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The Perplexities of Age and Power

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The elderly population in the United States is growing dramatically and is expected to reach over seventy-two million, or twenty percent of the citizenry, by 2030. But serious legislative and regulatory gaps leave the surging population of older adults with many unmet needs. Many Americans are aware of the Social Security and Medicare funds' financial woes. This Article emphasizes that these challenges are only the tip of the iceberg. In addition, the elderly face under-funded Older Americans Act programs, unaffordable long-term care, inadequate driving regulations that fail to identify and protect at-risk drivers, and a significant shortage of geriatricians, among other problems.

Neglect of the aging population in the legal and policy arenas makes little sense. Public choice theory, which teaches that all political actors act in their own self-interest, would suggest that support for the elderly should be a high priority because all individuals face the prospect of aging and caring for elderly loved ones. Relying in part on this theory, the Article develops new insights as to why seniors fail to use their potential political strength to advocate forcefully for beneficial policy changes and why aging issues do not resonate with policymakers, voters, and the media. The Article argues that it is human nature to avoid contemplating one's future decline, and thus we choose to ignore the challenges that lie ahead. Elected officials, in turn, respond to voters' priorities and conclude that focusing on eldercare matters will not win them votes or yield political pay-offs. The media, for their part, prefer sensational stories to those that engage in in-depth exploration of social problems' causes and solutions.

At its core, the Article is a call to action, as highlighted in its recommendations section. Aging and caregiving for elderly loved ones are not special-interest matters but matters that will affect all of us. Preparing for the swelling older population is not only in everyone's best interest, but is also a regulatory, social, and political necessity.

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INTRODUCTION

It is no secret that the elderly constitute a growing segment of the population in the United States. According to government statistics, in 2014, 14.5% of the population, or 46.2 million people, were age sixty-five and over.[1] The sixty-five and older population is projected to expand to 72.7 million by 2030 and to represent over twenty percent of total U.S. residents.[2] This dramatic population growth will be attributable to the "baby boomers," individuals born between 1946 and 1964, who began turning sixty-five in 2011.[3] Those who are eighty-five years old and older numbered 5.9 million in 2012.[4] Experts predict that by 2060, the eighty-five and older population will swell to 19.7 million.[5]

Older adults have many pressing needs that the American legal, health care, social services, and other systems fail to meet.[6] These needs will only grow as the elderly population expands. Just recently the media have focused attention on two significant matters: the dramatic rise in drug prices and the potential insolvency of the Social Security and Medicare funds.[7] The law cannot remedy all of the problems that American seniors face, but there is an increasingly urgent need to implement appropriate regulatory and statutory interventions. This paper, in large part, is a call to action. It urges both voters and elected officials to focus with much greater intensity and commitment on the challenges of aging in America.

Part I of this Article provides background information on the elderly population's demographics and care needs. Part II highlights several areas of critical need for the elderly population that could be improved through legal interventions.[8] It emphasizes that the problems are not restricted to the Social Security and Medicare funding shortfalls of which many Americans are aware.

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[1] United States Census Bureau, *FFF: Older Americans Month: May 2016* (Apr. 15, 2016), http://www.census.gov/newsroom/facts-for-features/2016/cb16-ff08.html.

[2] JENNIFER M. ORTMAN ET AL., AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES: POPULATION ESTIMATES AND PROJECTIONS 2-3, 6 (2014), https://www.census.gov/content/dam/Census/library/publications/2014/demo/p25-1140.pdf.

[3] *Id*. at 1.

[4] *Id*.

[5] United States Census Bureau, *supra* note 1.

[6] *See generally*, SHARONA HOFFMAN, AGING WITH A PLAN: HOW A LITTLE THOUGHT TODAY CAN VASTLY IMPROVE YOUR TOMORROW (2015).

[7] Katie Thomas, *Drug Prices Keep Rising Despite Intense Criticism*, N.Y. TIMES (Apr. 26, 2016), *available at* http://www.nytimes.com/2016/04/27/business/drug-prices-keep-rising-despite-intense-criticism.html?_r=0; Nick Timiraos, *Social Security, Medicare Face Insolvency Over 20 Years, Trustees Report*, WALL ST. J., June 22, 2016, *available at* http://www.wsj.com/articles/social-security-medicare-trust-funds-face-insolvency-over-20-years-trustees-report-1466605893.

[8] See *infra* Part II.

Instead, the challenges are wide-ranging and multi-layered. For example, programs promulgated under the Older Americans Act are significantly under-funded.[9] Professional long-term care, in the form of in-home aides, assisted living, and nursing homes, is unaffordable for many people.[10] State governments fail to identify and protect elderly motorists who are at risk of unsafe driving.[11] In addition, the older population faces a serious shortage of geriatricians who are specially trained to address the elderly's medical problems and coordinate their care.[12] These are only a few of the many serious difficulties that American seniors currently face.

Because of their numbers and the high rate at which they vote,[13] older citizens potentially have a strong political voice and significant influence. In the 2016 "Brexit" vote, pensioners were largely responsible for deciding that the United Kingdom should leave the European Union.[14] This Article puzzles over why, despite their political power, senior citizens' needs for care and support do not seem to be a national priority in the United States.

Part III of the Article develops answers to this question.[15] First, it explores principles of public choice theory and offers a novel application of this theory to advocacy for the elderly.[16] The theory's central theme is that what motivates political actors, including legislators and voters, is their self-interest rather than concern for the common good. Thus, legislators pursue initiatives that they believe will most effectively secure votes in future elections.[17]

The Article analyzes why politicians do not perceive advocating for the elderly to be politically advantageous. It also assesses the strengths and weaknesses of advocacy organizations such as the AARP.

Second, Part III argues that human beings tend to avoid thinking about their own decline and find it impossible to imagine becoming frail and dependent. This tendency may contribute to the absence of aging matters from the political arena.[18]

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[9] *See infra* Part II.A.
[10] *See infra* Part II.B.
[11] *See infra* Part II.C.
[12] *See infra* Part II.D.
[13] *See supra* note 1 and accompanying text and *infra* notes 193-194 and accompanying text.
[14] See Simon Shuster, *The U.K.'s Old Decided for the Young in the Brexit Vote*, TIME, June 24, 2016, at http://time.com/4381878/brexit-generation-gap-older-younger-voters/.
[15] *See infra* Part III.
[16] *See infra* Part III.A.
[17] *Id*.
[18] *See infra* Part III.B.

Finally, Part III evaluates the role of the media.[19] It examines how the media portray the challenges that the elderly face and the extent to which the media have agenda-setting powers. It also considers why eldercare matters do not receive more frequent and prominent media coverage. The Article argues that the media prefer sensational stories about immediate crises to those that explore the causes of and solutions to social problems such as the unmet needs of the elderly.

Part IV outlines several recommendations to address the problems on which this Article focuses. These include interventions to make long-term care and long-term care insurance more affordable, to enhance the job satisfaction of professional caregivers, to improve the efficacy of driving regulations, to incentivize medical students to enter the field of geriatrics, and to educate the public, policymakers, and the media about the challenges of aging in America and the need for political advocacy for the elderly and their caregivers.

As many commentators have observed, the needs of the elderly are not a common topic of conversation in national policy circles. An article in the *New England Journal of Medicine* noted that Republican presidential candidates often attacked the Affordable Care Act during their 2016 primary campaigns, but no candidate paid serious attention to long-term care challenges.[20] The author then laments that "a major societal challenge looms without a policy roadmap to guide it."[21] Likewise, Representative Debbie Dingell emphatically states that "[t]o put the nation on a sustainable path, a national conversation needs to be initiated about long-term care in the United States and how to pay for it."[22] This Article aims to help launch such a conversation.

I. BACKGROUND: DEMOGRAPHICS AND CARE NEEDS

Does American society need to worry about the welfare of its elderly population? The answer is clearly yes. Americans generally live long past retirement, but all too many do so without adequate financial security, without sufficient assistance from loved ones, and in poor health.

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[19] *See infra* Part III.C.

[20] John K. Iglehart, *Future of Long-Term Care and the Expanding Role of Medicaid Managed Care*, 374 N. ENGL. J. MED. 182, 186 (2016) (further stating that "[a]lthough health care issues received considerable attention during 35 Democratic and Republican debates back before the 2008 election, not a single major debate question focused specifically on long-term care.").

[21] *Id*.

[22] Representative Debbie Dingell, *Policy Essay: The Wide Range of Challenges Facing Seniors* 52 HARV. J. ON LEGIS. 309, 325 (2015).

In 2013 life expectancy in the United States was 81.2 years for women and 76.4 years for men.[23] Life expectancy is an average that varies with age, among other factors, and thus individuals who have reached the age of sixty-five can expect to live even longer, because they have survived infancy, childhood, young adulthood and the many hazards that people face earlier in life.[24] Among those who are now sixty-five, women can expect to reach the age of eighty-four and men age eighty-one.[25]

As Americans age, their health problems multiply. Approximately ninety-two percent of older adults suffer from at least one chronic condition, and seventy-seven percent have at least two.[26] The most common conditions afflicting this population are hypertension, heart disease, diabetes, cancer, stroke, chronic bronchitis, emphysema, asthma, and kidney disease.[27]

Furthermore, in 2016, an estimated 5.4 million Americans suffered from Alzheimer's disease, and all but 200,000 of these were sixty-five and older.[28] Thus, fully eleven percent of individuals sixty-five and older had Alzheimer's disease. The figure is expected to rise to at least 13.8 million by 2050.[29] Moreover, Alzheimer's disease is only one form of dementia and accounts for only sixty to seventy percent of dementia cases.[30] At death, as many as one in three individuals is afflicted with dementia.[31]

Alzheimer's disease and other dementias were estimated to cost the United States $236 billion in 2016.[32] Much of the burden of caring for this population falls on family and friends. According to the Alzheimer's

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[23] Jiaquan Xu et al., *Deaths: Final Data for 2013*, 64 NAT'L VITAL STAT. REP. 1, 6 (Feb. 16, 2016), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf.

[24] Maggie Koerth-Baker, *Death of A Caveman: What Swedish Babies and the Stone Age Can Teach Us About Life Expectancy and Income Inequality*, N.Y. TIMES MAGAZINE, March 24, 2013, at 14. Other factors, such as obesity, smoking, and physical activity, affect longevity as well. *See* EILEEN M. CRIMMINS ET AL., EXPLAINING DIVERGENT LEVELS OF LONGEVITY IN HIGH-INCOME COUNTRIES 1-6 (2011), *available at* http://www.ncbi.nlm.nih.gov/books/NBK62369/pdf/Bookshelf_NBK62369.pdf.

[25] LAWRENCE A. FROLIK & LINDA S. WHITTON, EVERYDAY LAW FOR SENIORS 3 (2012).

[26] National Council on Aging, *Healthy Aging Fact Sheet* (2016), https://www.ncoa.org/resources/fact-sheet-healthy-aging/.

[27] Virginia M. Freid et al., *Multiple Chronic Conditions among Adults Aged 45 and Over: Trends Over the Past 10 Years*, NCHS DATA BRIEF, No. 100 (July 2012), *available at* http://www.cdc.gov/nchs/data/databriefs/db100.pdf.

[28] ALZHEIMER'S ASSOCIATION, 2016 ALZHEIMER'S DISEASE FACTS AND FIGURES 17 (2016), *available at* http://www.alz.org/documents_custom/2016-facts-and-figures.pdf.

[29] *Id*.

[30] World Health Organization, *Dementia: Fact Sheet*, (Apr. 2016), http://www.who.int/mediacentre/factsheets/fs362/en/.

[31] Alzheimer's Association, *2016 Alzheimer's Disease Facts and Figures*, http://www.alz.org/facts/ (last visited July 9, 2016).

[32] *Id*.

Association, over fifteen million Americans will tend to dementia patients in 2016, supplying an estimated 18.1 billion hours of unpaid care.[33]

Overall, older adults receive eighty-three percent of the help they need from unpaid caregivers[34] who provide $470 billion worth of care.[35] This means that many younger people, most often their middle-aged children bear the burden of eldercare while raising their own families and working to support them.

But increasingly, many individuals cannot receive free care from loved ones. Approximately twenty-six percent of seniors live alone.[36] More specifically, thirty-two percent of women and eighteen percent of men who are sixty-five or older live by themselves. This figure includes as many as 800,000 individuals with Alzheimer's disease.[37] Moreover, many people do not have children. In 2014, fifteen percent of women between the ages of forty and forty-four had never given birth. Because children are the most likely source of unpaid care, elderly individuals who are childless are especially likely to have unmet care needs.[38]

Sadly, many older adults cannot afford to pay for the help they need. In 2014, the yearly median household income of individuals who were sixty-five or older was $36,895, and in 2011, seniors' median net worth was $170,516.[39] Ten percent were living in poverty.[40] According to a 2015 report issued by the U.S. Government Accountability Office, "[a]bout half of households age fifty-five and older have no retirement savings (such as in a 401(k) plan or an IRA)."[41] The National Institute on Retirement Security found that American households had a median retirement savings account balance of just $2,500, and the median for

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[33] ALZHEIMER'S ASSOCIATION, *supra* note 28, at 27.
[34] ALZHEIMER'S ASSOCIATION, *supra* note 28, at 32.
[35] Allison K. Hoffman, *Reimagining the Risk of Long-Term Care*, 16 YALE J. HEALTH POL'Y L. & ETHICS 239, 246 (2016).
[36] Renee Stepler, *Smaller Share of Women Ages 65 and Older Are Living Alone* (Feb. 18, 2016), http://www.pewsocialtrends.org/2016/02/18/smaller-share-of-women-ages-65-and-older-are-living-alone/.
[37] Alzheimer's Association, *2012 Alzheimer's Disease Facts and Figures Released Today*, http://www.alz.org/documents_custom/public-health/alzheimers_association_public_health_update_march_2012.pdf, (last visited July 9, 2016).
[38] Gretchen Livingston, *Childlessness* (May 7, 2015), http://www.pewsocialtrends.org/2015/05/07/childlessness/.
[39] United States Census Bureau, *supra* note 1.
[40] *Id*.
[41] U.S. Government Accountability Office, *Retirement Security: Most Households Approaching Retirement Have Low Savings* (May 2015), http://www.gao.gov/assets/680/670153.pdf.

those nearing retirement was a mere $14,500.[42] Such meager savings make it extremely difficult for retirees to cover their out-of-pocket medical costs, which often reach several thousands of dollars per year,[43] to say nothing of long-term care costs, such as nursing homes, assisted living, and in-home care.[44] Notably, American seniors struggle to pay for their health care to a greater extent than seniors in many other developed countries.[45] A 2014 Commonwealth Fund study explained that "[d]espite Medicare coverage, older Americans have less protection from health care costs, primarily because of high deductibles and copayments, especially for pharmaceuticals, and limitations on catastrophic expenses and long-term care coverage."[46]

II. THE INADEQUACY OF GOVERNMENT PROGRAMS, LAWS, AND REGULATIONS

The elderly population in the United States suffers many unmet needs. This part analyzes several that illustrate their broad range and seriousness: the dearth of funding for Older Americans Act programs, the very high cost of long-term care, weak regulatory efforts to identify and protect at-risk elderly drivers, and the shortage of geriatric medical care. In each of these areas, older adults would benefit greatly from additional regulatory or statutory interventions. This Part also discusses international human rights doctrine and notes that it has not elevated protection of the elderly's rights to the same status as protection of the rights of other vulnerable populations.

A. The Older Americans Act

A key resource for the aging population is the Older Americans Act of 1965 (OAA),[47] which supports a variety of services. With the help of the Department

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[42] NARI RHEE & ILANA BOIVIE, THE CONTINUING RETIREMENT SAVINGS CRISIS, NATIONAL INSTITUTE ON RETIREMENT SECURITY 1 (2015), *available at* http://www.nirsonline.org/storage/nirs/documents/RSC%202015/final_rsc_2015.pdf.

[43] RICHARD W. JOHNSON AND CORINA MOMMAERTS, WILL HEALTHCARE COSTS BANKRUPT AGING BOOMERS? 11 (2010), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412026-Will-Health-Care-Costs-Bankrupt-Aging-Boomers-.PDF; (predicting that seniors' average out-of-pocket annual expenditures for medical care would be $4,116 in 2020 and $7,832 in 2040).

[44] *See infra* Part II.B.

[45] Robin Osborn et al., *International Survey of Older Adults Finds Shortcomings in Access, Coordination, and Patient-Centered Care* (November 19, 2014), http://www.commonwealthfund.org/publications/in-the-literature/2014/Nov/International-Survey-of-Older-Adults (surveying 15,000 people age 65 or older in Australia, Canada, France, Germany, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and the United States, and finding that U.S. seniors "have the most trouble paying medical bills.").

[46] *Id*.

[47] 42 U.S.C §§ 3001-3057 (2010), reauthorized by the Older Americans Act Reauthorization Act of 2016, Pub. L. 114–144 (Apr. 19, 2016).

of Health and Human Services' Administration on Aging, the law provides for grants that enable state, local, and private agencies to furnish services such as Meals on Wheels, transportation, home care, aid for family caregivers, and disease prevention/health promotion programs.[48] But OAA funding has remained flat for almost a decade, even as the elderly population has steadily grown, and in 2016, it totaled only $1.915 billion.[49] By comparison, President Trump famously asserted that the cost of a new Air Force One will be over $4 billion, and the air force's more modest estimate is a five-year cost of $2.8 billion.[50] Because of inadequate funding, a mere five percent of eligible adults (those sixty and older) benefit regularly from OAA-funded programs, and fourteen percent benefit occasionally.[51] To illustrate the point, if all family caregivers were to seek financial assistance from the National Family Caregiver Support Program, which is funded at approximately $150 million per year, they would receive just three to ten dollars per person.[52] In the words of one commentator, "the government safety net for seniors has been fraying for years, victimized by woeful underfunding."[53]

B. Long-Term Care

Seventy percent of those who are currently approaching the age of sixty-five will require assistance with activities of daily living for, on average, three years.[54] Many will obtain assistance from loved ones, but others will turn to professional providers. In 2015, over 8.3 million people paid for long term care services.[55] These services are available from five primary sources: nursing homes, residential care communities such as assisted living, home health agencies,

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[48] NATIONAL HEALTH POLICY FORUM, OLDER AMERICANS ACT OF 1965: PROGRAMS AND FUNDING 4-8 (2012), http://www.nhpf.org/library/the-basics/Basics_OlderAmericansAct_02-23-12.pdf.

[49] Ravi B. Parikh et al., *The Older Americans Act at 50 – Community-Based Care in a Value-Driven Era*, 373 N. ENG. J. MED. 399, 400 (2015); KIRSTEN J. COLELLO & ANGELA NAPILI, OLDER AMERICANS ACT: BACKGROUND AND OVERVIEW 5 (2016), *available at* https://www.fas.org/sgp/crs/misc/R43414.pdf.

[50] *Trump Says Air Force One Costs Are "Out of Control." By How Much?*, FORTUNE, Dec. 10, 2016, http://fortune.com/2016/12/10/air-force-one-actual-cost/.

[51] NATIONAL HEALTH POLICY FORUM, *supra* note 48, at 5-6.

[52] Howard Gleckman, *One Cheer for Congress Renewing The Older Americans Act*, FORBES, Apr. 20, 2016, *available at* http://www.forbes.com/sites/howardgleckman/2016/04/20/one-cheer-for-congress-renewing-the-older-americans-act/#126e89ea477e.

[53] *Id*.

[54] LINDSAY GOLDMAN & ROBERT WOLF, HOW CAN STATES SUPPORT AN AGING POPULATION? ACTIONS POLICYMAKERS CAN TAKE 13 (2016), *available at* http://www.milbank.org/uploads/documents/MMF%20-%20NYAM%20Aging%20Report.pdf

[55] Family Caregiver Alliance, *Selected Long-Term Care Statistics* (January 31, 2015), https://www.caregiver.org/selected-long-term-care-statistics.

hospices, and adult day service centers.[56] It is estimated that by 2050 twenty-seven million individuals will need long-term care.[57] This increase is attributable both to the growth of the elderly population and to an anticipated decrease in the availability of unpaid caregivers—the latter because the population of those in the forty-five to sixty-four age range will shrink.[58]

1. Long-Term Care Costs

Long-term care services are extremely expensive, and patients often must pay for them out-of-pocket.[59] This part analyzes the various long-term care alternatives and their costs.

a. Skilled Nursing Facilities and Nursing Homes

Nursing homes are residential institutions that provide assistance with activities of daily living and other health-related services that are needed because of physical or mental impairments.[60] Many nursing homes are also certified by Medicare as skilled nursing facilities that provide care by licensed practitioners who are available 24 hours a day.[61] While many patients spend a few weeks or months in nursing homes to recover from surgeries or injuries, some become permanent residents, and they are among the most frail elderly.[62] Commonly, they are there because they have severe dementia, incontinence, behavioral problems, and/or no family.[63] Many view nursing homes as a choice of last resort for individuals who cannot live in any other setting, and commentators have often criticized the quality of care and quality of life in these institutions.[64]

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[56] U.S. Department of Health and Human Services, *Long-Term Care Services in the United States: 2013 Overview*, 37 VITAL & HEALTH STAT. viii-ix (2013), *available at* http://www.cdc.gov/nchs/data/nsltcp/long_term_care_services_2013.pdf (reporting 2012 numbers). There are approximately 15,700 nursing homes; 22,200 residential care communities, such as assisted living; 12,200 home health agencies; 3,700 hospices; and 4,800 adult day service centers.

[57] Family Caregiver Alliance, *supra* note 55.

[58] GOLDMAN & WOLF, *supra* note 54, at 13, 18 (predicting that "the unpaid caregiver support ratio [will] decline[] from 7:1 to 4:1."); Iglehart, *supra* note 20, at 184.

[59] *See* HOFFMAN, *supra* note 6, at 85-93.

[60] Marlo Sollitto, *What's the Difference Between Skilled Nursing and a Nursing Home?*, AGINGCARE.COM, https://www.agingcare.com/articles/difference-skilled-nursing-and-nursing-home-153035.htm (last visited Feb. 9, 2017); Medicaid.gov, *Nursing Facilities*, https://www.medicaid.gov/medicaid/ltss/institutional/nursing/index.html (last visited Feb. 10, 2017).

[61] Sollitto, *supra* note 60, Medicaid.gov, *supra* note 60.

[62] PAULA SPAN, WHEN THE TIME COMES: FAMILIES WITH AGING PARENTS SHARE THEIR STRUGGLES AND SOLUTIONS 149 (2009).

[63] *Id*. at 161 (2009).

[64] *Id*. at 149, Victoria Shier et al., *What Does the Evidence Really Say About Culture Change in Nursing Homes*? 54 THE GERONTOLOGIST S6, S6-7 (2014).

Nursing homes provide most of the long-term care that public insurance programs cover. Medicare coverage is available for Medicare-certified nursing facilities, but only to a limited extent.[65] To be eligible for Medicare coverage, patients must transfer to the facility after having spent at least three consecutive days as admitted patients in a hospital.[66] Some patients stay in hospitals "under observation," and observational status does not qualify them for subsequent nursing home coverage.[67]

Patients who meet Medicare requirements can receive 20 days of free care per benefit period and then pay a daily co-pay for days 21 to 100 (up to $161 per day in 2016), after which no Medicare funds are available until the next benefit period.[68] Medigap policies, which are private health insurance policies that individuals can purchase to supplement Medicare, cover the co-pay for days 21-100 but offer no further long-term care benefits.[69]

The median annual cost of a private room in a nursing home is over $92,000, and a semi-private room is over $82,000.[70] Nursing home residents obtain financial support not only from Medicare in limited circumstances, but also from another public program: Medicaid.[71] Medicaid, however, is available only to impoverished individuals; those with financial resources must "spend down" their assets to qualify for the program.[72] Detailed guidelines determine

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[65] *Id*. at 85-86.
[66] Centers for Medicare & Medicaid Services, *Your Medicare Coverage: Skilled Nursing Facility (SNF) Care*, https://www.medicare.gov/coverage/skilled-nursing-facility-care.html#2956 (last visited July 9, 2016).
[67] *Id*.
[68] Centers for Medicare and Medicaid Services, *2016 Medicare Costs* (last updated Dec. 2015), https://www.medicare.gov/Pubs/pdf/11579.pdf. Medicare explains the term "benefit period" as follows:

> A benefit period begins the day you're admitted as an inpatient in a hospital or [a skilled nursing facility (SNF)]. The benefit period ends when you haven't received any inpatient hospital care (or skilled care in a SNF) for 60 days in a row. If you go into a hospital or a SNF after one benefit period has ended, a new benefit period begins. ...There's no limit to the number of benefit periods.

Medicare.gov, *Glossary-B*, http://www.medicare.gov/glossary/b.html (last visited July 9, 2016).
[69] U.S. Department of Health and Human Services, *What is Covered by Health & Disability Insurance?*, http://longtermcare.gov/costs-how-to-pay/what-is-covered-by-health-disability-insurance/ (last visited July 9, 2016).
[70] Genworth Financial, *Annual Median Cost of Long Term Care in the Nation, Cost of Care Survey 2016* (June 22, 2016), https://www.genworth.com/about-us/industry-expertise/cost-of-care.html.
[71] Medicaid.gov, *Long-Term Services and Support*, https://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/long-term-services-and-supports.html (last visited July 9, 2016).
[72] U.S. Department of Health and Human Services, *Financial Requirements*, http://longtermcare.gov/medicare-medicaid-more/medicaid/medicaid-eligibility/financial-requirements/ (last visited July 9, 2016).

Medicaid eligibility, but typically, single people must have no more than $2,000 in "countable resources" (cash, financial accounts, stocks, bonds, and available assets in trust).[73]

Nevertheless, the majority of people residing in nursing homes are supported by Medicaid. This may be because those with financial means often prefer other alternatives such as home care.[74] According to the Kaiser Family Foundation, in 2014, 62.5% of nursing home residents were covered by Medicaid, 14.2% were covered by Medicare, and 23.3% paid from private sources.[75] Sadly, one study concluded that the median household wealth of individuals who lived in nursing homes for six months or more was only $5,518.[76] Arguably, there is no injustice in requiring individuals to exhaust their savings in order to pay for their long-term care, and society should not bear the cost until patients are impoverished. But many people who have worked very hard throughout their lives and take comfort and pride in having money to leave as an inheritance for their loved ones are devastated when they instead must hand over their life savings to nursing homes. Others forgo needed care and often suffer catastrophic consequences such as falling and breaking a hip when they are alone in a house that is no longer safe for them.

b. Assisted Living

The median cost of care in an assisted living facility is $3,628 per month or $43,536 per year.[77] These facilities allow residents to have their own apartments or rooms along with assistance in the form of meals in a dining room, cleaning services, personal care, activities, transportation, and more.[78] While they do not provide skilled nursing services, they can be a good option for frail seniors who can no longer live independently.[79]

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[73] *Id*.; U.S. Department of Health and Human Services, *Financial Requirements - Assets*, http://longtermcare.gov/medicare-medicaid-more/medicaid/medicaid-eligibility/financial-requirements-assets/ (last visited July 9, 2016).
[74] SPAN, *supra* note 62, at 149.
[75] The Henry J. Kaiser Family Foundation, *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 through 2014* (August 4, 2015), http://kff.org/report-section/nursing-facilities-staffing-residents-and-facility-deficiencies-facility-characteristics/.
[76] Sudipto Banerjee, *Effects of Nursing Home Stays on Household Portfolios*, EMPLOYEE BENEFITS RESEARCH INSTITUTE ISSUE BRIEF, NO. 372 (2012), p. 15, *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_06-2012_No372_NrsHmStys.pdf.
[77] *Id*.
[78] SPAN, *supra*, note 62, at 113-117 (2009).
[79] HOFFMAN, *supra* note 6, at 88; Lawrence A. Frolik, *Private Long-Term Care Insurance: Not the Solution to the High Cost of Long-Term Care for the Elderly*, 23 ELDER L. J. 371, 388-90 (2016).

Medicare does not offer reimbursement for care in assisted living facilities.[80] Most states offer partial Medicaid coverage for eligible low-income enrollees in assisted living residences.[81] However, not all assisted living communities accept Medicaid patients.[82]

c. In-Home Care

Many older adults prefer to remain at home rather than to move to an institutional setting such as an assisted living facility or a nursing home.[83] The national median hourly rate for an aide provided by an in-home care agency is twenty dollars.[84] Thus, an individual seeking round-the-clock care from aides would pay over $175,000 per year. In 2012 Americans spent an estimated $77.8 billion on supportive care provided at home.[85]

The terminology for home care varies and may include two different types of services. "Home health care" generally includes visits by licensed medical personnel providing skilled nursing or rehabilitation services, while "in-home care" includes only non-medical services such as companionship, assistance with activities of daily living (e.g. cooking, dressing, and bathing), driving, and medication reminders.[86]

Medicare pays for limited home care for homebound elderly people whose doctors approve care plans and who receive services from a Medicare-certified home health agency.[87] Services may include intermittent skilled

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[80] Medicare.gov, *What Are My Other Long-Term Care Choices?*, https://www.medicare.gov/what-medicare-covers/part-a/other-long-term-care-choices.html#collapse-4917 (last visited July 10, 2016).

[81] Paying for Senior Care, *Medicaid's Assisted Living Benefits: Availability and Eligibility*, https://www.payingforseniorcare.com/medicaid-waivers/assisted-living.html (last visited July 10, 2016); Ohio Department of Aging, *About Assisted Living*, https://aging.ohio.gov/services/assistedliving/ (last visited July 10, 2016).

[82] Paying for Senior Care, *supra* note 81.

[83] SPAN, *supra* note 62, at 38.

[84] GENWORTH, SUMMARY OF 2016 SURVEY FINDINGS (May 5, 2016), *available at* https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/131168_050516.pdf.

[85] Centers for Medicare & Medicaid Service, *National Health Expenditures 2012 Highlights*, http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/highlights.pdf (last visited July 10, 2016).

[86] *Id.*; Medicare.gov, *What's Home Health Care & What Should I Expect?* (2016), https://www.medicare.gov/what-medicare-covers/home-health-care/home-health-care-what-is-it-what-to-expect.html; Griswold Home Care, *Defining Non-Medical Home Care Services: Understanding Your Options*, http://www.griswoldhomecare.com/services/defining-home-care/#ixzz4CPmNheCY (last visited July 10, 2016).

[87] Medicare.gov, *Home Health Services*, https://www.medicare.gov/coverage/home-health-services.html (last visited July 10, 2016).

nursing, physical therapy, speech therapy, and occupational therapy.[88] Medicare does not pay for twenty-four-hour-a-day care at home, meal delivery, and homemaker services (e.g. cleaning and cooking) or personal care (e.g. dressing and bathing) for those who do not need skilled nursing.[89] In many states, Medicaid provides low income individuals with some degree of home care coverage.[90] Support may also be available through local programs, charities, or the Veterans Administration.[91]

d. Adult Day Care and Hospice Care

Adult day care provides individuals with activities, meals, recreation, and in some cases, health care and social services at an adult day care center.[92] Its average cost in the United States is sixty dollars per day.[93] Medicare typically does not pay for this service, though Medicaid does provide payment for eligible low-income enrollees.[94]

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[88] *Id*.
[89] *Id*.
[90] Tara Bahrampour, *D.C. Program Reflects National Trend Toward Moving Older Americans Out of Nursing Homes*, WASH. POST, January 2, 2014, *available at* http://www.washingtonpost.com/local/dc-program-reflects-national-trend-toward-moving-older-americans-out-of-nursing-homes/2014/01/02/8ac1a624-69c7-11e3-ae56-22de072140a2_story.html; U.S. Department of Health and Human Services, *State Medicaid Programs*, http://longtermcare.gov/medicare-medicaid-more/medicaid/ (last visited July 10, 2016); Kaiser Family Foundation, *Medicaid Benefits: Personal Care Services: 2012*, http://kff.org/medicaid/state-indicator/personal-care-services/ (last visited July 10, 2016).
[91] U.S. Department of Veterans Affairs, *Geriatrics and Extended Care: Homemaker and Home Aide Care*, http://www.va.gov/geriatrics/guide/longtermcare/homemaker_and_home_health_aide_care.asp (last updated June 17, 2016); NIHSeniorHealth, *Paying for Long-Term Care*, http://nihseniorhealth.gov/longtermcare/payingforlongtermcare/01.html (last visited July 10, 2016).
[92] A government website describes adult day care as follows:

> The goals of the programs are to delay or prevent institutionalization by providing alternative care, to enhance self-esteem, and to encourage socialization. There are two types of adult day care: adult social day care and adult day health care. Adult social day care provides social activities, meals, recreation, and some health-related services. Adult day health care offers intensive health, therapeutic, and social services for individuals with serious medical conditions and those at risk of requiring nursing home care.

Administration on Aging, *Adult Day Care*, http://www.eldercare.gov/Eldercare.NET/Public/Resources/Factsheets/Adult_Day_Care.aspx (last modified Oct. 15, 2015).
[93] AARP, *All About Adult Day Services*, http://www.aarp.org/relationships/caregiving-resource-center/info-10-2010/pc_all_about_adult_day_services.html (last visited July 10, 2016).
[94] National Adult Day Services Association, *Adult Day Services: The Most Cost-Effective Option in Long-Term Care Today* (Apr. 2015), http://www.nadsa.org/wp-content/uploads/2015/04/Adult-Day-Services-Most-Cost-Effective-Option-in-LTC-2015.pdf; Paying for Senior Care, *Paying for Adult Day Care and Adult Day Health Care*,

Hospices provide comfort care for terminally ill individuals in the last six months of life.[95] Patients typically receive care at home, but some are admitted to inpatient facilities, especially in their last weeks or days.[96] Medicare pays for hospice care, but it does not cover room and board for those in inpatient hospice units.[97]

e. The Bottom Line

Long-term care costs in the United States reached $219.9 billion in 2012 and are projected to skyrocket to $346 billion by 2040.[98] They represent 9.3 percent of all health care expenditures.[99] Medicaid paid for sixty-one percent of long-term care costs because so many individuals were impoverished by the time they needed care or spent down their assets and ultimately qualified for Medicaid coverage.[100] Long-term care costs put a significant strain on Medicaid's budget, almost a third of which is dedicated to these expenditures.[101]

Most of the costs not covered by Medicaid are paid by individuals out of private sources.[102] Thus, individuals who are not Medicaid-eligible frequently forgo needed care or rapidly exhaust their life savings because of extremely high out-of-pocket costs. In fact, almost one-fifth of seniors spend over $25,000 of their own money for long-term care before they die.[103] Recall that the median retirement savings for people nearing retirement is $14,500.[104] Consequently,

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https://www.payingforseniorcare.com/longtermcare/find_adult_day_care.html (last updated June 2016).

[95] Medicare.gov, *How Hospice Works*, https://www.medicare.gov/what-medicare-covers/part-a/how-hospice-works.html (last visited July 16, 2016); DEPARTMENT OF HEALTH AND HUMAN SERVICES, MEDICARE HOSPICE BENEFITS 4 (2016), *available at* https://www.medicare.gov/pubs/pdf/02154.pdf.

[96] Medicare.gov, *supra* note 95.

[97] DEPARTMENT OF HEALTH AND HUMAN SERVICES, *supra* note 95, at 7-9.

[98] Family Caregiver Alliance, *supra* note 55; NATIONAL HEALTH POLICY FORUM, NATIONAL SPENDING FOR LONG-TERM SERVICES AND SUPPORTS (LTSS), 2012 3 (2014), *available at* https://www.nhpf.org/library/the-basics/Basics_LTSS_03-27-14.pdf.

[99] NATIONAL HEALTH POLICY FORUM, *supra* note 98, at 1.

[100] *Id*., at 3. *But see* ERICA L. REAVES & MARYBETH MUSUMECI, MEDICAID AND LONG-TERM SERVICES AND SUPPORTS: A PRIMER (Dec. 15, 2015), http://kff.org/medicaid/report/medicaid-and-long-term-services-and-supports-a-primer/ (finding that long-term care expenditures in the U.S. totaled $310 billion, and that Medicaid covered 51% of those costs).

[101] *Id*., at 4; REAVES & MUSUMECI, *supra* note 100 (placing the figure at 28%); National Council on Aging, *The Critical Need for Long-Term Services and Supports Financing Reform* (March 2016), https://www.ncoa.org/wp-content/uploads/IB16-LTSS-Financing-Need-March.pdf (stating that "[t]here is a great risk that spending on LTSS will squeeze out other state spending priorities, such as education and basic health coverage for low-income individuals.").

[102] NATIONAL HEALTH POLICY FORUM, *supra* note 98, at 3.

[103] Family Caregiver Alliance, *supra* note 55.

[104] *See supra* note 42 and accompanying text.

individuals with high long-term care costs often find themselves impoverished and supported by Medicaid in nursing homes that are a choice of last resort.[105]

Many Americans are lucky enough to receive unpaid care from family and friends.[106] But such care also has significant costs, though these are absorbed by the caregivers. The costs can include physical and emotional strain, out of pocket costs, lost income because of time away from work, or stalled careers.[107]

2. Long-Term Care Insurance

Individuals who are concerned about potentially paying hundreds of thousands of dollars out of pocket for long-term care can attempt to insure themselves against this risk by purchasing long-term care insurance. Unfortunately, this option is unavailable or unaffordable for many and is often a bad choice even for those who are able to obtain it.[108]

Only about three percent of Americans have long-term care insurance policies.[109] Some who would be interested in purchasing policies are barred by strict eligibility criteria. For example, those with memory loss, mobility limitations, stroke histories, or even mild osteoporosis, may be deemed ineligible for coverage.[110]

For many others, long term care insurance is unappealing because of the policies' high cost compared to their benefits. Long-term care insurance policies cover nursing home stays, assisted living, adult day care, and home care, but different contract terms specify the conditions under which coverage is triggered.[111] Typically, coverage becomes available when the policy holder needs significant assistance with a minimum of two activities of daily living (e.g. bathing and dressing) because of physical limitations that are expected to last at least 90 days or because of severe cognitive impairment.[112] Before this point of

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[105] SPAN, *supra* note 78, at 113 (noting that "[n]obody wants to go to a nursing home, indispensable as they sometimes are; seniors and their families tend to shudder at the very phrase.").
[106] *See supra* notes 33-35 and accompanying text.
[107] Hoffman, *supra* note 35, at 272.
[108] *See generally*, Frolik, *supra* note 79, at 372.
[109]Iglehart, *supra* note 20, at 182.
[110] Kelly Greene, *Long-Term Care: What Now?*, WALL ST. J., March 9, 2012, *available at* http://online.wsj.com/articles/SB10001424052970203961204577269842991276650.
[111] Jeffrey R. Brown & Amy Finkelstein, *Insuring Long-Term Care in the United States*," 25 J. ECON. PERSPECTIVES 119, 122 (2011); Richard W. Johnson & Janice S. Park, *Who Purchases Long-Term Care Insurance*?, Urban Institute Older Americans' Economic Security No. 29 (March 2011), *available at* http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412324-Who-Purchases-Long-Term-Care-Insurance-.PDF.
[112] Johnson & Park, *supra* note 111.

advanced disability, the insurer will not reimburse policy-holders for their expenses even if they need significant help and hire professional caregivers.[113]

Policies generally have a variety of limitations. Most exclude coverage for an initial period of time, ranging from thirty to ninety days.[114] They also often restrict benefits to no more than three to five years, and only about one-quarter allow for benefits of unlimited duration.[115] In addition, most policies limit benefits to a maximum dollar amount per day, which will likely be lower than the daily cost of care.[116]

Of even greater concern is the extremely high cost of insurance premiums, which generally reach several thousand dollars per year. For example, the American Association of Long-Term Care Insurance states that a fifty-five-year-old individual may pay as much as $3,150 per year for a policy that will pay up to $365,000 if the person does not utilize benefits until the age of 85.[117] By age 85, however, the person will have paid $94,500 in premiums over thirty years, and that money may have grown substantially had it been invested wisely elsewhere. Moreover, the insured may die without ever qualifying for insurance coverage, and thus, the tens of thousands of dollars of premium payments will yield no financial benefit to them or their heirs.

It is also noteworthy that buyers have little choice in the long-term care insurance market. Today, as few as eighteen insurers nationwide offer this financial product.[118] Those that have stayed in the market often raise premium rates in order to remain profitable.[119]

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[113] *Id*.
[114] Frolik, *supra* note 79, at 393.
[115] *Id*. at 381; Brown & Finkelstein, *supra* note 111, at 125
[116] Brown & Finkelstein, *supra* note 111, at 125.
[117] American Association of Long-Term Care Insurance, *How Much Does Long Term Care Insurance Cost?*
Here Are Costs for 2015 for Leading Long-Term Care Insurers, http://www.aaltci.org/long-term-care-insurance/learning-center/long-term-care-insurance-costs-2015.php (last visited July 10, 2016).
[118] Iglehart, *supra* note 20, at 184. Some insurers are now offering hybrid long-term care policies in which either life insurance or an annuity is bundled with long term care coverage. Thus, the insurance product includes an investment component in the form of either an annuity or a death benefit. One challenge posed by these hybrid products is that they generally require very large initial premium payments, such as $50,000. Frolik, *supra* note 79, at 410-413; Enrique Zamora et al., *Long-Term Care Insurance: A Life Raft for Baby Boomers*, 26 ST. THOMAS L. REV. 79, 96 (2013).
[119] Kelly Greene, *Long-Term Care: What Now*?, WALL ST. J., March 9, 2012, *available at* http://online.wsj.com/articles/SB10001424052970203961204577269842991276650.

A growing number of commentators argue that contemporary long-term care policies are not a prudent investment for many or even most consumers.[120] According to one source, in light of the policies' high premiums and benefit restrictions, the typical policyholder can expect to receive only 68 cents in benefits for every dollar paid in premiums.[121] A law review article entitled *Private Long-Term Care Insurance: Not the Solution to the High Cost of Long-Term Care for the Elderly* provides a detailed critique of the limitations of these insurance policies.[122] Articles with titles such as *Long-Term Care Insurance: Less Bang, More Buck*[123] and *Why No One Can Afford Long-Term Care Insurance (and What to Use Instead)*[124] are reaching the popular press as well.

Congress attempted to remedy the long-term care insurance cost problem with the Community Living Assistance Services and Supports (CLASS) Act, which was part of President Obama's Patient Protection and Affordable Care Act of 2010 (ACA or Obamacare).[125] The law would have enabled the federal government to sell private long-term care insurance policies directly to the public.[126] This program, however, was abandoned in 2011 because it was deemed not to be financially viable.[127] In 2013, Congress created a bipartisan Commission on Long-Term Care that issued a report with twenty-eight recommendations for the improvement of long-term care in the United States.[128] However, the commission failed to formulate recommendation regarding the critical issue of financing because it could not reach consensus on this matter.[129]

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[120] See HOFFMAN, *supra* note 6, at 7-11.
[121] *Id*. at 126-27. For an accurate estimate, the calculation must take into account the present discounted values of premiums and benefits. The idea is that money that one has at present is worth more than money one will obtain in the future because it can earn interest or be invested in the interim.
[122] Frolik, *supra* note 79, at 393.
[123] Barbara Feder Ostrov, *Long-Term Care Insurance: Less Bang, More Buck*, KAISER HEALTH NEWS (March 17, 2016), http://khn.org/news/long-term-care-insurance-less-bang-more-buck/.
[124] Maryalene LaPonsie, *Why No One Can Afford Long-Term Care Insurance (and What to Use Instead)*, U.S NEWS & WORLD REP. (March 10, 2016), *available at* http://money.usnews.com/money/personal-finance/articles/2016-03-10/why-no-one-can-afford-long-term-care-insurance-and-what-to-use-instead.
[125] Community Living Assistance Services and Supports Act ("CLASS Act"), Pub. L. No. 111-148, 124 Stat. 148 (2010).
[126] Peter Kyle, *Confronting the Elder Care Crisis: The Private Long-Term Care Insurance Market and the Utility of Hybrid Products*, 15 MARQ. ELDER'S ADVISOR 101, 121-24 (2013);
[127] Letter from Secretary Sebelius to Congress about CLASS (October 14, 2011), *available at* http://www.ltcconsultants.com/articles/2011/class-dismissed/Sebelius-CLASS-Letter.pdf.
[128] UNITED STATES SENATE COMMISSION ON LONG TERM CARE: REPORT TO THE CONGRESS 35-77 (2013), *available at* http://ltccommission.org/ltccommission/wp-content/uploads/2013/12/Commission-on-Long-Term-Care-Final-Report-9-26-13.pdf.
[129] *Id*. at 60-62; Iglehart, *supra* note 20, at 185-86.

While the ACA did much to improve Americans' access to health insurance and health care, it did not ultimately address the problem of long-term care. Much work remains for federal and state legislatures to resolve the question of how Americans will meet their long-term care needs.

3. Caregivers' Job Satisfaction

Cost is not the sole barrier to receiving adequate long-term care. The poor working conditions that many caregivers face is another.

Home care aides are typically female and have no more than a high school education, and they are often underpaid and overworked.[130] Aides' average hourly wage in 2015 was $11.00, and their average annual salary was $22,740.[131] Their annual turnover rate is considerable, perhaps as high as sixty-five percent, and it is attributable to low pay, few benefits, stress, and injuries suffered while lifting and moving clients.[132] Caregiver unhappiness and recurrent staffing changes can be very distressing for the elderly, especially for people with dementia.[133] Workers who do not perceive caregiving as a promising long-term career may also be less devoted to their jobs and their clients. Consequently, a comprehensive solution to the long-term care problem in the United States must include consideration of the needs of the caregiver workforce.[134]

C. Driving

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[130] Healthcare Administration, *Shortage of Nurse Aides, Home Health Aides, and Personal-and-Home-Care Aides Projected*, http://www.healthcareadministration.com/shortage-of-nurse-aides-home-health-aides-and-personal-and-home-care-aides-projected/ (last visited July 10, 2016).

[131] United States Department of Labor Bureau of Labor Statistics, *Occupational Employment and Wages, May 2015, Home Health Aides*, http://www.bls.gov/oes/current/oes311011.htm (last modified March 30, 2016).

[132] Sarah Protlock, *Help Wanted (a Lot): Home-Health Aides*, WALL ST. J. (Aug. 22, 2014), *available at* http://www.wsj.com/articles/help-wanted-a-lot-home-health-aides-1408721457; Healthcare Administration, *supra* note 130. In some cases aides are required to sign non-compete agreements that restrict their ability to work for other home health agencies. Therefore, if they are dissatisfied with their particular jobs, they must either remain with the same employer despite their unhappiness or leave the industry altogether. *See* Ayesha Hardaway, *The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations*, 39 SEATTLE UNIV. L. REV. 957, 963-65 (2016).

[133] HOFFMAN, *supra* note 6, at 90; Carol Bradley Bursack, *What NOT to Do When Hiring Home Health Care*, AGINGCARE.COM, https://www.agingcare.com/articles/dont-make-these-mistakes-when-hiring-home-health-care-135896.htm, (last visited Feb. 5, 2017).

[134] *See* Hoffman, *supra* note 35, at 35 (explaining that higher wages would be very helpful, but on their own they are insufficient because of other sources of job dissatisfaction); Joseph White, *(How) Is Aging a Health Policy Problem?*, 4 YALE J. HEALTH POL'Y L. & ETHICS 47, 63 (2004) (stating that "[h]elping people to dress, eat, urinate, and defecate simply is not an attractive career. Dealing with individuals in various stages of dementia is trying.")

Long-term care is not the only area in which legislatures and regulators have been inattentive to the needs of the elderly. Driving is another neglected area, and in many cases it causes significant angst. The states generally fail to screen elderly drivers adequately, provide them with guidance as to the conditions under which it is safe for them to drive, and ensure that those who may pose a risk to themselves and others relinquish their licenses.

In 2014, there were 24.4 million licensed drivers in the United States who were seventy and older.[135] In fact, some people continue to drive even after they reach the age of 100; in 2013, Florida reported 455 licensed drivers who were one-hundred or older.[136]

As individuals age, a number of problems, such as cognitive decline, physical ailments, poor vision, and side effects from medications, can compromise their driving ability.[137] In 2014, over 5,700 older adults were killed and more than 236,000 were injured in car accidents.[138] By comparison, that same year 2,623 teenagers (ages 13-19) died in motor vehicle crashes, and the death rate for all age groups was 21,102.[139] The national annual injury rate is approximately 2.35 million.[140]

Happily, older drivers frequently engage in some degree of self-regulation. They are likely to wear seatbelts, to limit driving in bad weather and at night, to avoid driving long distances, and to drive sober.[141] Nevertheless, according to the Centers for Disease Control and Prevention (CDC), "[p]er mile traveled, fatal crash rates increase noticeably starting at ages 70-74 and are highest among drivers age 85 and older."[142] The American Medical Association and National Highway Traffic Safety Association add that "[o]n the basis of estimated annual

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[135] Insurance Institute for Highway Safety & Highway Loss Data Institute, *Older Drivers*, http://www.iihs.org/iihs/topics/t/older-drivers/qanda (last updated March 2016).

[136] Shelley Emling, *Study Shows Surprising Number of Drivers Over 100*, THE HUFFINGTON POST (September 23, 2013), http://www.huffingtonpost.com/2013/09/23/older-drivers_n_3975579.html.

[137] Centers for Disease Control and Prevention, *Injury Prevention & Control: Motor Vehicle Safety*, http://www.cdc.gov/motorvehiclesafety/older_adult_drivers/ (last updated Feb. 1, 2017).

[138] *Id*.

[139] Insurance Institute for Highway Safety & Highway Loss Data Institute, Teenagers, http://www.iihs.org/iihs/topics/t/teenagers/fatalityfacts/teenagers/2014 (last visited Feb. 5, 2017).

[140] Association for Safe International Road Travel, Annual United States Road Crash Statistics, http://asirt.org/initiatives/informing-road-users/road-safety-facts/road-crash-statistics (last visited Feb. 5, 2017).

[141] *Id*.

[142] *Id*. Nevertheless, according to the Centers for Disease Control and Prevention, "[t]he risk of motor vehicle crashes is higher among 16-19-year-olds than among any other age group." Centers for Disease Control and Prevention, *Teen Drivers: Get the Facts*, http://www.cdc.gov/motorvehiclesafety/teen_drivers/teendrivers_factsheet.html (last updated October 14, 2015).

travel, the fatality rate for drivers 85 and older is 9 times higher than the rate for drivers 25 to 69."[143] The CDC notes, however, that the high fatality rate is largely attributable to older people's frailty and inability to recover from serious injuries.[144]

In light of the high number of injuries and fatalities, it is surprising that states make only feeble efforts to scrutinize driver license renewal applications by elderly drivers. In 2016, nineteen states had shorter renewal periods for drivers older than a specific age, while eighteen states mandated that older drivers undergo vision testing more often.[145] Fifteen states and the District of Columbia required older drivers to renew their licenses in person, whereas younger drivers could do so by mail or online.[146] Only the District of Columbia required that physicians approve license renewals for older individuals (starting at age seventy), and only Illinois required a road test for seniors (those older than seventy-five at the time of renewal).[147]

Perhaps more troubling is the lack of structured mechanisms, beyond license renewals, by which states can identify individuals who are unsafe drivers. Only six states mandate that physicians report at-risk drivers to state authorities, though all states permit doctors to do so.[148] States vary as to whether they accept reports from family members, friends, or anonymous sources.[149] In addition, only about half the states are known to train law enforcement officers to recognize and report medically at-risk drivers.[150] Thus, many police officers who are called to the scenes of accidents involving elderly drivers simply ticket them and require

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[143] AMERICAN MEDICAL ASSOCIATION & NATIONAL HIGHWAY TRAFFIC SAFETY ASSOCIATION, PHYSICIAN'S GUIDE TO ASSESSING AND COUNSELING OLDER DRIVERS 5 (2nd ed. 2010) *available at*, http://www.aarp.org/content/dam/aarp/livable-communities/plan/transportation/older-drivers-guide.pdf.

[144] Centers for Disease Control and Prevention, *supra* note 137.

[145] Insurance Institute for Highway Safety, *Older Drivers: License Renewal Procedures*, at http://www.iihs.org/iihs/topics/laws/olderdrivers (last updated July 2016).

[146] *Id*.

[147] *Id*.

[148] AAA Foundation for Traffic Safety, *Physician Reporting of At-Risk Drivers*, http://lpp.seniordrivers.org/lpp/index.cfm?selection=reportingdrs1&orderby=abbv&sortorder=asc&country=USA (last updated June 6, 2016). The states are California, Delaware, New Jersey, Nevada, Oregon, and Pennsylvania.

[149] AAA Foundation for Traffic Safety, *Family & Friend Reporting of At-Risk Drivers*, http://lpp.seniordrivers.org/lpp/index.cfm?selection=reportingfamilyfriends1 (last updated June 6, 2016).

[150] AAA Foundation for Traffic Safety, *Law Enforcement Reporting of At-Risk Drivers*, http://lpp.seniordrivers.org/lpp/index.cfm?selection=lawenforcement (last updated June 6, 2016).

no follow-up even if the drivers seem confused or have histories of multiple recent collisions.[151]

Intervention, therefore, is left largely to families who often find themselves having to confront loved ones about driving with little support or guidance from government sources.[152] Such confrontations can be traumatic and cause lasting conflict and emotional distress if the elderly perceive their relatives as distrustful or disrespectful and as threatening their autonomy and well-being.[153] Unfortunately, in many locations, public transportation, which could help those who are robust enough to use it, is sorely inadequate or nonexistent. A report written in 2011 estimated that by 2015, more than 15.5 million older Americans would face poor transit access.[154] Thus, the cessation of driving can dramatically impact seniors' quality of life, including their ability to reach stores, pharmacies, or medical facilities, and their opportunities for social and intellectual interaction.[155]

Admittedly, there is uncertainty as to which regulations will make the roads safest. California pilot-tested a three-tier evaluation for anyone wishing to renew a driver's license.[156] The first tier screening consisted of a brief memory recall test, two vision tests, and the tester's observation of any visible physical limitations. The second tier consisted of a written test of driving knowledge. It also featured a Perceptual Response Test, designed to identify limitations in

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[151] *Id.* If a state is notified of an at-risk driver, it may intervene in a number of ways. State authorities will likely first consult the state's medical advisory board if one exists, the driver's physician, or another health care provider. Short of revoking the elderly person's license, the state may impose driving restrictions, such as prohibiting driving on high-speed roads, at night, or further than a certain distance from home. AAA Foundation for Traffic Safety, *Driver Medical Review Process / States WITH Medical Advisory Board (MAB)*, http://lpp.seniordrivers.org/lpp/index.cfm?selection=statesMAB (last updated June 6, 2016); AAA Foundation for Traffic Safety, *Driver Medical Review Process / States WITHOUT Medical Advisory Board (MAB)*, http://lpp.seniordrivers.org/lpp/index.cfm?selection=statesnoMAB (last updated June 6, 2016); AAA Foundation for Traffic Safety, *Types of Conditions or Restrictions on Licenses, Page 1*, http://lpp.seniordrivers.org/lpp/index.cfm?selection=restrictedlicensetypes1 (last updated June 6, 2016).

[152] HOFFMAN, *supra* note 6, at 63.

[153] *Id.* at 65.

[154] KEVIN DEGOOD ET AL., AGING IN PLACE, STUCK WITHOUT OPTIONS: FIXING THE MOBILITY CRISIS THREATENING THE BABY BOOM GENERATION 4 (2011), *available at* http://t4america.org/docs/SeniorsMobilityCrisis.pdf.

[155] AMERICAN MEDICAL ASSOCIATION & NATIONAL HIGHWAY TRAFFIC SAFETY ASSOCIATION, *supra* note 143, at 2.

[156] STATE OF CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, CALIFORNIA'S THREE-TIER DRIVING-CENTERED ASSESSMENT SYSTEM: OUTCOME ANALYSIS vi-vii (2011), *available at* https://www.dmv.ca.gov/portal/wcm/connect/616c71c6-9fc4-47ba-9cf5-dc34be28b3a9/S2-234.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=616c71c6-9fc4-47ba-9cf5-dc34be28b3a9.

perception and cognition that are relevant to driving, which California administered to those who failed Tier 1 testing or the Tier 2 written examination.[157] Individuals identified as at-risk drivers in the first two tiers were required to take a road test and undergo an educational intervention in Tier 3.[158] The state found no evidence that the program reduced crash risks among participants in general and older drivers in particular.[159] A study in Maryland, however, indicated that individuals who were seventy-eight and older and performed poorly on certain cognitive tests were twice as likely as other drivers to cause collisions.[160]

Researchers have also determined that the visual acuity tests that are currently performed are not effective in identifying drivers at risk for collision.[161] They speculate that "contrast sensitivity, visual field, processing speed, and divided attention tests" would be better screening tools.[162]

Regulators might hesitate to regulate elderly drivers more rigorously than others because of concerns about age discrimination. However, under the Equal Protection clause,[163] age discrimination is subject only to rational basis scrutiny.[164] Courts would likely find that increased injuries and fatalities among older drivers justify government intervention. In the alternative, states could apply stricter renewal standards and post-accident scrutiny to drivers of all ages in order to avoid potential Equal Protection violations, though this is a more costly option.

D. Geriatric Medical Care

Many older Americans suffer from multiple health problems.[165] Among them, millions are chronic pain patients.[166]

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[157] *Id*. at vi.
[158] *Id*. at vii.
[159] *Id*. at xvi.
[160] Karlene K. Ball et al., *Can High-Risk Older Drivers Be Identified Through Performance-Based Measures in a Department of Motor Vehicles Setting?*, 54 J. AM. GERIATR. SOC. 77, 81 (2006).
[161] Cynthia Owsley et al., *Vision and Driving*, 50 VISION RES. 2348, 2357 (2010).
[162] *Id*.
[163] U.S. CONSTIT. Amend. XIV (providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws.").
[164] Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to A Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 217-19 (2010).
[165] *See supra* notes 26-27 and accompanying text.
[166] Ivan R. Molton & Alexandra L. Terrill, *Overview of Persistent Pain in Older Adults*, 69 AM. PSYCHOL. 197, 197 (2014); American Academy of Pain Medicine, *AAPM Facts and Figures on Pain*, http://www.painmed.org/patientcenter/facts_on_pain.aspx (last visited June 26, 2016).

To treat their maladies, the elderly often visit a number of different specialists, including cardiologists, oncologists, rheumatologists, endocrinologists, psychologists, pain-management experts, and others. Studies have found that elderly patients see specialists more often than general internists, and up to a third see specialists but no primary care physicians at all.[167] According to one study, the elderly see an average of four different specialists a year.[168] Furthermore, according to the CDC, sixty-five percent of seniors take three or more prescription medications, and thirty-nine percent take five or more prescription drugs.[169]

Patients can receive expert, life-saving care from specialists. However, their care may also become fragmented and uncoordinated, with each specialist focusing only on her area of expertise and providing aggressive treatment for a single problem.[170] This approach, in turn, can lead to harmful interactions among different drugs, overly aggressive treatment that does not benefit the patient's overall health, or interventions that cause cognitive decline and other complications.[171]

A prudent approach to avoiding the adverse effects of care fragmentation is to have skilled geriatricians oversee and coordinate care for patients with multiple

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[167] Elizabeth J. Bragg et al., *The Development of Academic Geriatric Medicine in the United States 2005 to 2010: An Essential Resource for Improving the Medical Care of Older Adults*," 60 J. AM. GERIATR. SOC. 1540, 1543 (2012) (stating that "56% of all ambulatory visits by patients aged 75 and older in 2008 were to specialty care physicians"); Barbara Starfield et al., *Ambulatory Specialist Use by Nonhospitalized Patients in US Health Plans: Correlates and Consequences*, 32 J. AMB. CARE MANAGEMENT 216, 218 (2009).

[168] Starfield et al., *supra* note 167, at 222. *See also*, CLAUDIA GROSSMANN ET AL., ENGINEERING A LEARNING HEALTHCARE SYSTEM: A LOOK AT THE FUTURE 123 (2011), *available at* http://www.nap.edu/catalog/12213/engineering-a-learning-healthcare-system-a-look-at-the-future (stating that a "Medicare beneficiary sees a median of two primary care providers and five specialists per year").

[169] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., HEALTH, UNITED STATES, 2015 272 (2016), *available at* http://www.cdc.gov/nchs/data/hus/hus15.pdf#079 (using 2009-2012 data).

[170] Sandeep Jauhar, *One Patient, Too Many Doctors: The Terrible Expense of Overspecialization*, TIME (Aug. 19, 2014), *available at* http://time.com/3138561/specialist-doctors-high-cost/.

[171] HOFFMAN, *supra* note 6, at 68-70; CLAUDIA GROSSMANN ET AL., *supra* note 168, at 15 (quoting Johns Hopkins' Amy L. Deutschendorf as stating that "[p]atient care is now so fragmented, disorganized, and disconnected that safety and quality depends on the ability of patients and providers to communicate and work together more effectively").

medical problems.[172] Geriatricians are physicians with special training in evaluating and managing the health needs of older adults.[173]

Geriatricians can oversee and coordinate elderly patients' care, and they are attuned to subtle problems that often escape the attention of other specialists. These include deficiencies in "balance, gait, strength, hearing, vision, and memory" that can significantly impact an older adult's quality of life and portend illnesses to come.[174]

Dr. Atul Gawande, a surgeon and journalist, explains the need for geriatric specialists as follows:

> Most of us in medicine . . . don't know how to think about decline. We're good at addressing specific, individual problems: colon cancer, high blood pressure, arthritic knees. Give us a disease, and we can do something about it. But give us an elderly woman with colon cancer, high blood pressure, arthritic knees, and various other ailments besides – an elderly woman at risk of losing the life she enjoys – and we are not sure what to do.[175]

Unfortunately, the United States faces a grave shortage of geriatricians.[176] Currently, there are approximately 7500 certified geriatricians nationwide, or one for every 2,526 Americans who are seventy-five or older.[177] Because of the imminent growth of the elderly population and physicians' reluctance to specialize in geriatrics, experts anticipate that by 2030, the ratio will drop to one geriatrician for every 4,484 patients in this age group.[178] In 2013, only 319 physicians entered geriatric medicine fellowships, and of those, 203 graduated from medical schools outside the United States.[179]

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[172] Atul Gawande, *The Way We Age Now*, NEW YORKER (Apr. 30, 2007), *available at* http://www.newyorker.com/magazine/2007/04/30/the-way-we-age-now.
[173] Magaly Olivero, *Doctor Shortage: Who Will Take Care of the Elderly?*, U.S. NEWS & WORLD REP. (Apr. 21, 2015), http://health.usnews.com/health-news/patient-advice/articles/2015/04/21/doctor-shortage-who-will-take-care-of-the-elderly.
[174] Jonathan Peterson, *Where Are the Doctors You'll Need?*, AARP BULLETIN (Apr. 2016), at 9, 10.
[175] Gawande, *supra* note 172.
[176] Barbara Sadick, *A Remedy for the Looming Geriatrician Shortage*, WALL ST. J. (June 8, 2014), *available at* http://www.wsj.com/articles/a-remedy-for-the-looming-geriatrician-shortage-1402001802; John W. Rowe et al., *Preparing for Better Health and Health Care for an Aging Population*, 316 JAMA 1543, 1643 (2016) (decrying the inadequacy of the elder care workforce).
[177] American Geriatrics Society, *Frequently Asked Questions about Geriatrics*, http://www.americangeriatrics.org/advocacy_public_policy/gwps/gwps_faqs/ (last visited June 26, 2016).
[178] *Id*.
[179] *Id*. *See also*, John Y. Campbell et al., *The Unknown Profession: A Geriatrician*, 61 J. AM. GERIATR. SOC. 447, 447 (2013).

Not surprisingly, a primary reason for the dearth of geriatricians in the United States is financial. Despite their many years of education, geriatricians cannot expect to become wealthy. They are reimbursed largely by Medicare, which often pays physicians less than private insurance policies.[180] In 2010, the median salary of geriatricians in private practice was $183,523, whereas that of a neurologist was $249,867.[181] The comparatively low earning potential is justifiably a concern for many contemporary medical school graduates whose educational debts averaged $178,046 in 2014.[182] In addition, geriatricians face unpredictable work hours, patients with multiple and complex problems, and the prospect of managing chronic diseases rather than successfully curing them, which may be unappealing to many medical students.[183]

Dr. Heather Whitson of the Duke University School of Medicine warns that our nation is facing a crisis. She asserts that "[o]ur current health care system is ill equipped to provide the optimal care experience for patients with multiple chronic conditions or with functional limitations and disabilities."[184] The alarming shortage of geriatricians is another pitfall that cries out for attention.

E. Human Rights Doctrine

It is noteworthy that even in the human rights arena, the elderly have been somewhat neglected compared to other vulnerable populations.[185] Three cornerstone documents form the "Bill of Rights" in human rights doctrine: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.[186] Beyond the "Bill of Rights" are seven other core conventions: the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading

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[180] *Id*.; Olivero, *supra* note 173.
[181] American Geriatrics Society, *supra* note 177 (stating that the average general internist's salary was higher than a geriatrician's by $21,856); Bragg et al., *supra* note 167, at 1544.
[182] American Geriatrics Society, *supra* note 177.
[183] *Id*; Liz Seegert, *Aging Boomers Highlight Need for More Geriatric Specialists*, CONNECTICUT HEALTH I-TEAM (June 6, 2016), http://c-hit.org/2016/06/06/aging-boomers-highlight-need-for-more-geriatric-specialists/.
[184] Olivero, *supra* note 173.
[185] Marthe Fredvang & Simon Biggs, *The Rights of Older Persons: Protection and Gaps under Human Rights Law* 5, Brotherhood of St. Laurence and University of Melbourne Centre for Public Policy Social Policy Working Paper no. 16 (August 2012), *available at* http://social.un.org/ageing-working-group/documents/fourth/Rightsofolderpersons.pdf.
[186] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

Treatment or Punishment; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on the Rights of Persons with Disabilities; and the International Convention for the Protection of all Persons from Enforced Disappearance.[187]

None of these key international treaties focuses on the rights of older adults.[188] This is not to say that the elderly have been completely ignored by the United Nations (UN). Several non-binding "soft law" initiatives have been undertaken. In 1982, the World Assembly on Ageing adopted the Vienna International Plan of Action on Ageing.[189] Two decades later, the Second World Assembly on Ageing adopted the Madrid International Plan of Action on Ageing.[190] In the interim, in 1991, the UN General Assembly adopted resolution 46/91, the United Nations Principles for Older Persons.[191] Nevertheless, human rights advocates have noted the inequity among vulnerable populations and argued that the elderly merit a formal international treaty that focuses on protection of their rights.[192]

III. WHY ELDER MATTERS ARE NOT A POLITICAL PRIORITY

Based on their numbers and voting rates, seniors should be a population about whom politicians are particularly concerned. In 2014, there were 219.9 million eligible voters in the United States, out of which 44.1 million, or twenty percent, were sixty-five and older.[193] Among seniors, 59.4 percent voted in the 2014

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[187] International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S 3; Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S.3; International Convention for the Protection of all Persons from Enforced Disappearance, Dec. 20, 2006, 2716 UNTS 3. *See also* Fredvang & Biggs, *supra* note 185, at 9-10.

[188] Jaclynn M. Miller, *International Human Rights and the Elderly*, 11 MARQ. ELDER'S ADV. 343, 363 (2010).

[189] UNITED NATIONS, VIENNA INTERNATIONAL PLAN OF ACTION ON AGING (1983), *available at* http://www.monitoringris.org/documents/norm_glob/vipaa.pdf.

[190] UNITED NATIONS, MADRID INTERNATIONAL PLAN OF ACTION ON AGEING (2002), *available at* http://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf.

[191] United Nations Human Rights Office of the High Commissioner, *United Nations Principles for Older Persons*, G.A. Res. 46/91, Annex, U.N. Doc. A/RES/46/91/Annex (Dec. 16, 1991), *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx.

[192] Fredvang & Biggs, *supra* note 185, at 14-18; Miller, *supra* note 188, at 364.

[193] THOM FILE, WHO VOTES? CONGRESSIONAL ELECTIONS AND THE AMERICAN ELECTORATE: 1978–2014 2, 6 (2015), *available at* https://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf.

midterm elections, compared to 49.6 percent in the 45-64 age group, 37.8 percent in the 35-44 age group, and 23.1 percent in the 18-34 age group.[194]

One would think that elder matters would be high on the political agenda and that politicians would rush to offer and provide seniors with generous benefits. Yet, the concerns of the elderly are hardly foremost on voters' and legislators' minds. A Kaiser Health Tracking Poll conducted in January of 2016 identified the ten issues that most concerned voters in 2016. In their order of importance to voters they were: terrorism, the economy and jobs, cost of health care and health insurance, dissatisfaction with the government, the federal budget deficit, gun control, the situation in Iraq and Syria, the 2010 Health Care law, immigration, taxes, race relations, and climate change.[195] Even though the dearth of support for the elderly and their caregivers will affect almost all Americans, it was not recognized as a top ten issue by voters. As noted in a FrameWorks Institute report, "[o]lder adults have an enormous economic and social impact on American society — an impact that is often not well accounted for in our discourse, media and public policy."[196]

This Part first explores public choice theory as a partial explanation for why elder matters are not high on the list of priorities for either voters or politicians. It argues that politicians may not perceive promoting the welfare of the elderly as having sufficient pay-offs. It also examines the efficacy of advocacy groups such as the AARP. Next, this Part argues that both policymakers and voters neglect aging matters because they are unwilling to contemplate the prospect of their own decline. Finally, this Part examines the media's role in agenda setting and their limited interest in aging issues.

A. Public Choice Theory

Public choice theory is an economic theory used to explain the behavior of political actors. Its essential principles and application to elder matters are discussed below.

1. Principles of Public Choice Theory

Public choice theory is a well-regarded economic theory that posits that political actors, including legislators, are primarily motivated by their own self-

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[194] *Id*. at 5.

[195] Bianca DiJulio et al., *Kaiser Health Tracking Poll: January 2016* (January 28, 2016), http://kff.org/health-costs/poll-finding/kaiser-health-tracking-poll-january-2016/.

[196] ERIC LINDLAND ET AL., GAUGING AGING: MAPPING THE GAPS BETWEEN EXPERT AND PUBLIC UNDERSTANDINGS OF AGING IN AMERICA 5 (2015), *available at* http://www.giaging.org/documents/150501_gauging_aging_final_FrameWorks_report.pdf.

interest.[197] Accordingly, legislators have an incentive to provide benefits to voters in their districts or states in order to secure their votes.[198] For example, legislators might pursue expensive and inefficient "pork barrel" projects such as non-essential local infrastructure improvements even though money could be better spent elsewhere.[199]

A typical behavior in which legislators engage is called "logrolling."[200] Logrolling is vote trading whereby legislator A promises to vote for legislator B's pet project in return for B's vote for A's project of choice.[201] The constituents of both legislators will be pleased by the benefits of the pet projects even if these are objectively wasteful and irresponsible, and both legislators will be more optimistic about being re-elected.

Moreover, legislators tend to respond to organizations representing small groups with homogenous interests whose members have a high stake in policy outcomes and are thus passionate about them.[202] As an example, the farm lobby has succeeded in securing generous government subsidies.[203] Notably, the extremely powerful National Rifle Association (NRA) has a relatively small membership of five million individuals.[204]

By contrast, large groups, such as the elderly population, often have more diverse interests and experience difficulty in organizing to promote a particular cause.[205] In addition, members of large groups may hesitate to do the work of organizing and pursuing initiatives because other members will be able to free-ride and enjoy attained benefits without expending any effort themselves.[206]

Public choice theory also teaches that voters behave rationally when they do not invest effort in educating themselves individually about candidates or ballot

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[197] James B. Kau & Paul H. Rubin, *Self-Interest, Ideology, and Logrolling in Congressional Voting*, 22 J. L. & ECON. 365, 366 (1979); William F. Shughart II, *Public Choice*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2d ed. 2008), http://www.econlib.org/library/Enc/PublicChoice.html.
[198] Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 355 (1988).
[199] *Id*.
[200] Kau & Rubin, *supra* note 197, at 366; Tollison, *supra* note 198, at 354-55, STEARNS ET AL., *supra* note 206, at 26-28.
[201] Kau & Rubin, *supra* note 197, at 366; Tollison, *supra* note 198, at 354-55.
[202] *Id*. at 342; Shughart, *supra* note 197.
[203] Shughart, *supra* note 197.
[204] Christopher Ingraham, *Most Gun Owners Don't Belong to the NRA — and They Don't Agree with It Either*, WASH. POST (Oct. 15, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/15/most-gun-owners-dont-belong-to-the-nra-and-they-dont-agree-with-it-either/?utm_term=.c580909ce280.
[205] Tollison, *supra* note 198, at 342; Shughart, *supra* note 197.
[206] Tollison, *supra* note 198, at 342; Shughart, *supra* note 197; MAXWELL L. STEARNS ET AL., PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 14-15 (2009).

issues or do not vote at all.[207] The likelihood that a single person's vote will change the outcome of an election is vanishingly small. Thus, from an individual voter's perspective, investing considerable time in obtaining reliable information or even going to the polls at all is not worthwhile.[208] Consequently, voters may not dedicate themselves to learning which candidates are more likely to advocate for issues that are important to them and which candidates will improve their welfare.

2. ***Applying Public Choice Theory to Advocacy for the Elderly***

At first glance, public choice theory suggests that both policymakers and voters should prioritize support for the elderly out of self-interest. Everyone hopes for longevity and a good quality of life in later years, which means everyone should hope for plentiful and affordable long-term care, transportation, geriatric care, and other benefits. Moreover, many if not most adults will have elderly loved ones that require care, and the responsibilities of care-giving can be overwhelming without adequate support services.[209]

At the same time, however, public choice theory may partially explain why elder matters are not more of a legislative priority. Legislators likely do not perceive advocacy for the elderly as sufficiently promoting their own best interests. Senior citizens consist of tens of millions of individuals,[210] spread across the country, with diverse political views and interests. Therefore, they are not the type of small, homogenous interest group towards which politicians naturally gravitate.[211] Politicians may not believe that if they fight to pass a particular measure that benefits the elderly, they will, in return, secure the votes of most seniors in their district or state. Instead, seniors are likely to care more about other issues (e.g. terrorism or the deficit)[212] and to vote based on the candidates' positions on those matters or based on their party affiliation. Public choice theory also suggests that many voters will not study the complexities of elder issues and investigate candidates' positions regarding these matters. Doing so can be considered an inefficient use of time because a single individual's vote has only a minute impact on election outcomes.

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[207] Tollison, *supra* note 198, at 363; Shughart, *supra* note 197.
[208] Shughart, *supra* note 197.
[209] *See* Hoffman, *supra* note 35, at 271-275 (stating that "even if people take on caring for another with great generosity and love, long-term care is extremely demanding. Even in the best of circumstances, it will take a toll).
[210] *See supra* note 1 and accompanying text.
[211] *See supra* note 202 and accompanying text.
[212] *See supra* note 195 and accompanying text.

In fact, politicians may believe that advocacy for the elderly can backfire. Effectively tackling the challenges that this population faces will require considerable monetary investments. Increasing funding for OAA programs, making quality long-term care affordable, attracting clinicians to the field of geriatrics, and even developing appropriate mechanisms to identify at-risk drivers are all far from inexpensive propositions.[213] Recall that the CLASS Act, which had been passed as part of the Affordable Care Act in order to help Americans obtain long-term care insurance, had to be abandoned for financial reasons.[214] Politicians who support such initiatives in the current political climate may suffer relentless criticism for being fiscally irresponsible "tax and spend" advocates.

3. The AARP and Other Advocacy Organizations

Public choice theory suggests that the elderly should nevertheless have significant influence because they are represented by strong advocacy organizations, chief among which is the AARP.[215] The AARP is consistently listed among the top ten lobbyists in the United States.[216]

The AARP has an ambitious "Priorities Book" that covers a large number of issues.[217] Recently, it has been very active in the area of support for caregivers, helping twenty-one states pass the Caregiver, Advise, Record and Enable (CARE) Act.[218] This statute requires hospitals and rehabilitation facilities to do the following:

- Record the name of the family caregiver at the time an individual is admitted to the hospital;
- Provide family caregivers with adequate notice prior to hospital discharge; and

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[213] *See supra* Part II.
[214] *See supra* notes 125-127 and accompanying text.
[215] *See supra* notes 202-203 and accompanying text; AARP, *AARP*, http://www.aarp.org/ (last visited July 2, 2016).
[216] Michelle Leach, *10 Most Powerful Special Interest Groups in America* (July 2, 2014), http://listosaur.com/politics/10-powerful-special-interest-groups-america/ (listing AARP as the fourth most powerful interest group); Gerri Hastley, *10 of the Biggest Lobbies in Washington* (Apr. 26, 2011), http://www.businesspundit.com/10-of-the-biggest-lobbies-in-washington/.
[217] AARP, THE PRIORITIES BOOK: BUILDING A BETTER FUTURE 2015–2016 6 (2015), http://www.aarp.org/content/dam/aarp/about_aarp/aarp_policies/2015-05/AARP-Priorities-Book-2015-2016.pdf.
[218] Elaine Ryan, *The CARE Act: Helping Family Caregivers from Hospital to Home* (March 7, 2016), http://blog.aarp.org/2016/03/07/the-care-act-helping-family-caregivers-from-hospital-to-home/. *See e.g.*, Cal. Health & Safety Code §1262.5 (2016); 210 Ill. Comp. Stat. §§ 91/1 - 91/99 (2016).

- Provide family caregivers with clear, in-person instructions regarding medical tasks they will need to perform when their loved one returns home.[219]

Among other initiatives, the AARP is also lobbying Congress to pass the Recognize, Assist, Include, Support, and Engage (RAISE) Family Caregivers Act and the Credit for Caring Act and to strengthen Social Security.[220] The AARP is also well known for having provided an important endorsement for the ACA in 2009.[221]

However, it would be no surprise to public choice theorists that the AARP itself acts in its own best interest. For example, it has been accused of supporting Obamacare cuts to Medicare because the organization's health insurance arm would profit from them.[222] The AARP sells private Medigap policies to consumers who want health insurance that supplements the limited payments they get from Medicare.[223] Consequently, the AARP has much to gain from Medicare cuts that will encourage more people to purchase its insurance products. It may thus act against the interests of the seniors it represents when its own profitability is at stake.

In addition, the AARP is often viewed as partisan and inclined towards Democrats.[224] In response, several competing, more conservative organizations

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[219] *Id.* Larry Schumacher, *How the CARE Act Would Help Family Caregivers*, FORBES (May 1, 2014), *available at* http://www.forbes.com/sites/nextavenue/2014/05/01/how-the-care-act-would-help-family-caregivers/#3e48148b2860.

[220] AARP, *AARP Volunteers from Every State Head to Capitol Hill to Push Robust Agenda on Family Caregiving, Social Security* (June 8, 2016), http://www.aarp.org/about-aarp/press-center/info-06-2016/aarp-volunteers-capitol-hill-push-caregiving-social-security.html. The RAISE Family Caregivers Act would "require the development of a national strategy to support family caregivers," while the Credit for Caring Act would "provide a federal tax credit for eligible working family caregivers." *Id*.

[221] AARP, *AARP Endorses Affordable Health Care for America Act* (Nov. 5, 2009), http://www.aarp.org/about-aarp/press-center/info-11-2009/affordable_health_care_act_endorsement.html.

[222] Avik Roy, *How the AARP Made $2.8 Billion by Supporting Obamacare's Cuts to Medicare*, FORBES (Sept. 22, 2012), *available at* http://www.forbes.com/sites/aroy/2012/09/22/the-aarps-2-8-billion-reasons-for-supporting-obamacares-cuts-to-medicare/#5590a2f14353; David Silva, *AARP – Senior Supporter or Scammer?*, LIFEAFTER50 (Mar. 10, 2012), http://lifeafter50.com/news/2012/mar/10/aarp-senior-supporter-or-scammer/ (stating that the AARP's critics assert that it has "lost its way and became overly partisan and entirely too focused on making money").

[223] Roy, *supra* note 222.

[224] Diane C. Lade, *Anti-AARP Groups Looking to Woo New Retirees*, SUN SENTINEL (Jan. 14, 2013), http://articles.sun-sentinel.com/2013-01-14/about/fl-conservative-aarp-alternatives-20130113_1_anti-aarp-groups-south-floridians.

have been established.[225] These include the American Seniors Association,[226] the Association of Mature American Citizens,[227] and the 60 Plus Association.[228]

With so many advocacy organizations representing them, one might wonder why more progress has not been made towards promoting the interests of elderly Americans. Progress is slow in part because the AARP and other advocacy organizations can pursue only a few initiatives at a time. Legislators are understandably most responsive to pressure for low-cost interventions such as the CARE Act.[229] Yet, the needs of the elderly are wide-ranging and multi-faceted, and addressing them would require very significant investments of effort and money.[230] By contrast, the NRA has a simple, coherent, and inexpensive message: opposition to gun control measures and promotion of gun rights.[231] It is no wonder that many consider it to be the most powerful lobbying organization in America.[232]

Furthermore, if politicians who belong to one party perceive a special interest organization as being partisan and sympathetic to a different party, they may not be receptive to its overtures because they do not believe that its members will vote for them. Putting aside party affiliation, the AARP and its competitors may not easily convince politicians that they can secure votes for them. Many seniors care more deeply about other issues and may not even be aware of advocacy efforts on their behalf.[233] Thus, candidates' views concerning benefits for the elderly or their caregivers may not be important enough to voters to sway their decisions at the polls.

B. Unwillingness to Contemplate the Prospect of Decline in Old Age

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[225] *Id*.
[226] American Seniors Association, https://www.americanseniors.org/ (last visited July 3, 2016) (characterizing itself as "the conservative alternative to AARP).
[227] Association of Mature American Citizens, *About Us: Overview*, http://amac.us/about-us/ (last visited July 3, 2016) (noting its "conservative philosophies").
[228] The 60 Plus Association, *About 60 Plus*, http://60plus.org/about/ (last visited July 3, 2016) (stating that "60 Plus is often viewed as the conservative alternative to the American Association of Retired Persons (AARP).").
[229] *See supra* notes 218-219 and accompanying text.
[230] Brian Palmer, *Why is the NRA So Powerful*, SLATE (June 29, 2012), http://www.slate.com/articles/news_and_politics/explainer/2012/06/eric_holder_charged_with_contempt_how_did_the_nra_swing_the_votes_of_so_many_democrats_.html (noting that the "AARP … attempts to influence such diverse issues as Social Security, health care, energy, and ballot access laws").
[231] *Id*.
[232] *Id*.
[233] *See supra* note 195 and accompanying text.

Another possible explanation for the low priority aging receives on political agendas (and in human rights circles) is rooted in psychology. Human beings tend to eschew unpleasant thoughts about their own futures. Many individuals simply do not want to think about aging and the challenges they and their families will face.[234] Therefore, they do not recognize these as urgent matters and do not seek interventions to address the needs of the older population. Likewise, legislators themselves may not focus on the fact that government interventions to support the elderly are in their personal best interest because they too may be responsible for the care of elderly loved ones and later, will likely become frail and dependent themselves.

Some individuals feel that thinking about future difficulties will reduce their happiness in the present.[235] Others avoid the topic because they feel it is premature or because family members did not suffer a lengthy period of decline before dying.[236] Still others shun it because they feel powerless – they do not have the financial or social resources that will likely be necessary to meet their future needs, and thus worrying about or planning for later years is futile.[237]

Psychologists have observed a phenomenon called "age-group dissociation."[238] In order to enhance their sense of well-being, some older adults choose not to identify with their age group.[239] Thus, they distance themselves psychologically from their contemporaries and consider themselves to be more similar to younger people than to people their own age.[240] According to one study, while nearly half of individuals who are fifty or older feel at least ten years younger than they are, a third of those sixty five or older feel up to nineteen years younger.[241]

Indifference towards the challenges of aging may also be attributable to a failure of imagination. People are simply unable to imagine their current selves

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[234] Catrinel Cracium & Uwe Flick, *"I Will Never be the Granny with Rosy Cheeks": Perceptions of Aging in Precarious and Financially Secure Middle-Aged Germans*, 29 J. AGING STUD. 78, 83 (2014).
[235] Martin Pinquart & Silvia Sörensen, *Factors that Promote and Prevent Preparation for Future Care Needs: Perceptions of Older Canadian, German, and U.S. Women*, 23 HEALTH CARE FOR WOMEN INT'L. 729, 734 (2002).
[236] *Id*. at 735.
[237] *Id*.
[238] David Weiss & Frieder R. Lang, *"They" Are Old but "I" Feel Younger: Age-Group Dissociation as a Self-Protective Strategy in Old Age*, 27 PSYCH. & AGING 153, 154 (2012).
[239] *Id*.
[240] David Weiss & Alexandra M. Freund, *Still Young at Heart: Negative Age-Related Information Motivates Distancing from Same-Aged People*, 27 PSYCH. & AGING 173, 174 (2012).
[241] Ceridwen Dovey, *What Old Age Is Really Like*, THE NEW YORKER, Oct. 1, 2015, http://www.newyorker.com/culture/cultural-comment/what-old-age-is-really-like.

as frail older selves.[242] Such a self is "impossible," too remote and disconnected from one's existing sense of reality.[243] Author and social theorist Simone de Beauvoir wrote that "we have always regarded … [old age] as something alien, a foreign species."[244] Thus, human beings often have inflated beliefs about their efficacy, invincibility, and ability to control their destinies.[245] According to the American Society on Aging, "67% of Americans don't believe they will need aging care—ever."[246] In truth, seventy percent of seniors will require assistance with activities of daily living for an average of three years.[247]

In fact, most Americans think so little about their own aging that they do not even compose wills. More specifically, fifty-one percent of those in the age group of fifty-five to sixty-four and sixty-two percent of people between the ages of forty-five and fifty-four have not prepared wills.[248] In addition, only about one-quarter to one-third of adults have completed another critical document: an advance directive.[249] In advance directives individuals provide instructions for end-of-life care and appoint decision-makers who can direct their care if they lose the ability to make decisions for themselves.[250] While many organizations have

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[242] Laura M. Girling & Leslie A. Morgan, *Older Women Discuss Planning for Future Care Needs: An Explanatory Framework*, 26 J. AGING & HEALTH 724, 740 (2014); Tom de Castella & Virginia Brown, *Why Can't We Imagine Ourselves Getting Old?* BBC NEWS MAG., August 5, 2011, http://www.bbc.com/news/magazine-14412025.

[243] Kathryn B. McGrew, *Impossible Selves? Challenges and Strategies for Encouraging Individual Long-Term Care Planning*, SCRIPPS GERONT. CEN. PUB. 7 (2000), *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.549.4139&rep=rep1&type=pdf.

[244] SIMONE DE BEAUVOIR, THE COMING OF AGE 283 (W. W. Norton & Co. 1996)

[245] *Id*.

[246] Carol Marak, *The Challenges of the Aging Industry* (Aug. 13, 2015), http://www.asaging.org/blog/challenges-aging-industry.

[247] GOLDMAN & WOLF, *supra* note 54, at 13.

[248] Richard Eisenberg, *Americans' Ostrich Approach to Estate Planning*, FORBES (Apr. 9, 2014), *available at* http://www.forbes.com/sites/nextavenue/2014/04/09/americans-ostrich-approach-to-estate-planning/#6d26386f07b6. *See also*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE, INSIGHTS INTO THE FINANCIAL EXPERIENCES OF OLDER ADULTS: A FORUM BRIEFING PAPER 21 (2013), *available at* http://www.federalreserve.gov/newsevents/conferences/older-adults-forum-paper-20130717.pdf (stating that only forty-three percent of adults in their forties have prepared wills, and even among individuals seventy and older, only seventy-eight percent have wills).

[249] Jaya K. Rao et al., *Completion of Advance Directives Among U.S. Consumers*, 46 AM. J. PREV. MED. 65, 65 (2014) (finding that of 7946 respondents to a survey, 26.3% had an advance directive); Keshia M. Pollack et al., *The Public's Perspectives on Advance Directives: Implications for State Legislative and Regulatory Policy*, 96 HEALTH POLICY 57, 57 (2010) (finding that "[a]pproximately 34% of Maryland adults reported having" an advance directive).

[250] HOFFMAN, *supra* note 6 at 41-48; Diana Anderson, *Review of Advance Health Care Directive Laws in the United States, the Portability of Documents, and the Surrogate Decision Maker when No Document Is Executed*, 8 NAT'L ACAD. ELDER L. ATTY J. 183, 183 (2012).

undertaken educational initiatives regarding these important documents,[251] they have failed to gain adequate traction.

People who are middle-aged and older who reject thoughts of aging, fail to plan for it, and do not make use of easily available legal protections, are unlikely to become advocates for the elderly. They are unlikely to contact legislators and to seek government intervention that could improve their quality of life in the future.

C. The Media's Role in Agenda Setting

The media's treatment of the elderly may further contribute to their relative neglect in the policy arena. The media can tell compelling stories and can launch sustained efforts to educate the public about important social problems. Consequently, the media could potentially convince voters that addressing the needs of the elderly is in their own best interest and persuade politicians that they would be richly rewarded for efforts to improve the lives of older Americans. Yet, the media expend little energy on creating political momentum for change in this area.[252]

A 2015 study by the FrameWorks Institute found that "the public is exposed to bits and pieces of narrative – fractured, and often inconsistent, information about aging and older adults – and that this array of information is unlikely to stick in mind and, thus, is unlikely to deepen public understandings of aging issues."[253] When the media do turn their attention to the elderly, they tend to tell isolated, problem-oriented stories that focus on the travails of individuals.[254] News pieces generally do not analyze policy failures that are at the root of problems and do not provoke viewers to think deeply about their possible solutions.[255] Instead, media stories often suggest that successful aging is attributable to individual lifestyle choices and is entirely divorced from public policies, social determinants, and societal support mechanisms.[256]

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[251] See e.g., American Hospital Association, Put It in Writing, http://www.aha.org/advocacy-issues/initiatives/piiw/index.shtml (last visited Feb. 6, 2017).

[252] *See generally*, MOIRA O'NEILL & ABIGAIL HAYDON, AGING, AGENCY, AND ATTRIBUTION OF RESPONSIBILITY: SHIFTING PUBLIC DISCOURSE ABOUT OLDER ADULTS (2015), *available at* http://www.frameworksinstitute.org/assets/files/aging_ffa_final_090215.pdf.

[253] *Id.* at 5. The report is part of a project sponsored by prominent organizations including the AARP, the American Federation for Aging Research, the American Geriatrics Society, the American Society on Aging, the Gerontological Society of America, the National Council on Aging, and the National Hispanic Council on Aging. *Id*. at 3.

[254] *Id* at 5-6.

[255] *Id*.

[256] *Id*. at 6.

Several research projects have focused on the media's agenda-setting powers and questioned the degree of their influence. One study found that the "media can only impact the political agenda when all forms of media focus on the same issue, frame it the same way, and are persistent with their coverage of the issue."[257] The researchers concluded that such convergence is rare.[258]

According to the same study, the media have little to no power to set candidates' agendas during election campaigns.[259] At other times, politicians are most responsive to stories about newer issues rather than coverage of long-standing and intractable problems.[260]

A second study noted that the media choose to cover stories that are novel and feature conflict and drama rather than basing their selections on the importance of the subject matter.[261] The public, therefore, should not invest "gatekeeping trust" in the media, that is, trust that the media are highlighting the social policy issues of greatest significance.[262]

The media could play a role in convincing both voters and politicians that focusing on the needs of the elderly would advance their own interests.[263] However, like all other stakeholders, the media act out of self-interest and apparently do not believe that playing such a role would further their own economic goals of selling their products, selling advertising spots, and earning high ratings.[264]

The problems that the elderly face are deep-rooted, and thus they are not as exciting as newly emerging crises.[265] To the extent that the media present stories about the elderly, they tend to be "sensational," to emphasize drama and

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[257] Stefaan Walgrave & Peter Van Aelst, *The Contingency of the Mass Media's Political Agenda Setting Power: Toward a Preliminary Theory*, 56 J. COMMUNICATION 88, 93 (2006).
[258] *Id*.
[259] *Id*. at 96.
[260] *Id*. at 93-94.
[261] Raymond J. Pingree et al., *Effects of Media Criticism on Gatekeeping Trust and Implications for Agenda Setting*, 62 J. COMMUNICATION 351, 351 (2013).
[262] *Id*. at 369.
[263] Robert J. Brulle et al., *Shifting Public Opinion on Climate Change: An Empirical Assessment of Factors Influencing Concern Over Climate Change in the U.S., 2002-2010*, 114 CLIMATE CHANGE, 169, 175 (2012) (discussing the ideas that "public opinion is a reflection of the extent and prominence of media coverage" and that "the major impact of news media coverage is heightened issue salience.").
[264] Tai-Li Wang, *Presentation and Impact of Market-Driven Journalism on Sensationalism in Global TV News*, 74 INT'L COMMUN. GAZETTE, 711, 712 (2012) (stating that "[m]arket-driven forces are speculated to be the primary causes behind the spike in sensationalism.").
[265] See *supra* note 260 and accompanying text.

individual struggle rather than deep thinking about the underlying causes of the challenges that the elderly face and potential solutions.[266]

Furthermore, advertisers seek to target young consumers who are more easily influenced by marketing initiatives and who make more purchases than older individuals.[267] In particular, they value female readers and viewers in the eighteen to thirty-four age group.[268] Consequently, in order to appeal to advertisers, media outlets may tailor their programming to younger audiences and neglect stories that are relevant primarily to older people.[269] Indeed, younger people are particularly attentive to "breaking news,"[270] which encourages the media's tendency to cover dramatic stories of immediate import. Thus, media coverage represents another missed opportunity to confront and remedy aging-related policy shortcomings.

IV. RECOMMENDATIONS

We do not want to think about getting older, but we must. If American society does not prepare for the tens of millions of baby boomers who will become elderly in the coming years, the consequences will be grave in terms of suffering, costs, and lives lost. The overarching recommendation of this article, therefore, is that American society stop ignoring the looming challenges of our aging population and tackle them with energy and commitment.

Formulating a comprehensive blueprint for solving the many difficulties that seniors face in the United States is well beyond the scope of this article. Such a

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[266] See *supra* note 255 and accompanying text. *See also*, Wang, *supra* note 264, at 714 (stating that "sensational news stories focus on private citizens or celebrities to personalize or dramatize news stories, rather than allowing officials or more authoritative sources to legitimate the stories"); Monika Djerf-Pierre, *The Crowding-Out Effect: Issue Dynamics and Attention to Environmental Issues in Television News Reporting Over 30 Years*, 13 JOURNALISM STUD. 499, 503 (2012) (finding that the media pay more attention to 'obtrusive' issues - those that have an immediate impact on everyday lives, such as energy price, employment levels, and inflation rather than "unobtrusive" issues such as environmental problems that are distant in time and deal with "ambiguous processes, complex causes and effects, uncertainty, and future risks").

[267] JAMES T. HAMILTON, ALL THE NEWS THAT'S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO NEWS 71 (2004); Coming of Age, Our Understanding of the Older Consumer, http://www.comingofage.com/what-weve-learned-2/ (last visited Feb. 6, 2017) (stating that "[a]dult consumers tend to be less responsive to sweeping claims in marketing messages as they age.").

[268] HAMILTON, *supra* note 267, at 71.

[269] *Id*. at 101 (stating that "[a]n increase in one percentage point of women 18-34 listing the issue as a top priority translates into 1.28 more stories about the issue on the evening news broadcast").

[270] American Press Institute, *Social and Demographic Differences in News Habits and Attitudes*, March 17, 2014, https://www.americanpressinstitute.org/publications/reports/survey-research/social-demographic-differences-news-habits-attitudes/.

plan could fill many volumes. Instead, I briefly review the work of other policy experts and outline a number of interventions that would address the specific problems that this article highlights.

A. Existing Reports and Initiatives

The Milbank Memorial Fund issued a report in 2016 that offered a long list of activities that policy makers should consider in order to advance the following eight general goals:

- support age-friendly communities;
- meet the housing and transportation needs of seniors;
- increase the financial security and reduce financial exploitation of older adults;
- improve long-term services and support;
- implement caregiver-friendly policies;
- improve recruitment and retention of the long-term care workforce;
- assist adults with dementia; and
- advance telehealth.[271]

Representative Debbie Dingell emphasizes the need to support family caregivers, to shift Medicaid's focus away from nursing homes to settings that the elderly prefer, to improve Medicare in a variety of ways, and to initiate a national conversation about financing long-term care.[272] A third source, the long-Term Care Financing Collaborative issued a consensus framework in 2016 with the following primary recommendations:

- Creation of a universal catastrophic insurance program to provide support to individuals with high care needs over a significant period of time;
- Public and private sector initiatives and policies to improve the long-term care insurance market along with efforts to encourage saving for retirement;
- Modernization of the Medicaid long-term care safety net for economically disadvantaged individuals with more flexibility as to care setting; and
- Strengthening support for the families and communities of individuals obtaining care at home.[273]

Likewise, the National Council on Aging (NCA) states that it "is working to promote a bipartisan, national long-term care insurance financing system" that:

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[271] GOLDMAN & WOLF, *supra* note 54, at 7-27.
[272] Dingell, *supra* note 22, at 321-24.
[273] LONG-TERM CARE FINANCING COLLABORATIVE, A CONSENSUS FRAMEWORK FOR LONG-TERM CARE FINANCING REFORM 2 (2016), *available at* http://www.convergencepolicy.org/wp-content/uploads/2016/02/LTCFC-FINAL-REPORT-Feb-2016.pdf.

- Is actuarially sound
- Is fully paid for
- Increases affordable options for working Americans
- Does not exclude purchasers based on pre-existing health conditions
- Improves market opportunities for private insurance
- Produces significant savings to Medicaid.[274]

B. Specific Interventions

Policy papers and reports are important, but they are not enough. The time has come to meet the needs of our growing elderly population with action. Below are examples of legal and other interventions that address some of the challenges analyzed in this Article.

1. Long-Term Care

Policymakers will not be able to remedy the shortcomings of long-term care in the United States without investing considerable financial resources. This is perhaps the most significant problem that the elderly face, but extensive government intervention in this area is unlikely in the current, fiscally conservative climate. Nevertheless, it is worth mentioning that more generous Medicare reimbursement and liberalized Medicaid eligibility criteria would be important improvements. Furthermore, Congress should renew efforts to pass legislation such as the defunct CLASS Act[275] to make long-term care insurance affordable and useful for many more Americans.

Efforts must also be made to increase the job satisfaction and retention of professional caregivers.[276] Wage increases, health benefits, paid sick days, and policies that promote full-time (rather than part-time) work and job security would all ameliorate caregivers' stress and anxiety.[277] For example, a California

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[274] National Council on Aging, Long-Term Care Financing, https://www.ncoa.org/public-policy-action/long-term-services-and-supports/long-term-care-financing/ (last visited July 30, 2016). The Council also states that several organizations have developed proposals to finance long-term care. These include the Bipartisan Policy Center, Long-Term Care Financing Collaborative, LeadingAge, Urban Institute, and Leadership Council of Aging Organizations and Consortium for Citizens with Disabilities.

[275] *See supra* notes 125-127 and accompanying text.

[276] *See supra* Part III.B.3.

[277] Linda Delp et al., *Job Stress and Job Satisfaction: Home Care Workers in a Consumer-Directed Model of Care*, 45 HEALTH SERV. RES. 922, 933-34 (2010); Peter Kemper et al., *What Do Direct Care Workers Say Would Improve Their Jobs? Differences across Settings*, 48 GERONTOLOGIST (suppl_1), 17, 17 (2008) (noting that "workers called for more pay and better work relationships including communication; supervision; and being appreciated, listened to, and treated with respect.").

study showed that nearly doubling the wages of home care workers increased the retention rate from thirty-nine percent to seventy-four percent.[278]

2. Driving

To address driving concerns, states should conduct further research to determine which interventions are effective and implement additional regulations to protect elderly drivers and those who share the roads with them.[279] In 2014, Canada's Ministry of Transportation undertook a new initiative in Ontario, requiring the following of drivers eighty and older: 1) a vision test, 2) attendance in educational classes, 3) a review of the driver's record, and 4) two exercises consisting of drawing the hands of a clock to 11:10 and crossing out the "H" in rows of letters.[280] Data from this and other pilot projects may be illuminating for U.S. policy makers. It is also noteworthy that more onerous state licensing requirements, regardless of their specifics, can in and of themselves induce drivers to decrease or stop driving of their own accord.[281] Likewise, investment in both innovative car safety technology (e.g. rear-view cameras and warning alarms) and alternative transportation options (e.g. public buses and volunteer driver programs)[282] is necessary to reduce the likelihood that seniors lose their independence because of impairments that impact driving ability.[283]

3. Geriatric Care

What can be done to make geriatrics more attractive to American health care providers? A variety of interventions can be employed for this purpose. More generous Medicare reimbursement for geriatric services would be of obvious benefit. Various payment enhancements have been implemented for other purposes in the past. For example, the ACA established a four-year program through which primary care physicians could receive a ten percent bonus for seeing Medicare patients, but the program expired in 2015.[284] Currently, the

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[278] Healthcare Administration, *supra* note 130.
[279] Owsley et al., *supra* note 161, at 2357.
[280] Lorraine Sommerfeld, *Drive, She Said: New Test Coming Soon for Elderly Ontario Drivers*, GLOBE & MAIL (Jan. 31, 2014), *available at*, http://www.theglobeandmail.com/globe-drive/news/new-test-coming-soon-for-elderly-ontario-drivers/article16638607/.
[281] Elena Kulikov, *The Social and Policy Predictors of Driving Mobility Among Older Adults*," 23 J. AGING & SOC. POL'Y 14 (2011).
[282] Ken Teegardin, *Personal Transportation for Seniors*, SENIORLIVING.ORG, http://www.seniorliving.org/lifestyles/personal-transportation/ (last updated Sept. 12, 2011).
[283] Dave Bernard, *New Car Features Help Seniors Drive Safely*, U.S. NEWS & WORLD REP. (Feb. 1, 2013), *available at* http://money.usnews.com/money/blogs/on-retirement/2013/02/01/new-car-features-help-seniors-drive-safely; HOFFMAN, *supra* note 6, at 65-67.
[284] U.S. Department of Health and Human Services (DHHS) & Centers for Medicare & Medicaid Services (CMS), *Primary Care Incentive Payment Program (PCIP) Eligibility for New Providers Enrolled in Medicare* (Feb. 11, 2011), https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/downloads/R2152CP.pdf; Michelle Andrews, *End Of Medicare Bonuses Will Cut Pay To Primary Care Doctors*, NPR (Nov. 28, 2015),

Centers for Medicare & Medicaid Services (CMS) offers ten-percent bonuses to physicians who provide Medicare-covered services to patients in geographic "health professional shortage areas," as designated by the Health Resources and Services Administration.[285] Similar supplements could be created to boost the earnings of geriatricians across the United States.

Many state and federal programs offer loan forgiveness and scholarship opportunities to medical students and clinicians who meet particular requirements.[286] Such programs could be used to incentivize individuals to pursue geriatric training.[287]

Educational and licensing authorities should also take action. They must incorporate more extensive requirements for education about elder care in medical school curricula and for licensure and certification purposes.[288]

Not all legislators ignore the need for change. Representative Joseph Crowley (D-NY) has repeatedly introduced a Congressional bill entitled The "Resident Physician Shortage Reduction Act" to increase the number of residency slots by 15,000 over five years, with many slots dedicated to specialties in which shortages exist.[289] The bill, however, has never been enacted.

C. Solutions Based on Public-Choice Theory

Public choice theory teaches that legislators and regulators will become interested in finding solutions to problems that plague the elderly if concerned stakeholders pressure them to do so and convince them that they will gain political pay-offs. To that end, advocates must undertake vigorous public

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http://www.npr.org/sections/health-shots/2015/11/28/457148697/end-of-medicare-bonuses-will-cut-pay-to-primary-care-doctors.

[285] DEPARTMENT OF HEALTH AND HUMAN SERVICES & CENTERS FOR MEDICARE & MEDICAID SERVICES (CMS), HEALTH PROFESSIONAL SHORTAGE AREA PHYSICIAN BONUS PROGRAM 2 (2016), *available at* https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/downloads/HPSAfctsht.pdf.

[286] Association of American Medical Colleges, *Loan Repayment/Forgiveness and Scholarship Programs*, at https://services.aamc.org/fed_loan_pub/index.cfm?fuseaction=public.welcome&CFID=1&CFTOKEN=C0F700B0-C188-2D46-DBD89B242E4967FD (last visited, June 27, 2016); U.S. Department of Health and Human Services, *National Health Service Corps: Loan Repayment*, http://nhsc.hrsa.gov/loanrepayment/ (last visited June 27, 2016)

[287] Seegert, *supra* note 183.

[288] *Id.*; Sadick, *supra* note 176; INSTITUTE OF MEDICINE, RETOOLING FOR AN AGING AMERICA: BUILDING THE HEALTH CARE WORKFORCE 123-183 (2008); Olivero, *supra* note 173.

[289] *See e.g.* H.R.1180, 113th Cong. (2013); H. R. 2124, 114th Cong., 1st Sess. (2015*); 4 Things Students Should Know about the New GME Bill*, AMA WIRE (May 20, 2015), http://www.ama-assn.org/ama/ama-wire/post/4-things-students-should-new-gme-bill.

education campaigns to convince the public, government officials, and the media that the challenges the elderly face are a serious and personal concern for all.

As noted earlier, voters list terrorism as their first and most serious national concern.[290] In truth, however, terrorism directly affects very, very few individuals. Only eighty Americans were killed in terrorist attacks between 2004 and 2013, and of those, only thirty-six were murdered on U.S. soil.[291] In the words of one scholar, in the post-9/11 world, even courts are "likely to overstate the potential harm, neglect the probability, and presume the imminence of terrorist attacks."[292] By contrast, eldercare problems are likely to affect nearly all Americans.

Advocacy organization such as the AARP and senior centers could produce educational materials about elder matters, including widely distributed informational brochures, media programs, and community events. According to the National Council on Aging, 11,400 senior centers exist across the country, offering a wide range of programs and services, and over one million participants visit them every day.[293]

In addition, enterprising activists can initiate public engagement campaigns at the grass roots level. A movement called *The Conversation Project* promotes discussion of end-of-life care preferences among loved ones in small social gatherings and provides "conversation starter kits."[294] A second, similar initiative, *Death over Dinner*, encourages families and close friends to dine together and discuss death and dying matters.[295] Between 2013 and mid-2016, the organization inspired people to hold over 100,000 dinners in thirty countries.[296] These programs or others like them could encourage older adults and their family members to gather and discuss other topics, including long-term-care, driving hazards, and geriatric care and to emphasize the importance of political engagement regarding these issues.

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[290] *See supra* note 195 and accompanying text.
[291] National Consortium for the Study of Terrorism and Responses to Terrorism, *American Deaths in Terrorist Attacks* (October 2015), https://www.start.umd.edu/pubs/START_AmericanTerrorismDeaths_FactSheet_Oct2015.pdf.
[292] Avidan Cover, *Presumed Imminence: Judicial Risk Assessment in the Post-9/11 World*, 35 CARDOZO L. REV. 1415, 1415 (2014).
[293] National Council on Aging, *Senior Center Facts*, last visited July 26, 2016, https://www.ncoa.org/news/resources-for-reporters/get-the-facts/senior-center-facts/.
[294] Institute for Healthcare Improvement, *The Conversation Project*, last visited July 27, 2016, http://www.ihi.org/engage/initiatives/ConversationProject/Pages/default.aspx.
[295] Death over Dinner, *Let's Have Dinner and Talk about Death*, last visited July 27, 2016, http://deathoverdinner.org/.
[296] Richard Harris, *Discussing Death over Dinner*, THE ATLANTIC, April 16, 2016, *available at* http://www.theatlantic.com/health/archive/2016/04/discussing-death-over-dinner/478452/.

Government agencies can help educate the public as well. The U. S. Department of Health and Human Services includes the Administration on Aging (AoA), which is tasked with administering the Older Americans Act of 1965.[297] As our population ages and its needs intensify, the AoA could be given further responsibilities, including educational functions.

The United States Senate has a Special Committee on Aging, which has no legislative authority but can "study issues, conduct oversight of programs, and investigate reports of fraud and waste."[298] Many state legislatures have similar committees.[299] The existence of these committees indicates that legislatures are aware that there is much to be done to improve the quality of life of American seniors, even if this is not a priority action item for them.

At the time of this writing, shortly after the inauguration of President Trump, an unprecedented number of Americans are participating in political activity, contacting legislators, protesting, and voicing their concern about a variety of policies.[300] Citizens (and other residents) have proven that when they are unified and committed enough to particular causes, they can be vocal and effective advocates. This same energy should carry over to more entrenched social problems, including elder matters.

V. CONCLUSION

It is not impossible to achieve policy changes. In January of 2016, Medicare implemented a change that allows physicians to be reimbursed for discussing end-of-life care with patients.[301] Thus, doctors can now bill Medicare for discussing

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[297] U.S. Department of Health and Human Services, Administration on Aging (AoA), https://aoa.acl.gov/ (last modified Sept. 21, 2015). For more on the Older Americans Act of 1965, *see supra* Part II.A.

[298] United States Senate Special Committee on Aging, *History*, last visited July 27, 2016, http://www.aging.senate.gov/about/history.

[299] See e.g. The Senate of Texas, Legislative Committee on Aging, last visited July 27, 2016, http://www.senate.state.tx.us/75r/senate/commit/c802/c802.htm; California State Assembly Committee on Aging and Long-Term Care, Welcome to the Committee on Aging and Long-Term Care, last visited July 27, 2016, http://altc.assembly.ca.gov/; The 189th General Court of the Commonwealth of Massachusetts, Joint committee on Elder Affairs, last visited July 27, 2016, https://malegislature.gov/Committees/Joint/J44.

[300] Ashley Killough, Congress Deluged with Phone Calls, CNN, Feb. 3, 2017, http://www.cnn.com/2017/02/03/politics/congress-phone-calls/, Conor Friedersdorf, *The Significance of Millions in the Streets*, THE ATLANTIC, Jan. 23, 2017, https://www.theatlantic.com/politics/archive/2017/01/the-significance-of-millions-in-the-streets/514091/.

[301] Rebecca Dresser, *Medicare and Advance Planning: The Importance of Context*, 46 HASTINGS CENTER REP. 5, 5 (2016); Centers for Medicare and Medicaid Services, *Frequently Asked Questions about Billing the Physician Fee Schedule for Advance Care Planning Services* (March

advance directives with their patients and counseling them about different approaches to end-of-life care, such as aggressive treatment in an intensive care unit versus hospice care.[302] The reimbursement rule was initially part of the ACA but was not implemented because of vigorous opposition from Sarah Palin and others who claimed it would lead to "death panels."[303] The ACA itself is a law that achieved important and dramatic modifications to the health care system, though its future is now uncertain.[304]

Society cannot afford to tolerate a glacial pace of change. The shortcomings and pitfalls of the systems the elderly must navigate are grave and numerous, and they affect a substantial and growing portion of the American population.[305] As the National Council on Aging wrote in a recent issue brief, "[t]he status quo is not sustainable and it is urgent that we better understand and address the problems facing the millions of families struggling daily with these concerns."[306]

The problems with which this Article grapples impact not only the elderly, but also their younger family members who can at any moment become caregivers. Thus, even those who are middle-aged and younger will benefit from solutions to the problems of the elderly. For example, with more affordable long-term care or long-term care insurance, the elderly would be less likely to resist getting the help they need from paid caregivers for fear of becoming impoverished.[307] Sons and daughters could rely on the state to identify and restrict at-risk motorists rather than intervening themselves and initiating painful and traumatic confrontations about the issue of driving. Likewise, caregivers would less often watch their loved ones suffer from complications that occur because their care is not coordinated by competent geriatricians.

Public choice theory has much to teach about American politics. It is natural for individuals and organizations to prioritize their own interests. But one must have an accurate perception of what those interests are. Older adults should not bury their heads in the sand and refuse to think about the challenges that lie ahead. The same is true for younger people who will soon enough become elderly

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22, 2016), https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/PhysicianFeeSched/Downloads/FAQ-Advance-Care-Planning.pdf.

[302] Rich Daly, *Few Physicians Utilize Medicare Advance Care Planning Benefit: Survey*, HEALTHCARE BUS. NEWS, April 15, 2016, https://www.hfma.org/Content.aspx?id=47774.

[303] Dresser, *supra* note 301, at 5.

[304] U.S. Department of Health and Human Services, *Key Features of the Affordable Care Act by Year*, http://www.hhs.gov/healthcare/facts-and-features/key-features-of-aca-by-year/index.html# (last updated Aug. 13, 2015).

[305] See *supra* Part II.

[306] National Council on Aging, *supra* note 101.

[307] See supra Part II.B.

themselves and may well become caregivers long before that. Politicians should not consider promoting the interests of older adults to be a low-payoff proposition. If nothing else, their personal self-interest dictates that these matters receive significant attention because nobody is immune to the trials of both aging and caregiving. There is no time like the present for all stakeholders to confront the prospect of getting older and take action to help those who come before them and to help themselves.