Georgetown Journal on Poverty Law and Policy
Volume XXXII, Number 1, Fall 2024

Retirement in America: A Luxury Not All Can Afford

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Abstract

This piece is adapted from a paper written for a legal philosophy course taught by Professor Heidi Li Feldman. The piece examines state-sponsored social security benefits available to retirees in America, focusing on policies like spend-down requirements and the Estate Recovery program. It then argues that such policies incentivize Medicaid planning, a practice that disproportionately shifts the burden of the negative effects of these policies onto lower-income retirees and perpetuates economic inequality across generations. Borrowing from David Hume's "Of Commerce" and "Of Refinement in the Arts," the piece considers how policymakers should conceive of "surplus" assets and income among retirees. It frames Medicaid planning as a "luxury" under Hume's theory, then examines whether it is an "innocent luxury" or a "vicious luxury" that policymakers should seek to deter. Rather than penalizing those who engage in Medicaid planning, the piece argues that lawmakers should update asset limits and reform estate recovery to decrease the necessity of Medicaid planning.

I. INTRODUCTION

A significant and increasing percentage of American people over the age of 65 live under the poverty line, are economically insecure, or are economically vulnerable.[1] As the costs of long-term care (LTC) can quickly deplete an elderly couple's or individual's limited funds, many elderly households face massive financial risk.[2] In the face of this risk, those who have the assets and know-how may seek Medicaid planning assistance to protect their hard-earned assets, including their home, while ensuring that they can access Medicaid's free LTC services if they require them.

Retirees must comply with strictly enforced income and asset limits to qualify for social welfare benefits, but planning can allow those with higher incomes and more assets to circumvent these limits. This Note will argue that the United States' retirement system exacerbates wealth inequality across generations because it allows those who are not truly needy to protect their assets and qualify for free Medicaid LTC, which in turn overburdens the Medicaid system, leading to disproportionately negative effects on Medicaid's truly needy beneficiaries. At the same time, the exorbitant cost of LTC services coupled with the outdated methods of measuring "need" among the elderly population must be updated to reflect true neediness more accurately among America's elderly population.

Part II lays out the relevant background of the current American retirement system, including Social Security, Medicare, Medicaid, and private retirement savings and insurance, going into further detail about asset tests and the estate recovery program. Part III analyzes David Hume's discussion of surplus and luxuries in "Of Commerce" and "Of Refinement in the Arts." This section argues that a great failure of America's retirement system is that it treats necessary care like a luxury, incentivizing those who cannot afford to pay for LTC or who wish to leave an inheritance to engage in Medicaid planning to circumvent Medicaid's asset tests and qualify for low-cost care. This creates negative externalities experienced chiefly by people the programs are meant to help the most. Part II then identifies and briefly discusses several policy changes which could address these issues.

For the purposes of this Note, "low-income" or "lower-income" households will refer to elderly households that cannot afford one or more necessities and are either beneath or close to beneath current federal- and state-defined asset limit thresholds. "Middle-income" households will refer to elderly households in the

1. ROCKI BASEL ET. AL, THE 80%: THE CONTINUED TOLL OF FINANCIAL INSECURITY IN RETIREMENT 4 (2023), https://www.ncoa.org/article/addressing-the-nations-retirement-crisis-the-80-percent-financially-struggling.

2. *Id.* at 4.

gray area: too wealthy to easily qualify for Medicaid but too financially insecure to comfortably assume the risk of paying for LTC services. While this paper focuses on the effects of the administration of social welfare programs based on variances in economic status, readers should keep in mind that people of color are overrepresented in low- and lower-income communities.[3]

II. The Landscape of Retirement Policy in America: Social Security, Medicare, Medicaid, and Private Retirement Savings

Social Security, Medicare, and Medicaid are government programs that provide benefits and health insurance for retired adults in America. Social Security and Medicare benefit every qualifying older adult, regardless of their wealth level, while Medicaid protection is meant to only kick in to provide coverage for retirees below certain income and asset levels. While Social Security benefit payments make up the bulk of most retirees' incomes, retirement security is meant to be upheld by three pillars: Social Security, employer-provided pension accounts, and personal savings and investment accounts.[4]

A. Social Security

Social Security benefits provide a baseline monthly income for retired American citizens and qualified noncitizens.[5] There are several types of Social Security benefits, including regular Social Security benefits, disability benefits, survivor benefits, and Supplemental Security Income ("SSI").[6] To qualify for and receive regular Social Security benefits, an individual must accrue at least 40 Social Security credits[7] and be at least 62 years old, although waiting until 65 or even 67 secures recipients higher benefits.[8]

Social Security is funded by the Old Age and Survivors Insurance Trust Fund, which receives funding from a universal payroll tax of 6.2% paid by

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3. *Figure 3. Distribution of Total Population and Poverty by Race Using the Official Poverty Measure: 2022*, U.S. Census Bureau (2023), https://www.census.gov/content/dam/Census/library/stories/2023/09/black-poverty-rate/figure-3-black-poverty-rate.jpg.

4. Irena Dushi et al., *The Importance of Social Security Benefits to the Income of the Aged Population*, 77.2 Soc. Sec. Admin. Bulletin 1 (2017), https://www.ssa.gov/policy/docs/ssb/v77n2/v77n2p1.html ("The traditional major sources of retirement income in the United States—often called the three-legged stool or the three pillars—are Social Security benefits, employer-provided pensions (including retirement accounts), and income from assets or saving.").

5. 42 U.S.C. § 301; National Immigration Forum, Fact Sheet: Undocumented Immigrants and Federal Health Care Benefits 1 (2022), https://immigrationforum.org/wp-content/uploads/2022/09/Fact-Sheet-Undocuemnted-Immigrants-and-Health-Care.pdf (undocumented noncitizens are generally not eligible for these social welfare programs).

6. 42 U.S.C. § 301; *Social Security in Retirement*, Social Security Admin., https://www.ssa.gov/retirement (last visited Nov. 10, 2023).

7. 42 U.S.C.S. §414(a)(2) (A quarter of coverage is three calendar months.). 42 U.S.C.S. § 413(a)(1) (Workers can earn a maximum of four credits per year, and they must earn at least $1,370 each quarter of coverage to earn a credit.); *Quarter of Coverage – Latest Amount & QC Explanation*, Soc. Sec. Admin., https://www.ssa.gov/oact/cola/QC.html (last visited Nov. 10, 2023).

8. 42 U.S.C. § 402(a); 42 U.S.C. § 416(i) (The longer you wait to apply for Social Security benefits, the higher your benefit will be.).

employees and employers alike.[9] In 2023, the maximum taxable earning was $160,200, meaning that any individual earning income beyond $160,200 (the "cap") will not be taxed on their income beyond that amount.[10] Social Security benefit payouts are based on the recipient's taxable earnings, so the more an individual earns during their working years, the higher their benefit will be.[11] In 2023, the maximum benefit was $3,627, but the average benefit was $1,825.[12] Low earners will receive benefits that are lower than the average benefit, but may supplement these benefits with SSI benefits or through the "special minimum benefit," which allows longtime low earners to receive supplemented benefits based on how many years they were in the workforce.[13]

Federal SSI benefits are reserved for very low-income individuals over the age of 65 whose monthly income is less than $1,913 and who own less than $2,000 (individuals) or $3,000 (couples) in assets, including non-exempt possessions.[14] An individual's home and the land it sits on do not count toward the asset limit.[15] If a beneficiary rises above these strict federal asset limit thresholds, their SSI benefits will be terminated. In 2023, the SSI maximum benefit is $914 per month for an eligible individual, and $1,371 per month for an eligible couple.[16]

Social Security payments will make up the bulk of the income of many lower- and middle-income households upon retirement.[17] While Social Security benefits are meant to provide recipients with a livable wage after retiring, people are encouraged to save for retirement through other methods, including retirement savings accounts and other investments, to cover all necessary expenses.[18] The Social Security Old-Age and Survivors Insurance (OASI) Trust Fund will become increasingly depleted due to the United States' aging population and declining birth rate, and is projected to become exhausted in 2034, at which time payments

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9. SOC. SEC. ADMIN., FACT SHEET – 2023 SOCIAL SECURITY CHANGES 1 (2023), https://www.ssa.gov/news/press/factsheets/colafacts2023.pdf.

10. *Id*.

11. Office of the Chief Actuary, *The 2023 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/tr/2023/lr5c7.html (last visited, Nov. 11, 2023).

12. *Fast Facts & Figures About Social Security, 2023*, SOC. SEC. ADMIN. (2023), https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2023/fast_facts23.html.

13. Mark A. Sarney, *A Field Guide to Social Security Distributional Analysis*, SOC. SEC. ADMIN. (Dec. 2017), https://www.ssa.gov/policy/docs/rsnotes/rsn2017-02.html.

14. *Spending Down Assets to Become Medicaid Eligible for Nursing Home/Long Term Care*, AM. COUNCIL ON AGING, https://www.medicaidplanningassistance.org/medicaid-spend-down/(last updated Jan. 26, 2024).

15. *Id*.

16. *How Much You Could Get From SSI*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi/amount (last visited Nov. 11, 2023).

17. NARI RHEE & ILANA BOIVIE, NAT'L INST. ON RET. SEC., THE CONTINUING RETIREMENT SAVINGS CRISIS 17–18 (2015), https://www.nirsonline.org/wp-content/uploads/2017/07/final_rsc_2015.pdf.

18. Dushi et al., *supra* note 4.

to beneficiaries will have to be scaled back by approximately one quarter.[19] America's retirement system faces a massive burden between the impending depletion of the Trust and America's rapidly aging Baby Boomer generation.[20]

B. Medicare & Medicaid

Medicare is federally-funded health insurance for people aged 65 and older.[21] Medicare covers "hospital services," like hospital care, lab tests, short-term stays in skilled nursing facilities, and some "medical services," like medically necessary services and preventive services.[22] Medicare does not cover "custodial care," which is care that helps elderly individuals with activities of "daily living," including LTC services and assisted living.[23] Like Social Security, Medicare is funded by federal trust funds which are at risk of becoming depleted by 2031.[24]

Medicaid, on the other hand, is a joint federal and state program administered at the federal level by the Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS), and at the state level by a designated state agency.[25] Medicaid provides health insurance coverage for low-income individuals, including those who receive SSI benefits, as SSI eligibility renders an individual automatically eligible for Medicaid.[26] Medicaid is a social safety net program that is intended to serve as the "payor of last resort" for those who do not have the resources to cover essential medical services.[27] Medicaid covers vital services and devices beyond those covered under Medicare, notably "nursing facility care beyond the 100-day limit or skilled nursing facility care that Medicare covers," as well as "prescription drugs, eyeglasses, and hearing aids."[28]

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19. U.S. Dept. of the Treasury, Fact Sheet: 2023 Social Security and Medicare Trustees Reports (2023), https://home.treasury.gov/system/files/136/TR-2023-Fact-Sheet.pdf.

20. *See id.*; *see generally* James R. Knickman & Emily K. Snell, *The 2030 Problem: Caring for Aging Baby Boomers*, 37 Health Serv. Rsch. 850 (2002), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1464018/pdf/hesr_56.pdf.

21. 42 U.S.C.S. § 1395; *What's Medicare?*, U.S. Ctrs. for Medicare and Medicaid Servs., https://www.medicare.gov/what-medicare-covers/your-medicare-coverage-choices/whats-medicare (last visited Nov. 13, 2023).

22. 42 U.S.C. §§ 1395c–1395i; 42 U.S.C. §§ 1395j–1395w; *see also Parts of Medicare*, U.S. Ctrs. for Medicare and Medicaid Servs., https://www.medicare.gov/basics/get-started-with-medicare/medicare-basics/parts-of-medicare (last visited Sept. 10, 2024).

23. 42 U.S.C. §§ 1395d(a); *Nursing Home Care*, U.S. Ctrs. for Medicare and Medicaid Servs., https://www.medicare.gov/coverage/nursing-home-care (last visited Dec. 19, 2023).

24. U.S. Dept. of the Treasury, *supra* note 19.

25. 42 U.S.C.S. § 1396a(a)(5); *Department of Health and Human Services (HHS)*, Healthcare.gov, https://www.healthcare.gov/glossary/department-of-health-and-human-services-hhs/(last visited Oct. 10, 2024).

26. 42 U.S.C.S. § 1396(a)(10)(A)(i)(II); *Medicaid Eligibility*, U.S. Ctrs. for Medicare and Medicaid Servs., https://www.medicaid.gov/medicaid/eligibility/index.html (last visited Dec. 19, 2023).

27. Martin v. City of Rochester, 642 N.W.2d 1, 9 (Minn. 2002) (citing H.R. Conf. Rep. No. 99-453 at 542 (1985)).

28. 42 U.S.C.S. §§ 1396 et seq.; *What Medicaid Covers for Medicare Enrollees*, U.S. Ctrs. for Medicare & Medicaid Servs., https://www.medicaid.gov/medicaid/eligibility/seniors-medicare-and-medicaid-enrollees/index.html (last visited Dec. 12, 2023).

State Medicaid plans are funded through the federal government reimbursing state governments for their qualified Medicaid expenditures.[29] Medicaid spending accounts for 20% of the average state's budget, and federal funds reimburse the states for between 50% and 83% of these costs.[30] If state governments refuse to comply with certain federal Medicaid requirements, they risk losing some of their Medicaid funding. However, the Supreme Court has limited the federal government's ability to deny states access to all or a significant proportion of their Medicaid funding when federal regulations are "coercive" and deprive states of a meaningful choice to not implement the regulation.[31]

Approximately 7.2 million low-income elderly adults are enrolled in Medicaid along with Medicare.[32] As the largest payer for health care services in the United States, Medicaid has a high level of bargaining power and is able to pay significantly lower rates for LTC services than private payers.[33] For people without Medicaid coverage, LTC in a skilled nursing facility costs on average $100,000 per year,[34] although costs may be significantly higher or lower based on the state in which the person seeks care.[35] Assisted living facilities cost $54,000 per year on average.[36] Medicaid covers these costs entirely or partially for qualifying beneficiaries. If an individual's income is above the Medicaid threshold, but they still are not wealthy enough to cover their medical bills, many states offer cost-sharing pathways by which the individual can devote their surplus income to medical bills, and Medicaid will cover the remainder.[37]

Like the SSI benefit program, Medicaid coverage is meant to be reserved for low-income, needy individuals. Medicaid asset limits vary by state and by program, but since the passing of the Affordable Care Act, individuals may be eligible for Medicaid support so long as their income is less than 138% of the federal

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29. 42 U.S.C.S. § 1396b.

30. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581 (2012) (citing NAT. ASSN. OF STATE BUDGET OFFICERS, FISCAL YEAR 2010 STATE EXPENDITURE REPORT 11 (2011)); 42 U.S.C. § 1396d(b).

31. *Id*. at 581–82.

32. *What Medicaid Covers for Medicare Enrollees*, U.S. CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.medicaid.gov/medicaid/eligibility/seniors-medicare-and-medicaid-enrollees/index.html (last visited Dec. 12, 2023).

33. CHRIS POPE, MANHATTAN INST., TAKING THE STRAIN OFF MEDICAID'S LONG-TERM CARE PROGRAM 6 (2020), https://media4.manhattan-institute.org/sites/default/files/taking-strain-off-medicaids-long-term-care-program-CP.pdf; *2021 Nursing Home Costs by State and Region*, AM. COUNCIL ON AGING, https://www.medicaidplanningassistance.org/nursing-home-costs/ last updated Mar. 4, 2022).

34. Liza Hamel and Alex Montero, *The Affordability of Long-Term Care and Support Services: Findings from a KFF Survey*, KFF, https://www.kff.org/health-costs/poll-finding/the-affordability-of-long-term-care-and-support-services/(last visited Oct. 10, 2024).

35. *2021 Nursing Home Costs by State and Region*, AM. COUNCIL ON AGING, https://www.medicaidplanningassistance.org/nursing-home-costs/(last updated Mar. 4, 2022).

36. Kate Van Dis, *How Much Does Assisted Living Cost?*, NAT'L COUNCIL ON AGING (Oct. 11, 2023), https://www.ncoa.org/adviser/local-care/assisted-living/costs/.

37. *Spending Down Assets to Become Medicaid Eligible for Nursing Home/Long Term Care*, AM. COUNCIL ON AGING, https://www.medicaidplanningassistance.org/medicaid-spend-down/(last updated Dec. 14, 2022).

poverty level.[38] However, expanded Medicaid coverage only altered the income threshold for individuals under 65. For senior citizens over the age of 65, Medicaid eligibility remains based on strict income and asset limits that are indexed to the federal poverty line.[39] SSI asset limit eligibility is the only statutorily mandatory pathway to Medicaid eligibility in every state, but states may elect to expand or contract Medicaid eligibility for senior citizens.[40] Most states set eligibility at or around the poverty line, but certain states may elect their own criteria which is even more restrictive than the criteria laid out under the SSI program.[41]

To claim eligibility for Medicaid LTC coverage, individuals must "spend down" their countable assets without gifting or selling any assets for under their fair market value within a set lookback period.[42] Certain assets are not counted toward the asset limit, including the "applicant's primary home, household items and appliances, personal effects, a motor vehicle, burial plots, term life insurance, and in some cases, IRA/401(k) retirement benefits."[43] With foresight and assistance from an attorney, individuals and couples who are concerned about the mounting costs of LTC can engage in Medicaid planning by placing assets into irrevocable trusts, "selling" or trusting their assets to their heirs, and otherwise converting their assets into non-countable resources.[44] It is important to keep in mind that a person who requires LTC services will qualify for Medicaid once they have legally and "naturally" spent down their assets, and that Medicaid planning is an extra step taken to reposition certain assets.[45]

Once a Medicaid beneficiary dies, under certain conditions the state may seek recovery from the beneficiary's estate to pay back debts before the estate is

38. *Medicaid and the Affordable Care Act*, MEDICAID AND CHIP PAYMENT AND ACCESS COMM'N (MACPAC), https://www.macpac.gov/topics/aca-medicaid/#:~:text=The%20ACA%20also%20made%20a,and%20updating%20payments%20to%20safety%2D (last visited Dec. 12, 2023).

39. For people over 65, eligibility is determined either by SSI limits or stricter state-determined limits. *Medicaid Eligibility*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.medicaid.gov/medicaid/eligibility/index.html (last visited Dec. 12, 2023); Georgia Burke et al., *Medicaid and Supplemental Security Income Eligibility: Time for a Tune-up*, 12 NAT'L ACAD. OF ELDER L. ATT'YS J. (2016).

40. MACPAC, FACT SHEET: FEDERAL REQUIREMENTS AND STATE OPTIONS: ELIGIBILITY 7 (2017), https://www.macpac.gov/wp-content/uploads/2017/03/Federal-Requirements-and-State-Options-Eligibility.pdf.

41. Burke et al., *supra* note 39, at 4 n.10 (citing *Policy for States and State Choices*, PROGRAM OPERATIONS MANUAL SYSTEM (POMS) (Oct. 2, 2017), https://secure.ssa.gov/poms.nsf/lnx/0501715010).

42. AM. COUNCIL ON AGING, *supra* note 35; Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 [hereinafter OBRA] (codified at 42 U.S.C. § 1396p (2006)), at §§ 1396p(c)(1)(A)-(C).

43. *The Documentation Required to Verify Financial Eligibility for Long-Term Care Medicaid*, AM. COUNCIL ON AGING, https://www.medicaidplanningassistance.org/how-medicaid-verifies-income-assets/(last updated Feb. 28, 2023).

44. Robert East, *Note: Medicaid: A Safety Net for the "Wealthy"*, 19 IND. HEALTH L. REV. 455, 461–62, 468–70 (2022).

45. *Id*.

transferred to the beneficiary's living heirs.[46] Medicaid recipients may obtain an "undue hardship" waiver to protect certain assets,[47] and the state may not recover from a beneficiary's estate if they are survived by a spouse, a child under 21, or a disabled child.[48] Careful Medicaid planning can also protect beneficiaries' homes and other assets from estate recovery.[49]

C. Private Retirement Savings and Private Long-Term Care Insurance

1. Pensions & Private Savings

Job-based benefits and private pensions are tied to an individual's employment. These private retirement plans are governed by the Employee Retirement Income Security Act of 1974 (ERISA) which sets minimum standards and establishes protection for individuals who utilize these plans.[50] Less than half of the lowest quartile of earners have access to private retirement benefits, and even fewer of these individuals choose to participate in these plans.[51]

Individuals are encouraged to supplement their Social Security benefits with savings from private plans.[52] If policymakers do not take action to address the impending depletion of the Social Security trust fund, retirees in the near future will have to rely more heavily on their savings from private retirement systems.[53] Tax credits on retirement accounts incentivize retirement savings, but also are a massive expenditure, costing the federal government around $380 billion annually, which is equal to almost 40% of the amount the government pays out annually in Social Security benefits.[54] These tax credits, which were recently bolstered by the SECURE 2.0 Act, disproportionately benefit high earners since they receive higher subsidies on their contributions to retirement accounts and can wait longer to withdraw funds from their retirement accounts.[55]

46. *What is Medicaid Estate Recovery? And How Does It Work?*, NAT'L COUNCIL ON AGING (June 17, 2021), https://www.ncoa.org/article/what-is-medicaid-estate-recovery-and-how-does-it-work; 42 U.S.C.S. § 1396p.

47. 42 U.S.C.S. § 1396p(b)(3)(A).

48. 42 U.S.C.S. § 1396p(a)(2)(A)-(B); *see also Estate Recovery*, CTRS. FOR MEDICARE & MEDICAID SERVICES, https://www.medicaid.gov/medicaid/eligibility/estate-recovery/index.html (last visited Dec. 13, 2023).

49. *See* East, *supra* note 44, at 468–69.

50. ERISA, 29 U.S.C. ch. 18 §§ 1001–1461.

51. *TED: The Economics Daily – 73% of Civilian Workers had Access to Retirement Benefits in 2023*, U.S. BUREAU LAB. STAT. (Sep. 29, 2023), https://www.bls.gov/opub/ted/2023/73-percent-of-civilian-workers-had-access-to-retirement-benefits-in-2023.htm#:~:text=Less%20than%20half%20.

52. MICHAEL DORAN, THE GREAT AMERICAN RETIREMENT FRAUD 4 (2022), https://ssrn.com/abstract=3997927.

53. Social Security and Medicare Boards of Trustees, *A Summary of the 2023 Annual Reports*, SOC. SEC. ADMIN., https://www.ssa.gov/OACT/TRSUM/index.html (predicting depletion of the trust by 2034).

54. CHUCK MARR & SAMANTHA JACOBY, CTR. ON BUDGET AND POLICY PRIORITIES, House Bill Would Further Skew Benefits of Tax-Favored Retirement Accounts 1 (April 29, 2022), https://www.cbpp.org/research/federal-tax/house-bill-would-further-skew-benefits-of-tax-favored-retirement-accounts (citing DORAN, *supra* note 52, at 12.).

55. MARR & JACOBY, *supra* note 54; *see also* DORAN, *supra* note 52, at 64.

2. Long-Term Care Insurance

Private LTC insurance has gained in popularity among higher-income households because it has the potential to cost more than most individuals are capable of saving through their retirement funds.[56] Private LTC insurance is cost-prohibitive for lower-income couples and individuals but is a good option for households that have a moderate amount of retirement savings.[57] Purchasing LTC insurance also requires a considerable amount of foresight, as rates increase significantly for older individuals or those who are already in poor health.[58] An average LTC insurance policy covering up to $165,000 under this program ranges from around $80 per month to $125 per month for individuals and from $175 to $325 monthly for couples, depending on variables including the beneficiaries' age, health status, and gender, and whether the beneficiaries elect to pay a higher premium for inflation protection or not.[59]

The LTC Insurance Partnership Program provides beneficiaries with protection from asset limits and shelters these assets from estate recovery in the event that the beneficiary requires Medicaid assistance.[60] After their LTC insurance coverage runs out, the couple or individual will be able to seamlessly transition to Medicaid coverage and will be able to protect an equivalent amount of their assets to the amount that their LTC policy was worth.[61] Widespread participation in this program among middle-income households could help ease the burden on Medicaid's limited funding, which in turn would promote better quality LTC for truly low-income beneficiaries. Its appeal to middle-income seniors is dampened by the fact that it is relatively inexpensive and easy to qualify for Medicaid.[62]

D. Inequitable Policies Burdening Needy Retirees

LTC services are one of the largest financial risks that most elderly individuals will take on.[63] Since Medicare only insures against short-term nursing home stays, those who cannot afford to pay for a nursing home, assisted living stay, or home aide out-of-pocket may need to rely on Medicaid to cover these costs.

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56. National Institute on Aging*, Paying for Long-Term Care*, NAT'L INSTITUTES OF HEALTH, https://www.nia.nih.gov/health/long-term-care/paying-long-term-care (last visited Dec. 13, 2023).

57. Kelley C. Long, *The Long-Term Care Quandary: Helping Clients Prepare*, JOURNAL OF ACCOUNTANCY, (Oct. 14, 2021), https://www.journalofaccountancy.com/news/2021/oct/long-term-care-helping-clientsprepare.html#:~:text=According%20to%20HHS%2C%20women%20tend,for%20longer%20than%20five%20years (Accountants recommend LTC insurance to those with between $200,000 to $2 million in savings as a rule of thumb.); LIFEPLANS, WHO BUYS LONG-TERM CARE INSURANCE? TWENTY-FIVE YEARS OF STUDY OF BUYERS AND NON-BUYERS IN 2015-2016 7 (2017), https://www.ahip.org/documents/LifePlans_LTC_2016_1.5.17.pdf.

58. *See* National Institute on Aging, *supra* note 56.

59. *How Purchasing Long Term Care Insurance Can Help Medicaid Beneficiaries Protect Their Homes & Assets*, AM. COUNCIL ON AGING, https://www.medicaidplanningassistance.org/partnerships-for-long-term-care/(last updated Mar. 14, 2023).

60. *Id*.

61. *Id*.

62. POPE, *supra* note 33, at 12.

63. BASEL ET. AL, *supra* note 1, at 4.

Medicaid's strict asset tests are underinclusive as they fail to accurately capture neediness among the elderly population, and overinclusive as they may be circumvented through planning to allow those who are not truly needy to access Medicaid services while protecting their assets.

1. Spend-Down Requirements for SSI & Medicaid

Current SSI asset limits have not been indexed to inflation since 1972.[64] If SSI asset limits were adjusted for inflation in 2023, the asset limit would be close to $9,000 for individuals and close to $14,000 for couples.[65] The indexed limits would be around 78% higher than the current asset limits, which are $2,000 for individuals and $3,000 for couples. Similarly, the federal poverty line fails to capture an adequate measure of poverty for elderly individuals, especially those who suffer from health conditions or inhabit areas with a higher cost of living.[66] Almost every state uses these strict income and asset thresholds to establish Medicaid eligibility, with higher thresholds for those applying for Medicaid for nursing home care in certain states.[67] While income and asset limits must remain relatively low in order to fulfill Medicaid's promise to aid society's most vulnerable elderly individuals and maintain the program's long-term viability, it is also important that asset limits are not underinclusive and that they accurately reflect "neediness" among these individuals.

The Federal Supplemental Poverty Measure (SPM) and The Elder Index provide more accurate measures of poverty among elderly individuals in the United States. When policymakers refer to the high number of senior citizens lifted out of poverty by Social Security and the relatively low number of senior citizens living in poverty in general, they typically reference the federal poverty line as a measure of poverty.[68] The Federal SPM considers geographic variation in housing expenses, federal and state taxes, work expenses, and medical expenses.[69] While the percentage of older adults living under the federal poverty line in 2022 was

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64. *Policy Basics: Supplemental Security Income*, CTR. BUDGET AND POL'Y PRIORITIES, https://www.cbpp.org/research/social-security/supplemental-security-income (last updated Feb. 21, 2023).

65. Current limits are $2,000 in assets and $943 in income for individuals, $3,000 in assets and $1,371 in income for couples. *Id*.

66. Burke et al., *supra* note 39.

67. CTR. BUDGET AND POL'Y PRIORITIES, *supra* note 64; MaryBeth Musumeci et al., *Medicaid Financial Eligibility in Pathways Based on Old Age or Disability in 2022: Findings from a 50-State Survey*, KFF (July 11, 2022), https://www.kff.org/report-section/medicaid-financial-eligibility-in-pathways-based-on-old-age-or-disability-in-2022-findings-from-a-50-state-survey-appendix/("States can elect the "special income rule" option to allow people with functional needs who require an institutional level of care to qualify for Medicaid LTSS with incomes up to 300% SSI ($2,523 per month for an individual in 2022).").

68. *See* Andrew G. Biggs, *Social Security and the Poverty Line*, AM. ENTER. INST. (Sep. 26, 2022), https://www.aei.org/economics/social-security-and-the-poverty-line/#:~:text=Contrary%20to%20popular%20claims%2C%20the,well%20above%20the%20poverty%20line.

69. EMILY A. SHRIDER & JOHN CREAMER, POVERTY IN THE UNITED STATES: 2022 1 (2023), https://www.census.gov/content/dam/Census/library/publications/2023/demo/p60-280.pdf.

only 10%, under the more comprehensive Federal SPM, the percentage of older adults living in poverty was 14.4% in 2022, up from 10.7% in 2021.[70]

The Elder Index provides an even better depiction of the financial needs of the elderly, measuring the income that elderly adults need "to meet their basic needs and age in place with dignity" based on an individual's location, status as a homeowner, and health needs.[71] For example, a healthy individual over the age of 65 who owns their home outright in the Washington, D.C. metro area needs $2,318 per month to meet their needs. In contrast, that same individual would only require $1,892 per month if they lived in rural Accomack County on Virginia's eastern shore.[72] A healthy individual who owns their home with a mortgage, on the other hand, requires $3,798 monthly in the Washington, D.C. area, and $2,929 monthly in Accomack County.[73] Renters fall in between these metrics, requiring slightly less than homeowners with mortgages to maintain their standard of living.[74] The average Social Security benefit of $1,825 per month in 2023, which is significantly lower for women and people of color, would be inadequate to cover the needs of an elderly individual in either of these households.[75] Since Social Security benefits are based on an individual's taxable earnings, retirees who worked low-wage jobs receive significantly lower benefits than average.[76]

As eligibility for Medicaid is indexed to the Federal Poverty Line and SSI eligibility in most states, many individuals with assets and income over these limits who cannot qualify for Medicaid assistance lack sufficient income to meet their basic needs.[77] Poverty measures used to index asset limits also do not necessarily capture "financial insecurity," which is common among elderly households.[78] Nearly 80% of older American households are financially insecure, meaning that they would struggle to handle a financial shock, such as a "significant long-term care need, health issue, or loss of income due to divorce or widowhood."[79] LTC is by far the weightiest of these risks, as 80% of adults would be unable to afford two years of nursing home care, and 60% of adults would be unable to afford in-home LTC services.[80]

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70. *Id*. at 7–10.

71. *The Elder Index – Measuring the Income Older Adults Need to Live Independently*, GERONTOLOGY INSTITUTE AT UNIVERSITY OF MASSACHUSETTS BOSTON, https://elderindex.org/(last updated Feb. 14, 2023).

72. *Id*.

73. *Id*.

74. *See id*.

75. *Fast Facts & Figures About Social Security, 2023*, SOCIAL SECURITY OFFICE OF RETIREMENT AND DISABILITY POLICY, https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2023/fast_facts23.html (last visited Dec. 14, 2023).

76. *2023 OASDI Trustees Report – Table V.C7. – Annual Scheduled Benefit Amounts for Retired Workers With Various Pre-Retirement Earnings Patterns Based on Intermediate Assumption*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/tr/2023/lr5c7.html.

77. Burke et al., *supra* note 39, at 5 n.16.

78. BASEL ET AL., *supra* note 1.

79. *Id*. at 2.

80. *Id*. at 2–4.

To qualify for Medicaid assistance, individuals over the income limit may divest their assets, including their homes, into Miller Trusts or Medicaid Asset Protection Trusts, or may otherwise "reposition" their assets to non-countable resources.[81] These methods of Medicaid planning are expensive and require foresight to avoid look-back periods. Medicaid Asset Protection Trusts, for example, are only recommended for those with assets over $100,000 because they are costly to set up.[82] There is a bevy of Medicaid planning options available to couples and individuals who have enough money and know-how, but to lower-income households who have minimal surplus assets to "spend down," these options are unattainable.[83] Strict asset limits additionally may discourage lower-income households from saving for retirement, as savings accounts and private retirement accounts are often subject to asset limit tests.[84]

2. Medicaid Estate Recovery

State receipt of federal Medicaid funding is conditioned upon the state's compliance with certain conditions set by the Federal Medicaid Statute, including creating a state-run "Estate Recovery" program.[85] The Medicaid Estate Recovery provision of the Omnibus Budget Reconciliation Act of 1993 (OBRA) requires states to create and administer a program to recoup Medicaid expenses from certain beneficiaries through the seizure of the beneficiary's estate.[86] States must pursue recovery for nursing facility services, home-and-community-based services (HCBS), and for hospital and prescription drug services related to the aforementioned care services, while recovery for any other services rendered under the state plan is optional.[87] States are permitted to recover from a decedent's entire estate, and may elect to collect from non-probate assets, including assets conveyed to heirs or assigned through devices like joint tenancies, living trusts, and life estates.[88] Upon the death or permanent institutionalization of a Medicaid beneficiary, the individual's remaining assets may be vulnerable to Medicaid Estate

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81. East, *supra* note 44, at 468.

82. *How Medicaid Planning Trusts Protect Assets and Homes from Estate Recovery*, Am. Council on Aging, https://www.medicaidplanningassistance.org/asset-protection-trusts/(last updated Feb. 1, 2024).

83. Am. Council on Aging, *supra* note 82; East, *supra* note 44, at 468.

84. Rebecca Vallas & Joe Valenti, *Asset Limits are a Barrier to Economic Security and Mobility*, Ctr. for Am. Progress (Sep 10, 2014), https://www.americanprogress.org/article/asset-limits-are-a-barrier-to-economic-security-and-mobility/.

85. U.S. Const. art. I, §8; Omnibus Budget Reconciliation Act, 42 U.S.C. § 1396p(b)(3); *see* West Virginia v. United States Dep't of Health & Human Services, 289 F.3d 281, 284–85 (4th Cir. 2002) (holding that the estate recovery requirement is not impermissibly coercive, so it is a valid exercise of Congress' spending clause power). If the Secretary of Health and Human Services finds that a state's plan fails to comply substantially with any provisions set out in the statute, the Secretary may entirely or partially stop making payments to that state until it remedies its failure to comply. 42 U.S.C. § 1396c.

86. 42 U.S.C. § 1396p.

87. MACPAC, Chapter 3: Medicaid Estate Recovery: Improving Policy and Promoting Equity 83 (2021) [hereinafter MACPAC Report].

88. 42 U.S.C. § 1396p(b)(4)(B).

Recovery claims.[89] Estate recovery has generated substantial backlash from states who wish to protect the assets of their most vulnerable inhabitants and from individuals subjected to estate recovery claims on their inheritances.[90]

The federal government justifies the estate recovery requirement because 1) the program helps fund vital Medicaid services for vulnerable individuals including poor senior citizens, 2) beneficiaries are informed of estate recovery provisions before they elect to receive Medicaid benefits, and 3) the provisions do not come into effect when the beneficiary has a surviving spouse or dependent child.[91] Additionally, the federal Medicaid statute provides for waivers which allow certain beneficiaries to retain their home if estate recovery would cause an "undue hardship" for the beneficiary or their family.[92] Proponents of estate recovery favor the view that receiving free benefits under Medicaid is a privilege, not a right, and that recipients of benefits who opt in to Medicaid should expect to pay back for at least some of the services they receive.[93]

While arguments for mandatory estate recovery find strength in their pragmatism, this pragmatic approach to Medicaid funding overlooks the fact that estate recovery, as currently utilized, generates a relatively small amount of revenue for the state while creating a wide range of non-financial problems.[94] Estate recovery actions between 2015-2019 made up less than 1% of spending on fee-for-service (FFS) long-term services and supports (LTSS) in most states.[95] Although Medicaid is a social welfare program meant to aid society's most vulnerable elderly individuals, the existence of estate recovery sets Medicaid apart from its peer programs, including Social Security and Medicare; it is the only public benefit program that requires correctly paid benefits to be recouped through state seizure of the deceased beneficiary's assets.[96] Furthermore, estate recovery was universally implemented in 1993, after Medicaid had been operating for almost 30 years without requiring states to implement estate recovery programs.[97]

Since Medicaid requirements vary by state and are unpredictably enforced, it is difficult for beneficiaries to understand what sort of risk they are taking on when they opt in to Medicaid coverage.[98] For example, some states administer Medicaid funds through a monthly fixed rate "managed care" model, while others

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89. 42 U.S.C. § 1396p.

90. West Virginia and Michigan have challenged the estate recovery requirement. JUSTICE IN AGING ET AL., MEDICAID ESTATE CLAIMS: PERPETUATING POVERTY & INEQUALITY FOR MINIMAL RETURN 3 (2021).

91. West Virginia, 289 F.3d at 284–85 (citing 42 U.S.C. § 1396p(b)(1)).

92. 42 U.S.C. § 1396p(a)(3)(A).

93. Lauren S. Winchell, Note, *TennCare: Expanded Estate Recovery - Recover at ALL Cost*, 45 U. MEM. L. REV. 711, 748 (2015).

94. *See generally* JUSTICE IN AGING ET AL., *supra* note 90.

95. MACPAC Report, *supra* note 87, at 89.

96. JUSTICE IN AGING ET AL., *supra* note 90, at 2.

97. Twelve states had implemented estate recovery plans prior to the 1993 OBRA, but the effect of these plans is unknown. U.S. DEP'T OF HEALTH AND HUM. SERV., OFF. TO THE ASSISTANT SEC'Y FOR PLAN. AND EVALUATION, MEDICAID ESTATE RECOVERY 2 (2005).

98. MACPAC Report, *supra* note 87, at 84.

administer them through an FFS model.[99] When states pursue estate recovery against individuals enrolled in managed care plans, the state may recover the full amount of monthly payments made on behalf of the beneficiary, regardless of whether the beneficiary used any Medicaid services.[100] State standards for undue hardship waivers to estate recovery vary wildly, as states are granted a high degree of flexibility to determine their own parameters for granting hardship waivers.[101] Furthermore, some states recover only from a decedent's probate estate, while other states allow recovery from a decedent's non-probated assets, as well, in effort to thwart some Medicaid planning tactics.[102]

The Medicaid statute does not define "undue hardship," although the House Budget Committee issued some considerations for the creation of undue hardship criteria, including advocating for leniency when the home is a sole source of modest income to heirs, is a "homestead of modest value," or when there are "other compelling circumstances."[103] States have some discretion to define a "homestead of modest value," but cannot use methodology that sets the value so high as to "negate the intent of the estate recovery program."[104] The Secretary of Health and Human Services has approved undue hardship provisions like New Mexico's, which designates a "homestead of modest value" as a home worth 50% or less of the average price of homes in the surrounding county.[105] On the other hand, the Fourth Circuit struck down an undue hardship provision proposed by West Virginia that exempted an amount equal to the statewide average value of a home, reasoning that it was "overbroad."[106]

States' interpretations of what assets make up a recoverable estate also vary. States have discretion as to whether they will elect to recover from probate and non-probate assets or only from probate assets.[107] In simple terms, probate assets are those which pass through a last will and testament or through the state probate proceeding at the time of the decedent's death, while non-probate assets are assigned to heirs through other devices.[108] Litigation has arisen over "state statutory deficiencies," which occur when a state's statute fails to encompass non-probate devices utilized to transfer a decedent's property.[109] While states that elect to

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99. *Id*. at 82–83.

100. *Id.*; *see also* Samantha Wildow, *Medicaid Estate Recovery Can Charge Ohioans More Than Medical Care Provided*, DAYTON DAILY NEWS (Oct. 25, 2023), https://www.daytondailynews.com/ohio/medicaid-estate-recovery-can-charge-ohioans-more-than-medical-care-provided/X72RGEEB2FCHNOUL23NSN2GRPE/.

101. MACPAC Report, *supra* note 87, at 88; 42 U.S.C. § 1396p(b)(3).

102. 42 U.S.C. § 1396p(b)(4)(B); *see also* Raymond C. O'Brien, *Selective Issues in Effective Medicaid Estate Recovery Statutes*, 65 CATH. U. L. REV. 27, 43 (2015).

103. West Virginia v. Thompson, 475 F.3d 204, 207–208 (4th Cir. 2007) (citing H.R. CONF. REP. NO. 103-111, at 209 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 378, 536).

104. *Id*. at 208.

105. *Id*.

106. *Id*. at 213.

107. OBRA, 42 USCS § 1396p(b)(4)(B), *see also* O'Brien, *supra* note 102, at 43.

108. OBRA, 42 USCS § 1396p(b)(4)(B), *see also* O'Brien, *supra* note 102, at 44.

109. OBRA, 42 U.S.C.S. § 1396p(b)(4)(B), *see also* O'Brien, *supra* note 103, at 43 n.113.

recover from non-probate estates help shift some of the burden off of those who cannot afford to utilize Medicaid planning to protect their assets, the revenue generated by estate recoveries remains insignificant.

The assets at stake in estate recovery actions by the state are far more valuable to beneficiaries and their families than they are to the state.[110] As noted above, funds from estate recoveries contribute to less than 1% of state Medicaid funding in most states. Home ownership is seen as a major achievement. Lower-income homeowners work diligently to purchase and pay off their homes, and often derive great satisfaction from leaving their homes to their heirs.[111] Home ownership is seen by many as one of the safest and most foolproof methods of building intergenerational wealth and as a key stepping stone to help families escape poverty.[112] The Baby Boomer generation has the highest rate of home ownership in the United States, with approximately 80% of Baby Boomer couples and individuals owning their homes.[113] In fact, home equity represents between 60% and 80% of most older homeowners' net worth.[114]

Since higher-income beneficiaries have more access to estate planning options, they are able to protect their homes from estate recovery which likely significantly decreases the returns of the estate recovery program.[115] Estate recovery therefore disproportionately affects Medicaid's lower-income beneficiaries and their families.[116] These individuals are less likely to be aware of estate recovery or have access to Medicaid planning resources like elder law and estate planning attorneys.[117] They are not middle-income retirees who strategically spent down their assets with the assistance of an attorney in order to receive Medicaid services and pass down resources to their heirs; rather, they are individuals with very modest levels of home equity who otherwise are low-income and asset-poor enough to qualify for Medicaid assistance.[118] The heirs of this type of beneficiary are deprived of a home which would protect them from housing insecurity or serve as a vital source of income, and could help break the cycle of

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110. Just. in Aging, *supra* note 91, at 5.

111. *See id.* at 3–4.

112. Michael R. Diamond, *The Meaning and Nature of Property: Homeownership and Shared Equity in the Context of Property*, 29 St. Louis U. Pub. L. Rev. 85, 103–104 (2009), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1422&context=facpub.

113. Dana Anderson & Sheharyar Bokhari, *The Race to Homeownership: Gen Z Tracking Ahead of Their Parents' Generation, Millennials Tracking Behind*, RedFin (April 21, 2023), https://www.redfin.com/news/gen-z-millennial-homeownership-rate-home-purchases/.

114. National Council on Aging, The 80%: Four Ways to Help Retirees Make Their Money Last 5 (2020), https://assets-us-01.kc-usercontent.com/ffacfe7d-10b6-0083-2632-604077fd4eca/cb3ef5d5-2183-4720-bdb5-d0b5c4d848c2/2021-FWP-DG03_The%2080_White%20Paper_FINAL.pdf.

115. Sarah True, *Debt After Death: The Painful Blow of Medicaid Estate Recovery*, U.S. News & World Rep. (Oct. 14, 2021), https://www.usnews.com/news/health-news/articles/2021-10-14/debt-after-death-the-painful-blow-of-medicaid-estate-recovery.

116. MACPAC Report, *supra* note 87, at 84; Just. in Aging, *supra* note 91, at 3–4.

117. MACPAC Report, *supra* note 87, at 84; Just. in Aging, *supra* note 91, at 3–4.

118. *See* MACPAC Report, *supra* note 87, at 84; *see also* True, *supra* note 115.

multigenerational poverty.[119] This issue is likely further exacerbated in rural areas, where the population skews older and individuals often lack easy access to basic legal services.[120]

While estate recovery aims to recover funding to continue providing good-quality Medicaid care to low-income individuals, it fails to raise a significant amount of revenue due to its inefficient and unpredictable administration across states and the ease with which assets may be protected.[121] To promote fairness and equity, estate recovery should either be reformed to facilitate recovery from a portion of the full estates of every user of Medicaid, or eliminated entirely. Estate recovery provisions as currently administered are ineffective and inequitable.

III. America's Retirement System Perpetuates Inequality Across Generations

Several features of America's retirement system, outlined above, incentivize some individuals to engage in Medicaid planning to protect their assets. The system encourages workers to privately save for retirement to supplement their Social Security benefits; sets asset limits for SSI and Medicaid very low, but allows pathways around these limits; and forces states to recoup Medicaid expenses from the estates of beneficiaries. These same features disproportionately disadvantage Medicaid's neediest elderly beneficiaries, who are less likely to have accumulated significant private savings, often live without sufficient income to cover their cost of living, and may have homes that are more vulnerable to estate recovery proceedings. In this way, the retirement system unfairly perpetuates inequality across generations.

A. Necessary Medical Services Should Not Be a "Luxury," but Medicaid Planning Should Be

The potential for acquisition of surplus wealth allows individuals to develop desires for items beyond those that they need to stay alive, and in turn, these desires motivate individuals to work hard to earn the resources they need to achieve their desires.[122] While the meaning of "surplus" has changed greatly since thinkers like David Hume considered it in the 18th century, the concept itself provides a helpful framework under which to consider modern-day problems. American policy should seek to encourage the accumulation of a reasonable level

119. MACPAC Report, *supra* note 87, at 84.

120. *See* James C. Davis et al., USDA Econ. Rsch. Serv., Rural America at a Glance 9 (2022) (In 2021, people 65 and older made up 20% of the rural/"non-metro" population for the first time in U.S. history.); *see also* Nick Devine, *Equality Before the Law: Ending Legal Deserts in Rural Communities*, Geo. J. on Poverty L. & Pol'y (Nov. 3, 2020), https://www.law.georgetown.edu/poverty-journal/blog/equality-before-the-law-ending-legal-deserts-in-rural-counties/ (People living in rural communities have significantly less access to legal resources than those living in non-rural communities.).

121. *See* MACPAC Report, *supra* note 87, at 88–89.

122. David Hume, Essays Moral, Political, and Literary 261 (Eugene F. Miller, eds. 1987) (1907), https://ebookcentral-proquest-com.proxy.library.georgetown.edu/lib/georgetown/reader.action?docID=3327325&ppg=1 ("Every thing in the world is purchased by labour; and our passions are the only causes of labour.").

of surplus wealth among all its citizens, and to reward retired senior citizens for their lifelong contributions to the state through their labor and taxes.[123] This modest accumulation of surplus facilitates the purchases of goods and services beyond those necessary for day-to-day life ("luxuries") by the working class, which encourages the development of a strong and industrious middle-income group.[124]

American policy encourages individuals to save money for retirement costs, both through the mandatory payroll tax that funds Social Security and through private retirement accounts like IRAs and 401ks.[125] Retired senior citizens are compensated for their lifelong contributions to society through Social Security benefits and Medicare health insurance coverage. Whether someone's retirement savings are surplus or not depends on many factors, including their medical needs, their family situation, and the duration of their ability to live independently outside of an assisted living facility or nursing home.

Surplus is wealth beyond that which is required to purchase the resources and services that one needs to live,[126] and income and asset limits define what constitutes surplus for retired individuals. Since income and asset limits have not been indexed for inflation and do not accurately reflect a bare-minimum cost of living for many senior citizens, "surplus" beyond these limits does not adequately reflect true surplus that can be spent on luxury items. Medical supplies, required care, and even LTC services should not be treated like "luxuries" or "privileges" when these goods and services are necessary to keep an individual healthy and living comfortably. Social welfare programs reflect this proposition: Medicare is meant to make healthcare services accessible for senior citizens, and Medicaid is meant to provide a safety net for necessary healthcare services not covered by Medicare, such as LTC, for those who cannot afford these services out-of-pocket and are not otherwise insured against these costs.[127]

High-earning retirees who derive their income from Social Security, retirement accounts, and other savings have a considerable amount of surplus wealth, and consequently are typically able to spend their wealth on commodities and services and stimulate the economy while still maintaining assets to pass on to their heirs.[128] Middle-income retirees are more likely to be economically insecure, potentially lacking in surplus, and may utilize Medicaid planning to avoid taking on the huge financial risk of unexpected LTC needs, while also preserving

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123. *Id.* at 261–62.

124. I am grateful to Professor Heidi L. Feldman for this point.

125. Dushi et al., *supra* note 4.

126. I am grateful to Professor Heidi L. Feldman for this point.

127. BARBARA S. KLEES ET AL., CTRS. FOR MEDICARE & MEDICAID SERVS., BRIEF SUMMARIES OF MEDICARE & MEDICAID 6, 18 (2009), https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/medicareprogramratesstats/downloads/medicaremedicaidsummaries2009.pdf.

128. Wolfgang Fengler, *The Silver Economy is Coming of Age: A Look at the Growing Spending Power of Seniors*, BROOKINGS (Jan. 14, 2021), https://www.brookings.edu/articles/the-silver-economy-is-coming-of-age-a-look-at-the-growing-spending-power-of-seniors/.

their surplus wealth and assets for their heirs.[129] Advocates of Medicaid planning appeal to middle-income households, noting the devastating risk of losing the fortune that one worked, saved, and invested in because of the staggering cost of LTC, as well as the value of leaving a legacy to one's heirs.[130]

Truly low-income retirees, on the other hand, often receive less in Social Security or SSI benefits than they would require to maintain an adequate standard of living, are discouraged from saving money through the strict enforcement of asset limits, and are less likely to gain access to information about or assistance with Medicaid planning. Their inability to accumulate surplus or preserve assets to pass on to heirs perpetuates intergenerational poverty.[131] Since the home is excluded from eligibility assessments, it is very often the sole significant asset that remains in possession of a low-income beneficiary.[132] For those with living heirs whose assets consist chiefly of their home, the threat of Medicaid estate recovery looms.[133] For those low-income beneficiaries who will die without an estate or heirs, the strain on Medicaid funding that results from Medicaid planning leads to lower-quality LTC services. This is disproportionately evident in nursing homes in poorer communities that are typically home to larger minority populations.[134]

Necessary medical care, in contrast to leaving an inheritance to one's heirs, should not be so unattainable as to be likened to a privilege or a luxury. Since not everyone can access or afford Medicaid planning services, it is important to consider whether Medicaid planning should be defined as either a luxury or as a necessity. The chief object of Medicaid planning may be to protect an inheritance of money or property meant for one's heirs from the risk of estate recovery. Leaving an inheritance to one's heirs may feel like a necessity but should be considered a luxury unless the heirs are dependent on the decedent, which the Medicaid statute already accounts for.[135]

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129. *Is Medicaid Planning Considered Ethical?*, ELDER LAW ANSWERS, https://www.elderlawanswers.com/is-medicaid-planning-ethical-1175 (last updated July 29, 2024) ("Medicaid has by default become the long-term care insurance of the middle class.").

130. *See generally* Martin Schamis, *How to Restructure Your Assets to Qualify for Medicaid*, KIPLINGER (Nov. 7, 2021), https://www.kiplinger.com/personal-finance/insurance/health-insurance/603705/how-to-restructure-your-assets-to-qualify-for; C. Michael Shallowy, *Ethical Issues in Medicaid Planning*, 1 MARQUETTE ELDER'S ADVISOR 49 (2000), https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1302&context=elders; Ron Lieber, *The Ethics of Adjusting Your Assets to Qualify for Medicaid*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/your-money/estate-planning/the-ethics-of-adjusting-your-assets-to-qualify-for-medicaid.html.

131. MACPAC Report, *supra* note 87, at 84.

132. JUSTICE IN AGING, *supra* note 90, at 3.

133. *Id*.

134. Vincent Mor et al., *Driven to Tiers: Socioeconomic and Racial Disparities in the Quality of Nursing Home Care*, 82 THE MILBANK QUARTERLY 227, 230–33 (2004), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690171/.

135. Estate recovery provisions do not take effect while there is a surviving spouse or dependent child of the beneficiary or when they would work an "undue hardship." West Virginia v. United States Dep't of Health & Human Services, 289 F.3d 281, 285 (4th Cir. 2002) (citing OBRA §§ 1396p(b)(1)-(3)).

Another chief object of Medicaid planning may be to maintain adequate funds to pay for necessities that cost more than one can afford while adhering to Medicaid's strict income and asset limiting tests. As noted above, Medicaid's asset limits fail to accurately delineate "neediness," and many people who are above Medicaid's asset and income limits cannot afford all their medical necessities. However, if an elderly individual or couple would quickly become entirely impoverished if they had to pay for HCBS or LTC services using their Social Security benefits and private retirement savings, Medicaid planning and strategic spending-down may arguably be defined as a necessity for them. This argument is weakened by the availability of relatively affordable LTC insurance for middle-income retired households that can afford Medicaid planning and cost-sharing pathways in some states. It is also weakened by the fact that a person with income under the set limit can apply for Medicaid at any time once they naturally "spend down" their assets over the course of their retirement without concern for leaving an inheritance.[136]

If an elderly individual or couple could afford to pay for HCBS or LTC services and instead strategically engages in Medicaid planning to maintain their surplus wealth and pass it onto their heirs, Medicaid planning should be defined as a luxury, since it is beyond what they need to continue adequately providing for themselves. It may be useful here to consider the comprehensive income metrics provided by the Elder Index as the level of income that elderly households require to provide for themselves.[137] Medicaid's function as a social safety net kicks in for all applicants who drop below the set asset and income limits. For those whose income is below the level they need to provide for their medical needs but above Medicaid's income limits, cost-sharing options can alleviate the strain on these households. Since Medicaid offers eligibility at a higher-income threshold for LTC coverage, [138] it is unlikely that there are many seeking LTC services who fall into this gap. However, Medicaid's asset threshold for LTC services remains low, which may encourage Medicaid planning efforts to hide or protect assets.[139] Although necessary medical treatment offered by Medicaid itself is not a luxury, the act of Medicaid planning to obtain these services should be classified as a luxury.

David Hume distinguishes between innocent luxuries and vicious luxuries, and argues that luxuries exist along a spectrum, with some being socially

136. MACPAC, FEDERAL REQUIREMENTS AND STATE OPTIONS: HOW STATES EXERCISE FLEXIBILITY UNDER A MEDICAID STATE PLAN 1–2 (2018), https://www.macpac.gov/wp-content/uploads/2017/03/Federal-Medicaid-Requirements-and-State-Options-How-States-Exercise-Flexibility-Under-a-State-Plan.pdf.

137. *See* THE ELDER INDEX, *supra* note 71.

138. Medicaid LTC income eligibility is typically set at $2,829 per month for individuals. *Answers to All Your Questions About Medicaid Long Term Care*, AM. COUNCIL ON AGING, https://www.medicaidplanningassistance.org/medicaid-long-term-care-faq/(last visited Oct. 18, 2024).

139. However, LTC asset limits are only $2,000 in most states. *Id.*

beneficial and others socially harmful.[140] This distinction may help to parse out the harmful effects of Medicaid planning, and to shape socially beneficial modern solutions to these effects. Hume defines innocent luxuries as refinements in the arts and conveniences of life that are advantageous to the public, and states that "once a luxury ceases to be innocent, it also ceases to be beneficial; and when carried a degree farther, begins to be a quality pernicious. . . to political society."[141] Policymakers should consider innocent luxuries to be useful incentives to encourage constituents to work hard and save money, and leverage the power of these incentives to implement successful retirement policy. A vicious luxury, on the other hand, is a luxury that "engrosses all" of a man's money, and "leaves no ability for such acts of duty and generosity as are required by his situation and fortune."[142] This type of luxury is undesirable, and policymakers should shape policies that dissuade constituents from engrossing themselves in vicious luxuries.

Medicaid planning exacerbates existing inequalities. When people have sufficient assets to pay for some of their LTC or LTC insurance without significantly compromising their quality of life but engage in Medicaid planning to avoid paying for their own care and preserve wealth for their heirs, they increase the burden on Medicaid's limited funding.[143] This implicitly places a higher burden on those who do not have the luxury of Medicaid planning, as the overextension of the Medicaid system has a ripple effect on the quality of Medicaid LTC that is offered to all beneficiaries, particularly those residing in rural or impoverished regions.[144]

Accordingly, Medicaid planning is not an innocent luxury by any means, and could be deemed a "vicious luxury," as it also rids individuals of their ability to act dutifully and generously to society.[145] Qualifying for Medicaid through extensive, attorney-assisted planning frustrates legislative intent and risks causing a variety of negative social effects.[146] As mentioned above, the overburdening of the Medicaid LTC system decreases the quality of LTC for all beneficiaries.[147] Additionally, when states cannot access the assets of beneficiaries who engaged in Medicaid planning to protect their assets, they are forced to recover more frequently from the estates of beneficiaries who did not have the luxury of Medicaid planning.[148] The heirs of these lower-income beneficiaries are thus deprived of a

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140. DAVID HUME, OF REFINEMENT IN THE ARTS 106 (Knud Haakonssen ed., Cambridge Univ. Press 1994) (1752).

141. *Id.*

142. *Id.* at 113.

143. POPE, *supra* note 33, at 12.

144. *Id.* at 1011.

145. HUME, *supra* note 141, at 113.

146. *See e.g.*, In re Estate of Barg, 752 N.W.2d 52, 58 (Minn. 2008) (citing Martin ex rel. Hoff v. City of Rochester, 642 N.W.2d 1, 13 (Minn. 2002) ("Medicaid was intended to be the payor of last resort.") (citing H.R. CONF. REP. NO. 99-453, at 542 (1985))).

147. MACPAC Report, *supra* note 87, at 84.

148. *Id.*

valuable source of income and housing stability, while heirs of higher income beneficiaries are not.[149]

Proponents of Medicaid planning argue that it benefits the general public by securing a guarantee of inexpensive medical care for lower- and middle-income people in their old age, protecting low- to middle-income households from being plunged into poverty, and allowing less wealthy people to pass along a modest portion of their hard-earned money or their home to their heirs.[150] Through Medicaid planning, those who have relatively modest retirement savings may pass on their assets, including their home, to their heirs and begin to build intergenerational wealth to protect their family and community for generations to come. By framing Medicaid planning as a method by which hardworking individuals can protect their assets from the state and pass on an inheritance, proponents adopt the Humean argument that "sloth and idleness" are more injurious than luxury.[151]

Hume argues that luxuries, even vicious ones, might be preferable to other vices he terms "sloth and idleness," because these vices are more injurious to society.[152] In the context of Medicaid planning, there is an argument to be made that people are highly incentivized to work by the possibility of making a lasting fortune for their family, and that Medicaid planning allows people to work hard, save for retirement, purchase a home, and not bankrupt themselves paying for LTC. Additionally, social safety net programs like Medicaid arguably encourage sloth and idleness by guaranteeing a baseline of social insurance for people who do not work during their adult years and consequently save little to no money and generate little to no income.[153] While this line of thinking is pragmatically appealing, today a wide variety of factors can cause people to fail to save sufficiently for retirement, including the staggering cost of retirement care, increasing lifespans, low wages, job insecurity, inability to obtain or maintain steady employment due to poor or failing mental or physical health, and obligations to care for family members.[154] As noted above, low-wage jobs lead to low Social Security benefits, and low earners are much less likely to have access to or utilize private retirement saving options, regardless of how hard they work.[155]

It is unfair to burden individuals with the responsibility of mitigating the negative effects that their choice to engage in Medicaid planning inflicts on others,

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149. POPE, *supra* note 33, at 10–11.

150. For many individuals, leaving an estate to their heirs, however meager, is a point of pride. Others feel as though they deserve Medicaid as taxpayers who paid into the system, especially since plenty of foreign governments cover the costs of LTC for their citizens. *See* Lieber, *supra* note 131.

151. Hume, *supra* note 141, at 280.

152. *Id.* ("Luxury, when excessive, is the source of many ills; but is in general preferable to sloth and idleness, which would commonly succeed in its place, and are more hurtful both to private persons and to the public. When sloth reigns, a mean uncultivated way of life prevails amongst individuals, without society, without enjoyment.").

153. *Id.* at 279–80 ("By banishing *vicious* luxury, without curing sloth and an indifference to others, you only diminish industry in the state, and add nothing to men's charity or their generosity.").

154. Off the top of the author's head.

155. U.S. BUREAU LAB. STAT., *supra* note 51.

because those who engage in Medicaid planning are likely unaware of the burden they place on other beneficiaries. The burden here should instead be placed on those who created the policies that underlie the existing incentive structure. Policymakers can harness the beneficial incentivizing effects generated by allowing for a modest acquisition and preservation of surplus by beneficiaries through reforming Medicaid's asset limit tests and estate recovery programs. At the same time, the negative social effects of Medicaid planning could also be ameliorated by reforming asset limit tests to prevent asset-rich individuals from qualifying for Medicaid; providing for more comprehensive undue hardship waivers and allowing estate recovery from non-probate assets; and promoting reasonably priced alternatives to Medicaid planning, like the LTC Insurance Partnership program. These solutions will be outlined in the next section.

B. Equitable Solutions

Legislators and rule makers at the state and federal levels should seek to prevent those who are not truly needy from accessing Medicaid funds to avoid perpetuating economic inequality across generations, prevent the frustration of legislative intent, and ensure that Medicaid remains a viable social safety net program. At the federal level, tax reform could free up funding to bolster Medicaid's services. At the state level, states should consider proposing State Plan Amendments (SPAs)[156] to address the inequitable outcomes that arise under the current administration of Medicaid. Specifically, for the reasons outlined in Section I, the conception of "surplus" in state programs must be redefined to set asset limits that accurately capture "neediness." For the reasons outlined in Section II, Congress should revoke the requirement that states implement an estate recovery process. As it is unlikely that the federal government will stop enforcing estate recovery, states should use their discretion to provide for more uniform and fair standards on the definition of an estate and on the granting of undue hardship waivers.

SSI and Medicaid income and asset limits for elderly households must be adjusted for inflation, and this adjustment should follow the Elder Index's lead in taking specialized metrics like variances in cost of living and health care costs into account.[157] The CMS or Congress should implement a "floor" here but allow states flexibility to increase the floor. A retiree who is aging in places like San Francisco or Manhattan will have a very different cost of living than a retiree aging in a place like rural West Virginia, so income and asset limits should be indexed based on more flexible standards than the existing model of asset and income thresholds.[158] At the same time, legislation should seek to ease the burden

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156. States amend their plan by submitting State Plan Amendments (SPAs) for approval to The Centers for Medicare and Medicaid Services (CMS). 42 USC §§ 1396-1–1396(a).

157. Allison Hydzik & Anastasia Gorelova, *Changes to Outdated Medicaid Limits for Seniors Could Improve Eligibility for Minorities and Those in Poorer Health,* U. OF PITTSBURGH MED. CTR. (Dec. 6, 2021), https://www.upmc.com/media/news/120621-sabik-medicaid-asset-test; *see also* Burke et al., *supra* note 39; THE ELDER INDEX, *supra* note 71.

158. *See* THE ELDER INDEX, *supra* note 71.

of overly restrictive asset limit tests and of estate recovery on low-income beneficiaries who are just above the state-imposed limits.[159] The implementation of a new "high wealth category" asset test, which would bar potential enrollees who own high-value homes, secondary residences, businesses, and investments from qualifying for Medicaid assistance without doing so through the purchase of a partnership program LTC Insurance policy could address some of these concerns.[160]

To assist lower- and middle-income retirees, the federal government should create further incentives to purchase LTC insurance, encourage lower-cost alternatives to institutional LTC, and reform the treatment of private retirement accounts to promote the interests of lower- and middle-income earners. Policymakers should focus on promoting the existing LTC insurance partnership program to those who can afford to participate.[161] LTC insurance is unattractive because it is difficult to predict whether someone will require LTC and how long they will need it for, and because it is cost-prohibitive.[162] The partnership program allows beneficiaries to secure protection of portions of their assets from Medicaid's spend down and recovery requirements and allows them to seamlessly transition into Medicaid coverage when their policy runs out, making it an attractive option to those who would otherwise engage in Medicaid planning.[163] Federal treatment of taxation of private retirement accounts must be reformed to promote the interests of lower-income earners and decrease government spending on subsidies that disproportionately benefit high-income households.[164] While many low-income households do not utilize private retirement accounts, a decrease in government spending on these subsidies could free up funding to bolster the quality of Medicaid care or prolong the lifespan of the Social Security and Medicare trusts that benefit all retirees.[165] Reform might look like tightening subsidies for high earners and scaling back provisions that allow high earners to shelter their investments from taxes by delaying withdrawal, which could generate billions of dollars in savings for the federal government.[166]

Finally, the estate recovery program should be reformed to prevent disproportionate recovery from Medicaid's poorest homeowning beneficiaries. This may be accomplished through broadening the protections of undue hardship waivers, and by creating a "floor" below which the state may not recover from the decedent's estate. States should look to undue hardship provisions that have been approved or denied in the past when crafting provisions that are not overly broad

159. Hydzik & Gorelova, *supra* note 157 (proposing four potential solutions to fix the outdated asset tests, including indexing to inflation, increasing asset limits, and imposing a high-asset test, all of which would target a population that is more likely to be non-white and to report being in poorer health).

160. *Id.*

161. American Council on Aging, *supra* note 59.

162. Pope, *supra* note 33, at 7–8; LifePlans, *supra* note 57, at 8.

163. People prefer this type of "back-end" program, where Medicaid takes over and pays for LTC services after insurance runs out. LifePlans, *supra* note 57, at 9.

164. Marr & Jacoby, *supra* note 54, at 2.

165. Doran, *supra* note 52, at 9.

166. *See* Marr & Jacoby, *supra* note 54 at 1 (citing Doran, *supra* note 52).

but that still afford solid protections to the estates of low-income homeowners.[167] State legislatures could set a minimum threshold level of assets (i.e., up to $10,000 from estates valued less than $30,000) that are exempted from estate recovery, and then utilize a progressive system of increasing rates relative to the amount of assets in the estate.[168] States may also elect to recover from certain non-probate assets to prevent inequitable results from Medicaid planning. While expanding recovery seems counterintuitive, the expansion of recovery to non-probate assets coupled with progressively increasing minimum protected threshold amounts could help to shift some of the burden of estate recovery back onto those who are less truly needy. Additionally, guaranteeing beneficiaries the right to leave a portion of their estate to their heirs may lessen the incentive to use Medicaid planning to reposition or hide assets.[169] Absent reform, raising awareness about what assets may be subject to estate recovery through enhanced notice requirements and providing wider access to free or low-cost estate planning services in poor communities could potentially help to temporarily even the playing field by allowing lower-income beneficiaries increased access to the home-protecting services that higher-income households use.

IV. Conclusion

America's retirement system promotes inequality across generations because it promotes the interests of high earners over those of low earners, rather than seeking to serve the interests of people of all income levels. Low earners struggle to access devices that high and middle earners may use to protect themselves from the financial risk of LTC and pass on their wealth to heirs, including private retirement accounts, LTC insurance, and Medicaid planning. Medicaid, a program meant to protect the interests of the lowest-income retirees, can be made accessible to higher-income individuals through Medicaid planning, and the increased burden on the Medicaid LTC disproportionately affects the quality of LTC available to elderly people in low-income communities. Furthermore, Medicaid's strict asset tests fail to capture an accurate threshold of "neediness" among the elderly, barring truly needy individuals from coverage, and may discourage private retirement saving among lower-income retirees. Estate recovery proceedings to recoup funding at the state level are inefficient because higher-income beneficiaries are much more likely to protect their property from estate recovery and the home equity of lower-income beneficiaries are typically of a much lower value.

Providing for better retirement security across all income levels will help boost families and communities out of poverty, breaking cycles of intergenerational poverty

167. *See* West Virginia v. Thompson, 475 F.3d 204, 208 (4th Cir. 2007).

168. Katie L. Summers, Comment, *Medicaid Estate Recovery: To Expand, or Not to Expand, That Is the Question*, 118 Penn St. L. Rev. 465, 487 (2013), https://www.pennstatelawreview.org/118/2/7%20-%20Summers%20(final).pdf.

169. East, *supra* note 44, at 472.

that are exacerbated by current policy. Decreasing tax subsidies for high-income retirees could free up billions of dollars in federal funding that could strengthen federal retirement care for lower-income elderly households. Promoting access to LTC insurance through this partnership will help decrease the burden on Medicaid's limited funding, leading to higher-quality care for beneficiaries. Finally, reforming Medicaid asset tests and estate recovery proceedings to be stricter on higher income individuals, capture neediness more accurately, and protect a baseline level of assets from estate recovery proceedings should ameliorate Medicaid's current issues while still incentivizing people to save for their retirement.

In Hume's words, "every person, if possible, ought to enjoy the fruits of his labor" and deserves "all of the necessities, and many of the conveniences of life."[170] Retiring comfortably without significantly sacrificing one's pre-retirement quality of life is a strong incentive for workers across income brackets in the United States. Life's necessities, such as necessary medical care, medicine, nutritious food, and a comfortable place to live, should not be deemed a luxury in modern society. Behaviors like Medicaid planning that take advantage of social welfare programs for one's personal and familial benefit should be considered luxuries, and retirement policy should seek to discourage this behavior and mitigate its negative side effects. The blame should not be placed on the individual, but on the policymakers who have created a retirement system that unfairly favors those with higher levels of assets.

170. HUME, *supra* note 122, at 265.