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The Golden Years, Gray Divorce, Pink Caretaking, and Green Money

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Introduction

Hillary Clinton and Donald Trump have little in common—one of the only similarities is that they are both Baby Boomers. That means they are part of the largest generation to date to confront, and experience, aging in America. They also represent the diversity of Baby Boomers—Hillary Clinton married at the age of twenty-seven and has one child, whereas Donald Trump is on his third marriage and has numerous children. Like others of their generation, their experiences of growing old in America and facing serious illness are defined, in part, by their marital practices and fertility rates—although, unlike others, they experience class protection.

This Article considers the impact of changing family structures on aging in the Age of Trump. It looks at two critical and interrelated aspects of aging—economic security and caretaking—and offers policy suggestions on how to improve the financial stability of and caretaking possibilities for elders. The core thesis is that our current social, legal, and economic structure for growing old is organized around the nuclear family with respect to both caretaking and financial security. As family structures change in terms of partnering (and re-partnering and non-partnering) and number of children, and with the increase in economic inequality, support for old age needs to change as well. Nonetheless, notwithstanding changing family forms and roles and economic disparities, we have not made the requisite changes to prepare for the forthcoming silver tsunami.

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Contemporary legal approaches to aging reify the middle- and upper-middle-class intact nuclear family, enshrining class, gender, and marriage.[1] The result is that women and minorities experience higher poverty rates as they age. The solutions do not necessarily involve entirely unmooring caretaking and benefits from family but do involve "spreading the wealth," assuring that those left out of current nuclear-family-based transfers are not left out of financial security or caretaking, and that those who provide caretaking are appropriately recognized. That means making some changes to existing qualifications for benefits, as well as developing new means for the inclusion of those left out. To be sure, many others have commented on how each of these separate pieces is organized around the nuclear marital family; this Article brings those pieces together and provides a new perspective on the relationship between socioeconomic class, family, and the social and cultural structures surrounding aging.

Part I looks at family structure and our changing socioeconomic environment; Part II looks at how caretaking and economic security are organized around the nuclear family; and Part III offers solutions.

I. Family, Economics, and Caretaking

Today, there are 46 million Americans aged sixty-five and older, and it is expected that the number of individuals in this age range will double to over 98 million by 2060, meaning that the sixty-five-and-older age group's share of the total population will rise to nearly 24% from 15%.[2] Consequently, since women live longer than men, it

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1. *See* Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 Tax. L. Rev. 695 (2013); Pamela Herd, *Reforming a Breadwinner Welfare State: Gender, Race, Class and Social Security Reform*, 83 Soc. Forces 1365, 1389 (2005) (finding that welfare benefits "connected to marital status, even those intended to offset the costs of marital dissolution, still favor wealthier white women"); Maxine Eichner, *The Family, in Context*, 128 Harv. L. Rev. 1980 (2015) (reviewing June Carbone & Naomi Cahn, Marriage Markets: How Inequality Is Remaking the American Family (2014)); Joanna Zhang, *Marriage in the Golden Years: Revisiting Benefits and Obligations in Light of the New Individualism*, 38 N.Y.U. Rev. L. & Soc. Change 361, 365 (2014); *see also* Amy Ziettlow & Naomi Cahn, Homeward Bound: Modern Families, Elder Care, and Loss (2017) (discussing how care is organized in different family forms).

2. Mark Mather, *Fact Sheet: Aging in the United States*, Population Reference Bureau (Jan. 13, 2016), http://www.prb.org/Publications/Media-Guides/2016/aging-unitedstates-fact-sheet.aspx.

is a demographic reality that widowed women outnumber widowed men by almost four to one.[3]

Three trends over the past half-century have changed the demographic realities of growing old in America. First, much of the population no longer lives in married parent families, even though state policies continue to promote and support marriage. Second, economic inequality has risen, resulting in heightened precariousness of individual finances. Third, life expectancy has increased dramatically. This Part also discusses the demographics of caregiving.

A. Demographics and Marriage Promotion by the State

The American family is changing, and so is the social landscape.

1. History

In the colonial period and the era immediately following independence, families were hierarchically organized, interdependent households, with the man as head but with all members (regardless of age) contributing to the household's economic viability and to caring for one another. Marriage was virtually universal and remained so until the last third of the twentieth century. Care occurred within the family; if it did not, older people moved into a poorhouse. Elder care was, however, less significant simply because there were fewer old people (under 5% of the American population was over the age of sixty-five in 1870, and, as they aged, men remained in the labor force).[4]

The manufacturing era, which began in the Northeast before the Civil War, gradually resulted in alterations to the management of old age. As work moved off the farm, the nature of employment changed, meaning that there was less autonomy (for older men) to continue working. Similarly, the state began to assume some limited financial responsibility for aging. Beginning in 1861, the military pension system served as the start of a very

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3. Michael Hackard, *Stepmothers: The Cause of So Many Estate Fights*, Forbes (Jan. 23, 2018, 3:27 PM), https://www.forbes.com/sites/nextavenue/2018/01/23/stepmothers-the-cause-of-so-many-estate-fights/#7f37d16f1081.

4. Dora L. Costa, The Evolution of Retirement: An American History, 1880–1990, at 1–2, 6 (1998). Average life expectancy at birth in 1900 was approximately fifty for whites and under thirty-five for others. Kant Patel & Mark E. Rushefsky, Health Care in America: Separate and Unequal 227 (2008). "From 1650 to 1850, the number of elderly Americans was small, consisting of less than 2% of the population." Kevin C. Fleming, Jonathan M. Evans & Darryl S. Chutka, *A Cultural and Economic History of Old Age in America*, 78 Mayo Clinic Proc. 914, 914 (2003). For an anthropological perspective on grandmothers, see Peter S. Kim, James E. Coxworth & Kristen Hawkes, *Increased Longevity Evolves from Grandmothering*, 279 Proc. Royal Soc'y B 4880 (2012).

basic insurance system for soldiers and their widows (soldiers were solely male during this period), although the system died with the veterans.[5] Early twentieth-century mothers' pensions for deserving mothers were not old-age focused but did set the stage for further state public support.[6]

In terms of actual caregiving, however, even as America industrialized, the family continued to be the primary source of care for older people who were no longer self-sufficient. Additionally, the state continued to oversee marriage, promoting it as necessary to family stability and as a way to coordinate husbands' and wives' distinctively gendered societal contributions. This reinforced the availability of care for elders by wives or adult daughters.

2. Contemporary Families

Subsequent developments have transformed families and their ability to provide care. Caregiving has been profoundly affected by women's increasing presence in the workforce and by class divisions in marriage. First, the new information economy's demand for women's labor is occurring as the state promotes women's equal status in the workplace and, with the erosion of the ability to support a family on one wage-earner's income, as families need a second wage-earner.[7] While women have attained a greater degree of economic independence and have become increasingly likely to work outside the home,[8] it means they are less likely to be home to care for older relatives.

Second, the economy of the latter half of the twentieth century produced a wholesale shift in the role of women, and the result was a change in the nature of marriage. As women gained more autonomy and as men's

5. Fleming et al., *supra* note 4, at 22.

6. Maxine Eichner, The Marketized Family (forthcoming); Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States (1992).

7. *See, e.g.*, Alissa Quart, Squeezed: Why Our Families Can't Afford America (2018); June Carbone & Naomi Cahn, *Family Law and Emotion*, *in* Law & Emotions (Susan Bandes et al. eds., forthcoming 2019).

8. In 1948, 32.7% of women worked; today, it is over 56%. Mark DeWolf, *12 Stats About Working Women*, U.S. Dep't Labor Blog (Mar. 1, 2017), https://blog.dol.gov/2017/03/01/12-stats-about-working-women. "In March 2015, 69.9 percent of mothers with children under age 18 were in the labor force, up from 47.4 percent in 1975. The increase in the labor force participation has been even more pronounced for mothers with young children." U.S. Dep't Labor: Women's Bureau, Working Mothers Issue Brief 1 (2016), https://www.dol.gov/wb/resources/WB_WorkingMothers_508_FinalJune13.pdf. Black mothers are more likely than mothers of other races to be in the workforce. Nat'l Women's L. Ctr., Child Care: A Snapshot of Working Mothers (2017), https://nwlc.org/wp-content/uploads/2017/04/A-Snapshot-of-Working-Mothers.pdf.

wages declined, these trends challenged the traditional marital family of male breadwinners and female homemakers. In its place, state-sanctioned marriage became a legal relationship premised on formal equality that requires flexibility, maturity, and trust to endure. The changes in the economy and employment law corresponded with evolving family law legislation and judicial decisions that treated spouses as equal.[9]

The state now promotes marriage by granting various perquisites, such as family and medical leave privileges, Social Security, and more than a thousand other federal benefits, as well as state recognition of their interdependence that is reflected in such legal instruments as healthcare proxies. And states have been increasing the amount to which a surviving spouse is entitled from a decedent spouse's estate. These disproportionately benefit the upper-middle class; its members have the stable jobs that lead to pensions and Social Security, and the well-off increasingly marry each other and invest even more in their offspring.[10] Even though marriage remains highly desirable, the percentage of American adults who are married has decreased dramatically since the establishment of Social Security.

3. Decline of Marriage

Examining the reasons that marriage has declined is critical to appreciating the need to change our contemporary approach to economic security and caretaking. One approach to the relationship between marital decline and financial security in the legal literature has been clearly articulated by Professor Anne Alstott, who has compellingly addressed how the federal income tax and Social Security systems are structured around marriage. She challenges this linking based on the changing shape of the American family and questions whether "formal marriage represents a sound distinction [for receipt of benefits] in light of the purposes" of the underlying policies.[11] Her analysis provides a critical foundation for considering how approaches to economic security should be reconfigured to support contemporary family forms. Yet Alstott ascribes the change in marriage to a more individualistic approach in which people make choices to enter and exit marriage based on their self-focused evaluations of what is best for their own personal growth and happiness; she argues that spouses

9. *See* Carbone & Cahn, *supra* note 1.

10. *See id.*; Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, Pew Res. Ctr.: FactTank (Sept. 14, 2017), http://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/.

11. Alstott, *supra* note 1, at 758.

have become more autonomous financially, and marriage no longer involves expectations of "lifelong commitment . . . with a psychological sense of unity."[12] Based on this approach, policy interventions should be focused on the individual.

In contrast, as June Carbone and I have written, it is because marriage today is *not* an individualistic endeavor but instead reflects a newer, modernist morality that it provides strong support for older married couples.[13] This new system of family values emphasizes investment in women as well as men and careful family planning to ensure greater investment in children—and it involves expectations of mutual interdependence both financially and when it comes to raising children. At the top, the emphasis on married, two-parent families has increased, although not because of an increasing emphasis on personal fulfillment. College-graduate women were once less likely to marry than high school graduates; today, they are the women most likely to marry.[14] Indeed, the only group in American society to see their marriage rates increase over the past forty years has been women in the top 10% of the income scale.[15] Marriage is, to be sure, a choice, but the divorce rates of the college educated have fallen, reflecting their strong commitment to the institution of marriage.

Rather than couples living autonomous lives, the rate at which they pool their monies may change the longer they live together, although incidence varies by race.[16] Pooling of assets indicates commitment, and couples who do so appear to have higher quality relationships, with the higher the level of pooling, the more satisfying the relationship. Researchers speculate that, at least for men, pooling improves the quality of the relationship (rather than the quality of the relationship affecting likelihood of sharing). It is

12. *Id.* at 697, 734; *see* Zhang, *supra* note 1, at 383–84.

13. *See* Carbone & Cahn, *supra* note 1.

14. Lindsey Cook, *For Richer, Not Poorer: Marriage and the Growing Class Divide*, U.S. News (Oct. 26, 2015, 4:18 PM), https://www.usnews.com/news/blogs/data-mine/2015/10/26/marriage-and-the-growing-class-divide.

15. Shaun Fremstead & Melissa Boteach, Ctr. for Am. Progress, Valuing All Our Families: Progressive Policies That Strengthen Commitments and Reduce Family Disparities 33–34 (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/01/FamilyStructure-report.pdf.

16. Fenaba R. Addo & Sharon Sassler, *Financial Arrangements and Relationship Quality in Low-Income Couples*, 59 Fam. Rel. 416 (2010) ("Black men were 22.4 times more likely to have only separate accounts than only a joint one"), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3404834/pdf/nihms385803.pdf; Megan McArdle, *Want Marital Bliss? Pool Your Money*, Bloomberg View (Sept. 16, 2013, 3:06 PM), https://www.bloomberg.com/view/articles/2013-09-16/want-marital-bliss-pool-your-money.

true that women in shorter relationships (under five years) are more likely to report that the partners did not have a shared bank account.

Women's increased income does make them wait longer to get married, and the average age of marriage has steadily increased over the past half-century as "[t]he costs of attachment to an unreliable partner have . . . increased."[17] More elite men and women succeed in finding partners worthy of commitment, while those further down the socioeconomic ladder do not, resulting in the increasing number of gray divorces, even when they do get married.

Economic uncertainty makes things worse. Dual breadwinners become critical to stability, but each can also threaten the other's resources. Partners who do not carry their own weight in the relationship endanger the emotional and financial resources that the other partner sees as necessary to care not only for themselves but also for any children. Without a degree of financial security and agreement on basic responsibilities, marriage becomes less likely, and, when it happens, more unstable. Decreasing blue-collar employment reduces the number of "marriageable" men, as numerous studies have shown.

In the poorest communities, marriage has effectively disappeared. Divorce rates, which stabilized for college graduates, have continued to rise for the rest of the population, and a majority of the births to those without college degrees take place outside of marriage.[18] This means, effectively, that for many of these women (and men), they have no partner with whom to build an economically secure life.

Most people will get married, with only a slight decline in marriage prevalence expected over the next thirty years; more people will marry later in life, and first-marriage rates are increasing for those over the age of forty-five.[19] Moreover, marriage retains its role as a cherished institution, and there are still strong cultural expectations that women will stay home to care for children—although many return to the workplace once children are grown.

Nonetheless, compared to a century ago, families look substantially different: They are smaller because the birth rate has declined, people are less likely to be married, the divorce rate is substantially higher, and both

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17. *See* June Carbone & Naomi Cahn, *Nonmarriage*, 76 Md. L. Rev. 55, 92 (2016); Addo & Sassler, *supra* note 16.

18. *See* Ben Casselman, *Marriage Isn't Dead—Yet*, FiveThirtyEight (Sept. 29, 2014, 1:09 PM), https://fivethirtyeight.com/features/marriage-isnt-dead-yet/.

19. Philip N. Cohen, *Data Analysis: Are Older Newlyweds Saving Marriage?*, Fam. Inequality (Jan. 3, 2018, 7:54 AM), https://familyinequality.wordpress.com/2018/01/03/new-analysis-this-is-what-marriage-tapering-looks-like/.

partners are more likely to be working. Yet, the same expectations of care for dependent and vulnerable family members continue.[20]

The demographic changes have resulted in more older Americans with neither a spouse nor children; even if they have relatives, the older person may live far away from family members. Childlessness doubled among women aged forty to forty-four from 1980 to 2010; one-fourth of all Baby Boomers never had children.[21] More than one-fourth (27%) of women ages sixty-five to seventy-four lived alone in 2014, and this share jumps as women get older (to 42% among women ages seventy-five to eighty-four, and to 56% among women ages eighty-five and older). The percentage of older white Americans with neither spouse nor children will be approximately 8% to 10% over the next forty years, while for African Americans, it will be slightly higher.[22]

4. Divorce Rates

The divorce rate clearly has an impact on living alone. The likelihood of divorce for first marriages is approximately 50%, while it is even higher for second marriages.[23] Consequently, more older adults are divorced compared with previous generations. In 1980, the "share of divorced women" who were sixty-five and older was 3%, and by 2015, it had increased to 13%; for men, it was 4% in 1980 and 11% in 2015.[24]

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20. Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law*, in Oxford Handbook of Fiduciary Law (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3118349.

21. *See Aging Baby Boomers, Childless and Unmarried, at Risk of Becoming "Elder Orphans,"* EurekAlert! (May 15, 2015), https://www.eurekalert.org/pub_releases/2015-05/nsij-abb051315.php; Carina Storrs, *The "Elder Orphans" of the Baby Boom Generation*, CNN (May 18, 2015, 4:22 PM), http://www.cnn.com/2015/05/18/health/elder-orphans; *see also* Sandra L. Colby & Jennifer M. Ortman, *The Baby Boom Cohort in the United States*: 2012 *to* 2060, U.S. Census Bureau (2014), http://www.census.gov/prod/2014pubs/p25-1141.pdf.

22. Ashton M. Verdery & Rachel Margolis, *Projections of White and Black Older Adults Without Living Kin in the United States, 2015 to 2060*, 114 Proc. Nat'l Acad. Sci. 11109 (2017), http://www.pnas.org/content/pnas/114/42/11109.full.pdf; *see generally* Maria T. Carney et al., *Elder Orphans Hiding in Plain Sight: A Growing Vulnerable Population*, 2016 Current Gerontology & Geriatrics Res. 1 (2016), https://pdfs.semanticscholar.org/c44e/0ec5f37350bebc22b4422c3cda3d6432edfc.pdf; Anna Sutherland, *In Coming Decades, More Senior Americans Will Lack Close Kin*, Inst. Fam. Stud. (Jan. 17, 2018), https://ifstudies.org/blog/in-coming-decades-more-senior-americans-will-lack-close-kin.

23. *See* Philip N. Cohen, *Multiple-Decrement Life Table Estimates of Divorce Rates*, Ctr. Open Sci. (June 8, 2016, 10:01 AM), https://osf.io/zber3/.

24. Mather, *supra* note 2.

The Baby Boomer cohort, the contemporary silver tsunami generation, was the first to experience high divorce and remarriage rates during early adulthood, and almost 40% of all Baby Boomers have been divorced.[25] Moreover, they are continuing to divorce as they grow older; the divorce rate for those fifty and older doubled between 1990 and 2010.[26] The share of divorced women ages sixty-five and older increased from 3% in 1980 to 13% in 2015, and for men from 4% to 11% during the same period. Nonetheless, the divorce rate is still not all that high for those over the age of fifty. But the divorce rate for those over fifty is still *half* the rate for those under fifty.[27]

Divorce impacts both economic security and caretaking, even though, as discussed below, many of those who divorce will later cohabit. Married couples accumulate more wealth, and older divorce is associated with a decline in health.[28] While 4% of those over the age of fifty are cohabiting, a percentage that has almost doubled in the past decade, most of them have previously been married and divorced (55%) or are now widowed (13%), and slightly more than a quarter were never married.[29] This demographic reality means that more older people are partnered; because they are not married, however, they do not have access to the same state-sanctioned benefits.

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25. I-Fen Lin & Susan L. Brown, *Unmarried Boomers Confront Old Age: A National Portrait*, 52 Gerontologist 153 (2012).

26. *See generally* Susan L. Brown & I-Fen Lin, *The Gray Divorce Revolution: Rising Divorce Among Middle-Aged and Older Adults, 1990–2010*, 67 J. Gerontology 731, 735 (2012); *see also* Rodney Brooks, *Gray Divorce Can Drag Both Parties into the Red*, Wash. Post (Apr. 9, 2016), https://www.washingtonpost.com/business/get-there/gray-divorce-can-put-split-couples-into-the-red/2016/04/08/1fa02dda-fc09-11e5-9140-e61d062438bb_story.html?utm_term=.fcff28a7d653.

27. *See* Naomi Cahn & June Carbone, *Who Is at Risk for a Gray Divorce? It Depends*, Inst. Fam. Stud. (May 1, 2017), https://ifstudies.org/blog/who-is-at-risk-for-a-gray-divorce-it-depends (reporting that "in 1990, 5 people out of every 1000 married people divorced, and in 2010, it was 10 out of every 1000 married people. And yes, it has risen much more dramatically than has the rate for those under 50; in fact, there was a decline in the rate for those between the ages of 25-39.").

28. *See generally* Gary R. Lee, The Limits of Marriage: Why Getting Everyone Married Won't Solve All Our Problems 64–65, 79 (2015).

29. Renee Stepler, *Number of U.S. Adults Cohabiting with a Partner Continues to Rise, Especially Among Those 50 and Older*, Pew Res. Ctr.: Fact Tank (Apr. 6, 2017), http://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/.

B. Economic Security, Economic Inequality, and the Poverty Rate of Elders

In terms of economic security, relatively few Americans believe the government should have the greatest responsibility; instead, they believe that either family members or older adults themselves should be accountable.[30]

1. Economic Security

The famed three-legged financial stool of Social Security payments, pension benefits, and private savings is supposed to serve as the source of economic security for the expenses of aging. This is supplemented by either Medicare and private health insurance or Medicaid for medical expenses.

The three-legged stool, however, only provides stability for those who are already economically secure enough to have a good pension and savings to supplement the Social Security payments; a decreasing percentage of the population has saved enough for retirement, pensions no longer take the form of guaranteed benefits but are more likely to be defined contribution plans that are more dependent on market fluctuations and individual contributions—and are only available to about two-thirds of workers—and Social Security replaces only a small part of many workers' preretirement income.[31] Low-income workers are least likely to be offered employer-sponsored retirement plans; while less than 20% of workers in the highest quartile did not have such access, 60% of those in the lowest quartile did not.[32] Healthcare costs are increasing, and those sixty-five and older spend more than three times as much as younger adults.[33]

2. Poverty Rates

Nonetheless, the poverty rate for older people is comparatively low, at about 8%, although a larger number are economically insecure, and, in line with the rest of the population, their *rates* are not increasing, but their

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30. Only 24% of Americans believe government should have major responsibility, compared to 58% in Italy and 48% in Germany. *Family Support in Graying Societies: Supporting Family Members*, Pew Res. Ctr.: Soc. & Demographic Trends (May 21, 2015), http://www.pewsocialtrends.org/2015/05/21/2-supporting-family-members/.

31. *See* Peter H. Huang, *Achieving American Retirement Prosperity by Changing Americans' Thinking About Retirement*, 22 Stan. J.L. Bus. & Fin. 189, 204 (2017); U.S. Gov't Accountability Office, GAO-18-111SP, The Nation's Retirement System: A Comprehensive Re-evaluation Is Needed to Better Promote Future Retirement Security (2017), https://www.gao.gov/assets/690/687797.pdf.

32. *See* GAO-18-111SP, *supra* note 31, at 26–27.

33. *Id.* at 17.

numbers are growing.[34] Moreover, poverty rates for older people vary by gender, race, health, family status, and other characteristics. For older Americans who are living alone (or with nonrelatives), the poverty rate is 18%.[35] The poverty rate for widowed (13%), divorced (16%), and never-married women (18%) is higher than the general poverty rate for older people, or for married women (2%).[36]

Among gray divorcées, 27% of the women are poor compared to 11% of gray divorced men, creating what one research labels a "gray divorce penalty."[37] These higher numbers for divorced and never-married women probably reflect selection effects rather than a marriage bonus per se: Nonmarital and divorce rates are higher among groups that typically have lower lifetime earnings and retirement incomes.

3. Life Expectancy

A third demographic reality that structures the contemporary aging process is the dramatic increase in life expectancy and the corresponding increases in costs of care. As one example, consider that approximately 25% of all Medicare spending for those sixty-five and older is in the last

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34. *See* Juliette Cubanski, Giselle Casillas & Anthony Damico, Kaiser Fam. Found., Poverty Among Seniors: An Updated Analysis of National and State Level Poverty Rates Under the Official and Supplemental Poverty Measures (2015), http://files.kff.org/attachment/issue-brief-poverty-among-seniors-an-updated-analysis-of-national-and-state-level-poverty-rates-under-the-official-and-supplemental-poverty-measures; Nat'l Council on Aging, Economic Security for Seniors Facts (2016), https://www.ncoa.org/wp-content/uploads/NCOA-Economic-Security.pdf; Jessica L. Semega, Kayla R. Fontenot & Melissa A. Kollar, U.S. Census Bureau, Income and Poverty in the United States: 2016 (2017), https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf; Pedro Nicolaci da Costa, *More and More Older Americans Are Slipping into Poverty*, Bus. Insider (Sept. 15, 2017, 12:19 AM), http://www.businessinsider.com/americans-65-and-up-slipping-into-poverty-2017-9; Ashley Edwards et al., *Outlying Older Americans: The Puzzle of Increasing Poverty Among Those 65 and Older*, U.S. Census Bureau: Census Blogs (Sept. 12, 2017), https://www.census.gov/newsroom/blogs/random-samplings/2017/09/outlying_older_ameri.html.

35. Edwards et al., *supra* note 34.

36. Steven A. Sass, Ctr. for Retirement Res., How Work & Marriage Trends Affect Social Security's Family Benefits 5 (2016), http://crr.bc.edu/wp-content/uploads/2016/06/IB_16-9.pdf.

37. I-Fen Lin, Susan L. Brown & Anna M. Hammersmith, *Marital Biography, Social Security, and Poverty*, 39 Res. on Aging 86, 98 (2016). Jocelyn Elise Crowley labels these consequences "the gray divorce penalty." Jocelyn Elise Crowley, Gray Divorce: What We Lose and Gain from Mid-life Splits 17 (2018). She notes that women face financial penalties because of their childrearing responsibilities and workforce patterns; men experience a "social" penalty because they have less robust social support.

year of beneficiaries' lives; this is because they often "use costly services, including inpatient hospitalizations, post-acute care, and hospice . . . ."[38]

C. The Demographics of Caregiving

In light of these demographic and economic realities, caregiving is becoming increasingly important, and the primary source of that caregiving is the family—and women in the family[39]—although the amount of paid care is growing. According to the American Time Use Survey, "[a]bout a quarter of women 45 to 64 years old and one in seven of those 35 to 44 are caring for an older relative."[40] The financial value of the approximately thirty billion hours of unpaid caregiving annually is estimated to be $522 billion each year, just slightly less than what is spent each year on Medicaid.[41] Yet, this work has an economic impact on the family caregiver. Workers who leave their jobs to provide care lose hundreds of thousands of dollars in wages, Social Security benefits, and pension benefits.[42] Caregiving also affects their health and productivity

38. Juliette Cubanski et al., *Medicare Spending at the End of Life*: *A Snapshot of Beneficiaries Who Died in 2014 and the Cost of Their Care*, KAISER FAM. FOUND. (July 14, 2016), https://www.kff.org/medicare/issue-brief/medicare-spending-at-the-end-of-life/.

39. *See* Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 360 (2004) ("Gender pervades elder care patterns across the board . . . .").

40. *See* Eduardo Porter, *How Care for Elders, Not Children, Denies Women a Paycheck*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/business/economy/women-work-elder-care.html.

41. Amalavoyal V. Chan et al., *The Opportunity Costs of Informal Elder-Care in the United States: New Estimates from the American Time Use Survey*, 50 HEALTH SERV. RES. 871, 878–79 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4450934/pdf/hesr0050-0871.pdf; *NHE Fact Sheet*, CTRS. MEDICARE & MEDICAID SERVS. (Feb. 14, 2018, 3:16 PM), https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html.

42. This includes lost wages, pension benefits, and Social Security. METLIFE MATURE MKT. INST., THE METLIFE STUDY OF CAREGIVING COSTS TO WORK CAREGIVERS: DOUBLE JEOPARDY FOR BABY BOOMERS CARING FOR THEIR PARENTS 2, 12 (2011), http://www.caregiving.org/wp-content/uploads/2011/06/mmi-caregiving-costs-working-caregivers.pdf; *see also* LYNN FEINBERG & RITA CHOULA, AARP: PUB. POL'Y INST., UNDERSTANDING THE IMPACT OF FAMILY CAREGIVING ON WORK (2012), https://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2012/understanding-impact-family-caregiving-work-AARP-ppi-ltc.pdf; NAT'L ACAD., FAMILY CARING FOR AN AGING AMERICA 123–50 (Richard Shulz & Jill Eden eds., 2016), https://www.ncbi.nlm.nih.gov/books/NBK396401/pdf/Bookshelf_NBK396401.pdf.

and results in higher rates of absenteeism, turnover, and early retirement, costing U.S. employers approximately $34 billion each year.[43]

Spouses provide almost a third of the care hours, and adult daughters provide essentially double the number of hours as do adult sons; once they become caregivers, adult children are likely to commit a substantial amount of time—about seventy-seven hours on average each month—to looking after their relatives, researchers have found.[44] Women are almost twice as likely as men to provide personal care, such as aiding with bathing or getting dressed, while there is more parity when it comes to helping with errands or chores.[45] Female caregivers have a much higher probability of exiting the workforce to execute these duties. Women who are caregivers are less likely to be working and, if they are working, to be working fewer hours while they provide care.[46] By contrast, when

43. Brigid Schulte, *Aging Population Prompts More Employers to Offer Elder-Care Benefits to Workers*, Wash. Post (Nov. 16, 2014), https://www.washingtonpost.com/local/aging-population-prompts-more-employers-to-offer-elder-care-benefits-to-workers/2014/11/16/25f9c8e6-6847-11e4-a31c-77759fc1eacc_story.html?utm_term=.849c4d4e5bad.

44. Gal Wettstein & Alice Zulkarnain, Ctr. for Retirement & Res., How Much Long-Term Care Do Adult Children Provide? 3–4 (2017), http://crr.bc.edu/wp-content/uploads/2017/06/IB_17-11.pdf (stating that the percent of total hours of informal care is 31% for daughters and 16% for sons). There is a very different pattern in the LGBT community. Nancy J. Knauer, *LGBT Older Adults: Chosen Family, and Caregiving*, 31 J.L. & Religion 150, 151 (2016) (stating that "spouses, partners, and friends provide . . . 90 percent of the care").

45. According to one national study, 7% of the women in the sample "assisted with parents' personal needs, compared to 3.6% of men"; 20% of women "helped parents with chores, errands and transportation," compared to 16% of men. Paula Span, *Work, Women and Caregiving*, N.Y. Times: New Old Age (Nov. 21, 2013, 5:00 AM), https://newoldage.blogs.nytimes.com/2013/11/21/work-women-and-caregiving/. *See also* Yeonjung Lee & Fengyan Tang, *More Caregiving, Less Working: Caregiving Roles and Gender Difference*, 34 J. Applied Gerontology 465 (2013); Renee Stepler, *5 Facts About Family Caregivers*, Pew Res. Ctr.: Fact Tank (Nov. 18, 2015), http://www.pewresearch.org/fact-tank/2015/11/18/5-facts-about-family-caregivers/ (stating that 19% of women compared to 8% of men provided personal care).

46. Sean Fahle & Kathleen McGarry, *Women Working Longer: Labor Market Implications of Providing Family Care*, *in* Women Working Longer: Increased Employment at Older Ages 16 (Claudia Goldin & Lawrence F. Katz eds., 2018), http://papers.nber.org/books/gold-12. The authors report that one survey found that

> 10 percent of caregivers cut back on hours worked because of the demands of caregiving while an estimated 6 percent leave paid work entirely. Seventeen percent of caregivers take a leave of absence and 4 percent reportedly turn down promotions [while another study found that] 11 percent of caregivers lost their jobs due to caregiving and 52 percent had to reduce work hours by an average of 7 hours per week.

Id. at 4. *See* AARP: Pub. Pol'y Inst., Caregiving in the U.S. (2015), http://www.caregiving.org/wp-content/uploads/2015/05/2015_CaregivingintheUS_Final-Report-June-4_WEB.pdf (providing general statistics).

men took on caregiving roles, their employment status was unaffected.[47] Caregivers make a variety of changes in their own lives as a result of their responsibilities, such as cutting back on their own medical care and leisure activities, or using their own retirement savings.[48] The consequence for caregivers who stop working is lower lifetime earnings that result in lower Social Security benefits and lower pensions.

Second, caregiving has become increasingly commoditized, a process that has been ongoing for the past few centuries; indeed, to call it paid caregiving shows the tension experienced by those who are paid for what Arlie Hochschild has characterized as "emotional labor," ultimately "estrang[ing] workers from their own smiles."[49] As the business of caregiving becomes much larger, the labor is frequently done by professional, albeit low-paid, workers with few benefits who may be employed by a business, rather than by the individual care recipient. More than two million homecare aides provide help in the home, each earning approximately $15,000 per year, while 1.3 million certified nursing assistants work in nursing homes, with pay of about $20,000 per year.[50] Care recipients, or their family members, can even hire a "geriatric care manager" to help them sort through their options.[51] Although Medicaid prohibits paying legally responsible relatives under most circumstances, states do have discretion to allow for such payments "for personal care services under a range of other Medicaid programs including the home and community-based optional waiver program . . . , 'cash and counseling' . . . , and . . . 'community first

47. Amanda Hess, *Women Are More Likely to Care for Aging Parents—and Drop Out of the Workforce to Do It*, SLATE (Nov. 21, 2013, 3:06 PM), http://www.slate.com/blogs/xx_factor/2013/11/21/elder_caregiving_women_are_more_likely_to_drop_out_of_work_to_care_for_aging.html.

48. U.S. DEP'T LABOR, NAVIGATING THE DEMANDS OF WORK AND ELDERCARE 20 (2011), https://www.dol.gov/sites/default/files/NavigatingTheDemandsOfWorkAndEldercare.pdf.

49. ARLIE HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING 5, 7 (2d ed. 2003) (discussing "the management of feeling to create a publicly observable facial and bodily display; emotional labor is sold for a wage"). *See generally* HENDRIK HARTOG, SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE (2012) (discussing nineteenth-century management of elder care); *see* Premilla Nadasen, *The Care Deficit*, DISSENT, https://www.dissentmagazine.org/article/care-deficit-hta-domestic-worker-organizing-history (last visited Apr. 10, 2018) (stating that "the language of care pivots around the needs of consumers, rather than the rights of workers").

50. PAUL OSTERMAN, WHO WILL CARE FOR US?: LONG-TERM CARE AND THE LONG-TERM WORKFORCE 5 (2017).

51. Naomi Cahn, *Continuity and Caregiving: Comments on* Someday All This Will Be Yours, 40 L. & SOC. INQUIRY 492, 496 (2015) (reviewing HARTOG, *supra* note 49); *see also* ARLIE RUSSELL HOCHSCHILD, THE OUTSOURCED SELF: WHAT HAPPENS WHEN WE PAY OTHERS TO LIVE OUR LIVES FOR US 199–201 (2012).

choice attendant care benefit.'"[52] Payment is only available if the services are those that the family member would not otherwise be providing if the recipient were not disabled,[53] a limitation that seeks to balance the needs of a dependent adult with the expected support given by one family member to another in the absence of special needs. Less than 10% of the population that needs long-term services and support rely solely on paid care services.[54]

On the other hand, the issues of aging in place, the need to arrange for care, and the significance of interfamilial care remain with us. More than 80% of those receiving care receive it at home.[55] Indeed, although many older people will spend time in institutionalized care, ironically, nursing home care is most available to the poor, that is, those who qualify for Medicaid, and to the wealthy, who can afford the nursing home fees of thousands of dollars per month without public support. Only 1.6 million of the elderly are in nursing home care, although there is a 40% chance that an older person will spend at least some time in one.[56]

Indeed, family caregivers have proven critical to helping older people remain at home, and they perform a variety of functions. Consider that social connection is important to physical health, and, apart from adolescence (when peers are particularly significant), it is family members who provide that connection.[57]

II. The Legal Structure for Caregiving and Economic Security for Our Aging Population

Laws providing the economic and caregiving safety net for aging continue to focus on the marital family. Social Security and, relatedly,

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52. Jennifer Wolff et al., *Family Caregivers as Paid Personal Attendants in Medicaid*, Johns Hopkins U., https://www.jhsph.edu/research/centers-and-institutes/roger-c-lipitz-center-for-integrated-health-care/issue-brief-family-caregivers.html (last visited Apr. 10, 2018).

53. *Id.*

54. *Selected Long-Term Care Statistics: What Is Long-Term Care*, Fam. Caregiving Alliance (Jan. 31, 2015) [hereinafter *Selected Long-Term Care Statistics*], https://www.caregiver.org/selected-long-term-care-statistics.

55. *See id.*

56. Hochschild, *supra* note 49, at 199; *Populations in Need of LTSS and Service Delivery Issues: Testimony Before the Commission on Long-Term Care* (July 17, 2013), http://ltccommission.org/ltccommission/wp-content/uploads/2013/12/Feinberg-Testimony_Commission-on-Long-Term-Care.pdf (statement of Lynn Feinberg, Senior Strategic Policy Advisor, AARP Pub. Pol'y Inst.).

57. Debra Umberson & Jennifer Karas Montez, *Social Relationships and Health: A Flashpoint for Health Policy*, 51 J. Health & Soc. Behav. S54 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3150158/; Anna Goldfarb, *How to Maintain Friendships*, N.Y. Times (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/smarter-living/how-to-maintain-friends.html?emc=edit_nn_20180123&nl=morning-briefing&nlid=34085178&te=1.

Medicare set up a system that favors spouse claimants; the Family and Medical Leave Act (FMLA) allows caregiving leave to a legally recognized spouse and children;[58] and Medicaid allows for payment, in certain limited circumstances, to a spouse or family member for services. Somewhat ironically, marriage can be a financial detriment when it comes to eligibility for Medicaid and Supplemental Security Insurance.

A. Economic Support

Financial needs include both daily living and healthcare expenses. The three-legged stool provides the first, and Medicare/Medicaid are the primary sources of the second.

1. Economic Stability

Social Security provides benefits during retirement to qualified workers, and it is responsible for ensuring that almost a third of people over age sixty-five are not poor; indeed, it provides over 80% of income for 40% of older Americans.[59] Social Security is available based on an employee's having worked for ten or more years, and individuals can claim based either on their own work record or on that of a spouse or former spouse; a spouse is entitled to 50% of the amount that the other spouse would receive, and even if a spouse's own benefits are less than that amount, they will be "topped off." A divorced spouse is eligible based on a former spouse's earning record and can claim if (1) the marriage lasted longer than ten years;[60] (2) the claiming spouse is over age sixty-two and single; and (3) the worker spouse is eligible to receive such benefits. As long as they have been divorced at least two years, former spouses can claim a former spouse's earnings record even if that person has not yet claimed Social Security as long as both of them are at least sixty-two years old. Ex-spouses (who do not remarry before age sixty) are also entitled to

58. Allison K. Hoffman, *Reimagining the Risk of Long-Term Care*, 16 Yale J. Health Pol'y, L. & Ethics 147, 230 (2016).

59. Kathleen Romig & Arloc Sherman, *Social Security Keeps 22 Million Americans Out of Poverty: A State-by-State Analysis*, Ctr. on Budget & Pol'y Priorities (Oct 25, 2016), https://www.cbpp.org/research/social-security/social-security-keeps-22-million-americans-out-of-poverty-a-state-by-state; Teresa Ghilarducci, Bridget Fisher & Zachary Knauss, Schwartz Ctr. for Econ. Pol'y Res., Now Is the Time to Add Retirement Accounts to Social Security: The Guaranteed Retirement Account Proposal 4 (2015), http://www.economicpolicyresearch.org/images/docs/retirement_security_background/GRA_3.0.pdf.

60. Before 1977, the marriage was required to last more than twenty years. *See* Alstott, *supra* note 1, at 708.

survivor benefits when an ex-spouse dies. Both an ex-spouse and a current spouse can claim benefits through the same worker-spouse.[61]

The spousal benefit ensures a minimum benefit for married partners (or those divorced after ten years of marriage or more), regardless of an individual's own earning record. The percentage of women aged sixty-two or older who receive Social Security based *solely* on their husbands' earnings record decreased from 57% in 1960 to 21% in 2016, although the number of women who receive based on their own status as workers and then receive auxiliary ("topped-off") benefits based on their spouse's earnings record has increased.[62]

Social Security is a progressive scheme and contains biases that benefit some groups. First, the benefit-tax ratio is higher for lower income workers than higher income workers because they typically receive substantially more than they have paid into the system.[63] Second, for women, who are typically paid less throughout their lifetimes than men, the benefit-tax ratio is higher as well. Third, Social Security also benefits the currently or formerly married, and married couples in the traditional breadwinning model receive disproportionate benefits compared to what they have paid into the system. Anne Alstott explains that such families "receive 150% of the worker's retirement benefit after paying taxes on 100% of the husband's salary," while more equal-earning spouses pay taxes on both of their salaries but still may receive the same net Social Security benefits.[64] "But the spousal benefit has a darker side. . . . [It] combines with the payroll tax to disadvantage working wives, who pay full payroll taxes but, given their low wages, often receive zero payoff over the spousal benefit."[65]

That is, in a traditional marriage where one spouse is the primary or sole wage earner, the dependent spouse can receive Social Security without paying into the system. Moreover, such couples on average receive a

61. Mary Beth Franklin, *Gray Divorce Boosts Poverty Level for Women*, Investment News (Jan. 12, 2016, 12:31 PM), http://www.investmentnews.com/article/20160112/BLOG05/160119983/gray-divorce-boosts-poverty-level-for-women.

62. Soc. Sec. Admin., Fast Facts & Figures About Social Security, 2017, at 21–22, 29 (2017) [hereinafter Fast Facts & Figures], https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2017/fast_facts17.pdf. The Social Security charts only provide this piece of information for women in Table 5.A14. *See* Soc. Sec. Admin., Annual Statistical Supplement, 2017: Old-Age, Survivors, and Disability Insurance, https://www.ssa.gov/policy/docs/statcomps/supplement/2017/5a.html#table5.a1 (last visited Apr. 10, 2018) ("Number and percentage distribution of women aged 62 or older, by basis of entitlement, type of benefit, and dual entitlement status, December 1960–2016, selected years").

63. Cong. Budget Off., Is Social Security Progressive? 3 (2006), https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/reports/12-15-progressivity-ss.pdf.

64. Alstott, *supra* note 1, at 707–08.

65. *Id.* at 753.

larger share of the couple's combined income; once one spouse earns more than one-third of what the other earns, the household replacement amount declines.[66]

Compared to single people (or those ineligible to claim based on a partner's earnings record), couples also have an exponentially higher number of means to consider how to maximize their benefits. With increasing divorce and never-married rates, however, the number of people able to claim on their spouse's earnings is decreasing, particularly for nonwhite populations.[67]

While today, any married couple is eligible for Social Security, the benefit for divorced spouses is only available to couples who were able to marry; same-sex couples who functioned as married couples while they were together cannot claim the divorced spouse benefit. Neither can the cohabiting couple, regardless of the status of their relationship. For the decreasing number of Social Security claimants who seek benefits based on a spouse, the marriage may have involved trade-offs that allowed the working spouse to earn more,[68] so the inequities discussed above may be less serious.

Regardless of whether they claim on their own or a spouse's record, most Americans will receive Social Security; only 4% will never do so. The group that will not receive benefits "generally has lower education levels and higher proportions of women, Hispanics, immigrants, the never-married, and widows than the beneficiary population," and they are more

66. That is, assuming that Social Security for the primary earner replaces 40% of household income. *See* SASS, *supra* note 36, at 2.

67. Tom Anderson, *Married Couples Have 81 Ways to Claim Social Security. Here's How to Maximize Your Benefits*, CNBC (June 6, 2017, 8:06 AM), https://www.cnbc.com/2017/06/02/how-married-couples-can-maximize-their-social-security-benefits.html; *Marriage Trends and Women's Benefits: Differences by Race-Ethnicity and Nativity*, SOC. SEC. ADMIN. (Feb. 2014), https://www.ssa.gov/retirementpolicy/research/marriage-trends-race-ethnicity.html.

68. *Historical Income Tables: Households: Table H-12*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html (last visited Apr. 10, 2018) (comparing number of earners in a household with mean and median income; the income in one-earner households is slightly more than half of that in two-earner households).

than ten times as likely to live in poverty as are Social Security recipients.[69] Nonmarried women's poverty and near-poverty rate is more than three times higher than the rate for married women, while for nonmarried men, it is more than double.[70]

More than half of Social Security recipients are women.[71] Gray divorced women receive smaller Social Security benefits on average than all other single women and men.[72] Of those who experienced a gray divorce, women's benefits ($10,995) were lower, on average, than men's ($13,633). On the other hand, the share of divorced women who qualify for spousal benefits is projected to decline for successive cohorts.[73]

As for retirement benefits, again, the marital family is protected. For those with a defined benefit pension, a decision not to allow for survivors' benefits to a spouse under an ERISA-covered plan requires that the spouse waive that right.[74]

One final set of benefits available to surviving spouses is a set of estate set-asides after the death of the first spouse, including (in most states) a homestead exemption.[75]

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69. Kevin Whitman, Gayle L. Reznik & Dave Shoffner, *Who Never Receives Social Security Benefits?*, Soc. Sec. Admin. (2011), https://www.ssa.gov/policy/docs/ssb/v71n2/v71n2p17.html.

> Never-beneficiaries have a far higher poverty rate (about 44 percent) than current and future beneficiaries (about 4 percent). Ninety-five percent of never-beneficiaries are individuals whose earnings histories are insufficient to qualify for benefits. Late-arriving immigrants and infrequent workers comprise the vast majority of these insufficient earners. Late-arriving immigrants have a poverty rate of about 43 percent, and are particularly reliant on income from household coresidents. Infrequent workers have a poverty rate of about 57 percent, and are particularly reliant on Supplemental Security Income.

Id.

70. Fast Facts & Figures, *supra* note 62, at 29.

71. The Social Security Administration reports that 55% of adult Social Security beneficiaries are women. *Id.*

72. *See* Cahn & Carbone, *supra* note 27. Those who divorce at older ages, like those who divorce at younger ages, tend to be poorer than those who remain remained, with the gray divorced having only one-fifth of the assets of gray married couples. Susan L. Brown & I-Fen Lin, *Gray Divorce: A Growing Risk Regardless of Class or Education*, *in* New Inequalities: How Education, Income and Aging Affect Divorce and Family Stability 12 (Stephanie Coontz ed., 2014), https://contemporaryfamilies.org/wp-content/uploads/2014/10/2014_S_N_I.pdf. While gray married, remarried, and cohabiting couples have poverty rates of 4% or less, as noted earlier, 11% of men who divorced after the age of fifty were in poverty, and 27% of the women were in poverty (for never-married women, it is 25%). Lin, Brown & Hammersmith, *supra* note 37, at 98.

73. Zhang, *supra* note 1, at 383–84.

74. *Id.* at 390–391.

75. Unif. Probate Code § 2-402 (Unif. Law Comm'n 2010).

2. Healthcare Costs

More than 40 million people ages sixty-five and over receive Medicare. Eligibility is tied to Social Security, so a nonworking spouse can be covered based on a spouse's record. Approximately one-third of current recipients also are covered by a private healthcare plan. Within Medicare, recipients have various levels of coverage.[76] Medicare does not provide coverage for all services (including long-term care), and beneficiaries typically pay premiums and other out-of-pocket expenses.

For long-term nursing care, the primary public support is Medicaid. Medicaid is means-based, and eligibility consists of determining the resources available to the individual, including, if married, a spouse's assets. Medicaid assumes that each spouse is financially responsible for the other. The nonapplying (or "community") spouse can retain up to half of both spouses' joint liquid assets, subject to a statutory limit, but assets above that amount must be spent down before the other spouse can qualify. Similarly, the determination of eligibility for Supplemental Security Income (which, unlike Social Security, is not based on work history) may include a spouse's income.[77] Increasing amounts of Social Security also allow for more independence, resulting in more home care than institutionalized care.[78]

B. Caretaking

Not every person over the age of sixty-five needs care immediately. Although more than two-thirds of those who reach the age of sixty-five will need help with at least two activities of daily living (ADLs) at some point in their lives, a small percentage needs help at any one time.[79] Most

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76. *An Overview of Medicare*, Kaiser Fam. Found. (Nov. 22, 2017), https://www.kff.org/medicare/issue-brief/an-overview-of-medicare/. Kaiser estimates that "beneficiaries in traditional Medicare and enrolled in both Part A and Part B spent $6,150 out of their own pockets for health care spending." This constituted about 40% of average per capita Social Security income. Juliet Cubanski et al., *Medicare Beneficiaries' Out-of-Pocket Health Care Spending as a Share of Income Now and Projections for the Future*, Kaiser Fam. Found. (Jan. 26, 2018), https://www.kff.org/medicare/report/medicare-beneficiaries-out-of-pocket-health-care-spending-as-a-share-of-income-now-and-projections-for-the-future/.

77. *Understanding Supplemental Security Income SSI Income—2018 Edition*, Soc. Security Admin., https://www.ssa.gov/ssi/text-income-ussi.htm (last visited Apr. 10, 2018).

78. Gopi Shah Goda et al., *Income and the Utilization of Long-Term Care Services: Evidence from the Social Security Benefit Notch* 24 (Nat'l Bureau of Econ. Research, Working Paper No. 16076, 2010), http://www.nber.org/papers/w16076.pdf.

79. *QuickStats: Percentage of Adults with Activity Limitations, by Age Group and Type of Limitations—National Health Interview Survey, United States, 2014*, Ctrs. for Disease Control & Prevention (Jan. 15, 2016), https://www.cdc.gov/mmwr/volumes/65/wr/mm6501a6.htm; *Selected Long-Term Care Statistics*, *supra* note 54.

of the help will be provided by family members—primarily wives and daughters[80]—and that unpaid care has an impact on the caregiver. Medicaid will also pay for family caregiving; family caregiving is associated with lower Medicaid expenditures.[81] Some states will pay spouses.[82]

For caregivers who are working, the Family and Medical Leave Act (FMLA) offers the best and most direct form of support to informal caregivers. The FMLA allows eligible employees to take up to twelve weeks of unpaid, job-protected leave from work for the "serious health condition" of a spouse, parent, someone who has acted as a parent, or a child.[83] Elder care was one of the reasons for enacting the FMLA, even though the most frequent reason for taking FMLA leave is for the employee's own illness, and less than one-fifth of all leaves are to care for a parent.

While the FMLA takes one step towards recognizing the needs of elder care, it has numerous inadequacies that prevent its wider utilization. First, it is unpaid, so many workers cannot afford to take the time away from work. Second is a lack of knowledge: In our survey of sixty-three caretakers who provided care for aging Baby Boomer parents, no one mentioned taking FMLA leave.[84] Third, eligibility for coverage requires specific medical conditions, specific relationships, and specific employers. The Act does not reach private employers with fewer than fifty employees at any one workplace; the employee must have worked for the employer for at least twelve months and a minimum of 1,250 hours over the previous twelve-month period. Caregiving leave is based on the existence of a serious health condition rather than the types of chronic illnesses, such as Alzheimer's, involved in aging; nor does the FMLA, for example, help in transitioning a parent from one assisted living facility to another.

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80. *Women and Caregiving: Facts and Figures*, Fam. Caregiving Alliance (Dec. 31, 2003), https://www.caregiver.org/women-and-caregiving-facts-and-figures.

81. *Can I Get Paid to Be a Caregiver for a Family Member?*, AARP: Financial & Legal, https://www.aarp.org/caregiving/financial-legal/info-2017/you-can-get-paid-as-a-family-caregiver.html; Robert J. Newcomer, Taewoon Kang & Pamela Doty, *Allowing Spouses to Be Paid Personal-Care Providers: Spouse Availability and Effects on Medicaid-Funded Service Use and Expenditures*, 52 Gerontologist 517 (2011).

82. *Paying Spouses to Care for Their Elderly or Disabled Partners—Medicare, Medicaid, VA & Other Programs*, Paying for Senior Care (May 2017), https://www.payingforseniorcare.com/longtermcare/paying-spousal-caregivers.html. States have adopted a variety of programs to allow elders to hire family members to provide care, such as through "cash and counseling," "consumer-directed care," or Medicaid waiver. M. Christian Green, *"Graceful Pillars": Law, Religion, and the Ethics of the "Daughter Track,"* 31 J.L. & Religion 130, 145–46 (2016).

83. 29 U.S.C. § 2612(a)(1)(C) (2012); *see* 29 C.F.R. § 825.122(c) (2018) (specifying that "parent" includes those who stood "in loco parentis" but does not include "parents-in-law").

84. Ziettlow & Cahn, *supra* note 1, at 46–47.

Moreover, older people are more likely to have unanticipated caregiving needs that are complicated to manage.[85] Nor does it cover parents-in-law.

When the care recipient is a dependent, then the caregiver can claim that person on a tax return. The dependent does not have to be a family member, so long as the dependent has lived with the filer for at least six months.[86]

Some jurisdictions have enacted their own laws that often provide broader coverage than what is available under federal law; four states offer paid leave, and a few states even allow leave for taking a family member to a healthcare appointment. Moreover, some employers offer additional support. For example, they may provide brief periods of bereavement leave upon the death of specified family members or for routine healthcare appointments. Some are offering not only flexibility but also emergency backup care for older adults or time for Skyping into parents' appointments with doctors.[87]

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The future of Social Security and funding for Medicare and Medicaid depend on government action. During the winter of 2017–2018, the Trump administration began to allow states to toughen requirements for Medicaid recipients. There are fears that the futures of both Social Security and Medicare are precarious.[88]

III. Moving Forward

Legal doctrines and policy analyses that rely on the intact nuclear family are incomplete and inadequate because of the changing structure of the American family and because of advances in medical technology.[89] Those most likely to stay married are those who are most likely to be able to afford healthcare costs and the provision of long-term care. As the

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85. Smith, *supra* note 39, at 354. For limitations on grandparents offering care for grandchildren, see Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 Seton Hall L. Rev. 1, 37 (2013).

86. *Tax Tips for Caregivers*, AARP: Financial & Legal, https://www.aarp.org/caregiving/financial-legal/info-2017/tax-tips-family-caregivers.html (last visited Apr. 10, 2018).

87. Ziettlow & Cahn, *supra* note 1; Schulte, *supra* note 43.

88. Tracey Longo, *GOP Laying Groundwork to Cut Future Social Security, Medicare*, *Welfare Outlays*, Fin. Advisor (Dec. 6, 2017), https://www.fa-mag.com/news/gop-laying-groundwork-to-overhaul-entitlement-programs-36060.html; Rebekah Entralgo, *Rubio's "Paid Family Leave" Plan Is Actually Just Cutting Social Security*, ThinkProgress (Feb. 6, 2018), https://thinkprogress.org/rubios-paid-family-leave-plan-is-actually-just-cutting-social-security-8f148b641418/.

89. Alstott, *supra* note 1, at 697.

number of people who are not married and do not have children increase, however, the flaws in the existing system become increasingly evident. The structure of current benefits (aside from Medicaid) promote the state's strong interest in marriage. While they also serve as antipoverty measures, people who live outside of the traditional family structure do not receive the same protections. Possible policy choices involve, on the one hand, moving away from marriage as a measure of benefits eligibility and towards a more individualized needs assessment or, as an alternative, retaining the current structure and modifying it.

The primary pragmatic reason for unmooring benefits—at least somewhat—from presumptions about the marital nuclear family is based on class; those who are not married have higher poverty rates, are less likely to have retirement plans, and are less likely to have a dependable caregiving structure. And moving responsibility away from adult children—or compensating them—relieves stress and allows them to focus on their own earnings.

Objections to decoupling marriage from benefits might come from those who advocate an even stronger state role in supporting marriage. From this perspective, which June Carbone and I have labeled "red," moving away from marriage as a defining element of family legitimacy is unacceptable state policy. They argue that marriage provides economic security and that, for example, married men work harder and earn more.[90]

Yet at a time of rising inequality, focusing on marriage without accounting for nonmarital families has attracted widespread concern.[91] As an alternative to the red arguments, from a "blue" perspective, a more robust and enlightened state means ensuring that family form does not limit benefits. Relying on marriage privatizes the dependency that aging typically entails, obscuring the needs both within and outside of the family. Marriage itself, as an institution, serves a protective function, in part because marriage is not about individualism but about joint pooling of resources (as discussed earlier), and also because of the strength of its

90. *See, e.g.*, W. Bradford Wilcox, *Don't Be a Bachelor: Why Married Men Work Harder, Smarter and Make More Money*, WASH. POST (Apr. 2, 2015), https://www.washingtonpost.com/news/inspired-life/wp/2015/04/02/dont-be-a-bachelor-why-married-men-work-harder-and-smarter-and-make-more-money/?utm_term=.8c0ecd604712; Andrew L. Yarrow, *Marriage, Poverty and the Political Divide*, N.Y. TIMES (Jan. 24, 2016), https://www.nytimes.com/2016/01/24/fashion/weddings/marriage-poverty-gop-political-divide.html.

91. For a complete explanation of these terms, see NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010).

official supports.[92] For the increasing number of people who do not get married, new organizing principles for economic security and caretaking are critical, principles that do not involve marriage promotion. This involves reimagining the need for elder care, for both recipients and caretakers, recognizing that marriage serves to privatize what should be a public responsibility.[93]

Indeed, among those who examine the aging process, there is broad agreement that the most critical change is to reconceive long-term care as central to the quality of life of the millions of people who need it, rather than as an awkward stage of life that must be managed with ad hoc solutions.[94] Solutions must instead be more systemic, changing policy and public perception and the delivery of care. This change would require raising the profile of the field within medicine and incorporating long-term-care providers into healthcare teams.[95] It does not mean denying intrafamilial responsibilities but does involve building on them where they exist and providing alternative means where they do not.

This next Section discusses three sets of solutions, focusing on changing the existing financial safety net, providing improved support for caretaking, and responding to the underlying economic inequality.

A. Strengthening the Existing Safety Net

1. Social Security

Consider how Social Security eligibility could be changed. One option is to terminate the derivative benefits so that individuals would collect only on their own earning records.[96] This eliminates the bias in the system towards the traditional family, including bias against long-term cohabitating couples, and serves as an incentive to work. It would also translate into making Medicaid eligibility focused on the individual, rather than the potential contributions of a community spouse.

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92. Formal marriage does serve many spouses well. *But see* Alstott, *supra* note 1 (arguing that marriage is a sign of the new individualism). As one of the many examples of the protective function of marriage, see, for example, Joan DelFattore*, If You're Single with Cancer, You May Get Less Aggressive Treatment Than a Married Person*, Wash Post (Dec. 3, 2018), https://www.washingtonpost.com/national/health-science/if-youre-single-with-cancer-you-may-get-less-aggressive-treatment-than-a-married-person/2018/11/30/a1286d20-ce18-11e8-920f-dd52e1ae4570_story.html?utm_term=.b3cd2d2bcfb9.

93. Hoffman, *supra* note 58, at 154–55.

94. *See* Osterman, *supra* note 50, at 9.

95. *Id.*

96. Zhang, *supra* note 1, at 401–02.

Yet collecting only on one's earning record causes two problems. First, women's wages remain lower than men's, and collecting half of a spouse's benefit may be better than what many women are entitled to on their own. Second, in many marriages, one spouse continues to leave the workforce when children are born. This could lead to further impoverishment of older women. Anne Alstott and Bruce Ackerman propose, as an alternative, an old-age benefit that would be payable, regardless of earning history.[97] This kind of solution, while highly desirable, seems unlikely politically.

It thus is more realistic to consider changes in the existing system of Social Security eligibility, and it is to those suggestions that this Section turns, providing brief explanations of some of the most notable.

Social Security is financed by a 12.4% tax on wages up to the taxable-earnings cap; half of the tax is paid by workers, and the other half is paid by employers. The taxable wage base typically increases each year.

a. Change Benefits for Ex-Spouses

Options include reducing the minimum marriage duration required for divorced spouse and survivor benefits or increasing spousal benefits for divorced spouses. If the current ten-year marriage rule for Social Security were lowered by a few years, then this would substantially decrease the poverty levels of low-income divorced women.[98]

b. Improve Progressivity

Social Security taxes on earnings phase out at a certain level. More money would be paid into the Social Security system if the phase-out had a higher cap or were simply eliminated.[99] Lower-income workers currently pay a higher percentage of their income to Social Security taxes, although the receipt of benefits is not means-tested.

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97. Alstott, *supra* note 1, at 756.
98. Lin, Brown & Hammersmith, *supra* note 37, at 106.
99. Soc. Sec. Works, Social Security: Past, Present, and Future (2017) [hereinafter Social Security: Past, Present, and Future], https://www.socialsecurityworks.org/wp-content/uploads/2017/08/Social-Security-Past-Present-and-Future-FINAL.pdf.

c. Provide Social Security Credit for Caretaking

Congress has considered bills that would allow caretakers to accrue Social Security benefits.[100] This would allow a Social Security credit to be added to a worker's total career earnings and used to calculate future Social Security benefits for caregivers who spend at least eighty hours per month providing care. An alternative is a nonrefundable tax credit for family caregivers.[101]

d. Increase Social Security Taxes

The wages subject to Social Security taxes are capped, and fringe benefits are not subject to the tax. To ensure long-term stability and potentially increase benefits, the cap could be eliminated—or increased—so that higher levels of wages are subject to Social Security contributions.[102] It makes no sense that minimum wage workers should contribute a higher percentage of their wages than CEOs of Fortune 500 companies do.

2. RETIREMENT SUPPORT

Numerous proposals suggest alternative ways of increasing retirement savings. For example, rather than each individual taking risks on his or her own 401(k), those risks could be pooled to ensure the investment is protected and the individual receives a guaranteed annuity. This could take the form of a "guaranteed retirement account," a mandatory, professionally managed retirement account.[103] It would ensure that all workers would have retirement accounts, contributions would be withdrawn by the employer

100. Bryce Covert, *One Small Fix to Help People Who Leave Their Jobs to Care for Loved Ones*, THINKPROGRESS (Mar. 18, 2016, 1:11 PM), https://thinkprogress.org/one-small-fix-to-help-people-who-leave-their-jobs-to-care-for-loved-ones-bf5c1ef066c2/; Andy Jones, *Social Security Caregiver Credit Act Reintroduced*, ROOTED IN RTS. (Apr. 7, 2016), http://www.rootedinrights.org/social-security-caregiver-credit-act-reintroduced/; *Lowey Introduces Legislation to Provide Social Security Earnings Credit to Caregivers*, LOWEY.HOUSE.GOV (Aug. 27, 2015), https://lowey.house.gov/media-center/press-releases/lowey-introduces-legislation-provide-social-security-earnings-credit.

101. *The Credit for Caring Act*, AARP: FINANCIAL & LEGAL, https://www.aarp.org/caregiving/financial-legal/info-2017/credit-for-caring-act.html (last visited Apr. 10, 2018).

102. *See, e.g.*, Kathleen Romig, *Increasing Payroll Taxes Would Strengthen Social Security*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 27, 2016), https://www.cbpp.org/research/social-security/increasing-payroll-taxes-would-strengthen-social-security; SOCIAL SECURITY: PAST, PRESENT, AND FUTURE, *supra* note 99; SOC. SEC. WORKS, STRENGTHEN SOCIAL SECURITY . . . DON'T CUT IT (2013), https://www.socialsecurityworks.org/wp-content/uploads/2013/12/Means-Testing-Betrays-the-Universal-Promise-of-Social-Security.pdf.

103. TONY JAMES & TERESA GHILARDUCCI, RESCUING RETIREMENT: A PLAN TO GUARANTEE RETIREMENT SECURITY FOR ALL AMERICANS 44–45 (2016); GHILARDUCCI, FISHER & KNAUSS, *supra* note 59, at 2.

from the employee's paycheck, and the employee would be unable to dip into the account before retirement.

3. Medicaid

While some believe the current structure of pooled assets is a disincentive to marriage, it nonetheless seems appropriate to retain it. Consider that, upon divorce, all marital assets are subject to division in most states, and in about a dozen states, any of the spouses' asset can be divided; moreover, at death, even if one spouse omits the other from a will, the surviving spouse can elect up to one-third of the decedent's assets, and if there is no will, the surviving spouse is entitled to some part, if not all, of the estate. Making the assumption in Medicaid that marital assets are available for long-term care, particularly under the existing system, which sets property aside for the community spouse, seems to be in accord with the contemporary legal treatment of marriage in other contexts.[104]

B. Caregiving Support

Caregiving is embedded in familial relationships. Proposed changes to caregiving involve changing the fundamental assumption that care is extraordinary to one that accepts that care will be needed and that requires planning for both caregivers and recipients.

1. Caregivers

Caregivers are both paid and unpaid. For unpaid caregivers, changes to the FMLA are needed so that it better reflects the needs of caregiving for the elderly. Changes would include revising the definition of "serious medical condition" to include ongoing chronic situations, such as Alzheimer's, and to account for other caregiving needs, such as doctors' appointments. The lack of paid leave in most jurisdictions becomes very problematic when a serious medical condition exists. Training for family members would help them manage tasks associated with the activities of daily living, as well

104. The situation is probably somewhat more complicated; the spend-down provision is actually both over- and under-inclusive. *See* Erez Aloni, *Deprivative Recognition*, 61 UCLA L. Rev. 1276, 1291 (2014). One problem, for example, is that there is an industry of "Medicaid divorces." *Id*. So, in a world of no-fault divorce, this rule might not capture some families.

as enabling them to assist with limited physical therapy and to administer medications.[105]

Paid caregivers need better wages and job security. Approximately one-quarter of all homecare workers live below the poverty level, and immigration law reforms affect the supply because approximately one-quarter of all such workers are immigrants.[106] Consequently, increased scrutiny of immigrants threatens the care workforce.

2. Care Recipients

The primary issue for most care recipients is being able to afford the kind of care they want, and then finding that care. In general, people want to age at home, and that means planning for both the caretaking and its underlying financial support. The costs of nursing home care and of paid home health care—depending on the extent—are not all that different.[107] Options for small-group or other types of supportive housing allow for more choice and control.[108] Informal caregiving is free to the recipient, but the costs to the provider can be both emotional and financial. Accordingly, the issues concerning support for the activities of daily living are interrelated with financial stability and the capabilities of caretakers, as well as with community support options, such as home-delivered meals or accessible adult day care (which also provide respite for the caregivers). It is important to acknowledge that aging does not inevitably require help,

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105. *See, e.g., Caregiving 101: On Being a Caregiver*, Fam. Caregiver Alliance, https://www.caregiver.org/caregiving-101-being-caregiver (last visited Apr. 10, 2018); Jane Farrell & Sarah Jane Glynn, *The FAMILY Act: Facts and Frequently Asked Questions*, Ctr. for Am. Progress (Dec. 12, 2013, 9:11 AM), https://www.americanprogress.org/issues/economy/reports/2013/12/12/81037/the-family-act-facts-and-frequently-asked-questions; Nat'l Acad., Retooling for an Aging America: Building the Health Care Workforce 10 (2008), https://www.ncbi.nlm.nih.gov/books/NBK215401/pdf/Bookshelf_NBK215401.pdf; Hoffman, *supra* note 58, at 230–31; Osterman, *supra* note 50, at 9.

106. *See, e.g.*, Robert Espinoza, Paraprofessional Healthcare Inst., Immigrants and the Direct Care Workforce 4 (2017), https://phinational.org/wp-content/uploads/2017/06/immigrants_and_the_direct_care_workforce_-_phi_-_june_2017.pdf; Paula Span, *If Immigrants Are Pushed Out, Who Will Care for the Elderly*?, N.Y. Times (Feb. 2, 2018), https://www.nytimes.com/2018/02/02/health/illegal-immigrants-caregivers.html?partner=rss&emc=rss&smid=fb-nytpolitics&smtyp=cur. Approximately one million careworkers are immigrants, and slightly less than one-half of those are citizens. On pay and poverty levels, see Stephen Campbell, Paraprofessional Healthcare Inst., U.S. Home Care Workers: Key Facts (2017), https://phinational.org/resource/u-s-home-care-workers-key-facts/.

107. *Long-Term Care Calculator: Compare Costs, Types of Service in Your* Area, AARP: Financial & Legal, https://www.aarp.org/caregiving/financial-legal/info-2017/long-term-care-calculator.html (last visited Apr. 10, 2018).

108. *See, e.g.*, *Living Arrangements—Housing for Semi-independent Older Persons*, Med. Encyclopedia, http://medicine.jrank.org/pages/1023/Living-Arrangements-Housing-semi-independent-older-persons.html (last visited Apr. 10, 2018).

so these suggestions are focused on when those who are aging do need assistance.

C. Economic Inequality

Regardless of the fixes to the three-legged stool, the background conditions of economic inequality mean that workers at the lowest end of the income spectrum are most likely to face economic insecurity as they age. These economic problems are even more fundamental—and, during the Age of Trump, may be even harder to fix. Nonetheless, in light of the role of financial security, programs that enhance economic opportunities throughout the life cycle and lead to the accumulation of assets should also help the aging process and may also affect the gray divorce rate.

Potential solutions range from increasing the minimum wage to figuring out ways to make workers more valuable and encouraging companies to invest more in the employees they have. The federal minimum wage was last increased in 2009, it is almost 50% lower today than it was in 1968, and over half of the states have a higher minimum wage.[109] Increasing the minimum wage would decrease poverty levels.[110] More than 50% of fast-food workers need some form of public assistance, and the majority of public assistance payments go to working families.[111]

Second, because the capacity to update skills has become more important, education and training need to become more affordable and accessible. Unemployed workers should enjoy greater assistance in going

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109. Christopher Ingraham, *What Does a $15 Minimum Wage Do to the Economy? Economists Are Starting to Find Out*, Wash. Post (Jan. 11, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/01/11/what-does-a-15-minimum-wage-do-to-the-economy-economists-are-starting-to-find-out/?utm_term=.dfc25a64ae15. *See* Elizabeth Warren, This Fight Is Our Fight: A Battle to Save America's Middle Class 15 (2017); *Minimum Wage Tracker*, Econ. Pol'y Inst. (Jan. 8, 2018), https://www.epi.org/minimum-wage-tracker/.

110. Arindrajit Dube, Wash. Ctr. for Equitable Growth, Minimum Wages And the Distribution of Family Incomes in the United States 5 (2017), http://cdn.equitablegrowth.org/wp-content/uploads/2017/04/24114945/042517-dube-minwage.pdf (assuming a minimum wage of $12, this could reduce the poverty rate between

> 1.00 and 2.53 percentage points, hence reducing the number of non-elderly individuals living in poverty by somewhere between 2.7 and 6.8 million . . . . To put these changes in context, the Earned Income Tax Credit reduces the nonelderly poverty rate by around 1.7 percentage points, and cash transfers (means tested and nonmeans tested) reduce it by around 3.8 percentage points . . .).

Id. This would have long-term consequences for the economic security of older people.

111. Ken Jacobs, Ian Perry & Jenifer MacGilvary, *The High Public Cost of Low Wages*, U.C. Berkeley Ctr. for Labor Res. & Educ. (Apr. 13, 2015), http://laborcenter.berkeley.edu/the-high-public-cost-of-low-wages/.

back to school or with the retraining for needed skills. The government should serve as an employer of the last resort, addressing infrastructure and service needs in schools, hospitals, and other arenas that serve public needs.

Third, addressing economic inequality might ultimately result in making not just health care but also old age benefits independent of employment, an option discussed above.

IV. Conclusion

Moving forward, the family will continue to play an important role in financial well-being and care for older people. Rather than ignore or deny that role, a more constructive approach is to support the family's involvement and ensure that both recipients and providers are appropriately recognized. But aging successfully should not depend on the existence of a family for caregiving or benefit receipt; the family should be one of the structures for delivering appropriate care. To be sure, relying on the family to help structure care and benefits does privatize dependence; the advantages are Social Security auxiliary benefits and the drawbacks are Medicaid community spouse obligations. Perhaps this means equality between those with and without families; thus, for example, if a nonfamily member could be paid for services, then so too should a family member. Yet, the increasing number of people who do not receive that support requires us to develop alternative methods of assuring care. We are still working out our approaches, but going forward, we cannot ignore the legal and social impact of family.