

## WHAT ARE FAMILIES FOR? RE-EVALUATING RETURN TO FILIAL RESPONSIBILITY LAWS

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*As the elder population in the United States grows, so too does the concern over who should bear the costs of extended nursing home stays. One approach would call for a return to enforcement of filial responsibility laws, which are currently on the books in half of the states. In this Article, Professor Harkness discusses the history and current state of filial responsibility laws throughout the country as well as the justification for those laws over time. The author explores the various problems associated with enforcing filial responsibility laws and ultimately suggests some alternatives which would both defray the cost of caring for elder Americans and strengthen the supportive relationships which have proved essential for social stability and well-being.*

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## I. Introduction

Opinions on filial responsibility run the gamut. On one hand, there is a sense of dreaded inevitability, expressed in the title of a recent article by Howard Gleckman<sup>1</sup>: “Will Adult Children Have to Pay Mom’s Nursing Home Costs?”<sup>2</sup> On the other hand, there is a sense of grateful incredulity: reflecting on her own mother’s stay in a nursing home (the cost of which was partially paid for by Medicaid), author Jane Gross<sup>3</sup> expresses her surprise that “adult children weren’t legally responsible for their parents’ financial support, assuming they had money in the bank.”<sup>4</sup> In a 2005 policy brief, the National Center for Policy Analysis recommended that states begin “to more systematically enforce” filial responsibility laws to help defray and reduce costs now being borne by Medicaid.<sup>5</sup> For decades, a myriad of voices have been advocating such a course of action to remedy the escalating costs not only of health care but of providing overall support for indigent elder Americans.<sup>6</sup>

Certainly, the potential costs of caring for elder Americans are daunting. According to the 2010 U.S. Census, the baby boomer generation now consists of 81.5 million people, or 26.4% of the total U.S. population.<sup>7</sup> The increase in overall longevity due to improved living conditions and health care advances in the United States, coupled with a declining birthrate, has converged to create an impending crisis

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1. Howard Gleckman is the author of the bestselling book, *CARING FOR OUR PARENTS: INSPIRING STORIES OF FAMILIES SEEKING NEW SOLUTIONS TO AMERICA’S MOST URGENT HEALTH CRISIS* (2009).

2. Howard Gleckman, *Will Adult Children Have to Pay Mom’s Nursing Home Costs?* FORBES (May 16, 2012 7:27PM), available at <http://www.forbes.com/sites/howardgleckman/2012/05/16/will-adult-children-have-to-pay-moms-nursing-home-costs>.

3. Jane Gross, *Adult Children, Aging Parents and the Law*, N.Y. TIMES BLOG: THE NEW OLD AGE (Nov. 20, 2008, 6:00 AM), <http://newoldage.blogs.nytimes.com/2008/11/20/unenforced-filial-responsibility-laws>.

4. *Id.*

5. Matthew Pakula, *The Legal Responsibility of Adult Children to Care for Indigent Parents*, NAT’L CTR. FOR POL’Y ANALYSIS 1 (July 12, 2005), available at <http://www.ncpa.org/pdfs/ba521.pdf>.

6. See, e.g., John Walters, *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, 377 (1999); Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society*, 26 FAM. L.Q. 195, 196 (1992).

7. Lindsay M. Howden & Julie A. Meyer, 2010 CENSUS BRIEFS: AGE AND SEX COMPOSITION: 2010, U.S. CENSUS BUREAU 2 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

for the financing of the Social Security system.<sup>8</sup> Currently, less than 2.8 workers are contributing to the system per recipient, as compared to 4.9 in the 1960s.<sup>9</sup> The first wave of the baby boomers reached early retirement age in 2008.<sup>10</sup> As they did so, the costs of providing their maintenance, support, and health care, ranging from food, shelter, and personal assistance to assisted living and long term nursing services exploded. More than half of what are termed “entitlement benefits” (Social Security, Supplemental Security Income, Supplemental Nutrition Assistance Program, Medicare, and Medicaid) currently go to support those age 65 and over.<sup>11</sup> Medicare expenditures for seniors and those on disability totaled \$502.9 billion, or 20% of the total spent on all health care in the United States, while 2009 Medicaid expenditures reached \$373.9 billion, or 15% of the U.S. total spent on health care.<sup>12</sup> The past decade has also witnessed a surge in bankruptcy filings by elder Americans, which many sources believe is attributable to the inability of seniors living on a fixed income to absorb the rising costs of food, fuel, and uninsured medical bills.<sup>13</sup>

The stage is set for enforcement of filial responsibility, with over half of states having these laws already in place.<sup>14</sup> One such state is

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8. John Burritt McArthur, *Private Pensions and the Justification for Social Security*, 48 S. TEX. L. REV. 1, 31–33 (2006).

9. Stephen Ohlemacher, *Is Social Security Still a Good Deal for Workers?* YAHOO! NEWS (Aug. 5, 2012), <http://news.yahoo.com/social-security-still-good-deal-workers-125016929--finance.html>.

10. 42 U.S.C. § 402(a)(1)–(3) (2006). Pursuant to this statute, persons who are fully insured under the Social Security system are eligible to receive what are termed “early retirement” benefits upon attaining age 62. The older members of the baby boomer generation, composed of those born between the 1946 and 1954, celebrated their 62nd birthdays in 2008, and thus were potentially eligible for these benefits. CARRIE A. WERNER, 2010 CENSUS BRIEFS: THE OLDER POPULATION: 2010, U.S. CENSUS BUREAU 4 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf>.

11. ARLOC SHERMAN, ET AL., CONTRARY TO “ENTITLEMENT SOCIETY” RHETORIC, OVER NINE-TENTHS OF ENTITLEMENT BENEFITS GO TO ELDERLY, DISABLED, OR WORKING HOUSEHOLDS, CTR. ON BUDGET & POL’Y PRIORITIES (2012), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=3677>.

12. Windsor C. Schmidt, *Medicalization of Aging: The Upside and The Downside*, 13 MARQ. ELDER’S ADVISOR 55, 64 (2011).

13. See Gerri L. Elder, *Senior Citizens Filing Bankruptcy*, TOTAL BANKRUPTCY, <http://www.totalbankruptcy.com/news/articles/statistics/elderly-filing-bankruptcy-rates.aspx> (last visited Nov. 14, 2013); DEBORAH THORNE, ET AL., AARP PUB. POLICY INST., GENERATIONS OF STRUGGLE 9–10 (2008), available at [http://assets.aarp.org/rgcenter/consume/2008\\_11\\_debt.pdf](http://assets.aarp.org/rgcenter/consume/2008_11_debt.pdf).

14. See Katharine Pearson, *Family (Filial) Responsibility/Support Statutes in the United States*, PENN ST. L. REV., [http://law.psu.edu/\\_file/Pearson/FilialResponsibilityStatutes.pdf](http://law.psu.edu/_file/Pearson/FilialResponsibilityStatutes.pdf) (last updated March 5, 2012).

Pennsylvania, which recently applied its filial responsibility law<sup>15</sup> in the case of *Health Care & Retirement Corp. of America d/b/a Liberty Nursing & Rehabilitation Center v. Pittas*.<sup>16</sup> In September 2007, 61-year-old Maryann Pittas was admitted to Liberty Nursing Rehabilitation Center in Allentown, Pennsylvania for nursing care in the aftermath of an automobile accident that had left her with two broken legs.<sup>17</sup> Apparently, it was clear to the facility that her income and resources would not be sufficient to pay for the cost of her care, so an application for Medicaid assistance was submitted on her behalf.<sup>18</sup> Unfortunately, although other applications for Medicaid assistance submitted by Mrs. Pittas for other medical providers had been approved, the application for Mrs. Pittas's stay at Liberty was still pending at the time she was discharged in March 2008.<sup>19</sup> Mrs. Pittas and her husband, Andrew, subsequently left the United States to reside in Greece, leaving the facility's unpaid bill for services rendered behind them.<sup>20</sup> No question was raised about the facility's entitlement to be paid for the cost of care provided to Mrs. Pittas. However, the expense and uncertainty of attempting to recover from Mrs. Pittas or her spouse in an overseas jurisdiction made pursuit of that route unpalatable. Small wonder that the facility chose instead to sue John Pittas, the adult child of Mrs. Pittas and a resident of Pennsylvania, under Pennsylvania's filial responsibility law.<sup>21</sup> As precedent, the nursing facility looked to the 2003 case of *Presbyterian Medical Center v. Budd*, where the Pennsylvania Superior Court had found the adult daughter of a deceased nursing home resident potentially liable under the state's filial responsibility law after payment of the nursing home's claim filed against the mother's estate still left \$68,000 unpaid.<sup>22</sup> In remanding the case for further proceedings, the Superior Court noted that resort to the filial

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15. See 23 PA. CONS. STAT. ANN. § 4603 (West 2012).

16. *Health Care & Ret. Corp. of Am. v. Pittas*, 46 A.3d 719 (Pa. Super. Ct. 2012) *reh'g denied*, 2012 Pa. Super LEXIS 1587 (Pa. Super. Ct. 2012), *appeal denied*, 2013 Pa. LEXIS 567 (Pa. 2013).

17. Susanna Kim, *Pennsylvania Man Appeals to Court to Avoid Paying Mom's \$93,000 Nursing Home Bill*, ABC NEWS (May 23, 2013), <http://abcnews.go.com/Business/pennsylvania-son-stuck-moms-93000-nursing-home-bill/story?id=16405807>.

18. Brief of Respondent-Appellant at 7, *Health Care & Ret. Corp. of Am. v. Pittas*, 46 A.3d 719 (Pa. Super. Ct. 2012) (No. 536 EDA 2011).

19. *Id.*

20. Kim, *supra* note 17.

21. Mrs. Pittas had two other adult children, but neither of them lived in Pennsylvania. Brief of Respondent-Appellant, *supra* note 18, at 7.

22. *Presbyterian Med. Ctr. v. Budd*, 832 A.2d 1066, 1069 (Pa. Super. 2003).

responsibility law was particularly appropriate in the *Budd* case because the daughter's actions in transferring substantial amounts from her mother's bank accounts "allegedly brought about [the] Mother's indigent status."<sup>23</sup>

However, unlike the daughter in the *Budd* case, John Pittas was not alleged to have had access to any of his mother's resources. The Superior Court determined that Mrs. Pittas was indigent based on the fact that her income (which was approximately a \$1,000 per month) was insufficient to pay for the monthly cost of her care in the facility.<sup>24</sup> For some inexplicable reason, Mrs. Pittas's application for Medicaid was not approved, leaving \$92,943.41 in unpaid charges that had accumulated as a result and the nursing home sued for this remaining amount.<sup>25</sup> The proof showed Mr. Pittas to be a business owner with an annual income in excess of \$85,000; Mr. Pittas claimed that his existing obligations were such that despite this income he could not afford to absorb the cost of his mother's nursing home bill.<sup>26</sup> The trial court found in favor of the facility and awarded the nursing home a judgment against Mr. Pittas in the amount of \$92,943.41.<sup>27</sup> Mr. Pittas appealed and the judgment was upheld by the Superior Court; no further appeal was made by Mr. Pittas.<sup>28</sup> Perhaps he simply decided to pay the judgment, perhaps he filed for bankruptcy, or perhaps the application for Medicaid assistance to pay for the cost of Mrs. Pittas's care was finally approved.<sup>29</sup> No matter what the final outcome with regard to payment of the judgment, it is clear that the economic times are such that the issue of filial responsibility is receiving serious con-

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23. *Id.* at 1069–70. The daughter had apparently misappropriated approximately \$100,000 from her mother's bank accounts during the period while the mother was residing in the nursing home. This conduct left the mother impoverished, which further resulted in denial of the mother's application for Medicaid benefits on the grounds of disqualifying transfer of assets.

24. *Pittas*, 46 A.3d at 723–24.

25. Brief of Respondent-Appellant, *supra* note 18, at 5, 13.

26. *Pittas*, 46 A.3d at 722–23.

27. Order, Ct. of C.P. Lehigh Cnty., Pa. No. 2008-C-2344, (Pa. Sept. 3, 2010); Brief of Respondent-Appellant, *supra* note 18, at Appendix C. Interestingly enough, the dispute was initially referred to arbitration and the arbitration panel found that Mr. Pittas should not be held liable for the cost of his mother's care. *Pittas*, 46 A. 3d at 720.

28. *Pittas*, 46 A. 3d at 724.

29. As already mentioned above, the application for Medicaid assistance was filed by the nursing home initially; there is a suggestion in the record that dismissal of the Medicaid application occurred because the lawyer for the nursing home failed to appear at the hearing conducted by the state Department of Public Welfare to consider the application. Brief of Respondent-Appellant, *supra* note 18, at 7.

sideration. This Article will focus its consideration of such statutes within the context of the oft-articulated goal of strengthening the family, noting at the outset that the family itself is an institution that is in the process of fundamental redefinition and transformation. Part II of the Article will discuss the derivation of filial responsibility and its original justifications as a part of American law. Part III will address the traditional family structure that is still reinforced by the American legal system and that serves to stabilize society, but which is in transition, evolving in favor of much broader relational ties. This Article argues that the American legal system should now seek to foster and reinforce the family, however defined, as it continues to serve the same purpose and function as was served by the traditional family. Part IV will examine current filial responsibility statutes and case law in an attempt to categorize them. Part V will explore the various problems with filial responsibility laws and try to determine whether enforcement of such laws still make sense in light of new definitions of family relationships. Finally, Part VI will suggest some alternatives to enforcement of filial responsibility laws that may serve to simultaneously defray the cost of maintaining and caring for elder Americans while buttressing supportive relationships that are essential to societal stability and well-being.

## II. Basis for Filial Responsibility Laws

Scholars<sup>30</sup> trace the origins of filial responsibility laws back to antiquity, citing the Greek philosopher Aristotle,<sup>31</sup> Roman and Athenian

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30. Catherine Doscher Byrd, *Relative Responsibility Extended: Requirement of Adult Children to Pay for Their Indigent Parent's Medical Needs*, 22 FAM. L. Q. 87, 88 (1988); Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J. L. & POL'Y 709, 721 (2001); Jean Van Houtte & Jeff Breda, *Maintenance of the Aged by Their Adult Children: The Family as a Residual Agency in the Solution of Poverty in Belgium*, 12 LAW & SOC'Y REV. 645, 649 (1978).

31. Aristotle, *The Nicomachean Ethics*, Book VIII 518 (H. Rackham, trans. Harvard University Press 1962). The section that is often quoted from Aristotle's work in support of the principle of filial responsibility is contained in a larger section, or book, dealing with friendship (or what we might now call relationships) between various classes of people in society. *Id.* at 451-515. Aristotle begins by noting that the "friendship" between a father and a son is not an equal one, and states further:

nor indeed is the friendship of a father for son the same as that of son for father, nor that of husband for wife as that of wife for husband; for each of these persons has a difference excellence and function, and also different motives for their regard, and so the affection and friendship they feel is different. Now in these unequal friendships the bene-

laws, and the moral precepts of Judaism, Christianity, and Islam.<sup>32</sup> Interestingly enough, the Roman law that is seen as providing the model for such laws in Western Europe was initially passed at the very point that extended family relationships, which had characterized Roman social order, were eroding in favor of a more discrete, nuclear family model.<sup>33</sup> Nineteenth century social theorists posited that within Roman society, the Roman patriarch was the precursor of the modern state.<sup>34</sup> It was up to the Roman *pater familias*<sup>35</sup> to keep order within his family, which extended to any number of those persons who could trace their ancestry back to a common male relative. The Roman patriarch owned all property belonging to anyone within the family; neither spouses nor children could hold property in their own names.<sup>36</sup> In fact, spouses and children were under the complete domination of the patriarch, who could order them to be put to death should he so

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fits that one party receives and is entitled to claim from the other are not the same on either side; but the friendship between parents and children will be enduring and equitable, when the children render to the parents the services due to the authors of one's being, and the parents to the children those due to one's offspring.

*Id.* at 477–78. Aristotle is aware that where “friends” are “unequal” in station, the “one who is benefited in purse . . . must repay what he can, namely honor.” *Id.* at 513. While the “services” referred to in this passage as owing from the parents to the children are predictably “protection, food, clothes, education,” the “services” owed to the parents by the children are usually deemed to refer to “respect, love and obedience,” as opposed to a reciprocal financial obligation. See FRANCIS H. ETEROVICH, *ARISTOTLE'S NICHOMACHEAN ETHICS*, Commentary & Analysis 171 (1980).

32. Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 MARQ. L. REV. 401, 406–08 (2002).

33. *Id.* Van Houtte & Breda, *supra* note 30, at 647–48. The largest Roman kinship construct, the *gens*, operated on both a political and economic level and was composed of all those who could trace their ancestry to a common male predecessor.

34. Richard Saller, *Family Values in Ancient Rome*, U. CHI. FATHOM ARCHIVE (2001), [http://fathom.lib.uchicago.edu/1/777777121908/?&\\$NMW\\_TRANS\\$=ext](http://fathom.lib.uchicago.edu/1/777777121908/?&$NMW_TRANS$=ext).

35. The *pater familias*, or head of the Roman family, was “the oldest living ascendant in the male line” who thereby held “paternal power” or “*patria potestas*” over his descendants. BETH SEVERY, *AUGUSTUS AND THE FAMILY AT THE BIRTH OF THE ROMAN EMPIRE* 9 (Routledge 2003). This included married adult sons and grandsons, for as long as the *pater familias* remained head of the family, he alone had the power to enter into contract marriages and own property. *Id.* Although the *pater familias* possessed theoretical power of life and death over his family, this power was seldom exercised in an extreme fashion; the Roman patriarchal system obligated the *pater familias* to be a good citizen and role model and he was expected to rule his family in a “benevolent and beneficial” fashion. *Id.* at 9–10.

36. *Id.*

desire.<sup>37</sup> Of course, as Roman society evolved, wives and adult children came to have their own rights and the power of the patriarch declined.<sup>38</sup> In early times, the patriarch's authority provided the foundation for order and stability within Roman society. Despite the erosion of the patriarch's authority, family ties continued to be an important source of continuity and support.<sup>39</sup>

This erosion of the strength of family ties was caused by the transformation of Roman society from one composed primarily of agrarian farmers to an increasingly militaristic and mercantile society.<sup>40</sup> The latter societal structure enabled a young Roman male to break free of his *pater familias* and acquire his own independence as either a soldier or businessman.<sup>41</sup> This led to diminishing expectation by the *pater familias* of any duty to support family members that were no longer tied to the family's economic sphere of influence, which in turn led to the passage of the filial responsibility laws to restore the claims for maintenance when emancipated adult children ran into economic adversity.<sup>42</sup> As the development of the laws continued, a statute affording a reciprocal claim by the parents for support from their adult children was also enacted in the third century C.E.<sup>43</sup>

Current filial responsibility laws in the United States generally date back to colonial times<sup>44</sup> and were modeled after the so-called "Elizabethan poor laws."<sup>45</sup> The intent of these laws was to create

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37. As an extreme example, Lucius Junius Brutus, the legendary founder of the Roman Republic, had his sons put to death when they conspired against him. Jona Lendering, *Lucius Junius Brutus*, LIVIUS, <http://www.livius.org/bn-bz/brutus/brutus01.html> (last visited Nov. 14, 2013). On a more ordinary although no less horrific level, the practice of infanticide through abandonment and exposure to the elements was generally accepted as a part of Roman culture, and it was the *pater familias* who would be charged with making such decisions. W.V. Harris, *Child-Exposure in the Roman Empire*, 84 J. OF ROMAN STUDIES 1, 1-3 (1994).

38. Saller, *supra* note 34, at 3.

39. Van Houtte & Breda, *supra* note 30, at 647; SEVERY, *supra* note 35, at 249-50.

40. Van Houtte & Breda, *supra* note 30, at 648.

41. *Id.*

42. *Id.* at 648-49.

43. *Id.* at 649.

44. Moskowitz, *supra* note 32, at 421-22; Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support Our Parents be Effectively Enforced?* 36 FAM. L. Q. 501 (2002).

45. Usha Narayanan, *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, 373 (Fall, 1996); Moskowitz, *supra* note 32, at 711-12; Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STANFORD L. REV. 257, 258-62;



some system of relief to assist those who were “Lame, Impotent, Old, Blind, and . . . Poor, and not able to work. . .”<sup>46</sup> and it authorized certain officials to collect taxes and to “oversee” a program of subsistence. However, in order to ensure that not too great of a burden was placed on the public treasury, the law also contained a provision that required that the “Father and Grandfather, and the Mother and Grandmother, and the Children of every poor, old, blind, lame, and impotent Person or other poor Person not able to work, being of a sufficient Ability, shall, at their own Charges, relieve and maintain every such poor Person. . . .”<sup>47</sup> It should also be remembered that this same “system of relief” set up a series of workhouses and indentured apprenticeship for children.<sup>48</sup> That approach has been resoundingly rejected with the establishment of a child welfare system financed by the federal government,<sup>49</sup> and the enactment of child labor laws prohibiting the general employment of minors and closely regulating the types of employment that are still permitted.<sup>50</sup> It could be argued that these laws represented the beginning of a recognition that intergenerational justice (e.g. equitable distribution of resources between generational cohorts) should not be left to the unregulated discretion of individuals. Some minimal standards needed to be set and some societal obligations assumed to ensure adequate support and care for those members of society who are unable to care for themselves. Consequently, in addition to prohibiting the use of children as laborers, every American jurisdiction imposes liability upon parents for the support and maintenance of their minor children, a goal that is further buttressed by federal and uniform laws facilitating collection and en-

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See Poor Relief Act, 1601, 43 Eliz. 1, c. 2, V (Eng.) available at <http://www.workhouses.org.uk/poorlaws/1601act.shtml> (last visited Nov. 14, 2013).

46. Poor Relief Act, *supra* note 45, at 1.

47. *Id.* at VII.

48. tenBroek, *supra* note 45, at 259, 280–84. See also CHARLES DICKENS, OLIVER TWIST (Kathleen Tillotson ed., 1968) (providing a fictional account of the operation of the apprentice “workhouse” system).

49. Howard Davidson, *Federal Law and State Intervention When Parents Fail: Has National Guidance of Our Child Welfare System Been Successful?*, 42 FAM. L. Q. 481, 482–85 (2008); see also *Brief History of Federal Child Welfare Financing Legislation*, CHILD WELFARE LEAGUE OF AMERICA, [http://www.cwla.org/advocacy/financing\\_history.htm](http://www.cwla.org/advocacy/financing_history.htm) (last visited Nov. 14, 2013) (describing the changes in federal child welfare financing from the enactment of Title V under the Social Security Act of 1935 to the present).

50. Fair Labor Standards Act of 1938, 52 Stat. 1060 (June 25, 1938) (codified as 29 U.S.C. § 8201 19 (2006)). Current regulations pertaining to child labor can be found at 29 C.F.R. Part 570.

forcement<sup>51</sup> as well as providing subsidies for those children whose parents do not provide support.<sup>52</sup> This obligation is evidenced in very early American case law, which, unlike British law, generally found a common law duty to support one's dependent offspring.<sup>53</sup> However, as will be discussed in more detail in Part III below, all jurisdictions relieve parents of liability once their offspring reach the age of majority or emancipation, a public policy which reinforces individual autonomy and fosters personal responsibility. How can this policy be reconciled with the reality that, as recently as 50 years ago, nearly all states<sup>54</sup> had laws compelling financial responsibility among families with indigent members and even now, a majority of states continue to have such filial responsibility laws on the books?<sup>55</sup>

The durability of filial responsibility laws providing for support of elder parents by their adult offspring may be attributable to traditionally held spiritual values that one should "honor thy father and mother," as articulated in the Ten Commandments that form the cornerstone of both Christian and Jewish faiths.<sup>56</sup> Such values are also echoed by the exhortations of the Qur'an directing honor and respect for elders,<sup>57</sup> and may rest upon a broader humanistic notion that all persons owe a debt of gratitude to the progenitors that brought them

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51. Child Support Recovery Act of 1992 (codified as 18 U.S.C. § 228 (2006)); Uniform Interstate Family Support Act of 1996, §§ 101-905 (codified as 42 U.S.C. § 666(f) (2006)).

52. 42 U.S.C. § 608 (2006) (outlining the TANF Program).

53. Although, there is some discussion by commentators of a "natural duty" to support one's offspring in English law. See WILLIAM BLACKSTONE, 1 COMMENTARIES 447 (discussing how there was little in the way of English case law to establish the existence of such a duty); FIELD, THE LEGAL RELATIONS OF INFANTS, PARENT AND CHILD, AND GUARDIAN AND WARD 57 (Williamson & Higgle) (1888); BROWNE, ELEMENTS OF THE LAW OF DOMESTIC RELATIONS 72 (Boston Book Co.) (1883). Early American common law, on the other hand, did recognize such a duty, at least so long as the child was legitimated. See *Hillsborough v. Deering*, 4 N.H. 86, 95 (1827); *Godfrey v. Hays*, 6 Ala. 501, 502 (1844); *McGoon v. Irvin*, 1 Pin 526, 531 (Wis. 1845); *House v. House*, 6 Ind. 49, 49 (1854); *Haase v. Roehrscheid*, 6 Ind. 66, 68 (1854); *Dawson v. Dawson*, 12 Iowa 512, 514 (1861); *Plaster v. Plaster*, 47 Ill. 290, 291-94 (1868); *Tanner v. Skinner*, 74 Ky. 120, 130 (1874); *In re Hippert's Estate*, 12 Lanc. Bar 68, 68 (Pa. 1880); *Gilley v. Gilley*, 9 A. 623, 623 (Me. 1887); *Porter v. Powell*, 44 N.W. 295, 295 (1890).

54. Kline, *supra* note 6, at 196. The five states which never did adopt filial responsibility laws were Florida, Kansas, Texas, Washington and Wyoming.

55. See Pearson, *supra* note 14.

56. Moskowitz, *supra* note 30, at 721; Charlotte K. Goldberg, *The Normative Influence of the Fifth Commandment on Filial Responsibility*, 10 MARQ. ELDER'S ADVISOR 221, 230-35 (2009).

57. Moskowitz, *supra* note 32, at 407-08.

into this world and nurtured them to adulthood.<sup>58</sup> To the extent that these notions are founded on genetic or blood ties, their continued utility depends upon the strength of these bonds in the larger society, a question which will be examined in the following Part.

### III. Defining the “Family” and Determining its Societal Function

Virtually every scholar writing in the area of family law expresses recognition that the family as an institution is “evolving,”<sup>59</sup> although there may be disagreement concerning whether or not the law should change to accommodate that evolution.<sup>60</sup> In any case, most changes in family law are attributable to the transformation of the family unit, which has occurred as a result of a number of factors, for example: (1) availability of reproductive technology allowing for the use of donor eggs, sperm and embryos;<sup>61</sup> (2) expanded availability and acceptance of adoption;<sup>62</sup> (3) the growing phenomenon of blended

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58. One writer eloquently evokes the considerable sacrifice and expense that loving and responsible parents devote to the raising of children: “But most of us have never contemplated how much it cost our parents when we broke a leg playing soccer or sprained a wrist playing softball. If we made serious effort to estimate the total dollars our parents spent in raising us, the figure would be mind-blowing.” Walters, *supra* note 6, at 376.

59. WALTER WADLINGTON & RAYMOND C. O'BRIEN, *FAMILY LAW IN PERSPECTIVE* (2012); Katharine K. Baker, *Homogenous Rules For Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 320; P. Mars Scott, *Not The Cleavers Anymore: Third-Party Parental Interests in Minor Children and the Evolving American Family*, 73 MONT. L. REV. 97, 99–101 (2012).

60. Some commentators suggest that such accommodation may be equivalent to abandonment of the law's role in both definition of the family and imposition of “legally enforceable family obligations.” See Baker, *supra* note 59, at 369–371.

61. Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 368–69 (2012). The recent U.S. Supreme Court case of *Astrue v. Capato*, 132 S. Ct. 2021 (2012) provides a heartbreaking instance of how advances in technology that now allow for posthumous reproduction may run afoul of legal definitions predicated on a more traditional biological reality. Karen and Robert Capato had barely been married a year when he contracted esophageal cancer and was required to undergo chemotherapy that he was told might render him sterile. *Astrue v. Capato*, 132 S. Ct. 2021, 2026 (2012). He therefore deposited his sperm prior to undergoing therapy. Despite treatment, he died about a year and half later. *Id.* The court held that twins conceived through artificial insemination, using Robert's frozen sperm, and born a year and a half after his death, were not his children for purposes of receipt of Social Security survivor benefits. *Id.* at 2034. The Court's analysis was based on the fact that the twins would not have been recognized as the husband's intestate heirs under state law in Florida, where he was domiciled at the time of his death. *Id.*

62. WADLINGTON & O'BRIEN, *supra* note 59, at 172–74, 180–82.

families, adding step-parents, step-grandparents and step-siblings;<sup>63</sup> (4) the increasing propensity among intimate partners to live together and produce offspring without formalizing the relationship in any legal fashion;<sup>64</sup> and (5) the choice by some to create alternative lifestyles and social communities totally divorced from the genetic family ties in which they were raised.<sup>65</sup>

The evolution in the structure of families is wreaking havoc on many traditional family law doctrines<sup>66</sup> and similarly affecting associated areas of law like probate, trusts, and estates which have historically been dependent on family law definitions.<sup>67</sup> As Professor Ralph Brashier notes, statutory schemes of intestate inheritance that are in place in most states are woefully behind the times when one considers the actual structure of many family relationships.<sup>68</sup> It is not at all uncommon, given the highly mobile and increasingly transient lives of

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63. Compare *Spears v. Weatherall*, 385 S.W. 3d 547 (Tenn. Ct. App. 2012), where the Tennessee Court of Appeals refused to find an ex-step-grandfather (i.e. a step-grandfather who had lost his step-grandfather status by virtue of a divorce from the child's grandmother) to have standing to pursue grandparent visitation, despite a 25 year marriage to the grandmother and daily relationship with both the child's mother and the child during the marriage and continuation of a close relationship after the divorce, with *Lovlace v. Copley*, No. M2011-00170-COA-R3-CV, 2012 WL 368221, at \*1 (Tenn. Ct. App. 2012), where the Tennessee Court of Appeals granted step-grandparent status to the current husband of an adoptive grandmother who was divorced from the adoptive grandfather at the time her petition for grandparent visitation was filed. Although the grant of standing is clearly justified in the Lovlace case, the denial of similar standing to the appellant in the Spears case seems unnecessarily technical given the acknowledged existence of a loving relationship between the child and the ex-step-grandfather.

64. Baker, *supra* note 59, at 322–23. The Florida case of *D.M.T. v. T.M.H.*, 79 So. 3d 787 (Fla. Dist. Ct. App. 2011) provides another example of the way in which traditional family law concepts have failed to keep pace with reproductive technology.

65. Yvonne P. Mazzulo, *Non-Traditional Families Becoming the Conventional*, THE EXAMINER (Apr. 24, 2011), <http://www.examiner.com/article/non-traditional-families-becoming-the-conventional>.

66. See MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 230–33 (Routledge 1995). Symposium, "It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family, 1996 UTAH L. REV. 569, 576–84 (1996); Martha Minow, *Redefining Families: Who's In and Who's Out?* 62 U. COLO. L. REV. 269, 270–72 (1991); Nancy D. Polikoff, *This Child Does Have Two Mothers*, 78 GEO. L.J. 459, 468–73 (1989–90); Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J.L. GENDER & SOC'Y 73, 102–13 (2010); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 312 (2007); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J. L. & POL'Y 47, 72–74 (2007).

67. MELANIE B. LESLIE & STEWART E. STERK, TRUSTS & ESTATES 19–23 (2d ed. 2011).

68. RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 2–6 (2004).

many Americans, to find that elder parents have not seen one or more of their adult children for many years.<sup>69</sup> Perhaps the child moved out of state, was incarcerated, or developed a drug problem; no matter what the issue, he or she is basically no longer a part of the parent's life.<sup>70</sup> Instead, the parent may now have a female friend and companion who has lived with her for a number of years and is committed to taking care of her in her old age; it is this person who is a constant part of her life and would be her choice as beneficiary of her estate. Nevertheless, should she die intestate, that adult child will still inherit, despite the prolonged absence of any real family tie.

Similarly, as lifespans have grown and lifestyle options have increased, people may "reinvent" themselves at critical points within their life journey.<sup>71</sup> A man who married in his early twenties, pursued a successful career as a banker, and had raised two children by the time he was in his late forties, may decide to file for divorce on his fiftieth birthday, announce his intention is to move in with a same sex partner and commence a new career as a sculptor.<sup>72</sup> Such an individual may have little if anything in common with people who were formerly a part of his life, which often includes his children and his own parents and siblings. Accordingly, he must establish a new set of personal connections, based on lifestyle and social interests, instead of traditional kinship and blood ties. While the new "family" may include some members of the old, the basis for the connection will now

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69. This precise scenario was described to the author by an elderly widowed client of the University of Memphis Elder Law Clinic; the client had custody of and wished to adopt her teenage grandson, but had not seen or heard from the son that had fathered him for over a decade. Termination of the son's parental rights was a prerequisite to the adoption, and due process required that the son receive notice of the petition for termination unless his whereabouts proved to be unknown despite all efforts to find him. The student attorney assigned to the case embarked on a diligent search and located the son serving a life sentence in a Kentucky state prison.

70. See JOSHUA COLEMAN, WHEN PARENTS HURT: COMPASSIONATE STRATEGIES WHEN YOU AND YOUR GROWN CHILD DON'T GET ALONG 228–29 (2007). Dr. Coleman describes a growing phenomenon of estrangement between parents and their adult children, even in cases where no clear cause (such as child abuse or abandonment of the adult while still a child) is believed to have existed. *Id.* at 3.

71. GRANT DAVID MCCrackEN, TRANSFORMATIONS: IDENTITY CONSTRUCTION IN CONTEMPORARY CULTURE 85–87, 306 (2008).

72. This scenario is based on actions taken by someone with whom the author was acquainted.

be rooted in acceptance of the person's newly articulated identity and in social connections associated with his new lifestyle.<sup>73</sup>

Given this shifting background, it therefore becomes increasingly disingenuous for politicians and others in a position to propose policy initiatives to speak of "family values" as if they were referring to a monolithic set of beliefs that all members of society have accepted. Nevertheless, whether traditional or increasingly non-traditional, family relationships have still functioned to provide order and stability on a day-to-day personal level that is beyond the means of the state.<sup>74</sup> In a democratic state, if laws are going to be enacted which burden the family, then the social contract theory upon which the democratic state rests presupposes that this burden is one that has been voluntarily undertaken in return for some valuable consideration that is sufficient to match the obligations required.<sup>75</sup> Parents can justifiably be required to support minor children, for example, because, at least in some sense, they have chosen to have children.<sup>76</sup> While the children

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73. See generally ETHAN J. LEIB, *FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT* (2011). Leib argues for legal recognition of friendship ties since "friends are becoming more like family now that the traditional family is on decline . . ." *Id.* at 63. See also PEW RESEARCH CENTER, *THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES* (Nov. 18, 2010) available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>.

74. PEW RESEARCH CENTER, *supra* note 73, at 2–3.

75. JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* 74–83 (J.W. Gough 1946). Locke posited that humans are born into a "natural state" of equality and freedom, which they voluntarily relinquish to enter into civil society "for the mutual preservation of their lives, liberties and estates . . ." *Id.* at 62. Although Locke's theory does not mandate a democratic society (members of a society may consent to be governed by a king or dictator), a democratic society, with its incorporation of majority rule, should best exemplify the social contract. *Id.* at 65.

76. Admittedly, for some, the choice exercised was to engage in consensual sexual activity that resulted in the conception and birth of a child, as opposed to a deliberate decision to procreate. *Niesen v. Niesen*, 157 N.W.2d 660, 662 (1968). But civil liability for the consequences of one's negligent behavior has long been a component of American common law. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 5, 160–62 (5th ed. 1984). Significantly, early common law did not hold men who fathered illegitimate children accountable for their support, presumably because the man in such cases had not consented to be so bound by either marrying the mother of the child or acknowledging paternity and legitimating the child. Martin Levy & Elaine Duncan, *The Impact of Roe v. Wade on Paternal Support Statutes: A Constitutional Analysis*, 10 FAM. L.Q. 179, 181 (1976). For those who may object to a negligence analysis on grounds that they practiced all available options for birth control and still conceived, choices still exist to either avoid the pregnancy through abortion, or, should that be a morally unacceptable option, or an option only accessible to the mother, both parents may separately choose to surrender parental rights and thereby release an unwanted

are minors, the parents have a constitutional right to custody and control over their offspring which should be sufficient to keep any financial obligations within what the parent can afford.<sup>77</sup> To the extent that this is not true, due to the child's disability or catastrophic illness, then as members of an enlightened society, we should agree to provide assistance to the parents, as any of us might find ourselves in a similar predicament.<sup>78</sup>

However, once a child reaches the age of majority, the parents' legal obligation to support ends in every state.<sup>79</sup> This termination of the support obligation is consistent with the Western tradition of the emancipation of adults and the expectation that once a person reaches adulthood, he or she will be self-supporting and will lead an autonomous life, free from parental direction or interference.<sup>80</sup> In contradiction to this tradition and to the state laws terminating the parental support requirement are those filial responsibility laws which require parents to support indigent adult children;<sup>81</sup> query as to whether the existence of the aforementioned statutes terminating the support requirement now serve as an implied repeal of at least this aspect of fil-

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child for adoption. Lori L. Klockau, *A Primer on Adoption*, 31 WTR FAM. ADVOC., 16, 20–21 (2009).

77. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925).

78. Fortunately, this is what does happen for the most part with severely disabled children being eligible for Supplemental Security Income (SSI). See SOC. SEC. ADMIN., Pub. No. 05-10026, *Benefits for Children With Disabilities* (2013), available at <http://www.socialsecurity.gov/pubs/10026.html#a0=0>. This is also facilitated by medical assistance through Medicaid and children with catastrophic illnesses being eligible for Medicaid through the Children's Health Insurance Program (CHIP) in every state. CTRS. FOR MEDICARE & MEDICAID SERVS., *What is CHIP?*, INSUREKIDSNOW.GOV, <http://www.insurekidsnow.gov/chip/index.html> (last visited Nov. 14, 2013).

79. See *Termination of Child Support and Support Beyond Age of Majority*, Family Law Child Custody & Support: 50 State Statutory Surveys, THOMSON REUTERS (West 2010). The parental obligation generally ends at age 18, with some statutes extending the support obligation to age 19 or completion of high school, whichever comes first. *Id.*

80. Moskowitz, *supra* note 32, at 409–10.

81. ALASKA STAT. ANN. § 25.20.030 (West 2012); DEL. CODE ANN. tit. 13, § 503 (West 2012); GA. CODE ANN. § 36-12-3 (West 2012); IOWA CODE ANN. § 252.2 (West 2012); KY. REV. STAT. ANN. § 530.050 (West 2012) (limiting the support obligation to minor children or "a child adjudged mentally disabled"); MD. CODE ANN. Family Law, § 13-303 (West 2012); MISS. CODE ANN. § 43-31-25 (West 2012); MONT. CODE ANN. § 40-6-214 (West 2012); N.H. REV. STAT. § 167:2-b (West 2012); N.D. CENT. CODE ANN. § 14-09-10 (West 2012); OR. REV. STAT. ANN. § 109.010 (West 2012) (finding that a duty of support exists for an adult child in a direct action brought by a "mentally handicapped adult child against his parent."); UTAH CODE ANN. § 17-14-2 (West 2012); *Haxton v. Haxton*, 705 P.2d 721, 721–22 (Or. 1985).

ial responsibility statutes imposing this additional support requirement.<sup>82</sup> It should be noted that many states impose an obligation of continuing support past the age of majority only in the event that the offspring are severely disabled or incapacitated.<sup>83</sup>

In any case, despite the existence or elimination of any legal responsibility to support their children beyond the age of majority, nearly 60 percent of parents in fact do continue to provide substantial support to their young adult children, in the form of college tuition payments, living expenses (either monetarily or in-kind), health insurance, transportation costs, etc.<sup>84</sup> The same thing is happening at the other end of the spectrum; it is estimated that up to 61.6 million family members and friends provide uncompensated caregiving to an adult “with limitations in daily activities” at some point within the year, representing an aggregate annual economic value of \$450 billion in unpaid services in 2009.<sup>85</sup> That they do so is a testimonial to the emotional and motivational power of family and other social ties—people that care for one another are willing to do much more than the law would ever require. Although economic components certainly

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82. See *Malekos v. Yin*, 655 P.2d 728, 730 (Ak. 1982) (interpreting the duty of parents to support an adult child under Alaska’s filial responsibility statute to end at emancipation or majority); *Crane v. Crane*, 170 S.E.2d 392 (Ga. 1969) (finding that the Georgia statute terminating a parent’s obligation to support one’s children at age 21 precluded a 47-year-old legally incompetent man from being able to successfully maintain an action for maintenance and support against his father, despite Georgia’s filial responsibility statute).

83. *Davis v. Davis*, 67 N.W.2d 566 (Iowa 1954) (finding a father is obligated to support his adult son, despite having attained the age of majority, but finding that obligation to be justified as an exception to the normal rule, as the son was completely incapacitated, had become so while still a minor, and thus was incapable of caring for himself); *Holsomback v. Slaughter*, 171 So. 542 (Miss. 1937) (interpreting statutory duty to support adult child as applying to children with mental disability); *In re Guardianships of M.A.S.*, 266 P.3d 1267 (Mont. 2011) (finding a statutory duty to support an adult child is applicable where the adult child has been found to be in need of guardianship); see also Noralyn O. Harlow, *Postmajority Disability as Reviving Parental Duty to Support Child*, 48 A.L.R. 4th 919 (1986).

84. Jenna Goudreau, *Nearly 60% Of Parents Provide Financial Support To Adult Children*, FORBES (May 20, 2011, 11:30 AM), <http://www.forbes.com/sites/jenna-goudreau/2011/05/20/parents-provide-financial-support-money-adult-children>; see also Husna Haq, *Three in 10 young adults live with parents, highest level since 1950s*, CHRISTIAN SCI. MONITOR (Mar. 15, 2012, 12:24 PM), <http://www.csmonitor.com/layout/set/r14/USA/Society/2012/0315/Three-in-10-young-adults-live-with-parents-highest-level-since-1950s>.

85. Lynn Feinberg et al., *Valuing the Invaluable: 2011 Update The Growing Contributions and Costs of Family Caregiving*, AARP PUB. POL. INST. 1 (2011), available at <http://assets.aarp.org/rgcenter/ppi/ltc/i51-caregiving.pdf>; see also Michelle Singletary, *AARP Study: Burden of long-term care needs of elderly straining families*, WASH. POST (Aug. 3, 2011), [http://articles.washingtonpost.com/2011-08-03/business/35270698\\_1\\_long-term-care-caregivers-chronic-conditions](http://articles.washingtonpost.com/2011-08-03/business/35270698_1_long-term-care-caregivers-chronic-conditions).



remain, the modern family structure is primarily designed to provide social, psychological, and emotional support to its members. Given this as a presupposition, it makes both economic sense and sense from the standpoint of social order and stability to define the concept of family broadly enough to encompass all of the many voluntary caring relationships that fall outside of the traditional definition, and to develop public policy that serves to strengthen these ties of affection and caring.

#### IV. Analysis of Current Filial Responsibility Laws

For purposes of this discussion, filial responsibility laws in the United States are those laws that create a duty on the part of adult children to provide necessary support for their parents should the parents be unable to afford to pay for their own support.<sup>86</sup> The majority of these laws are civil in nature, but at least 12 states impose a criminal penalty for the failure to support.<sup>87</sup> The penalties for violating these criminal statutes range from simple misdemeanor charges, with possible fines of no more than \$200<sup>88</sup> and a maximum sentence of 30 days community service (at least for those with no prior criminal record)<sup>89</sup> to more serious misdemeanor and even felony charges carrying fines up to \$5,000<sup>90</sup> and imprisonment for up to two years.<sup>91</sup> The absence of case law appealing the application of these statutes suggests that criminal enforcement is rare to non-existent, an assumption that appears to be universally accepted among those that have written on the topic.<sup>92</sup> Filial responsibility laws which create civil liability ex-

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86. Moskowitz, *supra* note 30, at 713–14.

87. See CAL. PENAL CODE § 270(c) (West 2012); CONN. GEN. STAT. ANN. § 53-304 (West 2012); IND. CODE ANN. § 35-46-1-7 (West 2012); KY. REV. STAT. ANN. § 530.050 (West 2012); MD. CODE ANN. FAM. LAW §§ 13-101, 13-102, 13-103 (West 2012); MASS. GEN. LAWS ANN. ch. 273 § 20 (West 2012); MONT. CODE ANN. §§ 40-6-301, 40-6-302 (West 2012); N.C. GEN. STAT. ANN. § 14-326.1 (West 2012); OHIO REV. CODE ANN. § 2919.21 (West 2012); R.I. GEN. LAWS ANN. §§ 15-1 1 to 15-10-7; R.I. GEN. LAWS ANN. §§ 40-5-13 to 40-5-18 (Westlaw 2012); VT. STAT. ANN. tit. 15 §§ 202, 203 (West 2012); VA. CODE ANN. § 20-88 (Westlaw 2012).

88. MASS. GEN. LAWS ANN. ch. 273 § 20 (West 2012); R.I. GEN. LAWS ANN. § 15-10-1(a) (West 2012).

89. N.C. GEN. STAT. ANN. § 14-326.1 and 15A-1340.23 (West 2012).

90. IND. CODE ANN. § 35-50-3-2 (West 2012).

91. VT. STAT. ANN. tit. 15 § 202 (West 2012).

92. Moskowitz, *supra* note 30, at 716–18; Art Lee, *Singapore's Maintenance of Parents Act: A Lesson to be Learned from the United States* 17 LOY. L. A. INT'L & COMP. L. REV. 671, 678 (1995); Ann Britton, *America's Best Kept Secret: An Adult Child's Duty to Support Aged Parents*, 26 CAL. W. L. REV. 351, 359 (1990).

ist in 25 states,<sup>93</sup> but vary as to the mechanism for enforcement. Some statutes provide that the needy parent is the person with standing to enforce the support obligation,<sup>94</sup> while others nominate state or welfare authorities,<sup>95</sup> while still others allow creditors to bring the action.<sup>96</sup> Where criminal liability is at issue, the public prosecutor is generally the one with jurisdiction to enforce; Rhode Island's statute gives "the director of any licensed private charity," as well as the city director of public welfare, standing to prosecute a complaint.<sup>97</sup> The Virginia statute is unusual in that it allows the court to "have the power to determine and order the payment, by such person or persons . . . of that amount of support and maintenance which to the court may seem just," suggesting that the court may consider and apportion responsibility for support among all parties that are jointly and severally liable under Virginia law, whether the prosecutor initially brought charges against all such parties or not.<sup>98</sup> A number of the civil statutes do not indicate who has standing to bring an enforcement action.<sup>99</sup>

93. ALASKA STAT. §§ 25.20.030, 47.25.230 (West 2012); ARK. CODE ANN. § 20-47-106 (West 2012); CAL. FAM. CODE §§ 4400, 4401, 4403, 4410-14 (West 2012), CAL. WELF. & INST. CODE § 12350 (West 2012); CONN. GEN. STAT. ANN. § 53-304 (West 2012); DEL. CODE ANN. tit. 13, § 503 (2012); GA. CODE ANN. § 36-12-3 (2012); IND. CODE ANN. §§ 31-16, 31-17; IOWA CODE ANN. §§ 252.1, 252.2 (West 2012); LA. REV. STAT. ANN. § 13:4731 (West 2012); MISS. CODE ANN. § 43-31-25 (West 2012); MONT. CODE ANN. §§ 40-6-214, 40-6-301 (West 2012); NEV. REV. STAT. ANN. §§ 428.070, 439B.310 (West 2012); N.H. REV. STAT. ANN. § 167:2 (West 2012); N.J. STAT. ANN. § 44:4-101 (West 2012); N.D. CENT. CODE ANN. § 14-09-10 (West 2012); OR. REV. STAT. ANN. § 109.010 (West 2012); 23 PA. CONS. STAT. ANN. § 4603 (West 2012); R.I. GEN. LAWS ANN. § 40-5-13 (West 2012); S.D. CODIFIED LAWS §§ 25-7-27, 25-7-28 (West 2012); TENN. CODE ANN. § 71-5-115 (West 2012); UTAH CODE ANN. § 17-14-2 (West 2012); VT. STAT. ANN. tit. 15 § 204 (West 2012); VA. CODE ANN. § 20-88 (West 2012); W. VA. CODE ANN. § 9-5-9 (West 2012).

94. CAL. FAM. CODE § 4403(a)(1) (West 2012); IND. CODE ANN. § 31-16-17-2(1) (West 2012); LA. REV. STAT. ANN. § 13:4731 (West 2012); MONT. CODE ANN. § 40-6-303 (West 2012); 23 PA. CON. STAT. ANN. § 4603(c)(1) (West 2012).

95. ALASKA STAT. ANN. § 47.25.230 (West 2012); ARK. CODE ANN. § 20-47-107 (West 2012); GA. CODE ANN. § 36-12-3 (West 2012); IOWA CODE ANN. § 252.6 (West 2012); NEV. REV. STAT. ANN. § 428.070 (West 2012); N.H. REV. STAT. ANN. § 167:2 (West 2012); N.J. STAT. ANN. § 44:4-102 (West 2012); R.I. GEN. LAWS ANN. § 40-5-14 (West 2012); TENN. CODE ANN. § 71-5-115 (West 2012); W. VA. CODE ANN. § 9-5-9 (West 2012).

96. N.D. CENT. CODE ANN. § 14-09-10 (West 2012); S.D. CODIFIED LAWS § 25-7-26.1 and 25-7-27 (see *Americana Healthcare Center v. Randall*), 513 N.W.2d 566 (S.D. 1994); 23 PA. CONS. STAT. ANN. § 4603 (West 2012).

97. R.I. GEN. LAWS ANN. § 15-10-4 (West 2013).

98. VA. CODE ANN. § 20-88 (West 2013).

99. See CONN. GEN. STAT. ANN. § 53-304 (West 2012); DEL. CODE ANN. tit. 13, § 503 (West 2012); MISS. CODE ANN. § 43-31-25 (West 2012); UTAH CODE ANN. § 17-14-2 (West 2012); VT. STAT. ANN. tit. 15, § 204 (West 2012).

The laws also differ and many are unclear concerning the extent of support and maintenance which is to be provided. Some statutes refer to “support,”<sup>100</sup> others to “necessary food, clothing, shelter or medical attention,”<sup>101</sup> others to “medical expenses,”<sup>102</sup> and some to “a decent burial.”<sup>103</sup> None of the statutes provides any precise definition of indigence for purposes of determining when a parent would be unable to provide for their own support,<sup>104</sup> nor is there generally any time limit placed upon the duty to provide support.<sup>105</sup> Some of the statutes do at least condition the adult child’s duty to support upon his or her own financial ability to pay, but again, no definition of what that might mean is provided.<sup>106</sup> The California filial responsibility laws do mandate consideration of each party’s “earning capacity and needs; obligations and assets; age and health; and standard of living,” as well as any other things the court may find “just and equitable,”<sup>107</sup> but case law provides little in the way of illumination concerning how these factors are to be demonstrated and weighed. One California case held that county authorities need not conduct a factual inquiry to determine an adult child’s ability to provide support as a condition precedent to filing suit;<sup>108</sup> an earlier California case held that the ability to support on the part of the adult child must have been shown to exist at the time the support was furnished to the parent by the county.<sup>109</sup> Neither case dealt with the actual determination of financial ability. On the issue of the timing of the determination of financial

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100. IND. CODE ANN. § 31-16-17-1 (West 2012).

101. S.D. CODIFIED LAWS § 25-7-27 (West 2012).

102. TENN. CODE ANN. § 71-5-115 (West 2012).

103. ALASKA STAT. § 47.25.230 (West 2013).

104. The Alaska law, for example, provides that an adult child is required to provide maintenance when parents are “poor and unable to work to maintain themselves,” which implies a disability requirement in addition to that of poverty. ALASKA STAT. § 25.20.030 (West 2013).

105. The Iowa statute does require the court that orders support to at least “state the extent and value of the assistance per week, and the time the assistance shall continue” but also allows a court to “make the time of continuance indefinite,” leaving the matter open to modification “as circumstances require.” IOWA CODE ANN. § 252.8 (West 2013).

106. The Louisiana law requires the court to find that the adult child is “able to contribute to the support” of the parent. LA. REV. STAT. ANN. 13:4731 (West 2012); Massachusetts requires the adult child to be “of sufficient means,” MASS. GEN. LAWS ANN. ch. 273, § 20 (West 2013); North Carolina is one of the more specific statutes, requiring the adult child to have “sufficient income after reasonably providing for his or her own immediate family.” N.C. GEN. STAT. § 14-326.1 (West 2013).

107. CAL. FAM. CODE § 4404(a)–(e) (West 2013).

108. Santa Barbara Cnty. v. Monical, 88 Cal.; Rptr. 717, 719 (Ct. App. 1970).

109. Turnboo v. Santa Clara, 144 Cal. App. 2d 728, 733 (1956).

ability, South Dakota courts have held that the ability to pay may be adjudicated “at any time there is an outstanding debt which has not been barred by the statute of limitations.”<sup>110</sup> In the *Pittas* case discussed earlier in Part I,<sup>111</sup> the burden of establishing the defendant son’s financial ability to pay the \$93,000 bill for his indigent mother’s health care was placed on the plaintiff nursing home.<sup>112</sup> Plaintiff was found to have met its burden by submitting four years worth of the son’s tax returns and bank account statements, establishing the son to have a net annual income of \$85,000 and the apparent ability to make monthly payments of \$1,100 after all known expenses had been paid.<sup>113</sup> This shifted the burden of going forward to the son, who did not dispute the income figures, but maintained he had other obligations that had not been considered.<sup>114</sup> Unfortunately for him, the court found that he “failed to substantiate” these additional obligations and that his “testimony lacked credibility.”<sup>115</sup> Determining financial ability thus appears to be very much a case-by-case assessment.

In addition, the laws generally do not provide any direction concerning how or whether the liability for support should be apportioned among multiple children,<sup>116</sup> and whether “children” includes step-children, adopted children, children born out of wedlock, etc.<sup>117</sup>

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110. *Americana Healthcare Ctr. v. Randall*, 513 N.W.2d 566, 571 (S.D. 1994); see also *Prairie Lakes Health Care Sys., Inc. v. Wookey*, 583 N.W.2d 405 (S.D. 1998) (discussing the possibility of a solvent defendant making payments in installments rather than a lump sum).

111. *Health Care & Ret. Corp. of Am. v. Pittas*, 46 A.3d 719 (Pa. Super. Ct. 2012).

112. *Id.*

113. *Id.*

114. *Id.* at 723.

115. *Id.*

116. *Gluckman v. Gaines*, 71 Cal. Rptr. 795 (Ct. App. 1968) held that the support obligation for an indigent parent should be imposed on all children collectively and in proportion to their abilities. In *Britton v. Steinberg* 24 Cal. Rptr. 831, 832 (Ct. App. 1962), the court found that where a daughter had been the sole support of her mother for close to 40 years, the son was liable for contribution for the increased costs of the mother’s care that the daughter’s income was insufficient to cover. See also *Chun v. Chun*, 235 Cal. Rptr. 553 (Ct. App. 1987) (assigning financial responsibility for an emotionally disabled daughter to her parents).

117. Ohio does specify that its criminal nonsupport statute applies to an adult child’s “parent or adoptive parent.” OHIO REV. CODE ANN. § 2919.21(A)(3) (West 2012). In a California case where a couple had raised a “foundling” as their own child, but never legally adopted her, the child was held not to be obligated under the terms of the state’s filial responsibility statute. *Parshall v. Parshall*, 56 Cal. App. 553, 555 (1922).

Some states do provide that if an adult child was abandoned,<sup>118</sup> neglected<sup>119</sup> or abused<sup>120</sup> by a parent while still a minor, then the support obligation is negated. Finally, if none of the children of the parent live within the state, does the state have jurisdiction to pursue the adult children wherever it is that they are living? The Kentucky statute specifically states that both the indigent parent and the adult child must live in Kentucky in order for the filial responsibility law to apply.<sup>121</sup> Since several states condition the creation of the support obligation on the receipt by the indigent parent of state services, it is at least implied that the parent must either reside in the state or have resided in the state at some point.<sup>122</sup>

In short, the filial responsibility laws that currently exist in a majority of jurisdictions throughout the United States are quite varied, remain vague on a number of critical issues, and remain largely unenforced. It should be noted that part of the lack of enforcement for reimbursement of medical costs in particular may stem from implementation by the states of the federal Medicaid program, which forbade the imposition of financial responsibility for the cost of long term nursing care on any family member other than the spouse of the institutionalized individual, both as a matter of determining eligibility<sup>123</sup> and as a matter of admission to a long term care facility.<sup>124</sup> As state Medicaid budgets tighten, however, it is not beyond the realm of pos-

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118. N.J. STAT. ANN. § 44:4-102 (West 2012); OHIO REV. CODE ANN. § 2919.21(E) (West 2012); P.A. CONS. STAT. § 4603(a)(2) (West 2012).

119. IND. CODE ANN. § 35-46-1-7(b) (West 2012) (excusing the adult child from the obligation to support if the parent failed to support the child); MASS. GEN. LAWS ANN. 273 § 20 (West 2012); MONT. CODE ANN. § 40-6-301(1) (making reference to the "intemperance, indolence, immorality, or profligacy of the parent" as excusing the obligation to provide support; R.I. GEN. LAWS § 15-10-1(b) (West 2012) (excusing obligation to support excused if child is not "reasonably supported" by parent).

120. VA. CODE ANN. § 20-88 (West 2012) (mentioning abuse along with desertion, neglect and willful failure to support, as excusing the obligation to support).

121. KY. REV. STAT. ANN. § 530.050(4) (West 2012).

122. NEV. REV. STAT. ANN. § 428.070 (West 2012); N.J. STAT. ANN. § 44:4-101(a) (West 2012); TENN. CODE ANN. § 71-5-103(10) (West 2012).

123. 42 U.S.C. § 1396a(a)(17)(D) (West 2012); 42 U.S.C. § 1396r-5 (West 2012).

124. 42 C.F.R. 483.12(d)(2); *see Knight v. John Knox Manor, Inc.* 92 So. 3d 111 (Ala. Civ. App. 2012). The regulation does provide that a long term care provider "may require an individual who has legal access to a resident's income or resources available to pay for facility care to sign a contract, without incurring personal liability, to provide facility payment from the resident's income or resources." Of course, anyone acting as a fiduciary on behalf of the elder person who then misused that person's income and assets and thereby left bills unpaid would be financially liable for that malfeasance. *Northfield Care Ctr., Inc. v. Anderson*, 707 N.W.2d 731 (Minn. App. 2006).

sibility that this prohibition might be eliminated from the federal law as a cost-cutting measure.<sup>125</sup> And even if this prohibition remains, it only affects health care costs; many seniors who are not residing in nursing homes require financial assistance in order to maintain adequate shelter and food. Vigorous enforcement of filial responsibility laws may thus be viewed as providing a means of drastically reducing the government's burden to meet these needs, which otherwise would be met through subsidized housing, subsidized loans for home repair for elder Americans, food stamps, and Supplemental Security Income.

## V. Is Enforcement of Filial Responsibility a Viable Option?

As noted in Part II above, in addition to their secular origins, filial responsibility laws have historically been derived from spiritual beliefs relating to the honoring of one's parents, beliefs which happen to be held in common by at least three of the major religions practiced in the United States.<sup>126</sup> Nevertheless, a diverse society that proclaims First Amendment freedoms from establishment of religion cannot justify imposition of filial responsibility on its citizens based on religious precepts.<sup>127</sup> Further, if one accepts the construct of social contract as

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125. This in fact would not be a new idea. As medical expenses skyrocketed in the mid-1980s, the U.S. Department of Health and Human Services, through what was then the Health Care Financing Administration (HCFA), launched federal initiatives to allow states that had filial responsibility statutes to use them to require adult children to pay to reimburse the government for Medicaid funds spent for the care of their elder parents. See George F. Indest, *Legal Aspects of HCFA Decision to Allow Recovery from Children for Medicaid Benefits Delivered to Their Parents Through State Financial Responsibility Statutes: A Case of Bad Rule Making Through Failure to Comply with the Administrative Procedure Act*, 15 S.U.L. REV. 225, 226–27 (Fall 1988). Fortunately, since such a policy is at odds with the explicit language of the federal statute, current regulations clarify that the only relatives that may be held liable for such reimbursement are those “responsible parties” that have “access to the [nursing home] resident’s income and assets and agrees to use them to pay for the resident’s care.” See Susan T. Peterson, *The Price of Admission: Liability and Responsibility for Nursing Home Expenses*, 66 BENCH & B. MINN. 24, 26 (2009). As a consequence, states have concluded that enforcement of filial responsibility laws to obtain reimbursement of Medicaid expenditures would constitute a violation of federal law. Kline, *supra* note 6, at 199–200.

126. See discussion, *supra*, 10–11.

127. U.S. CONST. amend. I (stating that the Government action must satisfy three criteria in order to withstand a constitutional challenge under the Establishment Clause: (1) must have a secular purpose; (2) must not have the primary effect of either advancing or inhibiting religion; and (3) cannot foster “excessive entanglement” of the government with religion). *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). See also Gary J. Simson, *Religion By Any Other Name? Prohibitions on*

the basis for American democracy, adult members of society should only be responsible for themselves and for those whom they have either contractually agreed to be responsible or in connection with whom their behavior has engendered liability.<sup>128</sup> An example of the latter type of obligation would be liability for a personal injury claim caused by negligence or support for a child conceived as a result of consensual sexual activity.<sup>129</sup> To argue that an adult member of society should be legally obligated to pay for the support and maintenance of indigent parents imposes an obligation on the adult child that he or she has neither contracted for nor assumed through any voluntary action on his or her part.<sup>130</sup> Justifying the imposition of such an obligation on the basis that the child owes a debt of gratitude flies in the face of the common law presumption that financial support provided by one's relatives (and especially as between parents and children) is in the nature of a gift, and does not create any reciprocal obligation.<sup>131</sup>

This is not to say that a justification for filial responsibility does not exist outside of morality or religion. The cases that have sought to challenge filial responsibility laws on constitutional grounds have apparently conceded that the state does have a legitimate secular governmental purpose in ensuring that its older, more vulnerable citizens are cared for; no case has challenged such laws based on First Amendment Establishment Clause concerns. Equal protection challenges to filial responsibility statutes have required courts to determine whether selecting the children of an indigent person to comprise the class of persons that should bear the burden of supporting him or her constitutes an arbitrary classification and whether that classification is rationally related to the state's legitimate purpose of caring for its older, more vulnerable citizens.<sup>132</sup> Adult children challenging the laws have argued that the classification is arbitrary precisely because

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*Same Sex Marriage and the Limits of the Establishment Clause*, 23 COLUM. J. GENDER & L. 132, 135–36 (2012).

128. JOHN RAWLS, *A THEORY OF JUSTICE* 111–13 (1971).

129. Rawls puts it as follows: “obligations . . . arise as a result of our voluntary acts; these acts may be the giving of express or tacit undertakings, such as promises and agreements or voluntary acceptance of benefits or participation in “a mutually advantageous cooperative venture.” *Id.* at 112–13.

130. The tension between recognition of obligations that the adult child has voluntarily assumed and those that arise as a result of enforcement of “a statutorily imposed filial duty” are discussed in W. Walton Garrett, *Filial Responsibility Laws*, 18 J. FAM. L. 793, 798 (1980).

131. 38 AM. JUR. 2D *Gifts* § 77 (2013).

132. *Americana Healthcare Ctr. v. Randall*, 513 N.W.2d 566, 572 (S.D. 1994).

it does not derive from any voluntary choice or any conduct voluntarily engaged in by the parties being held liable.<sup>133</sup> Courts have dismissed this argument, instead justifying the classification, in the words of the California Supreme Court, by reference to “special benefits for the class arising out of the relationship,”<sup>134</sup> as well as “a long tradition of law, not to mention a measureless history of societal customs” which “has singled out adult children to bear the burden of supporting their poor parents.”<sup>135</sup> This allusion to historical customs by the court is especially ironic given the California court’s own admission that there ““was no such duty [of support between adult child and parent] at common law.”<sup>136</sup> In any event, given that societal customs are changing and that one can no longer assume that “direct lineal descendants” of an indigent person “received the support, care, comfort and guidance” from that indigent person during their minority,<sup>137</sup> it is possible that such statutes would not pass constitutional muster if challenged anew. Be that as it may, filial responsibility measures are certainly under-inclusive in the sense that they do not provide a support mechanism for indigent persons that either have no children, those whose children have predeceased them, or those whose children are disabled or indigent themselves. Filial responsibilities thus do not go far enough toward solving the legitimate problem of how society will provide for elder indigent members that are no longer able to support and maintain themselves. Expansion of governmental programs, such as Social Security, SSI, Medicare and Medicaid, helps meet the needs of elder Americans and presupposes societal acceptance of some level of intergenerational distributive justice.<sup>138</sup> To address the challenge of intergenerational justice, Dr. Norman

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133. *Id.*

134. *Swoap v. Super. Court of Sacramento Cnty.*, 516 P.2d 840, 851 (Cal. 1973).

135. *Id.* at 849.

136. *Id.* at 848.

137. *Americana Healthcare Ctr.*, 513 N.W.2d at 571.

138. The term “intergenerational justice” generally refers to issues of justice that arise between non-contemporary populations (e.g. future or past generations). See Lukas Meyer, *Intergenerational Justice*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY \*1 (Edward N. Zalta, ed.) (Spring 2010), available at <http://plato.stanford.edu/archives/spr2010/entries/justice-intergenerational>. Advocates for sustainability and environmental concerns often make reference to intergenerational justice as imposing on the present generation an obligation to preserve the earth’s resources for future generations. Philosophers have employed the term to also refer to the “problem of distribution across age groups.” See Norman Daniels, *Justice Between Adjacent Generations: Further Thoughts*, 16 J. POL. PHIL. 475, 475 (2008).



Daniels has argued for societal implementation of a “prudential lifespan” approach that attempts to achieve a fair treatment of adjacent generations when it comes to the distribution of resources and goods over the entire course of an individual’s life.<sup>139</sup> The prudential lifespan construct acknowledges that every member of our society has at least the expectation of someday growing old, that none of us can know what circumstances we will find ourselves in once we reach old age, and that differential treatment of persons depending on age is not per se discriminatory.<sup>140</sup> Extrapolating from what is prudent, therefore, younger healthy members of society should be willing to dedicate some of their income and resources to payment of health care costs for current older members of society, as they may need to call on the next generation of younger members to do the same for them—avoiding a situation where elder members of society will chronically find themselves in grinding poverty, homeless and unable to pay for needed health care.<sup>141</sup>

In addition, while it is beyond the scope of this Article to either provide a definitive description of what constitutes a family or to advocate for any particular definition, research has indicated that social isolation and loneliness (or the lack of any caring, interpersonal, committed relationship in one’s life) is a major cause of depression, deterioration, and erosion of health and quality of life among elder Americans.<sup>142</sup> Thus, the most important function that family, however defined, serves is that of enhancing the quality of life from an emotional, psychological, and physiological standpoint; it is not just a provision of financial support and maintenance.

For the purposes of this Article, therefore, it will be accepted as a given that justification exists for imposing intergenerational responsibility among all members of society. It will further be accepted that strengthening of the family, however defined, is an important goal, largely because the family represents interpersonal commitment.

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139. NORMAN DANIELS, *AM I MY PARENTS’ KEEPER* 40–65 (1988).

140. *Id.* at 41–42. One example of such differential treatment is deeming that those under age 18 lack the capacity to contract.

141. Daniels, *supra* note 138, at 485–86; *see also* DANIELS, *supra* note 139, at 119–24.

142. James S. House, *Social Isolation Kills, But How and Why?*, 63 *PSYCHOSOMATIC MED.* 273, 273 (Mar. 1, 2001) available at <http://www.psychosomaticmedicine.org/content/63/2/273.full>; Erin York Cornwell & Linda J. Waite, *Social Disconnectedness, Perceived Isolation, and Health Among Older Adults*, 50 *J. HEALTH & SOC. BEHAV.* 31, 43–44 (Mar. 1, 2009), available at <http://hsb.sagepub.com/content/50/1/31.refs.html>.

Whether the connection is based on biological ties, marriage, partnership or another relationship, it would seem that creation of a system that encourages intergenerational responsibility while at the same time strengthening the family (i.e., interpersonal commitments) would be optimum.

It has been suggested by some authors that requiring adult children to support elder parents would reduce elder abuse and neglect, as it would force adult children to provide for their vulnerable parents living on a limited income.<sup>143</sup> The reasoning seems to be that the threat of facing a lawsuit from either the public authorities or the private entity providing necessary services to the parents, or facing criminal charges for failing to support would be sufficient to deter abusive behavior.<sup>144</sup> There seems to also be the tacit assumption that the older person is loved and thus will be adequately cared for by family members—an assumption that has unfortunately proven to be unreliable.<sup>145</sup>

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143. Kline, *supra* note 6, at 206–7; Robin M. Jacobson, *Americana Healthcare Center v. Randall: The Renaissance of Filial Responsibility*, 40 S.D. L. REV. 518, 541 (1995); Allison E. Ross, *Taking Care of Our Caretakers: Using Filial Responsibility Laws to Support the Elderly Beyond the Government's Assistance*, 16 ELDER L.J. 167, 188 (2008); Andrew R. Fischer, *Elder Abuse: A Private Problem That Requires Private Solutions*, 8 J. HEALTH & BIOMEDICAL L. 81, 94–95 (2012); Lara Queen Plaisance, *Will You Still...When I'm Sixty-Four: Adult Children's Legal Obligations To Aging Parents*, 21 J. AM. ACAD. MATRIM. LAW 245, 258 (2008).

144. This latter belief seems particularly unfounded, since those found guilty of adult abuse already face significant jail time; the defendant daughter that Terence Kline refers to in his article was sentenced to ten years in prison as a consequence of her neglect of her mother. Kline, *supra* note 6, at 206–7. If that sentence was not sufficient to deter her behavior, it is hard to see how the threat of prosecution for violation of a filial responsibility statute would do so.

145. The horrific case of Robert Heitzman, referred to by Lara Queen Plaisance in her article, is instructive. Mr. Heitzman was living with and being “cared for” by two of his adult sons, Richard Heitzman, Sr. and Jerry Heitzman. Robert Heitzman was dead when the police came to the sons’ house; they found him lying on a rotting mattress, covered with bed sores, amid “the stench of urine and feces.” See *People v. Heitzman*, 886 P.2d 1229, 1232 (Cal. 1994). Son Jerry admitted not having given his father any food or water for the previous three days because they were planning to have company over for dinner and did not want the father’s loss of control over his bladder and bowels to result in any further odor in the house. *Id.* The two brothers were charged with involuntary manslaughter in the death of their father; their sister, Susan, who did not live in the home, was charged with elder abuse, as she had visited the home two weeks earlier, and thus presumably was aware that something was amiss with respect to the quality of care her father was receiving. The court nevertheless refused to find criminal liability on her part for failing to intervene. *Id.* at 1245–46. A dissenting opinion was filed that would have imposed liability, and the majority opinion conceded that it was a close question, stating explicitly that they understood why the state felt prosecution was in order in this particular case. *Id.* at 1245, 1250–51. Professor Moskowitz provides additional examples of horrific instances of elder abuse and neglect. See Moskowitz, *supra* note 32, at 417–18, 478–81.

As it stands now, the primary perpetrators of adult abuse are people close to the abused victim, family members and friends who find the victim's income and assets, however limited, to be great enough to tempt them to misappropriate the funds, while providing minimal, if any, care to the older person.<sup>146</sup> Further, rather than preventing elder abuse, one might expect that forcing unwilling family members to serve as caregivers would instead produce a greater incidence of active psychological or even physical abuse.<sup>147</sup> A survey taken in the 1980s found that almost two-thirds of seniors opposed the imposition of legally mandated filial responsibility;<sup>148</sup> although the survey itself is dated, current research on the attitudes of older Americans indicates that the last thing any older person wants is to be "a burden" on their families or loved ones.<sup>149</sup> From the standpoint of psychological abuse, what could be worse for a frail, elderly person than to know his or her inability to provide for self-support has created a financial millstone around the neck of those he or she cherishes? Finally, family members still stand the greatest chance of benefitting from any estate left by the older person, which creates a certain conflict between their willingness to spend the assets of the estate on the care of the elder versus allowing the assets to accumulate for purposes of inheritance. Thus, requiring family members to provide care and support as a matter of law may not guarantee that care and support will be provided as a matter of fact.

There is also the question of fairness in the apportionment of the obligation to be borne by the adult children. It is one thing to expect

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146. NAT'L CTR. ELDER ABUSE, THE NATIONAL ELDER ABUSE INCIDENCE STUDY (Final Report 1998). Adult children constitute the single "largest category of perpetrators" of elder abuse on non-institutionalized elders, with 47.3% of elder abuse incidents being attributable to an adult child of the victim. *Id.* at 4–28. Other perpetrators of abuse against this population, by percentage, include: spouses (19%); grandchildren (9%); other relatives (9%); siblings (6%); friends/neighbors (6%); in home service providers (3%); and out of home service providers (1%). *Id.* In 2010, the estimated annual financial cost to elder victims of financial exploitation was about \$2.9 billion and 34% of the abuse being reported in the news was perpetrated by "family, friends and neighbors." METLIFE MATURE MARKET INSTITUTE, ELDER FINANCIAL ABUSE 2 (June 2011). The actual figures may be much higher than that. See Plaisance, *supra* note 143, at 246; Moskowitz, *supra* note 32, at 416.

147. Plaisance, *supra* note 143, at 250–51.

148. Garrett, *supra* note 130, at 793.

149. Henry J. Aaron, *Longer Life Spans: Boon or Burden?* Vol. 135 No. 1 DAEDALUS 9, 18 (2006); Mark Goulston, *Baby Boomer Death Wish*, PSYCHOLOGY TODAY (June 30, 2010), <http://www.psychologytoday.com/blog/just-listen/201006/baby-boomer-death-wish>; Martin Gunderson, *Being A Burden: Reflections on Refusing Medical Care*, Vol. 34 No. 5 HASTINGS CTR. REPORT 37, 37 (2004); Moskowitz, *supra* note 32, at 410.

an adult child to assist in providing what would be the ordinary cost of support and maintenance of an indigent elder and quite another to provide for the overwhelming costs of medical care that may be incurred within the last years of life. And what if the parents have been profligate? One author uses the example of Hal and Wanda, a couple that decides to retire at age 65.<sup>150</sup> Hal and Wanda have worked hard all their lives, successfully raised two children, and now believe they are entitled to enjoy the remaining time they had left on this earth.<sup>151</sup> Consequently, in addition to retiring, they sell their home, and over the next five years proceed to spend \$500,000 of the \$1 million that they had accumulated for retirement on things like expensive clothes, gambling, and other arguably frivolous expenditures.<sup>152</sup> The adult children remonstrate with them, advising them that if they keep on spending like this, they will have exhausted their funds by the time they reach age 75.<sup>153</sup> Unfortunately, Hal and Wanda are undeterred, continue with their irresponsible behavior, and wind up destitute, at which point they bring an action for support against their two adult children under their state's filial responsibility law.<sup>154</sup>

Or what if one child has been inordinately successful financially, while the others have either underperformed, or chosen to engage in low-paying public interest employment, or been themselves profligate? Is it fair for the one successful child to have to assume the whole burden? Or, if the successful child has moved away to another state (or out of the country), will it be fair to instead place the entire burden on the next child that is working two jobs, but barely getting by because he must pay the cost of caring for a child with a disability, while his wife, who is an only child, has had to quit her job in order to provide hands-on, personal care for her elder parents?<sup>155</sup> Arguably,

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150. Amber Spataro, "Profligate Parent" as a Defense to Proceedings Brought to Require Support From a Child, 11 J. CONTEMP. LEGAL ISSUES 385, 385 (2000).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 385-86. The author recommends that proof of such irresponsible behavior should constitute an equitable defense to an action for support under state filial responsibility laws. *Id.* at 388-89.

155. The case of Yolanda Hunter, a 43-year-old former human resources professional, is illustrative. When Hunter's elder grandmother, who suffered from Alzheimer's Disease, was threatened with having to be put in a nursing home, Hunter made the decision to quit her job in order to function as a full-time, live-in caregiver for her. See Marilyn Geewax, *Discovering the True Cost of At-Home Caregiving*, MORNING EDITION, (May 1, 2012, 2:57 AM), <http://www.npr.org/2012/05/01/151472617/discovering-the-true-cost-of-at-home-caregiving>. After spend-

such a scenario should relieve this family of the obligation to pay any support, as these circumstances would indicate financial inability on the part of this adult child, but in the absence of any explicit criteria, it is hard to ascertain whether that would be the outcome. And the filial responsibility laws further make no allowance for the lost opportunity costs that accompany these hard decisions and the decreasing ability that such caregivers will have to save for their own support and maintenance needs once they reach retirement age or are confronted with a disability that prevents them from working.<sup>156</sup> Most distressingly, filial responsibility laws do not expressly recognize or credit such informal assistance, so the same adult children who are foregoing income and economic opportunity for themselves by providing in kind care and assistance to their elder parents may still be prosecuted under filial responsibility laws if the state has paid for any assistance to the parent or if a third-party provider has not been paid.<sup>157</sup>

And what about those persons that have no children, or whose children have predeceased them? As already mentioned, imposition of filial responsibility will obviously not constitute an overall panacea or answer to the issue of providing support, maintenance, and care to those that are elderly and indigent.<sup>158</sup> So, the same adult children who are providing either out-of-pocket financial assistance or in kind care to their elderly parents will be taxed to pay for the assistance provided to those indigent seniors that have no one to provide for them.

What can one expect the overall effect of such a draconian policy to be on the strength of family ties? Obviously, the lifetime of love and affection between most elder parents and their adult children will weather any storm of government burden. These are the folks that are currently providing for their elders despite the various obstacles: re-

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ing two years providing in-home care for her grandmother, Hunt has been trying to re-enter the workforce and is finding herself unable to do so. *Id.*

156. *Id.* These costs are estimated at roughly \$143,000 per female caregiver, representing loss of wages, reduced Social Security and pension benefits, and often reduced wages when the caregiver finally does re-enter the workforce.

157. Edelstone, *supra* note 44, at 506. This counterincentive effect may be further exacerbated if the adult child is providing shelter or financial support, as these contributions may be considered income for purposes of reducing government benefits like SSI, which the parent may also be receiving. *Id.*

158. In fact, given the administrative costs associated with enforcement and the limited returns that may actually be achieved, filial responsibility may turn out to be more of a hindrance than a solution. In the mid-1980s, when the state of Idaho attempted to enforce its filial responsibility law (which has since been repealed), the projected income from enforcement was in the neighborhood of \$1.5 million; the actual amount collected was a scant \$30,000. *Id.* at 506-7.

strictive rules that prohibit reimbursement of relative caregivers under qualifying long term care insurance plans;<sup>159</sup> issues with personal care contracts between parent and child intended to defray the opportunity costs and expense of caregiving on the younger adults;<sup>160</sup> and finally, situations where the elder parents lack sufficient funds and the adult children are subsidizing their maintenance and care already.<sup>161</sup>

For other families, the counterproductive trends are already evident. Out of fear of losing all assets to the nursing home,<sup>162</sup> many older persons are pursuing a strategy of giving away all their resources while they are still in good enough physical health to hopefully outlast the 60-month look-back period imposed for Medicaid eligibility.<sup>163</sup> The problem, of course, is that the older person is then at the mercy of the asset recipient to provide support and maintenance to the extent that the older person's remaining income alone is not sufficient to do so.<sup>164</sup> In those cases where the older person has transferred his or her assets to someone who has converted them to his or her own benefit instead of using them for the benefit of the elder, the outcome leads to the sort of tragic abuse that has already been referenced above,<sup>165</sup> possibly leaving the elder destitute and homeless.<sup>166</sup> And, if serious health issues requiring long term care arise within the 60-month period, the older person's application for Medicaid will be denied as a

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159. In order to be deemed qualified for purposes of entitling the insured to a tax deduction for payment of premiums, a long-term care policy must provide that services that are reimbursed under the policy are provided "pursuant to a plan of care prescribed by a licensed health care practitioner." 26 U.S.C. § 7702B(c)(1)(B) (West 2013).

160. Because such contracts must meet the requirements of ordinary contracts for employment, the parties should consult an attorney to be sure that the contract will be sufficiently detailed to pass muster and will not result in disqualification of the elder parent for Medicaid benefits should the need arise for such assistance.

161. See discussion, *supra*, Part III.

162. Although some state filial responsibility laws do contemplate lawsuits initiated by third parties seeking to collect the bills for unpaid services (see discussion, *supra*, Part IV), if the parent has actually qualified for and received Medicaid assistance, the nursing home will be paid and will not be seeking any further recovery. Instead, it will be the state that will be seeking reimbursement, generally through execution of a lien filed against real property owned by the benefit recipient or through estate recovery. 3 A. KIMBERLEY DAYTON, ET AL., ADVISING THE ELDERLY CLIENT § 29:113-29: 118 (June 2013). Despite this, people often still believe that it is the nursing home that will be pursuing a claim.

163. *Id.* at § 29:85 through § 29:91.

164. Denis Culley & Hanna Sanders, *Exploitation and Abuse of the Elderly During the Great Recession: A Maine Practitioner's Perspective*, 62 ME. L. REV. 429, 438-41 (2010).

165. See discussion, *supra*, at 24-25.

166. Culley & Sanders, *supra* note 164, at 430-31.

consequence of the transfer.<sup>167</sup> Where it can be shown that an adult child (or any other person, for that matter), has benefitted from a gratuitous transfer from an elder who then requires nursing home care, and whose application for Medicaid assistance is denied on the basis of the transfer, that adult child should bear financial responsibility for the cost of the older person's care up to the value of the assets transferred.<sup>168</sup> A number of the cases that have been cast as imposing filial responsibility on adult children actually involve variations of this scenario, often entailing transfers made pursuant to the child's authority as agent under a durable power of attorney.<sup>169</sup> Presumably, liability on the part of the adult child in these sorts of cases would remain, as a matter either of common law fiduciary principles or equitable principles of unjust enrichment and undue influence. That adult children are misappropriating the resources of their elder parents indicates serious erosion of family ties of affection and respect is already occurring and undermining the stability of any social safety net for elder Americans that is predicated on biological relationships alone.

In addition to the erosion of existing relationships between elder parents and their children, older persons who have resources and are living independently are now often reluctant to marry and create traditional family relationships. Even if they meet someone that they wish to share their lives with, it is no longer assumed that marriage is the ideal.<sup>170</sup> Instead, because of the looming specter of potential financial liability, many forego marriage altogether.<sup>171</sup> Stated public policy of strengthening family values through the establishment of marital commitments is thus undermined, as commitment is seen as an agreement to undertake a staggering financial burden that will leave the partner destitute, rather than as a reasonable expectation that a partner would provide for the necessary and ordinary support and maintenance of his or her spouse. Younger people, observing this example and wanting to avoid a similar destitution, may well conclude that the best course of action is to obtain as much of their inheritance as possible early on and then have as little to do with their elder par-

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167. DAYTON, ET AL., *supra* note 162, at § 29:91.

168. Ross, *supra* note 143, at 201–2.

169. See Troy Nursing & Rehab. Ctr. v. Naylor, 944 N.Y.S.2d 323 (N.Y. 2012).

170. Craig Reaves, *Ask An Elder Law Attorney: Late Life Marriage*, N.Y. TIMES: THE NEW OLD AGE 1 (June 16, 2011), <http://newoldage.blogs.nytimes.com/2011/06/16/ask-an-elder-law-attorney-late-life-marriage-issues/>.

171. Randy Dotinga, *More Baby Boomers Opting to Cohabit, Not Marry*, HEALTH DAY 1 (Aug. 31, 2012), <http://consumer.healthday.com/Article.asp?AID=667784>.

ents as possible. Modern society is already highly mobile and young people may conclude that placing as much distance between themselves and their parents as they can will also help them to avoid becoming a target for enforcement of these laws. Certainly, in the absence of a federal mandate, attempts made to enforce filial responsibility laws beyond the confines of the state where the elder person resides will raise questions of jurisdiction and due process.<sup>172</sup> Imagine a family with two children that start out in Alabama. Once the kids are grown, one adult child remains in Alabama, which does not have a filial responsibility law, while the other moves to Pennsylvania, which does have such a law. The folks sell their Alabama home and use their life savings to move to California, which also has a filial responsibility law. There they become impoverished after an earthquake and mudslide destroys their newly acquired hillside home. Query whether there are sufficient minimum contacts to permit California to exercise jurisdiction over either of the adult children if they remain in their respective states?<sup>173</sup> Clearly, the more a non-resident adult child tries to help his or her parents, by managing funds located in the parents' home state, contracting for care in the home state, and visiting the parents, the more likely it is that the necessary contacts will be found. So, if the child from Alabama decides to travel to California to assist the elders, while his sibling in Pennsylvania refuses to do so much as make a phone call or send an email, should the Alabama child's reward be additional financial liability for the parents' support and maintenance? What if the parents had moved to Pennsylvania in the first place, and transferred all their assets to the adult child living there, only to have that child wind up in prison for financial exploitation after having squandering it all and leaving them destitute and homeless? Should the child in Alabama be subject to Penn-

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172. Edelstone, *supra* note 44, at 513; Kline, *supra* note 6, at 209-10; Lynda Yamamoto, *Overcrowded Prisons and Filial Responsibility: Will States Utilize Support of the Indigent Statutes to Solve the Baby Boomer and Prison Crises*, 41 RUTGERS L.J. 435, 470-71 (2009).

173. The South Dakota Supreme Court upheld jurisdiction to enforce its filial responsibility statute against a non-resident adult child on the basis of the child's following contacts with the state: existence of a power of attorney authorizing the child to access his mother's bank account in South Dakota; appointment by a South Dakota court of the adult child as legal guardian of his mother (who was a resident of South Dakota); fact that the adult child occupied the role of trustee holding legal title to his mother's home located in South Dakota; visits made by the adult child to South Dakota to see his mother; prosecution of a bankruptcy action in South Dakota on behalf of his mother. *Americana Healthcare Ctr. v. Randall*, 513 N.W.2d 566, 574 (S.D. 1994).



sylvania filial responsibility laws to remedy a situation that that child did nothing to create? Conversely, if the parents had stayed in Alabama and the Alabama child had then converted all the parents' assets, the parents would be out of luck entirely, as Alabama has no filial responsibility law. Given the disparities between the filial responsibility laws that do exist and the absence of such laws in a sizeable minority of the states, increasing enforcement of the laws will only guarantee increasing incidence of unjust and anomalous results. This in turn will cause the expansion of creative planning intended to avoid filial responsibility altogether.

## VI. Alternatives to Filial Responsibility

If one assumes that a desirable public policy in this area will be one that will both reduce public expenditures supporting elder Americans and also foster genuine concern and caring connections among people, whether those connections arise out of biological or other ties, then renewed and expanded enforcement of filial responsibility laws may be less than desirable. Dr. Norman Daniels points out that the real question that gives rise to discussion of filial responsibility in the first place is one of distributive justice, specifically "what is a just distribution of social goods between the old and the young."<sup>174</sup> Viewing the problem as a competition between birth cohorts for limited resources creates an "us" against "them" mentality that places parents and children in the role of antagonists,<sup>175</sup> further fracturing what is already a perilously fragile institution called "the family."

In addition, an attempt to resolve what is clearly a societal problem by reference to what traditionally has been a private relationship will require government intrusion into that relationship in the form of governmental imposition of some sort of standards that delineate the boundaries and substance of filial obligation. As has already been implied in Part III above, we now live in a very diverse, multicultural society and attempts to justify filial responsibility legislation on the basis of any shared morality or traditions is simply not possible.<sup>176</sup> Casting the problem as one of filial responsibility creates intergenerational conflict. A better view would focus on how individual members of a just society should reasonably expect to be treated over the

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174. Daniels, *supra* note 138, at 21.

175. *Id.* at 16–17.

176. *Id.* at 22.

course of an entire lifespan—a view that would encompass not just that individual's treatment at the point when he or she is most productive, but also at the point when he or she is most vulnerable.<sup>177</sup>

Professor Daniels's "prudential lifespan" theory emphasizes the economic aspects of the distribution of health care in particular, but the theory works as well in the context of maintenance and support.<sup>178</sup>

Further, economic policy clearly wields dramatic influence over private behavior and social ties, as evidenced by the effect Temporary Assistance to Needy Families (TANF) eligibility rules have been shown to make on the decision by low-income women with children to either marry or cohabit with a male.<sup>179</sup> Professor Daniels tells his own anecdotal story about how the availability of payment mechanisms for end-of-life care has, until very recently,<sup>180</sup> fostered a mentality that caring relatives should feel compelled to assault terminally ill patients with life-prolonging extraordinary measures, even when, prior to that point, the same patients may have gone without adequate chronic care due to the high unreimbursed costs associated with prescription medications, in home health care, assisted living, and other accommodations.<sup>181</sup> However, we have had the anomalous situation that society would rather pay for expensive end-of-life treatment that is often largely a matter of medical futility, rather than provide more reasonably priced routine care that would improve the quality of life

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177. *Id.* at 52–5.

178. *Id.* at 119–38.

179. Robert A. Moffett, et al., *Cohabitation and Marriage Rules in State TANF Programs* at vi (RAND Labor & Population, Working Paper No. 585-1, 2009), [http://www.rand.org/content/dam/rand/pubs/working\\_papers/2009/RAND\\_WR585-1.pdf](http://www.rand.org/content/dam/rand/pubs/working_papers/2009/RAND_WR585-1.pdf).

180. The development of palliative hospice care and the inclusion of a payment mechanism for such care as part of Medicare now provides an acceptable option for those wishing to experience a natural death.

181. *Id.* Professor Daniels's example involved his elder great-aunt and he tells it best in his own words:

When my great-aunt became quite frail and suffered some mental impairment, her daughter found it extremely difficult to get adequate home care or an appropriate nursing home placement. When acute episodes threatened her life, however, she was rushed to intensive care facilities and exhaustive efforts were made to extend her life. In the final of these episodes, I was reassured by her daughter that "the doctors are doing everything to save her." I suggested that perhaps it was time to let her die peacefully, but I was rebuked. "It's my mother—I can't do that." I then asked my cousin whether she would want her daughter to treat her in the same way she was treating her mother. "God forbid," she said, "when my time comes, I just want to go."

Daniels, *supra* note 138, at viii.

being experienced for years and possibly decades prior to the end of life. Although it is clearly beyond the scope of this Article to address end-of-life issues,<sup>182</sup> in trying to determine what alternatives to filial responsibility would best provide support and maintenance to each of us as we age, it is helpful to focus on at least one measure of deprivation which appears to be universally dreaded—the specter of coming to the end of life abandoned and alone. A considerable number of elder people already find themselves existing in virtual isolation, living alone in their homes, without the support of close family or friends.<sup>183</sup> By definition, these individuals fall outside the parameters of those whose support and maintenance will be provided through laws of filial responsibility. Enforcement of filial responsibility laws would still leave a significant number of persons who are indigent, elder, incapacitated, ill and without family to support themselves and to anticipate spending their last days isolated and alone. It is hoped that rational beings would agree that all persons must be cared for, and that a wise society would promulgate policies that would strengthen social connections and thus hopefully, reduce the number of persons that will find themselves isolated in the future. Such alternative policies, some of which are already being implemented and all of which are under discussion, include the following:

1. Expansion of existing dependent tax deductions and exemptions that include individuals outside of blood or adoptive ties. Current IRS rules do permit taxpayers to claim non-related individuals as dependents so long as the person is truly a member of the taxpayer's household, lives with the taxpayer for the entire year, has gross income less than \$3,800,<sup>184</sup> and the taxpayer is paying for more than half of the dependent's support during the calendar year. In those cases where an outright deduction or exemption is too extravagant, perhaps the assistance provided could count toward the charita-

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182. Decisions concerning end-of-life care are profoundly personal and those facing terminal illness should have the option of pursuing extraordinary measures, if that is what is desired, or of seeking a natural death, as well as be afforded the routine care necessary to maximize quality of life in the time preceding the terminal phase. The additional concerns of diminished capacity and outside pressures which may influence end of life decision-making are sufficiently complex to keep scholars occupied indefinitely. See Schmidt, *supra* note 12, at 73–80.

183. See Naomi Karp & Erica Wood, INCAPACITATED AND ALONE: HEALTH CARE DECISION-MAKING FOR THE UNBETFRIENDED ELDERLY, ABA COMMISSION ON LAW AND AGING (July 2003).

184. 26 U.S.C. § 152 (West 2012).

ble donations listed on Schedule A. For example, suppose the taxpayer lives next to an elder neighbor on a fixed income who requires substantial assistance in maintaining her property (mowing grass, raking leaves, making repairs). If that neighbor pitches in and provides this assistance to help this neighbor stay in her home, he should be entitled to declare it as he would any other charitable contribution, subject to whatever reasonable guidelines the IRS may promulgate to document the assistance and guard against fraud.

2. Tax credits for installation of elder-friendly home improvements, such as handrails, ramps,<sup>185</sup> and perhaps even low-interest loans to finance the addition of an extra bedroom and bathroom to accommodate in-home care of older persons, to whom they are committed, whether related or not.<sup>186</sup>

3. Expansion of the federal Family and Medical Leave Act,<sup>187</sup> which requires employers to grant employees a three month period of unpaid leave to care for a parent.<sup>188</sup> Because the leave period is unpaid unless the employee has already accrued sufficient vacation or sick leave to cover it, many workers do not avail themselves of the entire four months, even when they are themselves the ones needing care.<sup>189</sup> Given that frail elders with chronic conditions may require prolonged periods of care far exceeding four months, special caregiver leave by employers should allow for what is actually necessary and provide some supplement to pension benefits for workers who must leave a job for several years in order to care for an older person, again whether related or not, to whom they are committed.<sup>190</sup>

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185. Professor Moskowitz writes that the Japanese have had such tax policies in place for relative caregivers for quite some time. Moskowitz, *supra* note 32, at 440–41.

186. *Id.* at 441.

187. 29 U.S.C. § 2601 *et seq.* (2012).

188. 29 U.S.C. § 2612(a)(1)(C) (West 2012); 29 C.F.R. § 825.112(a)(3) (2012).

189. AM. ASSOC. OF UNIV. WOMEN, *Know Your Rights: The Family and Medical Leave Act* (2007), <http://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/family-and-medical-leave-act/>. In fact, 50 percent of workers using the Family Medical Leave Act take less than ten days of leave. *Id.*

190. Japan has developed a special pension program for women that factors in economic loss faced by women who quit work to raise a family. Narayanan, *supra* note 45, at 394–95.

4. Government subsidy payments to programs and individuals providing community-based services and support to frail elder Americans.<sup>191</sup> This movement is already taking place with Medicaid waivers in the majority of states approving Medicaid reimbursement for long-term care in home and community-based settings as opposed to nursing facilities. However, in order for programs to qualify for payment, the care provided must be medically necessary.

5. Adoption of universal health care to cover basic health needs and required medical services. Although it is doubtful that this recommendation will ever be fully achieved, it is hoped that the Patient Protection and Affordable Care Act of 2010,<sup>192</sup> with its inclusion of such senior-friendly provisions as elimination of the Medicare Part D prescription drug “donut hole” and free preventive care,<sup>193</sup> as well as implementation of coordinated care for those low income seniors that are dually eligible for Medicare and Medicaid,<sup>194</sup> and increased support for community-based, long-term care support and services<sup>195</sup> will provide at least a transition toward this goal.

6. Provide tax incentives to support innovative private employer initiatives that are already taking place to assist employees that are caregivers. Such initiatives include provision of on-site adult day care facilities in the workplace, akin to the child care facilities offered by a number of employers, and incorporation of “flex-time” policies to accommodate those having to care for an elder person.<sup>196</sup> Some employers even go so

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191. Germany has established a social insurance program that takes this approach, and as a consequence have seen the decline of providers of institutional nursing home care in favor of adult day care and assisted living, which furnish supportive care. Moskowitz, *supra* note 32, at 443–44. The entire framework of reconfigured home based care for elders is much less expensive than the former reliance on institutional care. *Id.* at 445.

192. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119–1025 (2010).

193. CTRS. FOR MEDICARE & MEDICAID SERVS., *Medicare and the New Health Care Law—What it Means for You* at 2 (May 2010), [http://www.alz.org/documents/national/medicare\\_newhealthlaw.pdf](http://www.alz.org/documents/national/medicare_newhealthlaw.pdf).

194. Evin Isaacson, et al., *Medicaid Long Term Services & Supports 101: Emerging Opportunities and Challenges* 9 (Sept. 2012), NAT’L SENIOR CITIZENS LAW CTR., <http://www.nsclc.org/wp-content/uploads/2012/09/Medicaid-LTSS-Guide-Final.pdf>.

195. *Id.* at 11–12.

196. Moskowitz, *supra* note 30, at 730.

far as to provide “back up care” for their employees, who would otherwise miss work due to having to care for an elder relative.<sup>197</sup>

7. Incentives are given to encourage adoption by employers of the U.S. Equal Employment Opportunity Commission’s Best Practices for Workers with Caregiving Responsibilities<sup>198</sup> to combat employment discrimination against caregivers. A recent report by the AARP Public Policy Institute highlights the type of negative treatment that workers who are caring for elder or disabled family members may face; the adverse consequences of which may often include termination from employment.<sup>199</sup> Among the items recommended as best practices are better training of supervisory personnel to ensure that work-life balance programs are positively implemented, and that workers who avail themselves of such programs do not become the target of harassment and discrimination.<sup>200</sup>

8. Foster intergenerational community initiatives, such as Project Home Share, that are seeking to match single seniors with young families, or single young people with seniors, to establish living situations where they pay anything from a nominal to a reasonable rent as boarders, but will be socially accepted as a part of the household.<sup>201</sup> In those situations where neither the elder nor the younger individuals own homes, perhaps the intergenerational concept could be subsidized as it is in Germany, with the establishment of “multi-

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197. BRIGHT HORIZONS, *Back-Up Adult/Elder Care*, <http://solutionsatwork.brighthouse.com/Back-Up-Care/Back-Up-Elder-Care.aspx> (last visited Nov. 14, 2013).

198. EQUAL EMP’T OPPORTUNITY COMM’N, *Employer Best Practices for Workers with Caregiving Responsibilities*, <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html> (last modified Jan. 19, 2011) [hereinafter EEOC].

199. Joan C. Williams, et al., *Protecting Family Caregivers from Employment Discrimination*, AARP PUB. POL’Y INST. 3–4, (Aug. 2012), [http://www.aarp.org/content/dam/aarp/research/public\\_policy\\_institute/health/protecting-caregivers-employment-discrimination-insight-AARP-ppi-ltc.pdf](http://www.aarp.org/content/dam/aarp/research/public_policy_institute/health/protecting-caregivers-employment-discrimination-insight-AARP-ppi-ltc.pdf).

200. EEOC, *supra* note 198, at 3.

201. Andi Rierden, *Changing Lives Inspire Innovative Households*, N.Y. TIMES (Apr. 14, 1991). Rierden’s article describes a situation where a younger divorced man was matched with an elderly couple; the younger man pays a small amount to rent a room in the couple’s home and assists them with household chores that need to be done.

generational housing.”<sup>202</sup> The German model seeks to counteract the segregation of housing by age that is a trend in the United States as well, with suburban communities located near schools and shopping malls being populated by younger people with children, while older people are clustered in urban high rise buildings or in separate gated senior communities and assisted living.

9. Continued support and expansion of the Veterans Administration medical foster home approach currently operating in 36 states.<sup>203</sup> A medical foster home is a “private home in which a medical foster home caregiver” renders needed personal care to veterans who would otherwise have to be placed in a nursing home.<sup>204</sup> Because the homes are open to all veterans, they do not solely serve the elderly, but the average age of residents is 70.<sup>205</sup> Medical foster homes must be approved by the VA and are continually inspected to ensure ongoing compliance with VA requirements.

10. For 40 years now, the U.S. Administration on Aging has been providing well-balanced meals, nutritional information, and social contact to senior citizens at congregate meal sites in senior centers and senior housing, as well as through home delivery.<sup>206</sup> The success of this program, with over eight billion meals served, should be a catalyst for expanded services to seniors in as many diverse settings as possible. One such diverse setting is the SAGE Center in Manhattan, operated by Services and Advocacy for Gays, Lesbian, Bisexual and Transgender Elders.<sup>207</sup>

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202. Isabelle de Pommereau, *In Germany, Housing Brings Young and Old Together*, CHRISTIAN SCI. MONITOR 1 (Oct. 17, 2007), <http://www.csmonitor.com/2007/1017/p13s07-woeu.html>.

203. Alyson Martin & Nushin Rashidian, *For Veterans, an Alternative to the Nursing Home*, N.Y. TIMES BLOG: NEW OLD AGE 1 (2012), <http://newoldage.blogs.nytimes.com/2012/07/18/for-veterans-an-alternative-to-the-nursing-home/>.

204. 38 C.F.R. § 17.73(b) (West 2012).

205. Martin & Rashidian, *supra* note 203, at 2.

206. 38 C.F.R. § 17.73(a), (c); ADMIN. ON AGING, *AOA Celebrates the 40th Anniversary of its Successful Nutrition Program* (2012). [http://www.aoa.gov/AoARoot/Press\\_Room/Social\\_Media/Widget/Statistical\\_Profile/2012/2.aspx](http://www.aoa.gov/AoARoot/Press_Room/Social_Media/Widget/Statistical_Profile/2012/2.aspx) (last modified Feb. 29, 2012).

207. David W. Dunlap, *For Older Gay Men and Lesbians, a Place Like Home, Complete with \$2 Dinners*, N.Y. TIMES, Mar. 1, 2012, at A29. See also the SAGE website at <http://sageusa.org/index.cfm> (last visited Oct. 28, 2013).

The foregoing alternatives are intended to provide a small sampling of all the possibilities that may exist for creatively addressing the problem of providing financial support and maintenance for the burgeoning elder population and at the same time ending the social isolation that faces them as well. It is posited that implementation of these measures will support what is already a vast network of caring relationships between younger members of society and their older relatives and friends, and will foster, strengthen, and increase the number of such relationships in the future.

## VII. Conclusion

In summary, although they continue to be invoked as providing the perfect solution to supporting elder members of society who are no longer able to support themselves, filial responsibility laws are not a panacea for providing support, maintenance, and care of the elderly. Despite their long history, filial responsibility laws have clearly failed to remedy existing needs. The lack of uniformity in filial responsibility laws, the difficulty and cost of enforcement, along with the fact that such laws provide no coverage to those elder Americans that have no adult children to look to for support, render them a limited response at best. In addition, to the extent that filial responsibility laws are enforced, evidence indicates they would be destructive to family ties and have the counterproductive effect of further eroding and destabilizing the network of support available to elders.

Furthermore, by focusing solely on economic support, filial responsibility laws do not address the fundamental need that all persons, and most especially the vulnerable elderly, have to be supported by caring relationships. To the extent that the institution of the family, however defined, is the key to ensuring that such relationships exist, it behooves us as a society to strengthen and foster family ties through policy initiatives that reward caring relationships. The recommended list of initiatives outlined in Part VI is only a beginning; it is hoped that rather than continuing to invoke past remedies that have not worked, policy makers will instead focus on expanding and enhancing that list to meet the challenges that lie ahead.