Essay

Improving Familial and Communal Eldercare in the United States: Lessons from China and Japan

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INTRODUCTION

"[I]n this world, nothing can be said to be certain except death and taxes."[1] Eldercare policy strives to postpone the former without increasing the latter. As the elderly population in the United States grows, policymakers struggle to reduce eldercare costs while improving eldercare quality.[2] Strengthening familial and communal eldercare structures could accomplish both seemingly competing goals. However, the relationship between government action and strengthening these institutions remains complex and unclear. As our population ages, America is running out of time to experiment. Untested, broad shifts in national or state eldercare policy carry grave consequences.[3]

† Duke University School of Law, J.D. 2016; University of North Carolina at Chapel Hill, 2012. Thanks to Duke University School of Law generally, and the Law Teaching Committee specifically, for providing me with abundant support for my scholarly endeavors. Thanks to Judge Allyson K. Duncan, who has been an invaluable mentor and teacher. Thanks to Professors Kathryn Webb Bradley, Ralf Michaels, and Joan Magat for their helpful comments and edits.

1. Benjamin Franklin, *Letter from Benjamin Franklin to Jean-Baptiste Leroy* (Nov. 13, 1789), *in* 10 THE WRITINGS OF BENJAMIN FRANKLIN 68, 69 (Albert Henry Smith ed., 1907).

2. *See, e.g.*, Marshall B. Kapp, *Home and Community-Based Long-Term Services and Supports: Health Reform's Most Enduring Legacy?*, 8 ST. LOUIS U. J. HEALTH L. & POL'Y 9, 28 (2014).

3. *See* Stephen Crystal & Michele J. Siegel, *Population Aging and Health Care Policy in Cross-National Perspective*, *in* INTERNATIONAL HANDBOOK OF POPULATION AGING 610 (P. Uhlenberg ed., 2009) ("[H]ealth care costs burden has more to do with national health care policy choices than it does with population aging.").

Fortunately, the United States is not alone in confronting these eldercare problems. Almost all industrialized and developed countries face similar concerns.[4] And because its elderly-population boom lags behind other industrialized countries, the United States has an invaluable opportunity to study how those countries handle similar eldercare problems.[5] Unfortunately, eldercare policy and scholarship often ignore international comparative work.[6]

This Essay aims to fill that gap by formulating policy recommendations from the lessons of China and Japan—two countries that have taken divergent approaches to facilitating familial and communal eldercare. Conventional wisdom paints cultural portraits with a broad brush: inescapable forces fight against familial and communal eldercare in the West, while Eastern cultures revere the elderly. But cultural ideals and characterizations do not always accord with reality.[7] Similar to the United States, cultural and societal trends in both China and Japan have resisted government efforts to place the eldercare burden on families and communities.[8] This Essay explores how each government's response has altered eldercare practices and elucidates general principles applicable to the American-eldercare context.

Part I begins by defining eldercare and explaining the benefits of familial and communal eldercare. It concludes with a brief survey and analysis of familial and communal eldercare's past, present, and future in America. With the goal of increasing

4. Edward C. Norton & Sally C. Stearns, *Health Care Expenditures*, *in* INTERNATIONAL HANDBOOK OF POPULATION AGING, *supra* note 3, at 611; Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 MARQ. L. REV. 401, 405 (2002) (explaining how commonalities in international eldercare problems renders international comparative analysis useful).

5. *See* TAKESHI HIEDA, POLITICAL INSTITUTIONS AND ELDERLY CARE POLICY: COMPARATIVE POLITICS OF LONG-TERM CARE IN ADVANCED DEMOCRACIES 188 (2012); AI-JEN POO & ARIANE CONRAD, THE AGE OF DIGNITY: PREPARING FOR THE ELDER BOOM IN A CHANGING AMERICA, 151 (2015).

6. *See* PEDRO OLIVARES-TIRADO & NANAKO TAMIYA, TRENDS AND FACTORS IN JAPAN'S LONG-TERM CARE INSURANCE SYSTEM: JAPAN'S 10-YEAR EXPERIENCE 135 (2014); *see also* Ann M. Soden, *Family Matters: Some Emerging Legal Issues in Intergenerational and Generational Relations*, *in* BEYOND ELDER LAW: NEW DIRECTIONS IN LAW AND AGING 144 (2012).

7. "In the United States, informal (unpaid) caregiving by family members and friends remains the primary source of long-term care for the elderly population." Amalavoyal V. Chari et al., *The Opportunity Costs of Informal Elder-Care in the United States: New Estimates from the American Time Use Survey*, 50 HEALTH SERV. RES. 871, 871 (2015).

8. *Compare infra* Part I.B, *with* Part II.A *and* III.A.

familial and communal eldercare in mind, this Essay turns towards two differing international examples. Part II scrutinizes China's solution—mandating familial and communal eldercare to alleviate government costs. Part III analyzes Japan's approach—institutionalizing encouragement of familial and communal eldercare. Each Part also evaluates American analogs, and possible reform opportunities in the United States. An all-inclusive assessment and comparison would require empirical studies and elaboration beyond this Essay's scope. Instead of purporting to meet these demands, this Essay intends to chronicle the successes and shortcomings of China and Japan and give American policymakers a better understanding of pertinent considerations in formulating eldercare policy.

I. FAMILIAL AND COMMUNAL ELDERCARE'S ROLE IN THE UNITED STATES

A. THE BENEFITS OF FAMILIAL AND COMMUNAL ELDERCARE

What eldercare entails varies by society. Nonetheless, the vast majority of eldercare policies aim to secure a basic level of care and support for elders and, where possible, improve their quality of life in the process.[9]

Aging is expensive. At a certain point in every person's life, medical costs swell as employment opportunities dwindle.[10] Eldercare policy can tackle this problem by giving the elderly financial assistance or by directly providing food, shelter, and necessary care.

But eldercare means more than just keeping people alive. Ideally, eldercare will aim to maximize both physical and psychological well-being. In most cases, this involves accommodating an elderly person's individual preferences.[11] The elderly almost invariably prefer their own houses and communities to

9. *See* POO & CONRAD, *supra* note 5, at 25–26; Tracey A. LaPierre & Mary Elizabeth Hughes, *Population Aging in Canada and the United States*, *in* INTERNATIONAL HANDBOOK OF POPULATION AGING, *supra* note 3, at 209.

10. *See* MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 85, 87, 90 (2010); Norton & Stearns, *supra* note 4, at 634–36.

11. POO & CONRAD, *supra* note 5, at 10; *see also* Laura D. Hermer, *Rationalizing Home and Community-Based Services Under Medicaid*, 8 ST. LOUIS U. J. HEALTH L. & POL'Y 61, 88 (2014) ("With respect to self-directed care, individuals who are able to participate in such programs are significantly happier with the care they receive, as well as with their way of life in general, than those who have more limited control over the provision of their services.").

institutional care—such as hospitals or nursing homes.[12] Thus, successful eldercare policies endeavor to keep the elderly happy, healthy, and at home.

Yet, difficult questions arise when formulating policies to meet these needs. Who should pay for eldercare? Who should provide it? Will meeting the needs of the elderly through one medium affect how eldercare manifests in others? Do concerns change as the elderly age?

In any event, answering these questions will result in a division of labor between the elderly, their families, their communities, and the State.[13] For the majority of human existence, this division of labor largely relied on families[14] and communities[15] to care for the elderly. While the benefits of familial and communal eldercare are numerous, most fall into two main categories: (1) improving the quality of life for the elderly, and (2) reducing governmental eldercare costs.[16]

12. *See* Kapp, *supra* note 2, at 17; Jon Pynoos et al., *Aging in Place, Housing, and the Law*, 16 ELDER L.J. 77, 78–80 (2008). The term "institutional care" refers herein to long-term hospital and nursing home stays that remove the elderly from their homes or other community-based living arrangements and limit an elderly person's ability to come and go as they please. *See, e.g.*, Heying Jenny Zhan, Baozhen Luo, & Zhiyu Chen, *Institutional Elder Care in China*, *in* AGING IN CHINA: IMPLICATIONS TO SOCIAL POLICY OF A CHANGING ECONOMIC STATE 222 (Sheying Chen & Jason L. Powell eds., 2012) [hereinafter AGING IN CHINA].

13. *See, e.g.*, EICHNER, *supra* note 10, at 85, 87, 90.

14. *See* Norton & Stearns, *supra* note 4, at 632 ("In most societies, the extended family has traditionally cared for the elderly and many older people lived with an adult child."); Marshall B. Kapp, *Family Caregiving for Older Persons in the Home Medical-Legal Implications*, 16 J. LEGAL MED. 1, 1 (1995). Most major religious codes establish familial piety as a basic tenet. Andrea Rickles-Jordan, *Filial Responsibility: A Survey Across Time and Oceans*, 9 MARQ. ELDER'S ADVISOR 183, 188 (2007) ("Beyond basic moral duties, the three predominant world religions: Judaism, Christianity, and Islam obligate children to care, both legally and financially, for their parents."); *see also* Donna Harkness, *What Are Families for? Re-Evaluating Return to Filial Responsibility Laws*, 21 ELDER L.J. 305, 326 (2014). Confucianism, Taoism, and Buddhism also exhibit these norms, although some adherents would prefer to call these philosophies instead of religions. *See* Anita Ching Ying Ng et al., *Persistence and Challenges to Filial Piety and Informal Support of Older Persons in a Modern Chinese Society: A Case Study in Tuen Mun, Hong Kong*, 16 J. AGING STUD. 135, 139 (2002); Yao Yuan, *Weakening Family Support for the Elderly in China*, 34 CHINESE SOC. & ANTHROPOLOGY 26, 27–29 (2001).

15. *See, e.g.*, POO & CONRAD, *supra* note 5, at 132–39 (noting community responses to eldercare problems); Bin Li & Yining Yang, *Housing Stratification and Aging in Urban China*, *in* AGING IN CHINA, *supra* note 12, at 215–17 (noting benefits of community-based aging).

16. Jacky Chau-kiu Cheung & Alex Yui-huen Kwan, *The Utility of Enhancing Filial Piety for Elder Care in China*, *in* AGING IN CHINA, *supra* note 12, at

Familial and communal homecare can substantially improve an elderly person's quality of life.[17] An elderly person's family and community easily understand both her needs and how best to meet them in a way that other caregivers do not.[18] Similarly, caregivers with personal connections do more than furnish life's necessities; they also generate important emotional benefits.[19]

Policymakers too quickly overlook the positive externalities associated with these emotional benefits. While it is easier to observe physical health problems that impair quality of life, the psychological problems confronting the elderly can lead to even graver consequences.[20] Moreover, psychological and physical health intersect; declines in one area affect the other.[21] Studies have shown that emotional support arising out of familial and communal caregiving relationships has a positive impact on both the physical and psychological health of the elderly.[22]

127–28. Often "strengthening the institution of family" is another benefit cited. *See, e.g.*, Rickles-Jordan, *supra* note 14, at 202. In reality, the first two categories subsume the third. Strengthening the institution of family involves increasing its longevity, efficiency, and the amount of benefits it provides.

17. Some diseases and disabilities require institutional care. *See* Thomas P. Gallanis & Josephine Gittler, *Family Caregiving and the Law of Succession: A Proposal*, 45 U. MICH. J.L. REFORM 761, 763 (2012) (describing various diseases and disabilities that affect the elderly).

18. *See, e.g.*, Bridget Haeg, *The Future of Caring for Elders in Their Homes: An Alternative to Nursing Homes*, 9 NAELA J. 237, 253 (2013).

19. *See* Ge Lin & Shu Langen, *Making the Transition from Family Support for the Elderly to Social Support for the Elderly*, 34 CHINESE SOC. & ANTHROPOLOGY 35, 40 (2001); *see also* ROBERT E GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES 98 (1985) ("[F]riends, because of the emotional component inherent in their relationship, can supply each other with certain sorts of goods that are unavailable from mere strangers.").

20. *See generally* Naomi Karp & Erica Wood, INCAPACITATED AND ALONE: HEALTH CARE DECISION-MAKING FOR THE UNBEFRIENDED ELDERLY (ABA Commission on Law and Aging 2003). Indeed, lack of social support is one of the leading causes of elderly suicide. *See, e.g.*, TED C. FISHMAN, SHOCK OF GRAY: THE AGING OF THE WORLD'S POPULATION AND HOW IT PITS YOUNG AGAINST OLD, CHILD AGAINST PARENT, WORKER AGAINST BOSS, COMPANY AGAINST RIVAL, AND NATION AGAINST NATION 154, 332 (2010).

21. *See* Rainbow Tin Hung Ho et al., *An East-West Approach to Mind-Body Health of Chinese Elderly*, *in* AGING IN CHINA, *supra* note 12, at 174, 179–80 (noting scientific evidence).

22. *See e.g.*, Harkness, *supra* note 14, at 329; Xingming Song & Iris Chi, *Physical Health Strain and Depression of Elderly Chinese*, *in* ELDERLY CHINESE IN PACIFIC RIM COUNTRIES: SOCIAL SUPPORT AND INTEGRATION 198 (Iris Chi, Neena L. Chappell, & James Lubben eds., 2001) [hereinafter ELDERLY CHINESE IN PACIFIC RIM COUNTRIES]; *see also* Tin Hung Ho et al., *supra* note 21, at 174–75, 177–78.

Furthermore, by preemptively managing elderly health risks, familial and communal care improves longevity and quality of life. Aside from obvious health benefits, this preemptive management engenders greater life satisfaction by delaying the need for institutional eldercare.[23]

And delaying the need for institutional care should excite taxpayers just as much as it does the elderly. A higher level of familial and communal care—often in conjunction with home- and community-based services[24]—greatly diminishes governmental eldercare costs.[25] It is true that the realities of aging prevent families and communities from completely supplanting institutional care.[26] But many countries depend too heavily on institutional care.[27] This overreliance eats up a much larger portion of governmental eldercare budgets than is necessary.[28]

23. *See* K. Nicole Harms, Note, *Caring for Mom and Dad: The Importance of Family-Provided Eldercare and the Positive Implications of California's Paid Family Leave Law*, 10 WM. & MARY J. WOMEN & L. 69, 83–84 (2003); *see also* Pynoos et al., *supra* note 12, at 78–80.

24. "Home and community-based services are support and long-term care services that offer an alternative to institutional care for those who need assistance with life's daily activities." Sidney D. Watson, *From Almshouses to Nursing Homes and Community Care: Lessons from Medicaid's History*, 26 GA. ST. U. L. REV. 937, 937 (2010). "Traditionally, the strict demarcation between the two categories of institutional versus home and community-based services (HCBS) depended solely on the type of physical location where the services were provided. Nursing homes, assisted living facilities, and other residential care communities ordinarily were considered loci of institutional care, while adult day service centers, home care (including home health care, personal, and homemaker services), and hospice programs outside of a dedicated hospice 'house' have generally been characterized as HCBS." Kapp, *supra* note 2, at 11–12. However, new American federal regulations "look to the nature and quality of client experiences in the care setting" to differentiate the two, *id.* at 12, and that delineation appears more helpful.

25. *See* Lynn Feinberg et al., *Valuing the Invaluable: 2011 Update The Growing Contributions and Costs of Family Caregiving*, 51 INSIGHT ON ISSUES 1, 8–9 (2011) (noting the inverse relationship between elder admission to institutional care and the presence of family care); Will Pridmore, *Expanded Home and Community-Based Services Under the Ppaca and LGBT Elders: Problem Solved?*, 22 ANNALS HEALTH L. ADVANCE DIRECTIVE 108, 109 (2013).

26. Norton & Stearns, *supra* note 4, at 637; LaPierre & Hughes, *supra* note 9, at 221.

27. *See infra* Part III (discussing this problem in Japan and the United States).

28. Hermer, *supra* note 11, at 88.

Families and communities can perform most of the same care provided by government provided or subsidized institutional eldercare at a fraction of the cost.[29] In most cases, "[c]are delivered at home is one-third less expensive than institutional-based care."[30] In addition, by proactively addressing the causes of physical and psychological health problems, familial and communal care diminishes long-term eldercare medical costs by delaying the need for elders to enter into more intensive-care facilities at earlier stages in their lives.[31] Studies consistently show that familial and communal care minimizes the amount of long-term medical care the elderly seek from outside sources during their lives and allows elders to remain outside of institutional eldercare facilities for longer.[32] Likewise, familial and communal care directly reduces governmental eldercare costs by decreasing the need for—and usage of—other governmental eldercare programs and services.[33]

B. THE ROLE OF FAMILIAL AND COMMUNAL ELDERCARE IN THE UNITED STATES

Despites the benefits of familial and communal care, its role in America's eldercare structure has been waning since the early twentieth century. Changes in the national economy, familial economies, and an increase in governmental eldercare programs all have contributed to this trend.

America's early- to mid-twentieth century shift in economic structure had a hand in the weakening of familial ties. The early American economy centered itself around agrarian and localized

29. POO & CONRAD, *supra* note 5, at 132–39; Cheung & Kwan, *supra* note 16, at 127; Harms, *supra* note 23, at 80–82, 84–85.

30. Hermer, *supra* note 11, at 88.

31. *See, e.g.*, Haeg, *supra* note 18, at 241. Research establishes that "informal care by children is a net substitute not only for long-term care such as home health care and nursing home care but also for hospital care and physician visits." Norton & Stearns, *supra* note 4, at 637.

32. Chie Hanaoka & Edward C. Norton, *Informal and Formal Care for Elderly Persons: How Adult Children's Characteristics Affect the Use of Formal Care in Japan* 67 SOC. SCI. & MED. 1002, 1003, 1006, 1008 (2008) (discussing studies and reproducing those results); *see also* Haeg, *supra* note 18, at 241; Norton & Stearns, *supra* note 4, at 636–37.

33. *See generally* Feinberg et al., *supra* note 25; *see also* Norton & Stearns, *supra* note 4, at 636–37; G. H. Y. Ting & J. Woo, *Elder Care: Is Legislation of Family Responsibility the Solution*? 4 ASIAN J. GERONTOLOGY & GERIATRICS 72, 74–75 (2009); Rickles-Jordan, *supra* note 14, at 202.

commerce, which meant that most families lived close to relatives, if not on the same property.[34] Extended-family geographical concentration dissipated as industrialization and urbanization supplanted the agrarian and rural way of life.[35]

During this economic shift, familial economies also transformed drastically. Women began to enter the working force in theretofore unprecedented numbers,[36] and had less time for their caregiving responsibilities.[37] At the same time, the number of children in the typical nuclear family decreased, while life expectancy increased.[38] The negative correlation between birthrates and longevity imposed a greater burden on the fewer children available to provide eldercare.[39]

And as the burdens of eldercare grew, the American government assumed greater eldercare responsibility.[40] Currently, government health insurance, pensions, and financial assistance make up the vast majority of America's eldercare infrastructure.[41] This costly arrangement may prove unsustainable as the elder population continues to balloon.[42] Encouraging familial and communal eldercare to occupy a greater role in our eldercare infrastructure could be part of the solution.

34. *See* Twyla Sketchley & Carter McMillan, *Filial Responsibility: Breaking the Backbone of Today's Modern Long Term Care System*, 26 ST. THOMAS L. REV. 131, 134–36, 139 (2013).

35. *See* James L. Lopes, *Filial Support and Family Solidarity*, 6 PAC. L.J. 508, 515 (1975); Usha Narayanan, Note, *The Government's Role in Fostering the Relationship Between Adult Children and Their Elder Parents: From Filial Responsibility Laws to . . . What?, A Cross-Cultural Perspective*, 4 ELDER L.J. 369, 375–78 (1996).

36. STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 111, 139 (1988) (noting increase from 1880 to 1930).

37. *See* RUTH MILKMAN & EILEEN APPELBAUM, UNFINISHED BUSINESS: PAID FAMILY LEAVE IN CALIFORNIA AND THE FUTURE OF U.S. WORK-FAMILY POLICY 2 (2013); Kapp, *supra* note 2, at 29–30.

38. Lopes, *supra* note 35, at 515–16; Narayanan, *supra* note 35, at 376.

39. MILKMAN & APPELBAUM, *supra* note 37, at 2–3; Larry Polivka, *Closing the Gap Between Knowledge and Practice in the U.S. Long-Term Care System*, 10 MARQ. ELDER'S ADVISOR 75, 77–78 (2008).

40. Most commentators associate this increased government role with policies following the Great Depression. *See* Rickles-Jordan, *supra* note 14, at 198; Watson, *supra* note 24, at 941–43.

41. *See infra* Part III.B.1.

42. *See* Gail Wilensky, *Medicare and Medicaid Are Unsustainable Without Quick Action*, N.Y. TIMES (Jan. 11, 2016), https://nytimes.com/roomfordebate/2015/07/30/the-next-50-years-for-medicare-and-medicaid/medicare-and-medicaid-are-unsustainable-without-quick-action.

But if society wants to maximize the benefits of familial and communal eldercare without losing productivity in other areas, it must account for the costs of familial and communal caregiving.[43] Providing adequate eldercare is a monumental task that can negatively affect a caregiver's own physical and psychological well-being.[44] Caregivers perform a number of roles: companion, nurse, personal accountant, advocate, and so on.[45] Without outside support, these responsibilities exact heavy financial costs.[46] Beyond financing care,[47] "caregivers average[] twenty-one hours of care per week and much higher hours for those providing care for someone with Alzheimer's disease" or other disabilities.[48]

These caregiving duties detract from employment opportunities.[49] Many caregivers forego opportunities for career advancement, reduce the hours they work (which often results in a loss of job benefits), and sometimes quit their jobs entirely.[50] In addition, these costs disproportionately burden groups that already have decreased earning capacities: women, people in lower-income jobs, and the disabled.[51]

"These kinds of sacrifices . . . create a domino effect, hurting the caregiver's children and other family members, not to mention society and the economy as a whole."[52] Failing to care for caregivers destabilizes the future of eldercare. Fewer workers translate to less revenue for governmental eldercare programs,

43. *See, e.g.*, Gallanis & Gittler, *supra* note 17, at 762–68; Guifen Luo, *Social Policy, Family Support, and Rural Elder Care*, *in* AGING IN CHINA, *supra* note 12, at 92–95; *see also* Cheung & Kwan, *supra* note 16, at 130.

44. POO & CONRAD, *supra* note 5, at 64; Kapp, *supra* note 2, at 30; Feinberg et al., *supra* note 25, at 4, 7–8; Vivian W.Q. Lou & Shixun Gui, *Family Caregiving and Impact on Caregiver Mental Health: A Study in Shanghai*, *in* AGING IN CHINA, *supra* note 12, at 204.

45. Feinberg et al., *supra* note 25, at 4–5; *see also* Lou & Gui, *supra* note 44, at 201.

46. *See* POO & CONRAD, *supra* note 5, at 64; Polivka, *supra* note 39, at 77.

47. That is to say, direct out-of-pocket costs. Feinberg et al., *supra* note 25, at 5–6; Kapp, *supra* note 2, at 12.

48. Polivka, *supra* note 39, at 77.

49. The majority of informal caregivers are working-age adults. Chari et al., *supra* note 7, at 879.

50. JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT 148–50 (2003); POO & CONRAD, *supra* note 5, at 64–66); Chari et al., *supra* note 7, at 872; Feinberg et al., *supra* note 25, at 6–7.

51. *See* MILKMAN & APPELBAUM, *supra* note 37, at 3, 6–10; POO & CONRAD, *supra* note 5, at 62, 65; Feinberg et al., *supra* note 25, at 5.

52. POO & CONRAD, *supra* note 5, at 65; Feinberg et al., *supra* note 25, at 5.

and a concomitant greater dependency on those programs as individuals save less for their retirement.[53] Eldercare policy can only kick the can so far down the road. Failure to account for these costs will translate to less effective familial and communal eldercare and a greater eldercare burden on government.[54]

II. CHINA: MANDATING FAMILIAL ELDERCARE

Similar eldercare concerns confront China.[55] By 2050, China will have around 438 million citizens over age sixty,[56] and its national birth-control policies have led to a decrease in the number of children available to provide support for their elderly parents.[57] Still, a cursory examination of widespread familial care across Chinese society would seem to support its population's reputation for filial piety.[58] Currently, Chinese families provide the primary economic support and care for elders,[59] often with elderly parents cohabitating with children.[60] But these trends

53. POO & CONRAD, *supra* note 5, at 64–67; Feinberg et al., *supra* note 25, at 5–7; Gallanis & Gittler, *supra* note 17, at 767.

54. *See* OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 43; Lou & Gui, *supra* note 44, at 194, 204.

55. *See* Zhan, Luo, & Chen, *supra* note 12, at 222.

56. FISHMAN, *supra* note 20, at 294; *see also* Feinian Chen & Guangya Liu, *Population Aging in China*, *in* INTERNATIONAL HANDBOOK OF POPULATION AGING, *supra* note 3, at 159 ("The proportion of the population aged 65+ in China was below 7 percent prior to the 21st century but will quickly climb to 13.7 percent in 2025 and will constitute almost a quarter of its population by 2050."); *id.* at 159–61 (surveying other elderly-population data in China).

57. Du Peng & David R. Phillips, *Potential Consequences of Population Ageing for Social Development in China in* LIVING LONGER: AGEING DEVELOPMENT AND SOCIAL PROTECTION 98–99 (Peter Lloyd-Sherlock ed., 2010); Editorial Board of Population Research, *How Far Can Family Support for the Rural Elderly Go*, 34 CHINESE SOC. & ANTHROPOLOGY 67, 68 (2001); Lin & Langen, *supra* note 19, at 42–43.

58. Fan Hailin, *How Far Can Family Support for the Rural Elderly Go*: *Prospects and Perspective of Changes in the Pattern of Eldercare in China's Rural Areas*, 34 CHINESE SOC. & ANTHROPOLOGY 67, 85 (2001); Yuan, *supra* note 14, at 26–28; *see also* Chen & Liu, *supra* note 56, at 163 ("The majority of the elderly population receives financial support from their adult children." (citation omitted)).

59. Tan Bing, *An Analysis of Guangzhou's Endowment Policies with an Aging Population*, 42 CHINESE SOC. & ANTHROPOLOGY 78, 86 (2009).

60. Barbara R. McIntosh & Chun Zhang, *Aging: The Role of Work and Changing Expectation in the United States and China*, *in* AGING IN CHINA, *supra* note 12, at 27; Shengming Yan & Iris Chi, *Living Arrangements and Support for the Elderly in Urban China*, *in* ELDERLY CHINESE IN PACIFIC RIM COUNTRIES, *supra* note 22, at 208.

are on the decline. Scholars observe a decrease in both intergenerational cohabitation[61] and familial support of elderly parents.[62] And despite these trends, China adheres to its historical approach to eldercare problems: depend heavily on familial eldercare.[63]

This Part begins by describing China's approach, delineating it into two periods: (1) the period of command-and-control communism that spanning from roughly 1949 to the 1980s; and (2) the government's move towards more free market economic policies post-1980.[64] Although the Chinese government used legal regulations to mandate familial care in both periods, the artificial demarcation approximates when China revised how it did so. To conclude, this Part discusses America's attempt at a similar framework—filial responsibility laws—and examines the merits of reinvigorating that system. China's experience illustrates that mandating familial care cannot simultaneously accomplish goals of reducing eldercare costs *and* improving eldercare quality.

A. MANDATING FILIAL RESPONSIBILITY IN CHINA

In both periods surveyed, China employed governmental regulation to place eldercare responsibilities on families and communities. Command-and-control communism directly controlled familial resources. On its face, China's move towards a free market economy lessened direct control over private familial resources. But in reality, reallocation of familial resources simply occurs through another medium now—filial responsibility laws. Both approaches seem to have eroded norms of voluntary familial care in China, decreased the quality of eldercare, and imposed significant costs on the Chinese government.

61. Guifen Luo, *China's Family Support System: Impact of Rural-Urban Female Labor Migration*, *in* AGING IN CHINA, *supra* note 12, at 107. Some scholars claim a decrease as early as the 1980s. Joe C.B. Leung, *Family Support and Community-Based Services in* ELDERLY CHINESE IN PACIFIC RIM COUNTRIES, *supra* note 22, at 176–77. Others claim the 1990s. Chen & Liu, *supra* note 56, at 162. Some say the pattern was inconsistent, with steady decline not occurring until early 2000. FISHMAN, *supra* note 20, at 311–12.

62. *See, e.g.*, Yuan, *supra* note 14, at 26–28.

63. *See* Bing, *supra* note 59, at 81; Editorial Board of Population Research, *supra* note 57, at 67; Lin & Langen, *supra* note 19, at 47.

64. Economic transformation in fact began in the late 1970s. Luo, *supra* note 61, at 99.

1. Command-and-Control Communism

Codification of filial-support duties that previously were enforced through cultural norms came with the establishment of the People's Republic of China.[65] As communism grew, voluntary familial eldercare decayed.[66] "[B]asic functions of the family were systematically externalized outside the household by party-state policies."[67]

For example, before communism, elderly parents' control of land and inheritance allowed them to command support where familial norms failed.[68] The communist government undermined this incentive by removing private-land ownership.[69] "Collectivization deprived the old people of their power and control over economic resources in the family support institution."[70] In doing so, communism "eroded the traditional societal fabric and the economic foundation of kinship."[71] As a result of this shift and related changes, families began to view eldercare as a societal obligation.[72]

Unfortunately, society was not ready for that obligation.[73] Most national eldercare programs only covered those lucky

65. Prior to the People's Republic, fractured territories mostly enforced filial support through social norms, Lin & Langen, *supra* note 19, at 38–39; Yuan Fang et al., *Support of the Elderly in China*, *in* FAMILY SUPPORT FOR THE ELDERLY: THE INTERNATIONAL EXPERIENCE 251 (Hal Kendig, Akiko Hashimoto, & Larry C. Coppard eds., 1992), although some territories had legal mechanisms in place. *See* Moskowitz, *supra* note 4, at 445 (tracing the advent of these laws to the Western Zhou Dynasty (ca. 800 B.C.E.)).

66. *See* FISHMAN, *supra* note 20, at 300; YAN YUNXIANG, PRIVATE LIFE UNDER SOCIALISM: LOVE, INTIMACY, AND FAMILY CHANGE IN A CHINESE VILLAGE, 1949–1999 at 189, 231 (2003).

67. Luo, *supra* note 43, at 92.

68. Chen & Liu, *supra* note 56, at 163; Luo, *supra* note 61, at 111.

69. *Id.*

70. Luo, *supra* note 61, at 111; Chen & Liu, *supra* note 56, at 163.

71. Luo, *supra* note 61, at 107; *see also id.* at 111.

72. WILLIAM THOMAS LIU, ELDERCARE POLICIES IN CHINA: THE SOCIAL VALUE FOUNDATION IS IN THE FAMILY 26–27 (1998) (noting how transitioning to nuclear families and withdrawing land ownership coincided with the decrease in multigenerational households); *see also* Yao Yun, *How Far Can Family Support for the Rural Elderly Go: Seeing the Development of Rural Family Eldercare in Terms of Changes in the Operational Environment*, 34 CHINESE SOC. & ANTHROPOLOGY 67, 71 (2001).

73. The communist government did increase some eldercare programs. Fang et al., *supra* note 65, at 255; McIntosh & Zhang, *supra* note 60, at 28 (noting national-insurance coverage prior to 1980); Zhan, Luo, & Chen, *supra* note 12, at 224 (noting governmental institutional-care facilities established between 1950–1980); Chen & Liu, *supra* note 56, at 158 (noting national health campaigns and efforts).

enough to live in urban areas.[74] Local work units, cooperatives, and collectives retained responsibility for financing and administering eldercare programs for the large remainder of the population.[75] And despite isolated successes, most communities continued to depend on familial eldercare during command-and-control communism.[76]

The communist government maintained this arrangement by directly controlling facets of both the national economy and familial economies.[77] Centralized economic planning replaced any lack of private, filial-piety pressures.[78] If familial disputes over support arose, the government could divert some of a child's resources to elderly parents.[79] If an elderly parent required more care, the government could simply "authorize" a job change that relocated the child to the elderly parent's city (or even possibly the same residence).[80]

2. Move Towards a Market Economy

As the Chinese government moved away from these command-and-control policies in the 1980s, it delinked political ideology and expectations for familial eldercare.[81] But command-and-control communism had left the cultural institutions, which had previously encouraged filial piety, in ruins.[82] The quality of China's eldercare has suffered from an amalgam of disastrous consequences resulting from a convergence of political, economic, and cultural shifts taking place since the 1980s.[83]

74. Luo, *supra* note 43, at 83–84; McIntosh & Zhang, *supra* note 60, at 27.

75. Leung, *supra* note 61, at 180; Luo, *supra* note 43, at 84; Peng & Phillips, *supra* note 57, at 108.

76. Chen & Liu, *supra* note 56, at 168; Hailin, *supra* note 58, at 86.

77. *See, e.g.*, Luo, *supra* note 61, at 105 (noting control of economic decisions); Zeng Yi, *Population Policies in China: New Challenges and Strategies*, *in* AN AGING WORLD: DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY 61–63 (John Eekelaar & David Pearl ed., 1989) [hereinafter AN AGING WORLD] (describing how the communist government controlled familial decisions).

78. Fang et al., *supra* note 65, at 253; Luo, *supra* note 61, at 105.

79. Xu Qin, *How Far Can Family Support for the Rural Elderly Go?*, 34 CHINESE SOC. & ANTHROPOLOGY 67, 76 (2001).

80. LIU, *supra* note 72, at 25; Leung, *supra* note 61, at 175.

81. Yuan, *supra* note 14, at 31.

82. *See supra* Part II.A.1.

83. *See, e.g.*, Sheying Chen, *Introduction: Social Policy of the Changing Economic State*, *in* AGING IN CHINA, *supra* note 12, at 4.

China's movement back to private land ownership[84] produced a generation of elderly with little to no assets of their own.[85] Further compounding this problem is the fact that these same elderly do not have the same benefits or employment opportunities that the communist government used to provide them.[86] They also do not have the familial support that previous generations had; children coping with the same economic changes are unable to cover both their own living costs and their elderly parents' expenses.[87]

Moreover, China's "one-child" policy—which began roughly around the same time as China's economic shift—has decreased the number of familial caregivers available.[88] Now "many families currently have a '4-2-1' family structure (four aging parents need to be cared for by a couple who have one child)."[89] Even worse, a large group of aging Chinese citizens whose one child has already passed away have little hope for support.[90]

84. As a matter of official law, the Chinese government still owns all real estate. "When people 'buy' homes, they take possession of long-term leases that can run up to one hundred years, but they do not get a deed to the land." FISHMAN, *supra* note 20, at 324.

85. Leung, *supra* note 61, at 178; Qin, *supra* note 79, at 76; *see also* Hailin, *supra* note 58, at 84 (explaining how the peasant economy makes it impossible for peasants to save).

86. Yuebin Xu & Xiulan Zhang, *Pensions and Social Assistance: The Development of Income Security Policies for Old People in China*, *in* AGING IN CHINA, *supra* note 12, at 52; FISHMAN, *supra* note 20, at 317; YUNXIANG, *supra* note 66, at 188.

87. Xiaomei Pei & Youcai Tang, *Rural Old Age Support in Transitional China: Efforts Between Family and State*, *in* AGING IN CHINA, *supra* note 12, at 67.

88. The policy has reduced both the size of the nuclear family and the total number of female children. *Id.* at 64; FISHMAN, *supra* note 20, at 306–09; Shixun Gui, *Care of the Elderly in One-child Families in China: Issues and Measures* in ELDERLY CHINESE IN PACIFIC RIM COUNTRIES, *supra* note 22, at 115–18. *But see* Luo, *supra* note 61, at 113–14 (arguing that the one-child policy did not have the same result in rural areas); Chen & Liu, *supra* note 56, at 159 (noting the differences in legal administration of the policy in urban and rural areas).

89. McIntosh & Zhang, *supra* note 60, at 27 (citation omitted). "Researchers have been careful to note that the reduction [in children produced] was not only a consequence of government policy but also a response to social and economic development." Chen & Liu, *supra* note 56, at 159.

90. The only governmental support is a small monthly subsidy—between 270 and 340 Yuan (or fifty-two dollars)—that may not even cover many childless adults. *See* Laurie Burkitt, *Left Behind by China's One-Child Policy*, WALL ST. J. (Apr. 19, 2016), http://www.wsj.com/articles/left-behind-by-chinas-one-child-policy-1460982134.

Furthermore, with communism's direct control over familial-eldercare decisions absent, the same societal shifts that altered American cultural attitudes are negatively affecting "the capacity and willingness of the family to provide care for the elderly" in China.[91] Many of the phenomena responsible for this decline—such as urbanization and industrialization—are still in their infant stages and have not reached their zenith of influence.[92] Scholars and policymakers alike expect this caregiving crisis to get worse in the years to come.[93]

In some measure, China has attempted to counteract these problems with improvements to its governmental eldercare programs.[94] In the early 1980s, localities retained primary responsibility for funding and managing social-assistance and insurance programs, with effectiveness varying across regions.[95] In the 1990s, China established the national framework for what is now its pension, insurance, and assistance systems.[96]

Regrettably, the reform actually reduced benefits for many Chinese citizens.[97] For example, in 2003—compared to command-and-control communist policies pre-1980 and local programs post-1980—Chinese health insurance covered a smaller

91. Fang et al., *supra* note 65, at 257–58; Leung, *supra* note 61, at 177–78; Lin & Langen, *supra* note 19, at 36–38, 40–41; Qin, *supra* note 79, at 77; Yun, *supra* note 72, at 71–72.

92. FISHMAN, *supra* note 20, at 299; Luo, *supra* note 61, at 99–102; Peng & Phillips, *supra* note 57, at 101, 104, 110–11. Early evidence suggests that these phenomena are primarily responsible for the recent observable declines in familial eldercare and will continue to have the same impact for the foreseeable future. LIU, *supra* note 72, at 42; Xu & Zhang, *supra* note 86, at 57.

93. YUNXIANG, *supra* note 66, at 185, 233–35; Chen & Liu, *supra* note 56, at 164; *see also* Norman Daniels, *Justice Between Adjacent Generations: Further Thoughts*, 16 J. POL. PHIL. 475, 492 (2008).

94. Xu & Zhang, *supra* note 86, at 44–45; Chen & Liu, *supra* note 56, at 165–68.

95. *See, e.g.*, Xu & Zhang, *supra* note 86, at 49, 53; *cf.* Chen & Liu, *supra* note 56, at 168 (noting "pilot projects of old age social insurance programs" that the government implemented "in some developed rural areas" during the late 1980s).

96. Luo, *supra* note 43, at 85–89; Peng & Phillips, *supra* note 57, at 108–09; Xu & Zhang, *supra* note 86, at 46–50, 53, 55–56; Fang et al., *supra* note 65, at 252; China Labour Bulletin, *China's Social Security System*, CHINA LABOUR BULLETIN, http://www.clb.org.hk/en/view-resource-centre-content/110107 (last visited Apr. 3, 2018); All-China Federation of Trade Unions, *China's Pension System: Past and Present*, ACFTU (Mar. 24, 2015), http://en.acftu.org/28623/201503/24/150324110127983.shtml.

97. Luo, *supra* note 43, at 84; Xu & Zhang, *supra* note 86, at 46.

percentage of both urban and rural citizens.[98] In 2011, China passed the Social Insurance Law to remedy this problem and furnish comprehensive coverage.[99] However, early studies demonstrate that the reform is falling short, with broad programmatic participation,[100] coverage,[101] and enforcement[102] remaining spotty at best.

The reality is that no comprehensive national eldercare system exists in China.[103] Some provincial or citywide programs have success, but these only cover select urban areas.[104] Local governmental eldercare programs are rare,[105] and the few that do exist constantly struggle with severely limited funding.[106] Overall, the quality and quantity of governmental eldercare varies wildly,[107] with families and smaller communities retaining responsibility for most eldercare duties[108] and costs.[109] This

98. McIntosh & Zhang, *supra* note 60, at 27–28; *see also* Chen & Liu, *supra* note 56, at 166.

99. Lesli Ligorner et al., *The New PRC Social Insurance Law and Expatriate Employees*, CHINA BUS. REV. (Jan. 1, 2012), http://www.chinabusinessreview.com/the-new-prc-social-insurance-law-and-expatriate-employees.

100. FISHMAN, *supra* note 20, at 315, 317; China Labour Bulletin, *supra* note 96; Ligorner et al., *supra* note 99. For example, multiple factors have led to low participation by peasants in rural areas. Zeng Yi, *How Far Can Family Support for the Rural Elderly Go*: *It Is No Longer Appropriate to Advocate in Programmatic Party and Government Documents That "Family Support Should Be the Main Form of Eldercare in Rural Areas"*, 34 CHINESE SOC. & ANTHROPOLOGY 67, 82–83 (2001).

101. FISHMAN, *supra* note 20, at 301; Ligorner et al., *supra* note 99; China Labour Bulletin, *supra* note 96.

102. Leung, *supra* note 61, at 173; Luo, *supra* note 43, at 88–89; Peng & Phillips, *supra* note 57, at 104; Xu & Zhang, *supra* note 86, at 58; China Labour Bulletin, *supra* note 96.

103. *See, e.g.*, Zhan, Luo, & Chen, *supra* note 12, at 224.

104. Bing, *supra* note 59, at 82–93; Fang et al., *supra* note 65, at 255; Lin & Langen, *supra* note 19, at 44; Luo, *supra* note 43, at 104; Xu & Zhang, *supra* note 86, at 58.

105. Leung, *supra* note 61, at 182; Zhan, Luo, & Chen, *supra* note 12, at 224.

106. These programs fight to maintain themselves after the economic shift and de-collectivization removed major funding sources. *See, e.g.*, Chen & Liu, *supra* note 56, at 166 (noting cooperative-medical program collapse).

107. Leung, *supra* note 61, at 183; *see also* Pei & Tang, *supra* note 87, at 67–72, 78 (noting this variation, surveying three different localities, and documenting differences in eldercare).

108. Bing, *supra* note 59, at 81; Editorial Board of Population Research, *supra* note 57, at 67; Lin & Langen, *supra* note 19, at 47; Luo, *supra* note 43, at 92; Peng & Phillips, *supra* note 57, at 112.

109. Gui, *supra* note 88, at 120. For instance, social assistance for indigent elderly is available only if they meet a strict test that demonstrates their children are "economically unable to support them." Xu & Zhang, *supra* note 86, at 57. Large swaths of China's elderly population "are almost entirely dependent

holds especially true for rural citizens,[110] nongovernment workers,[111] and women.[112]

In essence, despite significant cultural movement away from filial-piety norms, the Chinese government still assigns most eldercare duties to families.[113] To assign these duties without the mechanisms of centralized economic planning, the Chinese government has added new remedies to filial responsibility laws.[114]

Beginning with legal changes in the 1980s, these laws created judicial mechanisms to reallocate financial resources when citizens refuse to support their parents.[115] Courts can order children to make support payments to their elderly parents, or reduce the child's inheritance as a punishment for neglecting their filial duties.[116] Where these efforts fall short, the threat of imprisonment, penal servitude orders, and surveillance orders motivate children to care for their parents.[117] Additionally, in 2013, China revised its laws to require that children visit or stay in touch with their elderly parents.[118] This legal revision includes

on family support." Lin & Langen, *supra* note 19, at 44; Pei & Tang, *supra* note 87, at 62; Qin, *supra* note 79, at 75; China Labour Bulletin, *supra* note 96.

110. YUNXIANG, *supra* note 66, at 177; Lin & Langen, *supra* note 19, at 47; Pei & Tang, *supra* note 87, at 62; Peng & Phillips, *supra* note 57, at 104; Xu & Zhang, *supra* note 86, at 58.

111. Luo, *supra* note 61, at 105–06; Pei & Tang, *supra* note 87, at 62–63.

112. Leung, *supra* note 61, at 173.

113. *See* FISHMAN, *supra* note 20, at 299 ("Though China is Communist in name, in the era of market reform it has reverted to relying on families to provide support for one another . . . .").

114. FISHMAN, *supra* note 20, at 301, 309–311; Fang et al., *supra* note 65, at 253.

115. Moskowitz, *supra* note 4, at 447–48; Zhan, Luo, & Chen, *supra* note 12, at 223.

116. Frances H. Foster, *Towards A Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 95 (1998); Moskowitz, *supra* note 4, at 447–48; Lara Queen Plaisance, *Will You Still . . . When I'm Sixty-Four: Adult Children's Legal Obligations to Aging Parents*, 21 J. AM. ACAD. MATRIMONIAL LAW. 245, 265 (2008).

117. *See, e.g.*, Fang et al., *supra* note 65, at 253; Zhan, Luo, & Chen, *supra* note 12, at 223.

118. Edward Wong, *A Chinese Virtue Is Now the Law*, N.Y. TIMES (July 2, 2013), http://www.nytimes.com/2013/07/03/world/asia/filial-piety-once-a-virtue-in-china-is-now-the-law.html; Wang Xiaodong, *New Filial Law Sparks Debate*, CHINA DAILY USA, June 3, 2013, http://usa.chinadaily.com.cn/epaper/2013-07/02/content_16707099.htm.

penalties for noncompliance,[119] ranging from a court-ordered reduction of a neglectful child's credit score,[120] to more severe and traditional penalties such as imprisonment.[121]

Courts do not occupy the entire enforcement space.[122] Some local governments have "adopted work rules for government employees that link their professional advancement to how well they perform their filial duties."[123] In addition, administrative settlement negotiations keep some of these cases out of court.[124] The filial responsibility laws also allow neighborhood or village committees to mediate disputes.[125] These committees use public shaming tactics to ensure compliance.[126] Where adult children and their parents live in the same community, these local efforts have proven effective.[127]

Nonetheless, many cases still find their way into court. Cases involving claims for material support constitute the majority of the large caseload increase.[128] Overall, investigation and enforcement of these laws is difficult, time consuming, and seriously costly.[129]

These laws also frustrate other purposes of encouraging familial eldercare. Public shaming, or vexatious and lengthy court

119. Xiaoqing Pi, *China Filial Piety Law Draws First Blood*, WALL ST. J. (July 2, 2013), http://blogs.wsj.com/chinarealtime/2013/07/02/chinas-new-filial-piety-law-draws-first-blood; Kristen Gelineau, *In Aging China, Old Woman Sues Children For Care*, TULSA WORLD (Oct. 13, 2013), http://www.tulsaworld.com/news/in-aging-china-old-woman-sues-children-for-care/image_df237cc2-8204-58d3-861e-be77287ca47a.html (detailing how one court divided care duties among siblings and required a payment of $10 a month to the mother along with splitting her medical bills).

120. Luo Ruiyao, *Shanghai Says People Who Fail to Visit Parents Will Have Credit Scores Lowered*, CAIXIN ONLINE (Apr. 11, 2016), https://www.caixinglobal.com/2016-04-11/101011746.html.

121. Pi, *supra* note 119; Louise Watt, *Law Requires Chinese to Visit Their Aging Parents*, YAHOO! NEWS, July 2, 2013, https://www.yahoo.com/news/law-requires-chinese-visit-aging-parents-063254370.html (discussing a case in the eastern Chines city of Wuxi).

122. FISHMAN, *supra* note 20, at 309–11.

123. "The county sends out officials to interrogate family members to see if their relatives on the government payroll perform their family responsibilities." *Id.* at 310.

124. Watt, *supra* note 121.

125. Leung, *supra* note 61, at 178, 184–85.

126. Such tactics include posting offender's names publicly. FISHMAN, *supra* note 20, at 310–11.

127. *Id.* at 310.

128. *Id.*; Qin, *supra* note 79, at 75.

129. Moskowitz, *supra* note 4, at 448; Pi, *supra* note 119; Qin, *supra* note 79, at 78.

proceedings, engender negative feelings between caregivers and the elderly and erase the emotional benefits that usually accompany familial support.[130] Additionally, China's workplace regulations on family leave have not caught up with the duties imposed by their filial responsibility laws.[131] Citizens often have to choose between caregiving duties or employment duties.

Reliable data on the financial impact these reinvigorated laws and practices have on families cannot be gathered yet. But it would seem that without significant regulatory change in other areas, these laws will have unintended fiscal consequences. Financially constrained families will work and save less—requiring greater eldercare themselves down the road.[132] Unemployed or underemployed caregivers will also pay less into government revenues—restricting the support government can provide.[133] Furthermore, in many cases, families simply cannot afford to take on the financial responsibilities of eldercare.[134] These government orders mandating familial eldercare may soon become empty edicts, wasting government resources without addressing the underlying problems.

B. FILIAL RESPONSIBILITY LAWS IN THE UNITED STATES

The United States is no stranger to filial responsibility laws. Although these laws have fallen into disuse over the years, America has a rich history of court-ordered filial support. Nonetheless, China's example suggests that revitalizing filial responsibility laws would be ill-advised.

1. History of Filial Responsibility Laws in America

Until the early twentieth century, American filial responsibility laws represented the primary means of guaranteeing familial and communal eldercare. Although occasional suits still occur, the laws largely have become a dead letter.

130. *See* Gelineau, *supra* note 119 (detailing how a suit brought under China's filial responsibility law caused harm to familial relations for one family).

131. One notable exception is that employers must provide 20 days of paid leave if an employee's parents live far away in order to facilitate visitation. Pi, *supra* note 119.

132. *See supra* Part I.

133. *See id.*

134. Luo, *supra* note 43, at 93; *see also* Chen & Liu, *supra* note 56, at 165 (noting that the average costs of necessary hospital treatments "approaches one's average annual income" in China).

Like many facets of the American legal system, the first American filial responsibility laws owe their origins to England. Early American colonies modeled their filial responsibility laws[135] on the English Poor Relief Act.[136] Under these laws, the government could tax families whose relatives ended up on public support.[137] When the United States gained its independence, many states retained or reenacted these laws.[138] As the country expanded, these laws spread. By the 1950s, 45 states had detailed filial-responsibility statutory schemes.[139]

Yet, at the height of America's eldercare cultural shift in the middle of the twentieth century[140] these laws began to die off. Enforcement declined, and many states repealed the laws.[141] As enforcement decreased, the number of contested suits and statutory challenges increased.[142] However, courts largely upheld these statutes,[143] and these laws remain on the books in over half of the states.[144]

135. *See, e.g.*, LAWS OF THE STATE OF DELAWARE, ch. CCXXV, § 6, 546–47 (1797).

136. The Elizabethan Act of 1601 for the Relief of the Poor, 43 Eliz. 1, ch. 2, § IV (Eng.); 39 Eliz. 1, ch. 3, § I (1597) (Eng.); *see also* Moskowitz, *supra* note 4, at 421–22. For a discussion of how this law influenced American colonial laws see Rickles-Jordan, *supra* note 14, at 190–91.

137. Harkness, *supra* note 14, at 313–14; Moskowitz, *supra* note 4, at 421–22.

138. Robert J. Levy, *Supporting the Aged: The Problem of Family Responsibility*, *in* AN AGING WORLD, *supra* note 77, at 253; Lopes, *supra* note 35, at 514.

139. Sketchley & McMillan, *supra* note 34, at 134.

140. *See supra* Part I.

141. Lopes, *supra* note 35, at 514 n.32; Narayanan, *supra* note 35, at 374.

142. *See* Narayanan, *supra* note 35, at 379–83 (discussing constitutional challenges).

143. *See, e.g.*, Swoap v. Superior Court of Sacramento, 516 P.2d 840, 849–52 (Cal. 1973) (rejecting an equal-protection-clause challenge to California's filial responsibility law); *see also* Moskowitz, *supra* note 4, at 424, 428–29 nn.118–20 (listing rejected constitutional challenges).

144. ALASKA STAT. ANN. §§ 25.20.030, 47.25.230 (West 2017); ARK. CODE ANN. § 20-47-106 (West 2017); CAL. FAM. CODE §§ 4400, 4401, 4403, 4410-14 (West 2018), CAL. WELF. & INST. CODE § 12350 (West 2018); CONN. GEN. STAT. ANN. § 53-304 (West 2017); DEL. CODE ANN. tit. 13, § 503 (West 2017); GA. CODE ANN. §36-12-3 (2017); IND. CODE ANN. § 31-16, -17 (West 2017); IOWA CODE ANN. §§ 252.1, .2 (West 2017); LA. STAT. ANN. § 13:4731 (2017); MISS. CODE ANN. § 43-31-25 (West 2017); MONT. CODE ANN. §§ 40-6-214, -301 (West 2017); NEV. REV. STAT. ANN. §§ 428.070, 439B.310 (West 2017); N.H. REV. STAT. ANN. § 167:2 (2017); N.J. STAT. ANN. § 44:4-101 (West 2017); N.D. CENT. CODE ANN. § 14-09-10 (West 2017); OR. REV. STAT. ANN. § 109.010 (West 2017); 23 PA. CONS. STAT. ANN. § 4603 (West 2017); 40 R.I. GEN. LAWS ANN. § 40-5-13 (West 2017); S.D. CODIFIED LAWS § 25-7-27, -28 (2018); TENN. CODE ANN. § 71-5-115 (West 2017); UTAH CODE ANN. § 17-14-2 (West 2017); VT. STAT. ANN.

In their current forms, these statutes vary considerably across jurisdictions.[145] Some include enforcement mechanisms,[146] while others only impose the caregiving duty.[147] At least 12 states have statutes that include criminal penalties.[148] or those statutes that require direct financial support, some consider the financial ability of the adult children, the parents, or both when deciding the amount of support due,[149] and others do not.

Courts also face difficult liability-apportionment issues in deciding how to divide support among multiple children dispersed across state lines.[150] Jurisdictional and residency requirements limit enforcement in most cases.[151] A dearth of precedential guidance hinders enforcement efforts in the remaining cases.[152]

The changing dynamic of the archetypical American family has made enforcement exceedingly rare—for both the cultural and legal reasons discussed above.[153] Nevertheless, some federal

tit. 15 § 204 (West 2017); VA. CODE ANN. § 20-88 (West 2017); W. VA. CODE ANN. § 9-5-9 (West 2017); *see also* Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children To Support Indigent Parents*, 20 ELDER L.J. 269, 304 (2013).

145. *See* Sketchley & McMillan, *supra* note 34, at 148 (characterizing the remaining statutory frameworks as "an antiquated patchwork of family liability"); *see also* Christina Lesher et al., *Whose Bill Is It Anyway? Adult Children's Responsibility to Care for Parents*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 247, 250–53 (2014).

146. *See, e.g.*, Levy, *supra* note 138, at 254; Rickles-Jordan, *supra* note 14, at 199.

147. Narayanan, *supra* note 35, at 384; *see also* Lesher et al., *supra* note 145, at 250–51 (noting problems associated with standing).

148. CAL. PENAL CODE § 270(c) (West 2018); CONN. GEN. STAT. ANN. § 53-304 (West 2017); IND. CODE ANN. § 35-46-1-7 (West 2017); KY. REV. STAT. ANN. § 530.050 (West 2017); MD. CODE ANN. FAM. LAW § 13-101, -102, -103 (West 2018); MASS. GEN. LAWS ANN. ch. 273 § 20 (West 2017); MONT. CODE ANN. § 40-6-301, -302 (West 2017); N.C. GEN. STAT. ANN. § 14-326.1 (West 2017); OHIO REV. CODE ANN. § 2919.21 (West 2017); 15 R.I. GEN. LAWS. ANN. § 15-1-1 to -7 (West 2017); R.I. GEN. LAWS ANN. § 40-5-13 to -18 (West 2017); VT. STAT. ANN. tit. 15 §§ 202, 203 (West 2017); VA. CODE ANN. § 20-88 (West 2017).

149. Harkness, *supra* note 14, at 323; Rickles-Jordan, *supra* note 14, at 200–01.

150. Harkness, *supra* note 14, at 324–25; Lesher et al., *supra* note 145, at 252.

151. Harkness, *supra* note 14, at 324–25; Lesher et al., *supra* note 145, at 265–66.

152. Harkness, *supra* note 14, at 324–25.

153. *See, e.g.*, Harkness, *supra* note 14, at 321; *see also* Soden, *supra* note 6, at 120 (noting possible reasons why).

and state actors have sought to resurrect these statutes as a means to stem the tide of government-eldercare costs.[154] In the private sector, eldercare providers have increased attempts to recover costs from children whose elderly parents cannot meet the bill by citing to long-dormant civil provisions found in filial responsibility laws.[155]

2. Revitalizing Filial Responsibility Laws

These filial responsibility laws strive to serve valuable goals, but they represent an inefficient, and often counterproductive, way to reach these goals. Administrative and enforcement costs eviscerate most—if not all—government savings. Moreover, enforcing these laws does not significantly improve quality of life for the elderly.

Administration of filial responsibility laws requires an immense amount of government resources.[156] China's recent experimentation with alternative enforcement mechanisms illustrates that a great number of cases will still necessitate court proceedings.[157]

Robust civil enforcement burdens already overworked court systems.[158] Innumerable legal and factual complications will

154. Soden, *supra* note 6, at 120; Narayanan, *supra* note 35, at 385–86. For example, policy guidance from the Department of Health and Human Services in 1983 led many states to pass legislation permitting civil actions against adult children for Medicaid funds disbursed on their elderly parents' behalf. George F. Indest III, *Legal Aspects of HCFA's 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, 251–54 (1988).

155. Health Care & Ret. Corp. of Am. v. Pittas, 46 A.3d 719, 720, 724 (Pa. 2012) (affirming a judgment requiring a son to pay $92,943.31 of his mother's nursing home bills pursuant to Pennsylvania's filial responsibility statute); Soden, *supra* note 6, at 120; Francine Russo, *Caring for Aging Parents: Should There Be a Law?*, TIME (July 22, 2013), http://healthland.time.com/2013/07/22/caring-for-aging-parents-should-there-be-a-law (noting recent lawsuits in Pennsylvania and South Dakota). This is the case despite conflicts with federal law. *See* Lesher et al., *supra* note 145, at 258–59.

156. Narayanan, *supra* note 35, at 384; *see also* Levy, *supra* note 138, at 257–62. Courts would likely face renewed challenges to these statutes as well. *See* Harkness, *supra* note 14, at 328.

157. *See supra* Part II.A.2.

158. Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support Our Parents Be Effectively Enforced?*, 36 FAM. L.Q. 501, 510–11 (2002); Lesher et al., *supra* note 145, at 264–65; Moskowitz, *supra* note 4, at 436.

lead to lengthy and expensive litigation in many cases.[159] Furthermore, civil cases expend private and public resources to determine liability when judgment collection is uncertain.[160]

Similarly, revitalizing criminal prosecutions would only waste public resources. Children "will only be further inhibited from providing financial support if they are incarcerated or if they are fined."[161]

And of course, in both criminal and civil proceedings, private litigation expenses drain limited familial resources as well. It is difficult to empirically calculate and balance these costs against potential benefits.[162] But arguably, both private and public resources are better spent directly on eldercare.

Beyond financial costs, these laws generate negative externalities that destroy the emotional benefits elderly people normally receive from familial care,[163] and threaten the vitality of private motivations and structures that encourage familial support.[164] "Generally, the number of elderly indigent who are altogether neglected by family members is a very small minority—most elderly indigents already receive some form of assistance from their children."[165] This assistance proceeds informally, with siblings dividing duties and children taking on responsibility because they view it as a gift or good deed.[166] When governmental regulatory schemes enter the fray, they displace private motivations.[167] Forcing families to share resources through filial responsibility laws "creates intergenerational conflict."[168] Moreover, the laws may counterproductively decrease opportunities

159. Harkness, *supra* note 14, at 331–33.

160. Sketchley & McMillan, *supra* note 34, at 151–53.

161. Lesher et al., *supra* note 145, at 265.

162. Although one American study of welfare schemes that required reimbursement from children estimated "[n]ational gross savings, including savings from deterred [welfare] applications . . . to be between $80 and $90 million and the administrative cost of collection was approximately thirty percent." Levy, *supra* note 138, at 265.

163. *See* Moskowitz, *supra* note 4, at 437 ("The adverse nature of litigation may destroy family bonds."); Gelineau, *supra* note 119 (detailing how a suit brought under China's filial responsibility law caused harm to familial relations for one family).

164. Lesher et al., *supra* note 145, at 263.

165. *Id.*

166. *Id.*

167. *Id.*; Sketchley & McMillan, *supra* note 34, at 154; *see also supra* Part II.A.1 (discussing how China's command-and-control communism supplanted filial piety norms).

168. Harkness, *supra* note 14, at 337.

for eldercare. For instance, when the possibility of substantial civil judgments interacts with jurisdictional limits, children may move away from their parents and become less involved in order to avoid liability.[169] As China's example demonstrates, mandating familial eldercare will do little to improve it.

III. JAPAN: BROAD PROGRAMMATIC SUPPORT AND INCENTIVES

Japan's burgeoning eldercare problems offer another example meriting American policymakers' attention. "Japan entered the twenty first century as the country with the highest proportion of elderly,"[170] and "in 2005 the population of Japan became the oldest national population in the entire world."[171] Japan and the United States have much in common: an industrialized economy, a democratic government, and similar rates of elderly-population growth.[172] At a superficial level, Japan's eldercare policies resemble American analogs.[173]

And although Japan's transformation in its national economy, familial economies, and governmental eldercare programs did not begin in earnest until after World War II,[174] Japan un-

169. *See* Sketchley & McMillan, *supra* note 34, at 153.

170. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 119.

171. Naohiro Ogawa et al., *Rapid Population Aging and Changing Intergenerational Transfers in Japan*, *in* INTERNATIONAL HANDBOOK OF POPULATION AGING, *supra* note 3, at 133. It is expected to remain true through 2050. *See* FISHMAN, *supra* note 20, at 145.

172. FISHMAN, *supra* note 20, at 144–45; Narayanan, *supra* note 35, at 388.

173. Japan has universal healthcare coverage, which differs in some respects from American healthcare coverage. *See* ELLEN RHOADS HOLMES & LOWELL D. HOLMES, OTHER CULTURES, ELDER YEARS 281 (2d ed. 1995); Dana Derham-Aoyama, *U.S. Health Care Reform: Some Lessons from Japanese Health Care Law and Practice*, 9 TEMP. INT'L & COMP. L.J. 365, 373 (1995); Ting & Woo, *supra* note 33, at 74. Japan also has a social security system similar to the United States. Erin E. Lynch, Comment, *Late-Life Crisis: A Comparative Analysis of the Social Insurance for Retirees of Japan, Germany, and the United States*, 14 COMP. LAB. L.J. 339, 346–53 (1993); Ting & Woo, *supra* note 33, at 74; United States Social Security Office of Retirement and Disability Policy, *Social Security Programs Throughout the World: Asia and the Pacific, 2010*, SSA.GOV, https://www.ssa.gov/policy/docs/progdesc/ssptw/2010-2011/asia/index.html (last visited Apr. 3, 2018). Expansive coverage for the elderly is a recent phenomenon. HOLMES & HOLMES, at 282; Takatomi Ninomiya, *Welfare and Support for the Elderly in the Community*, *in* AN AGING WORLD, *supra* note 77, at 187.

174. Keong-Suk Park et al., *Intergenerational Coresidence and Nearness in Korea and Japan: Unbalanced Aspects of Family Changes*, 8 INT'L J. JAPANESE SOC. 93, 95–96, 98–99, 112 (1999).

derwent many of the same changes the United States experienced.[175] Like the United States, Japanese prevalence of familial eldercare has declined since then.[176] The number of Japanese children living with their elderly parents has been dropping since at least the 1970s,[177] and the number supporting their parents since at least the 1990s.[178]

Yet, the decline has not been as severe as the one that took place in the United States or other industrialized nations.[179] "[I]nformal care by adult children is still the most common source of care for elderly persons in Japan."[180] Japan also exhibits a much higher rate of intergenerational co-residency compared with other nations.[181] Some recent studies show that the number of Japanese elderly living with *single* adult children is

175. Daisaku Maeda, *Decline of Family Care and the Development of Public Services: A Sociological Analysis of the Japanese Experience*, *in* AN AGING WORLD, *supra* note 77, at 301, 306–08; OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 7–9, 15; Ogawa, Matsukura, & Maliki, *supra* note 171, at 133–44. Park et al., *supra* note 174, at 95–96, 98–99, 112.

176. Moskowitz, *supra* note 4, at 439. Although very similar to the American experience, Japan did experience distinct phenomena contributing to a decrease in familial eldercare. *See, e.g.*, FISHMAN, *supra* note 20, at 174 (noting the Japanese Eugenic Protection Act enacted in 1949, which decreased Japanese birth rates). Perhaps the largest cultural difference that contributed to decreasing familial care was the decline in arranged marriage, Narayanan, *supra* note 35, at 391, which itself came with explicit obligations to care for elderly parents. FISHMAN, *supra* note 20, at 168; Hanaoka & Norton, *supra* note 32, at 1003.

177. Ninomiya, *supra* note 173, at 189; Naohiro Ogawa & Robert D. Retherford, *Shifting Costs of Caring for the Elderly Back to Families in Japan: Will It Work?*, 23 POPULATION & DEV. REV. 59, 75–76 (1997); *cf.* Ogawa et al., *supra* note 171, at 140 (claiming the decline began in 1981); Maeda, *supra* note 175, at 300 (claiming the decline began in the 1960s).

178. Derham-Aoyama, *supra* note 173, at 379; Hanaoka & Norton, *supra* note 32, at 1002; Moskowitz, *supra* note 4, at 439; Narayanan, *supra* note 35, at 390.

179. *See* FISHMAN, *supra* note 20, at 156 (noting a recent estimate that "nine in twenty Japanese over sixty years old live with their adult children"); Maeda, *supra* note 175, at 300, 302.

180. Hanaoka & Norton, *supra* note 32, at 1002; Naohiro Ogawa, *Population Aging and Household Structural Change in Japan*, *in* AN AGING WORLD, *supra* note 77, at 76.

181. *See* Ogawa, *supra* note 180, at 76 (noting that "the multigenerational family living arrangement has survived urbanization far better in Japan than in other developed countries"). Many choose this arrangement out of personal preference as opposed to financial constraints. Ogawa et al., *supra* note 171, at 140; Narayanan, *supra* note 35, at 388–89.

rising,[182] and predict a future resurgence in total intergenerational co-residency.[183] This difference in familial eldercare cannot completely be written off as cultural variance. Something in Japan seems to be combatting the trend towards lesser familial and communal eldercare.

The major difference between Japanese and American eldercare policy is that Japan has viewed programmatic costs associated with social insurances and assistance as an incentive to enact policies that encourage and facilitate familial- and community-based eldercare.[184] From tax breaks to government-funded services, Japan cares for its caregivers.[185]

Japan's eldercare programs have evolved slowly over time, but the most radical shift came when the Japanese government instituted long-term-care insurance.[186] Section A divides Japan's approach to eldercare into two periods in order to illustrate the difference long-term-care insurance has made.[187] The first period begins with the formation of Japan's democracy post–World War II, and tracks the evolution of its eldercare programs until 2000.[188] The second period follows eldercare policy since the introduction of long-term-care insurance, including costs and problems surrounding that program. Section B attempts to parse the good from the bad, recommending similar improvements to American structures without the negative externalities.

A. JAPAN'S EXPERIENCE

After World War II, the Japanese government developed national eldercare programs that greatly expanded coverage. But eventually rising costs occasioned by widespread institutionalization necessitated reform. Japan's Long-Term Care Insurance

182. FISHMAN, *supra* note 20, at 148. Yet, it is hard to distinguish between parasitic children and supportive adult children. *See id.* at 144–45.

183. *See, e.g.*, OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 10.

184. Ogawa et al., *supra* note 171, at 136; Ting & Woo, *supra* note 33, at 74; *see also* Narayanan, *supra* note 35, at 393–94 (describing some of these policies).

185. Like China and the United States, Japan does have filial responsibility laws. These laws are still enforced, with reported cases as recent as the 1990s. Ogawa et al., *supra* note 171, at 139–40. While these laws may affect eldercare practices, this section focuses on Japan's other eldercare policies.

186. *See infra* Part III.A.2.

187. For a quick illustration of differences in eldercare policies before and after 2000 in Japan see Yayoi Saito, *Care Providers in Japan: The Potential of and Challenges for Social Enterprises*, *in* MEETING THE CHALLENGES OF ELDER CARE: JAPAN AND NORWAY 106 (Yayoi Saito et al. eds., 2010).

188. For a helpful table detailing Japan's eldercare policies from the 1960s to 2000 see OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 17.

System represents the government's recent reform attempt. While the system has many benefits, structural failings have prevented the reform from ameliorating the government's financial problems.

1. Post–World War II Programs

In the years immediately following World War II, Japan's eldercare programs mainly consisted of small grants and subsidies to localities, who themselves administered limited eldercare services.[189] Attempts at forming comprehensive national eldercare began in earnest during the 1960s.[190] In 1961, Japan enacted social health insurance and universal pension coverage.[191] Other policies increased the number of government-backed institutional-care facilities and developed support services for indigent or severely disabled elderly.[192] In the 1970s, the government assumed an even larger portion of eldercare costs,[193] most significantly by making medical care free for everyone over 70.[194]

But economic and political realities began to limit the eldercare expansion.[195] As coverage increased so did hospital usage and costs. This phenomenon—nicknamed "social hospitalization"[196]—mostly resulted from families treating hospitals like nursing homes.[197] Struggling to deal with budgetary pressures,

189. HIEDA, *supra* note 5, at 112; Saito, *supra* note 187, at 107–08; *cf.* OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 16 (noting national efforts that took place in the 1950s).

190. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 17; Ogawa et al., *supra* note 171, at 138.

191. NATASHA CURRY ET AL., CARING FOR AN AGEING POPULATION: POINTS TO CONSIDER FROM REFORM IN JAPAN 9 (2013); OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 16; Ogawa et al., *supra* note 171, at 138; Saito, *supra* note 187, at 109.

192. HIEDA, *supra* note 5, at 113–15.

193. *Id.* at 115–118; Yayoi Saito, *Development of Home Help in Japan: A Comparison with Norway*, *in* MEETING THE CHALLENGES OF ELDER CARE: JAPAN AND NORWAY, *supra* note 187, at 39; OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 15, 17.

194. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 16.

195. HIEDA, *supra* note 5, at 118–21; Saito, *supra* note 187, at 109; Saito, *supra* note 193, at 44.

196. *See, e.g.*, Tetsuo Fukawa, *Health and Long-Term Care Expenditures of the Elderly in Japan Using a Micro-Simulation Model*, 6 JAPANESE J. OF SOC. SECURITY POL'Y 199, 199 (2007).

197. HIEDA, *supra* note 5, at 91, 105; OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 15; Derham-Aoyama, *supra* note 173, at 379; Saito, *supra* note 193, at 54.

politicians began to emphasize familial responsibility for eldercare[198]: in the 1980s, Japan restructured both the public insurance and pension systems,[199] and began considering smaller-scale programs aimed at strengthening the faltering intergenerational co-residency eldercare model.[200]

In 1989, these efforts led to development of "The Gold Plan"—a 10-year strategy to confront rising institutional-care costs.[201] The Gold Plan, and subsequent revisions, centered around three efforts: (1) upgrade home- and community-based care options, (2) increase the number of non-hospital long-term-care facilities, and (3) transfer more healthcare-consumption costs back to the elderly.[202] Nevertheless, from 1989 to the late 1990s eldercare reform progressed in piecemeal fashion.[203] Costs continued to rise as variance and ineptitude at the municipal level curtailed the effectiveness of programs under the Gold Plan.[204]

2. Post-2000 Reforms

After its numerous attempts at reform from 1980 through the late 1990s, Japan introduced the Long-Term Care Insurance System (LTCI)[205] to improve the quality of its eldercare infrastructure and combat rising institutional-care costs.[206] With

198. HIEDA, *supra* note 5, at 120; Ogawa & Retherford, *supra* note 177, at 68; Saito, *supra* note 193, at 65.

199. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 15, 17.

200. *Id.* at 16–17; Fumie Kumagi, *The Family*, 6 INT'L J. JAPANESE SOC. 117, 119 (1997); Saito, *supra* note 193, at 39–40.

201. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 18.

202. *See id.* at 17–19; Ogawa & Retherford, *supra* note 177, at 70; *see also* HIEDA, *supra* note 5, at 121–30 (discussing various policy efforts).

203. The one exception being the vastly-enhanced infrastructure for home- and community-based services executed at the municipal level. *See* Saito, *supra* note 187, at 110; Saito, *supra* note 193, at 40, 51–52; *see also* LEONARD J. SCHOPPA, RACE FOR THE EXITS: THE UNRAVELING OF JAPAN'S SYSTEM OF SOCIAL PROTECTION 185–86, 188–89 (2006).

204. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 19.

205. Passed in 1997, with enforcement beginning in 2000. *Id.* at 17, 19. The program's inter-workings merit more discussion than this paper provides. See *id.* at 21–35 for a summary.

206. Reiko Abe Auestad, *Long-Term Care Insurance, Marketization, and Quality of Care: "Good Time Living"*, *in* MEETING THE CHALLENGES OF ELDER CARE: JAPAN AND NORWAY, *supra* note 187, at 68. Although the reform also included other programmatic-eldercare change. For example, Japan decided to switch its medical-welfare system to a fee-for-service system. HIEDA, *supra* note 5, at 91, 106; Saito, *supra* note 193, at 57.

benefits eligibility based on a combination of age, physical status, and mental status, most elders over 65 easily qualify for expansive coverage.[207] Qualifying recipients pay a small copay,[208] but otherwise government funding covers the cost of hired caregivers, home- and community-based services, and some institutional services.[209] Combined with other existing programs, the government has assumed about 90 percent of formal elderly caregiving costs.[210]

Moreover, the Japanese government implements a multitude of other policies that assist familial caregivers.[211] Those providing eldercare receive tax exemptions and deductions that increase when "the old person is the taxpayer's or the spouse's parent and lives in the same household as the taxpayers, and when the degree of impairment is very serious."[212] Similarly, the government has increased tax benefits and loan programs for citizens purchasing, building, or renovating homes to accommodate familial eldercare.[213]

Local governments also receive tax deductions and subsidies

207. Disabled persons aged 40 to 64 also qualify for benefits. HIEDA, *supra* note 5, at 91. "An individual's income, assets, and family care availability are no longer relevant for benefits eligibility. . . ." OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 22 (citation omitted).

208. "45% of funding comes from taxes, 45% from social contributions [premiums that adults over 40 pay into the system], and 10% from cost-sharing (copayments [from the elderly receiving services])." OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 24; *see* HIEDA, *supra* note 5, at 91.

209. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 29–31, 33–34; Russo, *supra* note 155.

210. HIEDA, *supra* note 5, at 106; POO & CONRAD, *supra* note 5, at 151–52; *see also* CURRY ET AL., *supra* note 191, at 16–19 (describing qualification process). Some municipalities cover additional costs or provide other services. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 25.

211. Narayanan, *supra* note 35, at 388.

212. Maeda, *supra* note 175, at 313.

213. FISHMAN, *supra* note 20, at 148 (noting the presence of "tax breaks" for "multigenerational living arrangements" and "multigenerational mortgages, which offer low interest rates"); Yosuke Hirayama & Kazuo Hayakawa, *Home Ownership and Family Wealth in Japan*, *in* HOUSING AND FAMILY WEALTH: COMPARATIVE INTERNATIONAL PERSPECTIVES 221 (Ray Forrest & Alan Murie eds., 1995); Maeda, *supra* note 175, at 313; Ting & Woo, *supra* note 33, at 74. Japanese housing patterns have contributed to these programs' success. Japanese housing designs historically have contained "one or two rooms for an elder family member." Narayanan, *supra* note 35, at 392. Japanese homes also have a much shorter lifespan than most homes—the average home being demolished after 38 years. Greg Rosalsky, *Why Are Japanese Homes Disposable?*, FREAKONOMICS (Feb. 27, 2014), http://freakonomics.com/2014/02/26/why-are-japanese-homes-disposable-full-transcript/. With frequent homebuilding, the housing industry is able to accommodate changing elderly needs.

if they administer programs and services facilitating familial and communal care.[214] Numerous eldercare services have increased as a result, including: daycare services, home-help services, and short-term stay services.[215] In addition, Japan funds community alternatives to institutional care such as small-group homes for the chronically ill or disabled.[216]

Japan's long history of familial eldercare offers useful comparative data on the impact of the post-2000 reforms. This comprehensive eldercare overhaul has strengthened both the quality and quantity of familial and communal eldercare in Japan.[217] Because the government subsidizes the cost of most home- and community-based services, more Japanese elderly can live at home, in their communities, or with their families longer.[218] Moreover, the reforms have not exacted too high a cost on informal caregivers; informal caregivers have greater economic spending power, they can amass savings and acquire real property earlier in life, and "workforce participation among women is three times what it was a generation ago" before these policies took effect.[219] Studies demonstrate that post-2000 eldercare reform has "relieved some of the burden on family members, improved the quality of life of elderly persons, and provided a framework for addressing the nation's severe [aging] demographic challenge."[220] Japan has become an international leader in institutionalizing support for familial and communal care.[221]

214. FISHMAN, *supra* note 20, at 148; Maeda, *supra* note 175, at 312.

215. Maeda, *supra* note 175, at 312; Saito, *supra* note 193, at 58.

216. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 37. Smaller than nursing homes, these homes care for groups that require more medical attention, such as patients with dementia. CURRY ET AL., *supra* note 191, at 28–30; Auestad, *supra* note 206, at 71. Japan implements these programs in lieu of wide-scale public housing, Hirayama & Hayakawa, *supra* note 213, at 216, 224, but Japan does directly administer some homes for the elderly. Maeda, *supra* note 175, at 299–300.

217. Tetsuo Ogawa, *Ageing in Japan: An Issue of Social Contract in Welfare Transfer or Generational Conflict?*, *in* LIVING LONGER: AGEING DEVELOPMENT AND SOCIAL PROTECTION, *supra* note 57, at 147; Ting & Woo, *supra* note 33, at 74.

218. HIEDA, *supra* note 5, at 91, 104; Auestad, *supra* note 206, at 68.

219. FISHMAN, *supra* note 20, at 149.

220. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 44.

221. HOLMES & HOLMES, *supra* note 173, at 282; Holly Holder, *Japan's Solution to Providing Care for An Ageing Population*, THE GUARDIAN (Mar. 27, 2014), http://www.theguardian.com/social-care-network/2014/mar/27/japan-solution-providing-care-ageing-population.

At the same time, some governmental eldercare costs have decreased.[222] More government funding has led to a greater and more diverse amount of home- and community-based service providers.[223] As a result, competitive market forces have driven costs down and bettered the service quality.[224] Despite greater accessibility and use of these services, home- and community-based services represent the smallest governmental eldercare expenditure.[225]

Yet, Japan's policies have not been without costs.[226] The eldercare system successfully incentivizes familial and communal care, but it does so by transferring a considerable amount of long-term eldercare costs from families to the State.[227] Currently Japan is facing a fiscal crisis as the country's large deficit spirals out of control.[228] Paradoxically, the post-2000 reform, born out of desire to reign in the eldercare budget, has left Japan holding the bill on eldercare costs greater than it had encountered with its pre-2000 system.[229] And eldercare costs "are expected to increase further in the years ahead."[230]

The increase in Japan's elderly population may be partially responsible.[231] As Japan's population ages, more citizens become eligible for benefits, and the government has been unable to increase taxes as an offset.[232] However, this explanation does not tell the complete story.

Other forces have frustrated the cost-saving aims of reform efforts. Of course, Japan has not been sitting on its hands since the earlier 2000 reforms. The ever-nimble Japanese eldercare policy machine tried to prevent this foreseeable problem early

222. Early evaluations of Japan's policies show that compared to other developed countries, "the national [eldercare] burden as a percentage of national income . . . is extremely low." Tetsuo Ogawa, *supra* note 217, at 142; *cf.* Ogawa et al., *supra* note 171, at 133 (noting the same, but also noting potential for increasing costs in the next few decades).

223. HIEDA, *supra* note 5, at 91; CURRY ET AL., *supra* note 191, at 21–22.

224. Auestad, *supra* note 206, at 69; Saito, *supra* note 187, at 112–13; Saito, *supra* note 193, at 57–58; Tetsuo Ogawa, *supra* note 217, at 151, 153.

225. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 62.

226. Holder, *supra* note 221 (noting recent cost rises).

227. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 19, 44.

228. *Id.* at 35–36.

229. CURRY ET AL., *supra* note 191, at 19–21; Saito, *supra* note 193, at 60.

230. Ogawa et al., *supra* note 171, at 133; Fukawa, *supra* note 196, at 204.

231. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 119.

232. CURRY ET AL., *supra* note 191, at 20; Tetsuo Ogawa, *supra* note 217, at 150.

on. Because the elderly had fewer out-of-pocket costs, Japan reduced eldercare pension benefits in 2004.[233] The government also tried to minimize unnecessary or expensive medical treatments associated with social hospitalization. Starting in 2005, reforms limited eligibility for some healthcare services and increased co-pays.[234] The reform was intended to work in conjunction with LTCI, eliminating waste, while LTCI shifted the elderly medical-care structure more towards a prevention-oriented system.[235]

Some healthcare expenditures did decrease, but the reform was too blunt an instrument for bludgeoning the social-hospitalization phenomena into submission.[236] Political pressure to backtrack mounted as interest groups alleged that the latest round of reforms severely restricted access for elderly indigent in need of healthcare services.[237] The lobbying succeeded, and Japan dropped some of its cost-saving measures.[238]

Additionally, part of the initial policymaking vision was that post-2000 reform would include legal frameworks facilitating greater supplier entrance into the institutional-care market; for-profit and non-profit organizations would build more hospitals and nursing homes, increase competition, and thus decrease governmental healthcare costs.[239] But much of this vision went unrealized. Regulation still bars profit-seeking organizations from performing many institutional-care roles.[240] As for the non-profits, preferential tax treatment and protective regulations for existing institutions translated to a lack of change.[241]

233. Ogawa et al., *supra* note 171, at 139.

234. CURRY ET AL., *supra* note 191, at 19–20; OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 36–38, 45, 63, 78; Fukawa, *supra* note 196, at 199; Saito, *supra* note 193, at 61–62.

235. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 69, 78; Fukawa, *supra* note 196, at 205.

236. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 78.

237. CURRY ET AL., *supra* note 191, at 20; *see also* Auestad, *supra* note 206, at 69 (explaining criticism).

238. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 36; *id.* at 119–21 (discussing eldercare-policy changes in 2011–2012); *see also* POO & CONRAD, *supra* note 5, at 152 (noting current coverage).

239. HIEDA, *supra* note 5, at 110.

240. CURRY ET AL., *supra* note 191, at 26; Ogawa, *supra* note 217, at 153. "Japan has a healthcare policy known as the 'non-profit principle', which does not permit investor-owned hospitals or clinics." OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 33, 81.

241. HIEDA, *supra* note 5, at 110; Derham-Aoyama, *supra* note 173, at 379.

Furthermore, home- and community-based services cannot adequately meet the needs of the severely ill or disabled, and Japan's policies have led to fewer non-hospital long-term facilities (e.g., nursing homes),[242] and longer waiting lists for those facilities.[243] As a result, many elderly simply have no choice but to become part of the social-hospitalization problem.[244] Under the current system, it has become increasingly difficult to differentiate between necessary hospital use and social-hospitalization abuse.[245]

Moreover, the problems associated with the current market structure allow existing institutional-care facilities to significantly reduce the quality of care without suffering corresponding market losses.[246] Social welfare corporations and medical corporations[247]—the types of organizations monopolizing institutional care before the reform—still provide most institutional care, and their costs continue to rise.[248] Thus, lack of competition and shortage of non-hospital long-term-care facilities has driven up eldercare costs in Japan.[249] Institutional care now constitutes the highest expenditure in the eldercare budget, consuming around "61% of public spending on the elderly."[250]

And to a lesser extent, structural deficiencies in administering LTCI have increased eldercare costs. Care managers receive government funds to help individuals develop a care plan—a plan that matches an elderly person with a comprehensive array of services in a way that maximizes her health returns from the government benefits she receives.[251] Theoretically, care manag-

242. HIEDA, *supra* note 5, at 109; Auestad, *supra* note 206, at 70–71.

243. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 62, 96; Janice Tai & Seow Bei Yi, *A Home from Home for Japan's Elderly*, STRAITS TIMES (July 31, 2016), http://www.straitstimes.com/asia/a-home-from-home-for-japans-elderly.

244. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 44.

245. HIEDA, *supra* note 5, at 109; Derham-Aoyama, *supra* note 173, at 379.

246. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 96–97.

247. Saito, *supra* note 187, at 107–08, 110 (explaining these corporations). Social welfare corporations are private in name, but the government controls many of their internal affairs and gives them substantial tax benefits. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 81.

248. CURRY ET AL., *supra* note 191, at 32–33; HIEDA, *supra* note 5, at 110; OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 81.

249. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 61. However, it is important to note that users with severe disabilities will always impose greater costs. *Id.* at 63, 65, 103, 113.

250. *Id.* at 61; *see also id.* at 45–46.

251. CURRY ET AL., *supra* note 191, at 23.

ers should help a client find services that work best for the individual at the lowest cost.[252] But "a majority of care managers are employed by provider organisations so . . . there [is] a tendency for them to access [and recommend] the services provided by their care manager's organisation."[253] Thus, while profit and non-profit companies did enter home- and community-based service sector following reform,[254] many individuals do not have the knowledge or motivation to take advantage of diversity and mitigate costs.

Additionally, the government vacillates between spending too much money inspecting the provision of home- and community-based services on the one hand, and incurring the costs of fraud, abuse, and waste on the other.[255] Some companies have gone as far as registering fraudulent claims without ever performing services.[256] Yet, the Japanese government has not developed a satisfactory response to these problems because effectively monitoring thousands of localized services might require more resources than it saves.[257]

Therefore, in both the institutional-care and the home- and community-based care sectors, intractable dilemmas impede efforts to minimize eldercare costs. Lobbyist groups for the elderly and existing institutional-care facilities chip away at the expansive reform needed to remedy healthcare inefficiencies. The nature of individualized at-home care means the government must tolerate some level of self-interested dealing and waste or expend more resources to root out parasites on the eldercare budget.

Undoubtedly the post-2000 reform has fortified familial and communal care structures, and Japan's example demonstrates the benefits of doing so. But Japan's fiscal crisis also presents a cautionary tale for other nations: in any eldercare reform, institutional biases must be addressed to gain eldercare benefits without increasing government costs.

252. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 29, 38; Saito, *supra* note 193, at 59–61.

253. CURRY ET AL., *supra* note 191, at 23; Saito, *supra* note 193, at 60–61.

254. CURRY ET AL., *supra* note 191, at 22.

255. *See* CURRY ET AL., *supra* note 191, at 24–25, 31, 33; *see also* Saito, *supra* note 187, at 124–25 (giving evidence of one fraudulent scandal in Japan and problems of quality control).

256. Saito, *supra* note 193, at 58–59; *see also* OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 35.

257. *See* CURRY ET AL., *supra* note 191, at 24–25, 31, 33; Saito, *supra* note 187, at 124–25.

B. LESSONS FOR THE UNITED STATES

Across the Pacific Ocean, the United States employs an eldercare structure that delivers drastically fewer services and benefits, while still managing to cost too much. American social insurance and assistance fail to cover most home- and community-based services.[258] Compared on an international scale, coverage is abysmally pitiful.[259] American eldercare policy discourages familial care. Eldercare programs reduce benefits if elderly recipients live with family or receive support from family. The tax system aggravates this disincentive by failing to provide any meaningful deductions for spending on preventative eldercare or familial caregiving. As a result, the majority of government eldercare funds go to institutional or reactive care.[260] This system diminishes quality of life for the elderly, wastes public resources, and unnecessarily burdens informal caregivers. Fortunately, some moderate reforms—modeled after lessons from Japan—could avoid this outcome.

1. Structure of American Eldercare

Meaningful reform is impossible without taking into account the complexities of the current American eldercare system. This Subsection briefly surveys and evaluates major eldercare programs and regulatory determinants of familial and communal eldercare in the United States.

Government-provided eldercare insurance does cover a substantial amount of medical costs for elderly in the United States.[261] Individuals over 65 years old receive health insurance coverage through Medicare.[262] Disabled or indigent elderly garner even more benefits through Medicaid.[263] The Affordable

258. POO & CONRAD, *supra* note 5, at 31–32, 36–37; Sketchley & McMillan, *supra* note 34, at 158.

259. HIEDA, *supra* note 5, at 155.

260. *See, e.g.*, Watson, *supra* note 24, at 938–39.

261. Crystal & Siegel, *supra* note 3, at 621.

262. 42 U.S.C. §§ 1395 et. seq. (2012); LaPierre & Hughes, *supra* note 9, at 216; *see also* POO & CONRAD, *supra* note 5, at 182–84 (explaining basics of Medicare); Watson, *supra* note 24, at 953–60 (noting the origins of Medicare).

263. 42 U.S.C. §§ 1396 et. seq. (2012); POO & CONRAD, *supra* note 5, at 184–85 (explaining Medicaid); Watson, *supra* note 24, at 953–60 (noting the origins of Medicaid); Centers for Medicare & Medicaid Services, *Medicaid and CHIP Eligibility Levels*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-eligibility-levels/index.html (last visited Apr. 3, 2018).

Care Act[264]—which requires all individuals to buy health insurance or pay a tax—also improved coverage for both programs.[265]

Likewise, the American government financially supports and assists the elderly through various other efforts.[266] Social Security serves as both a pension and disability-benefits system for the elderly in America.[267] Other programs support indigent elderly with additional benefits, including supplemental income, housing assistance, and food stamps.[268]

These programs greatly reduce eldercare costs for elders and their families, but coverage gaps and structural flaws in these programs generate negative externalities that discourage familial and communal eldercare.[269] For example, some programs reduce or eliminate benefits and services if the elderly person lives in another person's household or receives other familial support.[270]

Similarly, widespread lack of coverage for home- and community-based services hinders familial and communal care.[271] Medicare only funds homecare services if an elderly person has illnesses or disabilities severe enough to warrant institutional

264. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1302(b)(1), 124 Stat. 119, 163–64 (2010), *amended by* Health Care and Education Reconciliation Act, Pub. L. No. 111-152, §§ 1302(b)(1), 2707(a) (2010) (*codified as amended* at 42 U.S.C. § 18022(b)(1) (2012)).

265. Centers for Medicare & Medicaid Services, *The Affordable Care Act & Medicare*, MEDICARE.GOV, https://www.medicare.gov/about-us/affordable-care-act/medicare-and-the-marketplace.html (last visited Apr. 3, 2018) (changes to Medicare); Centers for Medicare & Medicaid Services, *Affordable Care Act*, MEDICAID.GOV, https://www.medicaid.gov/affordable-care-act/index.html (last Apr. 3, 2018) (changes to Medicaid); Hermer, *supra* note 11, at 70–71, 72–87 (same).

266. LaPierre & Hughes, *supra* note 9, at 209–11.

267. 42 U.S.C. §§ 301 et. seq. (2012); POO & CONRAD, *supra* note 5, at 179–80; LaPierre & Hughes, *supra* note 9, at 210–11; *see also* Social Security Administration, *Retirement Information For Medicare Beneficiaries*, Publication No. 05-10529 (2015), https://www.ssa.gov/pubs/EN-05-10529.pdf (explaining differing benefits-levels).

268. POO & CONRAD, *supra* note 5, at 180–81; LaPierre & Hughes, *supra* note 9, at 210.

269. POO & CONRAD, *supra* note 5, at 36–41; Joel C. Dobris, *Divestment of Assets to Qualify for Medicaid: Artificial Pauperization to Qualify for Nursing Home and Home Care*, *in* AN AGING WORLD, *supra* note 77, at 791–97; Harkness, *supra* note 14, at 334–36.

270. *See, e.g.*, Mary Jo Gibson, *Public Health and Social Policy*, *in* FAMILY SUPPORT FOR THE ELDERLY: THE INTERNATIONAL EXPERIENCE, *supra* note 65, at 105.

271. Pynoos et al., *supra* note 12, at 84–85.

care.[272] Medicaid provides limited coverage for long-term care and homecare services for indigent elderly,[273] but this benefits only a small subset of the population.[274] Moreover, because states partially fund Medicaid and retain administrative control over what programs they participate in, coverage for home- and community-based services varies from state to state.[275] To qualify for Medicaid on the front-end, individuals must meet strict low-income eligibility requirements.[276] Once an individual receives Medicaid funding, restrictive conditions limit the amount and type of home-healthcare services covered.[277] Often lack of coverage for supportive homecare services turns on the *presence* of a family caregiver.[278] And after an individual meets all of these restrictive conditions, it is still possible she will not receive services or funding.[279]

Additionally, the tax system does not add any incentives for familial and communal eldercare. Currently, adult children cannot deduct expenses incurred from supporting their parents unless the support is so great that the elder parents qualify as dependents,[280] which is an unlikely scenario.[281] Supplemental long-term-care insurance policies purchased by the elderly or their families can provide tax-free benefits to cover supportive services, but to qualify for preferential tax treatment an elderly

272. HIEDA, *supra* note 5, at 153–54. It also pays for homecare services required for short-term recovery after surgery. Kapp, *supra* note 2, at 13.

273. *See generally* Hermer, *supra* note 11.

274. HIEDA, *supra* note 5, at 151.

275. Kapp, *supra* note 2, at 28–29; Watson, *supra* note 24, at 967.

276. HIEDA, *supra* note 5, at 151; Hermer, *supra* note 11, at 74.

277. HIEDA, *supra* note 5, at 151; Hermer, *supra* note 11, at 79–80.

278. *See, e.g.*, Gibson, *supra* note 270, at 105.

279. For example, in many states, administrative sloth and ineptitude has resulted in long waiting lists for home- and community-based services. *See* Watson, *supra* note 24, at 939, 967.

280. 26 U.S.C. §§ 152, 213, 7702B(c)(1)(B) (2012). However, private employers can offer access to dependent-care benefit plans, which can provide a tax break and possibly a reduction in an employee's share of social security taxes. *See* Andrew Lafond et al., *Practical Tax Strategies: The Tax Implications of Long-Term Care Insurance*, PRACTICAL TAX STRATEGIES, 2015 WL 6561903, at *5 (2015); Narayanan, *supra* note 35, at 397.

281. An elderly person does not qualify as a dependent if she earns small amounts of income or the adult child provides less than half of the elderly person's support. *See* IRS, *Personal Exemptions and Dependents*, IRS.GOV, https://www.irs.gov/publications/p17/ch03.html (last visited Apr. 3, 2018).

person has to be chronically ill.[282] Even then, deductions are limited.[283] Moreover, as the elderly age and accrue more health problems they "face higher premiums and an increased possibility of being denied coverage."[284] Current tax policy has not significantly stimulated the purchase of long-term-care insurance policies.[285]

Overall, the American eldercare system inspires little motivation—among elders or their families—to invest in preventative eldercare or familial and communal eldercare.[286] Unsurprisingly, elders and their families often opt for government funding of more costly institutional care.[287] Initially choosing institutional care undermines future opportunities for familial and communal eldercare.[288] More elders have to exhaust assets and

282. 26 U.S.C. § 7702B(c) (2012); *see also* Christopher R. Dang et al., *Planning Ahead: Practical Financial and Estate Planning Considerations*, 18 HAW. B.J. 4, 8–9 (2014); Joshua M. Wiener et al., *Federal and State Initiatives to Jump Start the Market for Private Long-Term Care Insurance*, 8 ELDER L.J. 57, 63–64 (2000).

283. 26 U.S.C. § 213(d)(10)–(11); *see also* Dang et al., *supra* note 282, at 8–9. Likewise, lack of coverage for preexisting conditions, policy limits, and policy exclusions limit these programs' effectiveness. AARP Education & Outreach, *Understanding Long-Term Care Insurance*, AARP (last updated May 2016), http://www.aarp.org/health/health-insurance/info-06-2012/understanding-long-term-care-insurance.html; Leslie Scism, *Long-Term-Care Insurance: Is It Worth It?* WALL ST. J. (May 1, 2015), http://www.wsj.com/articles/long-term-care-insurance-is-it-worth-it-1430488733; U.S. Department of Health and Human Services, *What Is Long-Term Care Insurance*, LONGTERMCARE.GOV, http://longtermcare.gov/costs-how-to-pay/what-is-long-term-care-insurance (last visited Apr. 3, 2018).

284. Lawrence A. Frolik, *Private Long-Term Care Insurance: Not the Solution to the High Cost of Long-Term Care for the Elderly*, 23 ELDER L.J. 371, 394–95 (2016); Wiener et al., *supra* note 282, at 60; Marylene LaPonsie, *Why No One Can Afford Long-Term Care Insurance (And What to Use Instead)*, U.S. NEWS (Mar. 10, 2016), http://money.usnews.com/money/personal-finance/articles/2016-03-10/why-no-one-can-afford-long-term-care-insurance-and-what-to-use-instead.

285. HIEDA, *supra* note 5, at 176; Frolik, *supra* note 284, at 394–95; Wiener et al., *supra* note 282, at 59–60.

286. HIEDA, *supra* note 5, at 153; Sketchley & McMillan, *supra* note 34, at 158.

287. POO & CONRAD, *supra* note 5, at 31–32, 36–37; Sketchley & McMillan, *supra* note 34, at 158.

288. Another interesting side effect of this policy is that as government funds flow to institutional care, the number of institutional-care facilities increases. *See* Watson, *supra* note 24, at 952–53. This growth may affect both personal and government preferences towards institutional-care policy. *Id.* at 960, 968; *see also supra* Part III.A.2.

sell their houses to meet remaining institutional-care costs.[289] Once elders are institutionalized and out of assets, they become eligible for increased government funding through Medicaid and other benefits programs to cover remaining costs.[290]

This is extremely costly for American taxpayers. Almost half of Medicaid's budget goes to nursing homes.[291] Around 70 percent of Medicare's budget goes to reactive care such as visits to the emergency room and hospital stays.[292] In many cases, home- and community-based services could replace these institutional services and minimize future health issues for less than one third of these costs.[293]

In the end, government ends up shouldering greater eldercare costs by foreclosing initial opportunities for familial and communal care. "With a lower proportion of elderly than many other nations, the U.S. spends more on health care by any measure than any other country and the gap is substantial."[294] Worst of all, these high expenditures still translate to poor eldercare-health outcomes compared to other countries.[295]

2. Possible Reform

Ignoring problems as the elderly population grows is itself a policy choice; the government can continue with business as usual, and assume greater institutional-care costs later.[296] Or, the government can rally around more proactive eldercare policies. Looking at these as new costs ignores the reality that "Medicaid is a de facto public long-term care program in the United States."[297] If the government wants to encourage familial and

289. Michael A. Stegman et al., *Home Ownership and Family Wealth in the United States*, *in* HOUSING AND FAMILY WEALTH: COMPARATIVE INTERNATIONAL PERSPECTIVES, *supra* note 213, at 106.

290. HIEDA, *supra* note 5, at 153.

291. *See* POO & CONRAD, *supra* note 5, at 31–32 (noting 2010 figures); *see also* Haeg, *supra* note 18, at 241.

292. POO & CONRAD, *supra* note 5, at 39.

293. Depending on the elderly's chronic health issues and disabilities. *See supra* Part I; Haeg, *supra* note 18, at 241 ("[For a home service provider] visit[ing] a client three times a week for four hours a day . . . the annual cost is $10,944, compared to a national average of $87,000 for a private nursing home bed. AARP estimates that on average 'Medicaid dollars can support nearly three older people and adults with physical disabilities in home and community-based settings for every person in a nursing facility.'" (citation omitted)).

294. Crystal & Siegel, *supra* note 3, at 607; *id.* at 621–22.

295. *See id.* at 627.

296. HIEDA, *supra* note 5, at 140, 156.

297. *Id.* at 153.

communal care, it must remove funding impediments to home- and community-based services—both government-benefits restrictions and structures depressing private spending. Relatedly, the government should get rid of provisions that revoke or reduce benefits based on the presence of familial care.

One track the United States government could take would be to expand eldercare benefits and programs. For example, some states have eldercare programs that cover long-term-care costs, and other states invest in "care commissions" that study and develop state-level solutions to eldercare problems.[298]

Another less costly option would be to reroute government funds to existing programs that facilitate familial and communal care. Rerouting funds will have less of an immediately discernible impact because severely disabled elderly still require institutional care.[299] But in the long term, using these funds for home- and community-based services can reduce institutional-care costs by prolonging the time before elderly need to enter institutional care.[300] Both the federal government and state governments already have existing programs aimed at rerouting government funds from institutional care to familial and communal care.[301]

At the federal level, the Older Americans Act[302] and similar programs provide home- and community-based services to elders, although funding is limited.[303] Other federal programs indirectly affect the provision of home- and community-based care. For instance, the U.S. Department of Housing and Urban Development grants federal funds to states and localities, which in turn fund affordable housing opportunities through grants or loans.[304] Some of these funds go to projects like ECHOs (elder

298. POO & CONRAD, *supra* note 5, at 149–50.

299. HIEDA, *supra* note 5, at 155.

300. *Id.* at 153–54 (noting that as states have expanded their use of Medicaid funding for these types of services, institutional-care spending has been reduced); Polivka, *supra* note 39, at 92.

301. Feinberg et al., *supra* note 25, at 12–13; Kapp, *supra* note 2, at 15.

302. 42 U.S.C. §§ 3001 et. seq. (2012).

303. Kapp, *supra* note 2, at 13; POO & CONRAD, *supra* note 5, at 186–87 (explaining the services created as a result of the Older Americans Act). Although these services are not based on income, the program has limited funding and it is "intended primarily for low-income, frail seniors over age sixty and seniors living in rural areas." *Id.* at 186; *see also* HIEDA, *supra* note 5, at 151, 154 (describing other similar programs); Harkness, *supra* note 14, at 343 (same).

304. U.S. Department of Housing and Urban Development, *HOME Investment Partnership Program*, HUD.GOV, http://portal.hud.gov/hudportal/

cottage housing opportunity units)—small, freestanding, and removable units that can be used to house elderly parents on a child's property.[305]

At the state level, recent efforts have been even more successful at rerouting public funds away from institutional care and towards home- and community-based care.[306] The Affordable Care Act greatly expanded options for states wishing to increase funding of home- and community-based services.[307] Some states are experimenting with programs that utilize Medicare and Medicaid funds for integrated care and preventative health service programs, such as the Program of All-Inclusive Care for the Elderly (PACE).[308] Fifteen states implement a Medicaid program called "Cash & Counseling" focused on individualized care plans similar to Japan's model.[309] Other state programs fund residential settings such as congregate or communal housing that function as an alternative between in-home care and institutional care.[310]

Both federal and state policy should consider expanding these and other existing programs.[311] Initial studies show that these programs—and other related programs[312]—facilitate familial and communal eldercare, save government resources, and

HUD?src=/program_offices/comm_planning/affordablehousing/programs/home (last visited Apr. 3, 2018).

305. 24 C.F.R. § 92.258 (2016); Narayanan, *supra* note 35, at 398; John M. Kerekes, Note, *The Housing and Community Development Act of 1992: Affordable Housing Initiatives May Have Found A Home*, 18 SETON HALL LEGIS. J. 683, 721 & n.190 (1994).

306. Kapp, *supra* note 2, at 31.

307. *Id.* at 22–26.

308. HIEDA, *supra* note 5, at 153–54; POO & CONRAD, *supra* note 5, at 157–58; *see also* Polivka, *supra* note 39, at 99–103 (noting other government-funded community-based programs).

309. Hermer, *supra* note 11, at 71–72; Sandra L. Hughes & Charles P. Sabatino, *Addressing Liability Issues in Consumer-Directed Personal Assistance Services (Cdpas): The National Cash and Counseling Demonstration*, 35 STETSON L. REV. 251, 257–59 (2005); National Resource Center for Participant-Directed Services, *Cash & Counseling*, BOS. COLL., http://www.bc.edu/schools/gssw/nrcpds/cash_and_counseling.html (last visited Apr. 3, 2018).

310. Pynoos et al., *supra* note 12, at 100–01.

311. *See* HIEDA, *supra* note 5, at 152, 154–55 (describing what home and community-based services Medicaid already allows states to provide). The federal government could assume greater responsibility for coordinating and administering these services if uniformity is desired. *See* Hermer, *supra* note 11, at 83–85.

312. *See* Hermer, *supra* note 11, at 72–77.

lead to an improved quality of life for the elderly and their caregivers.[313] Likewise, Japan's experience demonstrates that provider diversity will increase and prices will go down if government benefits can flow to home- and community-based services on a larger scale.[314] As these programs proliferate, the percentage of elderly in institutional care, and the concomitant cost of institutional care, will continue to decline.[315] Thus, these efforts can lower the cost of governmental eldercare overall.[316]

However, Japan's experience suggests that broadening the availability of public funding for home- and community-based services will only increase eldercare costs if the government fails to alter incentives around eldercare in the private sector.[317] Existing structural biases towards institutional care must be addressed alongside with other reform efforts.[318]

To shift private-spending norms, the United States should consider implementing modest changes to its tax code to encourage preventative eldercare and familial and communal eldercare. It is true that eldercare policymakers have faced some of the most significant political hurdles in tax-reform attempts.[319] Nevertheless, increasing deductions, exemptions, and benefits for eldercare can reverse some of the structural biases favoring institutional care, and net governmenal eldercare savings.

For example, easing the qualifications for long-term-care insurance deductions could increase the likelihood that more people will purchase policies or purchase them earlier.[320] More policyholders would likewise decrease the costs and availability of these policies.[321]

Additionally, arousing private-employer interest in facilitating familial and communal care represents another reform opportunity. The number of American companies delivering paid

313. POO & CONRAD, *supra* note 5, at 158–59; Hermer, *supra* note 11, at 70–72; National Resource Center, *supra* note 309; Polivka, *supra* note 39, at 81–83, 85.

314. CURRY ET AL., *supra* note 191, at 33–34.

315. Kapp, *supra* note 2, at 15–16; *see also* Part I.

316. *See* HIEDA, *supra* note 5, at 168.

317. OLIVARES-TIRADO & TAMIYA, *supra* note 6, at 134–35; *see also* Crystal & Siegel, *supra* note 3, at 615 (detailing structural reforms that would more effectively constrain costs).

318. Polivka, *supra* note 39, at 87.

319. *See* HIEDA, *supra* note 5, at 176–77 (noting the efforts by past politicians that have failed).

320. *See supra* notes 282–285.

321. Wiener, Tilly, & Goldenson, *supra* note 282, at 61.

time off for caregiving, eldercare services, or other eldercare benefits continues to grow steadily.[322] Increasing tax incentives for companies to provide these services and benefits could further increase their prevalence.[323]

But these programs are most common among higher-paid jobs.[324] In a similar vein, personal tax deductions will not influence behavior for lower-income workers who already pay very little taxes. The governmental eldercare framework should account for behavior of lower-income workers and employers as well. This is especially important since lower-income workers will be more likely to need government financial assistance during their elder years, and are more likely to rely on familial eldercare.[325]

Increased regulation and enforcement of employment discrimination might aid this effort.[326] Informal caregivers who take time off or have less flexible schedules often experience serious and illegal retaliations from their employers, such as dismissals or demotions.[327] Ramped-up enforcement efforts could alleviate these problems for some informal caregivers, but it would require widespread coordination, increased investigatory and prosecutorial resources, and publicized outcomes to deter future conduct.

Moreover, even complete evisceration of workplace discrimination does not ameliorate the financial burden and lost opportunity costs caregivers accrue when foregoing work.[328] Currently, the Family Medical Leave Act allows employees to take

322. *See supra* Part I; Narayanan, *supra* note 35, at 399–402.

323. Harkness, *supra* note 14, at 341; Kimberly Palmer, *The Cost of Caring for Aging Parents*, U.S. NEWS (Aug. 27, 2014), http://money.usnews.com/money/personal-finance/articles/2014/08/27/the-cost-of-caring-for-aging-parents?page=2.

324. MILKMAN & APPELBAUM, *supra* note 37, at 7–9; POO & CONRAD, *supra* note 5, at 65.

325. *See, e.g.*, Feinberg et al., *supra* note 25, at 15–16 (giving policy recommendations).

326. Harkness, *supra* note 14, at 342; *see also* Joan C. Williams et al., *Protecting Family Caregivers from Employment Discrimination*, AARP PUB. POL'Y INST. 3–4 (Aug. 2012), https://www.aarp.org/content/dam/aarp/research/public_policy_institute/health/protecting-caregivers-employment-discrimination-insight-AARP-ppi-ltc.pdf (detailing the negative treatment employees who are caring for elderly family members may face).

327. GORNICK & MEYERS, *supra* note 50, at 148–49.

328. *See* Kapp, *supra* note 2, at 31.

up to 12 weeks of unpaid leave to care for an ill elderly parent.[329] At best, the FMLA solves short-term eldercare problems, but the allowed time period cannot aid longer-term eldercare.[330] Furthermore, the absence of pay renders this a meaningless option for many employees.[331] Currently, "[o]nly three states, California, New Jersey, and Rhode Island, offer paid family and medical leave."[332] Whether executed at the national or state level, devising new paid-leave programs would likely require additional payroll taxes for funding.[333] Attempts to enlarge the scope of FMLA, add paid leave, and other similar legislative reforms have not been successful.[334] American attitudes towards tax hikes and workplace regulation limit the feasibility of these reforms.[335]

With or without workplace regulation reform, government should consider shuffling funds to more informal eldercare frameworks that harness the power of community.[336] For instance, Japanese communities have community-based programs

329. 29 U.S.C. § 2612(a) (2012). State employees cannot sue the states for violation of the FMLA. Coleman v. Court of Appeals of Md. 132 S. Ct. 1327, 1338 (2012).

330. Harkness, *supra* note 14, at 340; *see also* Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 35 (2007) (noting the FMLA's strict time limits).

331. Donna R. Lenhoff Sylvia, *Family and Medical Leave Legislation in the States: Toward A Comprehensive Approach*, 26 HARV. J. ON LEGIS. 403, 439 (1989).

332. National Conference of State Legislatures, *State Family and Medical Leave Laws*, NCSL (Dec. 31, 2014), http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx. Although New York recently passed a law requiring 12 weeks of paid time off for familial care, it will not be implemented until 2018. *See* Amanda Wills, *New York Just Passed the Nation's Most Radical Paid Family Leave Policy*, MASHABLE (Apr. 1, 2016), http://www.mashable.com/2016/04/01/new-york-paid-family-leave-policy.

333. National Conference of State Legislatures, *supra* note 332; *see also* MILKMAN & APPELBAUM, *supra* note 37, at 114–17 (outlining a policy proposal for a national paid-leave program).

334. *Cf.* MILKMAN & APPELBAUM, *supra* note 37, at 18 (noting state- and city-paid family-leave programs); Feinberg et al., *supra* note 25, at 13 (noting state-paid family-leave programs).

335. *See* Maxine Eichner, *Families, Human Dignity, and State Support for Caretaking: Why the United States' Failure to Ameliorate the Work-Family Conflict Is A Dereliction of the Government's Basic Responsibilities*, 88 N.C. L. REV. 1593, 1595 (2010).

336. POO & CONRAD, *supra* note 5, at 132–39; Pei & Tang, *supra* note 87, at 72–75 (noting that Chinese-eldercare support is greater in places with grassroots-community organizations).

that crowd-source eldercare without requiring financial transfers.[337] These "caregiving time banks" pay volunteers who provide care for elders in an "electronic time dollar"—the *Fureai Kippu*.[338] Different tasks receive different time values based on the skill required, the task's difficulty, and what time of day the caregiver performs the task.[339] This currency can then be used by the individual later to pay for his own care, or transferred to a family member's account (often one who lives too far away for family members to provide care personally).[340] In some systems, cash plays a role: to purchase care for elderly without electronic currency saved, or to compensate volunteers who prefer cash to the time-credit.[341] Despite expansion in earlier years, LTCI curbed widespread use of the system in Japan since almost all elderly could obtain home- and community-based services through government aid.[342] Ironically, America's disregard for subsidizing home- and community-based eldercare perhaps has a silver lining. In the United States, these systems could be constructed alongside other government reforms in order to prevent the presence of one program from dominating another.[343]

To be clear, programs like this should not be viewed as "a universal panacea, but should be seen as a valuable and necessary adjunct to other forms of care."[344] Caregiving volunteers

337. *See, e.g.*, POO & CONRAD, *supra* note 5, at 135–37 (describing caregiving banks).

338. POO & CONRAD, *supra* note 5, at 135; *see also* Saito, *supra* note 187, at 118–21 (describing similar programs). China has a limited *fureai kippu* program. *See* J.K. GIBSON-GRAHAM, JENNY CAMERON, & STEPHEN HEALY, TAKE BACK THE ECONOMY: AN ETHICAL GUIDE FOR TRANSFORMING OUR COMMUNITIES 107 (2013).

339. GWENDOLYN HALLSMITH & BERNARD LIETAER, CREATING WEALTH: GROWING LOCAL ECONOMIES WITH LOCAL CURRENCIES 140–41 (2011); GIBSON-GRAHAM, CAMERON, & HEALY, *supra* note 338, at 107.

340. J.K. GIBSON-GRAHAM, CAMERON, & HEALY, *supra* note 338, at 107; POO & CONRAD, *supra* note 5, at 135–36; Mayumi Hayashi, *Japan's Fureai Kippu Time-Banking in Elderly Care: Origins, Development, Challenges and Impact*, INT'L J. COMMUNITY CURRENCY RES. 30, 39–40 (2012).

341. *See, e.g.*, Hayashi, *supra* note 340, at 37–38 (describing various structures).

342. *Id.* at 36–37, 41.

343. Variations on the *fureai kippu* system already exist at the local level in the United States. *See, e.g.*, HALLSMITH & LIETAER, *supra* note 339, at 139 (Montpelier, Vermont).

344. POO & CONRAD, *supra* note 5, at 135–37; Hayashi, *supra* note 340, at 42; *see also* Pei & Tang, *supra* note 87, at 79 ("If this evidence from community organized efforts in rural China can offer any suggestions for policy development for old age provision in developing countries, it is that they can form a relatively effective and supplemental approach to government action.").

would not have the skills, resources, or credentials to perform institutional-care services,[345] but they could palliate many problems associated with providing home- and community-based eldercare. Governmental funding commitments would be low and would generate significant long-term benefits. Some initial funding for construction, maintenance, and execution of these programs might be necessary. Government funds may have to go to overseeing these programs to prevent elder abuse, but that regulatory need is present for any type of eldercare.[346] These costs would be small compared to savings and benefits.[347]

Government will have less of a need to subsidize home- and community-based services as these caregiving economies begin to thrive.[348] Additionally, short-term institutional-care needs recede when these programs enter communities.[349] Thus, these programs function as a lower-cost alternative for eldercare compared with other traditional pay-per-service or institutional models.[350] Entering these programs into the market as a competitor could also drive market prices for pay-per-service models down.[351] Relatedly, most recipients of care through these programs report higher satisfaction when compared to similar eldercare services.[352] Giving individuals some autonomy in choosing between these models could result in the desired improvements in quality and cost.[353]

Studies indicate that replacing current familial caregivers with paid unskilled care would result in a net economic gain,[354] as working-age familial caregivers can return to work or work

345. *See* Cheung & Kwan, *supra* note 16, at 127 (noting that informal elder care "may be ineffective due to a lack of professional skill" (citation omitted); Hermer, *supra* note 11, at 85–86 (noting eldercare services that required specialized skills, training, or licenses).

346. *See* Pridmore, *supra* note 25, at 119 (noting concerns for other eldercare services).

347. *See* BERNARD LIETAER & JACQUI DUNNE, RETHINKING MONEY: HOW NEW CURRENCIES TURN SCARCITY INTO PROSPERITY 168 (2013); *see also* Polivka, *supra* note 39, at 80 (noting the cost-effectiveness of existing home- and community-based services).

348. *See* Feinberg et al., *supra* note 25, at 15 (giving policy recommendations); Hermer, *supra* note 11, at 87–88 (recommending changes to FMLA or federal payments to caregivers).

349. LIETAER & DUNNE, *supra* note 347, at 168.

350. Hayashi, *supra* note 340, at 41.

351. *See supra* Part III.A.2.

352. HALLSMITH & LIETAER, *supra* note 339, at 141; LIETAER & DUNNE, *supra* note 347, at 168.

353. Fukawa, *supra* note 196, at 205.

354. Chari et al., *supra* note 7, at 879.

more hours. Individuals can volunteer when they are not working, converting the credit into numerous benefits,[355] including the provision of care for an elder parent when the primary caregiver is at work. The ability for the credit to travel geographically ensures a source of eldercare without relocating children or their elderly parents. Turning the credit into cash generates a much-needed source of income for unemployed or underemployed caregivers.[356]

Furthermore, government financial assistance can satisfy other needs as more individuals take advantage of these caregiving banks and save credits for later use. In short, government programs and familial care will both be more effective if combined with community support.[357]

CONCLUSION

The proposals included herein are illustrative, not exhaustive. National factors merit attention, but the countries surveyed share many of the same concerns and considerations in developing comprehensive eldercare policy. No reform operates in a vacuum. The lessons of China and Japan illustrate this principle well. Each action taken by their respective governments since the middle of twentieth century continues to have far-reaching ramifications today. Well-intentioned reforms can quickly fall flat or prove counterproductive if policymakers ignore structural biases in private or public spheres. Incentivizing and strengthening familial and communal eldercare could meet the challenges of future eldercare obstacles, but achieving this end requires careful balancing acts.

355. The system could also take advantage of the fact that retired elderly often volunteer and provide informal caregiving already. LaPierre & Hughes, *supra* note 9, at 222, 224.

356. *See* HALLSMITH & LIETAER, *supra* note 339, at 214.

357. POO & CONRAD, *supra* note 5, at 138–39; Pei & Tang, *supra* note 87, at 75 ("[E]vidence has been found that integration of community old age provision with state and local government efforts [in China] appears to be effective in meeting the needs of the rural aged").