

LINCOLN MEMORIAL UNIVERSITY LAW REVIEW

VOLUME 8

WINTER 2020

ISSUE 1

THE LONG-TERM GENDER AND RACE ISSUES IN LONG-TERM CARE

Brendan Williams

Women outlive men.¹ A consequence of greater longevity is greater infirmity later in life that could require care in a skilled nursing facility (“nursing home”).² If you live to be between 57 and 61, a study shows you are likely to spend at least one night in your life in a nursing home.³ Over two-thirds of nursing home residents are women, and most are on Medicaid.⁴ Their caregivers are also overwhelmingly women.

¹*See, e.g.*, Age and Sex Composition: 2010 4, U.S. CENSUS, <https://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf> (In 2010, there were over four times as many women centenarians as men) (last visited Oct. 5, 2020).

²*See* Press Release, Rand Corp., Average American's Risk of Needing Nursing Home Care Is Higher Than Previously Estimated (Aug. 28, 2017), <https://www.rand.org/news/press/2017/08/28/index1.html>.

³*See id.*

⁴*See* Medicaid’s Role in Nursing Home Care, KAISER FAMILY FOUND. (June 20, 2017), <https://www.kff.org/infographic/medicaids-role-in-nursing-home-care/>. One article notes that “[w]hile you can’t predict how long you’ll need long-term care services, the average woman needs care 3.7 years and the average man needs it for 2.2 years, according to the U.S. Department of Health and Services.”

For example, according to the Paraprofessional Health Institute (PHI), 92% of nursing assistants—the front-line caregivers in any nursing home—are women.⁵ These caregivers are also largely women of color: whites only account for 43% of nursing assistants.⁶

Certain health care crises are very visible. For example, prior to the COVID-19 pandemic, the opioid epidemic was a paramount federal policy concern, at least rhetorically.⁷ It has brought about in-your-face social disorder.⁸ Over twice as many men die from an overdose as women.⁹ Another health crisis of particular concern to women is the ongoing attack by Republicans upon family planning under the guise of opposition to abortion.¹⁰ Conservative states have competed with one another to erect roadblocks to abortion rights—a practice largely blessed by the U.S. Supreme Court.¹¹

Tamara Holmes, *Cost of nursing home care makes planning ahead crucial for financial security*, USA TODAY (Mar. 4, 2019).

⁵See U.S. Nursing Assistants Employed in Nursing Homes 2, PARAPROFESSIONAL HEALTH INST. (Sep. 3, 2019), <https://phinational.org/resource/u-s-nursing-assistants-employed-in-nursing-homes-key-facts-2019/>.

⁶See *id.* at 3.

⁷See Greg Allen & Amita Kelly, *Trump Administration Declares Opioid Crisis A Public Health Emergency*, NPR (Oct. 26, 2017); see also Francie Diep, *One Year After Trump Declared Opioid Addiction a Public-Health Emergency, What's Changed?*, PAC. STANDARD (Oct. 25, 2018) (“[A] year later, what has the emergency declaration accomplished? Not much, outside experts say.”).

⁸See Steve Coll, *The Jail Health-Care Crisis*, NEW YORKER (Mar. 4, 2019) (noting that “[o]pioid addiction . . . is an area in which jail health care is increasingly relied on by default.”).

⁹Opioid Overdose Deaths by Gender, KAISER FAMILY FOUND., <https://www.kff.org/other/state-indicator/opioid-overdose-deaths-by-gender/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Oct. 5, 2020).

¹⁰See, e.g., Alice Miranda Ollstein, *Trump administration issues rule to strip millions from Planned Parenthood*, POLITICO (Feb. 22, 2019) (“Conservatives are hailing the new Title X guidance as a de facto defunding of Planned Parenthood because the organization receives between \$50 million and \$60 million per year through the \$286 million program.”).

¹¹See, e.g., Brendan Williams, *NIFLA vs. Beccera: Abortion Speech Only as Free as the Supreme Court Wants It to Be*, 13 CHARLESTON L. REV. 89 (2018).

In contrast to these existential issues, long-term care is perhaps something that the average person can avoid contact with. Out-of-sight, out-of-mind?

Consider in-home care. Of the over 2.1 million workers providing in-home care, 87% are women.¹² Only 38% are white.¹³ As Ai-jen Poo, executive director of the National Domestic Workers Alliance, writes: “It’s work that we don’t see, because our culture takes it for granted and it’s hidden behind the closed doors of private homes.”¹⁴ With such work “tied to the long history of slavery and economic exploitation of African American women” it was deliberately excluded from federal workforce protections.¹⁵ Like the nursing home resident population, those being cared for at home are predominantly women.¹⁶

While nursing homes are reserved for the more infirm, home, and, community-based care, primarily in-home care has accounted for almost all of Medicaid long-term care spending growth in recent years.¹⁷ It comprised 57% of such spending in 2016.¹⁸ And yet home care workers earn a median wage of \$11.52 an hour and over half are on public assistance.¹⁹ How is this sustainable?

¹²See U.S. HOME CARE WORKERS: KEY FACTS 2, PARAPROFESSIONAL HEALTH INST. (Sep. 3, 2019), <https://phinational.org/resource/u-s-home-care-workers-key-facts-2019/>.

¹³See *id.* at 3.

¹⁴Ai-jen Poo, *How ‘Roma’ Reveals the Complex Reality of Domestic Work* (Guest Column), HOLLYWOOD REP. (Dec. 14, 2018).

¹⁵Premilla Nadasen, *Perspectives: Activists Have a Stake in How History is Told: Case of African American Household Workers*, LAW AT THE MARGINS (Mar. 4, 2019), <http://lawatthemargins.com/african-american-household-workers/>.

¹⁶See Adrienne L. Jones & Robert Valverde, *Characteristics and Use of Home Health Care by Men and Women Aged 65 and Over 2*, NAT’L HEALTH STAT. REP. (Apr. 18, 2012), <https://www.cdc.gov/nchs/data/nhsr/nhsr052.pdf> (“In the United States, the rate of home health care use for women aged 65 and over was 55% higher than the rate for men.”).

¹⁷See STEVE EIKEN ET AL., IBM WATSON HEALTH, MEDICAID EXPENDITURES FOR LONG-TERM SERVICES AND SUPPORTS IN FY 2016 (May 2018), <https://www.medicaid.gov/sites/default/files/2019-12/lts expenditures2016.pdf>

¹⁸See *id.* at 6.

¹⁹See U.S. HOME CARE WORKERS: KEY FACTS, *supra* note 12, at 2.

As Professor Paul Osterman has written, “[i]n 2015 around 14 million Americans needed long-term care. That number is expected to hit 22 million by 2030.”²⁰ One writer, Chris Farrell, notes that “the dismal combination of low wages, inconsistent work schedules and poor advancement prospects will make it extremely hard to fill the projected home care positions.”²¹ He points out that “the industry has high rates of on-the-job injuries (higher than mining and oil and gas extraction) and there is a high risk of sexual harassment and assault for its primarily female workforce.”²²

Added to these challenges was the COVID-19 pandemic, which, beginning in February 2020 in a nursing home in the state of Washington,²³ proved to be lethal in the long-term care setting – with nursing homes accounting for up to 40% of all U.S. deaths by August.²⁴

Is it unreasonable to posit that the chronic government underfunding of long-term care has something to do with the fact that society has devalued the women caring for women? This article explores that argument.

GENDER AND RACE IN LONG-TERM CARE

Rebecca Donovan, in a 1987 article, traced home care’s roots to slavery, and noted that “[w]hite males are physicians

²⁰Paul Osterman, *Why Home Care Costs Too Much*, WALL STREET J. (Sept. 12, 2017), <https://www.wsj.com/articles/why-home-care-costs-too-much-1505256809>.

²¹Chris Farrell, *The Shortage of Home Care Workers: Worse Than You Think*, FORBES (Apr. 18, 2018), <https://www.forbes.com/sites/nextavenue/2018/04/18/the-shortage-of-home-care-workers-worse-than-you-think/#7e1a50023ddd>.

²²*Id.*

²³See JoNell Aleccia, *Kirkland outbreak spotlights coronavirus risk in elder-care facilities*, SEATTLE TIMES (Mar. 2, 2020, 5:25 PM), <https://www.seattletimes.com/seattle-news/health/nursing-home-outbreak-spotlights-coronavirus-risk-in-elder-care-facilities/>.

²⁴See Lenny Bernstein, *Covid-19 surges back into nursing homes in coronavirus hot spots*, WASH. POST (Aug. 13, 2020), https://www.washingtonpost.com/health/covid-19-surges-back-into-nursing-homes-in-coronavirus-hot-spots/2020/08/13/edbff5fedd75-11ea-b205-ff838e15a9a6_story.html.

and administrators, while women are relegated to nursing and related functions of the care of patients, which are regarded as women's work. The lowest-paying and least desirable work is reserved for minority women."²⁵

As James Lin noted in a 2013 law review article on home care, "considerations of gender played a tacit but pervasive role in an industry that has historically been cast away from certain legislative protections."²⁶ He argues that "historical considerations suggest that the stride toward domesticating the home was, from the very beginning, an assertion of the house as a private sphere that was appropriate for female labor only."²⁷

An article in 2018 analyzing Census data reported that "Virginia home care workers are 86-percent female, 47-percent African-American, and 15-percent foreign born."²⁸ Domestic work once the province of slaves became a paid occupation, albeit a marginal one. "During the Great Depression home care was viewed as a form of workfare. A public works program provided the jobs to poor black women who would otherwise be collecting welfare."²⁹ In that same period they were excluded from the Fair Labor Standards Act (FLSA) and excluded again

²⁵Rebecca Donovan, *Home Care Work: A Legacy of Slavery in U.S. Health Care*, AFFILIA 33, 38 (Fall 1987), <https://journals.sagepub.com/doi/abs/10.1177/088610998700200304?journalCode=affa>. Sadly, many inequities remain over three decades later: "Women comprise 80% of the medical workforce, yet account for just 11% of executive roles, according to Time's Up." Jeanette Settembre, *Hollywood's Time's Up movement takes aim at the health-care industry*, MARKETWATCH (Mar. 4, 2019). Kaiser Family Foundation data shows that women comprise at least 83% of nurse practitioners, for example. *Total Number of Nurse Practitioners, by Gender*, KAISER FAMILY FOUND. (Mar. 2020), <https://www.kff.org/other/state-indicator/total-number-of-nurse-practitioners-by-gender/?dataView=1¤tTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

²⁶James Lin, *A Greedy Institution: Domestic Workers and a Legacy of Legislative Exclusion*, 36 FORDHAM INT'L L. J. 706, 725 (2013).

²⁷*Id.* at 728 (footnote omitted).

²⁸Mallory Noe-Payne, *Why Do We Rely on Women of Color to Take Care of People at Home?*, WVTF (Sept. 11, 2018), <https://www.wvtf.org/post/why-do-we-rely-women-color-take-care-people-home#stream/0>.

²⁹*Id.*

in the 1970s, when “the FLSA was amended to rectify the racist exclusions.”³⁰ As the article notes, “[t]he profession was clumped with jobs like babysitting, and considered companion work.”³¹ This “companion” exception was, essentially, a legal fiction.³²

In 2015, the Obama Administration extended wage-and-hour protections under the FLSA to cover most “home health and personal service aides working across the country” and the Trump Administration, perhaps surprisingly, has enforced the regulation and not sought to reverse it.³³ Those lobbying for its reversal included U.S. Sen. Pat Roberts (R., Kan.), who went so far as to file his own amicus brief in failed federal litigation against it,³⁴ and U.S. Senator Marco Rubio (R., Fla.), who argued to Trump’s labor secretary that it had “potential to harm vulnerable patients in need of care.”³⁵

The Obama Administration rule, which the U.S. Supreme Court declined to overturn, was hailed by PHI: “Extending federal wage protections to home care workers is a win for all stakeholders: hard-working home care aides earning poverty-level wages; consumers and their families counting on quality home care; and employers plagued by turnover rates as high as 60 percent annually.”³⁶

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³See Chris Opfer, *Labor Department Sues Home Care Companies*, BLOOMBERG (May 18, 2018), <https://news.bloomberglaw.com/daily-labor-report/labor-department-sues-home-care-companies>.

³⁴See Justin Wingerter, *U.S. Sen. Pat Roberts files amicus brief in federal appeals court case*, TOPEKA CAP.-J. (Apr. 9, 2015) (““This rule is not practical, and attempts to impose burdensome and costly labor requirements in the home where standards must remain flexible due to the individual nature of care for those in need of companion care,” Roberts said. ‘This is regulatory overreach gone array.’ [sic]”).

³⁵See Letter from U.S. Sen. Marco Rubio (R., Fla.) to Labor Secretary R. Alexander Acosta (Feb. 5, 2018), <http://src.bna.com/wby>.

³⁶See Press Release, PARAPROFESSIONAL HEALTH INST., PHI Vice President Robert Espinoza's Statement on U.S. Chief Justice John Roberts' Decision on the U.S. Department of Labor's Home Care Final Rule (Oct. 7, 2015).

The rule, promulgated in 2013,³⁷ stated that “[t]he ‘companionship services’ exemption was to apply to ‘elder sitters’ whose primary responsibility was to watch over an elderly person or person with an illness, injury, or disability in the same manner that a babysitter watches over children.”³⁸ It noted that “[t]oday, direct care workers are for the most part not the elder sitters that Congress envisioned when it enacted the companionship services exemption in 1974, but are instead professional caregivers.”³⁹ It found that “the growth in demand for home care and the professionalization of the home care workforce have not resulted in growth in earnings for direct care workers. The earnings of employees in the home health aide and personal care aide categories remain among the lowest in the service industry.”⁴⁰

One critic, Emily Munson, wrote in a law review article that “disability rights groups were concerned that the recipients of care—also historically marginalized—lacked the resources, both individually and governmentally, to cover the benefits home care workers desired, as Congress itself recognized when debating the companionship exemption.”⁴¹ Because the Obama Administration had “eradicat[ed] the third-party companionship exemption for all parties, except ‘for the individual, family, or household’ receiving care,” she complained “that states and other government entities involved in funding home care may be on the hook to pay minimum wage and overtime.”⁴²

Because of the diversity of home care workers, Munson finds a political motive to their protection, stating “there is a great chance that many of these caregivers voted for Obama”

³⁷Implementation was delayed until 2015: “[A] January 1, 2015 effective date provides time for these systemic changes to take place, and for employers to fully implement the Final Rule.” Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60454, 60495 (Oct. 1, 2013) (to be codified at 29 C.F.R. pt. 22) (citation omitted).

³⁸*Id.* at 60454 (citation omitted).

³⁹*Id.* at 60455.

⁴⁰*Id.* at 60458.

⁴¹Emily Munson, *Help That Hurts: How DOL's Home Care Rule Harms People with Disabilities and Caregivers*, 13 IND. HEALTH L. REV. 433, 434 (2016), <https://journals.iupui.edu/index.php/ihlr/article/view/21334/20629>.

⁴²*Id.* at 447 (footnote omitted).

and noting that the leading caregivers' union is a large Democratic donor.⁴³ She argues that the fact "[t]hat many caregivers are related to their employer diminishes the validity of accusations that these workers are treated deplorably. It also means that many of these workers feel intruded upon by increased regulatory and professional oversight, just as their employers do."⁴⁴

Yet any arguments that altruistic relatives alone can satisfy home care needs are naïve. With shrinking family sizes, one article notes, "there will be fewer adults to care for older relatives in the years ahead. By 2030, the ratio of informal caregivers to those in most need of care will be at 4 to 1, down from a peak of 7 to 1 in 2010."⁴⁵ According to a Rand Corporation study: "Having children . . . does not lessen the chances of needing a nursing home in old age, but can reduce the length of the stay and cut the associated costs by as much as 38 percent. *Having daughters able to provide in-home care was correlated with even larger savings.*"⁴⁶ That may be true, but 57.5% of women are in the workforce today,⁴⁷ and the rest may not have the time, inclination, or aptitude to care for mom or dad.⁴⁸

⁴³*Id.* at 462 (footnote omitted).

⁴⁴*Id.* at 465.

⁴⁵Jackie Crosby, 'Invisible Workforce' of Caregivers is Wearing Out as Boomers Age, MINNEAPOLIS STAR TRIB. (June 3, 2018), <http://www.startribune.com/invisible-workforce-of-caregivers-is-wearing-out/483250981/>.

⁴⁶See Rand Corp., *supra* note 2 (emphasis added).

⁴⁷See Josh Boak, AP FACT CHECK: Trump on women in the workforce, AP (Feb. 5, 2019), <https://apnews.com/article/eecabb904e234271b1f218cc12484658>.

⁴⁸Munson was even "unwilling to describe home care work as necessarily 'strenuous' or 'physically demanding and emotionally draining'" although she conceded that it requires "patience, diligence, and compassion." Munson, *supra* note 41, at 467. The provision of care by families could lack true voluntariness, which Munson does not acknowledge – one 1998 New York Times piece reported on

a tradition in the African-American community, where families have long been expected to care for their mothers and fathers and grandparents, as well as for their children. It is a tradition born of

If they do, it brings sacrifice: A 2017 article in the *Chicago Defender* related the story of Sharon Canady, a 55-year-old, who would help care for her mother while “she still had her own chores to do, worked 50+ hours a week at her job, was active in her church, and had family obligations with her husband and two sons, ages 14 and 20.”⁴⁹ Upon determining that both of her parents needed more help, Canady “decided to leave her job and become a home care aid for her parents through a privately owned agency. At \$10.95 an hour, it’s a fraction of what she once made.”⁵⁰

As to Munson’s point about costs, while it is true that treating those providing in-home care like everyday workers may raise costs, for too long the real cost of home care has been hidden—as part of a narrative where its proponents like to deride the costs of institutional care.⁵¹ The reality has long been, as Donovan wrote in 1987, that:

“certain harsh realities,” as Jacqueline Jones, a historian, puts it, “of a historic lack of access to good medical care, public support and the kind of jobs that guaranteed a secure old age.”

Sara Rimer, *Blacks Carry Load of Care for Their Elderly*, N.Y. TIMES (Mar. 15, 1998), <https://www.nytimes.com/1998/03/15/us/blacks-carry-load-of-care-for-their-elderly.html>. Contrary to Munson’s halcyon view, the article noted that “while caring for one’s own is a source of pride, and a statement of love and obligation, it also carries costs in terms of stress, lost wages, jobs and educational opportunities passed up, as well as health risks to the caregivers.” *Id.* Moreover, “Black caregivers tend to have less money than most white families caring for an elderly relative, so they bear a disproportionately higher burden of the care themselves because they can not afford to hire help.” *Id.*

⁴⁹Shari Noland, *The Black Caregiver Crisis*, CHICAGO DEFENDER (Apr. 18, 2017).

⁵⁰*Id.*

⁵¹For example, the American Association of Retired Persons (AARP) often falsely compares the cost of nursing home care with home care—not noting that a Medicaid payment for nursing home care also covers 24/7 housing, meals, and supervision. See, e.g., Victoria Sackett, *Nursing Home Costs Top \$100,000 a Year*, AARP (Oct. 24,

cost-reduction efforts are taking perhaps their heaviest toll on minority women workers who fill the nonprofessional jobs in home care as home attendants and home health aides. The structuring of home care work, according to the goal of reducing costs, may be seen, for example, in the recent trend toward governmental contracting with private employment agencies to

2018). But, when the Obama Administration conferred protections upon home care workers,

AARP suggested that the Department not require the payment of overtime if: (1) The individual is receiving HCBS under a publicly financed consumer-directed program; (2) a third party such as a public authority or a fiscal intermediary is involved; and (3) a family caregiver who lives with the consumer is being paid under the consumer-directed program to provide services for the individual.

Application of the Fair Labor Standards Act to Domestic Service, *supra* note 37, at 60476. AARP also suggested simply relying upon an agreement between the employer and caregiver instead of an actual record of hours worked. *See id.* at 60478. The Department of Labor disagreed: "With regard to the comments suggesting that the Department continue to allow the use of a reasonable agreement reflecting the expected schedule to establish a live-in domestic service employee's hours of work, the Department does not agree that such a system is appropriate." *Id.* at 60479. It noted that "[a]s the comments from employee representatives emphasized, live-in domestic service workers are in a vulnerable position due to their isolation, and many fear retaliation if they complain." *Id.* It also rejected, as unlawful, a AARP suggestion that "the Department allow employers to pay only the regular rate for sleep time even for overtime hours." *Id.* at 60491. AARP is being sued for alleged fraud involving the insurance policies it markets to seniors. See Evan Sweeney, *UnitedHealth, AARP hit with another lawsuit over co-branded Medigap plans*, FIERCE HEALTHCARE (Aug. 17, 2018).

provide publicly funded home care services.⁵²

The private agencies employing home health workers are certainly making money. Addus HomeCare, for example, announced in a March 2019 press release that “[f]or 2018, net service revenues were \$518.1 million, up 21.6% from \$426.0 million for 2017. Net income for 2018 increased 27.9% to \$17.5 million from \$13.7 million for 2017.”⁵³ And the company announced that its earnings actually improved during the COVID-19 pandemic: “Net service revenues were \$184.6 million for the second quarter of 2020, up 23.9% from \$148.9 million for the second quarter of 2019.”⁵⁴

There is a real potential for exploitation – as New York’s attorney general in 2009, Andrew Cuomo’s “Operation Home Alone” uncovered “a statewide range of fraudulent practices and schemes in the home health care industry by home health and personal care aides, the schools that train them, and the agencies that recruit and employ them.”⁵⁵

In Virginia, even under a Democratic governor, state-paid home care workers were only making \$9.40 an hour in 2018.⁵⁶ While efforts elsewhere have been made to organize

⁵²Donovan, *supra* note 25, at 39.

⁵³Press Release, Addus HomeCare, Addus HomeCare Announces Fourth-Quarter 2018 Financial Results (Mar. 4, 2019), <https://addus.gcs-web.com/news-releases/news-release-details/addus-homecare-announces-fourth-quarter-2018-financial-results>.

⁵⁴Press Release, AddusHomecare, Addus HomeCare Announces Second-Quarter 2020 Financial Results (Aug. 10, 2020), <https://addus.gcs-web.com/news-releases/news-release-details/addus-homecare-announces-second-quarter-2020-financial-results>.

⁵⁵Press Release, Off. Of N.Y. Att’y Gen., Attorney General Cuomo Announces \$24 Million Medicaid Fraud Settlement With Three Home Health Agencies (Dec. 17, 2009), <https://ag.ny.gov/press-release/attorney-general-cuomo-announces-24-million-medicaid-fraud-settlement-three-home>.

⁵⁶*See* Noe-Payne, *supra* note 28. One article noted that the Republican legislative majority “cut \$17 million in the Medicaid budget that had been set aside for overtime payments to personal assistance respite and companion services. The new budget language forbids overtime, which was set for a phase-in come July 1.” Travis Fain, *State budget:*

these workers into public sector unions, that work may be imperiled by a 2018 U.S. Supreme Court ruling making it harder to organize.⁵⁷ Such unions must now compete, door-to-door, with anti-union advocates and affirmatively enlist workers.⁵⁸ The Trump Administration has also worked to make it impossible for states to collect, and disburse, union dues where wages are paid directly by Medicaid.⁵⁹

Absent organization, as Ai-jen Poo has stated, “this work is almost defined by invisibility.”⁶⁰ And it is isolating—one estimate is that depression and exhaustion “can afflict up to 50 percent of those who provide in-home care for elderly and disabled people.”⁶¹ One author notes that “women provide 20 hours a week of unpaid care to their loved ones and spend more time than their male counterparts on caregiving tasks, which puts them at a greater risk for depression, anxiety and burnout.”⁶² Preoccupied with caregiving, “female caregivers are less likely to seek medical care, refill prescriptions, exercise and socialize.”⁶³ One columnist notes that “an estimated 60 percent of unpaid caregivers in the United States are women,

2019 funding, pay increases safe in Virginia spending plan, DAILY PRESS (Feb. 23, 2017), <https://www.dailypress.com/government/dp-nws-budget-rundown-20170223-story.html>.

⁵⁷Janus vs. Am. Fed’n State, Cty., & Mun. Emps. 138 S. Ct. 2448 (2018).

⁵⁸See Brendan Williams, *Somebody’s Knocking, Should I Let Them In? The Fight Over Unions Enters the Home*, 43 VERMONT L. REV. 351-368 (2018).

⁵⁹See Shefali Luthra, *Medicaid Officials Target Home Health Aides’ Union Dues*, NPR (Aug. 9, 2018), <https://www.npr.org/sections/health-shots/2018/08/09/636500804/medicaid-officials-target-home-health-aides-union-dues>.

⁶⁰Ivette Feliciano & Corinne Segal, *‘You’re mostly isolated and alone.’ Why some domestic workers are vulnerable to exploitation*, PBS (Aug. 12, 2018), <https://www.pbs.org/newshour/nation/ai-jen-poo-domestic-workers-exploitation>.

⁶¹David Downey, *Hemet woman may have killed herself, beloved aunt after 20 years of caregiver exhaustion*, PRESS ENTERPRISE (Feb. 19, 2019), <https://www.pe.com/2019/02/19/hemet-woman-may-have-killed-herself-beloved-aunt-after-20-years-of-caregiver-exhaustion/>.

⁶²Christina Best, *How Caregiving Affects Women’s Health*, HOMECARE (Mar. 1, 2019), <https://www.homecaremag.com/aging-place/march-2019/how-caregiving-affects-womens-health>.

⁶³*Id.*

and they pay much higher economic costs for taking on this role than men.”⁶⁴

President Trump’s hostility toward immigration, which has not extended to staffing his own country clubs,⁶⁵ also threatens a key component of the caregiving workforce.

Only 69% of home care workers are U.S. citizens by birth,⁶⁶ as compared to 79% of nursing assistants in nursing homes.⁶⁷ As one article reported: “‘What people don’t seem to understand is that people from other countries really are the backbone of long-term care,’ said Sister Jacquelyn McCarthy, CEO of Bethany Health Care Center in Framingham, Mass., which runs a nursing home with 170 patients.”⁶⁸

Even prior to the COVID-19 pandemic, with robust national economic indicators,⁶⁹ long-term care was not spared from cuts. In Alaska, for example, a new Republican governor proposed in 2019 to reduce Medicaid spending by 33 percent – the head of the trade association for hospitals and nursing

⁶⁴Sarah Anderson, *America Needs a Long-Term Care Program for Seniors*, COUNTERPUNCH (May 24, 2019), <https://www.counterpunch.org/2019/05/24/america-needs-a-long-term-care-program-for-seniors/>. This phenomena is not confined to the United States. Another columnist reports that “there are around 647 million full-time unpaid careers worldwide, of which 606 million are women.” Ana Garcia Valdivia, *Time To Change Perceptions: Why Care Work Can Boost Countries' Economies*, FORBES (May 27, 2019), <https://www.forbes.com/sites/anagarciavaldivia/2019/05/27/time-to-change-perceptions-why-care-work-can-boost-countries-economies/#45b59b80a7bd>.

⁶⁵See, e.g., Joshua Partlow & David A. Farenthold, *Trump’s golf course employed undocumented workers – and then fired them amid showdown over border wall*, WASH. POST (Jan. 26, 2019); see also David A. Farenthold, *Trump’s Mar-a-Lago Club in Florida seeks to hire 78 foreign workers*, WASH. POST (July 10, 2018).

⁶⁶See U.S. HOME CARE WORKERS: KEY FACTS, *supra* note 12, at 3. This does not account for the underground economy.

⁶⁷See U.S. NURSING ASSISTANTS EMPLOYED IN NURSING HOMES, *supra* note 5, at 3.

⁶⁸Melissa Bailey, *As Trump targets immigrants, elderly and others brace to lose caregivers*, WASH. POST (Mar. 24, 2018).

⁶⁹See, e.g., Lucia Mutikani, *Upbeat employment report underscores U.S. economic strength*, REUTERS (Jan. 4, 2019), <https://fr.reuters.com/article/us-usa-economy-idUSKCN1OY0AU>.

homes accused the governor of a “willingness just to make Alaska a poorer and less safe place.”⁷⁰

In Missouri, the *St. Louis Post-Dispatch* reported in 2019 that the Republican governor had commissioned a study that suggested a \$270 million cut to nursing home care.⁷¹ Yet wages for workers in Missouri’s nursing homes can already be so low that they celebrated the state’s passage of Proposition B in 2018 to raise the minimum wage from \$7.85 an hour to \$8.60 in 2019 (and eventually \$12 by 2023).⁷²

In Texas, one of the nation’s lowest Medicaid reimbursement rates for nursing home care, just \$144 a day in 2018, fueled a staff turnover rate of “97 percent for certified nurse aides, and 90 percent for licensed vocational nurses and registered nurses” according to a trade group.⁷³

⁷⁰Elwood Bremer, *Dunleavy budget includes \$225M cut to Alaska’s state share of Medicaid*, ANCHORAGE DAILY NEWS (Feb. 15, 2019), <https://www.adn.com/politics/2019/02/14/dunleavy-budget-includes-225-million-cut-to-alaskas-state-share-of-medicaid/>.

⁷¹Kurt Erickson, *New report recommends \$1 billion in annual savings with overhaul of Medicaid in Missouri*, ST. LOUIS POST-DISPATCH (Feb. 11, 2019), https://www.stltoday.com/news/local/govt-and-politics/new-report-recommends-1-billion-in-annual-savings-with-overhaul-of-medicaid-in-missouri/article_447de4bb-3d9c-5706-bb77-81b02282668a.html. In 2017, \$50 million had been cut from in-home care as well. See Samantha Liss, *After Missouri Cuts Funding for the Disabled, Some Fear They May be Forced into Nursing Homes*, ST. LOUIS POST-DISPATCH (Aug. 16, 2018), https://www.stltoday.com/news/local/govt-and-politics/after-missouri-cuts-funding-for-the-disabled-some-fear-they-may-be-forced-into-nursing/article_76b2dac9-76ed-5545-9689-e87650d4a3ab.html.

⁷²See Rebecca Rivas, *Missouri votes to raise the minimum wage, clean up politics, legalize medical marijuana*, ST. LOUIS AM. (Nov. 7, 2018), http://www.stlamerican.com/news/local_news/missouri-votes-to-raise-the-minimum-wage-clean-up-politics-legalize-medical-marijuana/article_7daa43a8-e25b-11e8-86ab-6f109948cbfe.html (“Paula Jones, an organizer with SEIU Healthcare union, celebrated Prop B’s win at the watch party held at the Flamingo Bowl. The union represents many nursing home and hospital workers who receive low wages, she said.”).

⁷³Trish Choate, *High turnover in nursing staff impacts North Texas’ most vulnerable seniors*, TIMES RECORD (June 15, 2018), <https://www.timesrecordnews.com/story/news/local/2018/06/15/high-turnover-nursing-staff-impacts-north-texas-vulnerable-seniors/706228002/>.

There are human consequences to this austerity. An epidemic of nursing home closures, especially in rural communities, scatters residents and caregivers alike.⁷⁴ When an 89-bed South Dakota nursing home closed in “Mobridge, an old railroad town of 3,500 people,” it was reported that residents had to move as far as 220 miles away to North Dakota: “‘Like cattle,’ said Nadine Alexander, a certified nursing assistant who worked at the Mobridge nursing home for 29 years. ‘They were just hauling them out.’”⁷⁵

Nursing homes are in competition with the service sector,⁷⁶ such as the hospitality industry: One such nursing home in New York’s Lake Placid, a tourist destination, had to draw workers from “more than an hour away” – forcing it to raise wages substantially, rent hotel rooms for workers, and consider “trying to start its own shuttle service that would pick up and drop off workers.”⁷⁷ In New Hampshire, one family-owned nursing home “even has an on-site early learning center for staff children.”⁷⁸

Those are all great initiatives, but in 2020, the Medicare Payment Advisory Commission’s annual report to Congress found that in 2018, nursing home services, nationally, were operating only at a -.3% total percent margin – the first negative

⁷⁴See, e.g., Jack Healy, *Nursing Homes Are Closing Across Rural America, Scattering Residents*, N.Y. TIMES (Mar. 4, 2019), <https://www.nytimes.com/2019/03/04/us/rural-nursing-homes-closure.html>.

⁷⁵*Id.*

⁷⁶Paradoxically, periods of low unemployment degrade care quality, according to a study, as facilities compete with other employers for staff: “Nursing homes are constrained by a flawed financing system that doesn’t support increasing workers’ wages, leading to nationwide staffing shortages.” Megan Cerullo, *Strong U.S. job market hurts care for those in nursing homes*, CBS (Dec. 11, 2018), <https://www.cbsnews.com/news/strong-u-s-job-market-hurts-care-for-those-in-nursing-homes/>.

⁷⁷Griffin Kelly, *Elderwood improves staff recruitment, retention*, ADIRONDACK DAILY ENTERPRISE (Mar. 4, 2019), <https://www.adirondackdailyenterprise.com/news/local-news/2019/03/elderwood-improves-staff-recruitment-retention/>.

⁷⁸Tom Argue & Patricia Ramsey, *New Hampshire must address critical caregiver shortage*, PORTSMOUTH HERALD (Dec. 12, 2018), <https://www.seacoastonline.com/news/20181212/new-hampshire-must-address-critical-caregiver-shortage>.

margin since 2000.⁷⁹ There is little room within a negative margin for new caregiver recruitment and retention strategies.

The New Hampshire nursing home, for example, was competing with a state willing to pay toll attendants more than the wages it would support for nursing assistants “who must undertake 100 hours of training and pass two criminal background checks.”⁸⁰ And, in a telling expression of government priorities, when the state discontinued COVID-19 hazard pay for those caring for its Medicaid long-term care clients, it continued hazard pay for state liquor store workers.⁸¹

Despite the Trump Administration’s attempts to cut Medicaid funding, polling shows the program commands public support.⁸² Yet Medicaid, as an “entitlement” program, is subject to ongoing conservative attack—perhaps it is, as Dahleen Glanton pointedly wrote, due to the myth of the “welfare queen” that President Ronald Reagan once conjured: “Conservatives refuse to give up their quest to bring down this lazy, scheming, African-American woman who uses her food stamps and other government aid to support a lavish lifestyle with countless jobless men who drift in and out of her bed.”⁸³ Rather than blame the enormous tax cuts enacted under President Trump for an exploding federal deficit, Republicans have blamed the safety net.⁸⁴

⁷⁹MEDICARE PAYMENT ADVISORY COMM’N, REPORT TO THE CONGRESS: MEDICARE PAYMENT POLICY 220 (2020), http://www.medpac.gov/docs/default-source/reports/mar20_entirereport_sec.pdf?sfvrsn=0.

⁸⁰See Argue & Ramsey, *supra* note 78.

⁸¹See Brendan W. Williams, *Restore stipend for the heroes on front line of COVID-19*, UNION LEADER (Aug. 4, 2020), https://www.unionleader.com/opinion/op-eds/brendan-w-williams-restore-stipend-for-the-heroes-on-front-line-of-covid-19/article_4b098ac2-124f-53a1-b83a-85f6d1a96ac5.html.

⁸²See Dylan Scott, *Poll: Medicaid is overwhelmingly popular, even as Trump looks to cut it*, VOX (Mar. 1, 2018),

<https://www.vox.com/policy-and-politics/2018/3/1/17066578/medicaid-work-requirements-poll-kff>.

⁸³Dahleen Glanton, *The myth of the 'welfare queen' endures, and children pay the price*, CHICAGO TRIB. (May 17, 2018),

<https://www.chicagotribune.com/columns/dahleen-glanton/ct-met-dahleen-glanton-welfare-queen-20180516-story.html>.

⁸⁴See Editorial, *Predictably, Republicans hint that tax-plan deficit justifies entitlement cuts*, ST. LOUIS POST-DISPATCH (Oct. 21, 2018),

While Republicans have been the architects of some of the most draconian long-term care cut proposals, neither party has been blameless – with both banking on Medicare cuts in a bipartisan federal budget “deal” in 2018 that each side frothed over in claiming victory.⁸⁵ However, the Democratic “Medicare-for-All” proposals introduced in the U.S. House and Senate in 2019 would cover long-term care.⁸⁶ They represented a long-overdue step toward looking at health care holistically.

https://www.stltoday.com/opinion/editorial/editorial-predictably-republicans-hint-that-tax-plan-deficit-justifies-entitlement/article_a5e74a11-49aa-51e0-a8e0-9d6ee7859732.html. (“Just because Republicans have undermined funding for important safety-net programs with their reckless tax cuts doesn’t mean Democrats have any obligation to help them throw those vulnerable populations overboard.”). In his Federal Fiscal Year 2020 budget proposal, President Trump suggested cutting over \$1 trillion from Medicaid care. See Jeff Stein & Amy Goldstein, *Trump proposes big cuts to health programs for poor, elderly and disabled*, WASH. POST (Mar. 11, 2019).

⁸⁵See Brendan Williams, *Stop cheering the budget deal. It's a blow to long-term care and the safety net.*, USA TODAY (Feb. 15, 2018), <https://www.usatoday.com/story/opinion/2018/02/15/stop-cheering-budget-deal-its-ruinous-long-term-care-well-need-brendan-williams-column/337760002/>. As the author noted:

The bipartisan jubilation ignored the fact that long-term care was used as a ‘pay-for’ to offset the military spending increase. According to the Congressional Budget Office (CBO), there is a \$3.5 billion Medicare cut to home health services, and a \$1.9 billion Medicare cut to nursing home care. While the cut will not begin until 2019 for home health, it starts Oct.1 for nursing homes with \$140 million slashed from care.

Id. Obviously “caregivers, and those they care for, do not enjoy the political clout of defense contractors. No grand parade will be staged in recognition of their sacrifice. Perhaps they are simply easier to marginalize because of their demographics.” *Id.*

⁸⁶See Sarah Kliff, *Medicare-for-all: Rep. Pramila Jayapal’s new bill, explained*, VOX (Feb. 26, 2019), <https://www.vox.com/policy-and-politics/2019/2/26/18239630/medicare-for-all-pramila-jayapal-bill;>

The COVID-19 pandemic exacerbated the longstanding government neglect of long-term care workers, with unusable personal protective equipment shipped by the Trump Administration to nursing homes,⁸⁷ and the administration waiting six months to ship testing machines to facilities to protect staff and residents alike.⁸⁸ Through July 2020, at least 760 nursing home workers had died from COVID-19 in the United States.⁸⁹ As a *Washington Post* op-ed noted:

[W]e have implicitly asked nursing home workers to risk their lives to care for our loved ones in nursing homes without acknowledging the gravity of this request. We failed to provide nursing home workers with the

see also Mary Ellen McIntire, *Bernie Sanders' new Medicare for All bill would cover some long-term care*, ROLL CALL (Apr. 10, 2019), <https://www.rollcall.com/2019/04/10/bernie-sanders-new-medicare-for-all-bill-would-cover-some-long-term-care/>.

⁸⁷See Andrew Jacobs, *FEMA Sends Faulty Protective Gear to Nursing Homes Battling Virus*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/24/health/coronavirus-nursing-homes-PPE.html>. Even progressive states failed to prioritize protecting nursing home workers; see Robert Weisman & Liz Kowalczyk, *A home to die in*, BOSTON GLOBE (Sept. 27, 2020) (In Massachusetts, “[s]tate officials, the Globe found, failed to give priority in March to front-line nursing home workers for protective masks and gowns. Instead, they sent more of the limited supply to hospitals, which were in a far better position than nursing homes to acquire the gear on their own.”), <https://apps.bostonglobe.com/metro/investigations/spotlight/2020/09/last-words/part2-forgotten-elderly/index.html>.

⁸⁸Ricardo Alonso-Zaldivar, *Trump nursing home plan limits supply of free COVID-19 tests*, ASSOCIATED PRESS (Aug. 4, 2020), <https://apnews.com/article/ap-top-news-health-politics-business-nursing-homes-267eb99ba143f39d9d51dee32f0512a8>, (Moreover, “The Trump administration’s plan to provide every nursing home with a fast COVID-19 testing machine comes with an asterisk: The government won’t supply enough test kits to check staff and residents beyond an initial couple of rounds.”).

⁸⁹Brian E. McGarry, Lori Porter & David C. Grabowski, *Nursing home workers now have the most dangerous jobs in America. They deserve better.*, WASH. POST (July 28, 2020).

basic tools to do their jobs safely or even financially compensate them for the risks they are taking. This lack of support is a national source of shame that has directly contributed to the sobering death totals among both nursing home staff and residents.⁹⁰

Perhaps it will take the tragedy of the COVID-19 pandemic to cause an aging society to finally awaken to long-term care needs, and cease the paradox where “we ennoble narratives of caregiving while simultaneously rating it low priority.”⁹¹ If this does not change, it will continue to be predominantly women caregivers—largely women of color—who suffer.⁹²

⁹⁰*Id.* Iowa was among the states that actually concealed from the public the number of nursing home staff who died from COVID-19 – suggesting the marginalization of nursing home workers could even be posthumous; see Clark Kauffman, *Iowa agency keeps secret the number of COVID-19 staff deaths in nursing homes*, DES MOINES REG. (Oct. 5, 2020, 9::37 PM).

⁹¹Courtney E. Martin, *Does America Care About Care? Not Enough*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/04/opinion/paid-family-leave.html>.

⁹²See, e.g., STEPHEN CAMPBELL, PARAPROFESSIONAL HEALTH INST., *Racial Disparities in the Direct Care Workforce: Spotlight on Black/ African American Workers* 4 (Feb. 1, 2018), <https://phinational.org/resource/racial-disparities-direct-care-workforce-spotlight-black-african-american-workers/>, (finding that “[f]ifty-three percent of U.S.-born Black/ African American workers rely on some form of public assistance, compared to 34 percent of Black immigrants and 38 percent of white workers.”).