid.gov/medicaid/section-1115-demonstrations/reentry-section-1115-demonstration-opportunity> (last visited Feb. 22, 2026).

¹⁷⁶ *Humane Prison Hospice Project is Transforming the Way Terminally Ill People in Prison Die*, *supra* note 10.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Thompson, *supra* note 171.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

pandemic highlighted the vulnerability of incarcerated populations to public health crises, particularly among elderly and medically fragile individuals.¹⁸⁷

With public health experts agreeing that the next pandemic is a matter of “when,” not “if,” correctional systems must proactively develop humane and legally sound responses, including the expansion of medical parole and compassionate release programs.¹⁸⁸ Ultimately, while no singular solution exists to address the complex healthcare needs of elderly inmates, national expansion of these programs could not only improve prison conditions but also serve as a model for integrating restorative justice principles into correctional practices, ensuring that the physical, emotional, and dignified care needs of aging incarcerated individuals are met in times of crisis and beyond.

Lastly, legislative reform must align with constitutional mandates and provide practical incentives for implementation. In *Estelle v. Gamble*, the Supreme Court made clear that deliberate indifference to serious medical needs constitutes cruel and unusual punishment in violation of the Eighth Amendment.¹⁸⁹ However, given its narrowly applied standard and the additional constraints imposed by the Prison Litigation Reform Act, it presents a significant barrier to relief for an already vulnerable population.¹⁹⁰ To address these shortcomings, Congress and federal agencies should enforce legislative frameworks and create regulations that encourage states to develop and maintain constitutionally adequate healthcare systems within their correctional facilities. Federal models like the Justice Reinvestment Initiative have effectively used incentives to encourage criminal justice reforms, suggesting that targeted grants and conditional funding could similarly promote the adoption of humane, cost-effective end-of-life care programs.¹⁹¹ States that implement robust hospice care initiatives and standardized compassionate release procedures should be rewarded, while states that fail to meet constitutionally required standards of care should be subject to heightened federal oversight, public reporting requirements, and potential penalties on the violating prison. Legislative reform must therefore not only articulate clear constitutional obligations but also embed practical, enforceable incentives that promote sustainable improvements.

VI. Conclusion

The failure of U.S. prisons to provide adequate end-of-life care reveals a systemic crisis that not only violates the Eighth Amendment but also raises profound ethical concerns about human dignity. As the incarcerated population continues to age—driven largely by harsh sentencing policies and limited rehabilitation opportunities—the urgent need for compassionate and accessible healthcare within prisons grows ever more pressing. Yet legal and financial barriers make it extraordinarily difficult for incarcerated individuals to advocate for their medical needs, amplifying the crisis. Legally, the stringent standards established by *Estelle v. Gamble*, coupled with the procedural hurdles imposed by the Prison Litigation Reform Act, create an almost insurmountable challenge for those seeking relief. Financially, states expend substantial taxpayer resources while still delivering grossly inadequate care to the most vulnerable individuals in their custody.

Although initiatives like the Humane Prison Hospice Project offer promising models, their reach remains limited without widespread legal and systemic reform. Compounding the problem, states’ chronic underutilization of compassionate release and medical parole programs underscores a broader indifference to the well-being of elderly incarcerated individuals. Addressing these issues demands a fundamental transformation in both policy and public perception—one that acknowledges the inherent humanity of incarcerated individuals and affirms their right to dignified care, regardless of their status. As current practices stand, the systemic neglect of older individuals’ medical needs constitutes deliberate indifference and, therefore, a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. Without meaningful and sustained reform, the

¹⁸⁷ McParland et al., *supra* note 60, at 226; Frieden, *supra* note 89.

¹⁸⁸ McParland et al., *supra* note 60, at 227; Frieden, *supra* note 89.

¹⁸⁹ 429 U.S. 97, 104 (1976).

¹⁹⁰ *Id.*; Fenster & Schlanger, *supra* note 92.

¹⁹¹ *The Justice Reinvestment Initiative*, BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/program/justice-reinvestment-initiative/overview> (last visited Feb. 22, 2026).

United States will continue to fail its constitutional and moral obligations by allowing incarcerated individuals to age into a system unequipped to meet their needs—condemning many to prolonged suffering and turning them into statistics of neglect as their sentences effectively extend beyond their original terms.

**BARRIERS TO REINTEGRATION:
THE SOCIOECONOMIC MARGINALIZATION OF ELDERLY FORMER INMATES**

*Lauren Lewchuk**

*“When you lie dead, no one will remember you.
For you have no share in the Muses’ roses.
No, flitting aimlessly about,
You will wildly roam,
a shade amidst the shadowy dead.”*

- Sappho, *Fragment 33*¹

I. Introduction

His hands, gnarled and trembling, clutched a cardboard box holding his few belongings; a half-finished crossword puzzle book, a dead plant, an annotated Bible. He stood where his mother had left him four decades ago, at these same prison gates. He remembered her taillights vanishing down the dirt road, her promise hanging in the air; “I’ll be right here when you get out.” He waited for her, knowing she would never come; she had been buried for 15 years. He had not attended the funeral. He pictured it sometimes; the small-town church overflowing with people he did not recognize, whispers he could not hear. His younger sister, perhaps, red-eyed and gripping a man’s hand. His school friends, now with wives and children, exchanging awkward glances. The minister, a man he had never met, reciting words he could not quite grasp. He imagined the scent of lilies and old hymn books, the heavy oak of the coffin, the damp earth piled high. He had not been missed. No one had saved him a seat.

All that remained was a disheveled, broken old man. He shuffled down the road, each step a monumental effort. His ill-fitting shoes, made from some cheap plastic imitation of leather, pinched mercilessly, the unforgiving material digging into bunions that had throbbed for decades. Where was he going? How would he even get there? He gasped for air, his lungs burning with a freedom that felt foreign; too heavy, too sharp. He had craved this, prayed for it in the suffocating confines of his cell. He had envisioned it, this freedom, a shimmering mirage in the harsh glare of the flickering fluorescent light above him, a light that buzzed and sputtered, its insistent hum a constant companion in the suffocating silence of his cell. But as the years bled into decades, the buzzing grew fainter, a distant drone, almost swallowed by the encroaching silence. He had smelled it, the imagined scent of pine needles and rain-soaked earth, a world away from the acrid stench of stale hash and sweat that permeated everything. But now, as he was standing on the dirt road, a cigarette hanging from his weak, dried jaw, his freedom felt like a cruel joke, a public humiliation. He felt like he had been dragged through the streets, tarred and feathered, his shame a sticky, suffocating coating. Every glance from a passerby was a hurled stone,

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¹ SAPPHO, *Fragment 33 (600 BCE)*, in *SAPPHO: A NEW TRANSLATION OF THE COMPLETE WORKS* (Diane J. Rayor, trans., Cambridge Univ. Press, 2014).

each whisper a stinging lash. Like a second birth, he was thrust into a world where his mere existence was a jarring intrusion. He was lost; orphaned.

The release of elderly inmates often results in a form of social exile. These former inmates, having served their time, are frequently discharged into a void, facing a new sentence of societal oblivion. Emerging from incarceration, they are not often released into the hands of their families but rather confront a reality of displacement and lack of resources.² This issue is particularly salient in Florida, given its significant elderly population and substantial prison population.³ The State's responsibility to address the complex reentry needs of this demographic is paramount. As emphasized by this Article, effective reintegration of elderly inmates necessitates a multi-pronged strategy that acknowledges the unique challenges faced by older returning citizens. These challenges encompass a range of interconnected issues, including physical and mental health decline, potential cognitive impairment, limited financial means, and often, an absence of stable housing.⁴ Releasing elderly inmates without comprehensive pre- and post-release support systems risks exacerbating existing problems, potentially leading to recidivism, homelessness, and a decline in overall well-being, thus placing additional burdens on already strained social services.⁵

Therefore, Florida must prioritize the creation and implementation of reentry programs that specifically address the needs of its aging prison population.⁶ These initiatives should promote collaboration between correctional institutions, community-based organizations, and healthcare providers to ensure a smoother transition and successful reintegration for elderly inmates.⁷ However, state-level efforts alone are not enough; a comprehensive national approach is essential. This should begin with an amendment to the Older Americans Act (“OAA”) to establish a Senior Reentry Assistance Program (“SRAP”) under Title 42, Chapter 35, Subchapter III (Supportive Services).⁸ By integrating case management for housing, Medicare and Medicaid enrollment, employment training, and legal aid into the existing aging services network, this initiative would provide the structured support reentering seniors need to achieve long-term stability.⁹

II. Background

While elderly offenders generally exhibit a low rate of recidivism, their successful reintegration into society is hindered by a combination of challenges.¹⁰ Before and after release, many face rapidly declining health, limited financial resources, and a lack of stable housing, making it difficult to access necessary healthcare, secure employment, or maintain a stable living situation.¹¹ These compounded barriers create significant obstacles to

² See Justin Dorazio, *Strengthening Access to Housing for People With Criminal Records Is Key to Successful Reentry*, CTR. FOR AM. PROGRESS (Apr. 17, 2023), <https://www.americanprogress.org/article/strengthening-access-to-housing-for-people-with-criminal-records-is-key-to-successful-reentry/>.

³ See *Time Served in Florida*, PEW (June 6, 2012), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2012/06/06/time-served-in-florida> (indicating that 36,678 prisoners were released from Florida prisons in 2009 alone).

⁴ See Niranjana Kowlessar et al., *New Research Brief: Older Americans Benefit from Older Americans Act Nutrition Programs*, ADMIN. FOR CMTY. LIVING 1, 3, 5 (Sept. 2015), <https://acl.gov/sites/default/files/programs/2016-11/AoA-Research-Brief-8-2015.pdf>.

⁵ See Jocelyn Fontaine & Jennifer Biess, *Housing as a Platform for Formerly Incarcerated Persons*, WHAT WORKS COLLABORATIVE 1, 2–3 (Apr. 2012), <https://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF>; see also Dennis Culhane et al., *The Emerging Crisis of Aged Homelessness: Could Housing Solutions Be Funded by Avoidance of Excess Shelter, Hospital, and Nursing Home Costs?*, ACTIONABLE INTEL. FOR SOC. POL'Y, <https://aisp.upenn.edu/wp-content/uploads/2019/01/Emerging-Crisis-of-Aged-Homelessness-1.pdf> (last visited Feb. 26, 2026).

⁶ The concepts of early or compassionate release are beyond the scope of this Article.

⁷ See RYAN ZHANG ET AL., HARVARD UNIV. INST. OF POL'Y CRIM. JUST. POL'Y GRP., SUCCESSFUL REENTRY: A COMMUNITY LEVEL ANALYSIS 4 (2019) (indicating the need for “greater communication and collaboration between community based and government based organizations”).

⁸ Older Americans Act of 1965, 42 U.S.C. § 3030d.

⁹ ZHANG ET AL., *supra* note 7, at 12 (praising the St. Louis Center for Women in Transition for the provision of services “include[ing] mentoring and advocacy, case management, basic necessities, and transitional housing”).

¹⁰ Brie Williams et al., *Coming Home: Health Status and Homelessness Risk of Older Pre-release Prisoners*, 25 J. AM. GERIATRIC SOC. 1038, 1038 (2010) (“Reentry programs linking pre-release older prisoners to medical and psychiatric services and to homelessness prevention programs are needed for both veterans and non-veterans.”).

¹¹ See Meredith Greene et al., *Older Adults in Jail: High Rates and Early Onset of Geriatric Conditions*, 6 HEALTH & JUST., Feb. 2018, at 1, 1.

reintegration, increasing the likelihood of reoffending, succumbing to poor health, or becoming homeless.¹² As the population of aging offenders grows, this Article posits that it is reasonable to expect these challenges to become more pronounced, highlighting the need for targeted reentry programs and support systems to address the unique needs of elderly individuals exiting the criminal justice system.¹³

A. The “Graying” of Floridian Correctional Facilities

According to Florida Statute Section 944.02, inmates who are housed in a state correctional institution may be defined as “elderly” if they are 50 years of age or older.¹⁴ The number of such elderly offenders, as recognized by the Florida legislature through the Elderly Offenders Correctional Facilities Program of 2000, is steadily increasing “and will continue to increase for the foreseeable future.”¹⁵ Between 1993 and 2013, the number of elderly inmates sentenced to at least one year in prison increased by 400%.¹⁶ A study by a division of The Pew Charitable Trusts (“Pew”) suggests that the “graying” of prisons is partially caused by an “increase in admissions of older inmates to prison and policies that keep inmates behind bars for longer periods.”¹⁷ Pew, in a separate study, found that between 1990 and 2009, overall time served increased by 166% in Florida.¹⁸ In fact, it was found that all prison populations have doubled over the past 20 years, with Florida’s prison population having the highest estimated increase.¹⁹ Florida similarly led the way for an increase of time served for violent offenders with a 137% increase.²⁰ This is partially because of policies passed by the Florida legislature, such as the early-1995 “85 percent rule,” which decided that all prisoners must serve at least 85% of their sentence.²¹ Keeping such a drastic increase in sentencing in mind, the fact that the number of incarcerated adults aged 55 years or less has increased by 280% between 1999 and 2016 becomes self-explanatory.²² State and federal sentencing policies from the 1970s to the 2000s, such as Florida’s 85% rule, contributed to what researchers have described as “a prescription for an increase in older inmates: more prisoners, more prison beds, more lifers, and less parole.”²³

i. Aging Behind Bars

Individuals who are incarcerated often experience accelerated aging due to environmental factors among other characteristics.²⁴ A study published by Health and Justice found that incarcerated individuals at the age of

¹² See Fontaine & Biess, *supra* note 5, at 2 (“Formerly incarcerated persons face a myriad of challenges upon release . . .”).

¹³ See Fla. Stat. § 944.804(1) (2000) (“[T]he number and percentage of elderly offenders in the Florida prison system are increasing and will continue to increase for the foreseeable future.”); see also E. Ann Carson & William J. Sabol, *Aging of the State Prison Population, 1993-2013*, U.S. DEPT. OF JUST. 27 (May 19, 2016), <https://bjs.ojp.gov/content/pub/pdf/aspp9313.pdf> (“[T]he number of older prisoners caused by longer stays in prison, along with increasing numbers of admissions of violent offenders age 55 or older, caused the dramatic growth of older prisoners.”).

¹⁴ FLA. STAT. § 944.02(4) (2026).

¹⁵ FLA. STAT. § 944.804(1) (2026); Carson & Sabol, *supra* note 13.

¹⁶ Carson & Sabol, *supra* note 13, at 1.

¹⁷ *Prison Population Continues to Age*, PEW (Oct. 3, 2014), <https://www.pew.org/en/research-and-analysis/articles/2014/10/03/prison-population-continues-to-age>.

¹⁸ *Time Served: The High Cost, Low Return of Longer Prison Terms*, PEW (June 6, 2012), <https://www.pewtrusts.org/en/research-and-analysis/reports/2012/06/06/time-served-the-high-cost-low-return-of-longer-prison-terms> (indicating that in Florida, “prison terms grew by 166 percent and cost an extra \$1.4 billion in 2009”).

¹⁹ *Id.* (indicating that in Florida, “time served rose most rapidly”).

²⁰ *Time Served in Florida*, *supra* note 3.

²¹ FLA. STAT. § 944.275(4)(b)(3) (2026).

²² See Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, THE PEW CHARITABLE TRUSTS (Feb. 20, 2018), <https://www.pew.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs>.

²³ R. V. Rikard & Ed Rosenberg, *Aging Inmates: A Convergence of Trends in the American Criminal Justice System*, 13 J. CORR. HEALTH CARE 150, 157 (2007).

²⁴ Greene et al., *supra* note 11, at 4.

59 years old have the same rate of geriatric morbidity as non-incarcerated individuals at the age of 75 years old.²⁵ Research from the Journal of the American Geriatric Society further explained that incarcerated individuals aged 50 or older are significantly more likely to suffer from one or more chronic health conditions or disability than their non-incarcerated counterparts.²⁶ Similarly, it was found that 40% of prisoners aged 55 or older carried a diagnosis of cognitive impairment in their medical records, a prevalence far higher than found in non-incarcerated older adults of the same age distribution.²⁷ Thus, due to the ever-increasing population of older and rapidly aging people in prisons, the system is forced to deal with their unique, accelerated needs.²⁸ In attempting to satisfy their needs, prison systems are forced to pay roughly double what they would pay to house younger adults to house elderly inmates.²⁹ This causes innate disparities in the care that elderly people receive while in prison.

The financial burden associated with housing elderly inmates is disproportionately high in part due to the increased medical care and structural modifications required to accommodate this population.³⁰ Correctional facilities must provide their inmates with frequent medical visits, medications, and rehabilitative services such as physical therapy, while also ensuring compliance with accessibility standards.³¹ Under Title II of the Americans with Disabilities Act (“ADA”), state and local prisons are legally required to provide individuals with disabilities, including elderly inmates, equal access to programs, services, and facilities.³² Additionally, Title 28 of the Code of Federal Regulations (“CFR”) mandates that correctional institutions implement “reasonable modifications” in policies and procedures to ensure that aging individuals receive necessary healthcare, mobility assistance, and other essential services.³³ The 2010 ADA Standards for Accessible Design further outline specific structural requirements, including the installation of wheelchair ramps, specialized beds, and accessible restrooms.³⁴ These mandated modifications can require substantial financial investment, contributing to the significantly higher costs associated with housing elderly inmates.

Despite these requirements, disparities in care persist also due to systemic challenges within the correctional system. Correctional facilities “were never designed to be nursing homes or geriatric wards,” which inherently makes it difficult to meet the complex medical and accessibility needs of aging inmates.³⁵ Although efforts have been made to address these issues, many facilities are constrained by limited budgets, understaffing, and a lack of specialized geriatric training for correctional healthcare personnel.³⁶ As a result, elderly prisoners frequently receive inadequate medical attention compared to individuals in nursing homes or specialized healthcare settings.³⁷ Reports from the Office of the Inspector General (“OIG”) indicate that older inmates often

²⁵ *Id.* (“Among older adults in jail with an average age of 59, the prevalence of several geriatric conditions was similar to that found among community dwelling adults age 75 or older.”).

²⁶ Brie Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Health Care*, 60 J. AM. GERIATRIC SOC. 1150, 1151 (2012).

²⁷ *Id.* at 1153.

²⁸ *Id.* at 1150.

²⁹ Inimai Chettiar et al., *At America's Expense: The Mass Incarceration of the Elderly*, AM. CIV. LIBERTIES UNION 57 (June 2012), https://www.aclu.org/wp-content/uploads/publications/elderlyprisonreport_20120613_1.pdf (“Because of healthcare and physical needs that prisons are ill-equipped to handle, each aging prisoner on average costs taxpayers \$68,270 per year—approximately double what it costs to incarcerate an average prisoner.”).

³⁰ *Id.* at 27.

³¹ See *Pa. Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 208, 210 (1998) (holding that ADA protections cover prison inmates); see also *Estelle v. Gamble*, 429 U.S. 97, 98, 103–105 (1976) (holding that the Eighth Amendment requires the government to provide health care to inmates).

³² See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131–12134 (1990).

³³ 28 C.F.R. § 35.130(b)(7) (2026).

³⁴ U.S. DEP'T OF JUST., *2010 ADA Standards for Accessible Design* (Sept. 15, 2010), <https://www.ada.gov/law-and-regs/design-standards/2010-stds/>.

³⁵ See Kirubel M. Mussie et al., *Challenges in Providing Ethically Competent Health Care to Incarcerated Older Adults with Mental Illness: A Qualitative Study Exploring Mental Health Professionals' Perspectives in Canada*, 21 BMC GERIATRICS, 2021, at 1, 11.

³⁶ Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*, HRW.ORG (Jan. 26, 2012), <https://www.hrw.org/report/2012/01/28/old-behind-bars/aging-prison-population-united-states>.

³⁷ See Williams et al., *supra* note 26, at 1156.

experience delayed treatment for chronic conditions, insufficient medical supervision, and restricted access to rehabilitative services which could help mitigate the physical decline associated with aging.³⁸

B. Release into Vulnerability

Nearly 700,000 inmates are released each year.³⁹ While some elderly individuals return to family upon release, others, often frail and exhausted, exit incarceration without support.⁴⁰ Inmates are often released with “gate money,” a small supply of their medication, and a bus ticket.⁴¹ A study found that 90% of states terminate inmate health insurance upon incarceration, leaving a medically vulnerable population uninsured during the critical months following release when risks of medical problems and death are highest.⁴² They then must wait until their benefits, if applicable, are restored; this is most commonly a duration of “several months.”⁴³

Upon release, formerly incarcerated individuals generally depend on family members for basic needs, such as housing and other material needs.⁴⁴ One of the most immediate challenges they face is finding a place to stay on their first night outside of prison.⁴⁵ For many, this means returning to their communities with only temporary housing options, leading them to become transient, moving from one location to another.⁴⁶ According to an Urban Institute study, which tracked returning prisoners across multiple sites, between 48 and 62% spent their first night after release at a relative’s home.⁴⁷ For those who do not have access to temporary housing options, such as elderly individuals without a support system, they resort to staying in a halfway house.⁴⁸ Halfway houses, including federal residential reentry centers and state and local reentry facilities, face significant challenges, including limited capacity.⁴⁹ It is clear that these facilities are not intended to serve as long-term housing solutions.⁵⁰

Many newly released former inmates are confronted with nowhere to go and are rendered unhoused;⁵¹ in fact, half of the nation’s unhoused population has a history of incarceration.⁵² A single instance of incarceration dramatically increases the risk of homelessness, with formerly incarcerated individuals facing a rate nearly seven times higher than the general population.⁵³ A study found that among formerly incarcerated individuals, 203 out of every 10,000 are unhoused, while nearly three times as many (570 out of 10,000) are housing insecure.⁵⁴

³⁸ OFF. INSPECTOR GEN., U.S. DEP’T OF JUST., *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, <https://oig.justice.gov/sites/default/files/reports/15-05.pdf> (last updated Feb. 2016) (utilizing BOP data from a singular institution, the OIG found that the “average wait time for inmates, including aging inmates, to be seen by an outside medical specialist for cardiology, neurosurgery, pulmonology, and urology to be 114 days”).

³⁹ Kamala Mallik-Kane & Christy A. Visher, *Health and Prisoner Reentry: How Physical, Mental, and Substance Abuse Conditions Shape the Process of Reintegration*, URB. INST. JUST. POL’Y CENTER 7 (Feb. 2008), <https://www.urban.org/sites/default/files/publication/31491/411617-Health-and-Prisoner-Reentry.PDF>.

⁴⁰ Lucas Espinosa, *The Struggle of Reentry: A Neglected Issue Concerning Older Adults*, 45 ABA COMM’N ON L. & AGING 151, 152 (2024).

⁴¹ Williams et al., *supra* note 10, at 1038.

⁴² Sarah Wakeman et al., *Filling the Gap: The Importance of Medicaid Continuity for Former Inmates*, 24 J. GEN. INTERN MED. 860, 860 (2009).

⁴³ *Id.* at 861.

⁴⁴ Fontaine & Biess, *supra* note 5, at 1.

⁴⁵ *Id.* at 3 (“Incarceration places individuals at an increased risk of housing instability and insecurity *immediately* upon their release from incarceration.”).

⁴⁶ *Id.*

⁴⁷ *Id.* at 4.

⁴⁸ Dorazio, *supra* note 2.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Williams et al., *supra* note 10.

⁵² Martha Burt et al., *Homelessness: Programs and the People They Serve. Summary Report. Findings of the National Survey of Homeless Assistance Providers and Clients*, URB. INST. 25, (Dec. 1999); *see id.*

⁵³ Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL. INITIATIVE (Aug. 1, 2018), <https://www.prisonpolicy.org/reports/housing.html>.

⁵⁴ *Id.*

Elderly individuals who were formerly incarcerated experienced the highest rates of housing insecurity.⁵⁵ The number of elderly individuals experiencing homelessness continues to increase; in fact, it is expected to triple by 2030.⁵⁶

Homelessness amongst elderly registered sex offenders, in particular, is a growing crisis. Per Florida Statute Section 775.21, the Florida Sexual Predators Act, registrants must remain upon the registry for life, “meaning a young offender will continue to face the same restrictions upon aging into his or her senior years.”⁵⁷ This means that the offenders could lack stable housing for a large portion of time. There are no comprehensive, publicly available lists of communities or neighborhoods that accept sex offenders, leaving many without stable shelter.⁵⁸ Florida’s registry includes approximately 10,200 offenders aged 65 and older and according to the Office of Program Policy Analysis and Government Accountability (“OPPAGA”), this population grew by two percentage points between 2015 and 2016.⁵⁹

In limited cases, charitable organizations provide stable living arrangements for a small, lucky number of individuals. One such facility is the Palace Mobile Home Park in St. Petersburg, FL, which was the focus of the 2016 documentary *Pervert Park*.⁶⁰ Established in 1990 by Nancy Morais, the founder of Florida Justice Transitions, the park was created in response to Florida’s stringent probation laws.⁶¹ Under Florida Statute Section 948.30, convicted sex offenders are prohibited from residing within 300 meters of locations where children are present.⁶² The Palace serves as one of the few available housing options, though its capacity is restricted to 120 residents at any given time.⁶³

Securing stable housing for convicted sex offenders presents significant challenges, often resulting in law enforcement placing them in any available location upon release.⁶⁴ In 2007, the *Miami New Times* documented a group of formerly incarcerated individuals in Miami who, due to stringent residency restrictions, were mandated to reside beneath the State Road 836 bridge near the county criminal court.⁶⁵ Their displacement was a consequence of stringent local ordinances, including the 2005 Lauren Book Child Safety Ordinance in Miami-Dade County, which prohibits registered sex offenders from residing within 2,500 feet of schools.⁶⁶ This policy significantly restricts available housing options, a problem further underscored by a 2009 study conducted by the Broward County Commission which found that increasing residency restrictions by just 200 feet reduced available housing by 40% within the county.⁶⁷ Many halfway houses, shelters, and landlords refused to rent to offenders out of fear of legal repercussions or community backlash.⁶⁸ These individuals, monitored by probation officers enforcing a 10:00 PM to 6:00 AM curfew, had limited access to basic amenities, and faced challenging living conditions.⁶⁹ As a result, probation officers directed some offenders to the encampment under the bridge

⁵⁵ *Id.*

⁵⁶ Culhane et al., *supra* note 5, at 4.

⁵⁷ FLA. STAT. § 775.21(6)(1) (2026); Meryl Kornfield, *Florida’s Sex Offender Population is Aging. Where Can They Live Out Their Silver Years?*, MIAMI HERALD (June 20, 2019), <https://www.miamiherald.com/news/state/florida/article231296693.html>.

⁵⁸ *Id.*

⁵⁹ FLA. OFF. PROGRAM POL’Y ANALYSIS & GOV’T ACCOUNTABILITY, SEX OFFENDER REGISTRATION AND MONITORING TRIENNIAL REVIEW, REP. NO. 18-08, 1 (2018).

⁶⁰ PERVERT PARK (Final Cut for Real 2014); Kornfield, *supra* note 57.

⁶¹ PERVERT PARK, *supra* note 60; Shafaq Hasan, *Documentary Explores Lives and Challenges of Florida Sex Offenders*, NON-PROFIT Q. (July 10, 2016), <https://nonprofitquarterly.org/documentary-explores-lives-challenges-florida-sex-offenders/>.

⁶² FLA. STAT. § 948.30(1)(b) (2026).

⁶³ PERVERT PARK, *supra* note 60.

⁶⁴ Isaiah Thompson, *Swept Under the Bridge*, MIAMI NEW TIMES (Jan. 1, 2007), <https://www.miaminewtimes.com/news/swept-under-the-bridge-6334676>.

⁶⁵ *Id.*

⁶⁶ MIAMI-DADE COUNTY, FLA., CODIFIED ORDINANCES, 21 § 283 (2010).

⁶⁷ Jill Levenson et al., *Where for Art Thou? Transient Sex Offenders and Residence Restrictions*, 26 CRIM. JUST. POL’Y REV., no. 4, Dec. 2013, at 1, 3.

⁶⁸ Thompson, *supra* note 64.

⁶⁹ *Id.*

because it was one of the only locations that technically complied with residency laws.⁷⁰ To make matters worse, federal rental assistance in public housing is not available to sex offenders.⁷¹ The U.S. Department of Housing and Urban Development (“HUD”) enforces this restriction, meaning Public Housing Agencies (“PHAs”) must deny housing to such individuals.⁷²

C. A Cycle of Hardship

Housing instability, homelessness, and incarceration constitute a destructive, self-reinforcing cycle. Upon release from incarceration, individuals often face systemic barriers to housing; notably discriminatory tenant screening wherein landlords routinely deny tenancy based on criminal records.⁷³ Alternatively, a lack of familial support or adequate finances may lead them directly into homelessness upon release; a common experience for elderly individuals and sex offenders.⁷⁴ Consequently, the inability to secure stable housing profoundly impedes employment acquisition, as many positions necessitate proof of a residential address.⁷⁵ The resulting unemployment significantly elevates the risk of reincarceration, with research indicating an 127% increase in odds of recidivism for unemployed ex-offenders.⁷⁶ Critically, the cycle persists even when full-time employment is attained; homelessness remains a potent risk factor for reincarceration, underscoring the enduring impact of housing insecurity.⁷⁷ Thus, the lack of stable housing drives homelessness, which may cause unemployment, which in turn, increases the likelihood of criminal justice system involvement, thereby completing and rebirthing a never-ending cycle; an eternal sentence.

Individuals transitioning from incarceration, whether into halfway houses or directly into homelessness, face significant barriers to secure independent housing and struggle to avoid recidivism.⁷⁸ These obstacles are multifaceted and include the continual criminalization of poverty.⁷⁹

Florida's House Bill 1365, passed in 2024, prohibits camping or sleeping on public property, directly targeting unhoused individuals.⁸⁰ The state legislature has appropriated \$30 million to assist municipalities with the implementation of the statute, specifically allocated for the provision of mental health and substance abuse treatment services.⁸¹ However, local government officials have expressed concerns regarding the adequacy of the allocated funds.⁸² Municipalities, particularly those representing larger counties, report receiving approximately \$600,000 each, which they deem insufficient to meet the demands of their respective unhoused populations and effectively implement the legislation.⁸³ For instance, data from HUD indicates that Florida's unhoused population increased to 30,756 in 2023.⁸⁴ Broward County, encompassing the bustling metropolis of Fort Lauderdale and

⁷⁰ *Id.*

⁷¹ *PIH 2012-28 & H 2012-11*, U.S. DEP'T OF HOUS. & URBAN DEV. (June 11, 2012), <https://nhlp.org/files/PIH2012-28.pdf>.

⁷² *Id.*

⁷³ Lynn M. Clark et al., *Landlord Attitudes Toward Renting to Released Offenders*, 71 *FED. PROBATION*, no. 1, June 2007, at 1.

⁷⁴ Fontaine & Biess, *supra* note 5, at 2.

⁷⁵ Katharine H. Bradley et al., *No Place Like Home: Housing and the Ex-Prisoner*, *CMTY. RES. FOR JUST.* 1 (Nov. 2001), https://www.crj.org/assets/2017/07/54_No_Place_Like_Home.pdf.

⁷⁶ Amanda Bunting et al., *Beyond the Employment Dichotomy: An Examination of Recidivism and Days Remaining in the Community by Post-Release Employment Status*, 63 *INT'L J. OF OFFENDER THERAPY & COMPAR. CRIMINOLOGY* 712, 720 (2019).

⁷⁷ *Id.*

⁷⁸ Burt et al., *supra* note 52, at 25.

⁷⁹ Dorazio, *supra* note 2.

⁸⁰ FLA. STAT. § 125.0231 (2026).

⁸¹ Terry Spencer & Kate Payne, *Florida Enacts Tough Law to Get Homeless Off the Streets, Leaving Cities and Counties Scrambling*, *COURTHOUSE NEWS SERV.* (Oct. 1, 2024), <https://www.courthousenews.com/florida-enacts-tough-law-to-get-homeless-off-the-streets-leaving-cities-and-counties-scrambling/>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ U.S. Dep't of Hous. & Urban Dev. Off. of Policy Dev. and Rsch., *The 2023 Annual Homelessness Assessment Report (AHAR) to Congress*, HUDUSER 16 (Dec. 2023), <https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf>.

surrounding regions, holds a particular need for housing assistance with approximately 1,650 individuals seeking shelter.⁸⁵ This demand exceeds the county's capacity of 700 shelter beds, which are predominantly occupied.⁸⁶ While municipalities scrambled to develop temporary housing strategies with the minimal funds they were provided, H.B. 1365 authorizes the establishment of outdoor encampments with a maximum residency of one year, thereby potentially returning individuals experiencing homelessness to unsheltered conditions upon expiration of the permitted period.⁸⁷ Without commensurate municipal investment in alternative support provisions, the return of unhoused individuals to public areas would likely precipitate their arrest for non-compliance with H.B. 1365's public space regulations.⁸⁸ As aforementioned, the number of elderly individuals experiencing homelessness continues to increase; in fact, it is expected to triple by 2030.⁸⁹ H.B. 1365's prohibition of public camping, coupled with the expanding unhoused elderly population, initiates a negative cycle.⁹⁰ Increased arrests, a direct result of this policy interaction, lead to a higher proportion of elderly individuals entering the criminal justice system, since the number of elderly unhoused individuals continues to increase.⁹¹ This, in turn, risks amplifying recidivism rates, perpetuating the cycle of homelessness and incarceration within the older demographic.

With the criminalization of homelessness, one can reasonably expect that the number of unhoused elderly individuals in the criminal justice system, who make up the largest portion of the unhoused population, will increase.⁹²

III. Proposed Solutions

Addressing the growing crisis of elderly individuals exiting the criminal justice system requires a comprehensive and strategic approach to reentry.⁹³ As Florida's aging prison population continues to increase, so do the systemic barriers to successful reintegration, such as housing instability, limited access to healthcare, and challenges securing employment.⁹⁴ Without targeted interventions, these issues contribute to a perpetuating cycle of homelessness, unemployment, and recidivism, particularly considering recent legislation that criminalizes homelessness; this, in turn, further entangles vulnerable populations in the justice system.⁹⁵ To break this cycle, Florida must implement tailored reentry programs that provide proactive support for elderly returning citizens.⁹⁶ These solutions must prioritize stability in housing, healthcare, and employment, fostering collaboration between correctional institutions, community organizations, and support agencies to ensure a smoother transition and

⁸⁵ Fla. Council of Homelessness, *Annual Report*, FLA. DEP'T OF CHILD. AND FAMS. 19–20 (June 2025), <https://www.myflfamilies.com/documents/64946.pdf>.

⁸⁶ *Id.*

⁸⁷ FLA. STAT. § 125.0231 (2026).

⁸⁸ Nat'l L. Cent. on Homelessness and Poverty, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities*, NAT'L HOMELESSNESS L. CENT. 8, <https://homelesslaw.org/wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf?utm> (last visited May 5, 2026).

⁸⁹ Culhane et al., *supra* note 5, at 4.

⁹⁰ *See* FLA. STAT. § 125.0231 (2026).

⁹¹ Aaron Leibowitz & Tess Riski, *Homeless Count Dips in Miami Beach Amid Arrests. Is That Related to an Uptick in Miami?*, MIAMI HERALD (Aug. 29, 2024), <https://www.miamiherald.com/news/local/community/miami-dade/article291179960.html#storylink=cpy> (reporting that Miami Beach police made more than 200 arrests for “illegal camping” since the enactment of the ordinance in October).

⁹² Fla. Stat. § 125.0231.

⁹³ OFF. INSPECTOR GEN., *supra* note 38, at 52 (determining that current reentry programming is “inadequate”).

⁹⁴ *See* Fontaine & Biess, *supra* note 5, at 2.

⁹⁵ Kristin Stainbrook et al., *Reentry and Housing Stability: Final Report*, OFF. ASSISTANT SEC'Y FOR PLANNING & EVALUATION 6 (Dec. 18, 2024), <https://aspe.hhs.gov/reports/reentry-housing-stability> (“[E]xperiencing homelessness puts individuals at greater risk of legal system involvement, due in part to policies that criminalize homelessness, such as laws against sleeping in public spaces, panhandling, or public urination. Returning individuals without a place to live are also more likely to experience supervision violations and rearrest.”).

⁹⁶ *See* OFF. INSPECTOR GEN., *supra* note 38, at 52 (recommending tailored reentry that is “flexible,” or unique to each inmate).

reduce long-term societal costs.⁹⁷ Through these targeted interventions, Florida can create a reentry system that empowers elderly individuals to successfully reintegrate into their communities, promoting their independence and long-term well-being.

A. Expanding Pre-Release Planning

The successful reintegration of elderly inmates depends on a structured, evidence-based pre-release planning process, which should begin well before their release date. Given the significant challenges aging individuals face in correctional settings, including chronic health conditions, financial instability, and limited social support, it is essential to implement targeted strategies that ensure a smooth transition into the community.⁹⁸ A critical component of this process is the establishment of dedicated reentry units within correctional facilities, designed specifically to address the unique needs of elderly inmates and reduce their risk of homelessness, recidivism, or general decline.⁹⁹

These senior reentry units should be staffed by a multidisciplinary team of professionals specializing in elderly reentry, such as social workers, mental health professionals, financial experts, and legal advocates.¹⁰⁰ Their primary role would be to conduct individualized needs assessments at least 12 months before release, evaluating key factors such as housing stability, healthcare requirements, financial security, and available social support networks.¹⁰¹ Based on these assessments, the case managers—each specialized in their own field—can develop personalized reentry roadmaps that outline concrete steps for securing stable housing, enrolling in healthcare programs, and obtaining financial assistance.¹⁰²

Beyond assessment and planning, the senior reentry unit must serve as a coordination hub, ensuring seamless communication between correctional institutions, social service agencies, and community organizations.¹⁰³ This collaboration is essential for securing placements in supportive housing programs, facilitating Medicaid and Medicare enrollment, and connecting individuals with case management services that continue post-release.¹⁰⁴

By integrating specialized reentry units into correctional institutions, facilities can proactively address the systemic marginalization elderly inmates face upon release. A structured, well-coordinated approach may increase the likelihood of successful reintegration, ensuring that aging individuals are not left to navigate post-incarceration challenges alone but are instead supported in achieving long-term stability and self-sufficiency.¹⁰⁵

⁹⁷ John Sawyer et al., *Essential Connections: Community Health Centers' Role in Facilitating Healthy Transitions Out of Incarceration*, THE COMMONWEALTH FUND (Feb. 9, 2024), <https://www.commonwealthfund.org/publications/issue-briefs/2024/feb/essential-connections-community-health-centers-role-facilitating> (finding that community centers and resources are essential to reintegration).

⁹⁸ OFF. INSPECTOR GEN., *supra* note 38, at 35–36, 52 (noting that institutions specifically fail to tailor planning to elderly inmates, who are briefly told about their access to Social Security or VA benefits).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 53–54, 65 (recommending that institutions consider “placing additional Social Workers” and implementing “release preparation courses” that acknowledge the “post-incarceration medical care and retirement needs of aging inmates”).

¹⁰¹ Ready4Release, a program by Operation New Hope, implements case-management by creating individual release plans for clients ninety days prior to their release, including housing, transportation, and employment assistance. See *Ready4Release: It's No Longer One Day. It's Now Day One!*, OPERATION NEW HOPE, <https://operationnewhope.org/our-programs/ready4release/> (last visited Feb. 4, 2025). In contrast, this Article argues that a unique approach is required to address elderly re-entry, involving a team of interconnected, disciplined experts rather than a sole case manager.

¹⁰² OFF. INSPECTOR GEN., *supra* note 38, at 52 (stating that current reentry programming is without flexibility to “create local programs or activities to address the needs of” aging inmates).

¹⁰³ Jesse Janetta et al., *The Elected Official's Toolkit for Jail Reentry*, URBAN INST. JUST. POL'Y CTR. 5, https://www.urban.org/sites/default/files/2015/02/11/elected-officials-toolkit-for-jail-reentry_final_0.pdf (last visited May 5, 2026) (“Collaboration and information-sharing between jails and community organizations are essential to ensuring a smooth transition for released inmates.”).

¹⁰⁴ OFF. INSPECTOR GEN., *supra* note 38 (suggesting that institutions further inform inmates about Social Security or VA benefits).

¹⁰⁵ Johanna Lacoë & Hannah Betesh, *Supporting Reentry Employment and Success: A Summary of the Evidence for Adults and Young Adults*, U.S. DEP'T OF LAB. 2 (Sept. 2019), <https://www.dol.gov/sites/dolgov/files/ETA/publications/ETAOP2019-11%20REO%20Supporting%20Reentry%20Employment%20RB090319.pdf> (stating that the “primary evidence of the effectiveness of these [case management] models comes from a review of experimental and quasi-experimental impact evaluations”).

i. Housing and Residential Assistance

Housing stability is a fundamental determinant of successful reintegration for elderly returning citizens.¹⁰⁶ Due to the physical, mental, and financial challenges associated with aging, correctional institutions must prioritize long-term, supportive housing solutions as a central component of the reentry process.¹⁰⁷ Securing stable housing before release is essential, as it provides elderly individuals with the security and access to essential services needed to transition successfully into the community.¹⁰⁸

The proposed senior reentry unit should incorporate a dedicated team of housing case managers, specifically tasked with addressing the housing needs of elderly individuals.¹⁰⁹ Case managers should work closely with housing providers, including assisted living facilities, affordable housing programs, and transitional housing organizations, to ensure that appropriate housing placements are secured before release. Establishing formal partnerships between the senior reentry unit and these housing providers will facilitate pre-release coordination, ensuring that elderly inmates are placed into stable housing well before their release date.¹¹⁰

Housing case managers will guide elderly individuals through public housing programs such as Section 202 Supportive Housing for the Elderly, rental assistance programs, and long-term care facility placements.¹¹¹ Case managers should also provide direct support in navigating the often-complicated application processes for these programs, ensuring that eligible individuals are linked to the services they need.

For elderly individuals with significant medical needs, housing case managers will be responsible for establishing referral pathways to specialized services, such as nursing homes and geriatric care programs, ensuring that they receive the necessary care and support upon release. Furthermore, particular attention will be given to elderly individuals with sex offense convictions, as they may face unique barriers to housing due to legal restrictions and potential discrimination. Housing case managers must work in close coordination with local housing authorities to help these individuals identify housing options that comply with residency restrictions such as distance from schools, parks, or other areas where restrictions may apply.

By incorporating these considerations into the broader reentry strategy, the housing case managers will help ensure that elderly returning citizens, particularly those with criminal backgrounds, are not further marginalized. This proposal emphasizes the importance of equitable housing solutions that provide elderly individuals with stable, supportive environments upon their return to the community.

ii. Employment and Financial Assistance Managers

Financial security is a crucial determinant in the successful reintegration of elderly former inmates. Many face significant barriers such as limited employment opportunities, restricted access to benefits, and overall

¹⁰⁶ Stainbrook et al., *supra* note 95 (stating that “housing is a vital element of successful reentry” and “securing stable housing is a foundational element of reentry success”).

¹⁰⁷ *See id.* at 9–10.

¹⁰⁸ Hagar Dickman et al., *Promising, Practices and Models for Older Adults Transitioning from Incarceration Back to the Community*, JUST. IN AGING (Jan. 16, 2025), <https://justiceinaging.org/promising-practices-for-older-adults-transitioning-from-incarceration/> (stating that “stable housing is vital for older adults re-entering the community” and “homelessness also increases the risk of reincarceration due to the rising criminalization of acts related to homelessness, such as loitering or sleeping outside”).

¹⁰⁹ Naima I. Lusaine, *Support Services from Prison to Home: Reentry Programs in a Midwestern State*, WALDEN UNIVERSITY 85, (Nov. 5, 2024) <https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=18259&context=dissertations> (praising reentry work done in Ohio wherein inmates worked with case managers to find housing).

¹¹⁰ An example of a community resource is the Clifford Hills Community Outreach Center in Tampa, Florida, which serves as a lifeline for ex-offenders seeking housing. *See Nonprofit Overview*, GREAT NONPROFITS, <https://greatnonprofits.org/clifford-hill-community-outreach-center-inc> (last visited May 5, 2026). The program, upon acceptance, offers furnished, deposit-free apartments, clothing, potential transportation from the bus stop, and assistance with finding employment. *Id.*

¹¹¹ *See* Linda Couch, *Section 202: Supportive Housing for the Elderly*, NAT’L LOW INCOME HOUSING COAL., https://nlihc.org/sites/default/files/AG-2021/04-13_Section-202.pdf (last visited May 5, 2026).

economic instability upon release. In response to such challenges, correctional institutions must implement comprehensive reentry strategies that prioritize the financial well-being of elderly individuals by supporting them in securing stable income sources including employment, disability benefits, and retirement programs.

A core component of this strategy is the establishment of a specialized team of case managers focused on employment and financial assistance within the senior reentry unit. These case managers will work closely with workforce development agencies, vocational training centers, and nonprofit organizations to provide job training and employment programs tailored to the specific needs of elderly returning citizens.¹¹² As many elderly individuals are no longer able to engage in physically demanding labor, the senior reentry unit will focus on offering alternative training and employment opportunities for part-time, remote, or low-impact roles. Expanding training programs to include digital literacy will equip elderly individuals with the practical skills they need for success in less physically demanding industries.¹¹³

In addition to job training, it is critical to recognize that for many aging ex-offenders, employment alone may not provide the financial security they need.¹¹⁴ As such, case managers within the reentry unit will assist eligible individuals in accessing Social Security benefits, Supplemental Security Income (“SSI”), and Social Security Disability Insurance (“SSDI”) before release, ensuring that they are financially stable upon reentry.¹¹⁵ This proactive approach will help prevent financial instability and address immediate income needs.¹¹⁶

Furthermore, the senior reentry unit will implement financial literacy programs tailored to elderly individuals, focusing on budgeting, managing fixed incomes, and navigating public assistance systems.¹¹⁷ Case managers will also assist in facilitating access to banking services, benefits, and nonprofit financial assistance programs, ensuring that elderly individuals have the necessary resources to manage their finances and achieve long-term economic stability.¹¹⁸

By prioritizing employment alternatives, financial education, and expanded access to benefits, the proposed reentry unit will create a comprehensive, multi-faceted approach to enhancing the economic stability of elderly former inmates.¹¹⁹ This approach will not only improve individual quality of life but also reduce reliance on emergency assistance programs and lower the risk of recidivism, fostering a more successful and sustainable reintegration into society.¹²⁰

¹¹² OFF. INSPECTOR GEN., *supra* note 38, at 33 (recommending that aging inmates require additional programs to meet their needs, including computer, wellness, foreign language, and creative classes).

¹¹³ See also Eugenia Zivanai & Gilbert Mahlangu, *Digital Prison Rehabilitation and Successful Re-entry Into a Digital Society: A Systematic Literature Review on the New Reality on Prison Rehabilitation*, 8 COGENT SOC. SCI., 2022, at 1,10 (finding that digital exclusion severely hinders offender re-entry as society increasingly relies on digital technologies, making digital literacy essential for successful reintegration). Prisons must embrace digital rehabilitation programs to promote social inclusion and equip offenders with the necessary skills for navigating a technology-dependent world. *Id.*

¹¹⁴ Mark Pogrebin et al., *Employment Isn't Enough: Financial Obstacles Experienced by Ex-Prisoners During the Reentry Process*, 39 CRIM. JUST. REV. 394, 396 (2014).

¹¹⁵ Catherine H. Conly, *Helping Inmates Obtain Federal Disability Benefits: Serious Medical and Mental Illness, Incarceration, and Federal Disability Entitlement Programs*, ABT ASSOCIATES INC. 56 (June 7, 2005), <https://www.ojp.gov/pdffiles1/nij/grants/211989.pdf> (arguing that helping ill inmates with benefits applications is important but complex, with low success rates, and that it should be part of a larger discharge plan).

¹¹⁶ *Id.*

¹¹⁷ An example of such a program is Florida's Project 180. Project 180, partnering with banks, delivers financial literacy courses in Florida prisons and jails, reaching nearly 1,300 individuals across four counties. See *Financial Literacy Course*, PROJECT 180, <https://www.project180reentry.org/portfolio-item/financial-literacy-course/> (last visited May 5, 2026). The curriculum covers credit management, borrowing, budgeting, and savings, with specialized lessons for long-term incarcerated individuals on basic banking and ATM usage. *Id.* It also emphasizes scam avoidance, addressing prevalent threats like identity theft and fraudulent schemes targeting reentrants, which is beneficial to older reentrants. *Id.*

¹¹⁸ Sawyer et al., *supra* note 97 (defining the creation of partnerships between correctional institutions and across legal, health, and other community-based organizations as one of the “10 Principles for Successfully Meeting People’s Health Needs at Reentry”).

¹¹⁹ ZHANG ET AL., *supra* note 7, at 7 (praising Chicago’s “Safer Foundation,” an inmate success program, for reducing recidivism to 17.5% for clients who have maintained employment for a 30-day period after providing them with one-on-one financial literacy lessons).

¹²⁰ *Id.* at 19.

iii. Healthcare and Mental Health Assistance Managers

Ensuring uninterrupted access to medical care is a critical component of successful reentry for elderly former inmates.¹²¹ Due to the complex medical needs that often accompany aging, correctional institutions must prioritize facilitating access to healthcare services before release, ensuring that inmates' medical requirements are seamlessly met as they transition into the community.¹²²

A key strategy in the proposed reentry unit is the appointment of dedicated case managers specifically focused on health and healthcare services. These case managers will work to facilitate the enrollment or reactivation of eligible inmates in healthcare programs such as Medicaid, Medicare, or VA healthcare prior to their release.¹²³ This will ensure that elderly individuals have immediate access to healthcare coverage upon discharge, thus minimizing the risk of gaps in medical care.¹²⁴ Additionally, case managers will establish formal agreements between correctional facilities and community health centers, hospitals, and geriatric care providers to ensure that inmates transition smoothly from institutional care to community-based services.¹²⁵ These partnerships will ensure continuity in the treatment of chronic conditions, including diabetes, heart disease, and hypertension, by facilitating referrals to specialists and primary care providers.¹²⁶

For inmates with significant healthcare needs, the case managers will create comprehensive care coordination plans before release.¹²⁷ These plans will include referrals to home healthcare providers, medical specialists, and long-term care facilities if required.¹²⁸ In addition, correctional institutions would be required to conduct pre-release medical screenings and implement medication management programs to prevent disruptions in essential treatments, particularly for individuals with chronic conditions who rely on regular medications.¹²⁹ Case managers will collaborate with healthcare providers to ensure that prescriptions are filled prior to release and will assist with coordinating a seamless transition to community-based care providers.¹³⁰

By appointing specialized case managers within the reentry unit to oversee healthcare access, correctional institutions can better ensure that elderly former inmates receive continuous, comprehensive medical care post-release.¹³¹ This approach will not only address the healthcare needs of aging individuals but also reduce the risk of health-related setbacks that could undermine their successful reintegration into their communities.¹³²

¹²¹ *Id.* at 20 (arguing that community organizations should prioritize re-entry healthcare, focusing on mental health, physical health, and substance abuse, using support and counseling).

¹²² Jesse Jannetta et al., *Strategies for Connecting Justice-Involved Populations to Health Coverage and Care*, URBAN INSTITUTE 24 (Mar. 2018), https://www.urban.org/sites/default/files/publication/97041/strategies_for_connecting_justice-involved_populations_to_health_coverage_and_care.pdf (arguing that to avoid healthcare gaps upon release, a specialized processing unit can prioritize activating coverage for those with urgent needs).

¹²³ *Id.* at 19.

¹²⁴ Conly, *supra* note 115 (praising a system in which healthcare, corrections, and benefits professionals assist inmates with preparing and pre-filing applications to re-initiate benefits).

¹²⁵ Sawyer et al., *supra* note 97.

¹²⁶ OFF. INSPECTOR GEN., *supra* note 38, at 14 (affirming that social workers help aging inmates with accessing medical services and community resources upon release, finding that “the lack of availability of Social Workers within . . . institutions hinders the[ir] . . . ability to effectively prepare aging inmates to reenter society”).

¹²⁷ *Id.* at 49–50.

¹²⁸ Rose Feinberg et al., *Health Care Transitions for Individuals Returning to the Community from a Public Institution: Promising Practices Identified by the Medicaid Reentry Stakeholder Group*, ASPE 18 (Jan. 1, 2023), <https://aspe.hhs.gov/sites/default/files/documents/d48e8a9fd499029542f0a30aa78bfd1/health-care-reentry-transitions.pdf> (encouraging the continuity of care by means of referring inmates to community resources).

¹²⁹ *Id.* at 16 (praising a Connecticut Department of Corrections procedure wherein “discharge planners” conduct detailed physical and mental health screenings 60 to 90 days prior to their release and, also, connect them with service providers, prescription refills, and community-based resources to ensure a smooth transition).

¹³⁰ *Id.* at 11, 20.

¹³¹ *Id.* at 5, 25.

¹³² *Id.* at 6 (“[P]rovision of treatment within prisons or jails supports successful transition back to the community.”).

iv. Legal Services

The successful reintegration of elderly returning citizens hinges not only on the availability of healthcare and housing but also on their ability to make informed legal decisions and protect their personal interests. Given the complex legal needs of aging individuals, particularly those with chronic health conditions or diminished capacity, it is essential that correctional institutions provide targeted legal services to support elderly inmates in planning for their futures.¹³³ These services should focus on crucial areas such as powers of attorney, guardianship, incapacity planning, and securing entitlement to public benefits, all of which are vital to ensuring their continued well-being upon release.¹³⁴

One of the primary legal services that should be offered to elderly returning citizens is the establishment of durable powers of attorney for both medical and financial matters.¹³⁵ Many elderly individuals face the possibility of diminished cognitive or physical ability upon release, which could hinder their capacity to make informed decisions regarding their healthcare and finances.¹³⁶ Correctional facilities should collaborate with legal aid organizations and pro bono attorneys to assist inmates in executing durable powers of attorney before their release.¹³⁷ This would allow a trusted individual to make legal, medical, and financial decisions on their behalf, ensuring that elderly individuals have proper representation if they become incapacitated.¹³⁸ Such legal arrangements should be part of a comprehensive pre-release planning program that addresses the future needs of aging individuals.

In addition to powers of attorney, correctional institutions should facilitate life planning for inmates with chronic conditions, cognitive decline, or other age-related health concerns. Legal services should include the drafting of advance healthcare directives and do-not-resuscitate (“DNR”) orders, which are essential tools for ensuring that an individual's healthcare preferences are respected in the event they lose the ability to communicate them.¹³⁹ Legal professionals, working in coordination with case managers and healthcare providers, should assist inmates in creating these legal documents before their release.¹⁴⁰ This proactive approach ensures that elderly returning citizens are not only prepared for possible health crises but that their wishes will be honored.¹⁴¹

For those whose capacity is significantly diminished or who lack appropriate family or support systems, guardianship may be an important consideration.¹⁴² Correctional facilities should assess the need for guardianship for individuals who cannot adequately manage their affairs post-release.¹⁴³ In such cases, legal services should help identify suitable guardians, whether family members, friends, or public guardians, to ensure that these

¹³³ *Legal Aid Helps Successful Reentry*, DEP’T OF JUST., <https://www.justice.gov/sites/default/files/atj/legacy/2013/08/13/reentry-legal-aid.pdf> (last visited May 5, 2026) (“[L]egal assistance can play a critical role for people leaving jail and returning to society, translating into reduced recidivism and increased chances for reintegration into the community.”).

¹³⁴ Martina E. Cartwright, *The Silver Tsunami: Aging Prisoners, Early Release, Guardianship and Prisoner Advocate Initiatives for Long Term Care Beyond the Prison Walls*, 1 *TOURO J. AGING, LONGEVITY, L. & POL’Y*, no. 1, 2016, at 54, 86 (stating that the reintegration process should “include public guardianship programs or nonprofit advocacy organizations that can assist in securing housing, enrollment for federal benefits and Medicaid, and easing former prisoners back into society”).

¹³⁵ Telephone Interview with Julie Childs, Consultant to the Department of Justice’s Elder Justice Initiative (Apr. 1, 2025) (“The living will and the medical powers of attorney are very important. They are sometimes the only things you have [upon reentry]; the right to say how you live and die.”).

¹³⁶ See Duke Han et al., *Mild Cognitive Impairment is Associated with Poorer Everyday Decision Making*, 94 *J. ALZHEIMER’S DISEASE* 1607 (2023).

¹³⁷ Cartwright, *supra* note 134, at 85 (“Reentry is only possible when there is a collaborative effort.”).

¹³⁸ Telephone Interview with Julie Childs, *supra* note 135 (reminding that any guardianship or power of attorney arrangement should be accompanied by proper education, so the returning citizen fully understands that they are delegating certain rights to another individual).

¹³⁹ Marisol Garcia et al., *A Review and Content Analysis of U.S. Department of Corrections End-of-Life Decision Making Policies*, 18 *INT. J. PRISON HEALTH*, no. 2, 2021, at 1, 10 (underscoring the necessity for standardized, comprehensive policies that support incarcerated individuals in making informed end-of-life decisions, ensuring their medical preferences are respected and upheld within the correctional system).

¹⁴⁰ *Id.* at 3.

¹⁴¹ *Id.*

¹⁴² Cartwright, *supra* note 134, at 94 (“[F]unding should also be provided to public guardianship programs for the hiring and training of staff devoted primarily or exclusively to inmates . . . identified as incapacitated.”).

¹⁴³ See *id.* at 88.

individuals are not left vulnerable to exploitation or neglect.¹⁴⁴ Guardianship arrangements should be established prior to release, with the court's oversight, ensuring a smooth transition to a supportive, legally recognized arrangement that safeguards the individual's rights and well-being.¹⁴⁵

It is essential to recognize that guardianship proceedings should not be the initial course of action upon release, as preserving autonomy remains a fundamental priority.¹⁴⁶ In an interview, Julie Childs, Consultant to the Department of Justice's Elder Justice Initiative, emphasized the critical need to uphold the autonomy of elderly individuals upon their release from correctional facilities.¹⁴⁷ She highlighted the importance of educating both inmates and potential guardians to prevent unnecessary restrictions on personal freedom due to guardianship overreach.¹⁴⁸ Childs explained that, while some individuals may lack the capacity to handle complex financial or legal matters such as filing taxes, they may still be fully capable of making other important personal decisions.¹⁴⁹ These include drafting a will, choosing their place of residence, and making daily living choices.¹⁵⁰ "Even individuals with Alzheimer's retain the ability to make certain decisions about their lives," she noted, stressing the necessity of preserving independence while providing appropriate support.¹⁵¹ Childs underscored the role of guardians ad litem in assisting elderly returning citizens, describing them as essential intermediaries between the courts, correctional institutions, and long-term care facilities.¹⁵² However, she cautioned that guardians ad litem must receive proper training to understand legal capacity, the rights of the individual, and alternatives to full guardianship.¹⁵³ "Guardians ad litem should not overreach, as their role is to provide guidance and support while ensuring individuals retain as much autonomy as possible," she stated.¹⁵⁴ Regarding powers of attorney, Childs stressed that incarcerated individuals must be fully informed of the legal implications before designating a representative to make financial or healthcare decisions on their behalf.¹⁵⁵

Legal assistance with public benefits is critical for elderly returning citizens, many of whom face barriers to accessing Social Security, Medicare, Medicaid, SSI, and other financial assistance programs.¹⁵⁶ Legal professionals should be made available to assist inmates in applying for these programs, ensuring that they are enrolled in the necessary benefits before their release.¹⁵⁷ This service should also include advocacy for overcoming any barriers related to criminal records, such as legal assistance to help individuals resolve issues of eligibility or ensure they are not unjustly denied benefits due to prior convictions.¹⁵⁸

To ensure the effectiveness of these legal services, correctional facilities should establish formal partnerships with legal aid clinics, law firms offering pro bono services, and community organizations that

¹⁴⁴ *Id.* at 92 (recommending a relationship between corrective institutions and public guardianship programs for those who are incapacitated).

¹⁴⁵ *Id.* at 88.

¹⁴⁶ Telephone Interview with Julie Childs, *supra* note 135 (indicating that the reentering citizen suspected of incapacity should not first be provided with a guardian, but should be asked "what can you do and what can't you do" to uphold premises of autonomy).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* ("education is important on both sides").

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* ("[E]ven individuals with Alzheimer's retain the ability to make certain decisions about their lives; creating a will, picking what to eat, and so on").

¹⁵² *Id.* (stating that guardians ad litem should function as a "liaison").

¹⁵³ *Id.* (indicating that guardians ad litem who focus on adults must be trained on incapacity).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (advocating for pre-release planning that prioritizes the least restrictive alternatives to guardianship and powers of attorney).

¹⁵⁶ Cartwright, *supra* note 134, at 86 (finding that public guardians and non-profit advocacy groups can assist an inmate in securing housing and enrolling them in federal benefits).

¹⁵⁷ Jannetta et al., *supra* note 122, at 17 (recommending that a special unit assists inmates in recovering or applying for benefits prior to their release to prevent gaps in care).

¹⁵⁸ Telephone Interview with Julie Childs, *supra* note 135 ("[T]here are barriers to almost everything you need to live if you have a criminal record.").

specialize in geriatric law and reentry support.¹⁵⁹ These partnerships would allow for comprehensive, individualized legal assistance and ensure that elderly individuals are well-prepared for the legal and financial challenges they may face upon reintegration.¹⁶⁰ Integrating these critical legal services into the pre-release planning process can significantly enhance the long-term stability of elderly returning citizens, providing them with the tools to navigate their post-incarceration lives with dignity, security, and legal protection.¹⁶¹

B. Funding and Implementation

The Older Americans Act (“OAA”), enacted in 1965, is the primary federal law supporting social services for older adults in the United States.¹⁶² Designed to promote the well-being of individuals aged 60 and older, the OAA funds programs that provide transportation assistance, caregiver support, legal aid, elder abuse prevention, and more.¹⁶³ These programs further help seniors maintain their independence through community-based services administered by State Units on Aging (“SUAs”), Area Agencies on Aging (“AAAs”), and local service providers.¹⁶⁴ Over the years, the OAA has been reauthorized and expanded to address the evolving needs of aging populations, yet it does not include targeted reentry services for formerly incarcerated seniors.¹⁶⁵

The SRAP would instate senior reentry units within correctional facilities and directly fund SUAs and AAAs, thereby empowering them to deliver a wide range of services crucial to elderly individuals reintegrating into society.¹⁶⁶ The SRAP would include specific funding to SUAs and AAAs that specialize in housing assistance, workforce training, legal aid, Medicare/Medicaid enrollment support, and other essential services.¹⁶⁷

Each senior reentry unit within correctional facilities would appoint case managers specifically tasked with facilitating the transition of elderly individuals.¹⁶⁸ These case managers would work closely with the aforementioned SUAs, AAAs, and other local agencies to ensure that elderly individuals are enrolled in necessary programs, such as Medicaid, Social Security, and housing programs, well before release.¹⁶⁹ Further, they would coordinate with such agencies to identify employment opportunities, healthcare providers, and legal services, ensuring a smooth transition into the community.¹⁷⁰ To ensure that elderly inmates are referred to appropriate housing programs, including Section 202 Supportive Housing for the Elderly, rental assistance programs, and long-term care facility programs, correctional institutions would also collaborate with local agencies.¹⁷¹

¹⁵⁹ The NACDL’s “Return to Freedom Project” exemplifies pro bono partnerships by pairing attorneys with individuals serving long sentences from exercising their right to trial. *See Return to Freedom*, NACDL, <https://www.nacdl.org/Landing/ReturntoFreedom> (last visited May 5, 2026). Though not solely for elderly inmates, it would be beneficial to have such a program for aging inmates bound to face unique post-release challenges.

¹⁶⁰ Another example of such individualized legal assistance is the Elder Reentry Initiative (“ERI”) by the Osborne Association. *See Elder Reentry Initiative*, OSBORNE, <https://www.osborneny.org/our-services/elder-reentry-initiative> (last visited May 5, 2026). This organization provides legal assistance as part of its reentry services, helping participants with issues such as applying for public benefits. *Id.* While ERI does not offer direct legal representation or focus on life planning, guardianship, or powers of attorney, it connects participants with relevant legal resources and advocacy organizations. *Id.*

¹⁶¹ Cartwright, *supra* note 134, at 85 (“Successful reentry is only possible when there is a collaborative effort . . .”).

¹⁶² Older Americans Act of 1965, 42 U.S.C. § 3030d.

¹⁶³ *Id.*

¹⁶⁴ *See id.* §§ 3011, 3030d.

¹⁶⁵ *See Older Americans Act*, ACL, <https://acl.gov/about-acl/authorizing-statutes/older-americans-act> (last updated Feb. 13, 2025) (expansion of the OAA).

¹⁶⁶ *See* Older Americans Act of 1965, 42 U.S.C. §§ 3011, 3030(d); Sawyer et al., *supra* note 97.

¹⁶⁷ *See* Lusaine, *supra* note 109, at 85.

¹⁶⁸ *Id.*

¹⁶⁹ *See* Sawyer et al., *supra* note 97.

¹⁷⁰ *See id.*

¹⁷¹ *See* Couch, *supra* note 111.

To encourage state and local compliance, the SRAP would provide funding that could be utilized for various supportive services and reintegration activities.¹⁷² States would be allowed to transfer up to 30% of the funds within Title III to reentry-related programs, providing flexibility for local agencies to tailor their services to the needs of their reentering populations.¹⁷³ States would be required to submit plans for how they will integrate reentry services into their aging networks and demonstrate how they will address the specific needs of formerly incarcerated seniors. This would ensure that the program is designed to meet local needs while adhering to the broader goals of the federal reentry strategy.

The U.S. Department of Health and Human Services (“HHS”) and the U.S. Department of Justice would, ideally, oversee the implementation of SRAP, monitoring state compliance with program goals.¹⁷⁴ States would be required to submit annual reports detailing their efforts to support elderly reentrants, including data on the number of individuals served, the types of services provided, and outcomes such as housing stability, employment rates, and recidivism reduction.¹⁷⁵ Correctional facilities would also be held accountable through performance metrics tied to the successful enrollment and transition of elderly individuals into SRAP services before release. Facilities would need to demonstrate that they are providing adequate preparation for reintegration through the SRAP framework, including the coordination of health screenings, housing arrangements, and workforce training.

By utilizing the existing infrastructure of SUAs and AAAs, the federal government could quickly and efficiently deploy resources to support elderly individuals transitioning from incarceration.¹⁷⁶ These agencies are adept at addressing the needs of aging populations and can easily integrate reentry services into their broader service offerings, reducing the administrative burden and promoting more coordinated care.¹⁷⁷ By embedding such reentry support within the existing OAA framework, it ensures alignment with other senior services and maximizes the efficiency of resource distribution.¹⁷⁸

The federal government, through HHS and the DOJ, should conduct regular evaluations of SRAP to assess its effectiveness in facilitating the reintegration of elderly individuals.¹⁷⁹ This could include evaluating recidivism rates, housing stability, employment outcomes, and overall well-being of reentering seniors. Based on the findings, adjustments and improvements would be made to ensure the program’s continued success.¹⁸⁰

¹⁷² An example of such funding can be found within the Bureau of Justice Assistance's “Improving Adult and Youth Crisis Stabilization and Community Reentry Program,” which provides grants to state, local, and tribal governments. See *Improving Adult and Youth Crisis Stabilization and Community Reentry Program*, NAT’L REENTRY RES. CTR. (Jan. 26, 2023), <https://nationalreentryresourcecenter.org/resources/fy-2023-improving-adult-and-youth-crisis-stabilization-and-community-reentry-program>. They also provide grants to community-based nonprofit organizations. *Id.*

¹⁷³ See *id.*

¹⁷⁴ HHS and DOJ would, ideally, oversee the SRAP due to the HHS’s administration of the OAA and the DOJ’s role in reentry planning behind prison walls.

¹⁷⁵ These reports would be similar to that of the First Step Act of 2018, requiring the Attorney General to submit annual reports detailing activities and accomplishments related to criminal justice outcomes, which may include data pertinent to reentry efforts. See Kristin Stainbrook et al., *Reentry and Housing Stability: Final Report*, OFF. OF THE ASSISTANT SEC’Y FOR PLAN. & EVALUATION (Dec. 18, 2024), <https://aspe.hhs.gov/reports/reentry-housing-stability>.

¹⁷⁶ See Older Americans Act of 1965, 42 U.S.C. §§ 3011, 3030d.

¹⁷⁷ *Supporting America’s Aging Prisoner Population: Opportunities & Challenges for Area Agencies on Aging*, NAT’L ASS’N OF AREA AGENCIES ON AGING 23 (“AAAs have the expertise to be a highly valuable resource when state and federal policymakers are looking for programs that can provide support . . .”).

¹⁷⁸ While the OAA does not explicitly include reentry programs for elderly individuals, its emphasis on supportive services to help older persons remain independent in the community suggests a potential framework for integrating such support. See *id.* at 6.

¹⁷⁹ See Lacoë & Betesh, *supra* note 105, at 2.

¹⁸⁰ See *id.*

IV. Conclusion

The challenges faced by elderly individuals upon release from incarceration are profound and multifaceted.¹⁸¹ As Florida's aging prison population grows, so does the complexity of their reentry needs.¹⁸² Elderly inmates often confront a stark reality of limited resources, inadequate housing, and the absence of family support, placing them at heightened risk of homelessness, health deterioration, and recidivism.¹⁸³ A proactive, comprehensive reentry program is essential to address these barriers and ensure successful reintegration into society.¹⁸⁴ Florida must prioritize the establishment of specialized reentry units within correctional facilities designed to provide tailored support and facilitate collaboration between correctional institutions, healthcare providers, and community-based organizations.¹⁸⁵ Additionally, a national approach is necessary, beginning with an amendment to the Older Americans Act to create a Senior Reentry Assistance Program.¹⁸⁶ By integrating critical services such as housing support, healthcare access, and legal aid into the existing aging services network, these initiatives can offer the structured support elderly returning citizens need for long-term stability and well-being.¹⁸⁷ Through these concerted efforts, Florida and the nation can break the cycle of recidivism, reduce the societal costs of incarceration, and promote the dignity and independence of older, reentering citizens.

¹⁸¹ Dickman et al., *supra* note 108 (indicating that older adults reentering communities often struggle to access health and economic security programs, particularly among older adults of color who face structural discrimination).

¹⁸² See OFF. INSPECTOR GEN., *supra* note 38, at 51.

¹⁸³ See Greene et al., *supra* note 11, at 3; see also Williams et al., *supra* note 10.

¹⁸⁴ See *id.*

¹⁸⁵ Sawyer et al., *supra* note 97.

¹⁸⁶ See Older Americans Act of 1965, 42 U.S.C. § 3030d.

¹⁸⁷ *Id.*

AGING IN THE EYE OF THE STORM: ADDRESSING THE NEED FOR STRONGER DISASTER PREPAREDNESS FOR OLDER ADULTS IN LONG-TERM CARE FACILITIES

Sofia C. Herrera*

I. Introduction

In the days after Hurricane Irma slammed into Florida in 2017, residents of the Rehabilitation Center at Hollywood Hills endured what was called a “hellish nightmare.”¹ Power outages left the nursing home without air conditioning and, as temperatures soared, emergency protocols were abandoned.² Fourteen residents of the Rehabilitation Center at Hollywood Hills unfortunately lost their lives after being abandoned by a system meant to protect them.³ This tragedy highlights that, although considered among the most vulnerable members of our community, older adults are significantly overlooked when natural disasters strike: after Hurricane Katrina, the Center for Disease Control determined that, while the elderly accounted for only 15 percent of New Orleans’ population at the time, they accounted for 73 percent of the deaths from the storm.⁴

Climate change continues to threaten our communities with rising sea levels and increasing hurricane intensity, which leads to several risks for older adults, particularly those in nursing homes.⁵ In Florida alone, the number of long-term care facilities exposed to flooding is projected to increase by 67 percent in 30 years, illustrating the need for preparedness plans when emergencies strike.⁶ Residents of these facilities are more likely to have medical problems that require various medications and may face limitations in their ability to get to safety.⁷ Indeed, nursing homes specifically are more challenging to evacuate than other care facilities because nursing homes tend to be larger and have more beds.⁸ Evacuations also require a sufficient amount of time to relocate safely, which can be difficult for nursing home residents with more delicate health who require special services, like ambulances, to evacuate.⁹ Research into evacuation protocols during hurricanes also identifies the unique challenges influencing the decision to evacuate or shelter in place, as residents with different capabilities may be adversely affected by the evacuation itself.¹⁰ Even if a facility decides not to evacuate its residents, and

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¹ Caitie Muñoz, ‘Hellish Nightmare:’ Hollywood Hills Nursing Home Tragedy Continues in Court, WLRN PUB. MEDIA (Mar. 1, 2018, 6:29 PM), <https://www.wlrn.org/news/2018-03-01/hellish-nightmare-hollywood-hills-nursing-home-tragedy-continues-in-court>.

² *Id.*

³ Jan Wesner Childs, *Nearly 700 Elderly Nursing Home Residents May Have Died Because of Hurricane Irma, New Study Says*, WEATHER CHANNEL (Oct. 13, 2020), <https://weather.com/news/news/2020-10-13-hurricane-irma-nursing-home-deaths>.

⁴ Wendy Taormina-Weiss, *Rights of Persons with Disabilities in America*, DISABLED WORLD (Feb. 27, 2012), <https://www.disabled-world.com/editorials/6786854.php> (explaining that “experts have suggested this occurred because many of the persons who died experienced medical, physical, or sensory limitations which made them more vulnerable”).

⁵ Allison Kopicki & Charles Wohlforth, *Coming Storms: Climate Change and the Rising Threat to America’s Coastal Elders*, GENERATIONS AM. SOC’Y AGING (2021), <https://generations.asaging.org/climate-change-threatens-americas-coastal-elders>.

⁶ *Id.*

⁷ See Michelle Conklin, Note, *Plan, Prepare, Prevail: How Nursing Homes Must Better Protect the Most Vulnerable When Disaster Strikes*, 28 ELDER L.J. 485, 489 (2021).

⁸ Patricia Mazzei et al., *Hurricane Dorian Tests Florida’s Ability to Move Older Adults Out of Harm’s Way*, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/us/hurricane-dorian-florida-evacuation.html>.

⁹ *Id.*

¹⁰ David Dosa et al., *To Evacuate or Shelter in Place: Implications of Universal Hurricane Evacuation Policies on Nursing Home Residents*, 13 J. AM. MED. DIR. ASS’N 190, 197 (2012).

instead decides to shelter in place, management and staff must be prepared to assist residents who rely on electricity for essential medical devices, like sensors, dialysis machines, CPAP machines, or nebulizers.¹¹ As such, plans to include backup power generation have been strongly encouraged by facilities that have decided to shelter in place.¹²

In a study examining staff perspectives in Florida during evacuations, staff members described the decision-making process for evacuating versus sheltering in place as “excruciating.”¹³ The facility’s administrators primarily make the decision to evacuate or shelter in place in nursing homes, as the Center for Medicare and Medicaid Services (“CMS”) only requires that nursing homes have an evacuation plan in place, but does not dictate the specifics of those plans.¹⁴ In 2006, Gulf Coast states held a summit where nursing home providers, along with state, local, and federal officials, collaborated to create the *National Criteria for Evacuation Decision-Making in Nursing Homes*.¹⁵ Although this document serves merely as a guide, it provides detailed decision-making criteria considering factors like resident frailty, the severity of the approaching storm, anticipated storm surge and flooding, the facility’s structural integrity, and the availability of essential resources like food, water, and electricity.¹⁶

Interviews with facility staff revealed that they felt “damned if we do, damned if we don’t” regarding the decision to evacuate, citing pressure from emergency managers to leave the facility despite significant logistical and safety challenges associated with relocating residents.¹⁷ Failing to plan adequately for future care in temporary shelters can result in dangerous conditions, as seen during Hurricane Ida’s impact on nursing homes in Louisiana: elderly residents in an overcrowded warehouse used as a shelter were “forced to sleep on wet mattresses as the facility flooded, [and] were not provided adequate food or access to toilets.”¹⁸ Additionally, facilities that have a memory or dementia unit can be more difficult to evacuate safely since older adults with dementia may not have the cognitive ability to follow safety directions or prepare their own materials, leading to them being adversely affected during emergency evacuations.¹⁹

As a response to the devastating outcomes of mighty hurricanes, research and training on long-term care facilities and the effects on older adults led to improved disaster response across the country.²⁰ In 2016, CMS implemented the Emergency Preparedness Final Rule, setting out emergency preparedness requirements for long-

¹¹ John Muscedere & George Heckman, *Climate Change and Older Adults: Lessons from Canada*, MCKNIGHTS LONG-TERM CARE NEWS (Sept. 13, 2019), <https://www.mcknights.com/blogs/climate-change-and-older-adults-lessons-from-canada/> (explaining that electrical power is critical for nursing homes because “frail seniors have challenges regulating their body temperatures during extremes of heat or cold” and are more susceptible to ailments exasperated by weather events).

¹² Lindsay J. Peterson & Kathryn Hyer, *Stay or Go? Why Hurricane Evacuation of Nursing Homes Remains an Unsolved Challenge*, PBS NEWS (Sept. 3, 2019), <https://www.pbs.org/newshour/nation/stay-or-go-why-hurricane-evacuation-of-nursing-homes-remains-an-unsolved-challenge>.

¹³ Lisa M. Brown et al., *Experiences of Assisted Living Facility Staff in Evacuating and Sheltering Residents During Hurricanes*, 34 CURR. PSYCH. 506, 509 (2015).

¹⁴ See *infra* Part II (explaining the role of federal emergency preparedness regulations and responsibilities during an evacuation).

¹⁵ Kathryn Hyer et al., *Helping Nursing Homes Prepare for Disasters*, 29 HEALTH AFF. 1961, 1963 (2010). The *National Criteria for Evacuation Decision-Making in Nursing Homes* is included as an appendix in the *Emergency Management Guide for Nursing Homes*, which is a stand-alone document that has been frequently downloaded from the Florida Health Care Association website. See *Emergency Management Guide for Nursing Homes*, FLA. HEALTH CARE ASS’N, https://www.fhca.org/facility_operations/emergency_management_guide (last visited May 25, 2026).

¹⁶ *Id.*

¹⁷ *Disaster Preparedness and Response: The Special Needs of Older Americans: Hearing Before the S. Spec. Comm. on Aging*, 115th Cong. 9–10 (2017) (testimony of Kathryn Hyer) (noting that there was limited access to transportation and shelters were inadequately equipped to care for older adults, particularly due to shortages of medical staff and supplies).

¹⁸ Suzy Khimm & Laura Strickler, *U.S. Scrutinizes Nursing Home Evacuation Rules After Hurricane Ida Deaths*, NBC NEWS (Sept. 30, 2021), <https://www.nbcnews.com/news/us-news/u-s-scrutinizes-nursing-home-evacuation-rules-after-hurricane-ida-n1280492>. Failing to properly secure safe transportation during an emergency was also illustrated during Hurricane Rita “when a bus fire resulted in the deaths of 24 assisted living facility residents An overheated right wheel bearing ignited a tire and the fire and smoke rapidly spread by portable oxygen containers that were improperly transported.” Brown et al., *supra* note 13, at 511.

¹⁹ Hyer, *supra* note 15, at 1963.

²⁰ *Id.*

term care facilities.²¹ Florida also introduced additional requirements for the state's facilities to collaborate with local emergency response and have backup energy.²² While regulations establish basic requirements for facilities, there continue to be ongoing problems including compliance failures and enforcement issues.²³ Audits on facilities' emergency preparedness identified systemic issues like delays in mandated inspections and a reduction of monetary penalties for noncompliance.²⁴

Natural disasters often present challenges beyond the control of a single facility or government agency, so effective emergency preparedness usually includes federal, state, and local collaboration to prepare evacuation procedures.²⁵ "Paper" compliance with emergency plans does not effectively address the unexpected challenges during storms that are not typically addressed in a plan like blocked evacuation routes, lack of hospital beds, and other challenges.²⁶ Although disaster preparedness regulations for long-term care facilities have improved recently, compliance alone is insufficient to address older adults' safety during a natural disaster. Current national regulations are neither detailed nor enforced, and the lack of active collaboration between facilities, local agencies, and state authorities leads to ineffective emergency response. To better protect older adults, policymakers should require that facilities integrate into local disaster response plans using public reporting mechanisms, provide detailed training and oversight, and hold facilities accountable for noncompliance.

This Article will first provide background on the legal framework governing emergency preparedness in long-term care facilities, examining both federal regulations set by the CMS and Florida's state law and administrative code. The responsibilities of federal, state, and local agencies and how they interact with facilities in preparing for natural disasters will be discussed, highlighting the need for active collaboration between these actors for effective emergency response. The analysis will identify key gaps in current regulations, including violations of emergency planning rules, reduction of monetary penalties, and issues in state oversight and collaboration. Finally, recommendations for strengthening disaster preparedness in long-term care facilities will be offered, including strengthening CMS standards for the integration of nursing homes into local disaster response, building a stronger relationship between state agencies and facilities, and increasing accountability measures to ensure emergency compliance.

II. Background: Legal Framework on Emergency Preparedness for Long-Term Care Facilities

The type of disaster assistance available to older adults depends primarily on their place of residence.²⁷ Generally, nursing homes are required by federal law to provide specific levels of care to residents, while oversight of community-based assisted living facilities is usually state-regulated.²⁸ Some assisted-living facilities can offer support that is similar to that offered by a nursing home, while others can place the responsibility for evacuation and preparedness on the resident or their family.²⁹ CMS regulates nursing homes and determines whether these facilities meet federal requirements to receive payment under Medicare or Medicaid programs.³⁰ These requirements influence the quality of care that nursing homes provide since facilities must meet them to secure funding for their services.³¹ The Emergency Preparedness Requirements for Medicare and Medicaid Participating

²¹ Michael Wasserman & R. Tamara Konetzka, *Beyond Compliance: A More Integrated Public Health Approach to Outbreaks in Nursing Homes and Other Disasters*, 41 HEALTH AFF. 831, 831–32 (2022).

²² FLA. STAT. § 400.23(2)(g) (2025); FLA. ADMIN. CODE ANN. r. 59A-4.1265 (2025).

²³ Conklin, *supra* note 7, at 496.

²⁴ *Id.* at 499–500; STAFF OF S. SPEC. COMM. ON AGING, 118TH CONG., UNINSPECTED AND NEGLECTED: NURSING HOME INSPECTION AGENCIES ARE SEVERELY UNDERSTAFFED, PUTTING RESIDENTS AT RISK 1–2 (2023).

²⁵ Wasserman & Konetzka, *supra* note 21, at 831.

²⁶ *Id.* at 834.

²⁷ Brown et al., *supra* note 13, at 507.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Nursing Homes*, CMS, <https://www.cms.gov/medicare/health-safety-standards/quality-safety-oversight-general-information/nursing-homes> (last updated Dec. 23, 2024, 10:31 AM).

³¹ Conklin, *supra* note 7, at 492.

Providers and Suppliers Final Rule, which went into effect in 2017, outlines four core elements: (1) risk assessment and emergency planning; (2) communication plans; (3) policies and procedures; and (4) training and testing.³² In addition to the few bullet points under each element, CMS also offers downloadable documents that are “not intended to be full comprehensive plans, but rather serve as examples and guide providers.”³³ CMS does not require that the plan be in a specific format and only requires that the facility be able to provide it when asked in a survey.³⁴ Notably, CMS encourages facilities to coordinate with state and local public health departments and emergency management agencies, underscoring the importance of having clear communication plans during emergencies.³⁵

However, due to changes in the regulations, relationships with various levels of authority have been difficult to maintain.³⁶ In 2019, federal regulations mandated that long-term care facilities document their efforts to contact emergency managers in their areas to help integrate themselves into local emergency planning, including sharing existing plans with local officials, having their contact information, and being able to demonstrate collaboration through full-scale exercises.³⁷ In 2021, however, CMS eliminated the documentation requirement and now only requires facilities to “have a process” to engage in collaborative disaster planning with state and local officials.³⁸

In some states, like Florida, state legislatures and agencies have gone beyond the federal requirements to ensure residents are safe during emergencies. Florida requires nursing homes to submit their emergency management plans to their respective county’s emergency officials annually for review and approval, ensuring that at least some community collaboration is being pursued.³⁹ Additionally, the Florida Administrative Code requires that each nursing home include plans to address emergency power in case the facility loses its source of primary electrical power, mandating all nursing homes to maintain a safe indoor air temperature, not to exceed 81 degrees Fahrenheit, for a minimum of 96 hours.⁴⁰

A state’s obligation to maintain proper oversight over its facilities is detailed in an agreement between CMS and the states’ survey agencies named the 1864 Agreement.⁴¹ The 1864 Agreement says that the state agency of each state is responsible for certifying the compliance or non-compliance of the facilities, including completing life-safety training and emergency preparedness surveys at least once every 15 months.⁴² The regulatory work of conducting these surveys and certification processes is carried out by offices within state governments, known as survey agencies, which are jointly funded by Medicare and the states.⁴³ Further, the management and staff at each

³² *Id.*

³³ *Core EP Rule Elements*, CMS, <https://www.cms.gov/medicare/health-safety-standards/quality-safety-oversight-emergency-preparedness/core-ep-rule-elements> (last updated Dec. 30, 2024).

³⁴ Conklin, *supra* note 7, at 494.

³⁵ *Core EP Rule Elements*, *supra* note 33.

³⁶ Lindsay J. Peterson, *Protecting Nursing Home Residents in Disasters: The Urgent Need for a New Approach Amid Mounting Climate Warnings*, 71 J. AM. GERIATRICS SOC’Y. 702, 703 (2021).

³⁷ *Id.*; *Survey & Certification Group Frequently Asked Questions (FAQs) Emergency Preparedness Regulation*, CMS, <https://www.cms.gov/medicare/provider-enrollment-and-certification/surveycertemergprep/downloads/frequently-asked-questions-faqs.pdf> (last updated Oct. 28, 2016).

³⁸ Peterson, *supra* note 36.

³⁹ *Id.*; FLA. STAT. § 400.23(2)(g) (2025).

⁴⁰ FLA. ADMIN. CODE ANN. r. 59A-4.1265 (2025).

⁴¹ Memorandum from Karen L. Triz & David R. Wright, Directors, Center for Medicare & Medicaid Services Quality, Safety, & Oversight Group and Survey & Operations Group, to Directors, State Survey Agency, State Obligations to Survey to the Entirety of Medicare and Medicaid Health and Safety Requirements Under the 1864 Agreement, No. QSO-22-12-ALL, at 1 (Feb. 9, 2022), <https://www.cms.gov/files/document/qso-22-12-all.pdf> [hereinafter CMS Memo QSO-22-12-ALL].

⁴² OFF. INSPECTOR GEN., DEPT. HEALTH & HUM. SERVS., FLORIDA SHOULD IMPROVE ITS OVERSIGHT OF SELECTED NURSING HOMES’ COMPLIANCE WITH FEDERAL REQUIREMENTS FOR LIFE SAFETY AND EMERGENCY PREPAREDNESS, No. A-04-18-08065, at 3–10 (2020) [hereinafter HHSOIG No. A-04-18-08065] (“Nursing homes are required to comply with all Federal, State, and local laws, regulations, and codes . . . Federal regulations on emergency preparedness include specific requirements for nursing home emergency preparedness plans . . . CMS lists applicable requirements on its *Emergency Preparedness Surveyor Checklist* . . . and references each regulation with an identification number referred to as an ‘E-Tag’”).

⁴³ STAFF OF S. SPEC. COMM. ON AGING, *supra* note 24, at 7; CMS Memo QSO-22-12-ALL, *supra* note 41, at 1–2 (“CMS allocates funding to each state for the reasonable costs of performing the functions specified in the 1864 Agreement . . . [and] will provide additional information to providers in such states clarifying the expected process to demonstrate compliance with federal requirements.”).

facility are responsible for ensuring the safety of their residents by making sure that generators, alarm systems, and elevators are properly installed, maintained, and tested in case of an emergency.⁴⁴

III. Analysis: Gaps in Emergency Preparedness in Long-term Care Facilities

a. Noncompliance in Emergency Preparedness

Despite recent improvements to emergency preparedness regulations, long-term care facilities are still failing to protect their vulnerable residents in the face of reoccurring natural disasters.⁴⁵ In 2022, the Office of the Inspector General (“OIG”) of the U.S. Department of Health and Human Services (“HHS”) released a report on audits of emergency preparedness in eight states, highlighting that the purpose of this review was because residents of nursing homes have limited or no mobility, making them particularly vulnerable in the event of an emergency.⁴⁶ In the investigation, the OIG identified 1,139 areas of noncompliance with emergency preparedness requirements in 150 of the 154 nursing homes surveyed.⁴⁷ These areas included noncompliance with requirements for emergency plans, emergency supplies and power, plans for evacuations and sheltering in place, tracking residents, communication plans, and plan training and testing.⁴⁸

Specifically, the investigation noted that facility staff used generic templates to incorporate CMS requirements into their emergency plans, resulting in an undetailed plan that provides little guidance, especially for a facility that may require more specific evacuation plans for its residents.⁴⁹ Moreover, inspections revealed that facilities failed to prepare for basic contingencies like bringing wheelchair-dependent people down the stairs in case of a power outage.⁵⁰ The OIG also found areas of noncompliance regarding supplies and backup power, noting that some facilities lacked sufficient water supply and had generators that could not power the facility’s machines, were not in appropriate areas, or were not properly tested and maintained.⁵¹ Even though evacuation procedures are one of the most essential aspects of preparing for a hurricane, there were nursing homes whose emergency plans failed to even mention evacuation or sheltering-in-place policies.⁵² Lastly, the OIG report identified 245 areas of noncompliance regarding training, specifically noting that some nursing homes did not conduct training on their emergency plans or update their plans and training exercises.⁵³

b. Survey Delays and Reduction of Penalties for Noncompliance

As previously discussed, facilities receiving federal funds must be surveyed to determine whether they are compliant with federal requirements, including emergency preparedness requirements.⁵⁴ Unfortunately, noncompliance is not always addressed due to the survey backlogs that have plagued the skilled nursing sector for years: feedback from all 50 states reported that severe staffing shortages hinder their ability to conduct timely surveys and promptly investigate noncompliance.⁵⁵ The staffing issue is not unique for state surveyors, since CMS

⁴⁴ HHSOIG No. A-04-18-08065, *supra* note 42, at 3.

⁴⁵ Conklin, *supra* note 7, at 492.

⁴⁶ OFF. INSPECTOR GEN., DEPT. HEALTH & HUM. SERVS., AUDITS OF NURSING HOME LIFE SAFETY AND EMERGENCY PREPAREDNESS IN EIGHT STATES IDENTIFIED NONCOMPLIANCE WITH FEDERAL REQUIREMENTS AND OPPORTUNITIES FOR THE CENTERS FOR MEDICARE AND MEDICAID SERVICES TO IMPROVE RESIDENT, VISITOR, AND STAFF SAFETY, No. A-02-21-01010, at 1, 4 (2022) [hereinafter HHSOIG No. A-02-21-01010].

⁴⁷ *Id.*

⁴⁸ *Id.* at 8.

⁴⁹ *Id.* at 9.

⁵⁰ Jordan Rau, *Nursing Home Disaster Plans Often Faulted As ‘Paper Tigers’*, KFF HEALTH NEWS (Sept. 19, 2017), <https://kffhealthnews.org/news/nursing-home-disaster-plans-often-faulted-as-paper-tigers/>.

⁵¹ HHSOIG No. A-02-21-01010, *supra* note 46, at 9.

⁵² *Id.* at 10.

⁵³ *Id.* at 11.

⁵⁴ See *supra* Part II (describing federal regulations on long-term care facilities regarding emergency preparedness).

⁵⁵ STAFF OF S. SPEC. COMM. ON AGING, *supra* note 24, at 16.

wrote that the number of federal employees conducting surveys and inspections has also been falling over the past ten years.⁵⁶

Even when surveyors do inspect facilities for compliance with emergency preparedness, facilities rarely face severe consequences, even after repeated mistakes.⁵⁷ Generally, CMS has different ways of applying monetary penalties to address violations: they can impose a specific fine, impose a fine for each day of violation, or deny new payments altogether.⁵⁸ In President Trump's first term, CMS scaled back on the use of penalties against facilities for patient safety errors, citing the administration's goal to reduce bureaucracy, regulation, and government intervention in healthcare businesses.⁵⁹ Citing the concern of "unnecessary regulation," the revised guidelines discouraged regulators from imposing fines in certain situations, even when they have resulted in a resident's death.⁶⁰ Specifically, CMS developed a system that gave regulators discretion to impose "immediate jeopardy" fines (rather than an automatic fine) and to merely instruct the facility to fix deficiencies.⁶¹

Importantly, revised regulations under President Trump's first term also shifted policy from "per day" fining to "per instance" fining.⁶² "Per day" fining refers to a fine imposed on facilities for each day they are found to be out of compliance with federal regulations, whereas "per instance" fining applies to each time surveyors cite a deficiency.⁶³ The change relaxes penalties that deter wrongdoing and allows nursing homes to avoid fines above the maximum per-instance fine of \$23,989.⁶⁴ Consequently, penalties become too low to be effective since care does not generally improve when the fines are inconsequential to the nursing home.⁶⁵ Experts also agree that per-instance fining provides a weaker incentive for nursing homes to improve the care provided to residents.⁶⁶ In a 2019 group letter to Congress, a coalition of patient advocates—including the Center for Medicare Advocacy, Justice in Aging, the Long-Term Care Community Coalition, and others—denounced CMS for lessening fines, pointing to the fact that fines are "critical deterrent[s] to abuse and substandard care."⁶⁷

Given the Trump administration's previous policies on reducing fines for nursing homes cited for deficiencies, and his repeated stance on eliminating what he considers "excessively burdensome regulations," it seems likely that a similar approach toward relaxed penalties for noncompliance with emergency preparedness standards could continue.⁶⁸ Notably, Project 2025's section on the HHS explicitly states that the federal government should "focus reform on reducing burdens of regulatory compliance . . . ceasing interference in the daily lives of patients and providers."⁶⁹ This language closely mirrors the administration's initial rationale for scaling back penalties on nursing homes,⁷⁰ suggesting a continuation of these policies.

⁵⁶ *Id.* at 19.

⁵⁷ Rau, *supra* note 50.

⁵⁸ Conklin, *supra* note 7, at 492.

⁵⁹ Jordan Rau, *Trump Administration Eases Nursing Home Fines in Victory for Industry*, N.Y. TIMES (Dec. 24, 2017), <https://www.nytimes.com/2017/12/24/business/trump-administration-nursing-home-penalties.html>.

⁶⁰ *Id.*

⁶¹ Dylan Matthews, *Trump Reduced Fines for Nursing Homes that Put Residents at Risk. Then Covid-19 Happened*, VOX NEWS (July 14, 2020), <https://www.vox.com/2020/7/14/21323279/nursing-home-coronavirus-covid-deaths>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Conklin, *supra* note 7 at 501; *LTC-HHA-CLIA Calculations of CMP Adjustments*, CMS (2022), <https://www.cms.gov/files/document/ltc-hha-clia-specific-cmp-adjustments-2022.pdf>.

⁶⁵ Conklin, *supra* note 7, at 501.

⁶⁶ Matthews, *supra* note 61, at 5.

⁶⁷ *Id.*

⁶⁸ See Jordan Rau, *Nursing Home Industry Wants Trump To Rescind Staffing Mandate*, N.Y. TIMES (Nov. 29, 2024), <https://www.nytimes.com/2024/11/29/health/trump-nursing-homes-staff-mandates.html>.

⁶⁹ Roger Severino, *Department of Health and Human Services*, in *MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 2025* 449, 450 (Paul Dans & Steven Groves, eds., 2023).

⁷⁰ See *Trump Administration Eases Nursing Home Fines in Victory for Industry*, *supra* note 59.

c. Lack of Collaboration Between State Agencies and Facilities⁷¹

Federal, state, and local agencies all have parts to play in a nursing home's plan to protect its residents during a climate emergency.⁷² In Florida, nursing homes are required to prepare and annually update a "comprehensive emergency management plan" that must include risk assessment and planning, policies and procedures, communication plans, and training and testing programs.⁷³ The nursing home county's local government then reviews each facility's plan following guidance from the Florida Agency for Health Care Administration ("AHCA"), Florida's state agency overseeing nursing homes.⁷⁴ County emergency management agencies are ultimately responsible for performing emergency management functions, primarily coordinating and executing the facility's plan.⁷⁵ Lastly, Florida requires each nursing home to address emergency backup power in a detailed supplemental plan.⁷⁶

An audit conducted by OIG into Florida's compliance with state and federal emergency preparedness regulations exposed several shortcomings, mainly that facilities failed to submit their emergency plan to their local counties, AHCA provided little oversight for facilities on their supplemental backup power plan, and local agencies lacked guidance on how to review and approve each facility's plan.⁷⁷ Local emergency management agencies reported numerous challenges to ensuring emergency plans are reviewed and approved, stating that AHCA either did not provide adequate resources or that the guidance only required the county to verify state requirements, which did not include all federal requirements detailed in 42 C.F.R. § 483.73.⁷⁸ County agencies additionally reported that AHCA did not develop an effective tracking system to track deficiencies and failed to provide facilities with the results of the surveyor's work on their emergency preparedness plans to make them aware of vulnerabilities.⁷⁹ In 2022, during a workshop with assisted living facilities and local emergency management officials, local stakeholders expressed concerns that the information presented was overwhelming and requested additional workshops for better collaboration.⁸⁰ Despite these concerns from both local management and facilities, AHCA's senior management declined to participate in these workshops, limiting the opportunity for meaningful dialogue and input.⁸¹ Although the agency eventually agreed to host additional workshops, its refusal to actively engage in collaborative planning with local governments and facilities undermines the effectiveness of these critical preparedness efforts.⁸²

Additionally, county emergency management agencies discussed concerns regarding general responsibilities.⁸³ For example, one agency reported that they did not have the engineering and electrical knowledge to properly assess a backup power plan (generator) or know where to obtain this guidance.⁸⁴

⁷¹ This Section will analyze the shortcomings of Florida's emergency preparedness response collaboration between the state agency, long-term care facilities, and local governments. Although Florida has made significant strides in emergency preparedness—such as implementing generator laws and other requirements discussed in the Background section—critical gaps remain that undermine the effectiveness of these measures. This analysis aims to illustrate that even states with advanced preparedness laws still face challenges that must be addressed to adequately protect older adults during climate emergencies.

⁷² Wasserman & Konetzka, *supra* note 21, at 831.

⁷³ FLA. STAT. § 400.23(2)(g) (2025).

⁷⁴ FLA. STAT. § 252.38(1)(c) (2025).

⁷⁵ OFF. INSPECTOR GEN., DEPT. HEALTH & HUM. SERVS., FLORIDA SHOULD IMPROVE ITS OVERSIGHT OF SELECTED NURSING HOMES' COMPLIANCE WITH FEDERAL REQUIREMENTS FOR LIFE SAFETY AND EMERGENCY PREPAREDNESS, No. A-04-18-08065, at 1, 15 (2020) [hereinafter HHSOIG No. A-04-18-08065].

⁷⁶ *Id.* at 2.

⁷⁷ *Id.* at 15, 16.

⁷⁸ *Id.* at 16.

⁷⁹ *Id.*

⁸⁰ Christine J. Sexton, *Assisted Living Facilities Ask State to Slow Down, Work with Stakeholders on New Emergency Rules*, FLA. POLS. (Nov. 30, 2022), <https://floridapolitics.com/archives/573329-assisted-living-facilities-ask-state-to-slow-down-work-with-stakeholders-on-new-emergency-rules/>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ HHSOIG No. A-04-18-08065, *supra* note 75, at 16.

⁸⁴ *Id.* ("The [county emergency management] agency stated that it did not know what [it's] responsibility was for obtaining this expertise.")

Concerningly, agencies reported critical evacuation issues, such as multiple nursing homes relying on the same transportation company and planning to evacuate to the same locations.⁸⁵ Local agencies also worried that transportation companies could not handle the combined demand, and shelters might not be able to accommodate all residents safely.⁸⁶

Despite it being the responsibility of each facility's leadership to develop, update, and train staff on their emergency plans,⁸⁷ many facility staff members still lack adequate training.⁸⁸ The OIG report noted that out of the 20 Florida nursing homes audited, 40 percent of them had one or more deficiencies related to emergency plan training, including not conducting full-scale training exercises or analyses of their training programs and failing to update training programs annually.⁸⁹ In response to these findings, AHCA argued that sufficient training was provided to nursing homes, pointing to the "abundant amount of training in the public domain" for providers.⁹⁰ The OIG responded by stating that although training on federal emergency preparedness requirements remains available for public use, AHCA has not done enough to develop Florida-specific training that could be required for nursing home staff.⁹¹ Although different workshops and sessions have been scheduled throughout the state, attendance is neither mandatory nor tracked—an audit from the OIG found that many staff members had never been to a training session or conference related to emergency preparedness requirements.⁹² Importantly, the OIG emphasized its recommendation for greater communication and collaboration in emergency planning and response, highlighting that through this audit, Congress specifically aimed to evaluate how effectively county, state, and federal authorities communicate during crises.⁹³

IV. Recommendations for Strengthening Disaster Preparedness in Long-Term Care Facilities

Based on the analysis and insights discussed, the following recommendations aim to address the identified challenges in facility emergency preparedness and enhance the effectiveness of emergency preparedness regulations. By implementing these strategies, older adults can be better protected in the face of ongoing climate emergencies.

a. Stronger Standards from CMS & Responsive Regulation Approach

As previously discussed, CMS has played a general role in encouraging facilities to collaborate with local and state agencies to plan for an emergency.⁹⁴ In 2019, federal regulations stated that nursing homes were required to document their efforts to contact emergency managers in their areas to help integrate themselves into community-level disaster planning.⁹⁵ In 2022, however, this requirement for documentation was removed, hindering the collaborative process that nursing homes should foster with local agencies.⁹⁶ Policymakers should encourage CMS to revisit this documentation requirement to ensure that facilities are doing all they can to prepare for a climate emergency. Although CMS has already set out general conditions for Medicare funding for

⁸⁵ *Id.* at 16, 17.

⁸⁶ *Id.* at 17.

⁸⁷ *Id.* at 3. Additionally, the Social Security Act mandates that states conduct periodic educational programs for the staff and residents of nursing homes and skilled nursing facilities to present current regulations, procedures, and policies. 42 U.S.C. §§ 1395i-3(g)(1)(B), 1396(g)(1)(B).

⁸⁸ HHSOIG No. A-04-18-08065, *supra* note 75, at 14.

⁸⁹ *Id.*

⁹⁰ *Id.* at 19.

⁹¹ *Id.* at 21.

⁹² HHSOIG No. A-04-18-08065, *supra* note 75, at 21.

⁹³ *Id.*

⁹⁴ *See supra* Part II (examining CMS's role in ensuring that long-term care facilities collaborate with local emergency management agencies).

⁹⁵ Peterson, *supra* note 36, at 703.

⁹⁶ *Id.*

emergency plans, it should provide additional regulations for long-term care facilities to help guide state and local governments in improving emergency preparedness.⁹⁷

A responsive regulation approach has been recommended by researchers to ensure that emergency preparedness plans for facilities are both sufficient and tailored to specific risks.⁹⁸ A responsive regulation approach recognizes that each state faces distinct climate emergencies, and each facility has unique vulnerabilities that must be addressed in an emergency plan.⁹⁹ This method of emergency planning would establish procedures that reflect a nursing home's actual risks and encourage involvement beyond nursing homes and government agencies to include local stakeholders.¹⁰⁰ Florida's emergency preparedness regulations are instructive in this regard because they incorporate principles of responsive regulation by requiring nursing homes to collaborate with local officials by obtaining county approval of their emergency plans.¹⁰¹ Despite this progress, significant challenges persist due to a lack of effective collaboration and limited guidance from AHCA on building meaningful community partnerships.¹⁰²

Studies have shown that regional partnerships that integrate emergency planning, healthcare, and public health organizations can be uniquely positioned to support nursing homes in developing plans that are specific and detailed.¹⁰³ A regulatory framework that is responsive to environmental hazards might involve greater inspection frequency for facilities that have critical emergency preparedness deficiencies or have a disproportionate risk of exposure to specific weather events in their region (like hurricanes along the Atlantic and Gulf Coast states).¹⁰⁴ Additionally, partnerships with local stakeholders can be beneficial because they can offer facilities valuable insights beyond proper evacuation. For example, they can show a facility's exposure to risk and its structural ability to withstand flooding by looking at the facility's building code.¹⁰⁵

State governments and agencies that oversee long-term care facilities are in the ideal position to encourage a risk-responsive regulation system, especially since CMS has limited its role in encouraging facilities to develop local community partnerships.¹⁰⁶ Interviews with facility staff after Hurricane Irma illustrated that effective collaborations between nursing homes and emergency officials were formed primarily by state efforts to host summits to encourage these relationships.¹⁰⁷ This role is appropriate for state agencies because there are already several statewide systems in place for disaster preparedness and quality assurance.¹⁰⁸ For example, state agencies can develop communication mechanisms to provide real-time support and guidance to individual facilities during emergencies.¹⁰⁹

b. Public Reporting is Key in Collaborations & Partnerships

Public reporting mechanisms can be critical in connecting long-term care facilities with state agencies and local governments in preparing for natural disasters.¹¹⁰ By publicly sharing preparedness data and procedures,

⁹⁷ Conklin, *supra* note 7, at 509.

⁹⁸ Peterson, *supra* note 36, at 702.

⁹⁹ *See id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Natalia Festa et al., *Evaluating California Nursing Homes' Emergency Preparedness for Wildfire Exposure*, 71 J. AM. GERIATRIC SOC'Y 895, 901 (2023).

¹⁰⁴ Natalia Festa et al., *Association of Nursing Home Exposure to Hurricane-Related Inundation With Emergency Preparedness*, 6 JAMA NETWORK OPEN 1, 8 (2023).

¹⁰⁵ *Id.*

¹⁰⁶ Peterson, *supra* note 36, at 703. The OIG also has recommendations for AHCA to increase collaboration with local agencies to identify areas where additional expertise or clarification may be needed to ensure the safety of nursing home residents. HHSOIG, No. A-04-18-08065, *supra* note 75, at 18.

¹⁰⁷ Peterson, *supra* note 36, at 703.

¹⁰⁸ *Id.*

¹⁰⁹ Wasserman & Konezka, *supra* note 21, at 835.

¹¹⁰ Conklin, *supra* note 7, at 507.

gaps in emergency readiness can be identified and addressed in collaboration with those involved.¹¹¹ Public reporting allows facilities to identify challenges in preparing for a natural disaster and develop solutions that promote resilience in long-term care facilities.¹¹² A key recommendation for enhancing collaboration is the wider adoption and training of nursing homes in the Incident Command System (“ICS”).¹¹³

The Incident Command System is a uniform management model used to coordinate responses to emergency events, particularly natural disasters.¹¹⁴ Although its application within the long-term care community is still evolving, ICS has been widely implemented in hospitals through the Hospital Incident Command System (“HICS”) since the 1970s.¹¹⁵ When faced with the challenges of a natural disaster, facility staff could use an ICS to create an organizational structure and road map to manage the incident efficiently and successfully respond to the emergency.¹¹⁶ After recognizing the need for an organized emergency response system for nursing homes, the John A. Hartford Foundation funded a project between 2006 and 2008 that led to the Nursing Home Incident Command System (“NHICS”),¹¹⁷ which preserved core components of the ICS (command, operations, planning, logistics, and finance & administration) while adapting to the distinct regulatory and care factors of long-term care facilities.¹¹⁸ Specifically, the NHICS assists facilities in assigning staff to certain emergency roles and identifies what they need to carry out those roles.¹¹⁹

How a nursing home responds to an emergency will depend not just on the existence of an emergency preparedness plan, but also on the leadership capabilities of the facility’s management team.¹²⁰ Indeed, a compliant plan is only as effective as the individual’s ability to execute it under emergency circumstances, which is reliant on the level of training they receive.¹²¹ The success of such training can be incentivized by public reporting, like an incident command structure.¹²² Training long-term care facility staff on incident command structures could help forge collaborations with government agencies by better integrating the facility’s plan into the existing emergency management systems.¹²³

CMS has also used public reporting before to improve care in long-term care facilities by developing its Nursing Home Quality Initiative, which included a set of publicly reported “quality measures” for all nursing homes to follow across the country.¹²⁴ The initiative encouraged nursing home stakeholders from all levels of government to collaborate on emergency preparedness plans and identify common challenges to implementing quality improvement projects.¹²⁵ This initiative demonstrated that public reporting can effectively drive improvements in the level of care that long-term care residents receive by focusing on areas needing reform, like training.¹²⁶ During the initiative, educational workshops, teleconference calls, and interactive sessions about quality measures were provided to nursing homes, which were useful in preparing staff for an emergency.¹²⁷ State

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 506.

¹¹⁴ *The Nursing Home Incident Command System*, FLA. HEALTH CARE ASS’N, https://www.fhca.org/facility_operations/incident_command_system/1000 (last visited Apr. 16, 2025).

¹¹⁵ *Id.*

¹¹⁶ CAL. ASS’N HEALTH FACILITIES, *NURSING HOME INCIDENT COMMAND SYSTEM 1* (2017).

¹¹⁷ *The Nursing Home Incident Command System*, *supra* note 114.

¹¹⁸ CAL. ASS’N HEALTH FACILITIES, *supra* note 116, at 3.

¹¹⁹ *See id.* at 2, 3. NHICS recognizes the following essential responsibilities for staff: people who lead and manage all of the activities necessary to support goals and objectives, people that do and get the stuff to support those goals, people who collect relevant information, analyze, and plan, and those offering financial, administrative, and clerical support. *Id.*

¹²⁰ Wasserman & Konetzka, *supra* note 21, at 833.

¹²¹ *Id.*

¹²² Conklin, *supra* note 7, at 506.

¹²³ *Id.*

¹²⁴ *Id.* at 507.

¹²⁵ *See* Stephanie Kissam et al., *Approaches to Quality Improvement in Nursing Homes: Lessons Learned from the Six-State Pilot of CMS’s Nursing Home Quality Initiative*, 3 BMC GERIATRICS 2, 2–3 (2003).

¹²⁶ *Id.* at 7.

¹²⁷ *Id.* at 5.

agencies are uniquely positioned to not only offer practical guidance but also design public reporting structures that encourage facilities to improve emergency preparedness in facilities.

c. Judicial Remedies

One way for nursing homes to be held more accountable for emergency preparedness is through a general negligence tort theory for failing to safely evacuate and protect residents during emergencies.¹²⁸ However, a plaintiff's main barrier to recovery on this theory is that both the federal and state governments play large roles in emergency preparedness, making it difficult for courts to apply liability solely to the facility.¹²⁹ The federal government authorizes funding and regulates hospitals and long-term care facilities, while state governments issue evacuation orders and also play a role in the regulation of facilities through state agencies.¹³⁰ Indeed, it would be counterintuitive to hold facilities solely liable if they have been compliant with federal and state emergency preparedness requirements.¹³¹

The decision to evacuate residents during a storm is not a common one, so a standard of care cannot be determined by any common standards or practices.¹³² The standard of care for evacuations is especially difficult to determine because the mode of evacuation for a particular resident involves balancing several factors such as the resident's medical condition and the predictions about the severity of the climate emergency.¹³³ The biggest issue in attributing liability to the government in these circumstances stems from issues in proximate cause, as the health care professionals and facility staff are usually the ones dealing directly with residents.¹³⁴ Additionally, healthcare professionals do not commonly encounter unique issues that arise in evacuations, like the quality and mode of transportation.¹³⁵ State legislatures can help solve this issue by defining the responsibility of the state and local government in times of natural disasters.¹³⁶ Addressing legal liability concerns can help encourage long-term care facilities to have evacuation plans in place to protect residents during a natural disaster.¹³⁷ Having the legislature strictly define liability could also help volunteers who often offer hands-on support to facilities during natural disasters.¹³⁸ By creating these state laws, legislatures can afford some protection to volunteers working to keep long-term care residents safe during natural disasters.¹³⁹

HHS has also been encouraged to accept a standard for the quality and mode of transportation so that liability can be properly assigned to a facility that breaches that standard of care.¹⁴⁰ The Administration for Strategic Preparedness and Response ("ASPR") is an operating agency of the U.S. Public Health Service within HHS that focuses on preventing, preparing, and responding to the adverse health effects of natural disasters.¹⁴¹ Through its initiative, the Technical Resources Assistance Center and Information Exchange ("TRACIE"), ASPR provides a centralized, peer-reviewed collection of materials tailored to a wide range of healthcare and emergency

¹²⁸ Conklin, *supra* note 7, at 505.

¹²⁹ *Id.*

¹³⁰ David H. Slade, *Who is Liable for Disaster Planning? Malpractice Liability for Hospital Administrative Plans*, 29 J. LEG. MED. 219, 233 (2008).

¹³¹ *Id.*; *Generator Status Map Dashboard*, FLA. AGENCY FOR HEALTH CARE ADMIN.,

<https://bi.ahca.myflorida.com/t/ABICC/views/GeneratorStatusMap/GeneratorStatusMap?> (last updated Apr. 5, 2025) (showing that all nursing homes and skilled nursing facilities in Florida are compliant with state law mandating compliance with emergency backup plans).

¹³² Slade, *supra* note 130, at 234.

¹³³ Conklin, *supra* note 7, at 513.

¹³⁴ Slade, *supra* note 130, at 235.

¹³⁵ *Id.* at 234.

¹³⁶ *Id.* at 235 ("These questions are best addressed by the legislature, as public policy is broadly implicated. A disaster, by nature, will result in injury and death, and it must be decided who should be responsible for the consequences.")

¹³⁷ Conklin, *supra* note 7, at 508.

¹³⁸ Slade, *supra* note 130, at 234.

¹³⁹ *Id.*

¹⁴⁰ Conklin, *supra* note 7, at 513.

¹⁴¹ ADMIN. FOR STRATEGIC PREPAREDNESS & RESPONSE, <https://aspr.hhs.gov/Pages/Home.aspx> (last visited Apr. 22, 2025) ("ASPR was established to respond to national disasters from Hurricane Katrina to infectious disease outbreaks . . . and played a crucial role during the COVID-19 pandemic.")

preparedness topics.¹⁴² The ASPR TRACIE Topic Collections contain resources (e.g., fact sheets, technical briefs, articles, webinars, and toolkits) that are especially valuable for local stakeholders, like long-term care facilities, seeking guidance to develop emergency preparedness plans.¹⁴³ Since 2009, ASPR has shifted its attention to developing a “crisis standard of care,” noting that the coordination of emergency response system planning is critical to limiting patient mortality.¹⁴⁴ The Topic Collection on a crisis standard of care provides guidance on decision-making during an emergency, providing that standards of care proposed under such circumstances must be “reasonable” despite the unique challenges of preparing for natural disasters.¹⁴⁵

However, recent HHS restructuring efforts and proposed funding cuts aligned with President Trump’s “Make America Healthy Again” initiative, which aims to reduce “bureaucratic sprawl,” risks undermining critical resources built by offices like ASPR.¹⁴⁶ The restructuring under Trump’s administration moves the ASPR from reporting directly to the health secretary to being housed under the Center for Disease Control (“CDC”), which, according to former head of ASPR Dawn O’Connell, could limit the agency’s scope.¹⁴⁷ O’Connell noted that moving the ASPR to the CDC could hinder their ability to quickly respond to emergencies, as they did during the COVID-19 pandemic.¹⁴⁸ Policymakers should exercise caution when considering further cuts to public health preparedness offices like ASPR, whose guidance remains essential to protecting older adults during emergencies.

d. Leveraging Civil Money Penalties (“CMPs”) for Emergency Preparedness Training and Resident Support

To address the challenges that long-term care facilities face in meeting emergency preparedness standards, states should consider more strategic use of CMP funds to enhance staff training on emergency preparedness regulations and provide resident support during the emergency. CMP funds, collected from nursing homes that fail to comply with federal standards, can be allocated by states to initiatives that protect and assist residents in emergencies.¹⁴⁹ This approach not only prepares facilities for natural disasters but also mitigates the financial burden associated with emergency compliance.¹⁵⁰

Cost is often a significant factor contributing to nursing home deficiencies in emergency preparedness.¹⁵¹ For example, the expense of installing a generator can range anywhere from \$350,000 to \$500,000,¹⁵² creating a substantial financial burden for long-term care facilities. While CMP funds cannot be used directly to purchase generators,¹⁵³ facilities can relieve their financial burden by using these funds to cover other critical emergency preparedness needs such as joint staff training of facility staff and surveyors, technical assistance for facilities, and training for long-term care ombudsman or other advocacy organizations.¹⁵⁴ By using the CMP funds

¹⁴² *Welcome to ASPR TRACIE*, DEP’T HEALTH & HUM. SERVS. (Sept. 15, 2015), <https://asprtracie.hhs.gov/>.

¹⁴³ *Comprehensively Developed Topic Collections*, DEP’T HEALTH & HUM. SERVS. (Sept. 15, 2015), <https://asprtracie.hhs.gov/technical-resources/topic-collection>.

¹⁴⁴ *Topic Collection: Crisis Standards of Care*, DEP’T HEALTH AND HUM. SERV. (Sept. 15, 2025), <https://asprtracie.hhs.gov/technical-resources/63/crisis-standards-of-care/0>.

¹⁴⁵ *Id.*

¹⁴⁶ Press Release, Dep’t Health & Hum. Servs., HHS Announces Transformation to Make America Healthy Again (Mar. 27, 2025), <https://www.hhs.gov/press-room/hhs-restructuring-doge.html>.

¹⁴⁷ Selena Simmons-Duffin et al., *The Trump Administration Restructures Federal Health Agencies, Cuts 20,000 Jobs*, NPR NEWS (Mar. 27, 2025), <https://www.npr.org/sections/shots-health-news/2025/03/27/nx-s1-5342414/hhs-doge-rif-rfk-job-cuts>.

¹⁴⁸ *Id.*

¹⁴⁹ *Examples of Allowable Uses of Civil Money Penalty (CMP) Reinvestment Funds*, CMS (Aug. 8, 2024), <https://dphhs.mt.gov/assets/sltc/CMP/ExamplesAllowableUsesCMPReinvestmentFunds.pdf>.

¹⁵⁰ Conklin, *supra* note 7, at 511.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Examples of Allowable Uses of Civil Money Penalty (CMP) Reinvestment Funds*, *supra* note 149 (“Funding cannot be used for meeting regulatory requirements [citing to Emergency Preparedness Regulations in federal code].”).

¹⁵⁴ *Id.*

strategically in this way, facilities could redirect resources toward meeting costly infrastructure requirements aimed at keeping residents safe during emergencies.

V. Conclusion

In the past years the rate of natural disasters has increased, specifically impacting those suffering from high-risk factors.¹⁵⁵ Disasters, like hurricanes, disproportionately affect the most vulnerable in our communities, and long-term care facilities stand at the center of this reality.¹⁵⁶ Moreover, older adults living in areas consistently prone to disaster become further burdened by stress, trauma, and the financial instability associated with natural disasters.¹⁵⁷ Due to the growing concerns of climate change, preparing for emergencies is now known as a critical element of nursing home operations, but government audits and repeated failures show that there continues to be gaps in emergency preparedness.¹⁵⁸ While federal regulations provide a general framework for emergency preparedness,¹⁵⁹ it's ultimately the leadership within each facility, supported by proactive state agency involvement, that determines the standard of care that residents receive during a natural disaster.¹⁶⁰

As Hurricane Irma revealed, the most effective responses during natural disasters comes from nursing homes having local collaborations and state-facilitated partnerships.¹⁶¹ Emergency preparedness regulations that emphasize leadership training and integrate long-term care facilities into broader emergency management systems are essential in protecting older adults.¹⁶² Additionally, using public reporting to collaborate with nursing home stakeholders fortifies emergency preparedness efforts and further incentivizes facilities to prioritize and refine their natural disaster response.¹⁶³ By fostering collaboration between state, federal, and local governments, long-term care facilities can work together to ensure that older adults are not left behind when emergencies strike. Preparing for a natural disaster protects older adults' dignity and demands a system that effectively responds with compassion and competence.

¹⁵⁵ Christine E. Cerniglia, *Systemic Injustice: The Need for Disaster and Pandemic Preparedness Legislation*, 99 U. DET. MERCY L. REV. 53, 54–56 (2021).

¹⁵⁶ Kopicki & Wohlforth, *supra* note 5 (“[O]lder facilities, which often serve low-income residents, may be built to lower standards or on sites subject to flooding, and may have fewer staff and resources to cope with disasters.”).

¹⁵⁷ Cerniglia, *supra* note 155, at 62.

¹⁵⁸ Peterson, *supra* note 36, at 702.

¹⁵⁹ *Nursing Homes*, *supra* note 30.

¹⁶⁰ HHSOIG No. A-04-18-08065, *supra* note 42, at 3.

¹⁶¹ Peterson, *supra* note 36, at 703 (As a result of interactions of facility staff with local officials, administrators “perceived they were more successful at anticipating their facility and resident needs, and those who faced unexpected challenges during the hurricane had local resources to call upon for help”).

¹⁶² Wasserman & Konetzka, *supra* note 21, at 831.

¹⁶³ Conklin, *supra* note 7, at 507–08.

THE CAREGIVER BURDEN: THE IMPACT OF THE CURRENT BUREAUCRATIC SYSTEM ON CAREGIVERS AND OLDER AND DISABLED INDIVIDUALS

*Emily Martin**

I. Introduction

On July 1, 2024, Governor Glenn Youngkin of Virginia signed multiple bills into law in an attempt to alleviate the burdens that many caregivers face on a daily basis.¹ These laws were enacted with the goal of making it easier for family members to be paid to provide care for their loved ones who are disabled and unable to care for themselves. As Americans age, unpaid family caregivers are becoming more and more common, and these caregivers have to give up opportunities, lose income, and make many other personal sacrifices in order to provide care for their loved ones. While there are currently many government programs and benefits available to unpaid caregivers, most of these programs require strict documentation and recordkeeping with government agencies and the local, state, and federal levels. Other benefits might be helpful to caregivers, but the majority of caregivers are unaware of the program or how to begin the application and eligibility process.

Although there have been some attempts to simplify the laws and documentation requirements that caregivers must complete in order to be compensated for the care they provide, the process remains overly complicated and places a burden on caregivers that makes it very difficult for them to navigate the complicated public benefits system. Most government agencies are underfunded and therefore understaffed, making the wait to obtain benefits impossibly long for caregivers and older individuals who are already in crisis. Finally, public programs and other solutions available to caregivers are often so narrowly construed as to make these benefits unavailable to all but a very select group of individuals. These circumstances thus discourage unpaid family caregivers from seeking compensation for the work they do on behalf of their loved ones, adding to the significant burden the caregiver is already facing.

II. The Price of Caregiving

There is no question that being a caregiver takes a personal toll on those providing the care. Studies have shown that people serving as caregivers to older individuals suffer psychological, emotional, and economic consequences.² According to the Alzheimer's Association, as of 2024, there are approximately 342,000 unpaid caregivers in Virginia alone, representing 662 million hours of unpaid care per year for a total of \$12.572 billion in unpaid care.³ Caregivers for spouses with dementia are more likely to delay healthcare for themselves and are more likely than other caregivers to "become increasingly frail during the time between becoming a caregiver and their spouse's death."⁴ In Virginia, 64.1% of dementia caregivers reported that they have at least one chronic

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¹ See Jahd Khalil, *Multiple New Caregiving Laws Take Effect Monday*, VPM NEWS (June 27, 2024), <https://www.vpm.org/news/2024-06-27/dd-waiver-dmas-caregiving-developmental-disability-home>.

² Heejung Kim et al., *Predictors of Caregiver Burden in Caregivers of Individuals with Dementia*, 68 J. ADVANCED NURSING 846, 848 (2011).

³ ALZHEIMER'S ASS'N, 2024 ALZHEIMER'S DISEASE FACTS AND FIGURES 47 (2024).

⁴ *Id.* at 50.

condition, 31.2% reported feeling depressed, and 15.1% reported that they themselves are in poor physical health.⁵ Adding to the emotional burden is that unpaid caregivers are more likely to divorce, with 80% reporting that their caregiving responsibilities put a strain on their marriage.⁶

Caregivers also make significant economic sacrifices. Unpaid caregivers spend an average of 26% of their own income on caregiving-related expenses each year, whether from personal care items for the person (such as medications, incontinence supplies, or clothing) or as a result of increased household expenses such as food, utilities, or home renovations (such as wheelchair ramps or bathroom grab bars).⁷ Not only do caregivers pay out of their own pockets for their family members' care, but data has shown that they also cut back on their own personal spending and do not save as much money in order to provide for their loved one—in fact, 27% of unpaid caregivers have less than \$1,000 in emergency savings, and half live paycheck to paycheck.⁸

In addition to the actual cost of caregiving, unpaid caregivers pay an opportunity cost as well. According to a study by Guardian, women who care for their mothers have median lost wages of \$24,500 over a two-year period.⁹ The Alzheimer's Association has reported that 47% of caregivers missed work time due to their caregiving responsibilities, with 9% of caregivers giving up working entirely while 6% were forced into an early retirement.¹⁰ Unfortunately, caregivers do not always feel comfortable discussing their situation with their employer for fear of the stigma that such a role often has. Caregivers may worry about being perceived as not dedicated to their job or as potentially unreliable employees.¹¹ Therefore, many unpaid caregivers simply end up retiring or cutting back hours rather than seeking workplace accommodations.

III. Understaffed Government Agencies Increase Caregiver Stress

Even with the help of public benefits such as Medicaid programs and veterans' benefits, caregiving is a difficult task. Unfortunately, the very benefits that are supposed to make the caregiver's role easier often add to the stress by imposing onerous documentation requirements on caregivers who are applying for or seeking to maintain these benefits. Public benefits applications are hefty, with most applications requiring dozens of pages of verifications along with a confusing application format. Often, caregivers feel the need to hire an attorney or other professional to help them with the process, adding further expenses to the already steep cost of care. Most government benefits, such as Medicaid long-term care supports and services, require an annual renewal process as well, so the burden of paperwork and dealing with confusing deadlines is never quite over.

The difficulty with obtaining public benefits does not stop once the application is submitted. Government agencies in charge of approving or reviewing the application are understaffed and overworked, which often leads to a delay in applications being reviewed and approved. In its 2022-2024 Strategic Plan, the Department of Medical Assistance Services ("DMAS"), the agency responsible for reviewing and approving Medicaid applications, revealed that while it continues to work on ways to retain and hire employees, "DMAS still has concerns regarding DMAS' retention of essential workforce members. Retirements and resignations could potentially have a significant impact on the agency's operations."¹² When it comes to Medicaid, Virginia suffers from particularly difficult budget issues—for 2023 and 2024, DMAS reported a \$632 million budget shortfall.¹³

The Veterans Benefits Administration (the "VA") has not been spared from these issues. The VA offers a pension called the Aid and Attendance Pension for veterans and their spouses who require the aid and attendance

⁵ *Id.* at 51.

⁶ GUARDIAN LIFE INS. CO. OF AM., *STANDING UP AND STEPPING IN: A MODERN LOOK AT CAREGIVERS IN THE U.S.* 11 (2023).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ ALZHEIMER'S ASS'N, *supra* note 3, at 53.

¹¹ GUARDIAN LIFE INS. CO. OF AM., *supra* note 6, at 16.

¹² DEP'T OF MED. ASSISTANCE SERVS., *2022-24 STRATEGIC PLAN*, DMAS No. 602, at 2 (Va. 2024).

¹³ Michael Martz, *Virginia Medicaid Program Faces \$632M Hole*, RICHMOND TIMES-DISPATCH (Nov. 9, 2024), https://dailyprogress.com/news/state-regional/government-politics/virginia-medicaid-shortfall-youngkin-tax-cuts/article_a52f701f-e003-5674-bfd3-3f5aa75bcb16.html.

of someone else to succeed in their daily lives.¹⁴ Individuals receiving this pension must require help with their activities of daily living and, similar to Medicaid, there are strict asset and income requirements that must be met in order for a veteran or surviving spouse to qualify for this pension. Once the individual qualifies, they will receive a tax-free pension that can supplement the cost of care in a facility or at home.¹⁵ This pension can help unpaid caregivers find relief by allowing them to hire professional caregivers for respite care and can also ease the financial burden that paying for care places on veterans and their families.

Unfortunately, this pension is not widely advertised, and many veterans and their families are unaware that it exists and that they qualify (or could easily become eligible) for the pension.¹⁶ For those who are aware of the pension, it can take several months after the application is submitted before their application is processed and they begin receiving retroactive and ongoing benefits. In July 2024, the Government Accountability Office (“GAO”) released a report that revealed the VA has failed to implement most of the recommendations that the GAO made in 2021 in an attempt to improve efficiency of the claims process.¹⁷

While the federal and state governments are clearly aware of the difficulties caregivers face when it comes to obtaining financial relief to pay for their loved ones’ care, the government at all levels has taken few steps to alleviate the burden on caregivers it creates. When coupled with the emotional, psychological, and financial toll that unpaid caregivers must confront, the constant delays and confusion created by these understaffed government agencies can often completely discourage caregivers from seeking assistance at all. The VA denies about 88% of caregiver program applications—not because they lack merit, but because the correct verifications and application requirements have not been met, and the VA does not have the staff to assist applicants with their claims in a meaningful way.¹⁸ Understandably, caregivers who are already overworked and overwhelmed with their duties often give up on applying for assistance after facing multiple roadblocks.

IV. Current Caregiver Documentation Requirements Under the Commonwealth Coordinated Care Plus Waiver

Lawmakers in Virginia have made it clear that there is a need for documentation and paperwork for all care providers, irrespective of the fact that the appropriate care was actually provided. In *Department of Medical Assistance Services v. Ablix Corporation*, the court of appeals stated that “the purpose of the Medicaid program is not only to provide needed medical services and equipment, but also to do so in a fiscally responsible manner.”¹⁹ The federal government requires that state agencies assure financial accountability for the funds it spends for home and community-based services.²⁰ In *Ablix*, DMAS issued a decision requiring that Ablix Corporation, a home health care provider, reimburse DMAS for personal care services and respite care services to the tune of over \$200,000 as a result of its failure to maintain adequate documentation of the care it provided.²¹

The elderly individual in this case was receiving care under the Elderly or Disabled with Consumer Direction (“EDCD”) Waiver, which has since been merged with other programs and reclassified as the Commonwealth Coordinated Care (“CCC”) Plus Waiver.²² The current law in Virginia, under the CCC Plus

¹⁴ U.S. DEP’T OF VETERANS AFFAIRS, ADJUDICATION PROCEDURES MANUAL M21-1.IX.ii.1.A (2024).

¹⁵ *VA Aid and Attendance: Everything Caregivers Need to Know*, GIVERS (May 8, 2023), <https://www.joinivers.com/learn/va-aid-attendance>.

¹⁶ *VA Benefits and Eligibility Criteria for Aid and Attendance aka Housebound Rating*, NAT’L VETERANS FOUND., <https://nvf.org/va-aid-and-attendance-benefits/> (last visited Nov. 6, 2025).

¹⁷ U.S. GOV’T ACCOUNTABILITY OFF., VA DISABILITY BENEFITS: TRAINING FOR CLAIMS PROCESSORS NEEDS TO BE ENHANCED, No. GAO-24-107510 (2024).

¹⁸ *Senators Hassan, Murray Lead Bipartisan Call to Improve VA Caregivers Program for Veterans and Their Families*, MAGGIE HASSAN (Feb. 22, 2022), <https://www.hassan.senate.gov/news/press-releases/senators-hassan-murray-lead-bipartisan-call-to-improve-v-a-caregivers-program-for-veterans-and-their-families>.

¹⁹ *Dept. of Med. Assistance Servs. v. Ablix Corp.*, 2015 Va. App. LEXIS 82 (Va. Ct. App. 2015).

²⁰ 42 C.F.R. § 441.302(b) (2024).

²¹ *Ablix*, 2015 Va. App. LEXIS 82 at 5.

²² *Id.* at 6.

Waiver, allows for “consumer-directed personal care attendants”; that is, personal care providers, who can be family members or friends, who are not employed with a specific home care agency.²³ The idea behind this program is that it allows individuals to receive care at home rather than in a nursing home or other facility, encouraging family or other caregivers to provide care to their loved ones.²⁴ In order to maintain these benefits and receive payment for the care they provide, caregivers and care recipients must submit to periodic “utilization reviews” to ensure compliance with policy and regulations.²⁵ During these reviews, staff will visit the caregiver on-site and conduct interviews with the individual, the family, or others.²⁶ Caregivers are required to provide billing records to the auditor.²⁷ The reviewer will then determine whether the services delivered were appropriate and whether the services continue to be needed.²⁸

In *Ablix*, the care providers did not complete the required forms, and the care providers included multiple service types on one form instead of using separate forms for each service type.²⁹ Therefore, they were required to reimburse DMAS over \$200,000—not because the agency had not provided the care or because there was anything improper about the care, but because Ablix did not provide the proper documentation to obtain compensation for the care.³⁰ In a similar case in which a care provider was required to reimburse DMAS for failing to keep adequate records, *1st Stop Health Services v. Department of Medical Assistance Services*, the Director of DMAS acknowledged that there was no dispute over whether the care had occurred; instead, the issue was with the proper forms not being completed.³¹ DMAS and the federal government have allowed documentation requirements to become the priority rather than honoring the spirit of the law, which is that caregivers who actually provide the care they are claiming to have provided receive adequate compensation for doing so.

While the caregivers in *Ablix* and *1st Stop* were agencies, the same documentation is currently required for individual caregivers under the CCC Plus Waiver. In fact, the CCC Plus Manual includes a 13-page chapter on billing procedures and documentation instructions for caregivers and a 15-page chapter on periodic reviews that DMAS carries out to ensure these procedures are met.³² Consumer-directed caregivers are strongly encouraged to complete a form on a weekly basis that details whether the attendant assisted with any of the six activities of daily living (bathing, dressing, feeding, transferring, toileting, and incontinence assistance), along with helping with tasks such as turning or changing positions, personal grooming, and supervision.³³ They also are encouraged to certify on a daily basis whether they have assisted with wound care, range of motion activities, vital signs, or medication management.³⁴ Given the above statistics on the time constraints and stressors that caregivers already face, these documentation requirements can place an unbearable burden on people who are already taking on a high level of responsibility. The CCC Plus Manual requires providers to refund payments from DMAS if they fail to maintain the proper records or documentation to support their claims, even if the care actually took place.³⁵

Although the CCC Plus Waiver allows for personal care attendants who are not medical professionals to be paid caregivers, these family members or friends are still required to undergo many of the same procedures are

²³ 12 VA. ADMIN. CODE § 30-120-935(G)(4) (2024); VA. DEP'T OF MED. ASSISTANCE SERVS., COMMONWEALTH COORDINATED CARE PLUS WAIVER MANUAL IV 4–5 (2024), <https://vamedicaid.dmas.virginia.gov/sites/default/files/2023-12/CCC%20Plus%20Waiver%20chapter%204%20%28updated%2012.29.23%29.pdf>.

²⁴ *Waivers*, DMAS, <https://www.dmas.virginia.gov/for-members/benefits-and-services/waivers/> (last visited Nov. 10, 2025).

²⁵ VA. DEP'T OF MED. ASSISTANCE SERVS., *supra* note 23.

²⁶ *Id.* at 5.

²⁷ *Id.*

²⁸ *Id.* at 3.

²⁹ *Dept. of Med. Assistance Servs. v. Ablix Corp.*, 2015 Va. App. LEXIS 82, at 8 (Va. Ct. App. 2015).

³⁰ *Id.* at 5.

³¹ *1st Stop Health Servs. v. Dep't of Med. Assistance Servs.*, 756 S.E.2d 183, 187–89 (Va. Ct. App. 2014).

³² VA. DEP'T OF MED. ASSISTANCE SERVS., COMMONWEALTH COORDINATED CARE PLUS WAIVER MANUAL V, ch. V, VI (2025), https://vamedicaid.dmas.virginia.gov/sites/default/files/2025-11/CCC%20Plus%20Waiver%20Chapter%20V%20%28updated%2011.6.25%29_Final.pdf.

³³ VA. DEP'T OF MED. ASSISTANCE SERVS., CONSUMER-DIRECTED EMPLOYER OF RECORD MANUAL 35, 57 (2021), https://vamedicaid.dmas.virginia.gov/sites/default/files/202307/CCC%20Plus%20Appendix%20C%20%28updated%209.1.21%29_Final.pdf.

³⁴ *Id.* at 58.

³⁵ VA. DEP'T OF MED. ASSISTANCE SERVS., *supra* note 23, ch. VI, at 2.

registered nurses or licensed practice nurses who provide the same care. Similar to a medical professional applying for any caregiving position, personal care attendants are required to have a satisfactory work record and two references from prior job experience—a requirement that may be impossible to meet if a caregiver has put off having a career or paying job to take care of a loved one.³⁶ Along with receiving regular tuberculosis screenings, they also must be willing and able to attend caregiver training at any time upon the request of the individual receiving the care, their family, or the Virginia Department of Social Services (“VDSS”).³⁷ If someone is the sole caregiver for an elderly adult who cannot be left alone, attending these trainings could be a hardship both for the caregiver and the person who needs the care. These periodic trainings may also require the caregiver to take time away from work or other personal obligations, adding to the responsibilities they are already managing.

Under the CCC Plus Waiver, the personal care attendant cannot be the spouse of the individual receiving care. Until recently, if caregiving services were rendered by other family members or caregivers living with the individual receiving care, there had to be “written, objective documentation” as to why there is no one else who is able to provide services to the individual.³⁸ The process was so complicated that DMAS provided a flow chart to determine whether the caregiver could be reimbursed depending on their relationship to the member.³⁹ Rather than encouraging the family unit to provide care to elderly or disabled relatives, these rules actually worked to deter caregivers from pursuing these benefits.

Thankfully, the Virginia General Assembly passed a law that went into effect on July 1, 2024, in an attempt to remedy some of these problems. This new law, House Bill 909, directs DMAS to seek federal authority to modify the program rules for home and community-based services waivers to eliminate the requirement that, in order for a caregiver to receive reimbursement for personal care services, no one else be available to provide services to the member.⁴⁰ Because this legislation was passed so recently, it remains to be seen whether this will have a permanent positive impact on the caregiver burden. Because Medicaid is a federal program administered by the individual states, Virginia still must seek and obtain federal authority before these rules can be modified successfully.

Although steps are being taken to assist unpaid caregivers, many of the regulations currently in place only serve to heighten difficulty for family members living with their loved ones to receive payment for the care they provide; in fact, many caregivers might be discouraged from seeking Medicaid reimbursement in the first place because they lack the time, training, knowledge, or initiative to obtain the required documentation and complete the requirements to become a paid caregiver.

V. Caregiver Child Exception to Medicaid Transfer Penalty Rules

One Virginia law that can greatly benefit children who live with and provide care for their elderly parents is called the “caregiver-child” exception to Medicaid asset transfer restrictions. Under normal circumstances, Virginia Medicaid rules penalize applicants who make gifts or uncompensated transfers within five years of applying for Medicaid benefits, including long-term care supports and services.⁴¹ This means that an individual cannot give away their assets, including their primary residence, within five years of applying for Medicaid if they want to avoid a penalty period. This rule applies to personal gifts to individuals as well as transfers to trusts. As of 2024, for every \$7,023 in gifts or uncompensated transfers made within five years of applying for Medicaid

³⁶ 12 VA. ADMIN. CODE 30-122-460(D)(7)(c) (2024).

³⁷ *Id.* at (D)(8)(f-g).

³⁸ *EPSDT Personal Care Services*, VA. DEP’T OF MED. ASSISTANCE SERVS. (Aug. 21, 2019)

https://vamedicaid.dmas.virginia.gov/sites/default/files/2023-07/EVV_EPSDT%20%20Personal%20Care%20Srvs%20%28updated%208.21.19%29%20-%20FINAL.pdf.

³⁹ VA. DEP’T OF MED. ASSISTANCE SERVS., CONSUMER-DIRECTED ATTENDANT DOCUMENTATION FORM, No. DMAS-487 (2009).

⁴⁰ H.B. 909, Ch. 0646, Reg. Sess. (Va. 2024).

⁴¹ DEP’T OF MED. ASSISTANCE SERVS., ELIGIBILITY MANUAL M1450.400.C.3 (2007).

benefits, the Medicaid applicant will be ineligible for Medicaid benefits for one month.⁴² However, Virginia allows for an exception to this rule: if a child has lived with their parent for a minimum of two years, caring for their parent in a way that has allowed them to avoid the need for a nursing home or other Medicaid benefits, the parent can transfer their primary residence to their child using a deed of gift without being penalized for doing so.⁴³

Unfortunately, many children who provide care to their parents are unaware of this exception, which requires a good deal of documentation to obtain. Along with the deed of gift, applicants must submit an evaluation from their medical provider stating that they have needed a certain level of care for at least two years.⁴⁴ Those hoping to benefit from this exception to the gifting rules must also submit an affidavit from a neighbor or other associate who can verify that the child has been living with their parent for at least two years prior to the date of the Medicaid application. In reality, the average caregiver would be unaware of this benefit or how to properly obtain it without consulting an experienced elder law attorney first.

VI. Care Agreements and Shared Expense Agreements

Caregivers can also be paid for their services without their loved one receiving Medicaid benefits through traditional care agreements. The individual needing care and the previously unpaid caregiver can execute an agreement in which the caregiver receives an hourly rate to provide basic caregiving services for their loved one. As long as the care is documented and spelled out clearly in the agreement, these payments do not constitute a gift that would cause any difficulty if the individual later applied for Medicaid.⁴⁵

However, these agreements require strict proof—the caregiver must keep a detailed log of how many hours per day they provide care and exactly what care is provided. In order to make a case for their hourly rate, many caregivers may choose to employ a geriatric care manager or other medical professional to evaluate their loved one and determine what services they need. Of course, hiring a geriatric care manager is an additional time commitment and expense that many caregivers simply do not have. The reality is that income under these care agreements must be reported as taxable income to the IRS and local tax authorities. Many caregivers do not want to have their tax liability increased as a result of the care they provide to their family member.

As previously discussed, family caregivers spend a great deal of their own funds making sure their loved ones are cared for properly. This is especially true if the elderly or disabled individual is living in the home—expenses such as groceries, water usage, power usage, cable and internet, and gas will increase exponentially if unpaid caregivers have their parents living in their home. Thankfully, Virginia law allows caregivers, and those receiving the care, to sign a shared expense agreement in which the person living in the caregiver's home pays their pro rata share of utilities, home maintenance, and other expenses.⁴⁶ Unlike payment under care agreements, this additional payment does not have any tax consequences for the caregiver. However, the expenses must be carefully documented with proof of utility bills and invoices or receipts for all expenses paid under the shared expense agreement.⁴⁷ If these payments are not properly documented, DMAS may see these payments as uncompensated transfers, or gifts, and impose a penalty accordingly if the individual receiving care ever needs to apply for Medicaid benefits. Many people may be receiving informal payments from their loved ones to “help out with the bills” without understanding the need for strict documentation and records for these payments. For those who document it properly, shared expense agreements can be a boon for caregivers with loved ones living in their home.

⁴² *Id.* at M1450.630.

⁴³ *Id.* at M1450.400.

⁴⁴ *Id.*

⁴⁵ CONSUMER-DIRECTED ATTENDANT DOCUMENTATION FORM, *supra* note 39.

⁴⁶ I.R.S. Pub. 502 (2023).

⁴⁷ *Id.*

VII. Proposals for Future Caregiver Benefits

According to a recent study by the AARP (formerly the American Association of Retired Persons), one in four caregivers have reported that they need help in figuring out forms, paperwork, and eligibility for services.⁴⁸ Although the government has made attempts to alleviate the burden that red tape, such as documentation requirements, lengthy applications, confusing flow charts, and ever-changing rules, placed on caregivers on a daily basis, the fact remains that for the average unpaid family caregiver, the current situation is both confusing and overly burdensome. A drastic overhaul of the application and eligibility process for Medicaid, veterans' benefits, and other potential benefits for caregivers is needed in order to alleviate this aspect of caregivers' stress permanently.

The federal government has made some attempts to alleviate the burden that these strict documentation and application requirements impose on care providers. Senator Edward Markey and a bipartisan commission of 21 cosponsors have introduced the Alleviating Burdens to Caregivers Act (or "ABC Act"), which has the goal of requiring "the Administrator of the Centers for Medicare & Medicaid Services and the Commissioner of Social Security to review and simplify the processes, procedures, forms, and communication for family caregivers to assist individuals in establishing eligibility for, enrolling in, and maintaining and utilizing coverage and benefits" under federal benefits programs."⁴⁹ This proposed law has been endorsed by dozens of organizations benefitting seniors including the AARP, Gerontological Society of America, and the Alzheimer's Association.⁵⁰ Unfortunately, this proposed bill has been referred to subcommittees and has not had any action taken on it in either house of Congress since April 2024.⁵¹

A. Tax Credits and Incentives for Caregivers

Almost two in three unpaid caregivers feel that financial support in the form of an income tax credit would allow them to continue to care for their loved one in the home.⁵² The federal government does offer limited tax benefits for children who provide care for their parents. In limited circumstances, children might be able to claim their parent as a dependent on their income tax return. However, the rules for children wishing to do so are very strict and only apply in limited circumstances. For example, child caregivers cannot claim their parent as a dependent if their parent files a joint return with their spouse. They must have paid more than half of their parent's support in the last calendar year, and the parent's gross income for the calendar year must be less than \$5,050.⁵³ While some caregivers may benefit from these rules, the circumstances under which a child can claim a parent as a dependent are so narrow as to exclude the vast majority of child caregivers from being able to do so. Even when the limited circumstances do apply, the tax credit is only a maximum of \$1,100 per year.⁵⁴

Additionally, caregivers who are able to claim their parent as a dependent may be able to claim their parent's unreimbursed medical costs as an itemized deduction on their income tax return if the medical expenses of everyone claimed on the tax return is more than 7.5% of the filer's adjusted gross income.⁵⁵ The types of expenses that can be claimed as deductions include adult day care, bandages, eyeglasses, hearing aids, copayments and deductibles, medications, transportation for medical appointments, and medical equipment such as a cane or

⁴⁸ AARP, CAREGIVING IN THE U.S.: 2020 REPORT (2020).

⁴⁹ Alleviating Barriers for Caregivers Act, H.R. 8018, 118th Cong. § 2(b) (2024).

⁵⁰ Press Release, Office of Senator Ed Markey, Ahead of National Family Caregivers Month, Sens. Markey, Capito Introduce Legislation to Alleviate Administrative Burdens for Family Caregivers (Oct 24, 2023).

⁵¹ H.R. 8018.

⁵² AARP, *supra* note 48, at 81.

⁵³ *Frequently Asked Questions for Caregivers*, IRS, <https://www.irs.gov/faqs/irs-procedures/for-caregivers> (last visited Dec. 10, 2024).

⁵⁴ *Id.*

⁵⁵ I.R.S. Pub., *supra* note 46.

walker.⁵⁶ However, these items and services must specifically benefit the person receiving the care and not the entire household.

While these provisions are a good start to alleviating the difficulties that caregivers face, when one considers the fact that the average unpaid caregiver spends 26% of their income on paying for their loved one's care each year,⁵⁷ the rules that are currently in place fall dismally short of what most caregivers need to be made financially whole for caring for their parents. The federal government has also made some attempts to remedy this problem. In early 2024, members of Congress led by Senator Michael Bennett reintroduced the Credit for Caring Act of 2024. This proposed law would provide a nonrefundable tax credit for working family caregivers. This tax credit would be a maximum of \$5,000 for 30% of the cost of long-term care expenses that exceed \$2,000 during the previous taxable year.⁵⁸ A caregiver would be eligible for this benefit if they have earned income over \$7,500 in the previous year and pay for or incur expenses for providing care to a spouse or other dependent relative with long-term care needs.⁵⁹ The goal of this legislation is to offset a percentage of caregiving costs such as respite care, modifications to the home, and transportation. Unfortunately, as with the proposed ABC Act, this bill has not made any progress since it was introduced to the Senate in January 2024 and referred to the Committee on Finance.⁶⁰

In order to provide meaningful financial relief for caregivers, federal, state, and local governments need to make serious progress on passing legislation that will provide financial incentives for family caregivers to continue to care for their loved ones. Both the ABC Act and the Credit for Caring Act should be passed immediately in order to continue the important work that has been done to make sure caregivers have the assistance they need. Caregivers who have financial support will be more able to take time off from work, spend time with their loved one, and feel relief from the stress of the financial burden that caregiving places on them.

Furthermore, expanding the eligibility rules for family members to claim those to whom they provide care and offering significant tax credits for unpaid caregivers would provide caregivers with an incentive to continue to provide this care. Although it would come at an initial financial cost for the federal government, expanding these tax incentives could mean that fewer individuals need to apply for Medicaid long-term care supports and services and veterans' benefits such as the Aid and Attendance Pension and VA nursing homes. Enabling children and other unpaid caregivers to care for their loved one in the home, rather than placing them in a facility or hiring private caregivers, will offset a large percentage of the \$592 billion that the federal government spends on Medicaid on an annual basis.⁶¹

B. Paid Caregiver Programs

As previously discussed, there are very few circumstances under which an unpaid caregiver can begin to receive payment for the care they provide. Government programs such as the CCC Plus Waiver have so many documentation requirements that it is both confusing and discouraging for already overburdened caregivers to pursue this avenue. More informal caregiver agreements place a tax burden on caregivers because the funds they receive for providing care are added to their taxable income for that year. Many caregivers do not want to contend with either the paperwork and added documentation, or the increased tax liability that comes with receiving compensation in this way, when they were already providing the care without these added complications. In order to encourage caregivers to take advantage of the ability to get paid for their services, the government at all levels should consider minimizing or even eliminating the degree to which income derived from caring for a family member impacts the caregiver's reportable income.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Credit for Caring Act, S. 3702, 118th Cong. § 25F (2024).

⁵⁹ *Id.*

⁶⁰ I.R.S. Pub., *supra* note 46.

⁶¹ *Budget Basics: Medicaid*, PETER G. PETERSON FOUND., <https://www.pgpf.org/article/budget-explainer-medicaid/> (last visited Dec. 10, 2024).

C. Workplace Benefits

Unpaid caregivers who are employed elsewhere often suffer negative consequences in their careers, including discipline from employers, lost income, and lost opportunities at their place of employment, as a result of their duties at home. The federal government has taken steps to allow employees to take job-protected leave from work for many reasons, including the illness of a parent under the Family and Medical Leave Act (“FMLA”).⁶² However, the FMLA only applies to employees who have worked for a covered employer for at least 12 months.⁶³ “Covered employers” must have 50 or more employees if they are private companies (public agencies do not have an employee minimum).⁶⁴ Those who take time off under the FMLA can take up to 12 weeks of time off without fear of being terminated or demoted as a result of taking the leave.⁶⁵

While this benefit can help ease caregivers’ fears of suffering from retaliation as a result of taking off time to care for their parent, it does nothing to solve the problem of the lack of funding available for unpaid caregivers. The FMLA only offers unpaid leave.⁶⁶ In order to be paid during FMLA leave, employees must use up sick leave, vacation time, personal time, or other employer-provided benefits first.⁶⁷ Under Virginia’s version of the FMLA, employees are only eligible to take leave if their parent suffers from a “serious medical condition.”⁶⁸ A “serious medical condition” has a very specific definition, which includes overnight stays in a hospital or medical care facility; a period of incapacity for more than three consecutive calendar days; a period of incapacity due to a chronic serious health condition; or a period of incapacity that is permanent or long-term due to an incurable condition such as Alzheimer’s disease or terminal cancer.⁶⁹ Of course, requesting leave under the FMLA requires the completion of multiple forms and certifications in order for an employee to obtain it—an often difficult process during an even more difficult time for unpaid caregivers who may be experiencing a family crisis.⁷⁰

VIII. Conclusion

The current systems and processes in place to help unpaid caregivers manage the stressful task of caring for a loved one are inadequate and overly complex. Unpaid caregivers in Virginia already suffer major consequences as a result of their caregiving duties including lost income, lost employment opportunities, and sacrifices to their financial and physical well-being.⁷¹ There are many benefits available to both caregivers and older or disabled individuals, but these benefits often have onerous application requirements. For example, the CCC Plus Waiver is so complex that DMAS has provided flow charts and has a large manual available to the public regarding eligibility.⁷² The VA offers a pension that could be used to supplement the cost of care for individuals living at home; however, most eligible veterans are unaware that the pension exists. There are potential tax benefits available to unpaid caregivers, but these benefits are limited in scope and are not sufficient to cover the personal expense that most caregivers incur on behalf of their loved ones.

While the current laws and benefits available are inadequate, there have been some attempts to reduce the strain on caregivers. Governor Youngkin passed several bills effective July 1, 2024 with the goal of simplifying

⁶² WAGE & HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #28C: USING FMLA LEAVE TO CARE FOR SOMEONE WHO WAS IN THE ROLE OF A PARENT TO YOU WHEN YOU WERE A CHILD (2025).

⁶³ *Id.*

⁶⁴ The Family and Medical Leave Act, 29 C.F.R. § 825.102 (2025) (defining “Employer”).

⁶⁵ WAGE & HOUR DIV., *supra* note 62.

⁶⁶ *Id.*

⁶⁷ 29 C.F.R. § 825.207(a) (2025).

⁶⁸ *Id.* § 825.201(a).

⁶⁹ *Id.* § 825.102 (defining “Continuing treatment by a health care provider”).

⁷⁰ See WAGE & HOUR DIV., U.S. DEP’T OF LABOR, THE FMLA LEAVE PROCESS FLOWCHART (2025).

⁷¹ See *Standing Up and Stepping In: A Modern Look at Caregivers in the U.S.*, GUARDIAN (2023), <https://www.guardianlife.com/reports/caregiving-in-america>.

⁷² See, e.g., COMMONWEALTH COORDINATED CARE PLUS WAIVER MANUAL V, *supra* note 32.

the process of applying for public benefits and making it easier for unpaid caregivers to receive compensation.⁷³ Perhaps the most impactful of these new laws directs DMAS to seek federal authority to modify the program rules for home and community-based services waivers, eliminating the requirement that, for a caregiver to receive reimbursement for personal care services, no one else be available to provide services to the member. The federal government has introduced multiple proposed bills with the goal of simplifying and expanding the benefits available to caregivers, including the Alleviating Burdens to Caregivers Act and the Credit for Caring Act. Unfortunately, both pieces of legislation are currently stalled in Congress with no proposed timeline for passing these bills.

To encourage unpaid caregivers to continue the vital role they play in caring for their loved ones, the government at all levels must work to pass legislation that will simplify the process for applying for and obtaining benefits for both caregivers and disabled individuals. Benefits such as increased tax credits for caregivers, tax exemptions for funds received as a result of caring for family members, and eligibility for programs such as the CCC Plus Waiver should be expanded and simplified. The government and federal agencies should make an effort to advertise these new benefits once they are in place, along with other benefits that can help caregivers and their families such as the VA Aid and Attendance Pension and the caregiver child exception to Medicaid asset transfer rules.

Although expanding these benefits would result in higher expenses for the federal, state, and local governments that implement them, these changes would be self-sustaining in the long run. Allowing caregivers the resources and ability to stay at home with their loved ones will reduce, and in some cases completely eliminate, the need for older individuals to go to a nursing home, thus reducing the amount that is spent on Medicaid long-term care supports and services. Increasing these benefits will allow caregivers to be happier and more productive, decreasing the stress and negative consequences most caregivers face. As Americans continue to age, the government must make a sincere, urgent effort to do everything it can to alleviate the caregiver burden and ensure that family members are incentivized and empowered to provide for their loved ones in the home.

⁷³ Khalil, *supra* note 1.

HOME IS WHERE THE HEART IS: PROTECTING OLDER ADULTS FROM FINANCIAL ABUSE IN THE PLACE THEY LOVE

Lacey N. Mickleburgh*

Abstract

The United States is getting older. As the ageing population grows, so does the prevalence of elder financial abuse. One of the most devastating forms of financial abuse occurs when an older adult unknowingly signs over a deed to their home, a cornerstone of their financial stability and key asset necessary for aging in place. While legal remedies exist in both civil and criminal courts, these protections are largely inaccessible to a self-litigant for a variety of reasons. Under California law, elder abuse restraining orders (“EAROs”) offer some protections, but recent case law in *Newman v. Casey* prevents the return of real property, even if that property has been procured through fraud or undue influence. This Article advocates for reform, including expansion of the current EARO statute to include the return of real property. There should be trials or “prove-up” hearings and a court investigator process, like those used in many probate proceedings. This Article also suggests several other potential reforms, such as strengthening the regulation of notaries and implementing short-term deed rescission rights for adults over 65. These measures could help fill critical gaps in protection and ensure older adults can prevent the loss of home ownership due to financial abuse.

I. Introduction

In the United States, the ageing population is growing at an unprecedented rate. Experts estimate that the number of individuals over 65 will increase dramatically in the next 40 years,¹ causing a significant shift in our age demographics and amplifying the need to safeguard the financial security and well-being of older adults. One of the most pernicious threats facing older adults is the likelihood of elder financial abuse. Broadly, elder financial abuse occurs when someone illegally or improperly takes the money or property of an older adult for their own personal use.² While elder financial abuse can take many forms, the loss of home ownership can have particularly devastating effects. As older adults desire to age safely in place in their homes,³ protecting this asset from financial abuse is critical to ensure their ongoing economic security, their safety, and their autonomy.

Elder financial abuse is a phenomenon that affects millions of older adults every year, causing billions in lost income, property, and assets.⁴ The majority of abuse is at the hands of family members.⁵ While the financial

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¹ JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, DEMOGRAPHIC TURNING POINTS FOR THE UNITED STATES: POPULATION PROJECTIONS FOR 2020 TO 2060, at 2 (2020); *The U.S. Population is Aging*, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/program-retirement-policy/projects/data-warehouse/what-future-holds/us-population-aging> (last visited Apr. 18, 2026).

² 42 U.S.C. § 1397(j)(8); see also Andrew Jay McClurg, *Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation*, 65 HASTINGS L.J. 1099, 1106 (2014) (citing NAT'L CTR. ON ELDER ABUSE, AM. PUB. HUM. SERVS. ASS'N, THE NATIONAL ELDER ABUSE INCIDENCE STUDY 3-3 (1998)).

³ Michelle R. Davis, *Despite Pandemic, Percentage of Older Adults Who Want to Age in Place Stays Steady*, AARP, <https://www.aarp.org/home-living/home-and-community-preferences-survey-2021> (last updated Nov. 22, 2022).

⁴ Steven Bradley, *Behind the Screen: Elder Financial and Technology Abuse in the Age of AI*, 46 BIFOCAL 76, 76 (2025) (citing FED. BUREAU INVEST., 2023 ELDER FRAUD REPORT 6 (2024)).

⁵ Emily J. Miller, *The Power of Personal Protection Orders for Older and Vulnerable Adults*, 46 BIFOCAL 82, 82 (2025) (citing Gali H. Weissberger et al., *Elder Abuse Characteristics Based on Calls to the National Center on Elder Abuse Resource Line*, 39 J. APPLIED GERONTOL. 1078, 1085 (2020)).

toll of these losses is staggering, the emotional shame and embarrassment of being victimized by someone you love and trust can never be fully remedied.⁶ For many Americans, their dream of home ownership has provided a deep sense of security, economic stability, and upward mobility. The family home is often the only asset that can be passed on to build generational wealth. As adults continue to live longer than ever before, the home is also one of the most important assets to assist them in their aging goals. The home is not just a place of comfort and familiarity. It is a nest egg that can provide options for financing to pay for in-home care,⁷ may be large enough to accommodate a caregiver or family member moving in, or may be used to rent out or sell to help pay for residential living if the need arises. However, this also means that the home itself is a valuable asset, ripe for the taking.

Every state provides older adults with at least some criminal or civil legal remedies to pursue when financial losses occur. Although these laws exist, practically speaking, our legal system continues to lag in its ability to resolve this type of dispute in an expeditious and financially realistic manner. Engaging in protracted litigation takes significant time, skill, and financial resources, when time and money are not often on the older adult's side. A home that an older adult has lived in their entire life, and the jewel of their many years of hard work, could be gone in the time it takes to complete a signature.

California is one state that has implemented several laws designed to protect older adults from abuse. Along with criminal statutes and civil remedies, older Californians under Section 15657.03 of the Welfare and Institutions Code can file for elder abuse restraining orders ("EAROs").⁸ While these petitions address emotional, verbal, physical, and financial harms,⁹ the recent decision in *Newman v. Casey*¹⁰ raises concerns that the remedies stop short of returning real property that was procured through fraud or undue influence. Before *Newman*, there was no definitive precedent that prevented the return of real property in an EARO matter. The *Newman* case highlighted that, for Californians who are victims of elder financial abuse, some of the most appropriate remedies can only be achieved by filing a civil lawsuit.¹¹

What is most troubling about the *Newman* ruling is that the processes and procedures for signing over a deed are relatively simple: draft the deed, sign the deed in front of a notary, and record the deed. A defendant can obtain ownership relatively quickly and inexpensively, but to undo the abusive and fraudulent transaction the older adult faces an expensive and lengthy process. Why should it be so much harder for victims to right the wrongs committed against them?

As this Article will discuss, the barriers older adults face in seeking private counsel to assist in the return of real property are significant. For many, the civil litigation process is simply not an option. On the other hand, many individuals represent themselves in EARO matters. This Article contends that the EARO process should be expanded to provide for the return of real property. Moreover, outside of the EARO process, we need to explore other ways the law can quickly support a return of real property and protect the precious jewel of home ownership.

This Article will also explore other potential avenues for reform, including an overhaul of California's notary laws, which currently do not require a notary to check for the signer's capacity or willingness to effectuate documents, or require a notary to confirm that the signer understands the documents being signed. As will be discussed, these and other potential safeguards could be implemented to require people over 65 confirm they understand they are signing a deed that transfers their ownership to someone else.

Aside from changes to notary laws, other laws could be strengthened to protect an older adult from unwittingly signing over their property. Laws regarding rescission of deeds could be implemented to allow a short time for older adults to rescind a deed. These laws would mirror those in effect for home solicitation contracts where older adults have additional time to cancel certain contracts.

⁶ *Id.*

⁷ Kathie Brown Roberts & Bailey Liipfert, *Housing Options for Seniors: Legal and Financial Considerations*, 46 BIFOCAL 61, 63 (2025); see also *Reverse Mortgage Suitability: Points to Consider*, CANHR, <https://canhr.org/reverse-mortgage-suitability-points-to-consider/> (last updated Sept. 4, 2024) (explaining one method for turning home equity into care funding).

⁸ CAL. WELF. & INST. CODE § 15657.03(a)(1) (West 2026).

⁹ *Id.* § 15657.03(b)(5)(A).

¹⁰ *Newman v. Casey*, 99 Cal. Rptr. 3d 706 (Cal. 1st Ct. App. 2024).

¹¹ *Id.* at 389–90.

This Article has seven Parts. Part II will discuss a case example from the Elder and Health Law Clinic at the University of the Pacific, McGeorge School of Law in Sacramento, California, where the return of real property was granted in an EARO filing in 2020. This client story narrates a common theme of cases litigated in the Clinic, where an older adult has unknowingly signed over real property to a family member. Part II will further discuss the scale of elder financial abuse. Part III will address the available remedies in California civil and criminal law and will review the *Newman* decision. Part IV will address why the EARO process, in California and beyond, should be expanded to permit the return of real property belonging to an older adult. Part V will argue that EARO laws should be expanded to provide more complete relief. Lastly, Part VI will examine other proactive alternatives to help prevent elder financial abuse, including reform to notary laws and rescission time periods for deeds signed by individuals over 65.

II. Return of Real Property—An EARO Example

Part II covers the return of real property, beginning with real experience approaching the process discussed in Section A.

A. Case Example

The Elder and Health Law (“EHL”) Clinic at the University of Pacific’s McGeorge School of Law has been in existence since 2010.¹² The EHL Clinic provides legal services to residents of Sacramento County age 60 and older who demonstrate the highest need and vulnerabilities. To meet emerging demands in the Sacramento community, the Clinic has developed expertise in elder financial abuse. It regularly represents clients in elder abuse restraining orders, civil litigation matters, and probate litigation matters. It is the only legal service provider in Sacramento County that provides this legal type of representation, making its varied subject matters a rich, fulfilling experience for its students. In addition to elder abuse, the Clinic handles consumer issues, access to and maintaining eligibility for public benefits (Social Security, Medicare, Supplemental Security Income, MediCal, and In-Home Supportive Services), powers of attorney, advance health care directives, estate planning, and probate litigation. The Clinic receives referrals from many community partners and works frequently with Adult Protective Services.

As a staff attorney in the Clinic since 2018, this Author has seen many cases with a standard fact pattern: an older adult loses title to their home at the hands of a family member. One case highlighted the need for a quick return of real property to the client so that she could avoid homelessness and maintain her only source of income.

In early 2020, the EHL Clinic, on behalf of Isabelle Orona,¹³ aged 73, filed an EARO matter against her daughter, Claudia, alleging financial abuse, elder abuse, and neglect. Mrs. Orona alleged that her daughter had secretly acquired title to her two residential properties. Mrs. Orona resided in one property with her husband, Armando, aged 84, and Claudia, her adult daughter, aged 41. The other property was used as a rental and the couple relied on the rental income to support themselves.

Claudia was a caregiver for her parents. She drove them to appointments, went to the grocery store, cooked meals, and provided them with their medications, among other tasks. In 2018, Mrs. Orona alleged that her husband’s health began declining rapidly. The couple, fearing that he did not have long to live, became concerned about passing their properties to Claudia when they died. Claudia suggested they transfer the properties to her immediately, offering that she would continue to provide care to them in their home and ensure the rental was well looked after. The couple trusted their daughter and, relying on her promises to care for them, agreed to sign

¹² *Elder & Health Law Clinic*, UNIV. OF THE PACIFIC, <https://www.pacific.edu/law/legal-clinics/elder-and-health-law-clinic> (last visited Apr. 18, 2026).

¹³ The identity of the individuals in the case summarized in this Article have been changed to protect their privacy and the confidentiality of the attorney-client relationship.

the homes over to her. Claudia promised that if they needed the homes back in their names for any reason, she would execute a transfer back whenever they asked.

In March 2020, only a few days into a statewide shutdown due to the Covid-19 pandemic, Claudia abruptly abandoned her parents in their home, alerting them that they were on their own. Without Claudia to care for them, the couple had no ability to leave the home for food. They subsisted on random pantry food for several weeks. Unbeknownst to her parents, Claudia was trying to quickly sell her parents' homes. She had arranged for cash buyers for both properties, but a report to Adult Protective Services was made anonymously. Once Mrs. Orona was referred to the Clinic, a request for an EARO was filed against Claudia. Mrs. Orona sought a restraining order against her daughter seeking protection from further abuse and the return of her properties. Unable to file a contemporaneous civil action due to covid court closures, Mrs. Orona argued that the taking of her homes constituted ongoing financial abuse. Without the return of the properties, Mr. and Mrs. Orona faced homelessness and a lack of income.

At the time, there were no other cases that addressed whether the return of real property was permitted in an EARO matter. The EHL Clinic argued that the superior court had wide latitude in granting equitable relief.¹⁴ The EARO judge agreed that the taking of the properties constituted ongoing elder abuse and, to prevent future harm, ordered the return of the properties to Mr. and Mrs. Orona. Mrs. Orona was able to prevent the sale of her properties and obtain the return of the titles to her name. She was then able to engage in proper estate planning to pass her properties to her designated beneficiaries. Had the abuse occurred today, however, the only remedy for Mr. and Mrs. Orona would be to file a civil lawsuit.

Through the EARO process, Mr. and Mrs. Orona were able to avoid lengthy and costly litigation. They were able to quickly have their properties returned to them, ensuring they had a monthly income to live off, and a home in which to continue to age in place. If not for the EARO process, Mr. and Mrs. Orona would have been forced into a lengthy and costly civil litigation matter to have their properties returned to their names. With no savings and no access to take out money from their homes, the couple would not have been able to afford a private attorney to file a civil lawsuit against Claudia.

This case highlights the problem with *Newman*, and many of the current laws discussed below, which all embody a flawed assumption: older adults will have the means to hire attorneys to assist them in navigating these complex matters.

B. The Demonstrated Need

What happened to Mr. and Mrs. Orona is not unusual. Over the years there have been many cases regarding elder financial abuse in the headlines.¹⁵ But elder financial abuse does not just occur to the rich and famous who have millions of dollars to lose. In the United States it is estimated that over 10% of people over 65 and older experience some form of elder abuse.¹⁶ During the Covid-19 pandemic, those numbers rose drastically and it is estimated that one in five older adults experienced some form of abuse.¹⁷ Other studies worldwide indicate that 6.8% of the population of older adults has experienced financial abuse.¹⁸ Even more staggering is the fact that

¹⁴ Supporting this argument is the discussion in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, where the Supreme Court stated that “[o]nce a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.” 402 U.S. 1, 15 (1971).

¹⁵ E.g., Deborah Roberts & Joan Martelli, *Brooke Astor Trial Verdict Latest in Long Family Drama*, ABC NEWS (Oct. 9, 2009, 10:48 AM), <https://abcnews.go.com/2020/Astor/brooke-astor-son-anthony-marshall-guilty-fraud-larceny/story?id=8629431>; David Hochman, *The Last Days of Stan Lee*, AARP, <https://www.aarp.org/entertainment/celebrities/stan-lee-elder-abuse/> (last visited Apr. 18, 2026); Nancy Dillon, *Priscilla Presley Sues for ‘Abhorrent’ Financial Elder Abuse, Claims Losses Over \$1 Million*, ROLLINGSTONE (July 18, 2024), <https://www.rollingstone.com/music/music-news/priscilla-presley-lawsuit-financial-elder-abuse-1235063496/>.

¹⁶ Elder Just. Initiative, *About Elder Abuse*, U.S. DEP’T JUST., <https://www.justice.gov/elderjustice/about-elder-abuse> (last visited Apr. 18, 2026).

¹⁷ E-Shein Chang & Becca R. Levy, *High Prevalence of Elder Abuse During the COVID-19 Pandemic: Risk and Resilience Factors*, 29 AM. J. GERIATR. PSYCH., no. 11, Nov. 2021, at 1152, 1153; *Get the Facts on Elder Abuse*, NAT’L COUNCIL ON AGING (July 8, 2024), <https://www.ncoa.org/article/get-the-facts-on-elder-abuse/>.

¹⁸ ABA Comm’n L. & Aging, *What Percent of Elders Are Abused?*, 46 BIFOCAL 81, 81 (2025).

financial exploitation of individuals over 60 years of age causes over \$28 billion in loss annually.¹⁹ While many assume that scammers, unknown individuals, or unrelated caregivers perpetrate elder abuse, the ugly truth is that most abuse occurs at the hands of someone the older adult knows.²⁰ Available data suggests that almost 50% of perpetrators of abuse are family members.²¹ In examining the toll of this familial financial abuse, it is estimated that \$20 billion of the annual loss reported above is attributed to people the older adult knows.²²

Elder abuse is also more than just the loss of billions of dollars. Older adults have higher rates of depression, shame, hospitalizations, and institutionalization due to abuse.²³ The financial strain is also not just the older adults' problem to bear—abuse has caused severe financial strain on our healthcare system in the amount of \$5.3 billion.²⁴ Even one event of elder financial abuse can trigger an upheaval in the older adult's life, causing “loss of independence, serious complicating illness, and even death.”²⁵ These health outcomes will worsen as more people than ever are getting older.

In California, the fastest growing population category is 80 and older.²⁶ The population of the 60-plus age group will continue their 142% increase over the next 15 years.²⁷ Additionally, the next 15 years will also see the remainder of the 238% increase in people age 80-plus.²⁸ Even before this shift in the aging population, elder financial abuse was the number one crime against older adults.²⁹

Although the numbers support that abuse occurs regularly, we also know that financial crimes against older adults often go unreported.³⁰ Victims of elder financial abuse may not want to report abuse for fear of what may happen to that family member or their relationship with that family member.³¹ Crimes against elders in a family setting are often ignored by law enforcement, who may classify the issue as a family dispute rather than the crime it is.³² This also means that there is a lack of data on the nature and scope of elder financial abuse.³³

C. The Intersection of Housing and Financial Abuse

Financial abuse can also lead to economic instability and homelessness. Homelessness has significant effects on health outcomes for people in any age category, but especially for older adults.³⁴ With limited resources for affordable senior housing,³⁵ losing any housing could have damaging effects for people in these age categories who are already on fixed incomes. In California especially, where housing costs are exceptionally high, older

¹⁹ JILENNE GUNTHER, AARP PUB. POL'Y INST., *THE SCOPE OF ELDER FINANCIAL EXPLOITATION: WHAT IT COSTS VICTIMS* 1 (2023).

²⁰ Charles P. Golbert, *Combating Financial Elder Abuse*, 40 BIFOCAL 59, 61 (2019); *Get the Facts on Elder Abuse*, *supra* note 17.

²¹ Weissberger et al., *supra* note 5, at 1078.

²² GUNTHER, *supra* note 19, at 5.

²³ Miller, *supra* note 5.

²⁴ Jerome M. Adams & Lance Robertson, *Elder Abuse: A Public Health Issue That Affects All of Us*, ADMIN. CMTY. LIVING, acl.gov/news-and-events/acl-blog/elder-abuse-public-health-issue-affects-all-us-0# (last modified May 7, 2020).

²⁵ SANDRA D. GLAZIER ET AL., *UNDUE INFLUENCE AND VULNERABLE ADULTS* 3 (ABA 2020).

²⁶ HANS JOHNSON ET AL., PUB. POL'Y INST. CAL., *CALIFORNIA'S AGING POPULATION* 6 (2025).

²⁷ *Fact Sheet: Older Adult Demographics*, CAL. DEP'T AGING, <https://www.aging.ca.gov/download.ashx?IE0rcNUV0zb4L9ijwWImXw%3d%3d> (last updated Sept. 26, 2024).

²⁸ *Id.*

²⁹ See BUREAU JUST. STATS., *CRIMES AGAINST PERSONS AGE 65 OR OLDER, 1992–97*, at 5 (2000).

³⁰ GUNTHER, *supra* note 19 (citation omitted).

³¹ CONSUMER FIN. PROT. BUREAU, *RECOVERING FROM ELDER FINANCIAL EXPLOITATION* 22–24 (2022).

³² *Id.* at 33.

³³ LISA NERENBERG, CAL. ELDER JUST. COAL., *REINFORCING CALIFORNIA'S ELDER JUSTICE INFRASTRUCTURE: COMMITTING TO EQUITY AND INCLUSION* 78, 89 (2023).

³⁴ MARGOT KUSHEL ET AL., UCSF BENIOFF HOMELESSNESS & HOUS. INITIATIVE, *TOWARD A NEW UNDERSTANDING: THE CALIFORNIA STATEWIDE STUDY OF PEOPLE EXPERIENCING HOMELESSNESS* 54 (2023).

³⁵ See *id.* ch. 2.

adults have maintained ownership of real property because most have owned their homes for decades.³⁶ Losing their home would make it exceptionally difficult to ever own another home again on their fixed incomes.³⁷

While older adults tend to own their homes more so than other age populations, the fastest growing population of people experiencing homelessness in the United States are individuals over 55.³⁸ In 2021, it was reported that almost two-thirds of people over 65 who were entering homeless shelters were doing so for the first time.³⁹ Additional data in 2024 suggested that the trend in older adults experiencing homelessness was occurring in part due to the problems related to affordability, accessibility, and availability of appropriate housing for older adults.⁴⁰ Further, lack of infrastructure is preventing older adults from aging in place. This infrastructure includes economic stability, neighborhood environments, and reduced isolation.⁴¹ Lastly, the challenges older adults face on a fixed income means that older adults must make difficult decisions about how and where they spend their money on even basic necessities.⁴² With homelessness on the rise, the need to protect housing at any cost is significant, as those who have worked hard to purchase their homes want to stay there. Eighty-eight percent of older adults have reported that it was important to them to continue living safely in their homes for as long as possible.⁴³

The reasons for increased homelessness among older adults show a trend regarding the affordability of housing in California. Research indicates that public benefits do not provide enough money to support housing and that older adults are languishing for years on affordable housing lists.⁴⁴ Recent research also indicates that elder abuse may be a risk factor in driving increased homelessness in older adults.⁴⁵ Since there is already a shortage of affordable housing, older adults cannot afford to continue to lose housing options to financial exploitation.

Housing has long been considered a social determinant of health.⁴⁶ Moving forward, new policy changes considering the “One Big, Beautiful Bill”⁴⁷ are going to have significant effects on health and housing options for older adults. California is already dealing with significant funding deficits that will negatively affect older adults.⁴⁸ The federal budget cuts that are projected under the One Big, Beautiful Bill will have a devastating effect on long-term care planning for older adults.⁴⁹ Drastic funding cuts to Home and Community Based Services are expected, forcing more older adults into institutionalized settings as they will no longer have access to the support systems that would allow them to age in place.⁵⁰ The potential Medicaid cuts will also cause nursing homes to

³⁶ See Hans Johnson, *California’s High Housing Costs Have Created a Million “House Rich” Millionaires* (July 21, 2022), <https://www.ppic.org/blog/californias-high-housing-costs-have-created-a-million-house-rich-millionaires/>; see also ADMIN. CMTY. LIVING, 2023 PROFILE OF OLDER AMERICANS 14 (2024) (finding that in 2022, of the 14.8 million households in the United States headed by people seventy-five and older, seventy-eight percent owned their own homes).

³⁷ ADMIN. CMTY. LIVING, *supra* note 36.

³⁸ Erica Costello, *Fostering Stability in Aging: Assisting Older Adults At-Risk of Poverty and Homelessness*, 46 BIFOCAL 47, 47 (2025) (citation omitted); see Daniel Soucy et al., *State of Homelessness: 2025 Edition*, NAT’L ALL. END HOMELESSNESS (Sept. 4, 2025), <https://endhomelessness.org/state-of-homelessness/>.

³⁹ Malya Kurzweil Levin, *Housing Instability and Elder Mistreatment: How a Growing Movement Addresses Two Intersecting Issues*, 46 BIFOCAL 50, 50 (2025) (citing MEGAN HENRY ET AL., U.S. DEP’T HOUS. & URB. DEV., PT. 2: ESTIMATES OF HOMELESSNESS IN THE UNITED STATES, 2021 ANNUAL HOMELESSNESS REPORT (AHAR) TO CONGRESS 1–8 (2023)).

⁴⁰ Yolanda Stevens, *The Biggest Challenges Facing Older Americans: Insights from The Aging Advisory Group*, NAT’L ALL. END HOMELESSNESS (Feb. 24, 2025), <https://endhomelessness.org/blog/the-biggest-challenges-facing-older-americans-insights-from-the-aging-advisory-group/>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ ADMIN. CMTY. LIVING, *supra* note 36, at 20 (citing Inst. Healthcare Pol’y & Innovation, *National Poll on Healthy Aging: Older Adults Preparedness to Age in Place*, UNIV. MICH. (Apr. 2022), <https://ihpi.umich.edu/national-poll-healthy-aging/national-findings/older-adults-preparedness-age-place>).

⁴⁴ See Stevens, *supra* note 40.

⁴⁵ Levin, *supra* note 39 (citation omitted).

⁴⁶ *Social Determinants of Health*, CTR. DISEASE CONTROL (May 16, 2024), <https://www.cdc.gov/public-health-gateway/php/about/social-determinants-of-health.html>.

⁴⁷ One Big Beautiful Bill Act, Pub. L. No. 119–21, 139 Stat. 72 (2025).

⁴⁸ CANHR, *The Devastating Effects of the New Budget Bills on California’s Long Term Care System*, 37 THE CANHR ADVOC., no. 2, 2025, at 1, 1.

⁴⁹ *Id.* at 1.

⁵⁰ *Id.* at 4.

close in California.⁵¹ This means that although demand for nursing homes may increase, there will be fewer beds overall.⁵² Without community-based services to help people age in place, and without open nursing home beds to move to if they cannot, there will be nowhere else for older adults to go.

When looking at these numbers, it is crucial to see elder abuse as the public health crisis that it is.⁵³ In summary, when elder financial abuse is so prevalent, losses are in the billions, and housing is already in short supply, more must be done now to protect these resources.

III. Elder Financial Abuse – An Overview

Part III provides an overview of elder financial abuse and its significance when discussing an older adult's loss of real property.

A. Capacity

One of the perceived barriers to prosecuting or litigating elder financial abuse is that the client or victim may not be a reliable witness due to a lack of capacity to testify or recall the underlying events or facts. While these are valid concerns, there is an element of bias. The bias about capacity in older adults likely stems from a belief that all older adults have diminished capacity.⁵⁴ This bias may be rooted in the prevalence of Alzheimer's disease or other dementia-related illnesses that affect older adults. In the United States, about one in nine individuals age 65 and older has Alzheimer's dementia, and the percentage of people living with Alzheimer's dementia increases with age.⁵⁵ Older adults may have memory issues, cognitive decline, or experience other health issues that contribute to their capacity.⁵⁶ This should not, however, be viewed as a barrier to legal remedies.

i. Presumption of Capacity

Whether someone demonstrates capacity can be complex because capacity can be variable by task and context.⁵⁷ California law creates a rebuttable presumption that every person has the capacity to "make decisions and to be responsible for their acts or decisions."⁵⁸ This presumption can be rebutted with evidence of a deficit in alertness and attention, information processing, thought processes, and ability to modulate mood and affect,⁵⁹ but a diagnosis of a mental or physical disorder alone is not enough to prove incapacity.⁶⁰ The deficit must significantly impair the person's ability to understand and appreciate the consequences of the act or decision in question.⁶¹ When determining a party's capacity, the court will consider the frequency, severity, and duration of periods of impairment.⁶²

⁵¹ *Id.*

⁵² *Id.*

⁵³ Adams & Robertson, *supra* note 24.

⁵⁴ Arabelle Malinis, *Protecting an Older Adult's Estate Plan from Capacity Challenges*, 36 CANHR L. NETWORK NEWS, no. 2, 2025, at 1, 1.

⁵⁵ ALZHEIMER'S ASS'N, 2025 ALZHEIMER'S DISEASE FACTS AND FIGURES 29 (2025) (citations omitted) (stating 33.4% of individuals over eighty-five years old have Alzheimer's dementia).

⁵⁶ *See id.* at 5.

⁵⁷ Lori Mars et al., *Balancing Protection and Autonomy: A Person-Centered Approach to Older Adult Guardianship Adjudication*, 16 J. AGING L. & POL'Y 74, 76 (2025).

⁵⁸ CAL. PROB. CODE § 810(a) (West 2026).

⁵⁹ *Id.* § 811(b).

⁶⁰ *Id.* § 811(d); *see* AM. BAR ASS'N COMM'N L. & AGING ET AL., JUDICIAL DETERMINATION OF CAPACITY OF OLDER ADULTS IN GUARDIANSHIP PROCEEDINGS: A HANDBOOK FOR JUDGES 11–13 (2006).

⁶¹ CAL. PROB. CODE § 811(b) (West 2026).

⁶² *Id.* § 811(c).

ii. Representing Older Adults

The starting point in representing older adults is determining if a client has decisional capacity to work with an attorney to prosecute their claim. An attorney is not required to conduct standardized psychological and neurological testing to determine capacity.⁶³ When working with older adults, a determination should be made as to the best time of day to speak with them to ensure or enhance capacity. This assessment may depend on their medication, sleep schedule, or periods of alertness.

The American Bar Association has established that if an attorney is representing a client with diminished capacity, the attorney should make every effort to maintain a normal attorney-client relationship.⁶⁴ The Rules of Professional Conduct in California have not adopted the model rule.

iii. Capacity to Execute a Deed

Relevant to this Article is the capacity needed to effectuate a change in title to real property. In California, the capacity to execute a deed is similar to testamentary capacity.⁶⁵ Essentially, the grantor would need to demonstrate that they understood the nature of the act, be aware of their situation and property, and appreciate the relationships affected by the transaction.⁶⁶

There may be many instances where an older adult lacked capacity at the time of signing a significant document, like a deed. To unwind the transaction, the plaintiff would need to establish evidence of their incapacity at the time of signing.⁶⁷ But the reality is that the loss of significant money or real property does not happen merely to those older adults who present with diminished or no capacity. Many older adults come to rely on the statements and promises of those they trust in agreeing to sign over property. This theory of abuse is defined as undue influence, which will be discussed in more detail below.

B. Civil Statutes for Elder Abuse and Theories of Recovery

Section 15600 of the California Welfare & Institutions Code, or the Elder Abuse and Dependent Adult Civil Protection Act (“EADACPA”), was enacted in 1982.⁶⁸ The legislature’s intent in creating the statute was clear; it recognized the need for a new statutory cause of action for elder abuse.⁶⁹ In its creation, the California legislature recognized the needs of elder and dependent adults who are susceptible to abuse at the hands of caregivers and family members.⁷⁰ The EADACPA also recognized that few elder abuse cases were being adjudicated due to court delays, problems with proof, and little incentive to prosecute.⁷¹ As a result of this finding, the legislature created incentives for the private bar to litigate elder abuse cases by enacting an attorney fee statute and options for treble damages.⁷²

The EADACPA also established requirements and procedures for mandatory and nonmandatory reporting of elder abuse crimes.⁷³ While the EADACPA provides a remedial framework for physical and psychological abuse, neglect, and self-neglect, this Article focuses on the financial elder abuse definitions.

⁶³ GLAZIER ET AL., *supra* note 25, at 12.

⁶⁴ MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS’N 2002); *see* David R. Katner, “Normal,” 33 S. CAL. REV. L. & SOC. JUST. 427, 427–28 (2024).

⁶⁵ *Hughes v. Grandy*, 177 P.2d 939, 944 (Cal. 1st Ct. App. 1947); *Hemenway v. Abbott*, 97 P. 190, 195 (Cal. 3d Ct. App. 1908).

⁶⁶ CAL. PROB. CODE § 6100.5(a)(1) (West 2026); *see also Hughes*, 177 P.2d at 945.

⁶⁷ *Hughes*, 177 P.2d at 944.

⁶⁸ CAL. WELF. & INST. CODE §§ 15600–15675 (West 2026).

⁶⁹ *Id.* § 15600(g).

⁷⁰ *Id.* § 15600(d).

⁷¹ *Id.* § 15600(h).

⁷² *See id.* §§ 15600(j), 15657.

⁷³ *See id.* § 15630.

C. Financial Elder Abuse

Under EADACPA, financial abuse occurs when someone takes or misuses another person's money or property for the benefit of someone other than that person.⁷⁴ Neighbors, caregivers, professionals, and even family or friends may take money without permission, fail to repay money they owe, charge too much for services, or not do something they were paid to do.⁷⁵ Financial abuse is broadly defined and occurs when a person or an entity takes, secretes, appropriates, obtains, or retains real or personal property of an elder or a dependent adult, for a wrongful use, with intent to defraud, or both.⁷⁶ A taking occurs when an elder or dependent adult is deprived of a property right, even if the property is held by the elder or dependent adult's representative.⁷⁷

Older adults are more susceptible to financial abuse for a variety of reasons. Many older adults experience isolation and loneliness,⁷⁸ which causes them to be vulnerable to abuse. Other older adults have concerns about physical mobility and may rely on others to assist them, even if those relationships are potentially harmful. Deficits in cognitive ability and mental acuity may play a role in an older adult agreeing to something they may not truly understand.⁷⁹ Some older adults agree to things that might not be in their best interest because they are worried about paying bills, and the fear of becoming a financial burden to their family members leads them to make financial decisions they otherwise might not make.⁸⁰

Elder financial abuse can take many forms. There might be inappropriate bank activity where an abuser uses the client's funds to pay for their own groceries or restaurant dinners.⁸¹ Financial abuse can also take the form of a family member paying off their own debts using the client's money.⁸² Elder financial abuse also occurs where documents are signed without the requisite capacity, including wills, trusts, or powers of attorney.⁸³ Of importance to this Article is the elder financial abuse that occurs when an older adult is convinced to give away their interest in real property. For example, an older adult might take their name off property and give it to a family member without payment or other consideration.⁸⁴

In alleging elder financial abuse as a cause of action, complaints can be filed in civil or probate court depending on the facts of a case.⁸⁵ If it is proven by a preponderance of the evidence that a defendant is liable for financial elder abuse, the court is directed to award reasonable attorney's fees and costs, including the reasonable cost of a conservator.⁸⁶ Increased punitive damages are also available if it has been demonstrated by clear and convincing evidence that a defendant has committed elder abuse with recklessness, oppression, fraud, or malice in the commission of the abuse.⁸⁷ In the event of the elder's death, a claim can survive for the decedent's personal

⁷⁴ *Id.* § 15610.30(a).

⁷⁵ *See id.* § 15610.30(a)–(c).

⁷⁶ *Id.* § 15610.30(a)(1).

⁷⁷ *See id.* § 15610.30(c).

⁷⁸ *See* Golbert, *supra* note 20, at 59–60 (discussing exploiters' attempts to prey on the "most vulnerable and isolated").

⁷⁹ *See id.*

⁸⁰ *See, e.g.,* CONSUMER FIN. PROT. BUREAU, *supra* note 31, at 23.

⁸¹ The EHL Clinic litigated a case where the client's family member had used her card to support their own lifestyle, often covering shopping at expensive stores and dinners out using the client's card.

⁸² The EHL Clinic also litigated a case where the client's family member claimed that client gave them permission to pay over \$50,000 in personal credit card debt using client's funds. Client had no idea that the funds were being directed from their account to pay off debt.

⁸³ *See Elder Financial Abuse*, CANHR, <https://canhr.org/elder-financial-abuse/> (last updated Dec. 18, 2024); *see also supra* Part III(A) (discussing capacity).

⁸⁴ *Elder Financial Abuse*, *supra* note 83. Additionally, several other EHL Clinic clients in recent years also experienced loss of housing due to their trust of a family member's promises. One client signed over their one-third interest in the property to the other property holders when convinced their name had to be removed to qualify for a refinance; another client believed the family home was being rented out, only to realize it was sold and the proceeds were directed to the purchase of a family member's home. Another client was convinced by a family member that if she did not sign over the residence, it would be lost to medical bill collectors.

⁸⁵ CAL. WELF. & INST. CODE § 15610.30 (West 2026); CAL. PROB. CODE § 859 (West 2026).

⁸⁶ CAL. WELF. & INST. CODE § 15657.5(a) (West 2026).

⁸⁷ *Id.* § 15657.5(b).

representative or successor in interest, who may recover exemplary damages the decedent would have been entitled to recover had he or she lived.⁸⁸

D. Other Related Causes of Action

Financial elder abuse is one cause of action that can be brought in a civil complaint, but several other causes of action may also be pled depending on the facts. Since elder financial abuse can touch many different areas of law, breach of contract, tort, or other property claims may also be applicable.

The Article focuses on the other property-related claims that would likely need to be addressed in a complaint alleging elder financial abuse where the older adult has lost their home. Fraud and misrepresentation are often present in these financial abuse claims as well.⁸⁹ Fraud in the execution or material alteration of a deed, such as misrepresenting the terms or purpose of the deed, can give rise to a cause of action.⁹⁰

i. Rescission of a Deed

Deed rescission restores the parties to a deed as if the deed had never been signed and recorded. In order to rescind a deed, a party must provide: 1) notice to the opposing party of the intent to rescind, and 2) restoration of anything value received.⁹¹ If the other party fails to accept the rescission, then a complaint must be filed, and the court will determine if the rescission is justified.⁹² A party may seek to rescind a deed executed under fraudulent circumstances or because of undue influence.⁹³ Rescission of a deed is retroactive and acts as if the event did not occur. Cancellation of a deed, however, cancels future performance.

ii. Cancellation of Deed

Actions to cancel a deed may arise out of fraud, undue influence, or lack of capacity.⁹⁴ A deed procured through undue influence or fraud may be voided so that it never existed, effectively undoing the transfer.⁹⁵ Plaintiffs often argue that a deed procured through fraud or undue influence should be voided and ask the court to order its cancellation. A California court with personal jurisdiction over the defendant has jurisdiction to find a deed to real property “void ab initio,” or void at the beginning, and order the defendant to execute a re-conveyance.⁹⁶ If a party fails to execute a re-conveyance, the court has jurisdiction to order the court clerk to execute it.⁹⁷ This is a significant help to older adults who were unduly influenced into signing over a deed, but it is a remedy that must be sought through the civil process.

⁸⁸ *Id.* §§ 15657(b), 15657.3(c)–(d) (cause of action passes to the personal representative or successor in interest); CAL. CIV. PRO. CODE § 377.34(a) (West 2026); *County of Los Angeles v. Superior Court*, 981 P.2d 68, 75–76 (Cal. 1999).

⁸⁹ See David Burnes et al., *Prevalence of Financial Fraud and Scams Among Older Adults in the United States: A Systematic Review and Meta-Analysis*, 107 AM. J. PUB. HEALTH e13, e19–e21 (2017) (“[B]etween 5.4% (complete overlap of [elder fraud] and financial abuse victims) and 9.9% (no overlap of [elder fraud] and financial abuse victims) of community-dwelling, cognitively intact older adults experience some form of financial exploitation each year.”).

⁹⁰ CAL. BUS. & PROF. CODE § 7161(c) (West 2026).

⁹¹ CAL. CIV. CODE § 1691 (West 2026).

⁹² *Wong v. Stoler*, 188 Cal. Rptr. 3d 674, 681 (Cal. 1st Ct. App. 2015).

⁹³ See *More v. More*, 65 P. 1044, 1046 (Cal. 1901); *Walsh v. Majors*, 49 P.2d 598, 604–05 (Cal. 1935).

⁹⁴ CAL. CIV. CODE § 3412 (West 2026).

⁹⁵ *Erickson v. Bohne*, 279 P.2d 619, 620–21 (Cal. 3d Ct. App. 1955); *Webb v. Saunders*, 191 P.2d 43, 46–47 (Cal. 4th Ct. App. 1947).

⁹⁶ See *Chamberlain v. Wakefield*, 213 P.2d 62, 69 (Cal. 2d Ct. App. 1949).

⁹⁷ *Id.*

iii. Constructive Trust

Under California law, a constructive trust is an equitable remedy to prevent unjust enrichment and to compel the transfer of property from a person who is wrongfully holding it back to the rightful owner.⁹⁸ To be successful in a request for a constructive trust, the plaintiff must show that: 1) there was a valid property or property interest, 2) the plaintiff has a right to that interests, and 3) the defendant wrongfully acquired the property interest.⁹⁹

iv. Quiet Title Actions

A party may bring a quiet title action to resolve disputes over ownership or title to real property. This can include claims to cancel a deed based on fraud, undue influence, or lack of consideration.¹⁰⁰ Quiet title actions in California allow a property owner to bring a claim to determine any adverse claim to ownership.¹⁰¹ In these actions, the court is required to have evidence of the plaintiff's claim to title before default judgment can be entered.¹⁰²

E. Undue Influence

Undue influence is a common form of elder financial abuse.¹⁰³ Undue influence is insidious in nature as it often occurs behind closed doors.¹⁰⁴ It was not until 2014 the definition of undue influence was adopted in probate matters and California's elder abuse statutes.¹⁰⁵ As a cause of action, undue influence is complex and challenging to prove because it often involves the piecing together of suspicious actions, requiring an in-depth knowledge of the law and facts in order to be successful.¹⁰⁶

Undue influence, as defined in the EADACPA, means "excessive persuasion that causes [an elder] to act or refrain from acting by overcoming that person's free will and results in inequity."¹⁰⁷ In elder financial abuse cases that involve undue influence, courts will look to the factors enumerated in the statute: (1) the vulnerability of the victim; (2) the influencer's apparent authority; (3) the actions or tactics used by the influencer; and (4) the equity of the result.¹⁰⁸ The fact that an older adult may be influenced by a loved one is not enough to indicate *undue* influence. Instead, as the California Supreme Court has stated, "[u]ndue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will, amounting in effect to coercion destroying the testator's free agency."¹⁰⁹

⁹⁸ Taylor v. Fields, 224 Cal. Rptr. 186, 195 (Cal. 2d Ct. App. 1986); PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP, 58 Cal. Rptr. 3d 516, 527 (Cal. 2d Ct. App. 2007); Am. Master Lease LLC v. Idanta Partners, Ltd., 171 Cal. Rptr. 3d 548, 574–75 (Cal. 2d Ct. App. 2014).

⁹⁹ Taylor v. Polackwich, 194 Cal. Rptr. 8, 13 (Cal. 2d Ct. App. 1983); Communist Party of the U.S. v. 522 Valencia, Inc., 41 Cal. Rptr. 2d 618, 623–24 (Cal. 1st Ct. App. 1995); Kraus v. Willow Park Pub. Golf Course, 144 Cal. Rptr. 744, 756 (Cal. 1st Ct. App. 1977).

¹⁰⁰ Hunter v. Hunter, 130 P.2d 704, 704 (Cal. 1942); Lewis v. Marshall, 265 P. 862, 862 (Cal. 1st Ct. App. 1928); see Samuels v. Superior Ct. of L.A. Cnty., 81 Cal. Rptr. 216, 218 (Cal. 2d Ct. App. 1969).

¹⁰¹ CAL. CIV. PROC. CODE §§ 760.010–764.080 (West 2026).

¹⁰² *Id.* § 764.010.

¹⁰³ Mars et al., *supra* note 57; see also David Horton & Reid Kress Weisboard, *The New Undue Influence*, 2024 UTAH L. REV. 231, 234.

¹⁰⁴ Mary Joy Quinn, *Defining Undue Influence: A Look at the Issue and at California's Approach*, 35 BIFOCAL 72, 72 (2014).

¹⁰⁵ *Id.* at 73–74; see CAL. PROB. CODE § 86 (West 2026) (giving undue influence the "same meaning" found in CAL. WELF. & INST. CODE § 15610.70 (West 2026)).

¹⁰⁶ GLAZIER ET AL., *supra* note 25, at 121.

¹⁰⁷ CAL. WELF. & INST. CODE § 15610.70(a) (West 2026).

¹⁰⁸ *Id.*

¹⁰⁹ Rice v. Clark, 47 P.3d 300, 304 (Cal. 2002). Although *Rice* references undue influence in the creation of a will, its ruling still affects any document obtained through undue influence.

Evidence of vulnerability may include incapacity, illness, status as a fiduciary, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency and whether the influencer knew or should have known of the alleged victim's vulnerability.¹¹⁰ For older adults, mere age may not indicate vulnerability. All factors regarding vulnerability may be explored under the statute, so the inclusion of "education" as a factor could lead exploration into the older adult's literacy skills, language abilities, or communication style.¹¹¹ Since the risk factors are not exhaustive, further examination could be made into a victim's health, what diagnoses they may have, how medication may affect them, and when their medication may cause side effects that limit their ability to make decisions.¹¹²

In determining factor number two, the influencer's apparent authority may include status as a fiduciary, family member, care provider, or other listed qualifications.¹¹³ Simply being a family member of an older adult involved in a financial transaction alone does not mean that undue influence occurs; rather it is the dynamic between the victim and the perpetrator that may determine if the victim could have acted under their own free will.¹¹⁴ In interviewing clients with regard to undue influence, the EHL Clinic examines the relationship between the parties, whether the alleged perpetrator was a caregiver, and inquiries about the level of trust and confidence shared between the parties.

In examining the actions of the influencer in prong three, the EHL Clinic looks for certain actions or tactics including control over the victim's necessities of life, medication, interactions with others, access to information, or amount of sleep.¹¹⁵ They also examine the use of affection, intimidation, or coercion. In this element, the EHL Clinic continues to dig deep in exploring the dynamic between the perpetrator and the victim. It is important to also scrutinize who initiated changes in personal or property rights, secrecy or expediency in effectuating those changes, and if these changes occurred at inappropriate times or places.¹¹⁶ Often times in interviews, the EHL Clinic spends a lot of time establishing the facts that led to a property transfer, and every detail matters. They routinely inquire as to: Whose idea was it to make the transfer? Who drafted the deed? Who else was present? Who selected and paid for the notary? Did the older adult read the document? Were they asked to sign as opposed to "told to sign"? What specifically was said during the signing? Did they get a copy after? What did they say would happen next? Every aspect of the transaction may be critical in helping to prove undue influence.

Lastly, as to prong number four, the EHL Clinic looks to the equity of the result. This may include the economic consequences to the victim, any divergence from the victim's prior intent or conduct, and the relationship of the value conveyed to the value of any services or payments received.¹¹⁷ Undue influence is a potential avenue to prove that elder financial abuse has occurred.¹¹⁸ It can be used to bolster the financial elder abuse claim, or it can be a cause of action on its own.

Under California Law, when a gift is procured through a testamentary document and certain elements are met, a presumption that the gift was procured by undue influence arises. A presumption of undue influence is triggered when three elements are met: (1) a confidential relationship exists where the person exerting influence had a special relationship of trust with the testator; (2) there was active participation in procurement where the alleged perpetrator was involved in preparing or executing a testamentary document, like a will or trust; and (3) the alleged perpetrator received a benefit under the instrument that appears to be excessive or unusual given the circumstances.¹¹⁹ When these three elements are met, there becomes a presumption of undue influence where the burden shifts to the person benefiting from the instrument to rebut the presumption that it was procured with

¹¹⁰ CAL. WELF. & INST. CODE § 15610.70 (West 2026) ("Evidence of an inequitable result, without more, is not sufficient to prove undue influence.").

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* § 15610.70(a).

¹¹⁴ JUDICIAL COUNCIL CAL., CIV. JURY INSTRS. no. 3117 (2026).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See* CAL. WELF. & INST. CODE § 15610.30 (West 2026); JUDICIAL COUNCIL CAL., CIV. JURY INSTRS. no. 3100 (2026).

¹¹⁹ *Rice v. Clark*, 47 P.3d 300, 304 (Cal. 2002).

undue influence.¹²⁰ While this burden shifting is typically seen more in litigation surrounding testamentary documents,¹²¹ case law supports that it can also be applied to inter-vivos gifts like deeds.¹²²

Once a civil litigation matter is filed, it can take years to resolve.¹²³ Although California law sets preferred timelines for the disposition of civil cases, these serve more as administrative goals.¹²⁴ While trial courts aim to have unlimited civil cases adjudicated within 24 months,¹²⁵ this timeline is often extended due to the complexity of cases and the potential for delays when those cases involve discovery.

F. Default Proceedings

If a defendant fails to respond to a complaint, the process of getting a judgment isn't necessarily easier to navigate. Collection on a default judgment can take significant time and resources. Pursuing judgment after default is also complicated if the underlying petition is requesting the return of real property.

California recognizes three different types of default proceedings.¹²⁶ In an elder abuse action, where the plaintiff is seeking the return of real property, the regular clerk-approved judgment would not be appropriate. Instead, the plaintiff would need to seek a court-approved default judgment, where the court would then need to hear evidence of the plaintiff's case to render judgment against a non-answering defendant.¹²⁷

If a defendant has failed to respond to an action and a plaintiff is pursuing the return of real property, then default must be entered against the defendant before the plaintiff can take further action. To have real property returned during the default judgment process, the plaintiff must schedule a "prove-up" hearing where the facts of their case are confirmed by a judge.¹²⁸ The plaintiff must be able to demonstrate that the deed was procured fraudulently and seek cancellation. If judgment is awarded, then the plaintiff must file the judgment with the county recorder's office to clear the title to the property.¹²⁹

This process becomes even more challenging if the defendant refuses to vacate the property. The plaintiff may then be required to file an eviction petition to regain possession.¹³⁰ Even with a default judgment, the time, energy, money, and expertise to file the correct documents for the return of real property are significant.

G. Elder Abuse Restraining Orders

Approximately 16 states have an elder abuse restraining order statutes, which are typically found in the laws governing Adult Protective Services.¹³¹ California's EARO statute was developed in 1982 as a component of the EADACPA.¹³²

The EADACPA provisions apply both to elders and dependent adults of any age. The EADACPA defines an "elder" as any person residing in California who is 65 years of age or older.¹³³ A "dependent adult" is a

¹²⁰ *Id.* at 305.

¹²¹ See CAL. PROB. CODE § 21380 (West 2026).

¹²² Sparks v. Mendoza, 189 P.2d 43, 45–46 (Cal. 2d Ct. App. 1948).

¹²³ Taylor Dalton, *The Trajectory of Civil Cases in Federal Court*, ABOVE THE LAW (May 28, 2021, 3:15 PM), <https://abovethelaw.com/2021/05/the-trajectory-of-civil-cases-in-federal-court/> (discussing federal case data indicating tort and property cases often take longer than 365 days).

¹²⁴ CAL. GOV'T. CODE § 68603 (West 2026).

¹²⁵ CAL. R. CT. 2.2(f)(1); see also JUDICIARY COUNCIL CAL., STATEWIDE CASELOAD TRENDS: 2015–16 THROUGH 2024–2025, at 83 (2026).

¹²⁶ CAL. CIV. PROC. CODE § 585(a)–(c) (West 2026).

¹²⁷ See CAL. CIV. PROC. CODE §§ 585, 764.010 (West 2026).

¹²⁸ CAL. R. CT. 3.1800(a).

¹²⁹ See CAL. CIV. PROC. CODE § 764.030 (West 2026).

¹³⁰ See generally *After the Eviction Trial Decision*, JUD. BRANCH CAL., <https://selfhelp.courts.ca.gov/eviction-landlord/after-trial> (last visited Apr. 29, 2026) (outlining the lengthy process necessary to evict someone despite a court's decision).

¹³¹ Elder Justice Initiative, *Implementing the APS-Initiated Elder Abuse Restraining Order (AIRO)*, U.S. DEP'T JUSTICE (Oct. 21, 2021), <https://www.justice.gov/elderjustice/video/implementing-aps-initiated-elder-abuse-restraining-order-airo>.

¹³² CAL. WELF. & INST. CODE § 15657.03 (West 2026).

¹³³ *Id.* § 15610.27.

California resident between the ages of 18 and 64 whose physical or mental limitations restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons with physical or developmental disabilities or whose physical or mental abilities have diminished because of age.¹³⁴ EAROs require proof by preponderance of the evidence of a past act or acts of elder abuse.¹³⁵

This type of restraining order recognizes that elder and dependent adults have a heightened vulnerability to abuse. In California, EAROs can be brought in cases where financial abuse is the only type of abuse present in the facts.¹³⁶ The hearings are held on an expedited basis and, upon the acceptance of a filing, must be heard within 21–25 days of the request.¹³⁷ Many of the individuals who seek protective orders are self-litigants.¹³⁸ The elder abuse restraining order matters may be heard in conjunction with another domestic violence or civil harassment protective order calendar, depending on the court.¹³⁹

H. Criminal Elder Abuse Statutes

There are several criminal statutes in California that address elder abuse. Elder financial abuse by a non-caretaker and caretaker are addressed in different prongs.¹⁴⁰ Violations of these code sections can be brought as misdemeanor or felony charges.¹⁴¹ A felony charge occurs where the defendant has taken more than \$100,000 from the victim.¹⁴²

If a defendant is found guilty and the victim has suffered economic loss, the court is required to order the defendant to pay restitution.¹⁴³ The amount of restitution ordered can be a full or partial repayment of the value of property that was taken, medical bills, mental health counseling bills, lost wages or profits, attorneys fees, interest, and more.¹⁴⁴ When a restitution order is granted, the defendant is required to file a disclosure form that provides information on their assets.¹⁴⁵ While some counties aid in collecting restitution, a victim may also pursue all civil remedies in enforcing the restitution on their own.¹⁴⁶ While restitution laws provide a framework for recovery, the law assumes there is actually money or assets to recover from the defendant. In many cases, by the time a restitution order is granted, the money is gone.

The EADACPA itself recognizes that criminal prosecution regarding elder abuse is rare.¹⁴⁷ Unfortunately, law enforcement does not have the ability to follow up on the reported financial abuse that occurs, meaning that

¹³⁴ *Id.* § 15610.23.

¹³⁵ *Bookout v. Nielsen*, 67 Cal. Rptr. 3d 2, 6 (Cal. 4th Ct. App. 2007). Note, CAL. WELF. & INST. CODE § 15657.03(c) (West 2026) does not specify an evidentiary standard, and preponderance is sufficient pursuant to Section 115 of the California Evidence Code. *Id.*

¹³⁶ JUDICIAL COUNCIL CAL., EA-100, REQUEST FOR ELDER OR DEPENDENT ADULT ABUSE RESTRAINING ORDERS 3 (2026); CAL. WELF. & INST. CODE § 15857.03 (West 2026).

¹³⁷ CAL. WELF. & INST. CODE § 15657.03(f) (West 2026) (good cause must exist for the hearing to be scheduled up to twenty-five days after filing).

¹³⁸ TASK FORCE ON SELF-REPRESENTED LITIGANTS, JUDICIAL COUNCIL CAL., STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 11 (2004) (“[In] family law, petitioners were pro per at the time of filing an average of 67 percent.”).

¹³⁹ *See, e.g., Civil Harassment Restraining Orders*, SAN DIEGO CNTY. SUPERIOR CT., <https://www.sdcourt.ca.gov/sdcourt/civil2/civilrestrainingorder> (last visited Apr. 18, 2026) (grouping EARO with civil harassment, gun violence, and workplace violence filings); *Elder Abuse/Dependent Adult Restraining Orders Forms*, SANTA CLARA CNTY. SUPERIOR CT., <https://santaclara.courts.ca.gov/self-help/complete-forms-home/self-help-forms-and-instructions/restraining-order-forms/elder-abusedependent-adult-restraining-order-forms> (last visited Apr. 18, 2026) (filed at the Civil Division Calendar Office); *Elder and Dependent Adult Abuse*, ORANGE CNTY. SUPERIOR CT., <https://www.occourts.org/divisions/probate/elder-and-dependent-adult-abuse> (last visited Apr. 18, 2026) (separate elder-abuse ex parte time on the same general protective-order framework). The unified calendaring practice reflects the shared procedural architecture across California law. *See* CAL. CIV. PROC. CODE § 527.6 (West 2026) (civil harassment); CAL. FAM. CODE § 6300 et seq. (West 2026) (domestic violence); CAL. WELF. & INST. CODE § 15657.03 (West 2026) (elder abuse); *see also* CAL. R. CT. 10.464.

¹⁴⁰ CAL. PENAL CODE § 368(d)(1)–(e)(1) (West 2026).

¹⁴¹ *See id.* §§ 368(c), 186.12(a)(1).

¹⁴² *Id.* § 186.12(a)(1).

¹⁴³ *Id.* § 1202.4(a)(2); *see also* CAL. CONST. art. I, § 28(b)(13).

¹⁴⁴ CAL. PENAL CODE § 1202.4(f)(3)(A)–(L) (West 2026).

¹⁴⁵ *Id.* § 1202.4(f)(5).

¹⁴⁶ *Id.* § 1214(b).

¹⁴⁷ CAL. WELF. & INST. CODE § 15600(h) (West 2026).

any criminal culpability for potential defendants is extremely behind where it should be.¹⁴⁸ Victims of financial elder abuse have a difficult time seeking any protections under the criminal justice system. In many instances, when an older adult seeks assistance from law enforcement, victims are told “it’s a civil matter.”¹⁴⁹

Data also suggests that prosecuting elder financial abuse cases can be arduous in a variety of ways.¹⁵⁰ Evidence and witness testimony may be challenging where a victim lacks capacity to testify.¹⁵¹ There may also be issues with time and resources, where forensic accountants or experts may be needed to demonstrate the complicated web of financial abuse.¹⁵² Lastly, the length of time and taxing nature of the court process may be too burdensome on the victim or others.¹⁵³ While there is evidence to suggest that prosecutions of elder financial abuses cases have increased in the last 20-plus years, the progress is “measured in inches, rather than yards.”¹⁵⁴

In reviewing data from Sacramento County alone, a 2024 Grand Jury report found that the county was lacking in any coordinated effort to address financial exploitation of older adults.¹⁵⁵ According to data collected by Adult Protective Services from 2019–2024, the agency investigated 11,391 cases of financial abuse.¹⁵⁶ This number represented 40% of their elder abuse investigations during this time.¹⁵⁷ Of the 11,391 cases that were investigated, 3,987 cases of elder financial abuse were confirmed.¹⁵⁸ From those cases, 1,678 were referred to law enforcement in Sacramento County.¹⁵⁹ Law enforcement only reported 123 cases to the district attorney’s office for potential prosecution, and 99 of those reported cases were prosecuted.¹⁶⁰ In the third largest county in California, only 3% of elder financial abuse cases were prosecuted.

Although the standards of proof are different for criminal versus civil matters, the fact remains that without the threat of criminal prosecution, elder financial abuse will continue to proliferate and cause significant issues for older Americans. If criminal prosecutions continue to lag, a larger burden of recovery is placed on self-litigants or those represented by civil attorneys to recover under civil complaints.

In *Newman v. Casey*, Gracia Bovis, aged 86 at the time, had signed over her home to her daughter, Marina Casey.¹⁶¹ In a February 2022 EARO request filed against her daughter, Ms. Bovis alleged that she was misled by her daughter and unknowingly signed her home over to her.¹⁶² Ms. Casey allegedly told her mother that if Ms. Bovis did not sign the home over to Ms. Casey, her property taxes would skyrocket due to Proposition 19.¹⁶³ Ms. Bovis was confused but relied on her daughter’s representations.¹⁶⁴

Ms. Casey brought her mother to an attorney’s office to sign the deed.¹⁶⁵ Ms. Bovis, testifying in court, shared that she continued to be confused by what was going on and did not realize the deed she signed was meant

¹⁴⁸ U.S. DEP’T JUST., *Elder Financial Exploitation and the Criminal Justice System* (March 5, 2024), <https://www.justice.gov/elderjustice/video/elder-financial-exploitation-and-criminal-justice-system>.

¹⁴⁹ Emily J. Miller, *The Power of Personal Protective Orders for Older and Vulnerable Adults*, 46 BIFOCAL 82, 84 (2025); BRENDA K. UEKERT ET AL., NAT’L CTR. STATE CTS., PROSECUTING ELDER ABUSE CASES: BASIC TOOLS & STRATEGIES 2 (2012); see also Andie MacNeil & David Burnes, *Bridging the Gap Between Homelessness in Older Adulthood and Elder Abuse: Considerations for an Age-Friendly Shelter System*, 34 J. AGING & SOC. POL’Y 391, 391–92 (2022).

¹⁵⁰ Rebecca C. Morgan et. al, *A View from the Bridge: A Brief Look at the Progression of Cases of Elder Financial Exploitation Prosecutions*, 25 ELDER L.J. 271, 312–14 (2018).

¹⁵¹ UEKERT ET AL., *supra* note 149.

¹⁵² Morgan et al., *supra* note 150, at 323 n.408.

¹⁵³ *Id.* at 313.

¹⁵⁴ *Id.* at 323.

¹⁵⁵ SACRAMENTO CNTY. GRAND JURY, GRAND JURY INVESTIGATIVE REPORT: NO EQUAL JUSTICE FOR VICTIMS OF ELDER FINANCIAL ABUSE 16 (2025).

¹⁵⁶ *Id.* at 8.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 9.

¹⁶¹ 317 Cal. Rptr. 3d 706, 709 (Cal. 1st Ct. App. 2024).

¹⁶² *Id.* at 710–11.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 712.

to convey her property to Ms. Casey during her lifetime.¹⁶⁶ After hearing her testimony, the court determined that Ms. Bovis had met her burden and awarded her a restraining order against her daughter.¹⁶⁷ The court further declared the deed “void ab initio” and ordered Ms. Casey both to return the property and stay away from the property.¹⁶⁸

On appeal, the appellate court held that the trial court exceeded its authority in declaring the deed void ab initio and ordering Ms. Casey to stay away from the property, because such an order was not among the enumerated restraining orders in Section 15657.03(b)(5) of the Welfare and Institutions Code, and because Section 15657.03(b)(5)(B) did not allow the trial court to issue a restraining order excluding the record owner from the property.¹⁶⁹ The appellate court concluded that in some situations a restraining order alone may provide an elder a sufficient remedy, but in other cases the restraining order matter would need to be supplemented with a civil or probate action for elder abuse.¹⁷⁰

Although the appellate court reaffirmed that the evidence was sufficient to order a restraining order, they determined that the lower court did not have the authority under the statute to exclude Ms. Casey from the residence as she was the record title owner.¹⁷¹ Further, after a discussion regarding the history and statutory construction of the statute, the court held that ordering the deed void ab initio was not within the enumerated orders in Section 15657.03.¹⁷²

In Ms. Casey’s opening appellant brief, she indicated her mother had passed away.¹⁷³ While the appellate court discussed her death in terms of mootness,¹⁷⁴ the petitioner’s death shortly after filing for a restraining order highlights the need for older adults to receive swift remedies to their legal issues. Her death came less than a year after the filing of her restraining order matter. Had the lower court in Ms. Bovis’s restraining order matter not taken action to return the home to her name, Ms. Bovis likely would not have seen the return of her property to her name prior to death. If she had been forced to file a contemporaneous civil action, it is unlikely her case would have even moved out of the onerous discovery phase and would not have been set for trial for several years.

On a human level, the stress and toll this litigation must have caused Ms. Bovis during the last year of her life is deeply troubling given this Article’s previous discussion of the effect abuse has on long-term health.¹⁷⁵ Embroiled in a fight with one’s child over their own property and spending tens of thousands of dollars on attorney’s fees is not the ideal end-of-life scenario for anyone.

The *Newman* case effectively determined that the only way to void the deed transfer of real property that was procured through undue influence would be through the filing of a separate civil lawsuit.¹⁷⁶ Unfortunately, since there is little published case law on restraining orders, the *Newman* case has become one of the most cited cases regarding elder law in California.

IV. Barriers to Representation and Recovery

The previous Parts discussed the scope of financial abuse and the various laws currently in place to mitigate its effects. In reviewing the above, one might conclude that there already exists ample support under the law to course-correct financial abuse when it occurs. While this may appear to be true, the real question is how accessible these laws are to an older adult who has signed over their home. This Part explores why expansion of current elder abuse laws should be considered.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 713.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 717.

¹⁷⁰ *Id.* at 727.

¹⁷¹ *Id.* at 717.

¹⁷² *Id.* at 717–18 (discussing enumerated restraining orders under CAL. WELF. & INST. CODE § 15657.03(b)(5)(A)–(C) (West 2026)).

¹⁷³ *Id.* at 715.

¹⁷⁴ *Id.*

¹⁷⁵ See discussion *supra* Part I(B)–(C).

¹⁷⁶ *Newman v. Casey*, 99 Cal. Rptr. 3d 706, 726 (Cal. 1st Ct. App. 2024).

Of practical importance is the delay that occurs in a civil litigation matter. Ms. Bovis was assisted by attorneys in bringing her claims. Even so, her death came very soon after her daughter appealed the EARO orders. Ms. Bovis did not live long enough to have her home restored under a civil lawsuit. Regardless of cost or skill to adjudicate the matter on their own, any delay in a civil case may be detrimental for an older adult. The reason a home was likely taken in the first place is often due to the vulnerabilities of the older adult victim. Any delay in a civil case can set a case back months or years. When a civil lawsuit is filed, it can take considerable effort, time, and money to get to a judgment, but just because an older adult wins the case does not mean they are immediately paid that judgment. Often, victims need to take additional steps to enforce the judgment, leading to even more delays in recovery.¹⁷⁷

A. Costly Litigation

The court in *Newman* highlighted that the EADACPA provides incentives for the private bar to take on civil filings.¹⁷⁸ A civil action for elder financial abuse certainly could have restored title to Ms. Bovis, but the cost of financing that litigation would be tremendous and, for most Americans, simply not feasible even when considering the attorney's fee statutes provided.

i. Contingency Fees

Attorneys may represent elder abuse victims on a contingency fee basis.¹⁷⁹ But for an attorney to agree to representation, there needs to be a significant likelihood for recovery. These fee statutes are much more appealing to the private bar when the defendant is a skilled nursing facility, bank, or a larger entity with an insurance policy to defend it.¹⁸⁰ If the only asset of an older adult is the home they wish to recover, then how can attorneys in a contingency matter be paid? Without a fund of money to go after, it is unlikely attorneys will be willing to take the risk on a contingency fee basis.

ii. Cost of Litigation

The average cost of litigation for a civil lawsuit varies widely based on jurisdiction, but using Ms. Bovis's locale of San Mateo County—the most expensive county to live in California¹⁸¹—the anticipated cost of hiring a private attorney would have been significant. It is likely that the hourly rate for representation would be at least several hundred dollars.¹⁸²

Ms. Bovis was not a person of limited means. In review of the probate court filings conducted after her death, a final accounting revealed that her estate was valued over \$3 million.¹⁸³ Much of her estate consisted of the residence at the heart of her EARO dispute. Following her death, her home was sold for \$2.6 million.¹⁸⁴ Due to the underlying appeals case, a probate matter was filed. In review of the filings concluding the accounting of

¹⁷⁷ CONSUMER FIN. PROT. BUREAU, *supra* note 31, at 36.

¹⁷⁸ See *Newman*, 317 Cal. Rptr. 3d at 726–27.

¹⁷⁹ See CAL. R. PRO. CONDUCT r. 1.5(c) (stating rule for prohibited contingent fees); CAL. WELF. & INST. CODE § 15657.5(a) (West 2026) (stating rule for attorney's fees awarded based on claims for financial abuse of an elder or dependent adult).

¹⁸⁰ Or rather, an insurance policy with the limits to be able to pay any settlement or judgment.

¹⁸¹ Marc Sternfield, *You Now Need \$2 Million to Buy a Home in These California Counties*, KTLA 5, <https://ktla.com/news/california/you-need-2-million-to-buy-a-home-in-these-california-counties/> (last updated May 23, 2024, 8:21 PM PDT).

¹⁸² Joan Feldman, *Small Firm Hourly Rates by State and Practice Area*, ATT'YS AT WORK (Oct. 23, 2024), <https://www.attorneyatwork.com/solo-and-small-firm-lawyer-hourly-rates/> (discussing hourly rates pulled from CLIO.com, a cloud-based case management system used by attorneys which releases a yearly trends report providing insight on average hourly fees and other data items).

¹⁸³ Ex Parte Petition for (1) Approval and Settlement of First Account and (2) Ratification of Acts of Trustee with Consents and Waivers of Notice at 6, *In re Bovis*, No. 23-PRO-00362 (Cal. Sup. Ct. Jan. 6, 2025).

¹⁸⁴ *Id.* at 8.

her estate, Ms. Bovis paid significant amounts to various attorney offices. Records show that attorney's fees of \$68,876.35 were paid to her previous attorneys and the EARO appellant attorneys.¹⁸⁵ Even for someone with means to pay, the cost of hiring a private attorney was significant.¹⁸⁶

The reality is that most Americans would not have been in Ms. Bovis' position to afford these attorney's fees. In 2022, the year that Ms. Bovis filed her restraining order action, the average social security retirement benefit was \$1,638 for women.¹⁸⁷ Nearly 55% of social security earners that year were women.¹⁸⁸ As of 2022, the average median income of older people was \$29,740 (\$37,430 for men and \$24,630 for women).¹⁸⁹ It was predicted that over half of Baby Boomers turning 65 between 2024 and 2025 have \$250,000 or less in assets.¹⁹⁰ With this level of income or assets, there is simply not enough money to pay an attorney for representation.

B. Access to Legal Aid

If an older adult cannot afford an attorney, would a legal aid agency be able to take on these types of matters? This is highly unlikely as well. The Legal Services Corporation ("LSC"), founded in 1974, remains the largest national funder of civil legal aid for low-income Americans.¹⁹¹ In order to qualify for services from an LSC office, a potential client's income must be below 125% of the federal poverty line.¹⁹² In 2026, that annual income is below \$19,950 for an individual, \$27,050 for a family of two, and \$41,250 for a family of four.¹⁹³ LSC funds 800 offices across the country.¹⁹⁴ In 2023, LSC served 163,858 clients over the age of 60.¹⁹⁵ This number is relatively small compared to the report's findings that 51 million Americans are eligible for services through LSC.¹⁹⁶

According to a 2024 Justice Gap Survey conducted in California, 72–75% of households in every income group experienced at least one civil legal issue in the past year.¹⁹⁷ Data indicates that civil legal needs impact mental and emotional health, financial situation, physical health, and safety of lower-income households more so than other income households.¹⁹⁸ The Justice Gap Survey reports that organizations that focus on civil legal needs are only able to provide legal representation to 20% of eligible persons.¹⁹⁹ For one in five Californians, even if they have a legal issue that could be resolved by an attorney, they are told the case is not financially worthwhile for the attorney to pursue.²⁰⁰ For older adults who are looking to have a home returned to their possession, an attorney is not likely to see the financial upsides to representation.

The LSC held a panel presentation in 2023 on the importance of civil legal aid. Chief Judge of the New York Court of Appeals, Rowan Wilson, described at the forum how—despite public perception—“[t]here are some civil matters that have a more catastrophic real-world consequence than some criminal matters.”²⁰¹ Judge

¹⁸⁵ *Id.* at 9.

¹⁸⁶ Feldman, *supra* note 182 (calculating 2024 hourly rates for a California attorney at a small or solo law firm, which average from \$340 to \$391 per hour).

¹⁸⁷ SOC. SEC. ADMIN., NO. 13-11785, FAST FACTS & FIGURES ABOUT SOCIAL SECURITY, 2023, at 15 (2023).

¹⁸⁸ *Id.* at 14.

¹⁸⁹ ADMIN. CMTY. LIVING, *supra* note 36, at 11.

¹⁹⁰ Roberts & Liipfert, *supra* note 7, at 61.

¹⁹¹ *Who We Are*, LEGAL SERVS. CORP., <https://www.lsc.gov/about-lsc/who-we-are> (last visited Apr. 18, 2026).

¹⁹² *LSC 101: Understanding Civil Legal*, LEGAL SERVS. CORP., <https://lsc-live.app.box.com/s/7f4y34xk63ka1y9b0wly45uoq6q27xxx> (last updated Apr. 1, 2026).

¹⁹³ Annual Update of the HHS Poverty Guidelines, 91 Fed. Reg. 1797, 1798 (Jan. 15, 2026). The Department of Health and Human Services also publishes tables displaying different multiples of the guidelines which organizations like LSC use to make determinations, available at <https://aspe.hhs.gov/sites/default/files/documents/b1bfa16b20ae9b89d525bc35de7c1643/detailed-guidelines-2026.pdf>.

¹⁹⁴ *Who We Are*, *supra* note 191.

¹⁹⁵ LEGAL SERVS. CORP., 2023 ANNUAL REPORT 10 (2023).

¹⁹⁶ *Id.*

¹⁹⁷ STATE BAR CAL., 2024 CALIFORNIA JUSTICE GAP STUDY 10 (2025).

¹⁹⁸ *Id.*

¹⁹⁹ John M. Greacen, *Self-Represented Litigants, the Courts, and the Legal Profession: Myths and Realities*, 52 FAM. CT. REV. 662, 663 (2014).

²⁰⁰ STATE BAR CAL., *supra* note 197, at 35.

²⁰¹ LEGAL SERVS. CORP., *supra* note 195, at 14.

Wilson noted that he “would rather spend 30 days in jail than *lose his home* or custody of his children.”²⁰² And yet, only Americans facing criminal charges have the right to an attorney. As Judge Wilson argued, “[w]e are not doing nearly enough’ . . . to help people facing potentially life-changing civil issues.”²⁰³

While legal aid offices are critical and provide intangible benefits protecting the rights of hundreds of thousands of people, the demand for pro-bono representation far exceeds the supply. Judge Wilson’s musings remind us that the return of property, the actual roof over someone’s head, is one of the most critical civil issues a person can face.

In summary, the likelihood of recovery from elder financial abuse is increased when victims have the financial security to hire attorneys.²⁰⁴ Ultimately, the inability to afford an attorney can often prevent litigants from accessing the justice system.²⁰⁵ California law has provided a myriad of options to explore in civil litigation, but they are hardly of any value if an older adult does not have a lawyer who can succinctly navigate those laws.

If older adults do not qualify for legal aid and they cannot afford litigation, what is an older adult to do? Their only option is to represent themselves.

C. It Is Unlikely That Self-Litigants Can Resolve a Civil Case on Their Own

Filing a lawsuit is challenging for a lay person. If you throw in medical and other health related issues, transportation, and the growing challenges of technology use in and out of the court system, it is highly unlikely that many older adults can represent themselves in a civil suit for the return of real property. The procedural rules for a civil matter are challenging even for seasoned attorneys, let alone self-litigants.

In July 2010, the American Bar Association conducted a nationwide survey of trial judges regarding pro se litigation.²⁰⁶ That survey found that over half of the 1,200 judges who were surveyed reported an increase in pro se litigation in their courtrooms.²⁰⁷ Sixty-two percent of judges reported that outcomes were typically worse for people who represented themselves in court, even in simple matters.²⁰⁸ Data available from only a handful of states in 2024 indicates that over two-million individuals represented themselves in court matters.²⁰⁹ This number did not consider any self-represented individuals from California, whose superior courts in fiscal year 2024–25 processed over 5 million cases.²¹⁰

Without representation, self-litigants had issues in presenting the necessary evidence, correcting procedural errors, conducting witness examination, and often had ineffective arguments or failed to properly object to evidence.²¹¹ Victims of elder financial abuse may be unable to follow through on attempts to retrieve money or property through the court system if complex forms and processes are a barrier to recovery.²¹²

²⁰² *Id.* (emphasis added).

²⁰³ *Id.* at 17.

²⁰⁴ CONSUMER FIN. PROT. BUREAU, *supra* note 31, at 40.

²⁰⁵ DAVID B. ROTTMAN, NAT’L CTR. STATE CTS., TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 19 (2005).

²⁰⁶ Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship—A Legal Crisis and its Solutions*, 45 FAM. L.Q. 45, 45 (2011).

²⁰⁷ *Id.* at 46.

²⁰⁸ *Id.* Note that the survey indicated that most people were representing themselves in a domestic violence or foreclosure cases. *Id.* at 52. A domestic violence matter is typically adjudicated in one or two short hearings, but even in these types of cases judges reported less favorable outcomes. *Id.* at 46. It is easy to conceptualize how difficult representation becomes when addressing more complex issues.

²⁰⁹ S. Gibson et al., *2024 CSP STAT*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/resources-courts/data> (click “See our trial court overview,” select the “Caseload Detail” heading, and choose “Self-Represented Litigants” from the caseload measure dropdown) (last updated Oct. 2024). California was not one of the seven states which provided information on self-litigants, but it is likely the total number of self-litigants exceeds the reported two million. *Id.*

²¹⁰ JUDICIARY COUNCIL CAL., *supra* note 125, at 51.

²¹¹ Painter, *supra* note 206, at 46.

²¹² CONSUMER FIN. PROT. BUREAU, *supra* note 31, at 39.

While many courts have adopted ways to assist self-litigants, these methods stop short of providing ongoing representation and advice.²¹³ Still, the trend appears to be that simplified processes need to be implemented because the cost of litigation is too high.²¹⁴ Some authors have opined that the fact that the legal process has been simplified for self-litigants, and potential costs have been lowered, does not mean the legal system is experiencing better outcomes.²¹⁵

Unfortunately, self-litigants don't just need help with the filing of the forms or the procedure, though that presents plenty of issues as well. They need assistance with the decision-making and judgment in relation to their legal issue.²¹⁶ Many of the concerns, as it relates to the self-litigant's ability to make appropriate judgment calls, analyze the law and facts, and provide a coherent argument related to those facts, would be challenging for any self-litigant. However, when that self-litigant may demonstrate diminished capacity, be easily confused, have significant mobility or other cognitive issues, and have hearing or vision loss, their ability to represent themselves would surely be difficult, if not impossible, in a formal civil action.

If an older adult is forced to represent themselves, what other challenges could they face? In California, plaintiffs can file a motion for trial preference which, if granted, would result in mandatory trial setting within 120 days.²¹⁷ While this type of motion would be critical to adjudicate an older adult's claim within a short timeline, the requirements to properly plead and file a motion of this kind would be incredibly difficult for many older adults whose digital literacy is far behind younger individuals. A single motion document would require the ability to read and understand the California Rules of Court regarding the requirements for the filing of motion documents,²¹⁸ an understanding of the county's local rules on filings and where to find them,²¹⁹ and the ability to obtain and draft the documents required for the motion.

Courts may increasingly require e-filing²²⁰ or the establishment of other court portals to receive notifications about the case. Adapting to these online forums may be difficult for older adults to manage on their own. Even to access assistance with EARO forms, self-litigants in Sacramento County are directed to correspond with the self-help center via email correspondence.²²¹ While the apparent trend in access to justice is to increase technology options,²²² adequately accessing technology options may continue to be a barrier for older adults lacking in digital literacy skills.

Even more so than just the filing process, the creation of legal documents on a computer may, at times, be a stretch for the current generation of older adults. Many older adults had already retired prior to the popularity of the internet or use of computers.²²³ Although the stark digital divide of a decade ago is moving in a positive

²¹³ See ABA STANDING COMM. ON DELIVERY LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE SELF-REPRESENTED LITIGANTS 1–2 (2014) (discussing the shift among courthouse to provide assistance to self-litigants in a variety of ways, including; guides, publications and forms, courthouse facilitators, desks with volunteer attorneys, and other self-help centers).

²¹⁴ See ROTTMAN, *supra* note 205.

²¹⁵ *E.g.*, Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 WIS. L. REV. 287, 290–91 (“The administration of justice is different from a commodity or service to be delivered to market as smoothly as possible at a cost as close as possible to zero.”).

²¹⁶ RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS 17–18 (2002). Richard Zorza labels this the Analysis Barrier. *Id.* at 17 (“Most self-help assistance programs report as the key problem that telling people the law was not enough. Litigants often need far more help than the program could give them in analyzing the implications of the law, in applying that law to the facts, and then in forging out of the law and the facts a coherent and persuasive legal argument.”).

²¹⁷ CAL. CIV. PROC. CODE § 36(f) (West 2026).

²¹⁸ See CAL. R. CT. 3.1110–3.1115.

²¹⁹ See, *e.g.*, SACRAMENTO CNTY. LOCAL R. 1.06(A) (2026); see also *id.* r. 2.40 (outlining procedure for requesting oral argument should the petitioner not prevail on the motion and need to make their plea to the judge).

²²⁰ It is unlikely that all courts require e-filing for self-litigants as this may demonstrate access to justice issues.

²²¹ *Elder or Dependent Adult Abuse Restraining Order*, SACRAMENTO CNTY. SUPERIOR CT., <https://www.saccourt.ca.gov/restraining-orders/elder-dependent-abuse.aspx> (last visited Apr. 18, 2026).

²²² See STATE BAR CAL., *supra* note 197, at 107.

²²³ The Pew Research Center reports that when it began tracking internet adoption in early 2000, only fourteen percent of adults sixty-five and older used the internet, and that figure did not exceed fifty percent until April 2012. See MONICA ANDERSON & ANDREW PERRIN, PEW RSCH. CTR., TECH ADOPTION CLIMBS AMONG OLDER ADULTS 3 (2017); PEW RSCH. CTR., OLDER ADULTS AND TECHNOLOGY USE 1 (2014). Among adults seventy-six and older, internet adoption was just thirty-four percent as of 2012. Kathryn Zickuhr & Mary Madded, *Older Adults and Internet Use*, PEW RSCH. CTR. (June 6, 2012), <https://www.pewresearch.org/internet/2012/06/06/older-adults-and-internet-use/>. The average U.S. retirement age during this same period ranged between fifty-seven (in 1991) and sixty-two (by 2014). Jeffrey M. Jones, *More in U.S. Retiring, or Planning to Retire, Later*, GALLUP

direction,²²⁴ older adults still lag behind younger generations in their technology capabilities.²²⁵ It is reported that only 66% of those 50-plus report comfort with their digital literacy skills and, as people age, their comfort with these skills diminishes.²²⁶ Older adults also do not feel that technology was built with them in mind and express concerns over the complexity of technology, lack of training, and need for additional instruction that they often cannot find.²²⁷

Even while older adults are increasingly online, folks over 65 are still the most likely of any age group to visit websites promulgating fake news articles.²²⁸ The technological skills of older adults vary widely based on their income, age within the group, and education, with some researchers referring to these differences as a “second-level digital divide.”²²⁹ Just because older adults are using internet and smart phones more does not mean their skills are adequate to effectively file a successful claim.

V. Expansion of Elder Abuse Laws

The court in *Newman* made it clear that certain remedies were not within the court’s jurisdiction because those remedies were not one of the enumerated restraints.²³⁰ This Article still disagrees with the remedies enumerated within the statute, since the taking of a home constitutes the highest form of ongoing elder financial abuse. The entire point of an emergency protective order is to provide a quick and accessible option to prevent current and future abuse.²³¹ *Newman* allows EARO judges to ignore one of the more critical financial losses by punting the issue to civil courts. If *Newman* continues to control California law on this issue, an older adult’s protection against ongoing financial abuse is a facade and allows for a major loophole abusers can exploit. If the taking of the real property is not addressed as part of the EARO action, then the older adult is still experiencing direct, ongoing financial harm. California’s maxims of jurisprudence provide that “[w]here the reason is the same, the rule should be the same.”²³² The EARO statute refers to California’s elder abuse definitions regarding financial abuse.²³³ If EAROs and civil cases for elder financial abuse are predicated on the same laws, then the remedies under these laws should be available in both courts. If a party is truly to be stopped from committing further financial abuse, then retaining property of an older adult will continue to violate that restraint. While true that the return of property cannot be categorized as a restraint, the statute can and should be expanded to provide necessary relief. As discussed above,²³⁴ the mechanism for restoring title already exists under the civil code and could be adopted under the EARO statute.

Expanding relief under the EARO statute would allow for matters to come before a judge in less than a month. The facts and evidence are generally limited and straightforward. Additional requirements could still be implemented into the statute that would allow for the resolution of the matter through the EARO’s shorter

(July 22, 2022), <https://news.gallup.com/poll/394943/retiring-planning-retire-later.aspx>. Today’s adults aged seventy-five and older therefore largely retired before the internet, broadband, smartphones, and routine computer use became fixtures of working and daily life.

²²⁴ Michelle Favero, *Share of Those 65 and Older Who Are Tech Users has Grown in the Past Decade*, PEW RSCH. CTR. (Jan. 13, 2022), <https://www.pewresearch.org/short-reads/2022/01/13/share-of-those-65-and-older-who-are-tech-users-has-grown-in-the-past-decade/>.

²²⁵ BRITTNE KAKULLA, AM. ASS’N RETIRED PERS., 2024 TECH TRENDS AND ADULTS 50+, at 45 (2024).

²²⁶ *Id.* at 5. Note that in practice there is a huge gap between the digital literacy skills and comfort of someone who is fifty-one and eighty-one years old. The fact that a person over sixty-five owns a smartphone does not mean that they can download forms or print, complete, and file them in a correct manner.

²²⁷ *Id.* at 45.

²²⁸ Susan Nash, *Older Adults and Technology: Moving Beyond the Stereotypes*, STANFORD CTR. LONGEVITY (Mar. 30, 2019), <https://longevity.stanford.edu/older-adults-and-technology-moving-beyond-the-stereotypes/>.

²²⁹ Eszter Hargittai et al., *From Internet Access to Internet Skills: Digital Inequality Among Older Adults*, 18 UNIVERSAL ACCESS INFO. SOC’y 881, 882 (2018).

²³⁰ *Newman v. Casey*, 99 Cal. Rptr. 3d 706, 717–18 (Cal. 1st Ct. App. 2024).

²³¹ *E.g.*, CAL. FAM. CODE § 6251 (West 2026) (expressly conditioning issuance of an emergency protective order on a judicial finding that the order “is necessary to prevent the occurrence or recurrence” of domestic violence, child abuse, child abduction, or abuse of an elder or dependent adult).

²³² CAL. CIV. PROC. CODE § 3511 (West 2026).

²³³ CAL. WELF. & INST. CODE § 15657.03(a)(1) (West 2026).

²³⁴ See discussion *supra* Part III(F).

calendar. This Article proposes two potential amendments to the EARO statute: (1) prescribe a requirement for probable cause or prove-up hearing if a petition seeks the return of real property, or (2) where petitions seek the return of real property, create a court investigator program similar to the programs seen on the probate calendar regarding guardianships or conservatorships.

A. Requirement for Probable Cause of “Prove-Up” Hearing

One possible way to allow expansion consistent with due process concerns would be to require a short court trial if the request of real property is made in an EARO petition. This requirement would be like the condition under California law that requires a plaintiff to “prove up” a case in a default judgment where the return of real property is requested.²³⁵ Pending trial, potential defendants could be immediately ordered to refrain from mortgaging, selling, renting, or making other real property related transactions regarding the subject property. The older adult could also be given temporary possession of the property pending trial.

A model amendment would look like this: “The court may issue an order requiring the return or restoration of real property wrongfully obtained through financial abuse as defined in Section 15610.30, where the petitioner shows by a preponderance of the evidence that the transfer was procured through undue influence, fraud, or coercion.”

By expanding Section 15657.03 of the Welfare & Institutions Code to include this relief, older adults who petition the court will have a faster route to relief in a courtroom, one that typically relaxes some of the rules of civil procedure and allows them to bring their case without representation, or without extensive representation costs, due to the nature of EARO cases.

B. Implementation of a Court Investigator Program for EARO Cases Involving Real Property

A court appointed investigator is a neutral third-party hired by the court to gather facts and report findings back to the court in certain legal matters.²³⁶ In conservatorship cases in California, a court-appointed investigator will conduct interviews with the proposed conservatee, proposed conservator, and other interested parties.²³⁷ The investigator’s report typically aides the court in determining whether a conservatorship is warranted based on the situation.²³⁸ Similarly, in California guardianship²³⁹ and adoption²⁴⁰ cases, a court investigator will conduct an in-home interview and meet with interested parties to determine whether or not the placement is in a minor child’s best interest.

EAROs hearings are typically already held in probate or family law courts, where these investigations are already occurring on a regular basis. Investigators in probate settings may also be very familiar with issues of abuse and capacity, making it a natural transition to also require a court investigation report for an elder abuse matter involving real property. This would allow the court to have another set of eyes on a situation to help piece together the circumstances for the alleged financial abuse.

These are just a few examples of how current EARO statutes can be expanded and amended to provide for additional protections and further investigations into the ongoing financial abuse that occurs when an older adult is fraudulently disposed of their real property.

²³⁵ CAL. CIV. PROC. CODE § 585.5(d) (West 2026).

²³⁶ See generally CAL. PROB. CODE §§ 1454, 1456, 1513, 1826 (West 2026).

²³⁷ CAL. PROB. CODE § 1851(a)(1)(D) (West 2026).

²³⁸ *Id.* § 1826(a).

²³⁹ *Id.* § 1513(a).

²⁴⁰ CAL. FAM. CODE § 8715(a) (West 2026).

VI. Other Remedies

There are other areas in which the law could provide additional safeguards regarding real property transactions for older Californians.

A. Proposed Changes in Notary Laws

One area of law that could be strengthened to help prevent the transfer of property is California's notary law.²⁴¹ There have been previous attempts at modifying notary laws to support the prevention of elder abuse by requiring notaries to be mandatory reporters; however, this legislation was unsuccessful.²⁴² There are several ways that notary laws could be improved to provide additional oversight into the deed process for older adults. The EHL Clinic often hears from potential clients that they did not know what document they signed, had not read the document placed in front of them, and had relied on the promises or statements of others in agreeing to sign a document.

Notaries are required to meet certain qualifications to be licensed, which includes enrolling in an approved study program and passing an exam.²⁴³ The signing of a deed in California requires that signatures are properly notarized by a licensed notary, who then provides a notary acknowledgment form indicating they have confirmed the identity of the person signing.²⁴⁴ Notaries are also able to administer oaths. Unlike an acknowledgment form, a jurat is a different type of notary verification where the signer declares under oath that a statement is true.²⁴⁵

While notaries have several duties that are prescribed under the Code,²⁴⁶ there is no requirement that notaries ensure a signer reviews a document before signing, understands the document, acknowledges what the document is and purports to do, speaks confidentially with the signer about the document, or evaluates if the signer has the capacity to sign.

When an older adult is signing over property, the deed to that property must be notarized. While there are still issues of fraud and forgery, for a deed to be valid a notary must be present to verify the identification of the signer and provide an acknowledgment form at the time of signing.²⁴⁷ Notaries may provide the key to ensuring a safety net during transactions involving older adults. This following Sections contain several potential solutions to reform the current codes governing notaries.

i. Requiring an Oath Confirmed by a Jurat Form

One potential solution is that, instead of requiring a regular acknowledgment form for deeds, an oath or confirmation could be used to verify that an older adult is aware of any deeds they are signing at the time. For example, when an attorney is admitted into practice, they must take an oath that they swear to uphold the constitution and the laws of the State of California, among other promises.²⁴⁸ If this oath is taken in front of a notary, a notary will fill out a jurat form. A jurat form for deeds could be created and required specifically for older adults over 65 who are signing real property deeds of any kind.

²⁴¹ CAL. GOV'T CODE §§ 8200–8230 (West 2026).

²⁴² Michael Lewis, *California Governor Vetoes Bill Requiring Notaries to Report Suspected Financial Abuse of Seniors*, NAT'L NOTARY ASS'N (Oct. 2013), <https://www.nationalnotary.org/notary-bulletin/blog/2013/10/gov-vetoes-notaries-report-senior-abuse>.

²⁴³ See CAL. GOV'T CODE § 8201.1(a) (West 2026); see also *Become a Notary Public*, CAL. SEC'Y STATE, <https://www.sos.ca.gov/notary/qualifications> (last visited Apr. 18, 2026).

²⁴⁴ *Id.* § 8205(a)(2).

²⁴⁵ See *id.* § 8202. For an example of a jurat form, see *Jurats*, CAL. SEC'Y STATE, <https://www.sos.ca.gov/notary/jurats> (last visited Apr. 18, 2026).

²⁴⁶ See CAL. GOV'T. CODE § 8205 (West 2026).

²⁴⁷ *Id.* § 8205(a)(2).

²⁴⁸ See *Attorney's Oath*, STATE BAR CAL., <https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Attorneys-Oath> (last visited Apr. 18, 2026).

An example of an oath could be: I, “name of grantor” confirm I am over 65 years old. I understand I am signing a deed to real property conveying my interest in “address or identity of real property” to “name of grantee”. I understand that by signing this deed, I will no longer be the owner of record for this property.

Admittedly, some unintended consequences may flow from improving this requirement. One question would be, couldn't a grantor who is being unduly influenced still state this oath and sign over property? The answer is yes, but the signing itself would not preclude an argument of undue influence based on the facts. The additional safeguard of ensuring that an older adult understands they are signing a deed may aid in airing out the nature of the transaction.

ii. Require Notary Capacity and Elder Abuse Training

Notary governance varies greatly state to state, but many require some form of training prior to licensure. As discussed above, California requires a day-long training and passage of a notary examination to be licensed.²⁴⁹ This training does not currently cover any rules regarding establishing or confirming the capacity of a potential signer.²⁵⁰

Nevada was the first state to pass legislation authorizing the Secretary of State to establish a code of professional responsibility for notaries.²⁵¹ A new Nevada law also authorizes a notary to refuse to perform a notarial act if it is not satisfied that the person executing the document is competent or has the capacity to execute the record.²⁵² While it is not clear what rules will be finalized in Nevada's code of professional responsibility, there are model professional rules that cover capacity that could be pulled from national notary organizations. For example, The National Notary Association provides sample conduct rules for consideration. Under their proposed rules, mental competence and coherent communication are essential to the notarial act.²⁵³ For mental competence, a notary “shall not perform a notarial act if the Notary has reasonable belief which can be articulated that the principal or witness identifying the principal, if any, does not have the mental capacity to execute the notarial act.”²⁵⁴ Other states have also prescribed that a notary should determine if a signor has the competence to sign.²⁵⁵ Unfortunately, California's notary laws are silent as to confirming capacity, competence, or willingness to sign on documents, leaving signers, especially those over 65, vulnerable to an unwanted transaction.

California should adopt the rules identified in other states that require a notary to determine capacity of a signer and should prescribe penalties for the failure to do so. A mandatory component of notary training should include education on capacity and elder financial abuse, including the prevalence and warning signs. Notaries should also receive training on undue influence to understand the potential dynamics at play between parties to a transaction. Further training on capacity and competence will be required to ensure that notaries understand any new regulations regarding capacity.

iii. Require Additional Note Keeping on Transactions

Notaries are required to notate every signature they notarize in a specialized signing book.²⁵⁶ The rules prescribe required notes that must be in every book for each transaction.²⁵⁷ These rules could be expanded to

²⁴⁹ *Become a Notary Public*, *supra* note 243.

²⁵⁰ See CAL. GOV'T. CODE § 8205 (West 2026). As of writing of this Article, this Author is also a licensed notary in California.

²⁵¹ NEV. REV. STAT. § 240.017(1) (2026).

²⁵² *Id.* § 240.075(2).

²⁵³ See NOTARY PUB. CODE OF PRO. RESP. § III-C-2 (NAT'L NOTARY ASS'N 2020).

²⁵⁴ *Id.*

²⁵⁵ See Brooke Merritt, *Alaska – U.S. Notary Reference*, NAT'L NOTARY ASS'N, <https://nmainternal.atlassian.net/wiki/spaces/ETS/pages/3258318849/Alaska+-+U.S.+Notary+Reference> (last updated Aug. 14, 2025) (recommending that “while you scan the document for any printed title or other document identification, [you] ask the signer to describe the document to you as well”).

²⁵⁶ CAL. GOV'T. CODE § 8206(a)(1) (West 2026).

²⁵⁷ *Id.* § 8206(a)(2).

require the recording of additional information. Requiring the notary to make a note regarding capacity, list names of other people who were present, write in who specifically arranged for the notary's services, or who paid could all be important facts to confirm.

iv. Increase Bond Requirement

To ensure that notaries hold to their training regarding capacity, the current bond requirement could be increased. Currently, notaries are required to be bonded in the amount of \$15,000 for any errors and omissions that may have occurred during the pendency of their commission.²⁵⁸ An increase to the bond value may help provide additional avenues for redress if a notary who was aware of the rules regarding capacity decided to allow the signature to proceed anyway.

B. Deed Rescission Reform

There is not currently a California law that would allow for a time period for rescission of a real property deed. However, certain contracts allow rescission. For seminar sales solicitation and home solicitation contracts, older adults have the right to cancel the contract until midnight on the fifth day of business after signing the agreement.²⁵⁹ Those under age 65 are permitted only three days to cancel.²⁶⁰

AB 2471 sought to alleviate the financial risk elders take when they enter contracts they do not fully understand.²⁶¹ Supporters contended that the modest extension of three days to five days would “alleviate some of the pressure felt during sales presentations and allow for a more measured and informed choice.”²⁶² They recognized that these types of contracts often involved “high-pressure or intimidating sales tactics—often taking place in the senior citizen’s home” and involving “a large financial commitment which senior citizens are ill equipped to recover from should the financial obligation prove to be too much.”²⁶³ The bill contended that “[t]hese contracts can have dire consequences, not only financially, but also psychologically for seniors who unknowingly place their home—their largest financial asset—at risk to foreclosure due to assessments or liens.”²⁶⁴ The California District Attorneys Association, who also supported the bill, expressed concern that homes could be foreclosed if senior citizens were unable to afford the payments on these contracts.²⁶⁵

Current law requires that the rescission be mailed to the address provided in the contract.²⁶⁶ Legislation was recently passed that now permits the delivery of rescission by email correspondence, with the requirement for an email address to be added to contracts.²⁶⁷

The California legislature has recognized that, when older adults are put in high pressure situations where they do not realize they are signing, they should have an out, because the financial implications of that signing could be disastrous for an older adult.²⁶⁸ When it comes to signing over the home itself though, there are no such safeguards. If sales contracts are permitted five days—where the value of the contract is likely much less than the value of a home—a 30-day period for rescission should be available under the law. Any adverse effect on

²⁵⁸ *Id.* § 8212.

²⁵⁹ CAL CIV. CODE § 1689.20(a)(1) (West 2026).

²⁶⁰ *Id.*

²⁶¹ *Senior Citizens: Rescission of Contracts: Hearing on A.B. 2471 Before the Senate Judiciary Committee*, 2019–2020 Leg., Reg. Sess. 5 (Cal. 2020) (statement of Hannah-Beth Jackson).

²⁶² *Id.* at 5.

²⁶³ *Id.* at 6.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ CAL. BUS. & PROF. CODE § 7159(c)(3)(B)(ii) (West 2026).

²⁶⁷ A.B. 1327, 2025–2026 Leg., Reg. Sess. 13 (Cal. 2025).

²⁶⁸ CAL. BUS. & PROF. CODE § 7159 (West 2026).

legitimate sales between informed parties could be avoided with an option to waive the time-period where there has been either assistance of counsel or a title company who is involved in the transaction.

VII. Conclusion

As our population ages, laws must adapt to the crises occurring within our communities. Although much more attention has been devoted to elder abuse in recent years, current avenues for relief lack a pragmatic approach to dealing with elder financial abuse issues. If action is not taken now to help protect the homes of older adults, the financial abuse numbers will only continue to rise. With this rise will inevitably come more burdens put on legal systems to try to support the loss of critical housing, health, and economic stability for older adults.

The crisis of elder financial abuse is preventable and can be addressed with comprehensive reform. As evidenced by the *Newman* matter, California's systems are failing older petitioners and plaintiffs. Expanding the elder abuse restraining order statute to include the return of real property would allow self-litigants to have their day in court earlier, in a setting that typically has more relaxed rules of evidence. Additional safeguards to stop the abuse from happening include: (1) notary law reform that provides further protections at the time of signing; (2) establishing trainings for notaries on spotting elder financial abuse and capacity; and (3) a requirement of an oath by a grantor over 65 confirming that the older adult verifies they are signing a deed and acknowledges they are transferring an interest in real property. The last safeguard is particularly important for helping vulnerable older adults who are being abused recognize what they are being asked to sign. Further, reform regarding rescissions of deeds for up to a 30-day period may allow an older adult to contact someone they trust and share that they signed a deed.

Without serious thought given to the threats that exist in every neighborhood around the country, we are ignoring future abuse that is not a matter of if, but when. If home is where the heart is, then we need to put more heart, and resources, into protecting the nest egg of our older neighbors.

RESTORATIVE JUSTICE, ELDER MISTREATMENT, AND COGNITIVE IMPAIRMENT: TOWARD EXPANDING CURRENT FRAMEWORKS

Malya Levin, Rachael Domanico, Erica Costello, and Deirdre Lok.¹

I. Introduction

Restorative justice is increasingly considered a framework to address categories of harm that have been resistant to impact via the traditional justice system. This article examines the application of a restorative justice framework to cases of elder mistreatment, particularly where the older adult experiencing harm has some degree of cognitive impairment. Part 1 discusses the essential elements of restorative justice; first historically, and then the ways in which its current rise in popularity is a direct response to perceived flaws or gaps in the traditional justice system, particularly the criminal justice system. Part 2 explores the ways in which common features of elder abuse can often be ill-suited to a traditional criminal justice response, particularly where the older adult who has experienced harm has cognitive impairment. Part 3 examines three programs currently providing elder abuse services and the degree to which these programs can integrate restorative practices. Finally, Part 4 examines the emerging trend of implementing a restorative approach in elder abuse cases where the older adult has a court appointed guardian or conservator; first through a case study, and then in an analysis of existing law. This article views the restorative justice approach as an emerging, promising practice in elder abuse cases and advocates for more consideration, both legally and clinically, of how current laws and programs can be adapted to expressly address the unique needs of people with cognitive impairment.

II. Restorative Justice Generally

A. Restorative Justice Origins

The popularity of restorative justice in the United States has emerged largely as a response to critical examination of the traditional justice system. Within the United States, the traditional approach to justice is structured around retributive responses, focused on assigning fault and enacting punishment.² Within contemporary justice systems, the response to harm is through punishment of the offender that is seen as equivalent to the severity of a crime.³ Modern restorative justice models have emerged from critiques of traditional justice systems as emphasizing punishment of the offender rather than addressing the personal and communal harms experienced by those involved.⁴

Recognizing the relationship between restorative practices and indigenous and faith-based traditions is critical to understanding modern restorative justice.⁵ Simply highlighting indigenous and faith-based traditions in broad terms can be challenging, as it risks oversimplifying and generalizing a diverse myriad of cultures, beliefs,

¹ The authors would like to thank Yusra Ahmed, MPH candidate at the Columbia University Mailman School of Public Health, and Alexandra Glezer, JD candidate at the Georgetown University Law Center, for their work on this article.

² Patrick Gerkin et al., *Implementing Restorative Justice Under the Retributive Paradigm: A Pilot Program Case Study*, SAGE OPEN (Feb. 1, 2017), <https://doi.org/10.1177/2158244017691562>.

³ Donald H.J. Hermann, *Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice*, 16.1 SEATTLE J. SOC. JUST. 71, 72 (2017).

⁴ *Id.* at 71.

⁵ The authors acknowledge that we are discussing indigenous cultural practices from a perspective that is outside of these communities. We recognize that we are presenting concepts through a lens that can oversimplify and not fully capture the depth, diversity, and significance of these practices. Our perspective is limited and we encourage readers to seek out indigenous voices and scholarship for a deeper and more complete understanding.

and legal approaches.⁶ Generally speaking, Native American and First Nation justice philosophy and practice emphasizes healing and reintegrating individuals into their communities over punishment of the offender by the state.⁷ While not all indigenous legal traditions primarily utilize restorative practices,⁸ many indigenous cultures perceive the response to maltreatment as a communal process involving reconciliation and community healing.⁹

Particularly, Navajo law is deeply rooted in spirituality and creation, contrasting sharply with Western legal systems.¹⁰ In Navajo culture, the concept of law, known as *beehaz'aanii*, is not merely a set of manmade rules, but a sacred system of central importance given by the Holy People¹¹ since the beginning of time.¹² Within this context, the Navajo approach to justice is an egalitarian process that involves shared responsibility, involving resolutions through collective decision-making, rather than through authoritative processes.¹³ Traditional Navajo civil resolution procedures use ceremony to promote dialogue and involve spiritual assistance, while drawing upon respected knowledge and traditions that resonate with community members.¹⁴ The resolution process is centered on principles of healing and restoration through group consensus and shared understanding of the nature of the problem.¹⁵ This shared consensus becomes the foundation to determine a collective plan of action to restore familial and community relationships.¹⁶

B. Contemporary Restorative Justice

The concept of contemporary restorative justice is expansive, with various approaches to its implementation and a range of definitions shaping its practice. As more practitioners become familiar with restorative justice, there is increasing diversity of restorative methodologies and a corresponding sense of ambiguity regarding its precise meaning.¹⁷ Scholars have called for the development of shared standards and guiding principles to preserve the integrity of restorative practice while allowing for contextual adaptation.¹⁸ While preserving integrity and allowing for flexibility in restorative adaptations can be a complex balancing act, it allows for broadening the applicability of restorative principles across diverse populations and settings, making it possible to engage more people in meaningful and relative ways.

Restorative justice can be described as both a philosophical framework and a set of practices.¹⁹ Its modern emergence was first pioneered by Howard Zehr in the 1970s in an effort to address the shortfalls within the Western legal system, primarily concerning the disregarded perspectives of the victims and central focus on the punishment of the offender.²⁰ According to Howard Zehr, restorative justice can be described as an approach to justice that views crime as not just a violation of the law, but as a violation of people, interpersonal relationships,

⁶ VAL NAPOLEON & HADLEY FRIEDLAND, *THE OXFORD HANDBOOK FOR CRIMINAL LAW* 226 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

⁷ Laura Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One*, INT'L INST. RESTORATIVE PRACTICES (Apr. 27, 2004), <https://www.iirp.edu/news/restorative-justice-practices-of-native-american-first-nation-and-other-indigenous-people-of-north-america-part-one>.

⁸ Aparna Polavarapu, *Myth-Busting Restorative Justice: Uncovering the Past and Finding Lessons in Community*, 13 U.C. IRVINE L. REV. 949, 954 (2023).

⁹ Larry Chartrand & Kanatase Horn, *A Report on the Relationship between Restorative Justice and Indigenous Legal Traditions in Canada*, DEP'T. JUST. CAN. 6 (Oct. 2016), <https://www.justice.gc.ca/eng/rp-pr/jr/rjilt-jrtja/rjilt-jrtja.pdf>.

¹⁰ Robert Yazzie, *Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175, 175 (1994) (“The term Holy People refers to divine personages or spirit forces which were instrumental in the creation of the world. Following creation and the exodus of the Navajo People to their present place in this world, the Holy People went into the rocks and earth, where they still help.”).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 180–181.

¹⁴ *Id.* at 184.

¹⁵ *Id.* at 185.

¹⁶ *Id.*

¹⁷ Polavarapu, *supra* note 8, at 952.

¹⁸ BELINDA HOPKINS, *RESTORATIVE THEORY IN PRACTICE: INSIGHTS INTO WHAT WORKS AND WHY* (2015).

¹⁹ Steve Kirkwood, *A Practice Framework for Restorative Justice*, 63 AGGRESSION AND VIOLENT BEHAV. 1 (2021).

²⁰ Howard Zehr, *Restorative Justice? What's That?*, ZEHR INSTITUTE FOR RESTORATIVE JUSTICE (2018), <https://zehr-institute.org/what-is-rj/>.

and communities.²¹ Zehr asserts that there are three questions vital to restorative processes: Who has been hurt? What are their needs? Who has the obligation to address the needs, right the harms, and restore the relationships?²²

According to Zehr, restorative justice responds to conflict and wrongdoing in a way that is both meaningful and grounded in the needs of those involved to achieve a sense of healing.²³ Because the needs or goals associated with healing vary depending on each person and their circumstances, approaches will differ among individuals and communities.²⁴

Restorative justice has gained significant traction in recent years, as evidenced by its use in various types of legal proceedings, demonstrating a broadening of its application across different contexts.²⁵ Increasingly, state statutes expressly reference restorative justice programming as an appropriate use of state funds or a complement to state action in a variety of contexts.²⁶ As of this writing, all of the 50 states have at least one reference to restorative justice codified in their statutes, most commonly in the areas of criminal justice, education law, or child welfare law.²⁷ In California, restorative justice is listed in the penal code's legislative findings as one of the purposes of criminal sentencing, and restorative justice programs are expressly listed among those that "should be available for incarcerated persons."²⁸

Specific programs vary greatly in the ways they operationalize principles of restorative justice. Victim-offender mediation²⁹ is one example of a restorative model within a criminal context that is designed to foster dialogue for both the victim and offender, often within formal justice systems.³⁰ It can be utilized prior to a charge or sentencing, or as a final resolution, with the goal of acknowledging the perspectives and needs of both parties while holding the offender accountable for their actions.³¹

Internationally, community and family group conferencing is a restorative justice process that has been integrated into New Zealand's criminal justice system.³² It is a restorative approach where trusted supports of both the victim and offender, with a professional facilitator, come together to discuss the impacts of an offense and identify agreed upon outcomes.³³ Stakeholders and community partners play a role in monitoring the offender's compliance, diverting public safety away from police to community-based organizations.³⁴

²¹ Howard Zehr & Harry Mika, *Fundamental Principles of Restorative Justice*, 1 CONTEMP. JUST. REV. 47, 47–55 (1998).

²² HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* (2002).

²³ Zehr, *supra* note 20.

²⁴ Erika Sasson & Charlene Allen, *Using Restorative Approaches to Address Intimate Partner Violence*, CTR. FOR CT. INNOVATION 7 (Oct. 2020), https://www.innovatingjustice.org/wp-content/uploads/2020/10/Guide_RJBlueprint_01282020.pdf.

²⁵ See Daye Gang et al., "Obviously It's for the Victim to Decide": Restorative Justice for Sexual and Family Violence from the Perspective of Second-Wave Anti-Rape Activists, 30(12–13) VIOLENCE AGAINST WOMEN 3187, 3187–88 (2024).

²⁶ Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, 2 JUST. POL'Y J. No. 13, Fall 2016, at 1, 1.

²⁷ See *Restorative Justice Laws Database*, NAT'L CENTER ON RESTORATIVE JUST., <https://ncorj.org/laws/> (last visited Apr. 20, 2026).

²⁸ CAL. PEN. CODE § 1170(a)(1)(2) (2023).

²⁹ Victim-Offender Mediation (VOM) is a process that fosters direct communication between a victim and offender, facilitated by a trained mediator. Participation in this process is usually initiated by a referral from courts or probation officers, but can also be accessed directly by the parties themselves. Both parties must provide informed consent to participate, ensuring voluntary and intentional involvement. VOM offers a space for both parties to discuss the harm experienced, and explore restorative actions needed to address the harm. Typically, restorative actions can include the offender agreeing to pay restitution, participating in community service, or engaging in self-help activities such as therapy or treatment. The agreement is written, signed by both parties, and usually monitored for compliance by the staff of a mediation program. See Toran Hansen & Mark S. Umbreit, *State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice—The Evidence*, 36 CONFLICT RESOL. Q. 99 (2018); see also Mark S. Umbreit & Toran Hansen, *Victim-Offender Mediation: A Humanistic Approach*, THE MEDIATION HANDBOOK: RESEARCH, THEORY, AND PRACTICE 97, 97–104 (Alexandros Georgakopoulos ed., 2017).

³⁰ Adler School Institute on Public Safety and Social Justice, *Restorative Justice: A Primer and Exploration of Practice Across Two North American Cities*, RESTORATIVE JUSTICE EXCHANGE 7 (June 4, 2015), <https://restorativejustice.org/rj-archive/restorative-justice-a-primer-and-exploration-of-practice-across-two-north-american-cities/>.

³¹ *Id.*

³² *Id.* at 8.

³³ *Id.*

³⁴ *Id.*

C. Restorative Justice as a Response to Gaps in the Criminal Justice System

State law and particularly criminal law's embrace of restorative justice is rooted in the growing body of research demonstrating that these systems have traditionally fallen short in addressing the complex needs of those who have experienced harm. Survivors frequently report that traditional legal proceedings fail to validate their experiences or prioritize their healing.³⁵ Many highlight how these processes can be retraumatizing, particularly when there is emphasis on the progression of a case over the survivor's needs and desired choices.³⁶ In doing so, these systems have the potential to replicate the same power and control dynamics present in the harmful relationship the survivor had been seeking help in addressing. In many cases, especially when the person who caused harm is someone close to the victim, survivors may be hesitant to engage with a system that could impose punitive outcomes rather than promote understanding or reconciliation.³⁷

In addition to its limitations in supporting the victims' goals, the conventional criminal justice system often neglects the needs of those who cause harm. Root causes such as trauma, economic instability, or lack of community support are rarely addressed in punitive settings.³⁸ In contrast, restorative justice emphasizes accountability in a way that encourages self-reflection and responsibility. It provides space for individuals to reflect and engage in reparative actions. This approach not only supports rehabilitation but has also been shown to reduce recidivism and disrupt cycles of violence and harm.³⁹

Community involvement is a foundational element of restorative justice.⁴⁰ Whereas the conventional system often isolates justice as a matter between the state and the offender, restorative justice views harm as indicators of broken relationships within a broader social context.⁴¹ Through practices like community-building circles and restorative conferences, restorative justice mobilizes communities to collectively support healing, accountability, and prevention.⁴²

The expansive use of restorative practices is particularly relevant in fields like elder justice, where harm often arises within complex relational and caregiving dynamics.⁴³ A broader restorative practices framework offers a foundation for fostering client empowerment and community responses, elements that are critical in addressing and preventing elder abuse.

III. Restorative Justice in Elder Abuse Cases

The nature and dynamics of elder abuse may be ill-suited to a traditional justice approach. By definition, elder abuse happens within the context of a relationship of trust.⁴⁴ Most frequently a family member is the person causing harm.⁴⁵ Additionally, there is often an interdependent relationship between the person causing harm and the person experiencing harm, in which the person causing harm provides some level of caregiving or

³⁵ Daye Gang et al., *supra* note 25, at 3204.

³⁶ Julia Bradshaw et al., *Intimate Partner Violence Survivors' Perspectives on Coping With Family Court Processes*, 30(1) VIOLENCE AGAINST WOMEN 101, 117 (2024).

³⁷ Sasson & Allen, *supra* note 24, at 7.

³⁸ Michael McGee, *Why Punishment Doesn't Work to Produce Lasting Change*, NEV. SPECIALTY CT. CONF. 2 (Oct. 18, 2024), https://nvcourts.gov/_data/assets/pdf_file/0021/45426/Punishment_Handout_Nevada_Specialty_Court.pdf.

³⁹ ALISHA MORELAND-CAPUIA, TRAINING FOR CHANGE: TRANSFORMING SYSTEMS TO BE TRAUMA-INFORMED, CULTURALLY RESPONSIVE, AND NEUROSCIENTIFICALLY FOCUSED 263–291 (2019); David Newton, *Restorative Justice and Youthful Offenders*, FBI LAW ENFORCEMENT BULLETIN (Oct. 6, 2016), <https://leb.fbi.gov/articles/featured-articles/restorative-justice-and-youthful-offenders>.

⁴⁰ Paul McCold, *Restorative Justice: The Role of the Community*, INT'L INST. FOR RESTORATIVE PRAC. GRADUATE SCH. (Mar. 31, 1995), <https://www.iirp.edu/news/restorative-justice-the-role-of-the-community>.

⁴¹ MARK UMBREIT, & MARILYN ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE 1, 2 (2011).

⁴² *Id.*

⁴³ People who experience elder abuse are often dependent on the person causing them harm for some degree of daily care and assistance, even while the caregiver is also causing harm or a risk of harm. Simultaneously, the person causing harm may be dependent on the older adult for stable housing or financial support. See Jagmohan S. Jandu et al., *Elder Abuse*, NCBI BOOKSHELF (Oct. 6, 2024), <https://www.ncbi.nlm.nih.gov/books/NBK560883/>.

⁴⁴ Jeffrey E. Hall et al., *Uniform Definitions and Recommended Core Data Elements for Use in Elder Abuse Surveillance*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL, DIV. OF VIOLENCE PREVENTION (2016), <https://stacks.cdc.gov/view/cdc/37909>.

⁴⁵ See Ron Aciermo et al., *National Elder Mistreatment Study*, NAT'L INST. JUST. 44 (2009), <https://www.ojp.gov/pdffiles1/nij/grants/226456.pdf>.

companionship to the person experiencing harm.⁴⁶ Elder abuse, like other forms of family violence, is not a single event or occurrence, but a pattern of behavior that happens over time.⁴⁷ Numerous studies have identified cognitive impairment as a risk factor for abuse.⁴⁸ While methodological issues make studies of this demographic difficult, the rate of abuse experienced by this population has been found to be as high as five times the rate of older adults without cognitive impairment.⁴⁹

In light of these characteristics of elder abuse, it is not surprising that older adults who experience abuse are unlikely to report the harm to any professional, including law enforcement.⁵⁰ Older adults who have experienced harm caused by someone they care about do not want to subject that person to the manifold potential consequences of a criminal prosecution. Incarceration is the most common potential harm generally cited, but these harms also include the disruption, embarrassment and expense caused by arrest and subsequent court appearances as well as the impact of arrest and prosecution on employment and benefits.⁵¹ Additionally, as stated above, older adults often rely on the person who caused them harm for some degree of caregiving or companionship, which the older adult may not want disrupted or likely permanently ended by a criminal prosecution.⁵² In cases where an older adult is experiencing some degree of cognitive impairment, the impact of upsetting this arrangement may be even more acute, as it may be challenging for the older adult to navigate finding alternate sources of support and simply a change in routine may cause a functional decline.

Criminal prosecution often will not achieve justice as conceptualized by the older adult who experienced harm. Often, the older adult conceives of justice as providing assistance to the person who caused harm, which may come in many forms, including treatment for alcohol or drug misuse, mental health support, or assistance around employment or housing. When the older adult who experienced harm is cognitively impaired, assistance for the person who caused harm may involve addressing caregiver burden, behavioral symptom management, caregiver-recipient conflicts, or lack of sufficient resources.⁵³ The role of orders of protection in criminal proceedings is particularly illustrative of the gap between the perspective of an older adult victim as described above and that of the criminal justice system itself.⁵⁴ For example, in New York State, an order of protection barring the defendant from any contact with the victim is issued at the outset of a criminal proceeding as a matter of course.⁵⁵ This order will remain in effect throughout the life of the criminal prosecution, and often part of a negotiated settlement or a guilty verdict will be the issuance of a final order barring contact between the parties for a period of years.⁵⁶ This standard feature of the criminal justice process may be in direct contravention to the goals of the older adult who experienced harm, whose goal is to maintain a relationship with the person who caused harm, albeit one without the harmful pattern of behavior.

⁴⁶ Jagmohan S. Jandu et al., *Elder Abuse*, NCBI BOOKSHELF (Oct. 6, 2024), <https://www.ncbi.nlm.nih.gov/books/NBK560883/>.

⁴⁷ *Elder Abuse and Neglect in Search of Solutions*, AM. PSYCH. ASS'N 2 (2012), <https://www.apa.org/topics/aging-older-adults/elder-abuse.pdf>.

⁴⁸ See CLAUDIA COOPER & GILL LIVINGSTON, *ADVANCES IN ELDER ABUSE RESEARCH* 140 (Amanda Phelan, ed., 2020); Jennifer E. Storey, *Risk Factors for Elder Abuse and Neglect: A Review of the Literature*, 50 *AGGRESSION VIOLENT BEHAV.* 1, 6 (2020).

⁴⁹ See Reza Nemat-Vakilabad et al., *The Prevalence of Elder Abuse and Risk Factors: A Cross-sectional Study of Community Older Adults*, *BMC GERIATRICS* 1, 2 (2023).

⁵⁰ See Lifespan of Greater Rochester, Inc. et al., *Under the Radar: New York State Elder Abuse Prevalence Study*, N.Y. STATE OFF. CHILD. FAM. SERV. (May 2011), <https://ocfs.ny.gov/reports/aps/Under-the-Radar-2011May12.pdf>; see also Tony Rosen et al., *Radiologists' Training, Experience, and Attitudes About Elder Abuse Detection*, 207 *AM. J. ROENTGENOLOGY* 1210, 1210 (2016).

⁵¹ Lisa Nerenberg, *In Elder Abuse Cases, Restorative Justice Holds the Promise of Honoring Relationships*, 27 *DISP. RESOL. MAG.* 13, 15 (2021).

⁵² Mary Helen McNeal & Maria Brown, *Elder Restorative Justice*, 21 *CARDOZO J. CONFLICT RESOL.* 91, 91 (2019).

⁵³ Xinqi Dong et al., *Elder Abuse And Dementia: A Review Of The Research And Health Policy*, 33 *HEALTH AFF.* 642 (2024).

⁵⁴ An order of protection is a court order aimed at protecting survivors of violence and abuse and preventing further escalation. Orders of protection can be issued by both civil and criminal courts. They can contain a variety of different provisions including limits on contacting or being in physical proximity to the survivor, as well as orders to surrender firearms, orders to return a survivor's identifying documents or orders to refrain from certain actions towards the survivor. See Harry & Jeanette Weinberg Center for Elder Justice at the Hebrew Home at Riverdale & Project Guardianship, *Elder Abuse in Guardianship Cases: A Legal Resource Guide*, <https://theweinbergcenter.org/wp-content/uploads/2024/05/Elder-Abuse-in-Guardianship-Cases-A-Legal-Resource-Guide.pdf> (last visited May 28, 2026).

⁵⁵ N.Y. CRIM. PROC. LAW § 530.12(1) (McKinney 2025).

⁵⁶ *Id.* § 530.12(4)–(5).

Isolation is both a risk factor for elder abuse as well as a tactic used by people who cause harm to maintain power and control over an older adult.⁵⁷ Older adults who are socially isolated are more vulnerable to mistreatment when they have fewer social contacts, perhaps because the lack of other social supports causes them to increasingly rely, both emotionally and functionally, on the person causing them harm. Furthermore, as the person causing harm further isolates the older adult, the older adult has fewer opportunities to disclose abuse and seek help, allowing the abuse and its impact to grow more severe over time.⁵⁸ While little research has been done on social isolation among cognitively impaired older adults, there are indications that older adults with cognitive impairment are even more likely to be socially isolated and may have more difficulty accessing social networks,⁵⁹ particularly if someone is actively trying to prevent them from connecting with others.

The criminal justice system is not designed to address issues of social isolation or to increase community connection for victims of crime. In contrast, and as discussed in Part 1 above, restorative justice practices are fundamentally communal and address harm in the context of responsibility of and to the community.⁶⁰ Therefore, restorative practices may help to address not just the older adult's goal of re-establishing or reframing their relationship with the person who caused harm, but also their goal of reaffirming and strengthening community ties.

Finally, scholarship has assessed criminal justice policies allowing the state to act over the objection of older adult victims as rooted in ageist stereotypes about older adults.⁶¹ Professor Nina Kohn, in her article *Elder (In)Justice*, views this trend through a feminist lens, as an outgrowth of the mandatory arrest policies implemented in domestic violence cases.⁶² Just as there has been a recent backlash against these policies as not giving sufficient agency to mostly female domestic violence victims, Kohn argues there ought to be a reckoning with criminal justice policies around elder abuse and the degree to which they have been shaped by views of older adults as incapable of acting in their own best interests.⁶³ The rise of restorative justice practices, in both the domestic violence and now the elder abuse arenas, seem to be a part of that reckoning, by centering the goals of the victim in seeking justice.

When an older adult has been diagnosed with any degree of cognitive impairment, these ageist stereotypes may be even more difficult to combat.⁶⁴ This is the case both where an older adult does not wish to participate in a criminal justice proceeding, as described above, or conversely, where an older adult wishes to report abuse or testify in a criminal proceeding but whose credibility is questioned due to even mild cognitive impairment. The mere assertion of cognitive impairment may be sufficient to prevent an arrest in the first place or cause prosecutors to decide not to proceed with a case because they believe an older adult with cognitive impairment won't be able to provide evidence sufficiently credible to meet their burden of proof.⁶⁵ In these cases, the criminal justice system may be foreclosed even to those older adults who want to engage with it, because their credibility is questioned rather than assumed.

IV. Elder Restorative Justice Programs Currently in Operation

As discussed above, the unique and complex characteristics of elder abuse can be well-suited to a restorative justice approach. This Article will now examine several operational programs currently implementing

⁵⁷ Maria T. Brown & Mary Helen McNeal, *Addressing Elder Abuse: Service Provider Perspectives on the Potential of Restorative Processes*, 32 J. ELDER ABUSE & NEGLECT 357, 368 (2020); see also S. Duke Han & Laura Mosqueda, *Elder Abuse in the COVID-19 Era*, 68 J. AM. GERIATR. SOC. 1386, 1386 (2020).

⁵⁸ Storey, *supra* note 48, at 6.

⁵⁹ Pablo Galvez-Hernandez et al., *Primary Care-Based Interventions Addressing Social Isolation and Loneliness in Older People: A Scoping Review*, 12 BMJ OPEN 1, 2 (2022); see also Margalida Cardona & Pilar Andrés, *Are Social Isolation and Loneliness Associated with Cognitive Decline in Ageing?*, 15 FRONTIERS IN AGING NEUROSCIENCE 1, 1 (2023).

⁶⁰ Sasson & Allen, *supra* note 24, at 7.

⁶¹ Nina A. Kohn, *Elder (In)Justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 2 (2012).

⁶² *Id.*

⁶³ *Id.* at 21–22.

⁶⁴ *Id.*

⁶⁵ *Id.* at 13.

restorative practices within their elder abuse intervention services, including those services offered to older adults with cognitive impairment.

A. The Waterloo Restorative Justice Approaches to Elder Abuse Project/EART

The Waterloo Restorative Justice Approaches to Elder Abuse Project, initiated in Ontario, Canada in 2000, was a community-based initiative developed in response to growing recognition that the conventional legal system often fails to meet the complex needs of older adults experiencing abuse.⁶⁶ The initiative aimed to create safe spaces for older adults to rebuild trust and relationships, particularly where formal legal action felt too adversarial or inaccessible.⁶⁷ The project had several goals, including increasing reporting of abuse, developing and implementing restorative approaches, and developing capacity to navigate abusive situations.⁶⁸ The restorative justice aspect of the program operated through a partnership with Conflict Resolution Network Canada and Community Justice Initiatives.⁶⁹ These organizations facilitated restorative processes such as victim/offender mediation, community conferencing, and community peacemaking circles.⁷⁰ Referrals could be made by anyone involved in the incident, and participation was decided by the older adult.⁷¹ Trained facilitators met individually with participants to establish safety and readiness before bringing parties together.⁷²

In 2006, the program's name was changed to the Elder Abuse Response Team (“EART”) and began operating within the Waterloo Regional Police Service domestic violence unit.⁷³ The EART maintained restorative justice as its guiding philosophy, but was broadened to provide other means of resolution where restorative justice was not suitable.⁷⁴ This shift in services addressed previous program limitations by increasing the amount of referrals and better facilitating community partnerships.⁷⁵

B. The RISE Model

The RISE (Relational, Individual, Social, and Environmental) model was developed in 2017 through a collaboration between the Maine Department of Health and Human Services and the Elder Abuse Institute of Maine.⁷⁶ It was created to fill the gap in existing Adult Protective Services (“APS”) structures, which often close elder abuse cases after brief crisis intervention, without addressing long-term healing or relationship dynamics.⁷⁷ RISE integrates restorative justice as one component of the larger program, “Repair Harm.”⁷⁸ Its framework was created to support older adults, alleged harmers, and the broader social environment surrounding them.⁷⁹

Restorative practices in RISE include person-centered goal setting, victim-defined reparative planning, and voluntary engagement of accused harmers, when appropriate.⁸⁰ Older adults who were harmed may articulate

⁶⁶ Arlene Groh & Rick Linden, *Addressing Elder Abuse: The Waterloo Restorative Justice Approach to Elder Abuse Project*, 23 J. ELDER ABUSE NEGLECT 127, 128 (2011).

⁶⁷ *Id.*

⁶⁸ *Id.* at 129.

⁶⁹ Arlene Groh, *A Healing Approach to Elder Abuse and Mistreatment: The Restorative Justice Approaches to Elder Abuse Project*, CMTY. CARE ACCESS CTR. OF WATERLOO REGION (May 2003), https://www.elderjusticecal.org/uploads/1/0/1/7/101741090/healing_approach_elder_abuse_manual.pdf.

⁷⁰ *Id.* at 25.

⁷¹ *Id.* at 34.

⁷² *Id.* at 37–38.

⁷³ Groh & Linden, *supra* note 66, at 141.

⁷⁴ *Id.*

⁷⁵ *Id.* at 142–43.

⁷⁶ David Burnes et al., *RISE: A Conceptual Model of Integrated and Restorative Elder Abuse Intervention*, 63 GERONTOLOGIST 966, 967 (2023).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 970.

the harm, express needs, and help co-create restorative action plans.⁸¹ Those who caused harm are given the opportunity to acknowledge wrongdoing and commit to specific, meaningful steps to prevent future harm.⁸² These processes allow for adaptability and flexibility based on client safety, capacity, and relational dynamics, with an emphasis on self-determination.⁸³

C. The Weinberg Center for Elder Justice Restorative Steps Program

The Weinberg Center for Elder Justice at the Hebrew Home at Riverdale (“Weinberg Center”) was founded in 2005 to provide safe haven together with supportive services for older adults who are unsafe within their communities.⁸⁴ The program was created to fill a gap in services for older adults, whose needs cannot be met in domestic violence and homeless shelter system, both because of the inability of those systems to meet older adults’ medical or clinical needs and the lack of professionals working within those systems with expertise in the specific issues facing older adults who have experienced abuse.⁸⁵ The Weinberg Center is embedded within a continuum of care facility that provides both rehabilitation and nursing care, enabling the program to address the variety of complex medical and nursing needs for older adults in tandem with providing supportive elder justice services.⁸⁶ These services are provided by a multidisciplinary team of lawyers, social workers, and medical professionals and include legal services, mental health services, case management, and housing navigation.⁸⁷ At the core of their work is a commitment to person-centered, trauma-informed care, delivered through comprehensive, multidisciplinary services that assess and respond to each client’s unique needs.⁸⁸ The program is short-term, with the goal of working with each client to support their long-term housing goals.⁸⁹

Programs based on the Weinberg Center model have been launched throughout North America by grassroots professionals hoping to fill a similar gap in their own communities. In 2012, the Weinberg Center created the SPRiNG Alliance (Shelter Partners: Regional. National. Global.) as a professional network for current and nascent elder justice shelter programs focused on capacity building and technical assistance.⁹⁰ In 2024, the New York Academy of Medicine released a national, multi-site evaluation of the elder justice shelter intervention.⁹¹ The evaluation was funded by the federal government’s Administration on Community Living, as part of an effort to explore best practices in helping older adults who experienced harm to move from needing crisis-level services to community-based living with local supports.⁹² Findings from the report suggest that elder justice shelter programs can contribute to greater safety, improved physical and mental health, better social connections, less recurring APS involvement, and greater long-term stability for older adults in need of services.⁹³ There are currently 28 communities who participate in the SPRiNG Alliance with shelter programs in various stages of development.⁹⁴

⁸¹ *Id.*

⁸² *Id.* at 971.

⁸³ *Id.*

⁸⁴ MALYA LEVIN ET AL., AN ELDER ABUSE SHELTER MODEL FOR INTEGRATED HEALTH SYSTEMS AND BEYOND: THE HARRY AND JEANETTE WEINBERG CENTER FOR ELDER JUSTICE 3 (2022).

⁸⁵ See Bonnie Brand et al, *A Safe Place to Heal: Addressing the Emergency Shelter and Transitional Housing Needs of Older Survivors of Abuse*, AMAZON WEB SERVICES 8–10, <https://s3-us-east-2.amazonaws.com/ncall/wp-content/uploads/2018/12/04154916/NCALLEmShelterTransHousing.pdf> (last visited June 2, 2026); see also National Domestic Violence Hotline, *When Abuse Tarnishes the Golden Years*, THE HOTLINE, <https://www.thehotline.org/resources/domestic-abuse-in-older-adults/> (last visited Apr. 20, 2026).

⁸⁶ SIERRA SMUCKER ET AL., EVALUABILITY ASSESSMENT OF THE WEINBERG CENTER FOR ELDER JUSTICE’S ELDER ABUSE SHELTER SERVICES 9 (2023).

⁸⁷ *Id.* at 2.

⁸⁸ *Id.* at 9.

⁸⁹ Levin et al., *supra* note 84, at 3.

⁹⁰ ELISA FISHER ET AL., NEED, ACCESS, IMPACT, AND OPPORTUNITIES: FINDINGS FROM A MULTI-SITE EVALUATION OF ELDER JUSTICE SHELTERS IN THE U.S. (2024).

⁹¹ *Id.* at 1.

⁹² *Id.* at 2, 41.

⁹³ *Id.* at 12, 40.

⁹⁴ *Id.* at 2.

Guided by clients' voices, the Weinberg Center recognized that some older adults may seek to reconnect with people who have previously caused them harm.⁹⁵ In response, the Weinberg Center launched its Restorative Steps initiative, an innovative protocol influenced by restorative justice principles.⁹⁶ This initiative is a framework that offers an organized yet flexible process for exploring reconnection and is grounded in the values of autonomy, dignity, safety, and healing.⁹⁷ It utilizes careful clinical and ethical inquiry with respect for a client's lived experience, and the belief that healing can include the restoration of previously harmful relationships in a context that allows for boundaries that balance safety and connection.⁹⁸

As discussed above in Section 2, restorative justice principles may be responsive to the unique needs of older adults with cognitive impairment who have experienced mistreatment. People who cause harm to older adults employ unique tactics when the older adult has cognitive impairment.⁹⁹ These tactics can compound the societal biases against older adults with cognitive impairment to effectively substitute the judgments and beliefs of others for those of the older adult. With a nuanced understanding of both elder abuse and cognitive impairment, it is possible to center the healing of the older adult via a restorative process even where there is significant cognitive impairment. This process requires expert investigation of the circumstances of the mistreatment as well as expert listening to and observation of the older adult in order to truly prioritize their wishes.

Recognizing these principles and drawing on their extensive expertise, the Weinberg Center expanded its Restorative Steps initiative to include a specialized restorative protocol primarily for older adults with dementia and other neurocognitive diseases, including those with court-appointed guardians.¹⁰⁰ This adapted framework recognizes the impact of cognitive changes on communication, memory, and judgment, while still centering the individual's values, historical preferences, and past and present expressed desires.¹⁰¹ This approach allows for both the continued protection and safety of their clients, while acknowledging the complex emotional and relational dynamics often present in elder abuse cases. The Restorative Steps Guiding Protocol for Clients with Cognitive Impairment is attached to this article as an appendix.

The protocol is intended for use by professionals in determining whether a restorative approach is appropriate in a particular case and if so, what framework would support a restorative process in order to minimize risk while prioritizing meaningful connection in accordance with the client's goals. The protocol begins by determining who initiated the request for contact, whether it is the client, family, guardian, or the person who caused harm. This initial question immediately prioritizes the client's perspective on reconnecting with the person who caused harm by seeking to distinguish other parties who might be initiating or supporting reconnection and to acknowledge their voices and motivation as distinct from that of the client. In centering the client's own voice when considering the possibility of a restorative approach, the protocol considers the client's expressed values, emotions, and preferences in a variety of ways that are not solely limited to verbal expressions. Cognitive impairment often affects an older adult's ability to communicate even strongly held wishes and preferences, which have the potential to significantly impact quality of life.¹⁰² Therefore, if a client cannot verbalize or express their desires around reconnecting with a person who has caused them harm, the Weinberg Center will still consider a

⁹⁵ SMUCKER ET AL., *supra* note 86, at 14.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Tactics used to assert power and control over an older adult with cognitive impairment include: isolation; withholding care; minimizing, denying or blaming the older adult for the mistreatment; threats and intimidation; asserting cognitive privilege over the older adult or to third parties; threatening the older adult's physical environment by disorganizing belongings or making the home unsafe; manipulating the relationship by eliciting strong feelings or fabricating a familial or historical connection; and legal maneuvering via coerced transfers of funds or property or coerced or unduly influenced advance directives or estate planning. See *Power and Control Wheel for People with Dementia*, THE WEINBERG CENTER FOR ELDER JUSTICE (2021), https://theweinbergcenter.org/wp-content/uploads/2022/02/Power-and-Control-Wheel-FINAL_Weinberg-Center.pdf.

¹⁰⁰ See App. 1.

¹⁰¹ See App. 1.

¹⁰² SIERRA SMUCKER ET AL., AN INITIAL EVALUATION OF THE WEINBERG CENTER FOR ELDER JUSTICE'S SHELTER MODEL FOR ELDER ABUSE AND MISTREATMENT 2, 18 (2021).

request for contact from another party by analyzing what the client's position would be on the issue.¹⁰³ The Weinberg Center draws on its expertise around elder abuse and cognitive impairment and considers past statements, known values, and input from trusted community members, family members, or their guardian relating to the client's desire for contact, in an effort to understand the client's wishes beyond verbal expression.¹⁰⁴

The protocol then prompts assessment of the client's baseline cognitive impairment and dementia related symptoms and the impact these symptoms may have on the older adult's ability to demonstrate insight into the harm that occurred, as well as to assess what would be meaningful to the older adult given their present cognition. This assessment helps professionals prepare for how to most appropriately plan with the client for restored contact, both in terms of therapeutic support before, during, and after a reconnection, as well as safety planning, which may require the support of professionals, as well as family and other social supports.

This process also considers the severity and history of the harm that occurred, any ongoing legal matters or court proceedings, both criminal and civil, and the emotional and physical risks involved in contact. The protocol is completed by a multidisciplinary team of attorneys, social workers and medical professionals, who all bring their respective professional expertise as well as knowledge and perspective of the particular case to bear on answering the questions posed by the protocol. At the conclusion of the analysis, if it is determined that a restorative approach can be attempted, a collaborative safety plan is developed with the client, family members, community supports, or guardian prior to initial contact. Based upon all the information gathered through the protocol, specific parameters for the visit are crafted which prioritize the client's clinical needs and the goal of maximizing their capacity, while also considering the specific history of the harm that occurred. The protocol also includes steps for monitoring initial visits and evaluating the emotional impact on the client to help inform phases for continued contact. The case study below, which describes how the protocol was used to initiate a restorative process for a client with a court-appointed guardian, illustrates the benefits of this program for older adults with cognitive impairment who have experienced harm.¹⁰⁵

This program benefits greatly from the controlled environment offered by a continuum of care facility and the constant professional presence which can be utilized to supplement safety planning and support. The degree to which the parameters of this protocol might be transferable to community settings is being explored.

V. Emerging Trends in the Use of Restorative Justice in Elder Abuse Cases

A. Ms. M's Story - A Restorative Approach in a Guardianship Case

Ms. M is a 75-year-old who lived in the townhouse she owned with her adult son for approximately two decades. She receives a significant pension in addition to Social Security benefits. In recent years, Ms. M began to exhibit signs of cognitive decline and was ultimately diagnosed with vascular dementia. Initially, her son assumed caregiving responsibilities, however concerns were raised by Ms. M's family about his ability to meet her complex care needs, citing his long-standing substance misuse.

In the fall of 2021, Adult Protective Services (APS) received a referral from NYPD for Ms. M after she was found wandering alone, disoriented, nearly an hour from her home. The assigned APS caseworker sought to connect Ms. M with essential services, including assistance with Medicaid planning and in-home care. However, these efforts were repeatedly obstructed by her son, as he would not provide needed financial documents, and refused home health aide services for his mother.

Further concerns emerged regarding financial exploitation, as it was believed Mr. S was misappropriating his mother's funds to support his continued substance use. In response, APS encouraged the son to engage in treatment through a structured day program, so he could continue to support his mother at home and to prevent him from using her funds. Despite these efforts, the son did not appear to actively participate in treatment and began evading the program altogether.

¹⁰³ See App. 1.

¹⁰⁴ See App. 1.

¹⁰⁵ See *infra* Part 4(A).

Subsequently, APS received anonymous photos that depicted patterned bruising on Ms. M's arms, legs and neck. When APS, accompanied by NYPD, conducted a home visit, they inquired about the injuries on Ms. M. Despite her dementia symptoms, Ms. M was able to articulate that her son had been the one who injured her. Due to significant safety concerns, Ms. M was admitted to a local hospital for evaluation. During her hospital stay, her son was permitted to visit Ms. M, but this was quickly ended after Mr. S gave his mother a marijuana edible in the hospital, which resulted in her experiencing increased paranoia and aggression.

Given Ms. M's cognitive impairment and concerns for her safety, the hospital filed a guardianship petition under New York Mental Hygiene Law § 81.08. Ms. M's niece was appointed as her temporary guardian and sought to have her admitted to the Weinberg Center Safe Haven Program. Initially, no contact was allowed between Ms. M. and her son, even though the Article 81 final order listed the son as a person entitled to visitation.¹⁰⁶ Ms. M's niece and guardian opposed this visitation, and the Weinberg Center assisted her in obtaining an order of protection in family court. During this proceeding, the son appeared in court while seemingly intoxicated and never produced evidence of participation in a substance misuse treatment program, which was a precondition of any sort of visitation with Ms. M. under the order of protection ultimately issued by the family court. After the family court order expired, Ms. M's son made a motion in the guardianship proceeding, requesting visitation with his mother in accordance with the final order in the Article 81 guardianship proceeding. In his motion, the son asserted that he was now sober and employed, and was now committed to rebuilding a safe relationship with his mother.

This motion and the son's representation of changed circumstances prompted the Weinberg Center professionals to initiate use of the Restorative Steps protocol. Engaging with the protocol focused the professionals on Ms. M's history of devotion to her son, who she maintained a close relationship with despite his long history of alcohol misuse. The protocol also underscored the fact that although Ms. M was unable to directly express her present wishes around visits with her son due to her confusion and significant impairment, she was generally quite social and responded positively to visits from family and friends.

Based on the analysis, it seemed to the professionals that to deny Ms. M the opportunity to engage with her son now that he was sober and seeking to connect with her would contravene her long-standing values, priorities and wishes. The Weinberg Center's multidisciplinary professional team engaged with the guardian around this conclusion, and the guardian was open to creating a plan for visitation with careful boundaries. The team then began to develop an individualized safety plan. The guardian had already marshalled Ms. M's assets, so financial exploitation was no longer a concern. The team agreed that initial visits ought to take place in a public area with supervision. The team also agreed that Ms. M's son would need to sign a written agreement acknowledging the parameters of the visits and acknowledging he would not bring Ms. M any food or otherwise interfere with her medical care. Ms. M's son was also required to provide periodic evidence of his continued participation in a substance misuse treatment program.

The initial visit was supervised by Ms. M's attorney as well as her son's attorney. Ms. M seemed quite happy to see her son. When she first saw him, she reached out toward him. She had a bright affect throughout the visit and continuously attempted to engage him in conversation. She was monitored closely during and after the visit for potential signs of distress such as pacing, agitation or tearfulness, and did not exhibit any. Subsequent visits were supervised by the Weinberg Center multidisciplinary professional team. At each one, Ms. M seemed very positively impacted by seeing her son.

Mr. S continued to demonstrate his renewed commitment to his personal growth and relationship with his mother. Through the Restorative Steps process and by witnessing his mother in an appropriate care environment, he began to acknowledge the harm he caused and expressed deep remorse for his actions. Determined to make meaningful changes, Mr. S articulated a clear goal: to prove to his mother and family that he is capable of long-term stability and is responsible for making amends.

¹⁰⁶ N.Y. MENTAL HYGIENE LAW § 81.16(c)(6) (McKinney 2025).

After six months of this, the visitation parameters were changed so explicit supervision was no longer required. Under the adjusted terms, Ms. M's son was required to schedule visits with the Weinberg Center professionals. These visits were to take place during normal business hours, Ms. M's son was to check in with the Weinberg Center upon arrival and the visits were to be held only in public areas. The visits are ongoing and Ms. M. continues to engage positively with her son and demonstrate enjoyment of his visits, while Mr. S continues to maintain his sobriety and stability.

B. Restorative Justice in Guardianship or Conservatorship

As the case study above demonstrates, individuals with cognitive impairment can respond positively to the use of restorative justice in guardianship or conservatorship proceedings. Under the 2017 Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, a “guardian”¹⁰⁷ is defined as someone appointed by a court to make personal decisions on behalf of an individual and a “conservator”¹⁰⁸ is defined as someone appointed by a court to make decisions with respect to the property or financial affairs of an individual. Many states only use one of these terms, with a guardian responsible for both the person and property or a conservator responsible for both.¹⁰⁹

The Uniform Act further provides the basis for appointing a guardian or conservator for an adult as:

(A) the respondent lacks the ability to meet essential requirements for physical health, safety, or self-care because the respondent is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making; and (B) the respondent's identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative¹¹⁰

While the Act does not specifically define “capacity” or “incapacity,”¹¹¹ it takes both functional and cognitive elements, as well as an individual's needs, into consideration when determining whether an individual with cognitive impairment should be appointed a guardian or conservator.¹¹² Such elements can also be taken into consideration when guiding the process of restorative justice.

The elder justice models previously discussed provide support for using restorative justice in guardianship and conservatorship proceedings, including when the individual is experiencing mild or significant cognitive impairment.¹¹³ For example, the RISE model assists older adults, with cognitive impairment and who have been harmed, with expressing their needs and goals through a RISE Advocate who consults other trusted individuals and substitute decision-makers to help guide the restorative process.¹¹⁴ Similarly, the Weinberg Center's Restorative Steps program includes clients with cognitive impairment and centers their approach around the client's expressed values, emotions, and preferences, including past statements, known values, and input from family members, appointed guardians and conservators, or others if the client cannot verbalize or express their values, wishes or preferences.¹¹⁵

¹⁰⁷ UNIF. GUARDIANSHIP, CONSERVATORSHIP & OTHER PROTECTIVE ARRANGEMENTS ACT § 102(9) (UNIF. L. COMM'N 2017).

¹⁰⁸ *Id.* § 102(5).

¹⁰⁹ See, e.g., CONN. GEN. STAT. § 45a-650(f)–(g) (2025); N.Y. MENTAL HYG. LAW § 81.02(a); FLA. STAT. § 744.102(9) (2025); CAL. PROB. CODE § 1801(c) (West 2025).

¹¹⁰ UNIF. GUARDIANSHIP, CONSERVATORSHIP & OTHER PROTECTIVE ARRANGEMENTS ACT § 301(a).

¹¹¹ There has been a recent shift toward defining “capacity” in a way that reflects its potential to fluctuate over time and across contexts. For example, the Uniform Health-Care Decisions Act of 2023 adopted a more individualized standard for assessing “capacity.” Section 3 emphasizes an individual's abilities and limitations and recognizes supported decision-making, while Sections 4 through 6 provides guidance on how capacity determinations should be made. In comparison, most guardianship statutes (like Indiana's) typically define “incapacity” by listing conditions that may prevent decision-making, such as “mental illness, infirmity, substance use, incarceration, duress, fraud, or undue influence.” See UNIFORM HEALTH-CARE DECISIONS ACT (UNIF. L. COMM'N 2023); see also IND. CODE § 29-3-1-7.5 (2025).

¹¹² UNIF. GUARDIANSHIP, CONSERVATORSHIP & OTHER PROTECTIVE ARRANGEMENTS ACT § 301 cmt.

¹¹³ See *id.* prefatory note.

¹¹⁴ Burnes et al., *supra* note 76, at 968.

¹¹⁵ SMUCKER ET AL., *supra* note 86, at 14.

The 2022 National Guardianship Standard of Practice¹¹⁶ also provides support for using restorative justice after a guardian or conservator has been appointed. NGA Standard 7 for Decision Making requires guardians “to identify and advocate for the person’s goals, needs, and preferences.”¹¹⁷ Under this standard, if the person is unable to express their goals, needs, or preferences, the guardian is required to seek input from others familiar with the person to determine what the person would have wanted.¹¹⁸ Only when the person’s goals, needs, or preferences cannot be ascertained may the guardian make a decision in the person’s best interests.¹¹⁹

Additionally, there is support that individuals experiencing severe cognitive impairment can participate in the process of restorative justice.¹²⁰ One recent study found that while many providers expressed concerns about the participation of older adults who have advanced cognitive impairment or impaired capacity, some believed that with proper supports, older adults with cognitive impairments could participate in the restorative process.¹²¹ Even if they were unable to actively participate in the restorative process, the providers believed that cognitively impaired individuals could still benefit from outcomes negotiated on their behalf.¹²² This demonstrates that adults with severe cognitive impairments under guardianship and conservatorship could still benefit from restorative justice through their participation or the use of supports.

Some states have identified the benefits of restorative justice in guardianship and conservatorship proceedings. For example, Nebraska¹²³ permits contested guardianship and conservatorship cases to be accepted for restorative justice programs. As restorative justice practices become more common, it is anticipated that the number of states permitting restorative justice in guardianship and conservatorship proceedings will increase.¹²⁴ In the meantime, the RISE Model, Weinberg Center for Elder Justice’s Restorative Steps Program, and 2022 NGA Standards of Practice provide excellent guidance and support for the use of restorative justice in guardianship and conservatorship proceedings, including when individuals are experiencing mild or significant cognitive impairment.

VI. Conclusion

Restorative justice approaches are emerging as promising practices to address cases of elder mistreatment. Restorative approaches are particularly responsive to the gaps within the criminal justice response to elder abuse. As this article has shown, these gaps may be further exacerbated when the older adult who experienced harm has cognitive impairment. Therefore, restorative approaches should be considered in these cases, even where the older adult has a court appointed guardian or conservator. This article advocates for more clinical and legal work to design programmatic elements that expressly address the unique needs of older adults with cognitive impairment within a restorative justice framework, and ultimately, more research to evaluate the impact of these programs.

¹¹⁶ NAT’L GUARDIANSHIP ASS’N, STANDARDS OF PRACTICE § 4(VI) at 6 (5th ed. 2022).

¹¹⁷ *Id.* § 7(I), at 8.

¹¹⁸ *Id.* § 7(I)(C), at 9.

¹¹⁹ *Id.* § 7(I)(D), at 9.

¹²⁰ Burnes et al., *supra* note 114, at 970.

¹²¹ Maria T. Brown & Mary Helen McNeal, *Addressing Elder Abuse: Service Provider Perspectives on the Potential of Restorative Processes*, 32 J. ELDER ABUSE & NEGLECT 357, 371 (2020).

¹²² *Id.*

¹²³ NEB. REV. STAT. § 25–2911(1)(f) (2025).

¹²⁴ THALIA GONZÁLEZ ET.AL, STATE RESTORATIVE JUSTICE LEGISLATION 2020–2025: CONFIDENTIALITY, ADMISSIBILITY & PRIVILEGE 1 (2025).

Appendix 1: RESTORATIVE STEPS

GUIDING PROCEDURES FOR CLIENTS WITH COGNITIVE IMPAIRMENT

Guiding Statement: The Weinberg Center supports the autonomy of older adults living with dementia and works to facilitate their sense of dignity and respect. Through this commitment, we seek to advance the equity and inclusion of residents with cognitive impairments by including them in our Restorative Steps initiative. Professionals must balance accountability and flexibility when implementing this protocol.

Statement of Purpose: The Weinberg Center recognizes clients may want to reconnect with those who have caused them harm as part of their healing process. A trauma-informed approach to working with older adults who have experienced abuse, including those living with cognitive impairment, requires centering clients' goals and values. To assess a desire for contact with a third party who may have caused harm, we will utilize the following protocol.

Step 1: What was the client's cognitive baseline when coming into shelter? How does the resident's cognitive impairment impact their decision making and thinking?

Step 2: Who initiated the desire for contact?

- Resident
- Family
- Weinberg Center
- Guardian
- HHAR (Hebrew Home at Riverdale)
- PWACH (person who allegedly caused harm)
- Other _____

(a) If Resident initiated:

- How did the resident express this desire?
- What is the resident asking for?
- What are the associated emotions involved with the desire for contact?
- How long has the client been at the Weinberg Center?

(b) If Family Initiated:

- How does the resident respond to the request?
- Which family member is requesting this?
- What is being requested?
- Why is this request being made?
- What are the past and present family dynamics?

(c) If Weinberg Initiated:

- What is being requested?
- Why is this request being made?
- How does the resident respond to this request?

Appendix 1: RESTORATIVE STEPS

(d) If Guardian Initiated:

- What is being requested?
- Why is this request being made?
- How does the resident respond to this request?

(e) If HHAR Initiated:

- What is being requested?
- Why is this request being made?
- How does the resident respond to this request?

(f) If PWACH Initiated:

- What is being requested?
- Why is this request being made?
- How does the resident respond to this request?

Step 3: Addressing reasons for Weinberg Center admission:

- What were the prior relationship dynamics between the client and PWACH?
- Does the client identify that harm was done?
- What is the client's narrative of events and how do they view the person who caused them harm?

Step 4: Case background relating to PWACH:

- Psychiatric Hx
- Substance Use Hx
- Criminal Hx
- Prior interactions with the Hebrew Home staff
- Severity of harm to resident
- Active legal case/legal case pending
- Orders of Protection
- Supports and protective factors

Step 5: If client is not able to verbalize request consider:

- Historical preferences, wishes, or values
- Past Statements by the client
- Family perceptions
- Level of care:
 - Rehab
 - Skilled
 - Memory Care
 - Palliative
 - Hospice

Assessment: Should Restorative Steps protocol proceed? If yes, continue to Step 6.

Appendix 1: RESTORATIVE STEPS

Step 6: Safety assessment

- Consider risks to client
 - What are the current risks?
- Consider other residents
 - What is the risk of harm to other residents?
 - What is the risk of harm to roommate?
- Consider other professionals (Doctor, Nurse, CNA, Social workers, Activities, Rehab, Security)
 - What is the risk of harm to staff?
 - Elicit feedback from staff prior to initial meeting.
 - Notify staff about upcoming meeting location and time.
- Safety planning
 - Identify existing protective factors and explore additional supports that can be implemented.
 - Develop a comprehensive safety plan that addresses potential risks and considers the reasons for shelter.
 - Establish a mutually agreed-upon objective for the meeting to promote collaboration and support positive outcomes.

Step 7: Communicate potential risks (physical, emotional, financial, sexual, and spiritual) and benefits to relevant stakeholders.

- Does the resident understand what risks and benefits are involved?
- Explore and communicate risks and benefits to Guardian or family.

Step 8: Establish Client Boundaries

- What are the client's boundaries?
- If client is unable to communicate their boundaries, include supportive community members, e.g. family, guardian, etc. in discussion.
- What are the PWACH boundaries?

Step 9: Initial meeting with PWACH and Weinberg Center Social Worker

- Review of visitation agreement and discussion of client's boundaries.

Step 10: Considerations prior to first visit between client and PWACH:

- The time and length of first visit is pre-scheduled, with the visit lasting a maximum of 1 hour. Refer to restorative steps visitation policy.
- Setting of visitation considerations:
 - Accessibility
 - Public space or private space
 - Sensitivity or reactivity to environment

Step 11: Initial meeting with PWACH and client:

Appendix 1: RESTORATIVE STEPS

- Meet with PWACH and escort them to meeting location
- Monitor clients verbal and non-verbal reaction to seeing PWACH
- Remain within direct vicinity to observe the entirety of the meeting
- Escort PWACH off the premise after the meeting has concluded
- Check in after first visit and evaluate impact on client
- Evaluate if a second meeting will occur
- Consider modifying restriction list

Step 12: Response to boundary violations:

- Boundary violation by resident:
 - Staff will assess the severity of the boundary violation and determine the appropriate intervention, which may include verbal redirection, documentation, temporary suspension of visits, or involvement of security.
- Boundary violation by PWACH:
 - Staff will assess the severity of the boundary violation and determine the appropriate intervention, which may include verbal redirection, documentation, temporary suspension of visits, or involvement of security.
- If termination of visits is appropriate or requested by client, proceed to step 13.

Step 13: Termination of visits:

- Evaluate potential impact to the client if visits are terminated:
 - Physical
 - Emotional
 - Psychological
 - Spiritual
- Provide appropriate referrals or supports as needed (e.g., mental health resources, adapted safety planning, or spiritual care).