

CARING FOR OUR PARENTS IN AN AGING WORLD: SHARING PUBLIC AND PRIVATE RESPONSIBILITY FOR THE ELDERLY

*Katie Wise**

I

INTRODUCTION

As America's population ages, the nation is confronted with the question of how to care best for its elderly citizens. Some have advocated increased public support for the elderly,¹ while others have argued that the appropriate solution to the problem of caring for the elderly is to leave the primary responsibility to their adult children and other family members.² However, some have suggested that leaving responsibility for the care of the elderly to their family has significant shortcomings. As one scholar has observed, "[T]he dominant dilemma is that family loyalties today are not what they used to be: family responsibilities are understood as less binding than they were even a generation ago."³ Contrary to the belief that adult children are

* J.D., 2001, New York University School of Law; Associate, Heller Ehrman White & McAuliffe LLP, San Diego, California. I would like to thank Professor Marcia Neave for her assistance in developing the topic of this Note, and Matt Marcotte and the *Journal of Legislation and Public Policy* staff for their excellent editorial assistance. I dedicate this Note to my parents—I hope to give you as much love and support in the years to come as you have given me.

1. See Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 710 (1991) ("Federal and state elderly programs, the argument would have it, should be reconfigured to direct more dollars to the poor and fewer dollars to the well-off elderly."); Alan C. Weinstein, *Essay: The Challenge of Providing Adequate Housing for the Elderly . . . Along with Everyone Else*, 11 J.L. & HEALTH 133 (1996) (advocating increased public assistance for housing elderly).

2. See generally John Walters, Note, *Pay Unto Others as They Have Paid Unto You: An Economic Analysis of the Adult Child's Duty to Support an Indigent Parent*, 11 J. CONTEMP. LEGAL ISSUES 376 (2000) (arguing that "uniform national recognition and enforcement of the adult child's filial responsibility to indigent parents is economically more efficient" than measures to provide public care).

3. Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, in DIVORCE REFORM AT THE CROSSROADS 166, 178 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); see also Ann Britton, *America's Best Kept Secret: An Adult Child's Duty to Support Aged Parents*, 26 CAL. W. L. REV.

unlikely to care for their aging parents, a substantial amount of data indicates that younger family members are not so quick to abandon their older relatives.⁴ Adult children and other family members frequently provide their elderly parents and relatives with services such as personal care, assistance with household tasks, shelter, and transportation.⁵

Although many children do choose to care for their parents, the question remains: Do adult children, whether they are able to or want to, have a duty—legal, moral, or otherwise—to support their aged parents? Aside from filial responsibility laws,⁶ which only exist in some states, no legal rules specify what duty, if any, children owe to their parents.⁷ However, such coercive legislation, which is rarely enforced even in those states where it exists, does little to encourage positive family dynamics, and merely enables indigent parents to sue their children for financial support.⁸

If adult children are not legally bound to care for their aged parents, should the state assume primary responsibility for the care of the elderly? Since the 1930s, various government programs have been enacted to aid the elderly, most notably Social Security, Medicare, and Medicaid.⁹ These programs, however, barely keep the elderly above

351, 367 (1990) (reporting that fewer than nine percent of adult children regularly provide their parents with financial help).

4. See, e.g., Usha Narayanan, Note, *The Government's Role in Fostering the Relationship Between Adult Children and Their Elder Parents: From Filial Responsibility Laws to . . . What?, A Cross-Cultural Perspective*, 4 ELDER L.J. 369, 369 (1996) (noting that, contrary to popular belief, "most adult children in the United States still live within one hundred miles of their elder parents, see their elder parents regularly, and contribute some financial support to their elder parents"); see also DEBORAH M. MERRILL, *CARING FOR ELDERLY PARENTS: JUGGLING WORK, FAMILY, AND CAREGIVING IN MIDDLE AND WORKING CLASS FAMILIES* 2 (1997) (pointing to evidence that "families provide multiple forms of support and assistance across and within generations, including care for the elderly").

5. See Mary Jo Gibson, *Family Support Patterns, Policies and Programs*, in *INNOVATIVE AGING PROGRAMS ABROAD: IMPLICATIONS FOR THE UNITED STATES* 159, 164 (Charlotte Nusberg et al. eds., 1984) (reporting that help from family members constitutes approximately eighty percent of all home health care services received by ill older Americans).

6. See *infra* Part II.B.

7. See Lee E. Teitelbaum, *Intergenerational Responsibility and Family Obligation: On Sharing*, 1992 UTAH L. REV. 765, 786 ("While statutes and courts announce a parent-child support obligation, they rarely . . . give it detailed meaning.").

8. See *infra* Part II.B.2.

9. See Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society?*, 26 FAM L.Q. 195, 199 (1992) (discussing such programs); see also *infra* Part III.

the poverty line¹⁰ and fail to address the many non-financial needs of the elderly, such as assistance in completing daily tasks and their need for companionship.

Whose responsibility is it to care for the elderly population of the United States—the state’s or the family’s? Which institution is in the best position to care for older persons? These questions are particularly compelling today, in light of the increase in the aging population, advances in technology, and rising health care costs, coupled with the decrease in the younger population capable of caring for the aged.¹¹ The elderly population of the United States is expected to explode between the years 2010 and 2030 when the members of the “baby boom” generation reach age sixty-five.¹² Investing in relationships with our parents is therefore a necessity, “since our lives will overlap with those of our parents to a considerably greater extent today than in earlier generations.”¹³

While such demographic changes are certain, the issue of who bears responsibility for the care of the elderly is much less so. In attempting to resolve this issue, this Note argues that care for the aged is neither an exclusively private matter to be left to the family nor an exclusively public concern best left to the state. Instead, this Note advocates a system that regards elder care as both a public and private matter, where family and state share responsibility for providing care to the elderly. Rather than advance laws that would enable parents to sue their children for financial and other support, such as filial responsibility legislation, a more sensible approach would be to enact state

10. In 1999, approximately 3.2 million elderly persons were below the poverty line, and the poverty rate for Americans aged 65 and older was 9.7%. Two million, or 6.1%, of the elderly qualified as “near poor” in 1999, meaning they had an income between the poverty level and 125% of that level. ADMINISTRATION ON AGING, U.S. DEP’T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2000, at 10 (2000), available at <http://www.aoa.dhhs.gov/aoa/stats/profile/profile2000-bw.pdf>.

11. See Marshall B. Kapp, *Family Caregiving for Older Persons in the Home: Medical-Legal Implications*, 16 J. LEGAL MED. 1, 4 (1995) (documenting increase in aging population and technological advancements related to health care); see also Hon. Patricia M. Wald, *Looking Forward to the Next Millennium: Social Previews to Legal Change*, 70 TEMP. L. REV. 1085, 1085–86 (1997). Judge Wald explains:

Between now and the year 2030 the percentage of people over age sixty-five in our population will double to a quarter of the population, equal to the number of people ages twenty to thirty-five. Older Americans will live longer. . . . Our youthful population, on the other hand, is not even reproducing itself.

Id. (footnotes omitted).

12. See ADMINISTRATION ON AGING, *supra* note 10, at 3.

13. Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings*, 1996 UTAH L. REV. 393, 420 (citing Peter Uhlenberg, *Death and the Family*, 5 J. FAM. HIST. 313, 318–19 (1980)).

and federal policies that encourage adult children to support their parents when it is feasible and that reward them for doing so. Such policies, which recognize elder support as being both a public and a private matter, should ultimately operate to the benefit of the elderly, the family members who care for them, and the state.

Part II of this Note examines “private care laws,” laws that assign care of the elderly to the family. This section considers different justifications that have been offered in support of an adult child’s duty to support her parents. Part II examines the history of filial responsibility laws and the debate over their utility and concludes that such laws are not an appropriate way to encourage positive family relationships or to provide for care of the elderly. Part III examines “public care laws,” laws and government programs that recognize the state’s obligation to care for the elderly, such as Social Security, Medicare, and Medicaid. Part IV reviews federal and state laws that encourage and reward adult children who care for their parents, in addition to considering the laws and policies in place in other countries. This Part also offers a solution to the question of who should bear the responsibility of caring for the aged, by advocating a system that regards elder care as a matter of both public and private concern.

II

PRIVATE CARE LAWS

In 1997, Judge Patricia Wald of the United States Court of Appeals for the District of Columbia predicted that the issue of responsibility toward this country’s ever-increasing older population would be “one of the dominant social dilemmas in the twenty-first century.”¹⁴ Judge Wald recognized the strong tension between our feelings of empathy toward the elderly and our collective desire to disown any obligation to support the aged. Wald eloquently captured this tension in remarking:

On the one hand, the dependency of frail or ill elderly people is viewed as “not their fault” and as part of the “natural progression of life.” Younger people can picture themselves in the same unenviable spot down the road and feel strong filial responsibilities to the parents who cared for them as children. Nonetheless, negative feelings toward the elderly run strong in our society. . . . Many Americans feel that the care of the elderly should be paid for by their families or from their own savings, rather than by the government—they resent subsidizing other people’s failure to plan ahead. Conversely, younger working Americans resent the notion that in

14. Wald, *supra* note 11, at 1091.

their peak years, they must bear the burden of supporting older relatives.¹⁵

This tension between negative and positive perceptions of the elderly make the question of who should bear responsibility for supporting older Americans very difficult to answer. Nonetheless, the prevailing view regarding long-term care in the United States has been to leave elder care to the family.¹⁶ Various theories have been advanced for why adult children in particular should bear the responsibility of caring for their own parents. The next section of this Note addresses these theories.

A. Theories for Assigning Elder Care to Adult Children

1. Honor and Gratitude

A child's duty to care for her parents is a fundamental Judeo-Christian value.¹⁷ That each child should "[h]onor thy father and thy mother"¹⁸ is "the first of the commands directed to man as social being."¹⁹ The word translated in the Fifth Commandment as "honor" is *kabbed*, the root of which means "be heavy, weighty" or "be honored."²⁰ As this "honor" recognizes the "weightiness" or worth of the person honored, it follows that "[f]ather and mother are to be perceived and treated as persons of import, worth, significance."²¹ Rabbis have interpreted this duty of honor as contemplating, in part, a child's financial support of her parents.²²

Like honor, gratitude also has roots in Judeo-Christian teachings. "Jewish thinkers teach that gratitude begins where life itself begins Those who give life merit gratitude first; once this ethical impulse is successfully implanted, it will spill over into the total social situation"²³ The idea behind gratitude is that when we were young, and for many of us when we were not so young, our parents cared and provided for us when we needed them. Once we are in a

15. *Id.* at 1090–91.

16. MERRILL, *supra* note 4, at 166.

17. See Gerald Blidstein, Honor Thy Father and Mother 1 (Norman Lamm ed., 1975).

18. *Exodus* 20:12.

19. BLIDSTEIN, *supra* note 17, at 1.

20. *Id.* at 47.

21. *Id.*

22. See Charla Murakami, Comment, *Parent-Child Relations: A Comparison of Jewish and California Law*, 1 U.C. DAVIS J. INT'L L. & POL'Y 107, 128–29 (1995) (discussing various rabbinical interpretations of Fifth Commandment).

23. BLIDSTEIN, *supra* note 17, at 9.

position to return the favor to our parents, and when they need us to do so, we are obligated to provide them with our care and services.²⁴

The family would be the appropriate place to nurture not only gratitude and honor, but also such qualities as loyalty and altruism.²⁵ Encouraging family members to care for one another would hopefully engender these values in children, and ultimately instill in them a sense of obligation toward their fellow human beings.

2. *Indebtedness and Reciprocity*

Various scholars have premised their support for an adult child's duty to care for her parents on theories of indebtedness and reciprocity. The idea behind these theories is that "our parents gave us life and took care of us when we needed care; in return, we owe them care when they are in need."²⁶ As Gerald Blidstein has noted, "From any point of view, even the purely normative one, filial responsibility is only part of an overarching structure binding parents and children. The responsibilities of children toward parents are, in a sense, balanced by the responsibilities of parents toward children."²⁷ Margaret Brinig has described the relationship between parent and child as a "covenant," whereby both parties "are bound not only to each other, but with some third party (God or the state or both)."²⁸

However, other scholars have suggested that while the duty of parents to children is easy to justify, a corresponding duty of children to parents is less tenable. While parents often make a conscious decision to bring children into the world, creating some duty on their part, children, as the argument goes, did not ask to be born.²⁹ In other words, children do not contract for the goods and services their parents provide to them, and therefore the simple fact that they receive such goods and services does not obligate them to provide for their

24. Cf. Joel Feinberg, *Duties, Rights, and Claims*, 3 AM. PHIL. Q. 137, 139 (1966) (asserting that gratitude and "duty of reciprocation" require person to render services to "benefactor" who "freely offered me his services when I needed them").

25. See Teitelbaum, *supra* note 7, at 775 (arguing that "[f]rom a utilitarian perspective, a case can also be made that loyalty and altruism are important aspects of human nature which are especially likely to be expressed and effective within the family").

26. Hilde Lindemann Nelson & James Lindemann Nelson, *Frail Parents, Robust Duties*, 1992 UTAH L. REV. 747, 751.

27. BLIDSTEIN, *supra* note 17, at 122.

28. Brinig, *supra* note 13, at 398.

29. See Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197 (1990); *But see* Nelson & Nelson, *supra* note 26, at 754 ("[M]any births are not a matter of choice, and even when parents choose to have a child, they no more choose *this* child than it chooses them.").

parents in return.³⁰ Furthermore, even if children honor their parents while they are young:

[I]t is “natural” for adults to forget that they remain children. From the parents’ point of view there may still be hope of enforcing the implicit contract made when the child was young—“I will take care of you, love you, invest in you, and in return be cared for by you when I am enfeebled.” . . . “I never agreed to have you live with me, and I have a life of my own” may be the child’s response to the parent’s incapacity. The adult child may therefore think of self and siblings as individuals in isolation from each other and from their parents.³¹

Such an attitude is ever more plausible, given that nuclear families have replaced extended families as the norm in American culture.³²

Some adult children may indeed feel a sense of indebtedness toward those who raised them. However, parents are not always willing to accept their children’s help. Aging parents may feel ashamed that the people for whom they once cared must now bathe, feed, and clothe them. In fact, one survey of older parents revealed that only ten percent of those responding believed that their adult children should provide them with support.³³ Approximately one-third of the respondents expressed a belief that the elderly should care for themselves.³⁴

3. *Public Cost Containment*

Among the more practical rationales for assigning elder care to the family is that of public cost containment. Some commentators

30. Lee Teitelbaum makes the following observation:

While children no doubt receive considerable benefit from their parents, we do not generally say that one who receives a benefit is obliged to return the good or its equivalent. There is, to be sure, a special quality to the rendition of the benefit by parents, because it flows from unconditional love. That quality suggests, however, that the benefit was given without an expectation of repayment rather than as the reflection of a culturally-based obligation.

Teitelbaum, *supra* note 7, at 780.

31. Brinig, *supra* note 13, at 400 (footnote omitted).

32. See Krause, *supra* note 3, at 184 (“In law even more than in fact, the extended family has given way to the nuclear family, even as—in fact but not yet in law—the nuclear family is giving way to the single-parent family.”).

33. ALVIN SCHORR, U.S. DEP’T OF HEALTH & HUMAN SERVS., “. . . THY FATHER & THY MOTHER . . .”: A SECOND LOOK AT FILIAL RESPONSIBILITY & FAMILY POLICY 12 (1980) (citing LOUIS HARRIS & ASSOCS., NAT’L COUNCIL ON AGING, THE MYTH AND REALITY OF AGING IN AMERICA (1975)); see also Teitelbaum, *supra* note 7, at 795 (acknowledging that many parents would prefer support from someone other than their children and that “many people do not wish to provide personal care for their elderly relatives”).

34. SCHORR, *supra* note 33, at 12.

have argued that laws that recognize and enforce adult children's duties to their parents are economically preferable to having Social Security, Medicare, and Medicaid provide for the elderly.³⁵ These observers point to evidence demonstrating that poverty among the aged continues despite extensive government aid to the elderly.³⁶ As the elderly population continues to grow, the states and federal government may not be able to meet the increased financial burden of providing care.³⁷ In order to alleviate this burden states should obligate adult children who are able to pay for their parents' support to do so.³⁸

One explanation for the cost-containment rationale is that, if services pose no cost to the elderly, they will overuse the resources available to them.³⁹ If adult children are required to provide for their parents' necessities, their parents may be less inclined to seek services they do not really need, so as to avoid burdening their children.⁴⁰ At the same time, adult children might make more of an effort to supervise their parents' use of goods and services and encourage their parents to conserve such resources if they were liable for the costs of that consumption.⁴¹ However, even if adult children are in the best position to monitor their parents' use of resources, filial responsibility laws may require them to do much more than that.⁴² As Lee Teitelbaum warns, "Family responsibility laws create a potentially unlimited obligation, which is far greater than is required for the limited purpose of reducing overuse of medical [and other] services."⁴³ Moreover, primary reliance on private support could leave many older citizens with little or no assistance. Family members generally provide their older relatives with less support than that provided by public assistance payments,⁴⁴ which might force some of the elderly to subsist on

35. See, e.g., Kline, *supra* note 9 (advocating use of filial responsibility laws to ensure support of elderly); Walters, *supra* note 2.

36. See Kline, *supra* note 9, at 202 ("Empirical evidence demonstrates the persistence of poverty among the aged notwithstanding massive government aid for the benefit of the elderly."); Walters, *supra* note 2, at 378 ("In 1991 alone, federal outlays for programs benefitting the elderly exceeded \$387 billion and accounted for more than 30% of the national budget."). See also ADMINISTRATION ON AGING, *supra* note 10 (discussing current poverty rates among elderly).

37. Walters, *supra* note 2, at 378.

38. *Id.*

39. Teitelbaum, *supra* note 7, at 782.

40. *Id.*

41. *Id.*

42. See *infra* Part II.B for a fuller discussion of filial responsibility laws.

43. Teitelbaum, *supra* note 7, at 783.

44. Narayanan, *supra* note 4, at 378 (citing W. Walton Garrett, *Filial Responsibility Laws*, 18 J. FAM. L. 793, 793-96 (1980)).

less than even the minimal amounts that public assistance currently provides to them.

4. *Romanticized Notions of Family Caregiving*

A final justification for assigning care for the elderly to the family is based on what some scholars consider romanticized notions of family caregiving.⁴⁵ After all, some regard the family as a “haven in a heartless world.”⁴⁶ Advocates of private support laws often argue that filial responsibility will encourage positive family relationships, as the family, unlike state-supported institutions, can uniquely provide a warm and comforting environment for an aging person.⁴⁷

In reality, however, many homes do not manifest the romantic virtues of love, comfort, and interdependence that we commonly associate with the family. Moreover, a family need not even be dysfunctional for a caregiving relationship to jeopardize the autonomy of an aging parent.⁴⁸ The tables are turned as the aging parent becomes financially and emotionally dependent on the very children for whom she once cared. This shift in the dependency relationship can create significant tension, as family members “may seriously underestimate the older person’s present decisional capacity or continuing ability to perform certain activities independently.”⁴⁹

Furthermore, this new dependency relationship is not so attractive to caregiving relatives. Caring for another person can be draining, not only financially, but also emotionally.⁵⁰ Edgar Borgatta and Rhonda Montgomery offered the following observations in the context of giving care to a disabled spouse, but their comments are similarly applicable to the child-parent relationship:

[T]here appears to be no recognition of the fact that many people, if given a true choice, would prefer to abstain from the caregiving role altogether. The more common picture that is painted is one of

45. See EMILY ABEL, WHO CARES FOR THE ELDERLY? 165 (1991) (“Idealizing the nineteenth-century world of caregiving, many policymakers view the household as the ‘natural’ locus for caregiving and argue that, by returning care to the home, we reinforce traditional values and strengthen family bonds.”).

46. CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED xiii (1977).

47. See Narayanan, *supra* note 4, at 378.

48. See generally Marshall B. Kapp, *Who’s the Parent Here? The Family’s Impact on the Autonomy of Older Persons*, 41 EMORY L.J. 773 (1992) (discussing how family caregiving adversely affects autonomy of elderly).

49. *Id.* at 786 (citing Nancy Dubler et al., *Guidelines for Clients, Families, and Caregivers*, in HOME HEALTH CARE OPTIONS: A GUIDE FOR OLDER PERSONS AND CONCERNED FAMILIES 303, 306 (Connie Zuckerman et al. eds., 1990)).

50. See Teitelbaum, *supra* note 7, at 798.

a loving spouse who tends to the needs of the disabled person and only gives up this role when personal resources are exhausted. The facts that the disabled person no longer functions as a companion, is demanding, and may even be abusive are rarely acknowledged. While caregiving may be a choice when the disabled person responds with love and actively participates in a mutually rewarding relationship, there is considerable reason to believe that for many people caregiving is a relationship of bondage from which a spouse is unable to escape.⁵¹

Thus, rather than foster positive relationships, assigning care for the elderly to the family can breed resentment and stress on the part of the caregiving child and shame and manipulation on the part of the parent receiving care.

B. *Filial Responsibility Laws*

1. *The History of Filial Responsibility Laws*

In view of the various justifications for family caregiving mentioned above, a number of states have enacted filial responsibility laws, which require children to provide their indigent parents with financial support.⁵² While the duty of parents to provide for their children is prescribed by common law, a child's duty to support her parents is found only in filial responsibility statutes.⁵³

The earliest forms of filial responsibility laws were enacted in ancient Rome, where transformation from a militaristic to a commercial society led to the deterioration of family obligations.⁵⁴ The Roman Emperor created filial responsibility laws in an attempt to strengthen family bonds, and such laws ultimately cultivated a widespread custom of children providing support for their parents.⁵⁵

Modern American filial responsibility statutes have their roots in the English Poor Relief Act of 1601, which required the "father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person to support that poor

51. Edgar F. Borgatta & Rhonda J.V. Montgomery, *Aging Policy and Societal Values*, in *CRITICAL ISSUES IN AGING POLICY* 7, 22 (Edgar F. Borgatta & Rhonda J.V. Montgomery eds., 1987).

52. See *infra* note 66 (listing filial responsibility laws currently in force).

53. See Art Lee, Note, *Singapore's Maintenance of Parents Act: A Lesson to Be Learned from the United States*, 17 *LOY. L.A. INT'L & COMP. L.J.* 671, 676 (1995).

54. See Robin M. Jacobson, Note, *Americana Healthcare Center v. Randall: The Renaissance of Filial Responsibility*, 40 *S.D. L. REV.* 518, 526 (1995).

55. See *id.* at 526-27.

person to the extent of his or her ability.’”⁵⁶ The Elizabethan poor law contemplated public assistance only when private family support was unavailable.⁵⁷ Despite the law’s limited assignment of public responsibility for the poor, the act codified England’s intent to provide public support for the elderly, at least under certain narrow circumstances.⁵⁸

In the United States, by the mid-twentieth century, most states had enacted a program of poverty relief for the elderly, including filial responsibility requirements based on the English poor law.⁵⁹ State courts enforced these provisions by requiring adult children to provide their indigent parents with financial support, unless such children were financially unable to do so.⁶⁰ One early court noted, “The main purpose of the statutes seems to be to protect the public from the burden of supporting poor people who have children able to support them.”⁶¹

2. *The Current Status of Filial Responsibility Laws*

Despite the popularity of filial responsibility laws in eighteenth- and nineteenth-century America, social and economic changes during the twentieth century led to a disintegration of the traditional family, as increased mobility and growing opportunities drew children into the cities and away from their parents.⁶² The resulting structural changes within the American family contributed to a decline in popular support of filial responsibility. However, the need for filial responsibility actually grew. As families became smaller, “an adult child’s proportionate share of the financial and emotional burden” toward her aging parents, who were also now more likely to live longer and thus require more support, increased.⁶³

The decline in the number and enforcement of filial responsibility statutes prevailing in the United States reflects fading public support for filial responsibility. In 1956, thirty-nine states had filial responsi-

56. Kline, *supra* note 9, at 197 (quoting English Poor Relief Act of 1601, 43 Eliz., c. 2, § 6 (Eng.)).

57. Narayanan, *supra* note 4, at 373.

58. *Id.* at 373–74.

59. Kline, *supra* note 9, at 198.

60. *See id.*

61. *Duffy v. Yordi*, 84 P. 838, 838 (Cal. 1906).

62. *See* Jacobson, *supra* note 54, at 528 (“Children began to move from the country into the cities [during the industrial age], often leaving their parents behind.”); Narayanan, *supra* note 4, at 375 (discussing how America “shift[ed] from an agrarian society characterized by extended families to an industrial society characterized by nuclear families”).

63. Narayanan, *supra* note 4, at 376.

bility laws.⁶⁴ By 1980, partly in response to the advent of public programs for the elderly, only twenty-three states still had such laws.⁶⁵ Today, twenty-eight states have some form of filial responsibility legislation.⁶⁶ Even in those states that still have filial responsibility statutes, such laws are rarely enforced.⁶⁷ Eleven states have filial responsibility statutes that have never been invoked.⁶⁸

Filial responsibility legislation is found in state civil, family, and criminal codes.⁶⁹ Many state filial support statutes currently in effect consist of general pronouncements recognizing the mutual responsibility of family members toward one another. For example, Louisiana's filial responsibility law provides:

Children are bound to maintain their father and mother and other ascendants, who are in need, and the relatives in the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal. This reciprocal obligation is limited to life's basic necessities of food, clothing, shelter, and health care, and arises only upon proof of inability to obtain these necessities by other means or from other sources.⁷⁰

Other statutes, such as California's Family Code, contain specific enforcement provisions, which authorize parents to sue their adult

64. See Daniel R. Mandelker, *Family Responsibility Under the American Poor Laws: I*, 54 MICH. L. REV. 497, 497-98 n.1 (1956) (citing filial responsibility laws then in force).

65. W. Walton Garrett, *Filial Responsibility Laws*, 18 J. FAM. L. 793, 813 (1980).

66. ALASKA STAT. § 25.20.030 (Lexis 2000); CAL. FAM. CODE § 4400 (West 1994); CAL. PENAL CODE § 270c (West 1999); CONN. GEN. STAT. ANN. § 46b-215 (West Supp. 2001); DEL. CODE ANN. tit. 13, § 503 (1999); GA. CODE ANN. § 36-12-3 (Lexis 2000); IDAHO CODE § 32-1002 (Michie 1996); IND. CODE ANN. § 31-16-17 (Michie 1997 & Supp. 2001); IOWA CODE ANN. § 252.2 (West 2000); KY. REV. STAT. ANN. § 530.050 (Michie 1999); LA. CIV. CODE ANN. art. 229 (West 1993); MD. CODE ANN., FAM. LAW § 13-102 (1999); MASS. GEN. LAWS ANN. ch. 273, § 20 (West 2000); MINN. STAT. ANN. § 256D.15 (West 1998); MISS. CODE ANN. § 43-31-25 (1999); MONT. CODE ANN. §§ 40-6-214, 40-6-301 (2001); NEV. REV. STAT. § 428.030 (1999); N.H. REV. STAT. ANN. § 546-A:2 (1997); N.J. STAT. ANN. § 44:1-140 (West 1993); N.C. GEN. STAT. ANN. § 14-326.1 (West 2000); N.D. CENT. CODE § 14-09-10 (1997); OHIO REV. CODE ANN. § 2919.21 (West 1997 & Supp. 2001); OR. REV. STAT. § 109.010 (2001); R.I. GEN. LAWS § 40-5-13 (1997); S.D. CODIFIED LAWS § 25-7-27 (Lexis Supp. 2001); TENN. CODE ANN. § 71-5-115 (1995); UTAH CODE ANN. § 17-14-2 (2001); VT. STAT. ANN. tit. 15, § 202 (1989); W. VA. CODE ANN. § 9-5-9 (Michie 1998).

67. See Lee, *supra* note 53, at 678 (maintaining that "record of cases in which parents brought a support action against the child is . . . sparse").

68. *Id.* at 677-78 (listing Alaska, Delaware, Idaho, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Tennessee, Utah, and Vermont as states where filial responsibility statutes have never been enforced).

69. See *supra* note 66.

70. LA. CIV. CODE ANN. art. 229 (West 1993).

children for support. Section 4400 of the California Family Code states, "Except as otherwise provided by law, an adult child shall . . . support a parent who is in need and unable to maintain himself or herself by work."⁷¹ Section 4403 empowers an indigent parent to bring a civil action against his or her child to enforce the child's "duty to support" established in section 4400.⁷² The California law allows adult children to escape financial liability toward their parents if they can prove inability to pay⁷³ or abandonment by the parent.⁷⁴

In some states, children who fail to support their indigent parents may be found guilty of a misdemeanor or a felony under the state's criminal law.⁷⁵ A finding that an adult child has refused or neglected to support her parent or parents could result in a fine or imprisonment.⁷⁶ This scheme is counterproductive in that either of these penalties would effectively prohibit an adult child from providing the requested support, at least to the extent of the fine and for the duration of imprisonment. This counterproductivity is only one of the many weaknesses of filial responsibility legislation.

3. Criticisms of Filial Responsibility Laws

There are many arguments against the adoption or enforcement of filial responsibility laws. The principal argument is that such laws pit family members against one another.⁷⁷ It is counterintuitive that a law enabling one family member to sue another would foster a warm

71. CAL. FAM. CODE § 4400 (West 1994).

72. CAL. FAM. CODE § 4403 (West 1994).

73. CAL. FAM. CODE § 4400 (West 1994).

74. CAL. FAM. CODE § 4411 (West 1999). The abandonment defense only applies if the parent abandoned the child during his or her minority. For a more detailed explanation of the abandonment defense, see Priscilla Day, Note, *The Abandonment Defense to a Claim for Parental Support*, 11 J. CONTEMP. LEGAL ISSUES 380, 380 n.4 (1997).

75. See, e.g., KY. REV. STAT. ANN. § 530.050(5)–(6) (Lexis 1999 & Supp. 2001) (classifying nonsupport as Class A misdemeanor and flagrant nonsupport as Class D felony); N.C. GEN. STAT. ANN. § 14-326.1 (West 2000) (deeming failure to support to be Class 1 misdemeanor).

76. See, e.g., MASS. GEN. LAWS ANN. ch. 273, § 20 (West 2000) (providing for fine of up to \$200 or imprisonment for up to one year); MISS. CODE ANN. § 43-31-25 (1999) (imposing fine of \$150 per month or partial month of nonsupport); VT. STAT. ANN. tit. 15 § 202 (1989) (providing for fine of up to \$300 and/or imprisonment for up to two years).

77. See, e.g., Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 3), 17 STAN. L. REV. 614, 645 (1965) ("[L]iability of relatives creates and increases family dissension and controversy, [and] weakens and destroys family ties at the very time and in the very circumstances when they are most needed . . . and is therefore socially undesirable, financially unproductive, and administratively unfeasible.").

and loving environment. Moreover, relegating the issue of family support to adversarial proceedings will only reduce the amount of money family members have to offer one another, provided they are financially able to litigate in the first place.

Legislatures and courts alike have rejected filial responsibility laws as a desirable means of providing elder support. The legislative history of the Medicaid Act of 1965 indicates that Congress disapproved of filial responsibility laws, as they “are often destructive and harmful to the relationships among members of the family group.”⁷⁸ Judges, asked to enforce such laws, have looked unfavorably upon them, viewing them as instruments that perpetuate poverty, target lower-income adult children, and ultimately destroy families.⁷⁹

Filial responsibility laws may also be of little use to parents who are reluctant to impose any burden upon their children, not to mention parents without children. In addition, enforcement of such laws is costly not only to litigants, but also to the institution charged with collecting funds from family members and distributing them to parents.⁸⁰ Even when funds are distributed to the elderly, the financial focus of filial responsibility laws does nothing to ensure that the elderly will receive the other forms of support they might lack, especially emotional support. Finally, some critics of filial responsibility statutes argue that such laws wrongly convert “a private issue into a public responsibility” by involving legislatures and the courts in an area traditionally viewed as a private concern.⁸¹ As the next section argues, fear of assigning responsibility for elder support to the state in some capacity is unwarranted. Nevertheless, because filial responsibility laws have limited utility in ensuring the provision of care, public support of care for the elderly would be best accomplished by other means.

78. S. REP. NO. 89-404, at 78 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2018.

79. *See, e.g.,* Carleson v. Superior Court, 100 Cal. Rptr. 635, 638 (Cal. Ct. App. 1972), *rev'd sub nom.* Swoap v. Superior Court, 516 P.2d 840 (Cal. 1973) (remarking that filial responsibility law “strikes most aggressively and harshly at adult children occupying the lower end of the income scale”).

80. *See* Robert J. Levy, *Supporting the Aged: The Problem of Family Responsibility*, in AN AGING WORLD 253, 265–67 (John M. Eekelaar & David Pearl eds., 1989) (describing administrative challenges raised by family responsibility programs); Michael Rosenbaum, *Are Family Responsibility Laws Constitutional?*, FAM. L.Q., Dec. 1967, at 55, 59 (advocating repeal of filial responsibility statutes, in part on basis of administrative costs).

81. Wendy Bernt, Development, *Lines of Dependence: The Rebirth of Parental Support Legislation in Canada*, 2 APPEAL 52, 56 (1996), available at <http://appeal.law.uvic.ca/vol2/pdf/bernt.pdf>. (on file with the *New York University Journal of Legislation and Public Policy*)

C. *Arguments Against Substituting Filial Responsibility for Societal Responsibility in the Context of Elder Care*

Assigning care for the elderly exclusively to the family overlooks society's interest in guaranteeing adequate care for all of our aging population.⁸² Just as adult children may have a moral duty to care for the individuals who raised them, society might be deemed to have a moral duty to care for its elderly population. Older Americans may have spent many years supporting the national economy, providing social services, fighting in wars,⁸³ and raising younger citizens. For these services and others, we, as a society, owe our elders support.

In addition to the aforementioned weaknesses specific to filial support legislation, various policy considerations weigh against substituting family responsibility for broader societal responsibility.⁸⁴ For example, reliance solely on private care laws will lead to significant class-based discrepancies in care. In a legal regime based exclusively on family responsibility, "the availability of medical care will depend greatly on family wealth rather than some other basis, such as degree of need or relative importance of the care provided."⁸⁵ Since middle and upper class children will be better situated to provide for their parents than individuals with lower incomes, any system that assigns support of the elderly to the family would magnify class differences. Such an approach seems irrational, as it will prevent those most in need of care from receiving much, if any, support.

Relying too heavily on family responsibility will also hurt certain ethnic groups more than others. According to a recent survey conducted by the AARP (formerly known as the American Association of Retired Persons)⁸⁶, Asian-Americans are most likely to provide care for their elderly family members, while Caucasians are least likely to do so.⁸⁷ Nineteen percent of Caucasians provide care for their elders,

82. *See id.*

83. The Department of Veterans' Affairs already provides military service veterans, and sometimes their families, with health benefits. *See* LAWRENCE A. FROLIK & ALISON PATRUCCO BARNES, ESQ., *ELDERLAW* 384–85 (1992). In addition, elderly veterans may use their subsidies from the Veterans Administration to pay relatives who care for them. *See* ABEL, *supra* note 45, at 166–67.

84. *See supra* Part II.B.3.

85. Teitelbaum, *supra* note 7, at 800.

86. AARP, *What is AARP, AARP Facts*, at http://www.aarp.org/what_is.html (last visited Mar. 30, 2002) (on file with the *New York University Journal of Legislation and Public Policy*).

87. BELDEN RUSSONELLO & STEWART & RESEARCH/STRATEGY/MANAGEMENT, AARP, *IN THE MIDDLE: A REPORT ON MULTICULTURAL BOOMERS COPING WITH FAMILY AND AGING ISSUES* 9 (2001), at http://research.aarp.org/il/in_the_middle.pdf (on file with the *New York University Journal of Legislation and Public Policy*).

compared to twenty-eight percent of African-Americans, thirty-four percent of Hispanics, and forty-two percent of Asian-Americans.⁸⁸ These statistics indicate that persons of certain races are more likely to provide adequate care for their aging parents.

Aside from augmenting ethnic and class differences, assigning elder care to the family will also have significant gender implications, as the caregiving role usually falls upon women. Seventy-three percent of all caregivers are women, and the typical caregiver is in her mid-forties, works full-time, and provides an average of eighteen hours of caregiving each week.⁸⁹ Twenty-nine percent of all caregivers to infirm elderly persons are their adult daughters.⁹⁰ Women who provide care often forgo other opportunities and neglect other responsibilities so they can remain at home to assist their elders.⁹¹ Emily Abel has warned that policies that obligate family members to care for their elders will only exacerbate the gender disparity that characterizes the caregiving function. Even though “[s]ome policymakers may view reliance on family care for the elderly as a way to foster social stability by giving women more work at home and strengthening intergenerational ties,”⁹² Abel points out, “[C]are for disabled elderly family members confines many women to the home. . . . Caregivers, like mothers, are simultaneously sentimentalized and devalued.”⁹³

From the perspective of a policymaker removed from the actual caregiving experience, it might seem natural that an adult daughter should stay at home to care for her aging parent, just as it might seem natural that she should remain home to care for her children. However, legislators must recognize that caregiving, a practice that might indeed be an act of love and concern, may nonetheless force a woman to sacrifice academic, professional, and other opportunities, and ultimately remove her from the public sphere.⁹⁴

88. *Id.*

89. See SHEEL M. PANDYA & BARBARA COLEMAN, AARP, CAREGIVING AND LONG-TERM CARE (Dec. 2000), at http://research.aarp.org/health/fs82_caregiving.html (on file with the *New York University Journal of Legislation and Public Policy*).

90. ABEL, *supra* note 45, at 4 (citing Robyn Stone et al., *Caregivers of the Frail Elderly: A National Profile*, 27 GERONTOLOGIST 616, 620 (1987)).

91. See *id.* at 118–20 (discussing how female caregivers have been forced to give up or change employment in order to provide care).

92. *Id.* at 13.

93. *Id.* at 8.

94. See Act of Dec. 2, 1991, Pub. L. No. 102-176, 105 Stat. 1224 (recognizing that “80 percent of disabled elderly persons receive care from their family members, most of whom are their wives, daughters, and daughters-in-law, who often must sacrifice employment opportunities to provide such care . . .”).

In addition to exacerbating class-, race- and gender-based differences, private care laws fail to recognize that caregiving is costly to family members. A survey conducted by MetLife revealed that over a lifetime, caregivers lose an average of \$659,139 in lost wages, Social Security, and pension benefits.⁹⁵ Caregiving responsibilities also affect the health and productivity of the person providing care. Caregivers experience higher rates of employee absenteeism, turnover, and early retirement than the general population.⁹⁶ Ultimately, caregiving is costly not only to caregivers themselves, but also to U.S. employers, who are estimated to lose between \$11.4 and \$29 billion each year because of employees' caregiving responsibilities.⁹⁷

Finally, laws that assign care of the elderly to the family fail to account for the care of older persons who have never had children, or whose children are no longer living, live far away, or cannot be located. In light of these limitations, sound public policy dictates that the state should assume greater responsibility for the care of elderly persons who have no one to care for them and compensate adult children who do care for their parents. Otherwise, many of our aging citizens will be left with no one to support them.

While assigning primary responsibility for the care of the elderly to their families has a number of advantages, it also has a number of risks. Policymakers should bear in mind both the advantages and the risks as they attempt to find the appropriate method for ensuring that all of America's elderly have adequate care.

III PUBLIC CARE LAWS

Arguments in favor of enforcing filial support statutes are part of a broader ideology favoring private responsibility for the care of the elderly over state intervention in the caregiving process. Some have attributed the tendency of Americans to favor private over public responsibility to our national affection for individual freedom and limited government interference.⁹⁸ Those who support private responsibility assert that the government should not interfere with the

95. NAT'L ALLIANCE FOR CAREGIVING & NAT'L CTR. ON WOMEN & AGING, MET-LIFE, *THE METLIFE JUGGLING ACT STUDY: BALANCING CAREGIVING WITH WORK AND THE COSTS INVOLVED* 6 (1999), at <http://www.caregiving.org/content/reports/JugglingStudy.pdf> (on file with the *New York University Journal of Legislation and Public Policy*).

96. *Id.* at 9.

97. *Id.*

98. See Viola M. Lechner & Margaret B. Neal, *The Mix of Public and Private Programs in the United States: Implications for Employed Caregivers*, in *WORK AND*

role of the family in caring for its elders, as the availability of public assistance has already contributed to the decline of family responsibility.⁹⁹ Advocates of private responsibility also fear that comprehensive government programs for the elderly would lead families to depend too heavily on the state and would require tax increases.¹⁰⁰

Although "care for the disabled elderly still is predominantly a private responsibility,"¹⁰¹ the United States boasts an elaborate program of social services for older persons. Since the 1930s, the federal government has participated directly in providing for the elderly through the administration of the modern social security and welfare system.¹⁰² To some extent, this system has recognized societal responsibility toward the aged by funneling tax revenue from those currently employed to persons who have already paid into the system.¹⁰³

Overall, public support programs, particularly Social Security and Medicare, have improved the economic standing of older Americans.¹⁰⁴ Nevertheless, access to public benefits has become increasingly limited, and recently, rising health care costs and our aging society have prompted exhaustive debates over the future of Social Security, Medicare, and Medicaid. The predicted depletion of public reserves, coupled with the persistence of poverty among the elderly, has led some commentators to advocate enforcement of filial responsibility laws.¹⁰⁵ Understanding how these programs were intended to work and how they have failed to work fosters a better understanding of how to enact private care laws to ensure that we provide proper care to all elderly Americans.

A. *Social Security*

The modern system of federal programs designed to assist the elderly dates back to the Great Depression, which left many older Americans destitute and illuminated the dangers of economic insecurity.

CARING FOR THE ELDERLY: INTERNATIONAL PERSPECTIVES 120, 131 (Viola M. Lechner & Margaret B. Neal eds., 1999).

99. See, e.g., Brinig, *supra* note 13, at 411 (arguing that availability of Social Security, Medicare, and pensions have made children less likely to support their parents); Lee, *supra* note 53, at 679–81 (arguing that growth of welfare state has partly contributed to decline of filial support laws).

100. See Lechner & Neal, *supra* note 98, at 131.

101. ABEL, *supra* note 45, at 165.

102. See Teitelbaum, *supra* note 7, at 766.

103. See *id.* at 766–67.

104. Wald, *supra* note 11, at 1087. *But cf. supra* note 10 and accompanying text (noting that large percentage of elderly Americans remain impoverished).

105. See, e.g., Kline, *supra* note 9; Walters, *supra* note 2.

riety.¹⁰⁶ The first legislation to treat the plight of the indigent elderly was the Social Security Act of 1935,¹⁰⁷ which President Franklin D. Roosevelt signed into law. The modern incarnation of the original program of benefits for the elderly is the Old-Age, Survivors, and Disability Insurance (OASDI) program, commonly known as Social Security.¹⁰⁸ More than ninety-five percent of citizens aged sixty-five years or older are eligible for Social Security benefits.¹⁰⁹ In 1998, ninety percent of elderly persons reported Social Security as a source of income.¹¹⁰

Recognizing that not all older Americans receive Social Security and that some receive very little, Congress developed the Supplemental Security Income (SSI) program to ensure that aged, blind, and disabled persons receive at least some monthly income.¹¹¹ However, the SSI program operates to the detriment of older Americans who reside with their adult children, because SSI benefits are reduced by one-third if the recipient lives in someone else's household.¹¹² While no one has proven that this reduction in benefits prevents elderly individuals from living with their adult children, the policy penalizes family members whose financial situation requires them to live together.¹¹³

In addition to the inadequacies of the SSI program, demographic shifts in America mean that while more Americans will be eligible to collect Social Security benefits, fewer Americans will be alive to provide the funds to pay for them. In 1950, for every American over sixty-five collecting benefits, sixteen Americans under sixty-five were contributing money into the Social Security Fund.¹¹⁴ In 1997, this number had dropped substantially, and only five workers under sixty-five were taxed to support each Social Security recipient.¹¹⁵ Some commentators predict that by the year 2030, only two or three workers

106. See, e.g., STUART BRUCHEY, *THE WEALTH OF THE NATION: AN ECONOMIC HISTORY OF THE UNITED STATES* 218 (1988) (discussing how Great Depression led to rise of welfare state).

107. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301-306 (1994)).

108. 42 U.S.C. § 401 (1994).

109. FROLIK & BARNES, *supra* note 83, at 207 (citing *Social Security Programs in the United States*, 52 SOC. SEC. BULL. No. 7, at 2, 6 (July 1989)).

110. ADMINISTRATION ON AGING, *supra* note 10, at 10.

111. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1465-78 (codified as amended at 42 U.S.C. §§ 1381-1383(d) (1994)).

112. Gibson, *supra* note 5, at 179.

113. See *id.*

114. Wald, *supra* note 11, at 1086.

115. Max Frankel, *Less Medicare, More Magic*, N.Y. TIMES, Mar. 9, 1997, § 6 (Magazine), at 30.

will be taxed to support each beneficiary.¹¹⁶ Others caution that the Social Security reserves will have been drained completely by 2030, if not earlier.¹¹⁷

B. Medicare

While Social Security provides public income support for the elderly, Medicare and Medicaid are the two major federal programs designed to provide health care for older Americans. Medicare, enacted in 1965 as part of President Lyndon B. Johnson's Great Society program and authorized under Title XVIII of the Social Security Act, is available to anyone aged sixty-five or older and eligible for social security benefits.¹¹⁸ It provides minimal assistance to individuals requiring medical care, regardless of their financial need. Medicare is limited in that it does not reach certain sizeable costs associated with disability and only partly covers other costs.¹¹⁹ In particular, Medicare only partially covers the cost of care rendered in a "skilled nursing facility,"¹²⁰ and if an individual requires long-term nursing care, then coverage is limited or entirely unavailable.¹²¹ Medicare completely overlooks the costs of custodial or non-skilled care. In addition, Medicare covers solely *medical* home health care services and excludes from coverage other critical social services administered in the home, such as full-time nursing care, housekeeping services, drugs or other therapies.¹²² Even the coverage of medical home health care is limited; in order to receive coverage, "recipients must be homebound, require skilled nursing care, and need services on an intermittent, rather than continuous, basis."¹²³

116. *Id.*

117. See, e.g., Robert A. Rosenblatt, *Social Security Panel Offers 3 Reform Plans*, L.A. TIMES, Jan. 7, 1997, at A1 ("Based on projections, the [Social Security] fund would confront a fiscal crisis in 2029, when revenues are expected to be sufficient to pay only about 75% of promised benefits.").

118. See 42 U.S.C. § 1395c (1994) (describing program objectives).

119. Teitelbaum, *supra* note 7, at 795.

120. A "skilled nursing facility" is an institution which is primarily engaged in providing residents who require medical or nursing care with skilled nursing care or rehabilitation services and maintains a transfer agreement with at least one hospital. 42 U.S.C. §1395i-3(a) (1994).

121. Teitelbaum, *supra* note 7, at 795 n.103.

122. *Id.*; see also ABEL, *supra* note 45, at 12 ("Medicare emphasizes medically oriented home health care, not the social services many elderly persons need to live independently in the community.").

123. ABEL, *supra* note 45, at 12.

C. Medicaid

Medicaid, authorized under Title XIX of the Social Security Act,¹²⁴ and designed to provide insurance coverage for much of the skilled and unskilled care neglected by Medicare, suffers from its own deficiencies. Unlike Medicare, which is controlled by the federal government, Medicaid is administered by the individual states pursuant to federal guidelines and supervision.¹²⁵ Individuals eligible for Medicaid may be either “categorically needy,” which means that their income is low enough to qualify for cash assistance, or “medically needy,” which means that their income and assets are too small to cover their medical bills.¹²⁶ To qualify as “categorically needy,” an individual must have income and assets below a certain level set by the state in which they live.¹²⁷ The states have set these levels so low that Medicaid is only able to reach barely over half of individuals whose income falls below 115% of the federal poverty standard.¹²⁸ Qualifying as “medically needy” is not much easier, as federal law permits, but does not require, states to provide “medically needy” individuals with benefits.¹²⁹ As a result, only about one in five older persons who receive informal care, or 780,000 individuals, are eligible for Medicaid.¹³⁰

IV

STRIKING A BALANCE BETWEEN PUBLIC AND PRIVATE RESPONSIBILITY FOR THE ELDERLY

The future of government benefit programs for the elderly is uncertain, as public resources dwindle from rising costs and an ever-aging nation.¹³¹ The public support that is currently available to the elderly is extremely limited, and leaves many older Americans below the poverty line.¹³² The state’s inability to provide full support to the

124. 42 U.S.C. §§ 1396–1396v (1994 & Supp. V 2000).

125. FROLIK & BARNES, *supra* note 83, at 335.

126. *Id.* at 336.

127. *Id.*

128. Teitelbaum, *supra* note 7, at 796; *see also* Marshall B. Kapp, *Options for Long-Term Care Financing: A Look to the Future*, 42 HASTINGS L.J. 719, 743 (1991) (arguing that “requiring individuals to spend down their private assets to qualify for Medicaid coverage fundamentally demeans the elderly”).

129. FROLIK & BARNES, *supra* note 83, at 337.

130. GARY SMITH ET AL., NAT’L FAMILY CAREGIVER SUPPORT PROGRAM, SUPPORTING INFORMAL CAREGIVING (UNDER MEDICAID) 3 (Sept. 25, 2001), at <http://www.aoa.dhhs.gov/carenetwork/Fin-Smith.pdf> (on file with the *New York University Journal of Legislation and Public Policy*).

131. *See* Walters, *supra* note 2, at 378.

132. *See supra* note 10.

elderly creates a somewhat compelling argument for returning primary responsibility for the care of the elderly to their families. However, despite the various economic, historical, and moral justifications for filial responsibility, assigning elder care to the family risks further augmenting gender and class differences in the quality of care, and fails to account for older people who do not wish to be cared for by their children, or who have no children to care for them. Coercive legislation, such as filial responsibility statutes, only enhances these problems by fostering adversarial relationships between family members. In light of the limitations of relying exclusively, or even predominantly, on either the state or the family to take responsibility for care of the elderly, an appropriate solution would be for the public and private spheres to share this important responsibility.

The support framework that this Note advocates depends on two assumptions. First, we must assume that the well-being of the elderly is a legitimate concern. From a purely cost-benefit perspective, “supporting family members to provide care will delay institutionalization, improve the quality of care that elders receive, and in the end be less costly to the government.”¹³³ For example, according to a recent study, delaying the institutionalization of Alzheimer’s patients by a single month could save \$1.2 billion each year.¹³⁴ The public as a whole would benefit from this efficient use of resources. In addition to reducing costs, one might say young Americans as a whole have a moral obligation to care for the elderly, similar to the moral obligation one might say children have to care for their parents.

Second, we must assume that encouraging positive family relationships is also a legitimate concern. Positive family dynamics teach people how to relate to one another on a broader social level.¹³⁵ By encouraging an ethos of support within the family, the law can instill in individuals a sense of concern and responsibility toward their fellow citizens.

Recognizing the importance of both the well-being of the elderly and positive family relationships, the framework set forth here asserts that the traditional public/private dichotomy has no place in the formulation of elder care policy. Rather, the public and private sectors

133. MERRILL, *supra* note 4, at 167.

134. Joel Leon et al., *Alzheimer’s Disease Care: Costs and Potential Savings*, HEALTH AFF., Nov.-Dec. 1998, at 206, 213.

135. Cf. J. David Hawkins et al., *Preventing Substance Abuse*, in BUILDING A SAFER SOCIETY: STRATEGIC APPROACHES TO CRIME PREVENTION 343, 401–02 (Michael Tonry & David P. Farrington eds., 1995) (discussing potential for family dynamic to prevent substance abuse and other behaviors).

can share responsibility for this pressing need. Family caregiving can be vigorously encouraged by meaningful public programs which recognize the shared nature of public and private responsibility toward the elderly. This Part examines federal, state, and international laws and policies that have been proposed or enacted in an effort to promote such shared responsibility. In addition, this Part discusses the strengths and limitations of such programs.

A. *Current and Proposed Federal Law*

1. *Federal Acknowledgement of Family Caregiving*

Some of the federal legislation relating to family caregiving has been largely symbolic, and thus of minimal practical value. For example, in 1991 Congress passed a joint resolution designating one week in November “National Family Caregivers Week.”¹³⁶ The resolution observes that family members help the elderly with their daily tasks and provide “between 80 and 90 percent of the medical care, household maintenance, transportation, and shopping needed by older persons.”¹³⁷ The resolution further acknowledges the physical and emotional toll on family caregivers, while recognizing that “the contributions of family caregivers help maintain strong family ties and assure support among generations.”¹³⁸ However, the resolution does nothing to alleviate any of the stress experienced by family caregivers.

2. *Generally Available Federal Tax Deductions and Credits*

The federal dependent care tax deduction, in place since 1976, allows individuals to claim a deduction against federal income tax liabilities for caregiving-related expenses in excess of 7.5% of their gross income.¹³⁹ In order for an adult child caregiver to receive the credit, her parent must qualify as a dependent. This means that the parent must receive more than fifty percent of his support from the child claiming the credit.¹⁴⁰

In March of 2001, bipartisan legislation was introduced in the House and the Senate to amend the Internal Revenue Code to provide for an annual tax credit for recipients of long-term care and their

136. Act of Dec. 2, 1991, Pub. L. No. 102-176, 105 Stat. 1224.

137. *Id.* at 1224.

138. *Id.*

139. I.R.C. § 213(a) (1994).

140. I.R.C. § 152(a) (1994) (defining “dependent” as individual “over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer”).

caregivers.¹⁴¹ The amount of the credit would increase yearly until 2005, when the credit would reach the level of \$3,000 for each individual with long-term care needs for whom the taxpayer was an eligible caregiver, as defined in the proposed legislation.¹⁴²

While these existing and proposed tax credits and deductions represent a positive step in governmental support of family caregiving, they exclude very poor caregivers who do not pay federal income taxes. Such persons might have forfeited work opportunities outside the home in order to care for their parents, and thereby have lost access to these important benefits.

3. *Dependent Care Assistance Plan*

The federal Dependent Care Assistance Plan (DCAP) allows individuals to exclude up to \$5,000 of expenses incurred in caregiving from their taxable income.¹⁴³ However, only persons whose employers have set up a dependent care assistance benefit for their employees may take advantage of this deduction.¹⁴⁴ In addition, the DCAP requires an eligible employee to pay for at least fifty-one percent of her parents' care-related expenses and mandates that the parent receiving care spend at least eight hours of every day in the employee's home.¹⁴⁵ Thus, similar to the tax credit, the DCAP appears impractical and ultimately of little use to many caregivers.

4. *Family and Medical Leave Act*

Since 1993, the federal Family and Medical Leave Act (FMLA) has obligated employers to grant unpaid leave of up to twelve weeks per year for employees to provide for family needs, including those of a seriously ill parent.¹⁴⁶ The FMLA formally recognizes employees'

141. Long-Term Care and Retirement Security Act of 2001, H.R. 831, 107th Cong. (2001); Long-Term Care and Retirement Security Act of 2001, S. 627, 107th Cong. (2001).

142. H.R. 831, § 3; S. 627, § 3.

143. I.R.C. § 129(a)(2)(A) (1994).

144. *Id.* § 129(d)(1). There are multiple requirements set forth that a benefit program must comply with in order to be a DCAP. *See id.* § 129(d)(2)–(9) (1994 & Supp. V 2000). However, even if a program does not meet those requirements, “employees who are not highly compensated employees” are still considered eligible for the DCAP. *Id.* § 129(d)(1) (1994).

145. *See id.* § 129(e)(1) (setting out basic DCAP provisions); *id.* § 152(a) (defining “dependent”); *id.* § 21(b)(2)(B)(ii) (providing that parent must regularly spend eight hours per day in child's household for child to be eligible for deduction).

146. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (1994 & Supp. V 2000). Section 2612(a)(1) limits the leave period to twelve weeks. *Id.* § 2612(a)(1).

needs to take care of not only their children, but also their parents, and explicitly notes men's caregiving roles by employing gender-neutral language in defining "eligible employee" for leave purposes.¹⁴⁷ Still, the FMLA suffers from a number of inadequacies with respect to elder care. First, the twelve-week period covered by the FMLA may not be enough time for a child to provide the care her elderly parent needs.¹⁴⁸ Second, the FMLA mandates only *unpaid* leave,¹⁴⁹ which makes taking time off impractical for many caregivers. The statute provides no protection against loss of pay or benefits during an employee's leave period. Third, the FMLA applies only to employers with more than fifty employees.¹⁵⁰ Consequently, employees working for smaller entities receive no benefit from the FMLA. Thus, the FMLA fails to provide comprehensive support for all people who may need to take time away from work to care for their aging parents.

5. *The Older Americans Act and the National Family Caregiver Support Program*

Congress enacted the Older Americans Act (OAA) in 1965, in an effort to promote the welfare and independence of the elderly.¹⁵¹ Subchapter III of the OAA provides states with funding for meal programs, homemaker services, transportation, counseling, and adult day care, among other services.¹⁵² All individuals aged sixty and older are eligible for OAA services, but the statute's declared purpose is limited to "giv[ing] priority to the elderly with the greatest economic and social need" in the programs it funds.¹⁵³

Of particular importance to adult children who provide care for their parents is the National Family Caregiver Support Program (NFCSP), passed as an amendment to the OAA in the year 2000.¹⁵⁴ The NFCSP allocates funds to each state based on its proportion of the

147. *Id.* § 2611(2).

148. See Sabra Craig, Note, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 *DRAKE L. REV.* 51, 66 (1995) ("It seems doubtful that the goals of [the Act] . . . will be accomplished by providing twelve weeks of unpaid leave in extraordinary situations.").

149. 29 U.S.C. § 2612(c).

150. *Id.* § 2611(4)(A)(i).

151. Older Americans Act of 1965, Pub. L. No. 89-73, 79 Stat. 218 (codified as amended at 42 U.S.C. §§ 3001-3058 (1994 & Supp. V 2000)).

152. 42 U.S.C. §§ 3030dr (1994).

153. 42 U.S.C. § 3003(2) (1994).

154. Older Americans Act Amendments of 2000, Pub. L. No. 106-501, § 316, 2000 U.S.C.A.N. (114 Stat) 2226, 2253-56 (to be codified at 42 U.S.C. § 3030s).

population aged seventy and older.¹⁵⁵ States are to work in conjunction with local agencies that serve the elderly and their families in providing information to caregivers about available services, assistance in gaining access to services, caregiver training and counseling, respite care, and supplemental services.¹⁵⁶ While the NFCSP represents a positive development in federal support of family caregiving, the amount of funding allocated to the program is still limited, especially in comparison to the resources allocated to Medicaid, for which fewer people are eligible.¹⁵⁷

B. State Law

Many states have implemented programs to aid adult children who care for their parents, in addition to other family caregivers. States can assist family caregivers through a Medicaid Home and Community-Based Waiver,¹⁵⁸ which permits the use of Medicaid funds for supportive, as opposed to exclusively medical, services, or through programs funded by state revenues. Some states have developed innovative and helpful programs, and could serve as models for further state and national reform.

1. Payment of Family Caregivers

Despite its limitations,¹⁵⁹ Medicaid has increasingly become a source of state support for family caregivers. In recent years, a number of states have increased funding to and expanded choice under their Medicaid programs so as to cover a broader range of caregiving services to benefit older Americans and those who care for them.¹⁶⁰ One highlight of some states' Medicaid laws is the authorization of caregiver payment programs, which provide family caregivers with

155. ADMIN. ON AGING, U.S. DEP'T OF HEALTH AND HUMAN SERVS., FAMILY CAREGIVING, at <http://www.aoa.gov/may2001/factsheets/family-caregiving.html> (last modified May 17, 2001) (on file with the *New York University Journal of Legislation and Public Policy*).

156. *Id.*

157. ENID KASSNER, AARP, THE ROLE OF THE OLDER AMERICANS ACT IN PROVIDING LONG-TERM CARE (2001) at http://research.aarp.org/health/fs12r_oaa.html (on file with the *New York University Journal of Legislation and Public Policy*). Approximately \$16 billion in Medicaid funding went towards home- and community-based long-term care in 1999. *Id.* In contrast, the NFCSP was funded at \$125 million in 2001. ADMIN. ON AGING, *supra* note 155.

158. 42 U.S.C. §1396n(c) (1994 & Supp. V 2000).

159. *See supra* Part III.C.

160. *See* WENDY FOX-GRAGE ET AL., FAMILY CAREGIVER ALLIANCE, FEDERAL AND STATE POLICY IN FAMILY CAREGIVING: RECENT VICTORIES BUT UNCERTAIN FUTURE 8 (2001), at http://www.caregiver.org/national_center/PolicyBrief_2.pdf (on file with the *New York University Journal of Legislation and Public Policy*).

compensation for their services. Family members who are legally responsible to provide for individuals receiving care—spouses and parents of minor children—are not eligible for payment.¹⁶¹ The largest and oldest caregiver payment program in the United States is California's In-Home Supportive Services (IHSS).¹⁶² The IHSS is funded with over \$500 million each year and serves more than 200,000 individuals.¹⁶³ The California program promotes the autonomy of elderly persons in need of care by enabling them to select their own caregivers.¹⁶⁴ Approximately forty percent of caregivers hired through the IHSS are relatives of the care recipient.¹⁶⁵ Programs like the IHSS would enable states to more directly support family caregiving by providing compensation for the time sacrificed by family members who provide care.

2. Family Leave Programs

In an effort to assist employees who need to care for their elderly relatives, a number of states have implemented family leave programs to supplement the job protection provided under the federal FMLA. Some states have enacted laws that allow employees to use their accrued sick leave to care for family members.¹⁶⁶ Such legislation, while recognizing family caregiving, fails to account for individuals who are unemployed or who otherwise have not accrued sick leave, primarily low-income individuals.¹⁶⁷ Washington state legislators have proposed a Family Leave Insurance Fund that would pay full-time employees \$250 each week of leave for up to five total weeks to

161. SMITH ET AL., *supra* note 130, at 6.

162. CAL. WELF. & INST. CODE § 12300 (West 2001); see LARRY POLIVKA, FAMILY CAREGIVER ALLIANCE, PAYING FAMILY MEMBERS TO PROVIDE CARE: POLICY CONSIDERATIONS FOR STATES 4 (2001), at http://www.caregiver.org/national_center/PolicyBrief_7.pdf (on file with the *New York University Journal of Legislation and Public Policy*).

163. POLIVKA, *supra* note 162

164. *Id.*

165. SMITH ET AL., *supra* note 130, at 6–7.

166. See, e.g., VT. STAT. ANN. tit. 21, § 472 (2001); OR. REV. STAT. § 659A.174 (2001); CAL. LABOR CODE § 233 (West Supp. 2002); WIS. STAT. § 103.10(5)(b) (1999).

167. See DONNA R. LENHOFF, NAT'L P'SHIP FOR WOMEN & FAMILIES, FAMILY LEAVE BENEFITS: A MENU OF POLICY MODELS 17 (2001) (noting that “[a] full 76% of poor working adults lacked paid sick leave at least some of the time over a seven-year period between 1990 and 1996”), at <http://www.nationalpartnership.org/library/Menu%20of%20Policy%20Models.pdf> (on file with the *New York University Journal of Legislation and Public Policy*).

care for an ill parent.¹⁶⁸ Approximately eighty percent of employees in Washington State would be eligible for payment under the insurance program, which would be funded by payroll contributions from employees and employers of one cent per hour of employment.¹⁶⁹ The Washington program demonstrates that there are effective, low-cost ways for governments to expand leave programs like the FMLA, thereby giving greater recognition and encouragement to those who are involved in caregiving.

3. *Caregiver Support Programs*

Some states have developed programs that provide family caregivers with information, training, respite care, and other support services. At least two states, California and Pennsylvania, have applied state revenues toward extensive family caregiver support programs.¹⁷⁰ Each year, the California Caregiver Resource Center assists up to 11,700 family members and other caregivers who provide support for individuals with cognitive illnesses, such as Alzheimer's Disease.¹⁷¹ The Pennsylvania Family Caregiver Program currently offers services and financial assistance to more than 6,000 family caregivers.¹⁷² Other states have developed comprehensive education and information programs, respite programs, and tax incentive legislation, in recognition of the extensive support so many individuals provide to their family members.¹⁷³ While these state programs expand the amount of public support available to adult children who support their parents, compensation is limited to residents of those few jurisdictions that have recognized the importance of family caregiving.

C. *International Law*

1. *Filial Responsibility Laws*

A number of foreign countries have filial responsibility legislation similar to the laws in place at the state level in the United States.

168. H.B. 1520, 57th Leg., Reg. Sess. (Wash. 2001); S. 5420, 57th Leg. (Wash. 2001).

169. LENHOFF, *supra* note 167, at 10.

170. FOX-GRAGE ET AL., *supra* note 160, at 5–6.

171. *Id.*

172. *Id.* at 6.

173. See BARBARA COLEMAN, AARP PUB. POL'Y INST., HELPING THE HELPERS: STATE-SUPPORTED SERVICES FOR FAMILY CAREGIVERS 1, 4 (2000) (listing New Jersey, Florida, Georgia, South Carolina, and Nevada as other states that have provided caregiver support programs), at http://www.research.aarp.org/health/2000_07_help.pdf (on file with the *New York University Journal of Legislation and Public Policy*).

In Italy, courts enforce family support laws, asserting that children have a duty to provide their parents with a portion of their assets and income if the parents and children live together.¹⁷⁴ Israel's Alimonies Law requires adult children to contribute to the nursing care expenses of their parents, depending on the financial situation of both the children and their parents.¹⁷⁵ The Japanese Civil Code provides that an elderly person's relatives are responsible for her care and support, but only after her relatives have provided for their immediate families.¹⁷⁶ As in most other countries with filial support legislation, the legal responsibility of Japanese children toward their parents is limited, especially when compared to the absolute responsibility parents bear toward their children.¹⁷⁷ Yugoslav law requires children to care for their older parents if the parents are ill and have no income.¹⁷⁸ Despite this express provision, few parents report their children for not supporting them.¹⁷⁹ Most other industrialized countries have abolished their family responsibility laws altogether.¹⁸⁰ This global trend away from the enactment and enforcement of filial responsibility laws indicates that while family caregiving must be valued, filial responsibility laws are not the most appropriate or most effective method for ensuring that family caregiving takes place.

2. Caregiver Payment Programs

In the United States, caregiver allowances are available only to residents of states with caregiver payment programs¹⁸¹ and to family members who provide care to elderly veterans.¹⁸² Other countries have enacted universal legislation making such payment available to all caregivers satisfying certain eligibility requirements. Since the

174. See Cosimo Marco Mazzoni, *Legal Protection of the Elderly in Italy*, 13 NAT'L ACAD. OF ELDER L. ATT'YS Q. No. 4, at 8, 9 (Fall 2000) (citing CODICE CIVILE art. 315 (Italy)).

175. Jenny Brodsky & Brenda Morginstin, *Balance of Familial and State Responsibility for the Elderly and Their Caregivers in Israel*, in WORK AND CARING FOR THE ELDERLY: INTERNATIONAL PERSPECTIVES, *supra* note 98, at 68, 76.

176. Narayanan, *supra* note 4, at 390.

177. See Daisaku Maeda, *Decline of Family Care and the Development of Public Services—A Sociological Analysis of the Japanese Experience*, in AN AGING WORLD, *supra* note 80, at 297, 298–99 (discussing that “the responsibility of children toward their aging parents [under the statute] is regarded to be *relative* in contrast with the *absolute* responsibility of parents toward their young children”).

178. Gibson, *supra* note 5, at 178.

179. *Id.*

180. *Id.*

181. See *supra* Part IV.B (discussing caregiver payment programs).

182. See Gibson, *supra* note 5, at 170; *supra* note 83 (describing benefits to veterans and their families).

1960s, Swedish law has authorized municipalities to employ family members as caregivers of elderly persons.¹⁸³ A caregiver's salary is set by the municipality and depends on the needs of the elderly person and the number of hours spent providing the care.¹⁸⁴ The caregiver receives all of the benefits of social insurance and pension credits that they would accrue in any other job, and the payment, which is considered income, is subject to taxation.¹⁸⁵ To qualify for this compensation, the caregiver must reduce or eliminate the hours devoted to other employment.¹⁸⁶

Germany's Long-Term Care Insurance program also offers compensation to eligible family caregivers. Elderly persons entitled to receive insurance benefits have two options: "benefits in kind" and "benefits in cash."¹⁸⁷ Individuals who select "benefits in kind" receive professional care services, which could allow adult children who would otherwise stay at home to care for their parents to enter or return to outside employment.¹⁸⁸ "Benefits in cash" enable the person being cared for to compensate family caregivers monetarily.¹⁸⁹ A survey conducted in 1996, only one year after the start of the program, reported that an overwhelming majority of beneficiaries were highly satisfied with the program and felt that it was essential to maintaining their independence.¹⁹⁰ As an additional benefit, the German program contributes to the pension funds of caregivers who are not otherwise employed or who work fewer than thirty hours per week, so long as they provide care for at least fourteen hours per week.¹⁹¹

3. *Work Leave Programs*

In contrast to the United States' FMLA, the family leave policies of some other countries entitle employees to *paid* leave. In Israel, employees may take up to six days of paid sick leave each year to care for a disabled elderly parent.¹⁹² This policy represents a limited ad-

183. Lars Andersson, *Sweden and the Futile Struggle to Avoid Institutions*, in *WORK AND CARING FOR THE ELDERLY: INTERNATIONAL PERSPECTIVES*, *supra* note 98, at 101, 103.

184. *Id.*

185. *Id.* at 104.

186. *Id.* at 103.

187. Monika Reichert & Gerhard Naegele, *Elder Care and the Workplace in Germany: An Issue for the Future?*, in *WORK AND CARING FOR THE ELDERLY: INTERNATIONAL PERSPECTIVES*, *supra* note 98, at 29, 36.

188. *Id.*

189. *See id.*

190. *See* POLIVKA, *supra* note 163, at 6.

191. Reichert & Naegele, *supra* note 187, at 36.

192. Brodsky & Morginstin, *supra* note 175, at 73.

vance, however, as it fails to account for extended illnesses and other long-term disabilities. In contrast, Japan's Long-Term Care Leave Law requires employers to grant up to three months of leave to employees to care for family members in need of continual assistance.¹⁹³ While the period of paid leave in Japan is longer than that allowed in Israel, employees are only entitled to approximately twenty-five percent of their ordinary salary during the leave under the Japanese law.¹⁹⁴ Employees in Japan can only take this leave once, although after they have done so, employers must permit them to work shorter days so they can care for their family members.¹⁹⁵

According to one commentator, "[T]he most comprehensive and useful leave [policy] is that exemplified by Sweden."¹⁹⁶ In Sweden, employment leave is guaranteed by the government, is available to all employees, and covers up to seventy-five percent of caregiving employees' salaries.¹⁹⁷ However, the leave period is limited to sixty days in the lifetime of the person receiving the care.¹⁹⁸ In contrast to Sweden's caregiver payment program, which compensates family caregivers at the levels set by individual municipalities, and therefore attracts primarily working class women, Sweden's care leave reimbursement depends on the caregiver's actual income, thus providing an incentive to members of all socioeconomic classes to provide care for their family members.¹⁹⁹

As these other industrial countries demonstrate, it is possible to enact a more expansive leave policy than the one existing under the FMLA. Expansive leave policies limit the disincentives that currently exist in the familial caregiving context by ensuring that adequate time and compensation is available when leave is taken.

4. *Other International Innovations*

Aside from filial responsibility legislation, paid caregiver laws, and family leave policies, some countries have developed a variety of other programs in hope of alleviating some of the stress caused by

193. Masako Ishii-Kuntz, *Japan and Its Planning Toward Family Caregiving*, in *WORK AND CARING FOR THE ELDERLY: INTERNATIONAL PERSPECTIVES*, *supra* note 98, at 84, 88.

194. *Id.*

195. *Id.*

196. Viola M. Lechner, *Final Thoughts*, in *WORK AND CARING FOR THE ELDERLY: INTERNATIONAL PERSPECTIVES*, *supra* note 98, at 211, 215.

197. Andersson, *supra* note 183, at 105.

198. *Id.*

199. *See id.* at 103–05 (discussing how paid care and leave programs in Sweden differ).

family caregiving. For example, respite care insurance, which provides temporary housing and support for elderly people who usually reside with their families, is commonplace in Western Europe and exists in Israel.²⁰⁰ The governments of countries such as Israel and Sweden also sponsor day care and sheltered housing for elderly persons, which can relieve family members from some of their caregiving responsibilities while providing the elderly with a sense of community.²⁰¹

Japan has implemented some of the most innovative family caregiving programs. The Japanese Ministry of Labor has encouraged employed caregivers to fulfill their employment and caregiving needs simultaneously by promoting “teleworking” or “satellite working”—working at home using the phone, facsimile, electronic mail and other forms of communication to stay in touch with their workplace.²⁰² The Japanese government also sponsors counseling, seminars on work and elder care management, and job referrals for caregivers.²⁰³ In addition to helping employees balance their work and caregiving responsibilities, the Japanese government also assists family caregivers in paying for adequate housing. The Oyakoko Loan program offers lower interest rates to adult children with elderly dependents who wish to take out housing loans.²⁰⁴ Adult Japanese children who care for their parents are also given top priority to obtain publicly funded housing.²⁰⁵ These policies represent only a handful of the many programs other countries have enacted in recognizing elder care as a responsibility to be shared by the family and the state.²⁰⁶

D. *The Need for Further Reform*

The laws in place in foreign countries,²⁰⁷ as well as the creative programs that have been developed in many of the fifty states,²⁰⁸ should serve as examples for future reform in the area of American

200. See ABEL, *supra* note 45, at 171 (discussing programs in Western Europe); Brodsky & Morginstin, *supra* note 175, at 79 (discussing program in Israel).

201. See Andersson, *supra* note 183, at 107–08 (discussing Swedish “service houses”); Brodsky & Morginstin, *supra* note 175, at 78–79 (discussing Israeli day care centers and other sheltered housing for the elderly).

202. Ishii-Kuntz, *supra* note 193, at 90.

203. *Id.*

204. *Id.* at 91.

205. *Id.*

206. See generally WORK AND CARING FOR THE ELDERLY: INTERNATIONAL PERSPECTIVES, *supra* note 98 (discussing the caregiver laws of Germany, Sweden, Japan, and Israel, in addition to those of Canada, Britain, Brazil, Mexico, China, and Uganda).

207. See *supra* Part IV.C.

208. See *supra* Part IV.B.

elder policy. Symbolic legislation,²⁰⁹ tax credits and deductions,²¹⁰ and unpaid family leave²¹¹ currently available through federal programs do not adequately account for the lost opportunities, financial strain, or physical and emotional stress affecting the lives of adult children who care for their parents. On the brighter side, recent developments at state and national levels evidence increased recognition of the important role that family members play in caring for our elderly population. Federal legislation such as the NFCSP²¹² and state initiatives such as caregiver payment programs,²¹³ family leave policies,²¹⁴ and caregiver support services²¹⁵ evidence growing commitment to the needs of family caregivers.

These innovative policies were made possible largely through state and federal budget surpluses experienced throughout the mid- to late-1990s.²¹⁶ The recent decline in the economy presents policymakers with many challenges in maintaining and developing public programs to support family caregivers. Nonetheless, rapidly accelerating health care costs²¹⁷ combined with the uncertainty surrounding the future of public benefits to the elderly should motivate lawmakers to provide more meaningful incentives for adult children to support their elderly parents. Beyond such economic concerns, however, lawmakers should design policies that reflect family members' wishes to live together and support one another, rather than penalizing them for doing so or forcing them to do so through filial responsibility laws. Developing legislation that rewards adult children for supporting their parents, rather than relying on laws that enable parents to sue their children for support, would not only honor the preferences and capabilities of family members, but also encourage positive family relationships.

The primary reason one might oppose such government support of family caregiving is the attendant costs. Any government support of family caregiving, and any administrative costs associated there-

209. See *supra* Part IV.A.1.

210. See *supra* Part IV.A.2–3.

211. See *supra* Part IV.A.4.

212. See *supra* Part IV.A.5.

213. See *supra* Part IV.B.1.

214. See *supra* Part IV.B.2.

215. See *supra* Part IV.B.3.

216. FOX-GRAGE ET AL., *supra* note 160, at 12.

217. See, e.g., Milt Freudenheim, *Coalition Forms to Reverse Trend of Fast-Rising Ranks of Uninsured Americans*, N.Y. TIMES, Feb. 9, 2002, at A12 (noting that “health care costs are rising much faster than general inflation rates”); Marilyn Werber Serafini, *Slow Burn to a Health Care Meltdown?*, 34 NAT’L J. 335, 335 (2002) (noting that “[health care] costs are expected to rise for the foreseeable future”).

with, would inevitably be funded by taxes, which many Americans complain are already too high,²¹⁸ or by rapidly depleting state and federal revenues. One concern facing policymakers is that any universal policy that would aid family caregivers would lead to increased demand for such support and, ultimately, increased strains on the public purse.²¹⁹

Two ways in which the federal and state governments can contain costs while providing assistance to adult children who support their parents are expanded family leave policies and caregiver payment programs. In the area of family leave policy, the FMLA was a groundbreaking piece of legislation that has provided many Americans with job protection while they tend to family members in need of care.²²⁰ State family and medical leave policies have provided increased support to family caregivers by extending leave requirements to employers with fewer than fifty employees, extending leave periods, and, in some states, offering paid leave to state employees.²²¹ Still, many workers cannot afford to take time off to care for their elderly relatives, particularly those workers most in need of financial support.²²² Americans should neither be forced to sacrifice their livelihoods in order to care for their family members, nor feel compelled to abandon their relatives in order to remain employed. The state has much to gain by encouraging family caregiving. Requiring employers to provide at least some paid leave for caregivers enables the state to save funds it would otherwise lose to unemployment benefits and

218. See, e.g., Editorial, *Clamor for Taxes? Not Hardly*, INVESTOR'S BUS. DAILY, Aug. 7, 2001, at A20 (citing a Rasmussen poll which found that "72% believe the [2001 Bush] tax cut was either too small or about right" and that "55% are apparently so unsatisfied that they think taxes should be cut again next year").

219. See Gibson, *supra* note 5, at 184 (describing cost-based arguments against governmental support of family caregiving).

220. See, e.g., Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2074–75 (1996) (describing job security provided by FMLA); Nancy J. King, *The Family Medical Leave Act: An Ethical Model for Human Resource Policies and Decisions*, 83 MARQ. L. REV. 321, 333–35 (1999) (noting specific benefits that FMLA provides to women and mothers).

221. See *supra* Part IV.B.2.

222. See COMM'N ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES XIX (1996) ("Among employees who need but do not take leave, fully 63.9% cannot afford the accompanying loss of wages, underscoring the importance of wage replacement."), at http://www.ilr.cornell.edu/library/e_archive/gov_reports/family_medical/FamilyMedical.pdf (on file with the *New York University Journal of Legislation and Public Policy*); Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER SOC. POL'Y & L. 39, 53 (1994) (noting that under current system, "only the workers who can afford unpaid family and medical leave will be able to exercise their full rights under the FMLA").

other public assistance received by caregivers.²²³ Therefore, members of Congress should consider amending the FMLA to provide not only job protection, but also salary and health care benefits during an employee's leave period, applicable to employers regardless of the size of their workforce, and to part-time employees. Those states without strong family leave policies should follow the lead of other states that have applied their family leave policies to smaller businesses and a broader range of family medical needs.²²⁴ Finally, all jurisdictions should consider providing family caregivers with paid leave.²²⁵

As expanded family leave policies would only serve *employed* caregivers, additional forms of assistance are needed to reach those individuals whose caregiving responsibilities prevent them from pursuing employment. Paid caregiver programs provide such needed assistance. Research has demonstrated that caregiver payment programs may be the most cost-effective way of providing informal care by preventing or delaying institutionalization.²²⁶ States and countries with such programs in place have significantly contained the costs of long-term care for the elderly, primarily by delaying or preventing institutionalization, while encouraging relationships between elderly individuals and the family members who care for them.²²⁷ The state can prevent misuse of public funds for family caregiver services by establishing reasonable eligibility requirements and carefully monitoring the need and use of caregiver assistance.²²⁸ Caregiver payment programs and expanded family leave policies represent only two of many methods that state and federal governments can pursue in providing assistance to family caregivers.

V

CONCLUSION

Family responsibility is not something that should be mandated through public requirements such as filial support legislation. Rather, it should be rewarded and encouraged by the state through meaningful

223. See LENHOFF, *supra* note 167, at 4 (noting how family leave programs may reduce state payments of unemployment or other public assistance funds).

224. See DONNA WAGNER, FAMILY CAREGIVER ALLIANCE, ENHANCING STATE INITIATIVES FOR WORKING CAREGIVERS 5 (2001), at http://www.caregiver.org/national_center/PolicyBrief_5.pdf (on file with the *New York University Journal of Legislation and Public Policy*).

225. See *supra* note 222 and accompanying text (discussing inadequacies of unpaid leave); see also Part IV.C.3 (discussing international programs of paid leave).

226. See POLIVKA, *supra* note 162, at 9.

227. *Id.*

228. See *id.* at 11 (discussing how "prevention of fraud" should be primary aim of care regulation, and methods thereof).

public support of family caregiving. Encouraging family caregiving is sound public policy, as it can help contain the costs of caring for the nation's growing elderly population, while promoting positive family relationships. Family members, including many adult children, already provide a large proportion of the long-term care administered in this country, not because the law demands that they do so, but because their personal sense of moral obligation will not let them abandon their relatives in times of need. State and federal policymakers must continue to recognize that the public sphere has an invaluable role to play in the support of family caregiving and should continue to develop constructive programs to assist adult children who care for their aging parents.

Policy-makers can and should look to the examples set by states and other countries for ways in which governments have encouraged family caregiving in an intelligent, effective, and fiscally responsible manner. By encouraging family caregiving through government action, America can benefit from both the added protections for the elderly that public care laws can give and the efficiency and nurture that care by the family can provide. By striking a balance between these two, America can ensure that its elderly are well cared for.