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LOSING LOVED ONES AND YOUR LIVELIHOOD: RE-EVALUATING
FILIAL RESPONSIBILITY LAWS

Kara Wenzl*

I. INTRODUCTION

Imagine that you just received news that your mother, who had been living in a nursing home nearby for the past year, passed away. While she was in the nursing home, you visited her a few times a week and bought her new clothes and toiletry items whenever she needed them. You work full-time and are raising two children of your own. Shortly after your mother's funeral, the nursing home where she lived serves you with a lawsuit. The nursing home is suing you for your mother's outstanding bill totaling \$90,000.00.

This hypothetical may seem unrealistic and unbelievable, but it is unfortunately a very real situation that more and more people face every day as states begin, with increasing regularity, to enforce filial responsibility statutes. For the reasons addressed in this hypothetical, along with several others I will discuss later in this article, filial responsibility laws should be eliminated across the United States. Filial responsibility statutes contradict the most basic and important policy goals of the judicial system, including efforts to promote familial relations, limit litigation, and uphold uniform laws across the nation. Further, filial responsibility laws implicate important gender issues and discrimination.

This article will be divided into eight parts. Part II will explain filial responsibility, at what point the filial responsibility arises, and how the laws are implemented. Part III will discuss the history of filial responsibility, including its origin, its application in America, and the recent resurgence of filial laws in United States courts. Part IV will offer an explanation for the recent resurfacing of filial responsibility laws, and will include a discussion on increased long-term care costs and decreased income to elderly individuals. Part V will address the burden that women, specifically, face when filial responsibility arises. Part VI will address the negative effects of enforcing filial responsibility laws in the United States, and how that enforcement contradicts important policy goals. Part VII will propose solutions to problems that

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filial responsibility laws attempt to address. Lastly, part VIII will conclude with a synopsis of where current filial responsibility laws leave consumers, and how eliminating filial responsibility laws will benefit society at large as well as improve familial relations and individual welfare.

II. UNDERSTANDING FILIAL RESPONSIBILITY

Filial responsibility statutes create a duty for adult children to financially support their parents who are unable to provide for themselves.¹ Although filial responsibility is not recognized under the common law, several states have imposed a filial responsibility duty by statute.² Over half the states have filial responsibility laws that hold children liable for their parents' healthcare bills, even after they are deceased.³

Filial responsibility statutes are often described in case law as inconsistent with the common law tradition and contrary to the notion of legal "emancipation" at the age of majority.⁴ The policy behind such laws arises from the reciprocal duty that parents have to care for their children. Because parents assumingly extend voluntary care to their minor children, it is the responsibility of children to return that support to their parents.⁵ Supporters of filial responsibility laws also emphasize the economic advantages these laws create and argue that they can improve familial relations.⁶

The trigger for the filial care or financial support obligation is the "indigency" of the parent. Indigency is not defined in the common law or in recodification. In older case reports, courts interpreted an indigent or "poor person" or "pauper" as meaning "one so poor that he must be supported at public expense."⁷ However, courts' definition of indigency has begun to expand, and an indigent person is no longer viewed as one who is "completely destitute and helpless."⁸ Now, courts view indigent persons as those who have limited income, which

¹ 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, 168 (2008).

² Matthew Pakula, *A Federal Filial Responsibility Statute: A Uniform Tool to Help Combat the Wave of Indigent Elderly*, 39 *FAM. L.Q.* 859, 865 (2005).

³ Ross, *supra* note 1.

⁴ *Gaydos v. Domabyl*, 301 Pa. 523, 152 A. 549 (Pa. 1930).

⁵ Pakula, *supra* note 2, at 864.

⁶ *Id.* at 865.

⁷ *Case of Rising*, 29 *York* 146 (1915); *see also* *Directors of the Poor v. Hickman*, 4 *D.R.* 494 (1895).

⁸ *Verna v. Verna*, 432 A.2d 630 (Pa. Super. Ct. 1981).

is not adequate to provide for their maintenance and care. Therefore, children whose parents have too few resources to pay for their healthcare or long-term care may be held responsible for their parents' bills.

III. RISE AND FALL OF FILIAL DUTY IN AMERICA

The duty to watch over one's parents is centuries-old.⁹ It is derived from philosophies such as Judeo-Christian theology, which state that children should "honor thy father and thy mother."¹⁰ In the early 1600s, filial responsibility was codified with the enactment of the Elizabethan Poor Relief Act.¹¹ In fact, most modern statutes are derived from the Elizabethan Poor Relief Act.¹² The statute mandated that "the father and grandfather and the mother and grandmother, and the children of every poor, blind, lame, and impotent person" must provide as much support as they could to that individual.¹³

States first implemented this duty into their laws hundreds of years ago.¹⁴ A Pennsylvania colonial law was one of the earliest American examples of filial responsibility statutes. The law authorized overseers of the poor to impose taxes with the intent of relieving poor, indigent, and impotent persons.¹⁵ However, the codification of such statutes really began to develop in the United States in the 1850s.¹⁶ An Iowa statute from that time period stated, "the father, mother, and children of any poor person, who is unable to maintain the poor person's self by labor, shall jointly or severally relieve or maintain such person . . ."¹⁷ By the 1950s, before the growth of the welfare state and changing attitudes toward the elderly, filial responsibility laws were at the height of their popularity in America; as many as forty-five states had

⁹ Katie Wise, *Caring for our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 563, 567 (2002).

¹⁰ *Id.*

¹¹ Pakula, *supra* note 2, at 861.

¹² *Id.*

¹³ *Swoap v. Superior Court*, 516 P.2d 840, 848 (Cal. 1973).

¹⁴ *See Albert Einstein Med. Ctr. v. Forman*, 243 A.2d 181, 183 (Pa. Super. Ct. 1968) (stating the first provision requiring children to support their parents if their parents were indigent is found in the 1771 Act, 1 Smith 344, in § 29).

¹⁵ Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society?*, 26 FAM. L.Q. 195, 197 (1992).

¹⁶ *Id.*

¹⁷ *See, e.g., IOWA CODE ANN. § 252.2* (2013) ("The father, mother, and children of any poor person, who is unable to maintain the poor person's self by labor, shall jointly or severally relieve or maintain such person . . .").

some form of a filial responsibility statute.¹⁸

In recent decades, although many of the states that had filial responsibility laws rarely enforced them, the statutes were still an available tool for courts and state legislatures.¹⁹ In just the past few years, however, this trend has changed and courts are beginning to invoke and enforce filial responsibility laws.

One of the most notorious cases addressing filial responsibility occurred in Pennsylvania in 2012. The Superior Court of Pennsylvania held that defendant John Pittas was responsible under Pennsylvania's filial responsibility statute for the \$92,943.41 nursing facility debt his mother incurred.²⁰ Pittas' mother, Maryann, was admitted into a nursing rehabilitation center following an automobile accident that left her with two broken legs.²¹ After six months of treatment, Maryann relocated to Greece, where her other two children resided, without paying her bill.²² Rather than waiting for the resolution of Maryann's pending Medicaid eligibility appeal or taking legal action against Maryann, the facility used Pennsylvania's filial support statute to seek payment from her son.²³ The nursing home argued that Maryann's income of \$1,000.00 a month in Social Security benefits and her husband's Veteran's Administration benefit was not enough to provide for the bill; therefore, Maryann's financial status established her as an "indigent" person.²⁴ Despite Pittas' argument that he did not have the financial means to support his mother, as the only remaining family member in the United States, he was liable for the entire \$92,943.41 bill.²⁵

Another example of a court applying filial responsibility laws occurred in South Dakota, and it resulted in liability to a child of a deceased parent.²⁶ In 1994, the South Dakota Supreme Court held that the state's filial responsibility statute was constitutional and that Robert Randall was liable for his deceased mother's unpaid nursing home bill, totaling \$36,772.30.²⁷ Ms. Randall was admitted to the Alz-

¹⁸ Kline, *supra* note 15, at 196.

¹⁹ Michael Lundberg, *Our Parent's Keepers: The Current Status of American Filial Responsibility Laws*, 11 J.L. & FAM. STUD. 533, 535 (2009).

²⁰ Health Care & Retirement Corp. of America v. Pittas, 46 A.3d 719 (Pa. Super. Ct. 2012).

²¹ *Id.* at 720.

²² *Id.*

²³ *Id.* at 721.

²⁴ *Id.* at 724.

²⁵ *Id.* at 719.

²⁶ Americana Healthcare Ctr. v. Randall, 513 N.W.2d 566 (S.D. 1994).

²⁷ *Id.* at 574-75.

heimer's unit of a healthcare center in the fall of 1990, where she remained until her death in December of 1991.²⁸ Her assets were tied up in an irrevocable trust, of which she was the beneficiary of income.²⁹ Therefore, due to her failure to exhaust her resources, the South Dakota Department of Social Services denied her Medicaid application, which left Robert Randall individually liable for her medical debt under South Dakota's filial responsibility law.³⁰ The court reasoned, "no other person has received a greater benefit from a parent than that parent's child and it logically follows that the adult child should bear the burden of reciprocating on that benefit in the event a parent needs support in their later years."³¹

In addition to the extremity of the financial liability children may be faced with if a court upholds the state's filial responsibility statute, there are very few defenses available to escape liability.³² One clause that may allow children to escape liability is that children are only required to support their parents so long as "they are of sufficient ability."³³ The policy behind such a clause is that if a child of insufficient economic ability is forced to provide for his or her indigent parents, it merely creates a new indigent person to either replace or add to the indigent senior.³⁴ However, one problem with this clause can be seen in the *Pittas* case. John Pittas argued that the court wrongfully took only one factor—his annual income of \$85,000.00—into account when it assigned his mother's debt to him.³⁵ In an interview with ABC News, Mr. Pittas stated that the court did not consider other factors influencing his income, such as his expenses, including a business to run, a child, and the fact that his wife was pregnant during litigation.³⁶ He further noted that he also suffered from economic downturn during that period.³⁷ Though John Pittas still suffered from the negative effects that "escape" clauses are meant to prevent, he did not have a viable defense to the claims.

Children can also avoid filial responsibility if they can prove

²⁸ *Id.* at 569.

²⁹ *Id.*

³⁰ *Id.* at 575.

³¹ *Id.* at 573.

³² Lundberg, *supra* note 19, at 536.

³³ UTAH CODE ANN. §17-14-2 (2008).

³⁴ Lundberg, *supra* note 19, at 536.

³⁵ See Susanna Kim, *Pennsylvania Man Appeals to Court to Avoid Paying Mom's \$93,000 Nursing Home Bill*, ABC NEWS (May 23, 2012), <http://abcnews.go.com/Business/pennsylvania-son-stuck-moms-93000-nursing-home-bill/story?id=16405807>.

³⁶ *Id.*

³⁷ *Id.*

that their parent abandoned them.³⁸ There are stipulations to this exception, which includes proving that the abandonment lasted for two-years, that the child was a minor during the abandonment, and that the parent was capable of supporting the child at that time.³⁹ Many argue there is valid justification for waiving the duty of filial responsibility for a child who was abandoned given that the rationale for the filial duty is based on the fiduciary care that a parent presumably provided to the child.⁴⁰ Further, some states have applied various legal doctrines to reduce the amount a child is required to pay.⁴¹ For example, under the “unclean hands” doctrine, courts can consider a parent’s prior bad acts when determining the amount of support their child must pay.⁴² Additionally, some states take into account temporary abandonment when determining the requisite amount.⁴³

IV. RESURGENCE OF FILIAL RESPONSIBILITY LAWS IN AMERICA

While it is difficult to say exactly why filial responsibility laws are resurfacing, it is likely due to the increasing costs of long-term care, the difficulties for the elderly in qualifying for proper Medicaid coverage, and the lack of supplemental income for elderly persons.⁴⁴

A. Increased Long-Term Care Costs

Not only is there an increasing population of elderly people in the United States, many of these elders are not economically prepared for retirement or long-term care.⁴⁵ It is estimated that over 70% of people over the age of sixty-five will need some form of long-term care

³⁸ Pakula, *supra* note 2, at 866.

³⁹ Ross, *supra* note 1, at 170 (discussing *Gierkont v. Gierkont*, 134 A.2d 10 (N.J. Super. Ct. App. Div. 1957), where the father abandoned his son for half of the child's minority but eventually returned, and the court determined that the child could be responsible for the amount of support equivalent to the percentage of time the father was present in his son's childhood).

⁴⁰ *Id.*

⁴¹ *Id.* at 171.

⁴² *Id.*

⁴³ Pakula, *supra* note 2, at 866.

⁴⁴ Robert A. Mead, *Getting Stuck with the Bill? Filial Responsibility Statutes, Long-Term Care, Medicaid, and Demographic Pressure*, 302 ELDER L. ADVISORY, NL 1 (2016).

⁴⁵ *Id.*

service before the end of their life.⁴⁶ Long-term care services encompass medical and non-medical services, can be found in many different environments, and can become increasingly intensive and expensive as chronic and debilitating diseases progress.⁴⁷ Long-term care services can include assistance with daily activities, homemaking services, adult day care, intermittent supervision, home healthcare, nursing homes, and more.

Costs for long-term care services can devastate families and they have consistently increased over time. In 2016, the median annual cost of adult day care was \$17,680.00.⁴⁸ This number merely covers the cost of care that is typically provided at community-based centers for those adults who need part-time supervision or assistance during the day, but do not need round-the-clock care.⁴⁹ The community-based centers may provide social activities, therapy, and a limited number of health services. But many adults who require long-term care services often need much more than adult day care; and, the costs for round-the-clock care and twenty-four hour services are more than double the amount of adult day care.⁵⁰ The median annual costs for assisted living facilities, or residences that provide personal care and health services for elderly people who need assistance with activities of daily life, were \$43,539.00 in 2016.⁵¹ Elderly persons who require a higher level of supervision and twenty-four hour skilled nursing care incur even higher costs. Nursing homes with a “semi-private” room had a median annual cost of \$82,125.00, and a private room was \$92,378.00 in 2016.⁵² In addition, many elderly persons would prefer to stay in their own homes, but need assistance with homemaking and personal care. To maintain this lifestyle, they face annual costs of homemaker services and home health aides, which were \$45,760.00 and \$46,332.00, respectively in 2016.⁵³

All of the services listed above are experiencing an annual growth in cost and demand, and for many elders, adequately saving for

⁴⁶ See *Genworth 2013 Cost of Care Survey*, GENWORTH FIN. (10th ed. Mar. 22, 2013), available at https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/cost-of-care/130568_032213.pdf.

⁴⁷ *Id.*

⁴⁸ See *Genworth 2016 Cost of Care Survey*, GENWORTH FIN. (June 22, 2016), available at <https://www.genworth.com/about-us/industry-expertise/cost-of-care.html>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* (discussing that nursing home care offers around-the-clock skilled nursing assistance for those that require a higher level of supervision and care).

⁵² *Id.*

⁵³ *Id.*

these long-term care services is nearly impossible. The long-term care services discussed above far exceed the average yearly salary of an American worker—\$48,098.00 in 2015—and the average annual salary of a retiree—\$31,742.00 in 2012.⁵⁴ As a result, many elderly persons become indigent late in their life, making it difficult to afford the care that they need.⁵⁵ Further, once the limited savings that the elderly do have runs out, many are forced to turn to their families for assistance. As a result, millions of elderly Americans are receiving long-term care services from family members who receive no compensation, which can add up to billions of dollars per year.⁵⁶ The less fortunate individuals do not have families that can provide these services for them, leaving them to rely on government programs, like Medicare, to cover their long-term care costs.

B. Medicare Policy Changes

When individuals and families can no longer afford the costs of long-term care or are unable to provide it themselves, they may be forced to rely on government safety net programs like Medicaid and Medicare.⁵⁷ A contradiction exists between the Medicare safety net and the traditional moral obligation to provide care to family members, and it is evidenced within the Medicaid statute and subsequent regulations.⁵⁸ In determining Medicaid eligibility, the statute requires that states do not consider an applicant's or recipient's financial responsibility for any individual unless such applicant or recipient is the individual's spouse or child under the age of twenty-one.⁵⁹ However, the Reagan Administration released a Medicaid Transmittal in the 1980s that communicated a new policy which allowed states to apply a general filial responsibility statute, stating "the law and regulations permit states to require adult family members to support adult relatives without violating the Medicaid statute," so long as statutes are generally

⁵⁴ See Ke Bin Wu, *Sources of Income for Older Americans, 2012*, AARP PUB. POL'Y INST. (Dec. 2013), available at http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2013/sources-of-income-for-older-americans-2012-fs-AARP-ppi-econ-sec.pdf.

⁵⁵ Mead, *supra* note 44, at 2.

⁵⁶ Twyla Sketchley & Carter McMillian, *Filial Responsibility: Breaking the Backbone of Today's Modern Long Term Care System*, 26 ST. THOMAS L. REV. 132, 143 (2013).

⁵⁷ See Public Health and Welfare Act, 42 U.S.C. § 1396d (2012) (including "nursing facility services," "skilled nursing facility" services, and "intermediate care facilities" in the types of long-term care covered by Medicaid to some degree).

⁵⁸ Mead, *supra* note 44, at 2.

⁵⁹ 42 U.S.C. § 1396a(a)(17)(D) (2012); 42 C.F.R. § 435.602(a)(1).

applicable and not limited to Medicaid recipients.⁶⁰ This allowance is still outlined in the State Medicaid Manual; and, while states have been reluctant to impose such statutes as an instrument to control Medicaid costs, the upcoming demographic crisis facing Medicaid and Medicare might change this past hesitancy.⁶¹

For the fiscal year 2014, federal and state governments disbursed \$475.9 billion for Medicaid.⁶² This amount is increasing, as over half the states chose to expand Medicaid coverage in response to the Obama Administration's Affordable Care Act.⁶³ Further, the demographic shifts that will occur in the future suggest that the United States will experience rapid growth in its elderly population.⁶⁴ In 2050, the number of Americans aged sixty-five and older is estimated to be 88.5 million, more than double its elderly population in 2010.⁶⁵ The drastic increase in the number of elders will likely require a substantial increase in Medicare and Medicaid funding, especially if a significant percentage of them are indigent in their final years. Without increasing Medicaid funding, states will likely use filial responsibility statutes and Medicare estate recovery to address shortfalls in Medicaid funding.⁶⁶

C. Decreased Supplemental Income

Aging consumers also receive less income from Social Security and other government programs that were once provided to sustain the financial stability of aging Americans.⁶⁷ The Social Security system now lacks sustainable financial resources and, as a result, Social

⁶⁰ MANUAL TRANSMITTAL NO. 2, HCFA Pub. 45-3, no. 3812, Medicare & Medicaid Guide (CCH) ¶ 32,457 (Feb. 1983).

⁶¹ THE STATE MEDICAID MANUAL § 3812, CTRS. FOR MEDICARE AND MEDICAID SERVS., available at <https://www.cms.gov/Regulations-and-Guidance/guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html> (last visited Apr. 23, 2017).

⁶² *Affordable Care Act Medicaid Expansion*, NAT'L CONF. OF STATE LEGS. (Apr. 6, 2016), available at <http://www.ncsl.org/research/health/affordable-care-act-expansion.aspx>.

⁶³ *Id.*

⁶⁴ Mead, *supra* note 44.

⁶⁵ Grayson Vincent & Victoria Velkoff, *The Next Four Decades: The Older Population in the United States: 2010 to 2050*, U.S. CENSUS BUREAU (May 2010), available at <https://www.census.gov/prod/2010pubs/p25-1138.pdf>.

⁶⁶ Katherine C. Pearson, *Re-Thinking Filial Support Laws in a Time of Medicaid Cutbacks—Effect of Pennsylvania's Recodification of Colonial-Era Poor Laws*, 76 PA. B.A. Q. 162, 169 (2005).

⁶⁷ Ross, *supra* note 1, at 167 (prior to Social Security, half of the elderly population lived below the poverty line, compared to 11% now).

Security funds are being depleted.⁶⁸ The United States introduced Social Security in 1935 and framed it as “social insurance,” with the goal to keep older people out of poverty after they retired.⁶⁹ However, Social Security was not intended to be a retiree’s sole source of income; the system assumes elderly persons also have personal savings and retirement plans. Although many countries, like Germany and Italy, are dismantling and rebuilding their systems as their societies progress, the United States just keeps putting “band-aids” on its system.⁷⁰

As a result, Social Security funds are being depleted; and, as baby boomers continue to retire, more benefits will be disbursed, further depleting the Social Security Trust Fund.⁷¹ The 2000 United States Census indicated that the number of people living in the United States over the age of sixty-five constitutes 12.4% of the population.⁷² As discussed above, this number is likely to increase to 20% by 2030.⁷³ In 1935, when the federal government enacted sixty-five as the eligible age to receive Social Security benefits, the average life expectancy was only sixty-two.⁷⁴ Now, the average life expectancy is seventy-eight and is continually increasing due to life-extending technology and the eradication of many life threatening diseases.⁷⁵ But American retirees still receive Social Security benefits at sixty-five despite more people living for an extra thirteen years and collecting benefits.

V. FILIAL RESPONSIBILITY LAWS AND GENDER BIAS

For the reasons discussed above, many elderly people have no choice but to turn to their family members, often their children, for care in their older years. Historically, elder care has been a family affair largely carried out by women.⁷⁶ But with recent socio-demographic

⁶⁸ Ross, *supra* note 1, at 167.

⁶⁹ Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620.

⁷⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-75SP, SOCIAL SECURITY'S FUTURE: ANSWERS TO KEY QUESTIONS (Oct. 2015), available at <http://www.gao.gov/assets/680/673385.pdf> [hereinafter SOCIAL SECURITY'S FUTURE].

⁷¹ *Id.*

⁷² LAWRENCE A. FROLIK & ALISON MCCHRISTAL BARNES, ELDER LAW CASES AND MATERIALS 5 (3d ed. 2003) (highlighting table showing U.S. Census August 2000 Special Reports).

⁷³ Pakula, *supra* note 2, at 859.

⁷⁴ SOCIAL SECURITY'S FUTURE, *supra* note 70.

⁷⁵ *Id.*

⁷⁶ See Angelina Grigoryeva, *When Gender Trumps Everything: The Division of Parent Care Among Siblings* (Ctr. for the Study of Soc. Org., Working Paper

changes—like the widespread entry of women into the workforce and the current fight for equal wages—there is a societal expectation that men should collaborate in caring for their elder parents.⁷⁷

However, studies show that gender inequality is more pronounced in elder care than in housework or childcare.⁷⁸ So, even as men provide more housework and spend more time on childcare, it is still well-established that adult daughters provide most elder care.⁷⁹ A 2014 study by a Princeton researcher found that in families with children of both sexes, the gender of the child is the single biggest factor in determining who will provide care for an aging parent.⁸⁰ Additionally, the study found that daughters will increase the time they spend with an elderly parent to compensate for sons who do not.⁸¹ Further, the study found that daughters step up twice as often as sons when it comes to caregiving duties, regardless of job status, child-care duties, and other variables.⁸²

Therefore, daughters usually bear the brunt of caregiving duties in the form of daily caretaking, emotional support, and social service functions.⁸³ A 2015 Pew Research Center study found that women were twice as likely than men to have provided personal care, such as clothing or bathing, for an elderly relative.⁸⁴ And when sons do participate in elder care, they are likely to take on “advisory roles.”⁸⁵ These services often require a fee, like an executor of a will. In contrast, caregiving duties from women most often go unpaid.⁸⁶ Therefore, when men or sons do step up and provide elder care, they often do not have

No. 9, 2014), available at <https://www.princeton.edu/esso/working-papers/WP9-Grigoryeva.pdf>.

⁷⁷ *Id.*

⁷⁸ Eleanor Palo Stoller, *Males as Helpers: The Role of Sons, Relatives and Friends*, 30 *GERONTOLOGIST* 228, 229 (1990).

⁷⁹ *Id.*

⁸⁰ Grigoryeva, *supra* note 76, at 2 (using a large, nationally representative dataset, the author reports direct, indirect, and structural effects of gender on parent caregiving).

⁸¹ *Id.* at 8-9.

⁸² *Id.* at 2.

⁸³ Betsy Houser & Sherry Berkman, *Sex and Birth Order Differences in Filial Behavior*, 13 *SEX ROLES* 641 (Dec.1985), available at <https://link.springer.com/article/10.1007/BF00287300> (Sex Roles: A Journal of Research is a global, multidisciplinary, scholarly, social, and behavioral science journal with a feminist perspective).

⁸⁴ Renee Stepler, *5 facts about family caregivers*, PEWRESEARCHCENTER (Nov. 18, 2015), <http://www.pewresearch.org/fact-tank/2015/11/18/5-facts-about-family-caregivers/>.

⁸⁵ Houser & Berkman, *supra* note 83.

⁸⁶ *Id.*

a hands-on role and may even receive compensation.

Providing elder care can impose a significant financial burden on caregivers in the form of direct expenses and lost income.⁸⁷ Caregivers may be responsible for direct expenses, like the goods and services they provide to their care recipients.⁸⁸ Even if an elderly parent is in a nursing home or an assisted living facility, caregivers may still be responsible for providing them with clothes and toiletry items. Further, women may also suffer from lost earnings if they take time away from their professions to care for their elderly parents.⁸⁹ In other words, not only do women provide more parent care than men, but they also suffer from higher costs of parent caregiving than their male counterparts.

VI. FILIAL RESPONSIBILITY LAWS AND POLICY GOALS

As discussed in Part V, filial responsibility laws implicate important gender biases; however, that is merely one of the negative effects of enforcing such laws. Enforcing filial responsibility laws contradicts even the most basic policy goals of this country, including efforts to foster familial relations, limit litigation, and uphold uniform laws nationwide.

A. Fostering Familial Relations

Enforcing filial responsibility laws can lead to stress, disagreement, and ultimately the breakdown of the family unit. Additionally, those effects could amplify if creditors, nursing homes, or healthcare facilities sue children for reimbursement of their parents' bills.⁹⁰ Proponents of filial responsibility laws argue that they incentivize individuals to care for their elderly relatives; however, substantial data indicates that adult children and other family members often provide support and services on their own, without legal enforcement.⁹¹ Additionally, knowledge of such laws is arguably more likely to drive away

⁸⁷ Grigoryeva, *supra* note 76, at 6 (discussing labor-market earnings as well as payment for goods and services).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Mari Park, *The Parent Trap: Health Care & Retirement Corporation of America v. Pittas, How it Reinforced Filial Responsibility Laws and Whether Filial Responsibility Law Can Really Make You Pay*, 5 EST. PLAN. & COMMUNITY PROP. L.J. 441, 456 (2013).

⁹¹ 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, 396 (1996) (discussing

caregivers who are able to provide care and support, as they try to insulate themselves from the high costs of liability.⁹² In order to avoid responsibility and filial responsibility lawsuits, children may choose to move out of the state and away from their elderly relatives, move their elderly relatives out of state and uproot their lives, refuse to act as fiduciaries, limit their visits and interactions with their elderly family members, interfere with a parent's choice because of consequences to them, or even leave their parents with no family support.⁹³

Additionally, filial responsibility statutes encourage litigation between family members and encourage children to take preventative steps to protect themselves from liability. This results in children attempting to take control over their parents' decision-making in an attempt to preemptively protect themselves from liability.⁹⁴ This is because states that have filial responsibility statutes do not allow a parent's poor planning or spending habits to act as an escape from liability; nor do states allow children to access their parents' financial accounts or interfere with their financial decisions.⁹⁵ Thus, even these attempts to interfere with financial planning and decision-making on the part of a child can cause significant conflict and increase family dissonance. Consequently, many adult children are left to watch their parents make unwise financial decisions, knowing that they may one day be responsible for paying off their debts.

For many families, pending litigation and family conflicts can cause severely damaged, even irreparable, family relationships. Informal caregiving is a crucial and necessary aspect of our modern long-term care system, and filial responsibility laws and their effects may destroy informal caregivers' desire, and ability, to support and provide care for American elders.⁹⁶

the modernization of technology, a favoring of the nuclear family over the extended family, and the development of social systems based on geographic mobility as factors in the shift from family caregiving to institutional caregiving).

⁹² Sketchley & McMillian, *supra* note 56, at 153 (discussing the high costs of long term care services).

⁹³ *Id.*

⁹⁴ Wise, *supra* note 9, at 575.

⁹⁵ Sketchley & McMillian, *supra* note 56, at 155 (analyzing research showing no way a child could access a parent's bank account based solely on their status as a child).

⁹⁶ *Id.* at 153.

B. Limiting Litigation

Not only are enforcing filial responsibility laws an administrative nightmare, but enforcement also frequently produces more lawsuits, which ultimately wastes valuable judicial resources.⁹⁷ When filial responsibility is enforced, oftentimes there are multiple lawsuits taking place, such as a creditor or healthcare facility suing a child, the child may be suing the estate for reimbursement, and the children who are held liable may then sue their siblings to establish their liability. Although proponents of filial responsibility statutes argue that they save the government money, the administrative costs of enforcing them are incredibly high.

Many of the high administrative costs stem from the complexity of dealing with the family issues that arise from enforcing filial responsibility statutes. Enforcing filial responsibility laws against family members that live in other states that have differing or nonexistent filial responsibility statutes is still an unsettled issue with no clear procedures or law in place.⁹⁸ Determining whether a court has jurisdiction over a person from another state involves a very fact intensive investigation and inquiry that, once again, consumes valuable court resources.⁹⁹ It also causes the litigants to pay for discovery and evidentiary hearings, none of which is benefitting the elder at issue or their creditors. Even if a court can establish that an out-of-state child is liable, it can be very difficult to enforce its judgment against that child in the state where they reside.¹⁰⁰

Since enforcing filial responsibility laws against out-of-state children involves lengthy and expensive litigation with unlikely chances of recovery, filial support will likely be enforced against the children who live within the state; the ones who likely provided care and support while the parent was alive. At that point, the child who is adjudged responsibility for their parents' bills may choose to take legal action against their parents' estate, or other relatives. Further, other creditors or healthcare facilities with unpaid bills and debts from a deceased or indigent parent may choose to act if other facilities are successful. In sum, filial responsibility laws result in an endless cycle of litigation, consuming valuable resources from the litigants and the judicial system.

⁹⁷ Ross, *supra* note 1, at 189.

⁹⁸ Sketchley & McMillian, *supra* note 56, at 149 (discussing the challenges associated with cross-border enforcement).

⁹⁹ *Id.* (citing Health and Welfare, Op. IDAHO ATT'Y GEN. 85-10 at 10 (1985)).

¹⁰⁰ *Id.* at 151.

C. Upholding Uniform Laws

As discussed previously, over half the states have filial responsibility statutes. However, the laws are far from uniform and vary in the type of support required, which relatives specifically are required to provide support, penalties for violations, and under what circumstances relatives can escape filial duty.¹⁰¹

Many states focus solely on the duty of children to support their indigent parents; however, other states implicate relatives as distant as grandchildren and grandparents for support.¹⁰² None of the statutes provide an exact definition of indigence for purposes of determining when a parent is unable to provide for themselves, nor is there any time limit placed upon the duty to provide support.¹⁰³ Additionally, while some states require a specific dollar amount of support, others simply define the requirement as “necessaries” or “support,” and many states only allow parties to recover the cost of medical bills.¹⁰⁴

The majority of filial responsibility laws are civil in nature; however, at least a dozen states impose a criminal penalty for failure to support.¹⁰⁵ The penalties for violating these criminal statutes vary greatly. Some states impose a fine of no more than \$200.00 and a maximum sentence of thirty-days community service, whereas others have penalties consisting of felony charges that carry fines up to \$5,000.00 and imprisonment for up to two-years.¹⁰⁶ Civil liability for violating a filial responsibility statute also varies in the mechanisms of enforcement.¹⁰⁷ Some laws state that the indigent parent is the person with standing to enforce the obligations; others allow creditors to bring the action, and many of the civil statutes do not indicate who has standing

¹⁰¹ *Id.* at 148.

¹⁰² Sketchley & McMillian, *supra* note 56.

¹⁰³ Donna Harkness, *What Are Families For? Re-Evaluating Return to Filial Responsibility Laws*, 21 *ELDER L.J.* 305, 323 (2014).

¹⁰⁴ Sketchley & McMillian, *supra* note 56, at 148.

¹⁰⁵ Harkness, *supra* note 103, at 322 (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 (West 2012)).

¹⁰⁶ *Id.* at 321 (discussing statutes from all states with filial responsibility statute).

¹⁰⁷ *Id.* at 322.

to bring an enforcement action.¹⁰⁸

Further, defenses against filial responsibility largely differ among states. While some states have any defenses available, others only address defenses available to the indigent parents' children.¹⁰⁹ If there are any statutory defenses—such as abandonment or the “unclean hands” doctrine—they still vary greatly from state to state.¹¹⁰

VII. WHERE DO WE GO FROM HERE?

The policy goals for enforcing filial responsibility laws prove to be valid and necessary. However, the United States needs a solution that reduces public expenditures supporting elderly persons, while at the same time fostering family connections, limiting lawsuits, and maintaining a uniform system. Alternative polices can, and in some cases will, be implemented to achieve such public policy goals.

A. Tax Incentives

One alternative to filial responsibility statutes would be to provide tax deductions and exemptions to adults who care for elderly people.¹¹¹ The current tax system does not allow for taxpayers to claim non-related individuals as a dependent, nor does the tax system allow taxpayers to deduct financial assistance to indigent persons as a charitable contribution.¹¹² Giving tax benefits to adults who care for an elderly neighbor or friend would encourage not only financial assistance and donations, but also an opportunity to declare services as a charitable contribution. Additionally, allowing tax credits for individuals who make elder-friendly home improvements to accommodate a live-in elderly person would encourage relatives or friends to add an extra bedroom, hand rails, or ramps to their home.

Further, the IRS could provide tax incentives to support employer initiatives to assist employees that are caregivers. For example, companies would receive tax deductions if they provide adult day care facilities, incorporate “flex-time” for employees who have to take time off to care for an elderly parent or relative, or provide information on

¹⁰⁸ *Id.* (listing states with statutes that discuss standing to bring a filial responsibility claim).

¹⁰⁹ Sketchley & McMillian, *supra* note 56, at 148.

¹¹⁰ *Id.*

¹¹¹ Harkness, *supra* note 103, at 339.

¹¹² 26 U.S.C. § 152 (2015) (defining dependent); 26 U.S.C. § 170 (2015) (defining charitable contributions).

care options for their employees.¹¹³

B. Employer Policies

One major factor that influences whether a child can care for an elderly relative is their employer's policy. As such, expanding and revising government programs, such as the Federal Family and Medical Leave Act ("FMLA"), would allow employees to take more time off work to care for the elderly.¹¹⁴ Currently, the FMLA mandates that employers grant employees a three-month period of unpaid leave to care for a parent.¹¹⁵ Since the leave period is unpaid, many workers do not take advantage of the full time allowed under the FMLA unless the employee has already accrued paid time off to cover it.¹¹⁶

A more flexible policy may allow individuals to care for their parents on a more long-term basis. Additionally, Congress could expand the FMLA to cover more elderly persons than just an employee's parents. If an employee needs to leave their job for several years to care for a parent, their employer could provide some supplement to existing pension benefits.

Occasionally, incentives are given to employers who adopt the United States Equal Employment Opportunity Commission's ("EEOC") Best Practices for Workers with Caregiving Responsibilities to combat employment discrimination against employees who are caregivers.¹¹⁷ A report by the AARP Public Policy Institute found that employees who are caring for elderly or disabled family members may face negative treatment at work, including termination.¹¹⁸ The report recommends practices to combat such discrimination including training managerial personnel to ensure work-life balance programs are implemented and ensuring employees who participate in the programs are

¹¹³ See Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J. L. & POL'Y 130 (2001).

¹¹⁴ Harkness, *supra* note 103, at 340.

¹¹⁵ 29 U.S.C. § 2612(a)(1)(C) (2009); 29 C.F.R. §825.112(a)(3) (2012).

¹¹⁶ *Know Your Rights at Work: The Family and Medical Leave Act (FMLA)*, AM. ASSOC. OF UNIV. WOMEN, <http://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/family-and-medical-leave-act/>. (last visited Apr. 13, 2017).

¹¹⁷ *Employer Best Practices for Workers with Caregiving Responsibilities*, EQUAL EMP'T OPPORTUNITY COMM'N, available at <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html> (last modified Jan. 19, 2011) [hereinafter EEOC].

¹¹⁸ Joan C. Williams et al., *Protecting Family Caregivers from Employment Discrimination*, AARP PUB. POL'Y INST. 3-4, (Aug. 2012).

not discriminated against.¹¹⁹

C. Healthcare Plans

Arguably, one of the main issues with filial responsibility laws is the extremely high cost of healthcare and long-term care that elderly persons face. To get at the root of the problem, these high costs, ideally, would be addressed. One solution is to adopt universal healthcare to cover required medical services and basic health needs. Unfortunately, it is unlikely that the United States will adopt universal healthcare anytime soon. Although, the Obama Administration made progress when it implemented the Patient Protection and Affordable Care Act in 2010, which included senior-friendly provisions like eliminating the Medicare Part D prescription drug coverage gap, free preventative care, coordinated care for low-income seniors, and increased support for community-based, long-term care and services.¹²⁰ And although the Affordable Care Act may be amended or overturned, it has provided a transition toward a more sustainable and affordable national health care system.

Another alternative to filial responsibility laws is already underway in the majority of states that approved Medicaid reimbursement for long-term care in home settings.¹²¹ As an alternative to nursing home facilities, the federal government will disburse subsidy payments to programs and individuals who provide support and care to seniors in their home or community. To qualify for reimbursement, the care provided must be medically necessary and take place in a participating state.¹²²

Government assistance in obtaining healthcare and medical services, in the form of universal healthcare or subsidy payments to those who provide support and care, can decrease overall costs on the elderly in the long run. As seniors receive medical care earlier and more regularly, and individuals are incentivized to support and care for their elderly relatives, nursing home costs and long-term care needs will ultimately decline.

¹¹⁹ EEOC, *supra* note 117.

¹²⁰ The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 8002, 124 Stat. 119-1025 (2010).

¹²¹ 42 U.S.C. §1394 (2000) (Section 1394 authorizes payments to states, either by advancement or reimbursement as determined by the agency secretary).

¹²² Moskowitz, *supra* note 113, at 443-44.

VIII. CONCLUSION

Filial responsibility statutes are contradictory to the most basic and important policy goals of the judicial system, including efforts to promote familial relations, limit litigation, and uphold uniform laws nationwide. Further, filial responsibility laws implicate important gender issues and biases. While there may be a valid underlying policy goal to enforcing filial statutes, there are alternatives, like tax incentives, employer policies, and healthcare plans, that better effectuate those public policy concerns. Enforcing filial responsibility statutes is unsustainable and ineffective; and, eliminating filial responsibility laws will benefit society at large while improving familial relations and individual welfare.