MARRIAGE IN THE GOLDEN YEARS: REVISITING BENEFITS AND OBLIGATIONS IN LIGHT OF THE NEW INDIVIDUALISM

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I.
INTRODUCTION

Since the mid-twentieth century, there has been a profound cultural shift in the way Americans approach intimate relationships. Gone are the days of marriage as the predominant site for sexual activity, shared identities and resources, childbearing and childrearing, and fixed domestic roles.[1] The conventional script of the breadwinner male and homemaker female marrying, having children, and growing old together "til death do us part" is largely a relic of the past. We have since seen marked increases in divorces, women entering the paid work force, same-sex relationships, births outside of marriage, and cohabitation (in lieu of and preceding marriage).[2] Americans are now cycling through multiple and shorter partnerships in a landscape of frequent divorce, frequent marriage, and frequent short-term cohabitation.[3] Not only has the menu expanded beyond marriage as the sole option, but the once-fixed ingredients of marriage have given way to abundant personalization, evoking a choose-your-own-adventure feel. As sociologists have recognized, marriage has undergone a "deinstitutionalization."[4]

Enter the "new individualism."[5] One of the leading researchers of marriage,

1. The "Bergerian" worldview that colored mid-twentieth century America understood marriage as a jointly transformative event, a "dramatic act in which two strangers come together and re-define themselves." Peter Berger & Hansfried Kellner, *Marriage and the Construction of Reality*, *in* 46 DIOGENES 1, 5 (Roger Caillois ed., 1964).

2. *See* Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 849 (2004). Cherlin notes that America is currently experiencing the following trends contributing to the "deinstitutionalization" of marriage: (1) a shifting division of labor in the home as more women enter the paid work force; (2) an increasing number of births occurring outside marriage; (3) a drastic increase in divorce rates; (4) growth in cohabitation and its status as an alternative to marriage; and (5) the movement toward legalizing same-sex marriage. *Id.* at 849–50.

3. *Id.*

4. *Id.* at 848. *See* Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of the New Individualism* 14 (Yale Law School, Public Law Research Paper No. 276, 2013), *available at* http://ssrn.com/abstract=2220322.

5. *See* ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE

sociologist Andrew Cherlin, was influential in identifying this phenomenon as a central strand of American culture underlying today's deinstitutionalized climate:

> The cultural model of individualism . . . holds that self-development and personal satisfaction are the key rewards of an intimate partnership. Your partnership must provide you with the opportunity to develop your sense of who you are and to express that sense through your relations with your partner. If it does not, then you should end it.[6]

Although the existence of an increasingly individualistic America has been documented within sociology[7] and widely discussed in the popular press,[8] the cultural influence of the new individualism is only now starting to gain recognition in the legal literature. Professor Anne Alstott has led the way in providing a detailed account of modern family life as molded by the new individualism. Through her discussion of the income tax and Social Security spousal benefit, she has demonstrated that "the new individualism has rendered obsolete legal doctrines and policy analyses that treat formal marriage as the proxy for family life."[9] Alstott's work provides a mere "glimpse [into] the new policy possibilities opened up by the new individualism,"[10] as there remain broad swaths of existing law that have not yet been reconsidered in light of the new individualism.

If the state, acting through social welfare policy, were to endorse the values underlying the new individualism, what implications would these values have for

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FAMILY IN AMERICA TODAY 29 (2009); Alstott, *supra* note 4, at 2. Specifically, Cherlin understands this new individualism to be a form of "expressive individualism," a term that was first coined by Robert Bellah and colleagues to represent "a view of life that emphasizes the development of one's sense of self, the pursuit of emotional satisfaction, and the expression of one's feelings."

6. *See* CHERLIN, *supra* note 5, at 30.

7. *See, e.g.*, ANTHONY ELLIOTT & CHARLES LEMERT, THE NEW INDIVIDUALISM: THE EMOTIONAL COSTS OF GLOBALIZATION 7–8 (2d ed. 2009); ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 25 (2000); PAUL LEINBERGER & BRUCE TUCKER, THE NEW INDIVIDUALISTS: THE GENERATION AFTER THE ORGANIZATION MAN 2 (1991); Eric L. Hsu, *New Identities, New Individualism*, *in* HANDBOOK OF IDENTITY STUDIES 129 (Anthony Elliott ed., 2012) ("To date with a few notable exceptions, the core concern of most research on individualism has been to highlight its contrast to a more collectivist disposition within society."); Robert Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 75 (1995) (documenting the increasing "individualizing" of leisure time).

8. *See, e.g.*, Robin Marantz Henig, *The Post-Adolescent, Pre-Adult, Not-Quite-Decided Life Stage*, N.Y. TIMES MAG., Aug. 22, 2010, at 28 (explaining that twenty-somethings in America are in a distinct life stage called "emerging adulthood," in which they "slouch toward adulthood at an uneven, highly individual pace"; many are "advancing professionally before committing to a monogamous relationship, having children young and marrying later, leaving school to go to work and returning to school long after becoming financially secure"); Stephanie Rosenbloom, *Generation Me vs. You Revisited*, N.Y. TIMES, Jan. 17, 2008, at G1 ("'Generation Me' inspired a slew of articles in the popular press with headlines like 'It's all about me,' 'Superflagilistic, Extra Egotistic' and 'Big Babies: Think the Boomers are self-absorbed? Wait until you meet their kids.'").

9. *See* Alstott, *supra* note 4, at 3.

10. *Id.* at 45.

policymaking going forward? This article analyzes that question in relation to programs supporting Americans in old age—namely, what the new individualism would mean for existing law governing benefits and obligations at old age, focusing on Medicaid, Social Security spousal benefits,[11] and ERISA-governed private pensions.

Old age is a particularly vulnerable time for individuals who are simultaneously burdened with thin resources and skyrocketing long-term care costs. As of 2010, Americans aged sixty-five or over comprised thirteen percent of the population,[12] a figure projected to increase to sixteen percent in 2020 and nineteen percent in 2030.[13] Not only will more Americans reach retirement age, but they will also live longer.[14] As America's aging population swells, more people will need long-term care—primarily nursing home care—and a means to pay for it.[15] Researchers predict that the long-term care costs of dementia, a disease that incurs even greater costs than heart disease and cancer, will more than double in the next thirty years and "swamp the system."[16]

Health care spending as a share of United States gross domestic product (GDP) has climbed from five percent in 1960 to eighteen percent today.[17] A total of $2.6 trillion in 2012 was spent on health consumption expenses, including $328.2 billion out-of-pocket, $917 billion on private health insurance, $572.5 billion on Medicare, and $421.2 billion on Medicaid.[18] The proportion of health

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11. This article's discussion of Social Security spousal benefits will expand upon Alstott's above-mentioned analysis.

12. U.S. CENSUS BUREAU, 2010 Census Summary File 1.

13. Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE & FAM. 403, 413 (2010).

14. *FastStats: Life Expectancy*, CTRS. FOR DISEASE CONTROL & PREVENTION, www.cdc.gov/nchs/fastats/life-expectancy.htm (last visited May 26, 2014) (using data from the 2010 Census); *see also* Elizabeth Arias, *United States Life Tables 2008*, NAT'L VITAL STATS. REPS. (Sept. 24, 2012), at 1, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_03.pdf (reporting that in 2008, the life expectancy for females was 80.6 years, while that of males was 75.6 years).

15. *See* HENRY J. KAISER FAMILY FOUND., HEALTH CARE COSTS: A PRIMER 25 (2012), http://www.kff.org/insurance/upload/7670-03.pdf. A 2009 study on health care spending found that sixty-five-year-olds—the group with the highest health care spending—spent an average of $9,744 per person on health care that year. *Id.* at 9. Average costs of long-term care were $205 per day or $6,235 per month for a semi-private room in a nursing home as of 2010. Nat'l Clearinghouse for Long Term Care Info., *Costs of* Care, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.longtermcare.gov/LTC/Main_Site/Paying/Costs/Index.aspx (last visited May 26, 2014).

16. Pam Belluck, *Dementia Study Predicts a Surge in Costs and Cases*, N.Y. TIMES, Apr. 4, 2013, at A1. By 2040, total costs of dementia are expected to soar to between $379 billion and $511 billion. *Id.*

17. Cathy Schoen, Stuart Guterman, Mark A. Zezza & Melinda K. Abrams, *Confronting Costs: Stabilizing U.S. Health Spending While Moving Toward a High Performance Health Care System*, THE COMMONWEALTH FUND, http://www.commonwealthfund.org/Publications/Fund-Reports/2013/Jan/Confronting-Costs.aspx?page=all.

18. National Health Expenditures; Levels and Annual Percent Change, by Source of Funds: Selected Calendar Years 1960–2012, 4 tbl.3, CTRS. FOR MEDICARE & MEDICAID SERVS., *available at* http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/tables.pdf.

care costs funded by Medicare and Medicaid has significantly increased since 1970.[19] In 1970, Medicare and Medicaid funded 3.5% and 23.3% of nursing care costs, respectively, while 49.5% of costs were funded out-of-pocket. In 2010, however, Medicare and Medicaid funded 22.3% and 31.5% of nursing care costs, respectively, with only 28.3% of costs funded out-of-pocket.[20]

It is no secret that the demands on broader institutional support systems will only intensify.[21] Now, more than ever, is a good time to examine how the state allocates economic benefits and burdens at old age. Existing foundational programs including Medicaid, Social Security spousal benefits, and ERISA-governed private pensions are premised on a model of lifetime economic partnership, which relies on the fading notion of a dependent homemaker wife in a lasting marriage. This article posits that the new individualism, taken seriously, would mandate a significant overhaul of the existing web of state programs supporting Americans in old age. Rather than focusing on transitional reforms for current baby boomer couples who married against the backdrop of mid-twentieth-century norms, this article looks ahead to what the law should be when the generation forming relationships in the culture of the new individualism reaches old age.

So far, this article has proceeded as if all Americans share the same conception of marriage, as shaped by the new individualism—and intentionally so. From the poorest to the wealthiest, and across all races, young adults today approach marriage with a pronounced emphasis on individual development and personal emotional satisfaction.[22] As Cherlin observed, "[w]hen it comes to marriage, the poor and the near-poor . . . are operating in the same twenty-first century culture as the middle class."[23]

This is not to be dismissive of the pervasive and important distinctions in marital trends along lines of income, race, and gender.[24] Lower-income individuals are more likely to raise children outside of marriage.[25] College-educated individuals who tend to have higher incomes also cohabitate but are more likely to wait until marriage to have children.[26] Non-college-educated Americans are more likely to cycle through cohabitating unions. When they do

19. *See* HENRY J. KAISER FAMILY FOUND., *supra* note 15, at 11 fig.8.

20. *Id.*

21. *See id.* at 2 (noting that federal spending on health care is projected to grow from 5.6% of GDP in 2011 to 9.4% of GDP by 2035, and that "[d]espite the many cost-reducing provisions in the [Affordable Care Act], system-wide health care costs are still projected to rise faster than national income for the foreseeable future").

22. CHERLIN, *supra* note 5, at 174.

23. *Id.* at 178; *see* Natalie Angier, *The Changing American Family*, N.Y. TIMES, Nov. 25, 2013 ("Yet across the divide runs a white picket fence, our unshakable star-spangled belief in the value of marriage and family. We marry, divorce and remarry at rates not seen anywhere else in the developed world.").

24. *See* KAY S. HYMOWITZ, MARRIAGE AND CASTE IN AMERICA: SEPARATE AND UNEQUAL FAMILIES IN A POST-MARITAL AGE 3–4 (2007).

25. *Id.* at 160.

26. *Id.* at 167. Nine out of ten college-educated women are married when they give birth.

marry, their marriages are less stable. An estimated thirty-four percent of the first marriages of women without high school degrees, and twenty-three percent of those without college degrees end in divorce or separation within five years, compared to just thirteen percent of those with college degrees.[27] African Americans have experienced the greatest decline in marriage rates. Today, only two out of three African American women will marry during their lifetimes, compared to nearly nine out of ten in the 1950s.[28]

Although commentators disagree as to whether the new individualism represents a welcome expansion of personal freedom or a lamentable decline in moral standards,[29] this article refrains from taking sides in that debate. It is indisputable, however, that there have been dramatic changes in the cultural landscape of marriage in the past few decades, and many areas of law which were developed when marriage was still understood as a lifetime economic partnership have not yet caught up with today's social reality. Particularly at a time when financial burdens in old age are escalating, it is important that the state update its old age support programs to address the needs of modern families. This article seeks to advance the important project of considering what a rigorous interpretation of the new individualism would mean for the law.

Part II describes the new individualism, as reflected in the attitudes of younger people toward marriage, with respect to principles governing state program design. The tenets of the new individualism will be contrasted with those of the older lifetime economic partnership model. Part III provides an overview of the aspects of Medicaid, Social Security derivative benefits, and ERISA-governed private pensions that distinctly affect married individuals, and demonstrates how these programs reflect outdated tenets of the lifetime economic partnership model. Finally, Part IV analyzes how these existing laws would have to be reformed in order to align with the tenets of the new individualism. Though political and administrative constraints exist, these reform proposals are useful in repositioning our locus of policy options going forward under a serious conception of the new individualism.

II.
TENETS OF THE NEW INDIVIDUALISM

The new individualism is the cultural force behind today's "deinstitutionalized" marriage. Although the features of deinstitutionalized

27. *Id.* at 168.

28. *Id.* at 169–70.

29. *See, e.g.*, HYMOWITZ, *supra* note 24 (arguing that "American marriage program," which has separated childrearing from wedlock, has particularly harmful consequences for children raised in low-income families, often by a single mother); CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA, 1960–2010 (2012) (viewing the current state of deinstitutionalized marriage as a reflection of the broader cultural and moral decline that is exacerbating the gap between upper and lower class America); *cf.* BRIAN POWELL, CATHERINE BOLZENDAHL, CLAUDIA GEIST & LALA CARR STEELMAN, COUNTED OUT: SAME-SEX RELATIONS AND AMERICANS' DEFINITIONS OF FAMILY (2010) (embracing the contours of the changing American family).

marriage have been extensively documented,[30] the phenomenon of the new individualism has yet to be distilled into a set of normative principles to guide legal institutional design. Cherlin has characterized the cultural model of the new individualism as embodying the following elements:

> One's primary obligation is to oneself rather than to one's partner and children.
>
> Individuals must make choices over the life course about the kinds of intimate lives they wish to lead.
>
> A variety of living arrangements are acceptable.
>
> People who are personally dissatisfied with marriages and other intimate partnerships are justified in ending them.[31]

The first element prioritizes individual, emotional fulfillment, while the second and third elements recognize and promote variety in the methods of attaining personal fulfillment. The last element flows naturally from the first three, as individuals should be able to freely navigate from one relationship to another on their individualized path to personal fulfillment. This Part adapts these elements into principles shaping legal design, identifying the core tenets of the new individualism as (1) personal fulfillment; (2) emotional fulfillment; (3) greater personal choice; and (4) easy exit. A serious conception of the new individualism would require that the state endorse these values with respect to policy design.

Figure 1. Tenets of the New Individualism vs. Lifetime Economic Partnership

The New Individualism	Lifetime Economic Partnership
Personal fulfillment	Linked fulfillment
Emotional fulfillment	Economic security
Greater personal choice	Marriage as the ideal choice
Easy exit	No exit

The tenets of the new individualism stand in stark contrast to those of the older lifetime economic partnership model, which embody the following principles: (1) linked fulfillment trumps individual fulfillment; (2) economic security takes priority over emotional fulfillment; (3) marriage is the ideal choice over all other intimate partnership arrangements; and (4) marriage is lasting and difficult to exit from (see Figure 1). This model of marriage—also known as the

30. *See* Cherlin, *The Deinstitutionalization of American Marriage*, *supra* note 2, at 849–50, and Alstott, *supra* note 4, at 2, for a summary of the social trends characterizing the deinstitutionalization of marriage. These include the following: (1) "Marriage is no longer the dominant site for adult development or child-bearing and -rearing"; (2) "The institution of marriage no longer necessarily implies shared resources, shared expectations, shared children (or any children at all) or defined roles in day-to-day life"; and (3) "Marital behavior has become stratified by class to an unprecedented degree," with the upper class as the exclusive domain for a conception of lasting marriage and continuous childrearing. Alstott, *supra* note 4, at 2.

31. CHERLIN, *supra* note 5, at 31.

"companionate marriage"—flourished between 1900 and 1960.[32] During this time, the male breadwinner/female homemaker ideal reigned supreme, and homemaker wives were dependent on their breadwinner husbands for economic support.[33] The predominant assumption was that men and women would marry before having children, and stay married afterward.[34]

Starting in the 1960s and accelerating in the 1970s—aided by the women's rights movement, the advent of the birth control pill, and the ability to file for divorce without a showing of fault—Americans transitioned from the companionate marriage to the individualized and deinstitutionalized marriage.[35] This transition from "role to self" was part of the broader cultural shift toward the new individualism, requiring "a new kind of marriage in which the spouses are free to grow and change and in which each feels personally fulfilled."[36] The sections below discuss the core tenets of the new individualism, as contrasted with those of the lifetime economic partnership model.

A. Personal Fulfillment

In the older model of lifetime economic partnership, a notion of linked fulfillment and "togetherness" prevailed, in which one spouse's identity was inextricably linked to that of the other spouse.[37] It made sense for spouses' primary source of support and fulfillment to come from one another within the marriage itself. The new individualism, however, conceives of "marriage as a partnership of individuals."[38] Self-development is the primary goal, requiring that each person (whether single, cohabiting, or married) continuously pay attention to his or her personal needs, growth, and happiness, as opposed to subordinating such needs to those of his or her spouse.[39] Linked fulfillment under the lifetime economic partnership model is no longer enough for a successful intimate relationship, as it has since been replaced by a focus on personal fulfillment and each person's individual well-being.

How does this translate into a normative principle for purposes of legal design? We must reject the presumption that married individuals form one indivisible unit such that a benefit conferred upon one spouse can be imputed to the other.[40] We can no longer assume that an individual is willing to sacrifice

32. *Id.* at 69; *see also* Eli J. Finkel, Chin Ming Hui, Kathleen L. Carswell & Grace M. Larson, *The Suffocation of Marriage: Climbing Mount Maslow Without Enough Oxygen*, 25 PSYCH. INQUIRY 4 – 6 (2014).

33. *See id.* at 76.

34. *See id.* at 78.

35. *See id.* at 88.

36. *Id.* at 89–90.

37. *See* Berger & Kellner, *supra* note 1, at 5.

38. CHERLIN, *supra* note 5, at 97; *see also* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.").

39. *See* CHERLIN, *supra* note 5, at 88.

40. Individuals, particularly women, are increasingly asserting their financial independence

personal growth and happiness in order to further his or her partner's well-being. Thus, the tenet of personal fulfillment counsels toward the individualized allocation of rewards and responsibilities within any intimate relationship, whether marriage or cohabitation.[41]

Where children are involved, it may be impossible to disentangle the personal fulfillment of the child from that of their caretaker. This article's conception of the tenets of the new individualism is confined to relationships between romantic partners, and not between parents and children or between romantic partners who are raising children. Although it may be difficult in practice to separate the fulfillment of one partner from that of the other, a serious conception of the new individualism must reject the default assumption of linked fulfillment.

B. Emotional Fulfillment

The tenet of emotional fulfillment prioritizes emotional satisfaction over economic gain in intimate relationships. Economic security, a hallmark of the older lifetime economic partnership model, is no longer the primary goal in marriage. In the earlier half of the twentieth century, the male breadwinner/female homemaker model of marriage required that marriage provide the wife with economic security while she stayed home to raise the kids. The lifetime economic partnership model assumed that such specialization was efficient, viewing childrearing as the ultimate goal, and marriage as the primary vehicle for achieving the economic stability necessary for childrearing.[42] The understanding that the couple was a unit whose well-being was inextricably linked made the expectation that economic earnings (primarily earned by the husband) be shared between spouses, all the more reasonable. This economic organization reflects the heavily gendered division of household labor under the lifetime economic partnership model as women's participation in the workforce

within intimate relationships. *See, e.g.*, Kathleen Grace, *Cinderella's Guide to Financial Independence*, THE SHRIVER REPORT (Jan. 23, 2014), *available at* http://shriverreport.org/cinderellas-guide-to-financial-independence-kathleen-grace/ (advising young women today: "*Money gives you choices*. Once you give up your financial independence in a romantic relationship, you are now left with fewer options. When you maintain financial independence, however, you have choices. . . . [I]t is not wise to rely on husbands, significant others, or partners for your financial security."); *Increase of Prenuptual Agreements Reflects Improving Economy and Real Estate Market: Survey of Nation's Top Matrimonial Attorneys Also Cites Rise in Women Requesting Prenups*, AMERICAN ACAD. OF MATRIMONIAL LAWYERS (Oct. 16, 2013), *available at* http://www.aaml.org/about-the-academy/press/press-releases/pre-post-nuptial-agreements/increase-prenuptial-agreements-re (reporting that sixty-three percent of divorce attorneys cited an increase in prenuptial agreements during the past three years, with the top three items most commonly covered in prenups being "protection of separate property," "alimony/spousal maintenance," and "division of property," and also finding a forty-six percent increase in women initiating requests for these agreements).

41. *See* CHERLIN, *supra* note 5, at 140.

42. *Id.* at 78. For a discussion on the now outdated theory of specialization, see GARY BECKER, A TREATISE ON THE FAMILY (1991) and Robert Pollack, *A Transaction Cost Approach to Families and Households*, 23 J. ECON. LITERATURE 581 (1985).

was considered secondary and largely unrecognized by the Census Bureau.[43]

Fast-forward half a century to the era of the new individualism. In 2010, fifty-nine percent of married couples were dual-earners, compared to forty-four percent in 1967.[44] Only nineteen percent of married couples in 2010 consisted of male breadwinner/female homemaker pairings, compared to thirty-six percent in 1967.[45] With the decline of the male breadwinner family, the rise of the higher earning female,[46] and the growing legalization of same-sex marriage, marriage is not the financial security blanket it once was for one (female) partner.[47] Instead, the practical significance of marriage has been replaced with an emotional significance, a "SuperRelationship" of sorts.[48] Rather than viewing marriage as the beginning of a path to economic stability, most young adults today treat it as a capstone event—a "mark of prestige" and "display of distinction"—*after* they have become independently economically stable.[49] This is also reflected in the later median ages of first marriages, which in 2011 was approximately 29 years old for men and 27 for women, compared to 23 for men and 20 for women in 1955.[50] Consistent with the emphasis on self-development, individuals increasingly view economic security as a personal responsibility, as opposed to an entitlement from a spouse. A recent study of young adults in their twenties demonstrates the prevalent notion that marriage is "centered on intimacy and love rather than on practical matters such as finances and children," with ninety-four percent agreeing "when you marry you want your spouse to be your soul mate, first and foremost."[51] Eighty-two percent believed it was "extremely important . . . to be economically set before [getting] married,"[52] and eighty percent of women felt it was more important "to have a husband who can communicate about his deepest feelings than to have a husband who makes a

43. *See* Philip N. Cohen, *The Gender Division of Labor: 'Keeping House' and Occupational Segregation in the United States*, 18 GENDER & SOC. 239, 240, 242 (2004).

44. U.S. BUREAU OF LABOR STATS., REPORT NO. 1040, WOMEN IN THE LABOR FORCE: A DATABOOK 3, 80 tbl.23 (2012), *available at* http://www.bls.gov/cps/wlf-databook-2012.pdf.

45. *Id.*

46. Twenty-nine percent of working wives now out-earn their husbands, a figure up from eighteen percent in 1987. *Id.* at 82 tbl.25. Furthermore, working wives in 2010 earned thirty-eight percent of their families' incomes, compared to twenty-seven percent in 1970. *Id.* at 81 tbl.24.

47. *See* Cohen, *supra* note 43, at 246–49. Family households that are headed by single females (15 million) greatly outnumber those headed by single males (5.6 million). U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, tbl.14, *available at* http://www.census.gov/population/age/data/files/2011/2011gender_table14.xlsx.

48. CHERLIN, *supra* note 5, at 139–40 (citing THE NATIONAL MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2011 (2001), *available at* http://www.stateofourunions.org/pdfs/SOOU2001.pdf)).

49. *Id.* at 140 ("Meanwhile, couples are deferring marriage until they have a firm economic base.").

50. *See* Alstott, *supra* note 4, at 17. Cherlin observed that "[i]t makes more sense today for women to postpone marriage—possibly while living with a partner—until they are confident they have established themselves in the labor market," adding that this extensive work experience serves to increase the choices they can make. CHERLIN, *supra* note 5, at 185.

51. CHERLIN, *supra* note 5, at 139 (citing THE NATIONAL MARRIAGE PROJECT, *supra* note 48). Only sixteen percent agreed that "the main purpose of marriage these days is to have children." *Id.*

52. *Id.*

good living."[53]

The tenet of emotional fulfillment, adapted for the purposes of legal design, counsels toward the understanding that marriage does not necessitate the assignment of economic benefits and obligations. Marriage is no longer necessary for women to achieve financial stability at the expense of their breadwinner husbands, nor is its attraction based on the promise of economic security. Thus, spouses should not be presumed to take on the responsibility of ensuring the other's economic security.[54]

It is true that economic benefits in marriage may promote personal and even emotional fulfillment of individual spouses, but there are several reasons why the default under the new individualism should not countenance the allocation of economic benefits between spouses. First, consider the very real scenario in which the state confers economic benefits exclusively to those who are married. Those benefits are financed in part by unmarried individuals, thereby creating a situation in which the state privileges marriage over other intimate arrangements—a violation of the tenet of greater personal choice.[55] Or, consider the classic means-tested program in which the state premises the allocation of economic benefits on the cumulative financial need of the marital couple. Resource sharing between spouses necessarily requires at least one spouse to give away economic resources for the benefit of the other. Even though one spouse might be benefiting from the exchange, the other spouse is saddled with the responsibility of economic sharing. For the state to burden one spouse with economic responsibility for the other spouse is not only at odds with the autonomy associated with personal fulfillment, but it also makes marriage less attractive to some and more attractive to others—again, violating the tenet of greater personal choice. Ultimately, if today's young adults do not approach marriage as a vehicle for economic security, a serious conception of the new individualism should refrain from treating it as such.

C. Greater Personal Choice

A key tenet of the new individualism is the availability of greater personal choice in the attainment of personal and emotional fulfillment. Marriage is not the only intimate relationship in which one can achieve personal and emotional fulfillment, nor is it a necessary chapter in today's "do-it-yourself biography." By contrast, the lifetime economic partnership model was founded on the pragmatic purpose of economic security and rooted in the rigid notion of

53. *Id.* at 139–140.

54. This is not to ignore the reality that many spouses do financially support one another. However, the prospect of receiving financial support from a spouse is no longer the primary motivation for entering marriage today. Thus, under a serious conception of the new individualism, marriage should not impose economic obligations on spouses. Spouses may (and often do) end up assuming these obligations voluntarily, but the important thing is that the state is not putting that pressure on them.

55. *See infra* Part II.C.

marriage as the dominant site for childbearing and childrearing.[56] Marriage was the ideal choice for the homemaker wife and viewed as the only option for those looking to start a family.

With women's increased economic independence and the new emphasis on emotional fulfillment, a much more flexible conception of family life has emerged. Since 1990, the number of cohabiting couples and nonmarital births has rapidly increased.[57] In the 1960s, more than eighty percent of Americans between the ages of twenty and fifty-four were married, compared to only fifty-one percent in 2010.[58] From 1982 to 2010, there was a ten percent decline in the percentage of women aged fifteen to forty-four who reported being married, while cohabitation rates increased from three percent to eleven percent.[59] Significantly more couples are cohabiting before marriage; it is estimated that over fifty percent of first marriages today are preceded by cohabitation, compared to only ten percent in the 1960s and 1970s.[60]

The increase in cohabitation and nonmarital childbearing and childrearing underscores the importance of flexibility in arranging one's family life. Translated into a principle to guide legal design, the tenet of greater personal choice requires that the law remain neutral among family arrangements and refrain from privileging marriage over cohabitation. Individuals should remain free to choose how they can best attain personal and emotional fulfillment without the state incentivizing them to take one path over another.

D. Easy Exit

Easy exit is fundamentally intertwined with the other three tenets of the new individualism. In the quest for personal and emotional fulfillment, Americans today engage in an ongoing self-appraisal of their personal lives, causing them to be "always on the go, choosing to move up or choosing to move out."[61] Unhappy couples are expected to break up and pursue happiness elsewhere. The mid-twentieth-century lifetime economic partnership model of marriage, by contrast, assumed that there would be no exit from the partnership. It made sense especially for the female homemaker to stay in a marriage for life, as it was a practical source of economic support. Exit from marriage posed grave economic risks to female spouses, who were likely to lack the skills and experience to obtain a paid job. As women began entering the workforce, and as the notions of linked fulfillment and economic security gave way to continuous monitoring of

56. CHERLIN, *supra* note 5, at 200–01; *see* Alstott, *supra* note 4, at 1–2.

57. *See* Alstott, *supra* note 4, at 13–16, for a thorough statistical overview of the growing prevalence of nonmarriage. She notes that between 1970 and 2002, "the percentage of children living in two-parent families fell from 85 percent to sixty-nine percent, while the share living in single-parent families more than doubled, from eleven percent to twenty percent." *Id.* at 16 (internal citations omitted).

58. *Id.* at 14.

59. *Id.* at 15 tbl.1.

60. *Id.* at 15.

61. CHERLIN, *supra* note 5, at 186.

one's own emotional fulfillment, there was less reason to stay in a personally unfulfilling marriage. And due to the adoption of no-fault divorce laws in many states in the late 1970s, individuals could file for divorce without having to prove that the other spouse was at fault.[62]

A comparison of the duration of marriage in the lifetime economic partnership model to that in the new individualism illustrates the cultural shift from no exit to easy exit. First marriages occurring in the early 1960s lasted longer than those that took place after the late 1970s.[63] Both men and women experienced declines in marital longevity at the five, ten, fifteen, and twenty-year anniversaries.[64] For example, among marriages begun between 1960 and 1964, approximately eighty-three percent lasted at least ten years and sixty-seven percent lasted at least twenty years; compare this to marriages begun between 1980 and 1984, in which only seventy-one percent lasted at least ten years and fifty-seven percent lasted at least twenty years.[65] Easy exit accounts for the high turnover in intimate relationships today, contributing to cycles of cohabitation, marriage, divorce, and remarriage or cohabitation. As of 2009, the median duration of a first or second marriage ending in divorce was eight years.[66] About twenty-one percent of men and twenty percent of women have been married at least twice,[67] typically remarrying an average of four years after their first divorce.[68] America is also in the midst of a "gray divorce revolution," as the divorce rate among Americans aged fifty and older has doubled over the past twenty years, from one in ten in 1990, to one in four in 2010.[69] Those aged fifty and older who had remarried experienced a divorce rate over two times higher than that of couples in their first marriages.[70]

What does the tenet of easy exit mean for legal design? Under a serious conception of the new individualism, individuals should not be restricted in their ability to move from one relationship to another. Easy exit would require that the

62. *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 479 (4th ed. 2010) (explaining that many states follow the California or Uniform Marriage and Divorce Act model and providing background on the development of no-fault divorce). No-fault divorce laws may have served both as a reflection of the onset of the new individualism and as a facilitator of easy exit from marriage.

63. ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, NUMBER TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2009, 9 (2011).

64. *Id.* at 10, 11 tbl.4.

65. *Id.* at 11 tbl.4. There is not yet data measuring certain durations of marriage for cohorts who married after 1985.

66. *Id.* at 15, 18 tbl.8.

67. Alstott, *supra* note 4, at 18.

68. KREIDER & ELLIS, *supra* note 63, at 15.

69. Susan L. Brown & I-Fen Lin, *The Gray Divorce Revolution: Rising Divorce Among Middle-Aged and Older Adults, 1990–2009* 28 fig.1 (Nat'l Ctr. for Family and Marriage Research, Working Paper No. 12-04, 2012); *see* Leslie Mann, *Post-50 Divorce Rate Doubled in 20 Years*, CHICAGO TRIBUNE, Feb. 27, 2013, § 5 at 1.

70. Brown & Lin, *supra* note 69, at 3. Moreover, thirty percent of people aged fifty and older were in remarriages in 2010 (as opposed to just nineteen percent in 1980), and over half of those aged fifty and older who divorced in 2010 were in remarriages. *Id.* at 21.

law remain neutral regarding an individual's choice to exit one intimate relationship and enter into another.

III.
STUCK IN THE PAST: EXISTING PROGRAMS GOVERNING BENEFITS AND OBLIGATIONS AT OLD AGE

Keeping in mind the core tenets of the new individualism—personal fulfillment, emotional fulfillment, greater personal choice, and easy exit—and their contrast to the features of the lifetime economic partnership model, this Part demonstrates how laws governing old age benefits today are tied to the lifetime economic partnership model. Retirement security policy can be conceptualized as a "three-legged stool" consisting of Social Security old age benefits (including Medicare and Medicaid), employer-sponsored pensions, and private savings.[71] The status of being married and the duration of one's marriage play major roles in determining government benefits and pension payments. This article will treat Social Security as a proxy for Medicare because anyone aged sixty-five or older who is entitled to Social Security benefits, including spouses of covered workers,[72] is also entitled to Medicare coverage.[73] Accordingly, the three state programs that will be addressed below consist of Medicaid payments for nursing home care, Social Security derivative benefits, and ERISA-governed employer-sponsored pensions.[74]

A. Medicaid

1. An Overview

Based on the most recent Census data, approximately 61.8 million Americans received Medicaid payments in 2009, 4.1 million of whom were age sixty-five and older, and 1.6 million of whom received payment for nursing home care.[75] Medicaid is a means-tested, joint federal-state program that pays

71. *See, e.g.*, MERTON C. BERNSTEIN & JOAN BRODSHAUG BERNSTEIN, SOCIAL SECURITY: THE SYSTEM THAT WORKS 93 (1988); MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE 99 (1999).

72. The term, "covered worker," is used to refer to an individual who is fully insured with the requisite minimum of forty years of coverage in order to be eligible for Social Security benefits.

73. Generally, if an employee meets the eligibility requirements to receive Social Security benefits on a spouse or prior spouse's record, then that employee will also be eligible for Medicare—both Part A and Part B—at age sixty-five on that record. SOC. SEC. ADMIN., PUB. NO. 05-10043, SOCIAL SECURITY: MEDICARE 5–7 (2013), *available at* http://www.ssa.gov/pubs/EN-05-10043.pdf.

74. Though private pensions fund retirement using private earnings and investments, they are governed by ERISA rules imposed by the state. Thus, for the purposes of this article, private pensions will be categorized alongside Medicaid and Social Security as state programs.

75. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 109 tbl.151 (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0151.pdf. There is a tremendous state-by-state variation in Medicaid spending. For example, New York and California significantly outspent other states on Medicaid payments at $44.8 billion and $35.2 billion, respectively. *Id.* at 109 tbl.152.

the medical expenses of low-income individuals who are aged, blind, or disabled, in addition to children, pregnant women, and family members with dependent children who meet certain financial eligibility requirements.[76] This discussion focuses on provisions pertaining to those who qualify due to being age sixty-five or older and "categorically needy,"[77] a segment that accounts for approximately one-third of total Medicaid dollars spent.[78]

Since the passage of the Medicare Catastrophic Coverage Act (MCCA) in 1988, Medicaid has included special eligibility rules for married couples facing the costs of one spouse entering a nursing home.[79] As a matter of terminology, the spouse not entering the nursing home is known as the "community spouse," while the one requiring continuous nursing home care is known as the "institutionalized spouse."[80] In most states, anyone who is eligible for Supplemental Security Income (SSI)—meaning they are aged sixty-five or older, blind, or disabled, and have less than a certain amount in countable resources—is automatically eligible for Medicaid.[81] Under the SSI resource standard, an unmarried individual cannot have more than $2,000 in countable resources, while a married couple cannot have more than $3,000 collectively.[82] Countable resources are defined under the SSI resource rules, and include cash on hand other than current income; financial accounts, including individual retirement accounts; stocks and bonds; and assets in trust, pension plan assets, and annuities only to the extent that they can be immediately accessed.[83] Resources that are

76. 42 U.S.C. §§ 1396a–1396d (2006).

77. *See* § 1396a(m)(1)(A)–(C) (establishing that Medicaid provisions are to apply to those who are at least sixty-five years old, whose income is no greater than the official poverty line applicable to a family of the size involved, and whose resources do not exceed the maximum amount of resources that an individual may obtain under the Supplemental Security Income (SSI) program); § 1396d(a)(iii) (defining "medical assistance" payments to cover those who meet the income requirements and are at least sixty-five years old); 42 C.F.R. § 435.120 (2013) (defining the "categorically needy" as those who are "aged, blind, and disabled...who are receiving or are deemed to be receiving SSI" and for whom states "must provide Medicaid").

78. LAWRENCE A. FROLIK & LINDA S. WHITTON, EVERYDAY LAW FOR SENIORS 82 (Richard Delgado & Jean Stefancic eds., 2010).

79. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683.

80. *See* 42 U.S.C. § 1396r-5(a), 5(h) (2006 & Supp. 2012); CTRS. FOR MEDICARE & MEDICAID SERVS., THE STATE MEDICAID MANUAL CH. 3—ELIGIBILITY § 3260.1, http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html (last visited May 26, 2014) [hereinafter STATE MEDICAID MANUAL].

81. *See* 42 U.S.C. § 1381a (2006); *Supplemental Security Income (SSI) and Eligibility for Other Government Programs*, SOC. SEC. ADMIN., http://www.ssa.gov/ssi/text-other-ussi.htm (last visited May 26, 2014).

82. *See* 20 C.F.R. § 416.1205 (2006). A "spouse" under Medicaid is defined as a "[p]erson legally married to another under State law." STATE MEDICAID MANUAL, *supra* note 80. Congress enacted the provision allowing SSI eligibility to determine Medicaid eligibility in 1972; at the same time, however, it allowed states under the "209(b) option" to retain their more stringent eligibility standards enacted before 1972. *See* Social Security Amendments of 1972, Pub. L. No. 92-603, § 209(b), 86 Stat. 1329 (1973) (codified at 42 U.S.C. § 1396a(f) (2006 & Supp. 2012)). As of 2010, eleven states were taking advantage of the 209(b) option to retain their stricter eligibility requirements. *See* FROLIK & WHITTON, *supra* note 78, at 83–84.

83. *See* 20 C.F.R. § 416.1201(a) (2013) (defining resources as "cash or other liquid assets or

excludable from the resource calculation include the value of the family home,[84] one vehicle that is currently being used for transportation, and household goods and personal effects.[85] Income limits, as opposed to resource limits, are currently set at $710 per month for unmarried individuals and $1,066 per month for married individuals, collectively.[86]

Medicaid is defined by three rules that reflect the tenets of the outdated lifetime economic partnership model: (1) the pooling requirement which counts both spouses' resources in the determination of one spouse's Medicaid eligibility; (2) the resource spend-down requirement in which a married couple must spend down their pooled resources to meet the resource eligibility threshold; and (3) the Community Spouse Resource Allowance ("CSRA") and Minimum Monthly Maintenance Needs Allowance ("MMMNA") which exclude a portion of the non-applicant spouse's resources from the spend-down requirement. The first two rules, the pooling and resource spend-down requirements, must be considered jointly.

a. The Pooling and Resource Spend-Down Requirements

All countable resources owned by a married couple, regardless of whose name is on the title, are considered in determining whether either spouse is eligible for Medicaid.[87] The law explicitly provides that "all the resources held

any real or personal property that an individual (or spouse, if any), owns and could convert to cash to be used for his or her support and maintenance"); FROLIK & WHITTON, *supra* note 78, at 88 (noting that under the "snapshot" method, countable resources are valued at fair market value as of the first day of the month of continuous nursing home residency).

84. *See* 42 U.S.C. § 1396p(f) (2006) (excluding the value of a home if the individual's equity interest does not exceed a certain threshold amount, provided the individual's spouse or another qualified family member lives there); FROLIK & WHITTON, *supra* note 78, at 85.

85. *See* 42 U.S.C. § 1382b(a) (2006 & Supp. 2012). Other excludable assets include property used in a trade or business necessary for self-support, life insurance that does not exceed $1,500 at face value, and burial expenses up to $1,500 for an individual and $3,000 for a married couple. FROLIK & WHITTON, *supra* note 78, at 86.

86. *2013 SSI and Spousal Impoverishment Standards*, MEDICAID.GOV, http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Downloads/2013-SSI-and-Spousal-Impoverishment-Standards.pdf (last visited May 26, 2014).

87. *See* 42 U.S.C. § 1396r-5(c)(2) (2006 & Supp. 2012) ("In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property—(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and (B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits)."); § 1396r-5(c)(1)(A) ("There shall be computed . . . (i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and (ii) a spousal share which is equal to 1/2 of such total value.").

Income, however, is treated differently. Separate rules govern the treatment of income and resources for Medicaid eligibility. Under the "name on the check" rule governing income, income earned solely in the name of the community spouse is not counted in the Medicaid eligibility determination. § 1396r-5(b)(1); § 1396r-5(b)(2)(A)(i).

by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse" in the determination of Medicaid eligibility.[88] Under the resource spend-down requirement, those couples whose countable resources exceed the state-imposed limit may qualify for Medicaid by spending down excess resources (often on medical care), subject to certain limitations on asset transfers.[89]

b. Allowances for the Community Spouse

Medicaid provides specific rules governing the amount of resources the community spouse can retain before having to spend down resources. The CSRA permits the community spouse to retain a specified amount of resources set by states, so long as it falls within the permitted resource allowance range of between $23,184 and $115,920.[90] Essentially, the CSRA amount will not be counted toward "all countable resources owned by the couple" for purposes of Medicaid eligibility.[91] Most states set the CSRA at half of the couple's countable resources (up to the federally permitted maximum amount).[92]

Additionally, the MMMNA operates to preserve for the community spouse a minimum monthly income, which states can set anywhere within the federally permitted range of $1,938.75 to $2,898.[93] If the community spouse's income falls below the state-imposed MMMNA, he or she may claim income from the institutionalized spouse's income to reach the MMMNA amount.[94] If the entirety of the institutionalized spouse's income (minus any personal needs

88. § 1396r-5(c)(2).

89. *See* FROLIK & WHITTON, *supra* note 7878, at 91–93. An applicant may not give away assets to non-spouse family members to avoid spending down joint resources on medical care unless he or she does so more than sixty months before applying for Medicaid. There is a sixty-month look-back period, meaning that any gift made within the sixty months preceding the Medicaid application for nursing home benefits must be disclosed. The punishment for transferring gifts during this look-back period is a period of Medicaid ineligibility; the length of this ineligibility is based on the gift's value. The look-back restriction does not apply to gifts the applicant gives for the sole benefit of his or her spouse or for the sole benefit of the applicant's blind or disabled child. *See id.*

90. *See* 42 U.S.C. § 1396r-5(f); *2013 SSI and Spousal Impoverishment Standards*, *supra* note 86. The existence of a minimum CSRA does not serve a practical purpose other than to signal to states that they cannot set a minimum lower than that amount. In practice, if a couple's total countable resources do not meet the minimum CSRA amount, they will simply transfer any or all of that amount to the community spouse for his or her CSRA. The state does not step in to pay the difference.

91. *See* § 1396r-5(c)(2)(B) (providing that only the community spouse's resources that exceed the CSRA amount will be counted toward the couple's total resources in determining Medicaid eligibility).

92. *See* FROLIK & WHITTON, *supra* note 78, at 88. Only a few states are more generous, setting the CSRA at either the federal maximum or the entirety of the couple's countable resources, whichever is lower. *Id.*

93. *See* § 1396r-5(d)(1). Note that the MMMNA is $2,422.50 for Alaska and $2,231.25 for Hawaii, while every other state's MMMNA is set at $1,938.75. *2013 SSI and Spousal Impoverishment Standards*, *supra* note 86.

94. *See* §§ 1396r-5(d)(1)(B), (d)(2). This is known as the "income first" rule.

allowance), when added to the community spouse's income, still fails to meet the MMMNA amount, the difference will be accounted for by increasing the community spouse's CSRA by the shortfall.[95]

2. Medicaid as a Reflection of the Lifetime Economic Partnership Model

Embedded in these rules are tenets of the lifetime economic partnership model, primarily linked fulfillment and economic security. The pooling and spend-down requirements reflect an assumption underlying these two principles: that the married couple is a single, inseparable unit, with each spouse deriving his or her primary source of emotional and economic support from the marriage.

a. The Pooling and Spend-Down Requirements

Because Medicaid is a means-tested program that limits benefits to those who meet certain resource and income requirements, the threshold question is how the state gauges financial need. The current pooling requirement makes clear that the unit is drawn around the married couple, such that the assessment of a married applicant's financial need is not just based on his or her personal resources, but the non-applicant spouse's resources as well. Though it provides some protection for the community spouse's resources, Medicaid in large part does not distinguish between the financial resources of an individual married applicant and the joint financial resources of the married couple. By expecting de facto joint ownership of financial resources within a marriage, Medicaid assumes that a married applicant has full access to the financial resources of his or her spouse.

Medicaid's assessment of financial need is both over- and under-inclusive. By limiting pooling to the marital unit in the determination of financial need, Medicaid assumes that spouses are one another's primary, if not exclusive, source of financial support. At the same time, Medicaid assumes unmarried individuals to be completely financially independent, overlooking any support such individuals may receive from their partners or family members.

The spend-down requirement is undiscerning in how the pooled resources are to be spent in order to meet the threshold eligibility amount. Medicaid does not specify how much of each spouse's resources must be spent down or whose must be spent down first, with the exception of the state-set CSRA.[96] Though Medicaid does not go as far as to explicitly require the community spouse to

95. *Id.*

96. At first glance, it may seem as if the state-set CSRA is an important exception, as it allows the community spouse to retain a significant amount, often half, of the couple's pooled resources. The reason that the CSRA is not reflective of the new individualism is that it is too rough a proxy of how couples ultimately decide to share their individual resources. While drawing the line at half of a couple's pooled resources may accurately approximate some individuals' desired financial arrangement, there are bound to be those who do not adhere to such an arrangement, and who will be forced to make financial sacrifices inconsistent with the tenets of the new individualism.

financially support the institutionalized spouse, the spend-down requirement facilitates that result. It conditions the provision of long-term nursing home care on the community spouse making financial sacrifices on behalf of the institutionalized spouse.

For example, consider a married couple, Bob and Clara, in which Bob is the institutionalized spouse applying for Medicaid and Clara is the community spouse. Bob and Clara have individual countable resources of $100,000 and $200,000, respectively. Assume they are residents of Connecticut, a state which imposes on them a countable resource limit of $1,600 and sets Clara's CSRA to $115,920.[97] There are no restrictions on transferring assets between spouses,[98] but in this case, Bob cannot transfer any money to Clara because she has already met her CSRA limit. Instead, he and Clara must spend down most of their individually owned resources to satisfy the $1,600 eligibility threshold. Even though she is not the one in need of nursing home care, and her resources are technically hers in title, Clara may very well end up directing the entirety of the $84,080[99] she must spend down toward Bob's nursing home costs. And even if Clara chooses not to spend her resources on Bob's care, she must still find a way to spend down her own resources—otherwise, Bob cannot qualify for Medicaid, even if he spends all of his $100,000. This outcome is at odds with a serious conception of the new individualism.

Medicaid, as evidenced by the pooling and spend-down requirements, assumes that spouses are willing to make financial sacrifices for one another. This is consistent with the previously held tenets of linked fulfillment and economic security, which prevailed when Medicaid was enacted in 1965.[100] The mid-twentieth-century vision of marriage as a transformative act, melding two identities into one, endorses the state's view of the married couple facing life's challenges together as a single economic unit.

The tenet of linked fulfillment justified the state's expectation that the community spouse would spend down resources for the institutionalized spouse's benefit, as so much of one spouse's fulfillment was dependent on that of the other spouse. With respect to the tenet of economic security, drawing the

97. Lisa Nachmias Davis, *Medicaid for Married Couples*, SHARINGLAW.NET, http://www.sharinglaw.net/elder/MedicaidforMarrieds.htm (last updated Feb. 25, 2013). As of January 1, 2013, Connecticut had set its CSRA at the lesser of $115,920 or one-half of the couple's combined assets. *Id.* In our hypothetical, $115,920 is less than $150,000 (half of $300,000).

98. FROLIK & WHITTON, *supra* note 78, at 92. Despite the look-back period restricting the transfer of assets as gifts to family members, institutionalized spouses are not penalized for transferring their assets as gifts to the community spouse, though it does nothing to help their eligibility.

99. This is the amount of Clara's non-CSRA-protected resources remaining after deducting $115,920 from $200,000.

100. Note that the CSRA and MMMNA were not enacted until the Medicare Catastrophic Coverage Act (MCCA) was passed in 1988. Before then, the community spouse had no buffer from potentially having to spend down all of his or her resources in order for the institutionalized spouse to qualify for Medicaid. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360 (1988).

economic unit around married spouses and requiring them to spend down resources together assumes that marriage inherently involves one spouse financially protecting the other. This is tied to the gendered environment of the mid-twentieth century, during which marriage was a natural vehicle for a homemaker wife to receive economic support from her breadwinner husband. Equating one spouse's resources to the total of both spouses' functionally demands that the resources of the breadwinner husband be fully shared with the homemaker wife. The spend-down requirement was intended to ask the breadwinner husband to spend down the couple's collective resources and continue doing what he was expected to do anyway: bear the brunt of the financial obligations in the marriage. But today, the spend-down requirement forces spouses who may be economically independent from one another or dual earners to spend down regardless of their financial arrangements.

b. Allowances for the Community Spouse

Recognizing that the pooling and spend-down requirements posed the risk of depleting the entirety of the community spouse's resources, Congress updated Medicaid in 1988 to protect the community spouse from impoverishment, this time at the expense of the institutionalized spouse's resources.[101] At first glance, the resulting CSRA and MMMNA promote financial independence by allotting a set amount—usually half of the couple's countable resources—for the community spouse's own use. However, this practice actually furthers the assumption that spouses' individual resources are to be shared with each other.

The CSRA reflects the tenet of economic security, in which the breadwinner husband transfers resources to his homemaker wife so she can be cared for while he languishes in a nursing home. For example, assume that Bob, the institutionalized spouse from our earlier example, has $200,000 in individual resources, while his wife Clara has none. Clara is entitled to a CSRA of $115,920. Rather than spend down $198,400 of his resources to meet the $1,600 eligibility requirement, Bob can easily transfer $115,920 of those resources to Clara. This way, Bob only has to spend down $82,480[102] and Clara now has $115,920 of Bob's resources at her disposal. This is a win-win situation for a couple like Bob and Clara consisting of a breadwinner and homemaker, but not for the modern-day dual-earner couple. Bob's transfer to Clara to meet her CSRA reflects the assumption underlying economic security that the breadwinner—usually the husband—should provide financial support for the homemaker—usually the wife.

Like the CSRA, the MMMNA is also linked to an understanding of marriage as an economic security blanket. Medicaid, through the pooling requirement, views all resources as shared by both spouses, regardless of the name on the title; in contrast, when it comes to income, Medicaid recognizes the

101. Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360 (1988).
102. $200,000 – $115,920 – $1,600 = $82,480.

"name on the check," only counting the institutionalized spouse's income in the determination of his or her Medicaid eligibility. Yet, the MMMNA erodes the line separating spouses' income by explicitly permitting a community spouse whose personal income does not meet the MMMNA to make up the difference using the income of the institutionalized spouse.

This makes sense under the traditional gendered expectation that the breadwinner husband should provide economic support to his homemaker wife, even if his money is technically his in name and title. Assume Bob, the breadwinner/institutionalized spouse, has a monthly income of $1,000, while Clara, the homemaker/community spouse, has no monthly income. In order to qualify for Medicaid, the couple—functionally, Bob—cannot make more than $1,066 per month, and upon the receipt of Medicaid benefits, he will have to spend all of his monthly income on nursing home expenses (except for a $60 personal needs allowance).[103] However, Clara is entitled to up to $2,898 in MMMNA.[104] She can claim a maximum of $940 each month from Bob's income (in order to leave him with $60 of personal needs allowance),[105] but will still be short $1,958 of her MMMNA. Medicaid then allows her to make up the difference by increasing her allotted CSRA amount by $1,958 to a total of $117,878.[106] As previously illustrated, the expectation is that Bob, the spouse with more resources, would transfer resources to Clara to meet her CSRA. Despite the multiple steps in this example, the common theme is the transfer of income and resources from Bob, the breadwinner husband, to Clara in order to protect her from impoverishment upon Bob's institutionalization. This captures the paradigmatic setting—a breadwinner husband financially supporting his wife—in which the tenet of economic security thrived.

The further we move away from the breadwinner husband/institutionalized spouse and homemaker wife/community spouse context, the more the community spouse is at risk for making potentially unwanted financial sacrifices on behalf of the institutionalized spouse. Assume Clara, the community spouse, has worked all her life, and being risk averse, has set aside $200,000 of her earned income into a separate account to protect her at old age. Bob has also worked but is less risk averse, saving only $5,000 of his own income and spending the rest. Clara cannot protect the savings she has accumulated but now

103. *See 2013 SSI and Spousal Impoverishment Standards*, *supra* note 86. States can choose between two income eligibility standards: the spend-down method or the income-cap method. Under the spend-down method, the applicant must spend down all of his or her income on medical care expenses but may retain a personal needs allowance amount set by states, which must meet a minimum of $30 for an unmarried individual and $60 for a married couple. On the more restrictive end of the spectrum, states using the income-cap method (including our example state of Connecticut) set a cap on an unmarried applicant's monthly income at typically 300% of the SSI income benefit, or $2,130. Those who earn more than the income cap are not eligible for Medicaid, and may not simply spend down the difference on medical expenses. *See* FROLIK & WHITTON, *supra* note 78, at 86–87.

104. *See 2013 SSI and Spousal Impoverishment Standards*, *supra* note 86.

105. $1,000 – $60 = $940.

106. $115,920 + $1,958 = $117,878.

must spend down a significant amount, $84,080,[107] in order to make sure Bob is cared for.

One might ask why Clara and Bob, with their above-average savings,[108] even need Medicaid in the first place. The sobering answer is that even if Clara and Bob spent the entirety of their combined $205,000 in savings on Bob's nursing home care, it would only sustain him for 2.7 years.[109] This may be enough to cover Bob's care, as the average length of stay in a nursing home is 2.3 years,[110] but it would leave virtually nothing for the rest of the couple's needs.

Though the CSRA and MMMNA provide some protection, they only highlight the continuing assumptions of linked fulfillment and economic security underlying the Medicaid pooling and spend down requirements.

B. Social Security Derivative Benefits

1. An Overview

Social Security is another important state program that remains wedded to the older principles of the lifetime economic partnership model. Unlike the means-tested Medicaid program, Social Security, enacted in 1935, is a mandatory, contributory defined-benefit program "intended to provide workers with . . . a basic floor of protection upon which the other forms of retirement income could be built."[111] While Medicaid may overestimate married individuals' ability to pay by presuming their spouses' resources to be available to them, Social Security may overcompensate married individuals with benefits based on the same assumption. By using marital status as a measure of financial dependency, Social Security fails to provide an accurate safety net to some financially dependent but unmarried individuals, while providing unnecessary support for financially independent, married individuals.

Social Security covers an estimated 161 million people, or ninety-four percent of all workers,[112] and is the primary source of income for retired or

107. $200,000 – $115,920 = $84,080. Bob would also have to spend down most of his $5,000 to meet the $1,600 resource eligibility threshold.

108. *See* NATIONAL INSTITUTE ON RETIREMENT SECURITY, THE RETIREMENT SAVINGS CRISIS: IS IT WORSE THAN WE THINK? 3 (2013), *available at* http://www.nirsonline.org/storage/nirs/documents/Retirement%20Savings%20Crisis/retirementsavingscrisis_final.pdf (noting that the average 401(k) balance is $100,000 for households near retirement age, but that "[w]hen all households are included—not just households with retirement accounts—the median retirement account balance is $3,000 for all working-age households and $12,000 for near-retirement households").

109. This calculation is based on the assumption that the average cost of nursing home care is $74,820 per year. *See* Nat'l Clearinghouse for Long Term Care Info., *supra* note 15.

110. *See FastStats: Nursing Home Care*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/fastats/nursingh.htm (last visited May 26, 2014).

111. Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values It Reflects*, 33 COMP. LAB. L. & POL'Y J. 2, 5–7 (2011).

112. *Social Security Basic Facts*, SOC. SEC. ADMIN., http://www.ssa.gov/pressoffice/basicfact

disabled workers and their dependents, with almost ninety percent of those aged sixty-five and older receiving benefits averaging $1,269 per month.[113] Social Security benefits comprise at least half of the total income of fifty-three percent of married couples and seventy-four percent of unmarried individuals aged sixty-five and older.[114] All working individuals must pay payroll taxes that fund Social Security benefits.[115] Only after working enough to earn forty quarters of coverage[116] is an individual who has reached early[117] or normal retirement age entitled to a monthly Social Security benefit.[118]

Not only are Social Security benefits available to the covered worker who reaches retirement age, but they may also be paid out to the covered worker's spouse and, in certain situations, his or her ex-spouse.[119] Importantly, the covered worker's amount of monthly benefits is unaffected by others who are eligible to claim derivative benefits. Social Security will simply pay the claimant spouse *in addition* to the covered worker, without any reduction in the covered worker's benefit.

In 2011, an estimated 15.6% of total Social Security payments consisted of derivative benefits to spouses, ex-spouses, and surviving spouses.[120] Of the 35.6

.htm (last visited May 26, 2014).

113. *Id.* Retired workers and their dependents are the recipients of seventy percent of the total benefits paid. *Id.*

114. *Id.* Social Security benefits comprise at least ninety percent of the total income of twenty-three percent of married couples and forty-six percent of unmarried individuals aged sixty-five and older. *Id.*

115. *See* 26 U.S.C. § 3101(a) (2006 & Supp. 2012) (requiring under the Federal Insurance Contributions Act (FICA) that employees pay a 6.2% payroll tax on earnings); *Update 2014*, SOC. SEC. ADMIN., http://www.ssa.gov/pubs/EN-05-10003.pdf. The monthly benefit amount is calculated based on average monthly earnings, and is designed such that lower-income workers receive a higher percentage of replacement income from Social Security benefits than higher-income workers. The monthly benefit calculation applies only to wages subject to Social Security taxes under FICA, with a wage cap at $113,700.

116. *See* 42 U.S.C. § 413 (2006) (defining "quarter" as a period of three months, and explaining that an employee's quarters of coverage are computed by dividing a worker's yearly pre-tax earnings by the minimum required earnings per quarter); *Update 2014*, *supra* note 115 (explaining that a worker can obtain up to four quarters of coverage each year, and that in 2014, a worker would have to make $1,200 in pre-tax wages to earn one quarter of coverage).

117. 42 U.S.C. § 416(l)(2) (2006). Early retirement age is sixty-two years old, at which point an individual can choose to receive a permanently reduced amount of monthly benefits, as opposed to the full amount they would receive if they had started at their normal retirement age. *See Benefit Reduction for Early Retirement*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/oact/quickcalc/earlyretire.html. Note too that Social Security benefits can be deferred beyond the full retirement age, in which case the individual will receive higher monthly benefits as compensation for the shorter payout term. § 402(w).

118. *Id.* § 414(a)(2). Normal retirement age varies based on an individual's year of birth, such that those born before 1943 have a normal retirement age of sixty-five, while those born after 1959 must wait until they are sixty-seven. *See Retirement Age Calculator*, SOC. SEC. ADMIN., http://www.ssa.gov/pubs/ageincrease.htm (last visited May 26, 2014).

119. Benefits may also be paid to the retiree's qualified children and parents in certain situations, though this will not be the focus of this article.

120. Peter W. Martin, *The Case for Reforming the Program's Spouse Benefits While "Saving Social Security"* 1 (Cornell Law Faculty Working Papers, Paper No. 101, 2012), *available at*

million retired workers claiming Social Security benefits in 2011, 2.3 million, or 6.4%, claimed derivative benefits as wives and husbands (including ex-spouses).[121] Of those 2.3 million spouses of retired workers, 97% (2.23 million) were wives and 3% (63,232) were husbands, with an average monthly benefit of $613 and $397, respectively; 6.6% (147,897) were ex-wives and 0.25% (5,647) were ex-husbands, with an average monthly benefit of $646 and $483, respectively.[122] Social Security derivative benefits are declining in prevalence as more women are qualifying for benefits on their own work records. The percentage of women aged sixty or older claiming derivative benefits as wives has decreased from 33% in 1960 to 9.3% in 2011, and almost 48% of women aged 60 or older are currently entitled to benefits solely based on their own (and not their husbands') work records.[123] In fact, it is projected that by 2080, more than seventy percent of women will qualify to receive benefits based on their own work records.[124]

This section provides an overview of the rules governing current, divorced, and surviving spouses' eligibility to receive derivative Social Security benefits upon retirement, and shows how the system remains rooted in the structure of the lifetime economic partnership model.

a. Derivative Benefits for Current, Divorced, and Surviving Spouse

Current Spouse. The current spouse of a covered worker may receive the greater of either the benefit based on his or her own work record, or half of his or her spouse's benefit.[125] Even if a spouse would not have qualified for Social Security benefits individually, he or she would still be entitled to a monthly benefit equal to half of her spouse's. A spouse is eligible for derivative benefits if he or she is at least sixty-two years old and has been married for at least one year to a covered worker.[126] The spouse cannot receive derivative benefits until

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http://scholarship.law.cornell.edu/clsops_papers/101; *see also* SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT tbl.5.A1 (2012), *available at* http://www.ssa.gov/policy/docs/statcomps/supplement/2012/5a.pdf (reporting that as of December 2011, there were 44,791,146 total OASI recipients, 2,291,792 of which were spouses of retired workers; of these spouses, 63,232 were male, and 2,228,560 were female).

121. SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT tbl.5.C1 (2012), *available at* http://www.ssa.gov/policy/docs/statcomps/supplement/2012/5c.pdf; *see* Alstott, *supra* note 4, at 48.

122. *See* SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT tbl.5.A1.3 (2012), *available at* http://www.ssa.gov/policy/docs/statcomps/supplement/2012/5a.pdf.

123. *Id.* tbl.5.A14; *see* Alstott, *supra* note 4, at 48, 64 fig. 12.

124. *See Current Law Projections: Women & Dual Entitlement, 2025–2080*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/retirementpolicy/projections/women-dual-2025.html (last updated Apr. 2012).

125. 42 U.S.C. § 402(b)–(c) (2006); FROLIK & WHITTON, *supra* note 78, at 30.

126. FROLIK & WHITTON, *supra* note 78, at 30; *see also* 42 U.S.C. § 402(b)–(c). A spouse caring for his or her covered spouse's child may receive derivative benefits at any age, even before age 62, without any early retirement reduction, as long as the child has not yet reached age 16 and is also eligible to receive benefits.

the covered worker begins receiving his or her benefits.[127]

Divorced Spouse. Divorced spouses are entitled to derivative benefits equal to half of their ex-spouse's monthly benefit.[128] In order for the claimant ex-spouse to qualify for derivative benefits, several criteria must be met: (1) the marriage to the covered worker must have lasted a minimum of ten years; (2) the claimant ex-spouse must be at least sixty-two years old; (3) the claimant ex-spouse must be unmarried; and (4) the divorce must have been final for at least two years.[129] If the claimant ex-spouse remarries, he or she cannot qualify for derivative benefits until that subsequent marriage terminates.[130]

Surviving Spouse. Upon the death of a covered worker, the surviving spouse is eligible to receive the greater of either the benefit based on his or her own work record, or the entirety—not just half—of his or her deceased spouse's benefit.[131] The surviving spouse may be eligible for reduced survivor benefits as early as age sixty, and is not subject to any restriction on remarrying upon reaching age sixty.[132] The surviving spouse must have either been married to the worker for at least nine months prior to the worker's death, or reasonably expected that the worker would live at least nine months after the marriage date.[133]

Social Security imposes a limit on the maximum amount of monthly derivative benefits it will pay family members based on a worker's record, typically set at between 150% and 180% of the covered worker's benefit.[134] The family maximum does not limit the covered worker's benefit amount and only applies to family members—current spouses or children, but *not* divorced spouses—claiming benefits on the covered worker's record.[135]

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127. FROLIK & WHITTON, *supra* note 78, at 30.

128. *Id.*

129. *Retirement Planner: Benefits for Your Divorced Spouse*, SOC. SEC. ADMIN., http://www.ssa.gov/retire2/yourdivspouse.htm (last visited May 26, 2014).

130. *See id.*

131. 42 U.S.C. § 402(e)–(f); FROLIK & WHITTON, *supra* note 78, at 31.

132. *See id.*. *See also* FROLIK & WHITTON, *supra* note 78, at 31. A surviving spouse can also receive derivative survivors benefits if (1) he or she is unmarried and (2) taking care of the deceased spouse's child who is under age sixteen or disabled and eligible for survivors benefits on the deceased spouse's record. *See Survivors Planner: Survivors Benefits for Your Widow or Widower*, SOC. SEC. ADMIN., http://www.socialsecurity.gov/survivorplan/onyourown2.htm (last visited May 26, 2014).

133. 20 C.F.R. § 404.335(a)(1)–(2).

134. *See Formula for Family Maximum Benefit*, SOC. SEC. ADMIN., http://www.ssa.gov/oact/cola/familymax.html (last visited May 26, 2014).

135. *See id.*. *See also Frequently Asked Questions*, SOC. SEC. ADMIN., https://faq.ssa.gov/ics/support/KBAnswer.asp?questionID=2089&hitOffset=94+93+90+72+57+56+46+40+39+33+32+21+19+18+7+4&docID=4140 (last visited May 26, 2014) (explaining that when the family maximum is reached, the designated maximum amount will be split equally among the entitled dependents).

2. *Social Security Derivative Benefits as a Reflection of the Lifetime Economic Partnership Model*

The tethering of Social Security benefits to one's status as a married spouse made "eminent good sense"[136] under the lifetime economic partnership model of the mid-twentieth century. The program of derivative spousal benefits maps onto the tenets of linked fulfillment, economic security, marriage as the ideal choice, and no exit. Unlike Medicaid, which more heavily affects spousal economic obligations, Social Security primarily implicates the distribution of benefits.[137] Whereas Medicaid engages in a financial need-based inquiry, Social Security operates on presumptive need in furtherance of its goal to provide the national work force and its dependents with "basic protection against economic hazards which would otherwise cause future insecurity."[138] However, the metrics upon which the state gauges presumptive need, as reflected by the existing rules, are not reliable indicators of actual need today.

Measuring a married couple's presumptive need as related to the covered spouse's benefit is logical in the context of the lifetime economic partnership model. Basing the amount of need solely on the earnings of the spouse comports with the notion of linked fulfillment, in which the marital unit is the primary source of economic fulfillment for spouses. Social Security derivative benefits are also well suited for the single breadwinner couple of the lifetime economic partnership model. Indeed, the initial purpose of derivative benefits was to facilitate economic security within marriage, premised on the assumption that the mid-twentieth-century marriage required the breadwinner husband to provide economic support and stability to his homemaker wife.[139] The Social Security

136. Alstott, *supra* note 4, at 11.

137. Though the focus of this section is on economic benefits, as opposed to obligations, this is not to discount the contribution of married and unmarried individuals to the payroll tax that funds Social Security payments. Notably, working wives who pay full payroll taxes may not receive as great (if any) a payoff from the derivative benefit as compared to a homemaker wife who does not have to pay payroll taxes and receives 50% of her husband's benefit, for a total of 150% of the husband's benefit between the couple. *See id.* at 48 (explaining that women benefit in that they receive 49% of Social Security benefits but pay only 41% of taxes).

138. Soc. Sec. Bd., Proposed Changes in the Social Security Act: A Report of the Social Security Board to the President and to the Congress of the United States, SOC. SEC. BULL., Jan. 1939, at 4, *available at* http://www.ssa.gov/policy/docs/ssb/v2n1/v2n1p4.pdf. In its proposal for the 1939 Amendments (which was later adopted in full), when discussing federal old-age insurance, the Social Security Board emphasized the need to maintain a "reasonable relationship between past earnings and future benefits," while also recognizing and accommodating "presumptive need" and not specific, means-tested need. *Id.* at 5.

139. *Id.* at 6. The now-obsolete "living together" requirement in the 1939 Amendments demonstrates that the Social Security Board expressly countenanced financial support from a husband to a wife and even made it a prerequisite for the receipt of derivative benefits. Namely, a wife or widow seeking derivative benefits based on her husband's record must have been living with her husband at the time she filed her application for benefits. Social Security Act Amendments of 1939, ch. 666, § 202(b)(1)(C), 53 Stat. 1360. The 1939 Amendments considered a wife or widow to be "living together" with her husband if they were "[1] both members of the same household, or [2] she [was] receiving regular contributions from him toward her support, or [3] he ha[d] been ordered by any court to contribute to her support." § 209(l)(4)(n). Congress

Act Amendments of 1939, which amended the original 1935 Act to introduce derivative benefits to wives and widows of retired workers,[140] sought to protect the vulnerable wife from financial destitution upon her breadwinner husband's retirement or death. When Congress extended derivative benefits to financially dependent divorced wives and widows in 1965,[141] the Senate Finance Committee Report explained that the expansion of derivative benefits would "provide protection mainly for women who have spent their lives in marriages that are dissolved when they are far along in years—especially housewives who have not been able to work and earn social security benefit protection of their own—from loss of benefit rights."[142] This concern for the economic stability of married or divorced housewives may also explain Congress's reluctance to liberally extend derivative benefits to husbands, a group that was expected to serve as the financial providers in marriage and who did not have a presumptive need for economic protection.[143] While Congress provided limited derivative benefits to husbands and widowers as early as 1950, and the Supreme Court ruled that they must be granted these benefits on the same terms as wives and widows in 1977,[144] it was not until 1983 that Congress codified these rulings and removed most of the gender-based distinctions between men and women in the Social Security Act.[145]

The fear that a wife would be left financially destitute upon her husband's retirement, death, or divorce motivated the passage of laws disincentivizing divorce, in furtherance of the no exit principle. This is particularly salient in the context of derivative benefits for divorced spouses. When Congress extended coverage to divorced wives and widows in 1965, it conditioned the receipt of derivative benefits on the marriage having lasted at least twenty years.[146] A twenty-year marriage duration was a reasonable expectation at the time, and it made sense that the longer the marriage, the less likely the aged homemaker wife could enter the workforce herself.[147] The subsequent reduction of the duration of marriage requirement from twenty years to ten in the 1977 Amendments[148]

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removed these financial dependency requirements in 1972. Social Security Amendments of 1972, Pub. L. No. 92-603, § 114, 86 Stat. 1329.

140. *See* Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360.

141. Social Security Amendments of 1965, Pub. L. No. 89-97, § 308(a), 79 Stat. 286 (with the change reflected in § 202(b)(1)(H)(ii) of the Social Security Act at the time).

142. S. REP. NO. 89-404, at 108 (1965). The Committee observed that "[i]t is not uncommon for a marriage to end in divorce after many years, when the wife is too old to build up a substantial social security earnings record even if she can find a job." *Id.* at 107.

143. *See also* Martin, *supra* note 120, at 8 (providing a chronology of the Social Security Act's path toward gender neutrality).

144. Califano v. Goldfarb, 430 U.S. 199, 203 (1977).

145. *See* Social Security Amendments of 1983, Pub. L. 98-21, §§ 301–310, 97 Stat. 65.

146. Social Security Amendments of 1965, Pub. L. No. 89-97, § 308(a), 79 Stat. 286 (with the change reflected in § 202(b)(1)(H)(ii) of the Social Security Act at the time).

147. *See* KREIDER & ELLIS, *supra* note 63, at 10 (noting that seventy percent of men who married between 1960 and 1964 stayed married for at least twenty years).

148. Social Security Amendments of 1977, Pub. L. No. 95-216, § 337, 91 Stat. 1509; *see* Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing,*

sought to extend coverage to the increasing number of divorced women with limited earning records in the wake of the no-fault divorce revolution.[149] Despite this shift in the direction of easy exit, the reduced marriage duration requirement may nonetheless act as a deterrent to divorce, especially for those nearing their ten-year anniversaries. True, many who marry in the era of the new individualism are already financially independent and may therefore be less sensitive to the duration-of-marriage requirement. But given that the median first marriage today lasts only eight years,[150] the ten-year duration requirement still presents a risk that individuals may delay ending unfulfilling marriages.

It is telling that the Social Security derivative benefit most rewards the traditional breadwinner/homemaker pairing. This couple would only have to pay one payroll tax on the breadwinner's salary in order to receive a collective payout of 150% of the breadwinner's benefit.[151] A dual-worker couple, however, would have to pay two payroll taxes and still might not receive more than 150% of the higher earner's benefit. [152] Furthermore, the low-earning unmarried worker who pays the same amount of payroll tax as the low-earning married worker is disadvantaged compared to the latter if the married worker's spouse is a higher-earner who can provide a derivative benefit greater than the low-earning worker's individual benefit. Under the current system, the unmarried, low-earning worker effectively subsidizes the derivative benefits of the married homemaker or low-earning worker. Social Security's partiality toward breadwinner/homemaker marriages and its protection of the non-working spouse are reflective of the increasingly antiquated notion that the single-earner marriage is the ideal family arrangement.

C. ERISA-Governed Private Pensions

1. An Overview

Pension plans constitute the final important source of income to retirees at old age. They represented an average of one third of the total income for those

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and the Challenge of Reform, 1999 WIS. L. REV. 1, 11–13, 18–24 (describing the effects of the marriage duration requirement and providing an overview of the historical motivations behind spousal benefit rules, noting that "[d]espite its gender neutrality [through the creation of husbands' and widowers' benefits to parallel wives' and widows' benefits], the design of the current system was motivated by the needs of male breadwinner-female homemaker households in which marriage typically lasted until death").

149. *See* Alstott, *supra* note 4, at 12.

150. *See* Casey E. Copen, Kimberly Daniels, Jonathan Vespa & William Mosher, *First Marriages in the United States: Data From the 2006-2010 National Survey of Family Growth*, NAT'L HEALTH STATS. REPS., Mar. 2012, at 1, 7 (finding that between 2006 and 2010, the probability of a first marriage lasting at least ten years was sixty-eight percent for women and seventy percent for men, and the probability of a first marriage lasting at least twenty years was fifty-two percent for women and fifty-six percent for men); Martin, *supra* note 120, at 10, 11 (noting an increasing percentage of women are divorcing after less than ten years of marriage).

151. *See* Alstott, *supra* note 4, at 12.

152. *Id.*

aged sixty-five and older in 2010.[153] Private pensions are offered by private sector employers, and are subject to close regulation under the Employee Retirement Insurance Security Act of 1974 (ERISA).[154] In their seminal book, *True Security*, Professors Michael Graetz and Jerry Mashaw remind us that even though pensions are typically dismissed from the social insurance discussion as being "private" and "voluntary," the government plays "such a large and critical role in regulating and providing tax incentives for these forms of retirement savings that any discussion of social insurance for retirees is radically incomplete if it omits them."[155]

ERISA divides private employer-sponsored retirement benefit plans into "defined benefit plans" and "defined contribution plans."[156] Defined benefit plans, exemplified by the traditional pension, promise employees a set payout at retirement[157] (typically in the form of lifetime annuities paid in fixed monthly payments) and place sole responsibility on the employer to contribute money into the employee's retirement account and decide how to invest it.[158] Defined contribution plans, which are typically 401(k)s and individual retirement accounts ("IRAs"), require that employers *and* employees contribute to the retirement account and give employees the ability to decide how to invest their funds.[159] Employers heavily favor defined contribution plans over defined benefit plans because the risk of poor investments is shifted to the employee.[160]

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153. *See* Emp. Benefit Research Inst. (EBRI), *Databook on Employee Benefits Ch. 7: Sources of Income for Persons Aged 55 and Over* tbl.7.5 (updated Nov. 2011), http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2007.pdf; *Notes*, 31 Employee Benefit Research Inst. 1 (2010), http://www.ebri.org/pdf/notespdf/EBRI_Notes_06-June10.Inc-Eld.pdf; *see also* Emp. Benefit Research Inst., *Income of the Elderly Population Age 64 and Over*, EBRI NOTES 1 (2010), available athttp://www.ebri.org/pdf/notespdf/EBRI_Notes_06-June10.Inc-Eld.pdf (detailing income sources of the elderly in 2008, with pensions and annuities representing an average of about twenty percent of income for those aged sixty-five or older for that year).

154. 29 U.S.C. § 1001 (2006); *see also* Jonathan Barry Forman, *Funding Public Pension Plans*, 42 J. MARSHALL L. REV. 837, 859 (2009). Public pensions are administered by state and local government employers and unlike private pensions, are exempt from ERISA's numerous provisions. *Id.* at 839, 859. Thus, they will not be covered in this Article. Although ERISA imposes certain requirements, employers retain significant discretion over the administration of pension plans and may modify or terminate them at any time.

155. GRAETZ & MASHAW, *supra* note 71, at 102.

156. 29 U.S.C. §§ 1002(34), 1002(35) (2006).

157. Normal retirement age is the earlier of (1) when plan participants attain normal retirement age specified by the plan; or (2) the later of (a) when plan participants reach age sixty-five; or (b) five years from the date when plan participants commenced participation in defined benefit plans. *Id.* § 1002(24). A qualified defined benefit plan must provide for participants to become fully vested if they have completed either at least five years of service or after seven years of service. Early retirement is typically the date participants reach age fifty.

158. *See* LESLIE ANN SHANER, DIVORCE IN THE GOLDEN YEARS 210 (2010).

159. 29 U.S.C. § 1002(34) (defining "defined contribution plan"). A qualified defined contribution plan allows distributions as early as age 59.5, and specifies that participants can become fully vested only if they have completed at least three years of service or after six years of service. *See* SHANER, *supra* note 158, at 205.

160. *See generally* JACOB S. HACKER, THE GREAT RISK SHIFT (2006); Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 458 (2004) (arguing that "the assignment of risk and reward to the individual account holder is a critical feature of the defined contribution

Between 1975 and 2010, the number of defined benefit plans has dropped from 103,346 to 46,543, while the number of defined contribution plans has surged from 207,748 to 654,469.[161]

ERISA-governed private pensions allow a spouse or former spouse to claim survivor pension benefits on the participating worker's plan and impose a spousal consent requirement in which the non-participating spouse must consent to the assignment of his or her survivor pension benefits to a third party. The following section explains these rules and shows how they reflect tenets of the lifetime economic partnership model.

a. Survivor Pensions and Spousal Consent

Survivor Pensions. ERISA includes protections for surviving spouses with respect to defined benefit plans.[162] First, ERISA requires that defined benefit plans offer participating employees the right to a qualified joint and survivor annuity ("QJSA") if they are alive at the annuity start date (i.e. the date the pension is to vest).[163] The QJSA is an annuity for the life of the participant and allows the surviving spouse, upon the participating spouse's death, to receive a survivor annuity equal to between fifty percent and one hundred percent of the amount that was payable during the joint lives of the participant and spouse.[164] The actual monthly amount of the participating employee's QJSA is calculated based on the life expectancy of the longest surviving spouse.[165] Thus, the participating employee would receive a lower monthly benefit when married to someone with a longer life expectancy, as compared to if he or she remained single.[166] Additionally, if the participating employee dies *before* the annuity start date, defined pension plans must offer participating employees survivorship coverage, entitling the surviving spouse to receive a qualified preretirement survivor annuity ("QPSA")—an amount no less than fifty percent of the deceased spouse's account balance[167]—upon the date the deceased spouse would have reached the earliest retirement age under the plan.[168] ERISA permits

paradigm").

161. Emp. Benefits Sec. Admin., U.S. DEP'T OF LABOR, Private Pension Plan Bulletin Historical Tables and Graphs 1 tbl.E1 (2012), *available at* http://www.dol.gov/ebsa/pdf/historicaltables.pdf.

162. These were introduced via the Retirement Equity Act of 1984 (REA). Retirement Equity Act of 1984, Pub. L. No. 98-397, § 103, 98 Stat. 1426.

163. 29 U.S.C. § 1055(a)(1) (2006).

164. *Id.* § 1055(d).

165. *Id.* Qualified plans enjoy significant federal income tax advantages over non-qualified plans, as the employer may deduct contributions made to the plan from its taxable income; the employee does not have to report taxable income until distributions or investment earnings on retirement account funds are actually paid out. *See* I.R.C. §§ 404(a), 402(a), 501(a).

166. *See* 29 U.S.C. § 1055(d); FROLIK & WHITTON, *supra* note 78, at 46 (explaining that employers are not required to reduce the benefit paid to a married employee, but they often do).

167. *See* SHANER, *supra* note 158, at 217 (noting that the typical benefit for surviving spouses is set at an actuarially reduced fifty percent of the joint and survivor annuity).

168. *See* 29 U.S.C. § 1055(e) (2006) (defining "qualified preretirement survivor annuity").

employers to withhold QJSAs and QPSAs until the participating employee and spouse have been married for at least one year, as of the earlier of the employee's annuity start date or the date of the employee's death.[169]

Spousal Consent. ERISA bars the unilateral revocation of survivor benefits, such that the participating employee cannot terminate his or her spouse's right to survivor benefits without that spouse's consent; nor may prenuptial agreements waive the receipt of survivor benefits.[170] Instead, both the employee and the spouse must consent in writing under witness of a plan representative or notary public.[171] Spousal consent is only valid once the participating employee reaches age thirty-five, and must be made within ninety days of the annuity start date.[172]

The amount and recipient of survivor benefits may be altered upon divorce by state courts through the issuance of a qualified domestic relations court order ("QDRO"). A QDRO may award a spouse survivor benefits in addition to a portion of the participating employee's plan benefits as a division of property,[173] and ERISA requires that the defined benefit plan honor the terms of the QDRO.[174] For example, a QDRO may mandate that a former spouse, as opposed to a current spouse, receive survivor benefits, so long as the former spouse had been married to the participating employee for at least one year.[175] In this case, a nonparticipating individual may receive a survivor benefit even after divorcing the employee.

2. ERISA-Governed Private Pensions as a Reflection of the Lifetime Economic Partnership Model

Survivor pension benefits for spouses of participating employees, along with the requirement of spousal consent, are well-tailored for the lifetime economic partnership model. Compared to Social Security derivative benefits for surviving spouses, the additional requirement of spousal consent for survivor pension benefits more strongly reflects the assumptions underlying the expectation of

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169. *See* § 1055(f).

170. Linda J. Ravdin, *Making Pension Promises in a Prenup: The Impact of ERISA*, FAM. ADVOC., Winter 2011, at 38, 38.

171. *See* 29 U.S.C. § 1055(c)(2)(a) (2006 & Supp. 2012).

172. *See* Ravdin, *supra* note 170, at 38.

173. *See id.*

174. *See* 29 U.S.C. § 1056(d)(1) (2006) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."); 29 U.S.C. § 1056(d)(3)(A) (2006) ("Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order."); Qualified Domestic Relations Orders, EMPLOYEE BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR, http://www.dol.gov/ebsa/faqs/faq_qdro.html (last visited May 26, 2014); Ravdin, *supra* note 170, at 38.

175. *See* 29 U.S.C. § 1056(d)(3)(F) (2006) ("To the extent provided in any qualified domestic relations order—(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and (ii) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of [this section].").

economic security, among other tenets—notably linked fulfillment and no exit—of the twentieth-century model of marriage.

With the traditional breadwinner husband/homemaker wife pairing in mind, survivor pension benefits were enacted to protect the economically vulnerable wife of the participating plan employee upon that employee's death. One of the purposes of the Retirement Equity Act of 1984 (which introduced survivor pension benefits and the consent requirement), as articulated by President Reagan upon its signing, was to "improve[] and protect[] the vital role of pensions as retirement income to widows" by ensuring that "[n]o longer will one member of a married couple be able to sign away survivor benefits for the other."[176] Prior to the REA, a spouse could not receive any of his or her participating employee spouse's pension benefits if that participating employee died before becoming eligible for retirement.[177]

The provision of a survivor pension benefit to married spouses is consistent with the understanding that marriage implied economic security, a responsibility on the husband to provide his wife with economic support. Whereas the state is the payor of Social Security benefits from a pool funded by general payroll taxes, the private employer is the payor of pension benefits from company profits to which the employee indirectly contributed. In both situations, the directive from Congress is the same: When the breadwinner husband can no longer fulfill his duty of support, the state or private employer must step in and shield the vulnerable and unemployable wife from impoverishment.

Notably, the presence of a claimant spouse affects the amount of benefits to which the covered worker or participating employee is entitled. Social Security derivative benefits given to spouses will not reduce the covered worker's amount of monthly benefits,[178] but the amount of the participating employee's pension benefits may decrease when a spouse with a longer life expectancy claims a qualified joint and survivor annuity. For example, assume Bob is the participating employee, with a life expectancy of eighty-three years, while his wife Clara has a life expectancy of eighty-five years. Instead of calculating Bob's pension benefit based on Bob's life expectancy, the calculation is based on Clara's longer life span. Because Clara's payments are projected to continue for a longer period of time, each monthly payment is reduced. Thus, Bob would receive a smaller monthly pension during his lifetime than he would if he were unmarried. Clara is then also entitled to that same pension amount upon Bob's death.

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176. President Ronald Reagan, Statement on Signing the Retirement Equity Act of 1984 (Aug. 23, 1984), *in* 20 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 1161, 1161–62 (1984).

177. *See* Edmund T. Donovan, *The Retirement Equity Act of 1984: A Review*, 48 SOC. SEC. BULL. 38 (1985). Reforms like the REA (1984) and the Medicare Catastrophic Coverage Act (1988) were motivated by a desire to save money for the government through privatization, but they ironically came at a time when the lifetime economic partnership model of marriage, on which privatization depended, had already broken down. *See generally* HACKER, *supra* note 160.

178. The covered worker is also exempt from the family maximum limitations. *See Frequently Asked Questions*, *supra* note 135.

Against the gendered backdrop of the lifetime economic partnership model, it makes sense to calculate the breadwinner's pension benefits based on the life expectancy of the longest surviving spouse (the female with the higher life expectancy). The resulting reduction in the breadwinner's pension benefit would be entirely consistent with the understanding that it is the breadwinner's responsibility to ensure the lifelong economic security of the homemaker wife. This also comports with the assumption underlying linked fulfillment in which the fulfillment of the marital unit trumped that of the individual spouse. It would be worth it for Bob to take a cut in his individual pension benefits if it meant that Clara would be financially protected upon his death. Given that the mid-twentieth-century model of marriage expected the breadwinner husband to dutifully provide economic support for his homemaker wife, the ban on a participating (breadwinning) employee unilaterally signing away his wife's survivor pension benefits functioned as an enforcement measure. This prohibition supplemented social pressure to ensure that breadwinner husbands fulfilled their economic responsibilities in marriage.

The spousal consent requirement effectively gives the spouse of the participating employee an ironclad right to survivor pension benefits. ERISA does not make any exceptions to this arrangement, as the participating employee cannot unilaterally revoke survivor pension benefits, even upon divorce. Short of mutual consent, the only way survivor pension benefits can be revoked is through a QDRO at the discretion of a state court judge. Here, we see ERISA deferring to the courts to determine the recipient of the survivor pension benefits. Without court intervention, however, the spousal consent requirement would unconditionally guarantee a spouse survivor pension benefits, even if he or she is no longer married to the participating employee or has remarried.

Return to the example of Bob, the participating employee, who is married to Clara. Clara is entitled to survivor pension benefits upon Bob's death. After she and Bob divorce, she remarries Joe, another participating employee entitled to pension benefits. It is Joe's first marriage, so he can assign his survivor pension benefits to Clara. Meanwhile, Bob remarries Diane, but cannot unilaterally divest survivor pension benefits from Clara to Diane. ERISA leaves these couples with the inequitable result of Clara receiving two sets of survivor pension benefits, while Diane receives none. In order to accurately target those who are financially vulnerable upon their working spouse's death, the spousal consent rule would have to take place in the era of the lifetime economic partnership, in which there is no exit from marriage.

IV.
UPDATING EXISTING LAW IN LIGHT OF THE NEW INDIVIDUALISM

Three of America's most important sources of old age support—Medicaid, Social Security derivative benefits (and by proxy, Medicare), and ERISA-governed private pensions—still operate under the outdated assumptions of the lifetime economic partnership model of marriage. This Part will address the

practical consequences of the failure to update each of the existing programs in light of the new individualism. By neglecting to update Social Security and private pensions, the state rewards college-educated, higher-income Americans in stable marriages at the expense of virtually everyone else. Conversely, the failure to update the means-tested Medicaid program saddles married individuals with significantly greater obligations than those who are single.

The proposals below may be difficult to implement and unlikely to be immediately accepted by Congress. However, their value lies in showing just how drastic a shift is needed in order for existing law to catch up to the new individualism.

A. Medicaid

The Medicaid pooling and spend-down requirements, as well as the CSRA and MMMNA, reflect assumptions underlying the lifetime economic partnership model of marriage. While it was more reasonable in the mid-twentieth century to expect that the breadwinner husband would be the primary source of support for the homemaker wife, this assumption does not always hold true under the new individualism. Therefore, it no longer makes sense to presumptively measure one spouse's financial need based on the total resources of the marital couple. I propose the following two-part reform: (1) an individualized inquiry into financial need, and (2) removal of the CSRA and MMMNA altogether.

1. An Individualized Inquiry

In order to be consistent with the new individualism, we must revise how Medicaid measures the institutionalized spouse's financial need. Instead of drawing the economic unit around the marital couple for purposes of the pooling and spend-down requirements, Medicaid should conduct an individualized inquiry into all sources of financial support actually relied upon by the institutionalized spouse. This could include the spouse, a cohabiting partner, adult children, extended family members, and roommates. An important consequence of the individualized inquiry is that only those who actually provide financial support to the institutionalized spouse are responsible for reducing their contributions in order for the institutionalized spouse to meet the eligibility threshold.[179]

For example, an individualized inquiry could show that Bob, the institutionalized spouse, actually has access[180] to thirty percent of Clara's resources, along with twenty percent of his adult son Dave's resources.[181] In that

179. The eligibility threshold amount should be the same for both married and unmarried spouses.

180. Having access does not mean Bob must have title to those resources, but simply that there is actual evidence of a shared understanding that Bob may access those resources. This is also what I mean when I use the term "make available."

181. Clara's resources equal her individual resources, specifically those that she does not share with anyone else. The same goes for Dave's resources.

case, if Bob needed to spend down the entirety of his individual resources to meet the eligibility threshold, Clara and Dave would be capped at spending down only the amount of their actual contribution (thirty percent and twenty percent of their respective individual resources). Though there are certainly implementation challenges, which I will discuss below, an individualized inquiry theoretically exemplifies all four tenets of the new individualism.

First, the individualized inquiry's removal of the default responsibility on the community spouse to spend down resources is consistent with the modern understanding of the individual as his or her own person, rather than as merely one half of a marital unit. It erases the default assumption that the community spouse is willing to sacrifice his or her personal well-being for the sake of the institutionalized spouse. The individualized inquiry will only assign financial responsibility to those parties who actually contribute support to the institutionalized spouse, and will not hold them responsible for spending down any more than the percentage of their individual resources that they permitted the institutionalized spouse to access.

Second, consistent with the tenet of emotional fulfillment and its rejection of marriage as an economic security blanket, the individualized inquiry eradicates the default assumption that the institutionalized spouse, by virtue of being married, has unfettered access to the community spouse's resources (and vice versa). The determination of financial need involves looking beyond the marital unit, to any person who has made available their resources to the institutionalized spouse. And the individualized inquiry does not simply assume that the institutionalized spouse has access to the entirety of those resources, instead making a case-by-case inquiry into the portion of resources that the institutionalized spouse was actually able to access.

Third, taking into account greater personal choice, the individualized inquiry covers all the potential permutations of intimate relationships that result in support coming from someone other than a spouse. It also facilitates free choice between those options by removing the heightened pooling and spend-down obligations exclusively associated with marriage. It is ultimately up to the community spouse to decide how much of his or her individual resources to make available to the institutionalized spouse. The individualized inquiry abides by a principle of neutrality among intimate relationships, such that being married to a Medicaid applicant carries with it the same degree of scrutiny under the Medicaid means-tested inquiry as cohabiting with that individual.

Finally, neither the existing pooling and spend-down requirements, nor the proposed individualized inquiry, pose any hindrance to easy exit from marriage. They are consistent with the new individualism's emphasis on easily moving from one intimate relationship to another. Under the existing requirements, a couple could simply divorce in order to avoid the heightened burdens Medicaid imposes on married spouses.[182] In fact, this strategic practice, known as the

182. Note, however, that divorce in general carries with it complex practical considerations

"Medicaid divorce," is not uncommon today."[183] The individualized inquiry, by removing the heightened burden on married spouses, eliminates the need for Medicaid divorce. Whereas the existing rules may cause spouses who are personally and emotionally fulfilled in their marriage to divorce simply to avoid the restrictive Medicaid eligibility requirements, the individualized inquiry does not incentivize divorce.

2. Removal of the CSRA and MMMNA

Under a serious conception of the new individualism, the implementation of the individualized inquiry would naturally be accompanied by the elimination of the CSRA and MMMNA. These allowances were suited for the gendered context of the lifetime economic partnership model, as their purpose was to protect the community spouse (typically the homemaker wife) from impoverishment upon her breadwinner husband's institutionalization. The CSRA goes arm-in-arm with the pooling and spend-down requirements, as it buffers the potentially devastating impact of the spend-down requirement. However, when we update Medicaid to utilize an individualized inquiry that does not automatically require the community spouse to spend down excess resources, there is much less risk that the community spouse will face impoverishment (unless the community spouse has made all of his or her individual assets available to the institutionalized spouse). The state should not impose additional burdens on married individuals through the pooling and resource spend-down requirements, and nor should it offer additional financial protection exclusively to the spouses of Medicaid applicants. The removal of the CSRA and MMMNA would be more aligned to the new individualism, particularly the tenets of emotional fulfillment and greater personal choice.

Unlike in the lifetime economic partnership model, marriage is no longer the

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often dependent on particular state laws. It can impact other benefits spouses would have expected to receive, such as Social Security benefits, tax deductions, insurance, pensions, and medical decision-making rights. The division of assets upon divorce is an important consideration in assessing the attractiveness of the Medicaid divorce strategy. If, for example, Bob and Clara were facing the potential of spending down $500,000 in savings, then a divorce resulting in roughly equal distribution of assets would allow Clara, the community spouse, to retain $250,000 of their savings, a significant amount over her CSRA. *See* WEISBERG & FRELICH, *supra* note 62, at 563–67 (reviewing how states have varying methods of distributing property upon divorce and explaining that states typically require courts to divide the marital property acquired during marriage equitably, in "just" proportions).

183. *See* THOMAS D. BEGLEY & JO-ANNE HERINA JEFFREYS, 1 REPRESENTING THE ELDERLY CLIENT: LAW AND PRACTICE 1–29 (2004) (pointing out several factors contributing to the growth of Medicaid estate planning: the increase in affluent seniors, the increase in nursing home costs, the rise in awareness that Medicare does not cover long-term nursing home costs, and the increase in the elder law bar); Randy Cohen, *The Ethicist: Get a Divorce*, N.Y. TIMES MAG., July 28, 2002, at E14 (highlighting the ethical dilemmas in getting a Medicaid divorce but ultimately supporting it on the grounds that "[i]t is through divorce, paradoxical as it sounds, that you can best honor your marriage vow to cleave to your husband for better or for worse"); Michael Farley, *When "I Do" Becomes "I Don't": Eliminating the Divorce Loophole to Medicaid Eligibility*, 9 ELDER L.J. 27 (2001) (advocating for closure of the Medicaid divorce loophole).

predominant means by which women achieve economic security. Removing the CSRA and MMMNA while implementing the individualized inquiry would overturn the presumption that every community spouse is in need of a protective allowance solely by virtue of being married to a Medicaid applicant. Moreover, exclusively providing married individuals with buffers against financial impoverishment in the form of the CSRA and MMMNA violates the new individualism's commitment to neutrality among intimate arrangements. It is true that these allowances were intended to compensate for the burdens that the pooling and resource spend-down requirements imposed on married individuals. However, this exclusive allocation of benefits and burdens within marriage only underscores the lack of neutrality between marriage and other forms of intimate partnerships. The benefits offered by the CSRA and MMMNA would have to be removed, along with the burdens of the existing pooling and resource spend-down requirements (to be replaced with the individualized inquiry), in order to even the playing field and facilitate greater personal choice in pursuing personal and emotional fulfillment.

3. Challenges and Open Issues

The individualized inquiry, despite its intellectual merits, is not without its drawbacks in implementation. First, there are major administrative challenges to conducting individualized inquiries on individuals who are not easily identified by the formal relationship of marriage. It may be practically impossible for the state to identify all the financial relationships the Medicaid applicant is entangled in. A compromise between accuracy and practicability could be to redraw the unit of inquiry around a workable definition of the household.[184] For example, a household could be defined as individuals who live together and share in food expense and preparation.[185] That might, however, fail to account for the increasing number of couples who live apart due to educational and work constraints, as well as children who have moved out of the family nest. A broader definition of household might include anyone who has a first-degree familial tie to the applicant (i.e. parents, children, siblings) and anyone who is currently living with the applicant. Yet, this definition still does not resolve the difficulty of identifying the long-distance partner who is not legally married to the applicant. Moreover, there are significant challenges in monitoring the composition of a household and even just verifying one's legal marital status.[186] Perhaps the state would have to put more of a burden on Medicaid applicants to

184. *See* Alstott, *supra* note 4, at 41 (addressing this same challenge in the context of a welfarist income tax and recognizing that "we must adopt some simplified understanding of the household").

185. *See id.* (providing the example of the federal food stamps program's definition of a household as "a group of individuals who live together and customarily purchase food and prepare meals together for home consumption").

186. *See id.* at 42 (explaining that the government collects very little data on household composition and noting that even marital status is only tracked by local vital statistics offices and not routinely monitored by the government).

truthfully report whom they share a household with in addition to their intimate and familial relationships. Currently though, the state lacks a reliable way to verify self-reported information.[187]

The question of how to determine what portion of an individual's resources is made available to the Medicaid applicant is also a challenging one. One idea is to look at whether there is evidence of a shared understanding between the individual and the Medicaid applicant that the latter may access a specific portion of the former's resources. This assessment would be more easily conducted with regard to applicants who are listed as beneficiaries, trustees, or co-owners of pensions, trusts, and annuities. Of course, any mechanism designed to assess complex financial relationships would place an additional burden on Medicaid applicants, who may unwittingly misreport the source of their finances.[188] With respect to Medicaid applicants whose financial reliance on others is not documented through pensions, annuities, or other formal financial instruments, there is the option of relying on the self-reporting of resources. However, without state verification, this poses a serious risk of strategic underreporting of resources. State verification of self-reporting, even when fully implemented, would be time-consuming and require difficult-to-access information.

A related question pertains to what span of time the individualized inquiry should cover. Should it measure the countable resources that the Medicaid applicant had access to as of the first day of continuous nursing home residency, in keeping with the current snapshot method?[189] This might be too narrow a view, as it would allow transfers to be made before the snapshot date. It may make sense to observe the patterns of asset transfers, including gifts, over a period of sixty months, consistent with the existing sixty-month look-back period.[190] One way to quash the perverse incentive for the Medicaid applicant to give away his or her assets to family members as gifts for safekeeping is to recognize that any gift[191] not made for the sole benefit of the beneficiary that the institutionalized spouse made in the past five years is still considered part of his countable resources for purposes of the individualized inquiry.[192]

The proportional spend-down requirement proposal raises the question of

187. There is, as Alstott suggested, always the "creepy" recourse of the government relying on data collected by private companies on consumer demographics, financial transactions, and private activity. While likely an effective way to monitor household composition, this would raise significant privacy concerns. *Id.* at 42–43.

188. This may also pose perverse incentives for applicants to avoid documentation while still sharing resources.

189. *See supra* note 83 and accompanying text.

190. *See supra* notes 83, 89 and accompanying text.

191. This would include gifts made to one's spouse which were previously exempt from the look-back period restrictions. *See id.*

192. This would also remove the penalty of delaying eligibility by a period of months based on the amount of the gift. Instead, it would be more consistent with a true measure of need, as the amount of the gift would simply be counted toward the amount of countable resources available to the Medicaid applicant.

how to decide who must spend down how much and in what order. Consider the earlier example with Clara and Dave, who must spend down at most thirty percent and twenty percent of their individual resources, respectively. It would violate the neutrality principle to assume that Clara, the wife, always has more responsibility than Dave. And it might further disincentivize the sharing of resources if the person who shares the most resources is first in line to spend them all down. One solution could be to have the contributors spend down simultaneously, in proportion to their contributions. For example, if Clara's contribution comprised forty percent of Bob's total countable resources, and Dave's comprised ten percent, then Clara and Dave should proportionally spend down their resources using a 4:1 ratio. This would incentivize accumulating multiple contributors at smaller amounts, further diluting the impact of the spend-down requirement.

The proposal to remove the CSRA and MMMNA raises many questions. Will non-applicant parties be left economically vulnerable? Is this something that the state should even address, given that Medicaid purports to serve the financially needy? It is possible that an individualized inquiry will yield many more contributors than just the spouse, and thereby reduce the individual burden of spending down resources. Assuming a need for the state to intervene, would Medicaid be the appropriate program to cushion this shock, or should other programs like Social Security step in? While the individualized inquiry would mandate one threshold amount for both married and unmarried individuals, the question is whether and by how much this amount should be increased to better cushion the economic impact of qualifying for Medicaid. For example, the state could recalibrate the eligibility threshold amounts or increase the number and/or amount of exempted resources from the countable resource calculation.[193]

Lastly, why not treat all individuals as individuals and not require anyone to spend down resources for another person's care? This is certainly an attractive option, as it removes many of the complexities in monitoring and identifying financial contributors, while adhering to the tenets of the new individualism. However, it ignores the need-based inquiry upon which Medicaid is premised. Simply measuring an individual's need based on the resources that are under that individual's name would fail to account for other sources of financial support that may impact that individual's actual financial need. The new individualism promotes the baseline assumption that spouses are not responsible for financially supporting one another, but it does not mean that an inquiry into an individual's financial need should turn a blind eye to actual sources of financial support, including from spouses.

B. Social Security Derivative Benefits

Like Medicaid, Social Security derivative benefits for spouses remain

193. For a description of categories of countable resources, see *supra* notes 83–85 and accompanying text.

deeply enmeshed in the lifetime economic partnership model, so much so that they seem like "a set piece from another time."[194] Their heavily gendered undertones and myopic focus on marital status is incongruous with today's new individualism. Many of the proposals floating around only address the transitional issue of economically vulnerable married women at old age,[195] while steadfastly adhering to the outdated assumption that formal marriage is the exclusive site for the achievement of economic security. Alstott unlocked the door to thinking about true innovation in Social Security under the new individualism, inviting us to consider two proposals: (1) a proposal originally conceived of by Alstott and Bruce Ackerman in 1999 to transform the progressive benefit to a flat benefit to all individuals at old age, irrespective of marital status or work history;[196] and (2) an optional joint and survivor annuity (similar to the qualified joint and survivor annuity in the private pension context) in which every covered worker may elect to convert their solo lifetime benefit into a joint benefit, such that the actuarially adjusted benefit will go to any survivor of his or her choice (not just a spouse).[197]

Though drastically different in scope, both proposals envision scrapping the current scheme of spousal derivative benefits altogether—a move that, barring other changes, reduces the pool of beneficiaries to workers who qualify based on their earnings record. The proposals then step in to expand the pool of beneficiaries beyond qualified workers, without a commensurate increase in funding.[198] The reach of the flat old-age benefit is extremely broad, as it allows any individual, regardless of work history, to receive the same amount of benefits. The optional joint and survivor annuity is more conservative in its reach but gives the covered worker the discretion to expand the pool of beneficiaries beyond those who could qualify on their own work record.[199]

It is important to take a step back and focus on the threshold reform of

194. Alstott, *supra* note 4, at 49 (remarking that the current spousal benefit has "more than a whiff of 'Mad Men' about it").

195. *See, e.g.*, Martin, *supra* note 120, at 20 (advocating for combining a surviving spouse benefit with year-by-year earnings sharing in order to protect economically vulnerable widows). Another example, addressed by Alstott, is a reform proposal that was popular in the late 1980s and 1990s, which would dispense Social Security benefits on the basis of childrearing activity so that stay-at-home mothers would not be left out of the picture. As Alstott notes, this proposal fails to recognize that it is not the stay-at-home mother with whom our proposals should be concerned, but rather the working mother—single or married—who earns low wages and faces the high costs of child care. *See also* Alstott, *supra* note 4, at 50.

196. Alstott, *supra* note 4, at 50. For a more detailed explanation of this proposal, see generally BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999).

197. *See* Alstott, *supra* note 4, at 50–51 (emphasizing that the survivor annuity would not be free and must be actuarially fair).

198. *See supra* notes 196–197 and accompanying text. Instead of redistributing the amount of benefits, the size of the funding pool could be increased via taxes—an unpopular political move but an option nonetheless.

199. *See id.* Depending on the specifics of the funding structure, the actual amount of economic cushioning provided may be significantly different for these plans (e.g., when comparing a similarly situated worker who would have earned a greater benefit under the second proposal than the first).

eliminating the existing program of Social Security spousal derivative benefits without additional provisions to redistribute or expand coverage. Of course, there are also important questions as to how Social Security should carry out its goal of insuring individuals against economic shocks, and this article seeks to add to this discussion. But it is valuable to first understand why the new individualism mandates, *at a minimum*, removing Social Security derivative benefits and measuring an individual's benefits solely based on his or her work record.

1. Back to Basics: Removal of Social Security Derivative Benefits

At the most basic level, what would it look like to abolish Social Security derivative benefits? Current spouses of covered workers would no longer be entitled to receive half of the covered worker's benefits. Divorced spouses likewise would not be able to claim half of their ex-spouse's benefits, and the current ten-year duration of marriage requirement would be moot. Upon the death of the covered worker, surviving spouses would no longer be eligible to receive the entirety of their deceased spouse's benefit. There would be no need for the family maximum limit on the amount of derivative benefits that can be claimed by family members. Essentially, the sole means for current, divorced, and surviving spouses to receive Social Security benefits would be to rely on their own work records, rather than those of their spouses. This would be the equivalent of reverting back to Social Security old age benefits as originally conceived in 1935. As backwards as it may seem, this back-to-basics proposal is actually incredibly forward-looking when examined in light of each of the tenets of the new individualism.

First, basing the receipt of Social Security benefits solely on the wages of the individual is consistent with the emphasis on the individual underlying the tenet of personal fulfillment. Allowing a spouse to receive benefits linked to his or her status as the husband or wife of a covered worker implies a shared marital identity that no longer matches the assumptions of the new individualism. Personal fulfillment counsels against the idea that spouses derive most of their emotional and economic fulfillment from marriage, and it is inappropriate to assume that any benefit allotted to the marital unit would be shared among spouses. To the extent that Social Security derivative benefits seek to approximate the presumptive need of a married couple,[200] a measurement based on the covered worker's benefit would not be an accurate proxy.

Abolishing derivative benefits to spouses also embraces the tenet of emotional fulfillment and recognizes that we no longer live in an era where married women need and expect economic protection from their husbands. If the state wanted to address vulnerable populations, it should expand its reach

200. The Social Security Board explained that "supplementary benefits for aged wives" would recognize the "greater presumptive need of the married *couple* without requiring investigation of individual need." Soc. Sec. Bd., *supra* note 138, at 6 (emphasis added).

beyond married individuals who are economically dependent on their spouses to address the prevalence of unmarried workers earning low wages. Furthermore, the state must be more sensitive to the actual support structures that are in place for a family of any kind in order to identify those who are most vulnerable when a primary source of support disappears.

In promotion of greater personal choice, removing derivative benefits eliminates the preferential treatment to married spouses, and allows any individual regardless of marital status to receive benefits commensurate to their working record. By conferring exclusive benefits to married spouses and ex-spouses who had been previously married for at least ten years, Social Security derivative benefits violate the neutrality principle underlying the tenet of greater personal choice. In particular, the unmarried, low-earning worker is disadvantaged compared to the similarly situated married low-earning worker. This inequality is exacerbated by today's increasing numbers of women entering the work force and individuals in non-marital cohabiting relationships, including same sex couples in states that do not recognize same sex marriage (who are single in the eyes of the state).

Additionally, the removal of derivative benefits would eradicate a current disincentive to easy exit: the ten-year duration of marriage requirement. Spouses seeking a divorce would no longer have the incentive, however small, to stay in an unfulfilling marriage for ten years. Without any prospect of receiving derivative benefits, a spouse could freely exit marriage in pursuit of personal and emotional fulfillment.

2. Challenges and Open Issues

The elimination of the existing program of Social Security derivative benefits would neatly align with a serious conception of the new individualism. Because this is a reform tailored for today's generation of twenty-somethings when they reach old age, the focus is not on remedying transitional issues and cushioning the shocks of vulnerable wives and widows who married against the backdrop of the lifetime economic partnership model. Even still, there remains the crucial question as to whether and how the state should supplement the updated program of Social Security benefits in order to more effectively cushion against economic shocks. The backdrop of the new individualism, characterized by the increase in the number of women who are working in the labor market, strongly indicates that more individuals would qualify for benefits under this approach today than when it was originally conceived of in 1935. However, the back-to-basics proposal would still underserve non-workers as well as low-wage and contingent workers who are economically vulnerable at old age.[201]

Another option would be to fall back on the Supplemental Security Income

201. Although this article focuses on state support for those facing the economically vulnerable life event of old age, it is important to consider the many other significant shocks that warrant economic protection in the era of the new individualism, such as single motherhood, low wages, and divorce. *See* Alstott, *supra* note 4, at 50.

program. It bears mention that under the new individualism, the SSI standards, which also govern Medicaid, must be updated to reflect the features of the proposed individualized inquiry for Medicaid.[202] It is reasonable to expect that the small segment of homemakers who would be ineligible to claim derivative benefits could then qualify for state support under SSI. It is less certain as to the fate of low-earning married and unmarried individuals with intermittent employment who cannot meet the work history qualifications for Social Security benefits. After all, they may have more resources than the stringent amount SSI allows. This goes back to the concern highlighted by the Medicaid individualized inquiry—namely, are the state's resource eligibility requirements so restrictive as to leave a sizeable portion of actually needy individuals without any recourse? Relaxing the resource eligibility requirements for SSI would be an effective (though expensive) way to expand coverage to non-workers and those who would not qualify for Social Security benefits on their own.[203]

C. ERISA-Governed Private Pensions

The last stop in our tour of old age obligations and benefits in light of the new individualism is ERISA-governed private pensions for surviving spouses. Like Medicaid and Social Security derivative benefits, survivor benefit pensions are more suited for the lifetime economic partnership model of the past. As with the comparably designed Social Security derivative benefit for surviving spouses, the survivor pension benefit was founded on the presumption of fixed gender roles in marriage and the idea of marriage as the vehicle for economic security. In order to bring this program in line with a serious conception of the new individualism, I propose an optional joint and survivor annuity—similar to Alstott's Social Security proposal[204]—in which the participating employee has the discretion to select a joint and survivor annuity option and direct pension benefits to any survivor that he or she chooses, whether it be a spouse, child, extended family member, or friend. Importantly, the participating employee would have the unilateral prerogative to revoke and reassign the survivor benefit pension rights to anyone of his or her choosing prior to the annuity start date.

1. The Optional Joint and Survivor Annuity

The optional joint and survivor annuity would update two existing rules. First, it would remove the spousal consent requirement in which the participating employee needs his or her spouse's consent in order to revoke that spouse's right to survivor benefits. Second, it would no longer automatically entitle the spouse of the participating employee to receive survivor benefits. Not only would the

202. Specifically, the updated SSI resource standards must be the same for married and unmarried individuals, and the inquiry into resources must not impute any resources of one spouse to the other without actual evidence of the amount and extent of sharing.

203. This could serve as an extension of the existing Earned Income Tax Credit program, which currently provides a supplementary source of support for low-income workers.

204. *See* Alstott, *supra* note 4, at 50–51; *see also supra* text accompanying note 197.

participating employee be able to choose to forego converting his lifetime annuity to a joint and survivor annuity, the participating employee would no longer be limited to conferring the benefit of the survivor pension to his or her spouse. Any person could be named a recipient of these benefits. This proposed optional joint and survivor annuity would reflect the four tenets of the new individualism and allow the distribution of pension benefits to track the actual support systems of individual families.

First, the optional joint and survivor annuity would no longer put the participating employee in a position where he or she is automatically expected to take a cut in his or her monthly pension benefit amount in order to accommodate survivor pension benefits for his or her spouse. (This would be the case where the participating employee's life expectancy is shorter than that of his or her spouse.) This proposal would give the participating employee the autonomy to pursue his or her own personal fulfillment without the state assuming that it is personally fulfilling to make financial sacrifices on behalf of one's spouse. The participating employee, under the proposal, would now have the option to allocate survivor pension benefits and incur a potential reduction in his or her monthly benefits if he or she believed it would be personally fulfilling. The removal of the existing spousal consent requirement would further recognize the importance of individual autonomy and allow participating employees to change their minds (and revoke the allocation) if it was in furtherance of their ongoing pursuit of personal fulfillment.

Next, the optional joint and survivor annuity would eliminate the assumption that spouses of participating employees are economically vulnerable and deserving of a functionally absolute right to survivor pension benefits upon their spouse's death. Under this proposal, the participating employee could still elect to give his or her spouse a survivor pension benefit—and indeed it might be a source of personal and emotional fulfillment—but that decision would be entirely up to the participating employee, not to the state.

Not only would expanding the pool of potential beneficiaries beyond the marital unit recognize that marriage is not the exclusive site for the allotment of economic benefits, but it would also facilitate the ability of the participating employee to make a personally and emotionally fulfilling choice. In furtherance of promoting neutrality among intimate relationships, the optional joint and survivor annuity would remove the automatic privilege of the married spouse to receive survivor benefit pensions. It would also eradicate the married spouse's veto power over the revocation of those benefits. Both the unmarried and married individual would be part of the potential pool of candidates that the participating spouse may choose to confer benefits upon.

Lastly, the joint and survivor annuity would release the married spouse's control over survivor pension benefits. The first spouse of the participating employee would no longer be able to claim his or her survivor pension benefit right to the exclusion of the participating employee's later spouse. The participating employee could easily move between intimate relationships without

feeling economically tied down to the first spouse,[205] or anyone for that matter, and would have the option of transferring the survivor pension benefit to whomever he or she desired.

2. Challenges and Open Issues

Though theoretically consistent with the new individualism, implementation of the optional joint and survivor annuity would raise several issues. First, there is a question as to the extent of the participating employee's ability to revoke and transfer a survivor pension benefit right once he or she has conferred it. I have proposed that the participating employee be able to revoke and transfer such rights up until the rights are vested. This revocation option would align closely with the tenet of greater personal choice. However, it may be fairer to provide for some recognition of reliance interests and allow the beneficiary to challenge any action to revoke benefits he or she had substantially relied upon.

Another question is whether there can be more than one designated beneficiary of survivor pension benefits. Although it might be exceedingly complex to calculate benefits to more than one beneficiary, it theoretically makes sense to give participating employees complete control over both the beneficiaries of their pension and how the funds are distributed among them. Once we open the door to allow the designation of beneficiaries, there does not seem to be a principled reason why participating employees should not have greater control over the duration and amount of the benefits to be conferred.

With the increase in working women today, there are certainly more employees who could participate in retirement plans. There is no question as to demand, but the problem lies in the supply. Only about half of the workforce today is covered by private retirement plans.[206] Moreover, defined benefit plans (i.e. pensions) are on the decline, while defined contribution plans like 401(k)s and IRAs are on the rise.[207] Defined contribution plans need not contain the same requirements for spouses' survivor benefits, though in practice, many plans, such as 401(k)s, do.[208] The proposed reform to ERISA-governed pensions is just the start of a broader conversation regarding the future of employer-based retirement plans.

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205. Under the existing program, the participating employee's monthly benefits are calculated using whichever of the two spouses' life expectancies is longer. *See supra* note 166 and accompanying text. Thus, if the participating employee receives a lower monthly benefit as a result of the annuity calculation, there is no way to adjust that amount even after that participating employee no longer has a relationship with the spouse or if the spouse remarries.

206. *See* Zelinsky, *The Defined Contribution Paradigm, supra* note 160, at 530.

207. *Id.* at 453–54.

208. *See, e.g.*, 26 U.S.C. § 417(a)(2) (2006 & Supp. 2012) (requiring that 401(k) plans have the participating employee obtain spousal consent before designating any beneficiary other than the spouse to receive the account balance if the participating employee dies while enrolled in the plan); *What You Should Know About Your Retirement Plan*, U.S. DEP'T OF LABOR, http://www.dol.gov/ebsa/publications/wyskapr.html (last visited May 26, 2014).

V.
CONCLUSION

This article has only scratched the surface of the policy opportunities that would become available—and challenges that would have to be confronted—if the state were to take seriously the sociological phenomenon of the new individualism. A commitment to approaching legal design using the tenets of personal fulfillment, emotional fulfillment, greater personal choice, and easy exit would counsel toward a much different version of the old age support programs we currently know. Medicaid, Social Security, and ERISA-governed private pensions would have to countenance an individualized inquiry into need, the repeal of spousal benefits, and an optional model of survivor benefit pensions, respectively. American family life has experienced immense changes since the *Leave It To Beaver* days of yore. Though these changes have undoubtedly expanded our personal freedom, they come at the cost of economic security. Should the state take notice and embrace the tenets of the new individualism, it must address these costs and update our existing legal infrastructure to better support the rising generation of Americans at old age.