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## The Perfect Storm: Coronavirus and The Elder Catch

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# The Perfect Storm: Coronavirus and the Elder Catch

Jessica Dixon Weaver\*

*The global COVID-19 pandemic has exacerbated an already growing phenomenon: the Elder Catch. This term defines the caregiving dilemma faced by adults who are simultaneously working, caring for elder parents or relatives, and in some cases, raising children at the same time. Few scholars have explored how the state uses the traditional family framework to resist providing comprehensive government support for elder care. Women typically bear the brunt of caregiving costs within the family and become physically and mentally vulnerable in the process. COVID-19 has pushed women caught in the Elder Catch to the brink while sheltering at home, and has illuminated the disparities between genders regarding the high level of expectation society places on the availability of unpaid family caregiving. The coronavirus has also highlighted racial inequities for African American and Latinx families where female caregivers are more likely to be essential workers forced to work outside the home, and therefore more likely to contract and spread the virus within their family and surrounding communities. This Article uses vulnerability theory to address the caregiving void that American women are facing. By introducing a new term, resistant assets, within the taxonomy of vulnerability theory, this Article introduces a diagnostic tool for scholars and policy makers to analyze why it is so difficult to change state and market dependence on unpaid family caregiving and challenge government opposition to expanding social support of the family.*

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*Resistant assets are frameworks used by the state to reinforce the status quo and maintain a posture of legal and social nonintervention. The normative and extended family are resistant assets that prevent a revision of the American Social Contract. This Article fills a gap in family law scholarship by exploring how analysis of resistant assets within vulnerability theory can contribute to the development of a theoretical foundation for legal change to support family caregivers.*

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## I. INTRODUCTION

Prior to the 2020 global novel coronavirus pandemic, many American families were caught in the Elder Catch. This term defines the caregiving dilemma faced by adults who are simultaneously working, tending to the daily needs of elder relatives, and in some cases, raising young children. There are over forty million unpaid caregivers

of adults ages sixty-five and older in the United States.<sup>1</sup> Six-in-ten caregivers are employed, and half of them work full-time.<sup>2</sup> Almost one-quarter of adults ages forty-five to sixty-four care for an aging adult.<sup>3</sup> While there has been a good deal of legal scholarship and policy debate over universal daycare for children, very little attention has been paid to the struggles of adult children caring for their elder parents. This Article uses vulnerability theory to explore the caregiving void that American families are facing.

The Elder Catch best describes the dilemma of families that are dealing with various costs of caregiving for two vulnerable groups within our society, elders and children. The Elder Catch defines two different “catch-22” situations for families. In the first instance, it can mean an adult child who has to choose between continuing to work full time or leaving the workplace, either partially or altogether, to care for aging parents. In the second instance, the Elder Catch is the dilemma of caring for elder relatives *and* children at the same time, either in the same home or between two different locations. As the number of senior citizens ages sixty-five and older is expected to double by 2050, the private family network is being pushed beyond its limitations.

This dilemma unfortunately puts families in a difficult situation. They do not have enough time to provide ongoing, long-term care for their aging parent(s), continue to work full-time, and parent their children.<sup>4</sup> “[N]or do they have enough money to put their children through school, pay for the additional costs of caretaking for their parents, and cover the costs of their life after retirement.”<sup>5</sup> For those adult children who are providing financial support for their aging parents, 30% have enough money left over for basic expenses, and 11% do not have enough money to meet even their basic expenses.<sup>6</sup> The additional family financial obligation of caring for elders increases the

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1. Renee Stepler, *5 Facts About Family Caregivers*, PEW RSCH. CTR. (Nov. 18, 2015), <https://www.pewresearch.org/fact-tank/2015/11/18/5-facts-about-family-caregivers/#:~:text=There%20are%2040.4%20million%20unpaid,the%20Bureau%20of%20Labor%20Statistics> [<https://perma.cc/5BJG-Y87B>].

2. *Id.*

3. *Id.*

4. Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1, 69 (2013).

5. *Id.* at 69-70.

6. KIM PARKER & EILEEN PATTEN, PEW RSCH. CTR., *THE SANDWICH GENERATION: RISING FINANCIAL BURDENS FOR MIDDLE-AGED AMERICANS* 4 (2013), <https://www.pewresearch.org/social-trends/2013/01/30/the-sandwich-generation/> [<https://perma.cc/42W3-7LYE>].

chance that the family will destabilize if disability, unemployment, or catastrophe strikes. Ordinary life circumstances may force working adults navigating the Elder Catch into poverty. For those families who are already poor, there is limited tangible support in the United States for caregivers who fall near or below the outdated poverty line.<sup>7</sup>

COVID-19 exacerbated this growing phenomenon, as nursing homes and assisted living centers became hot spots for the deadly virus, propelling many families to remove their elder family members and bring them into their homes for care.<sup>8</sup> Shelter-in-place orders mandated that schools and nonessential workplaces close their doors, forcing parents who could work from home to monitor their children's online education while tending to the needs of an elder relative.<sup>9</sup> Many essential workers faced the difficult choice of leaving vulnerable elders and children at home alone or in the care of neighbors or other family members willing to look after them.<sup>10</sup>

COVID-19 has also revealed the sharp gender gap between men and women regarding who carries the larger load for caregiving within the home. There were 1.6 million fewer mothers in the workforce in the fall of 2020 than a year prior to the pandemic.<sup>11</sup> "The Covid crisis is a perfect instance of the gendered fallback plan, just on a grander scale than we usually observe."<sup>12</sup> Similar to what studies have shown in the United States about the reduction in female labor force participation when providing significant caregiving to elder relatives,<sup>13</sup>

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7. See LAURA KATZ OLSON, *THE NOT-SO-GOLDEN-YEARS: CAREGIVING, THE FRAIL ELDERLY, AND THE LONG-TERM CARE ESTABLISHMENT* 71 (2003).

8. Sindya Bhanoo, *Pandemic Forces Family Members into New Role: Caregivers for Elderly Loved Ones*, WASH. POST (Mar. 23, 2020), [https://www.washingtonpost.com/lifestyle/wellness/family-caregivers-seniors-coronavirus/2020/03/23/f7b3f9f4-6c99-11ea-a3ec-70d7479d83f0\\_story.html](https://www.washingtonpost.com/lifestyle/wellness/family-caregivers-seniors-coronavirus/2020/03/23/f7b3f9f4-6c99-11ea-a3ec-70d7479d83f0_story.html).

9. Liz O'Donnell, *Balancing Work and Elder Care Through the Coronavirus Crisis*, HARV. BUS. REV. (Mar. 31, 2020), <https://hbr.org/2020/03/balancing-work-and-elder-care-through-the-coronavirus-crisis> [<https://perma.cc/96XJ-XBJR>].

10. Olga Khazan & Adam Harris, *What Are Parents Supposed to Do with Their Kids?*, ATLANTIC (Sept. 3, 2020), <https://www.theatlantic.com/politics/archive/2020/09/limited-child-care-options-essential-workers/615931/>.

11. Claire Cain Miller, *When Schools Closed, Americans Turned to Their Usual Backup Plan: Mothers*, N.Y. TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/upshot/schools-closing-mothers-leaving-jobs.html?action=click&module=News&pgtype=Homepage>.

12. *Id.*

13. Meredith B. Lilly et al., *Labor Market Work and Home Care's Unpaid Caregivers: A Systematic Review of Labor Force Participation Rates, Predictors of Labor Market Withdrawal, and Hours of Work*, 85 MILBANK Q., 641, 663 (2007) (noting that women reduced

the sheer number of women who stepped in to manage remote schooling as well as childcare reiterates a basic fact, “[o]ther countries have social safety nets; the U.S. has women.”<sup>14</sup>

Seventy percent of women today work and take care of families,<sup>15</sup> and many of the laws integral to daily life continue to marginalize the value of caregiving, even as the number of aging citizens in need of care increases. Scholars have extensively explored gender division in caretaking to create legal, social, and political changes to achieve equality for women.<sup>16</sup> Much of caregiving is arranged through gendered social expectations and exclusion of care work from the business market.<sup>17</sup> Few scholars have explored how the state uses the traditional family framework to resist providing comprehensive government support for elder care.

This Article is the first article to use the COVID-19 pandemic to explicate the deep socio-legal chasms in America’s Social Contract regarding intergenerational caregiving.<sup>18</sup> While the state has always

their labor force participation when they provided ten or more hours of caregiving, and left the workforce if caregiving reached twenty hours or more).

14. Miller, *supra* note 11 (quoting Ann Helen Petersen, “*Other Countries Have Social Safety Nets. The U.S. Has Women.*,” *CULTURE STUD.* (Nov. 11, 2020), <https://annehelen.substack.com/p/other-countries-have-social-safety>).

15. Usha Ranji & Alina Salganicoff, *Data Note: Balancing on Shaky Ground: Women, Work and Family Health*, HENRY J. KAISER FAM. FOUND. (Oct. 20, 2014), <http://kff.org/womens-health-policy/issue-brief/data-note-balancing-on-shaky-ground-women-work-and-family-health/> [<https://perma.cc/A82D-N5MK>].

16. See generally JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) (noting the pressures on caregivers in a market society); MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* (2000) (discussing the effects that the division of labor in the household has on society); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) (exploring the state’s imposition of responsibility on the family, and particularly on women); MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* (2010) (exploring the state’s obligation to support female family caregivers); JOANNA L. GROSSMAN, *NINE TO FIVE: HOW GENDER, SEX, AND SEXUALITY CONTINUE TO DEFINE THE AMERICAN WORKPLACE* (2016) (noting that some businesses and organizations have an economic interest in achieving workplace equity).

17. See generally NANCY FOLBRE, *VALUING CHILDREN: RETHINKING THE ECONOMICS OF THE FAMILY* (2008) [hereinafter FOLBRE, *VALUING*] (discussing how traditional economics does not consider the household to be a production unit); OLSON, *supra* note 7 (noting how government policies have led to greater burdens on women and the household); COLETTE V. BROWNE, *WOMEN, FEMINISM, AND AGING* (1998) (examining how society and policy influence caregiving); NANCY FOLBRE, *WHO PAYS FOR THE KIDS? GENDER AND THE STRUCTURES OF CONSTRAINT* (1994) [hereinafter FOLBRE, *WHO PAYS*] (investigating how politics and the economy contribute to the sexual division of labor).

18. Josh Freedman & Michael Lind, *The Past and Future of America’s Social Contract*, *ATLANTIC* (Dec. 19, 2013), <https://www.theatlantic.com/business/archive/2013/12/the-past-and-future-of-americas-social-contract/282511/> [<https://perma.cc/EJH7-P2BN>]

expected that the traditional family framework would care for vulnerable members, the conflation of work, caregiving demands, and financial limitations threaten to upend the normative status quo of private family care. This Article expands the discussion about caregiving by analyzing the Elder Catch within vulnerability theory, and presents new terminology with which to examine the government response to this caregiving crisis.

Vulnerability theory defines the concept that human fragility creates dependency and a moral obligation to help those in need or at risk of harm. Because humans are bound to be vulnerable to injury at some point in the course of life, the state is responsible for assisting people when families cannot materially provide for one another. The existence of our system of governance is therefore justified by the fact that the institutions created by it are for the purpose of constructing a just society.<sup>19</sup> This Article fills a gap in the legal literature by critiquing the paradigm within vulnerability theory that there is a responsive state motivated to prevent harm to the human or vulnerable subject. This critique is illuminated by the introduction of a new term within the taxonomy of vulnerability theory, resistant assets, which are frameworks or social constructs used by the state to reinforce the status quo and maintain a posture of nonintervention.

Unpaid family caregiving is a resistant asset relied upon by the state, and research shows that female caregivers are made vulnerable by their sacrifices. Caregivers suffer from both physical and mental health conditions, including fatigue, hypertension, depression, anxiety, and chronic stress.<sup>20</sup> COVID-19 has again exposed the stress fractures for women caregivers caught in the Elder Catch.<sup>21</sup> Resistant assets are

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(noting that the modern social contract in America began with the New Deal Era of the 1930s after the Great Depression and continued in the 1970s when President Lyndon B. Johnson introduced the concept of the “Great Society.”). Both were premised on provision of higher wages, worker benefits, and government regulation of businesses. *Id.*

19. Martha Fineman, *Universality, Vulnerability, and Collective Responsibility*, 16 *LES ATELIERS DE L'ETHIQUE/THE ETHICS FORUM* (forthcoming 2021) [hereinafter Fineman, *Universality*] [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3869039](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3869039).

20. Richard Schulz & Paula R. Sherwood, *Physical and Mental Health Effects of Family Caregiving*, *AM. J. NURSING*, Sept. 2008, at 23, 23.

21. Shefali Luthra, *For Family Caregivers, COVID-19 is a Mental Health Crisis in the Making*, *USA TODAY* (Oct. 20, 2020, 12:48 PM), <https://www.usatoday.com/story/news/politics/elections/2020/10/17/family-caregivers-struggle-added-mental-stress-covid-19/5953020002/>; see generally UNIV. OF PITT., EFFECTS OF COVID-19 ON FAMILY CAREGIVERS: A COMMUNITY SURVEY FROM THE UNIVERSITY OF PITTSBURGH (July 2020), [https://ucsur.pitt.edu/files/center/covid19\\_cg/COVID19\\_Full\\_Report\\_Final.pdf](https://ucsur.pitt.edu/files/center/covid19_cg/COVID19_Full_Report_Final.pdf) (analyzing a study of the behavioral, financial, and health impacts on caregivers due to the pandemic).

useful as a diagnostic tool for scholars to analyze why it is so difficult to change economic dependence on family behavior and government resistance to expansion of social support for the family. Using vulnerability theory as the basis for how society can organize a response to the human condition, this Article provides a theoretical foundation for a new way to envision legal change to support intergenerational caregiving.

This Article proceeds in three parts. Part II provides factual background about the increasing population of aging citizens and its impact on the American family dynamic. It provides a breakdown of the costs of caregiving in terms of time, money, and physical and mental output. Part II also sets forth the role of women as primary caregivers within families, the role of government support of elders, and how intergenerational living assists families in caring for elders. Part II introduces the COVID-19 pandemic and highlights its effect on long-term care facilities, multigenerational homes, and on African American and Latinx families.

Part III examines vulnerability theory by exploring the taxonomy of the concept. It sets forth the relationship between vulnerability and dependency, and defines the terms and types of institutional assets used to explain the relationship of the state, the market, and individuals to vulnerability. In discussing how institutions address inevitable harm within society, it introduces a new term, resistant assets, and examines who controls them and whether the state should alter its reliance on them to improve the situation of caregivers and the people for whom they care. Part III also explores how vulnerability theory has been utilized to analyze care for children and the elderly.

Part IV examines the family as a resistant asset. It reviews the way in which gender affects family economics, highlighting most women's historical place in the private sphere of the home. It also sets forth the assertion that the law and normative social expectations are the driving forces behind why female family members bear the brunt of caretaking within the family. The analysis of various laws and societal mores raise the issue of whether the state is the apparatus that puts everything in motion. Finally, Part IV examines the political aspects of care and the factors that relegate female family members to being unpaid caregivers.

This Article concludes by questioning how the state can be truly responsive to the needs of the family without relying on its resistant assets. It asserts that the state uses the resistant asset of free informal caregiving to avoid expanding the safety net for families, leaving many



single, unmarried, or widowed poor women and their children financially insecure. It argues that the increased need for elder care in the midst of a global pandemic requires more than a proposal for a major social reform plan for family caregiving. A unified approach to intergenerational caregiving requires changes at the institutional level that will be more difficult without a shared concept of interdependency within society.

## II. THE AGING WORLD MEETS CORONAVIRUS

This Part sets forth factual background regarding a rapidly aging population within the context of various changes in the life cycle of humans and the diversity of the country. The effects of aging on the normative family network are discussed with a focus on the costs of caregiving on women, who serve as the primary caregivers in most families. The unexpected development of the coronavirus pandemic in 2020 as an illuminating condition that synthesizes age, gender, race, and class to illustrate the increased exposure to harm and greater vulnerability caused by ageism, structural racism, and a severe lack of government leadership. This Part concludes with a brief overview of the government response to the COVID-19 crisis, highlighting how the state partially expanded the safety net for millions of families while simultaneously allowing the virus to run rampant throughout the country, killing an unprecedented number of elders.

### A. *The Aging Population*

Senior citizens across the globe are living much longer than humans have ever lived, and medical technology continues to enhance their ability to live with many health ailments due to aging.<sup>22</sup> It is projected that by 2050, there will be 3.7 million centenarians (people aged 100 years or older) across the globe.<sup>23</sup> Some refer to this

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22. See generally RONALD J. ANGEL & JACQUELINE L. ANGEL, WHO WILL CARE FOR US?: AGING AND LONG-TERM CARE IN MULTICULTURAL AMERICA 1-2 (1997) (noting the rising rates of populations sixty-five and older in both developing and developed countries); EVELYN NAKANO GLENN, FORCED TO CARE: COERCION AND CAREGIVING IN AMERICA 1 (2010) (noting that “[n]utritional and medical advances have lengthened average life spans so that the fastest-growing segments of the population are the oldest age groups—those in their seventies, eighties, and nineties.”).

23. Renee Stepler, *World's Centenarian Population Projected to Grow Eightfold by 2050*, PEW RSCH. CTR. (Apr. 21, 2016), <http://www.pewresearch.org/fact-tank/2016/04/21/worlds-centenarian-population-projected-to-grow-eightfold-by-2050/> [<https://perma.cc/UC7G-QZRB>].

incredible bulge in aging population as the “silver tsunami.”<sup>24</sup> A recent documentary by the same name highlights the fact that government cuts in science and social services coupled with the decrease in retirement funds, Social Security, and affordable housing will present a human crisis of unprecedented proportions.<sup>25</sup> Critics claim the analogy is a misnomer because the rise in population is well documented and not occurring in a sudden, unexpected way similar to a tsunami.<sup>26</sup> Social scientists and policy makers have been studying and debating this phenomenon since the 1990s.<sup>27</sup> From a social and political standpoint, state and private institutions are aware that the ability to medically care for the elderly and provide for their basic needs may stretch the state welfare network beyond its current capabilities.

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24. Reenita Das, *A Silver Tsunami Invades the Health of Nations*, FORBES (Aug. 11, 2015, 9:48 AM), <http://www.forbes.com/sites/reenitadas/2015/08/11/a-silver-tsunami-invades-the-health-of-nations/#2930d28a4c59> [<https://perma.cc/U2NK-BHCF>]; Lisa Riordan Seville, *Aging Tsunami: As Crisis Grows, a Search for Help*, NBC NEWS (Dec. 21, 2014, 10:10 AM), <http://www.nbcnews.com/health/health-care/aging-tsunami-crisis-grows-search-help-n267106>; Derek Thompson, *Gray Nation: The Very Real Economic Dangers of an Aging America*, ATLANTIC (Mar. 26, 2012), <http://www.theatlantic.com/business/archive/2012/03/gray-nation-the-very-real-economic-dangers-of-an-aging-america/254937/>; Phillip Longman, *Think Again: Global Aging*, FOREIGN POL’Y (Oct. 12, 2010, 12:48 AM), <http://foreignpolicy.com/2010/10/12/think-again-global-aging/> [<https://perma.cc/8UCF-SGMG>].

25. SILVER TSUNAMI (CKH Productions 2014).

26. NPR, “*Silver Tsunami*” and *Other Terms That Can Irk the Over-65 Set* (May 19, 2014, 3:23 AM), <https://www.npr.org/2014/05/19/313133555/silver-tsunami-and-other-terms-that-can-irk-the-over-65-set> [<https://perma.cc/AX29-XJY2>] (noting that “a tsunami is something that strikes without warning and that sucks everything out to sea . . . [i]n fact, the demographic wave [that] we’re looking at is an extremely well-documented phenomenon that is washing gradually across a flood plain. It’s not crashing on some undefended shore without warning”) (quoting Ashton Applewhite); Martha Albertson Fineman & Stu Marvel, *The Right’s Latest Obamacare Lie: Scapegoating America’s Seniors*, SALON (Nov. 7, 2013, 7:45 PM), [https://www.salon.com/2013/11/07/the\\_rights\\_latest\\_obamacare\\_lie\\_scapegoating\\_americas\\_seniors/](https://www.salon.com/2013/11/07/the_rights_latest_obamacare_lie_scapegoating_americas_seniors/) [<https://perma.cc/QP9D-36L9>] (noting that this change in demographics has been moving through the human life cycle for almost the last sixty-five years, and the United States has “had plenty of time to consider the possible implications of the inevitable aging of the baby boomers and respond with appropriate policies before a crisis emerged.”).

27. See generally ANGEL & ANGEL, *supra* note 22 (noting how the over sixty-five population is growing at an unprecedented rate); NAT’L. RSCH. COUNCIL, PREPARING FOR AN AGING WORLD: THE CASE FOR CROSS-NATIONAL RESEARCH (2001) (summarizing the steady rise in the proportion of elderly citizens across cultures and nations); CHALLENGES OF AGING ON U.S. FAMILIES: POLICY AND PRACTICE IMPLICATIONS (Richard K. Caputo, ed., 2005) (exploring the economic and social ramifications of an aging population in the United States); THE NEW POLITICS OF OLD AGE POLICY (Robert B. Hudson, ed., 2005) (examining how the number of older Americans has grown over the past century); JULIA LYNCH, AGE IN THE WELFARE STATE: THE ORIGINS OF SOCIAL SPENDING ON PENSIONERS, WORKERS, AND CHILDREN (2006) (examining the effect and consequences of social welfare programs in twenty industrialized democracies).

An increasing aging population will cause the social order of life to shift in most countries, and issues regarding resource allocation will have to be addressed.

Our traditional conception of the life cycle, with education, marriage, and fertility confined to the early years and retirement occurring in the mid-sixties, will change as individuals routinely pursue two or more careers, have multiple spouses, rear children later in adulthood, and continue working into what are now considered the retirement years.<sup>28</sup>

For seniors, health and quality of life improvements mean that sixty is midlife, and retirement at sixty-five will be less common.<sup>29</sup> The average life span is approaching eighty, and economic necessity will force people to continue working.<sup>30</sup>

As seniors age in unprecedented numbers around the world, the family dynamic in America is also changing.<sup>31</sup> There are an increasing number of multigenerational homes in the United States with as many as three or more generations living in one household.<sup>32</sup> Of the 56.8 million people living in multigenerational homes in 2012, there are almost an equal number of two adult generations living together (48%) as three or more generations living together (47%).<sup>33</sup> A significant change has occurred in the last three decades regarding the number of children living with their grandparents. Since 1980, there has been a 16% increase in the number of grandchildren living with grandparents who are heads of household.<sup>34</sup> Many family law scholars have written about various changes within the family, including the declining rate of marriage, the growth in cohabitation and single-mother households, and it has been noted how these significant changes will affect the care of elderly citizens.<sup>35</sup> However, few legal scholars have studied how the

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28. ANGEL & ANGEL, *supra* note 22, at 4-5.

29. *Id.* at 5.

30. *Id.* at 6.

31. Weaver, *supra* note 4, at 10-12.

32. RICHARD FRY & JEFFREY S. PASSEL, PEW RSCH. CTR., IN POST-RECESSION ERA, YOUNG ADULTS DRIVE CONTINUING RISE IN MULTI-GENERATIONAL LIVING 8, 15 (2014), <http://www.pewsocialtrends.org/files/2014/07/ST-2014-07-17-multigen-households-report.pdf> [<https://perma.cc/H9HP-PMZY>].

33. *Id.* at 15.

34. *Id.* at 13.

35. See generally JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014) (describing how daughters are more likely than sons to provide care to their elderly parents); MARGARET F. BRINIG, FAMILY, LAW, AND COMMUNITY: SUPPORTING THE COVENANT (2010) (arguing that declining rates of marriage in America has changed the makeup of the family structure); CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS (2014) (discussing marriage

increase in the number of elderly family members will influence the caretaking responsibilities of the nuclear family.<sup>36</sup>

Even less has been written about how the demographic changes that have taken place over the last forty-five years among families will inevitably cause the state to bear a much larger responsibility for the care of the elderly.<sup>37</sup> A decline in fertility rates among couples will result in fewer children available to care for elder family members.<sup>38</sup> More young adults are also choosing not to have children, and there is a multitude of reasons why.<sup>39</sup> They boil down to gendered life choices and economic insecurity about the ability to earn enough money to care for children.<sup>40</sup> Women, particularly those who are first-generation college graduates, are delaying parenthood or avoiding it all together because of gender inequality in the workplace, a desire to achieve economic stability, and the expense of child rearing.<sup>41</sup>

While 75% of American adults believe it is the family's responsibility to provide financial assistance to an elderly parent in need, caretaking involves more than just money. A little over one-third of adults provide emotional support or assistance with daily needs for a parent sixty-five years old or older.<sup>42</sup> Who is providing the help to aging parents? Not the government, which accounts for only 3% of assistance via Social Security, Medicare, or other government

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rates, cohabitation rates and single-parent homes); Alicia Brokars Kelly, *Better Equity for Elders: Basing Couples' Economic Relations Law on Sharing and Caring*, 21 TEMP. POL. & CIV. RTS. L. REV. 387 (2012) (examining how modern family law contributes to inequalities in caretaking between genders); ANGEL & ANGEL, *supra* note 22 (noting that the social context of aging has fundamentally changed across America and that new family patterns have important implications for individuals during the later stages of life).

36. See Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 393-98 (2004); Allison K. Hoffman, *Reimagining the Risk of Long-Term Care*, 16 YALE J. HEALTH POL'Y, L., & ETHICS 147, 147 (2016) (noting that the law and social welfare policy have expanded the risk to informal caregivers (who are mostly women, members of communities of color, and individuals who are low-income), which threatens their own long-term security).

37. See ANGEL & ANGEL, *supra* note 22, at 14.

38. NAT'L ACADS. SCIS., ENG'G, MED., FAMILIES CARING FOR AN AGING AMERICA 2 (Richard Schulz & Jill Eden eds., 2016).

39. Claire Cain Miller, *Americans Are Having Fewer Babies. They Told Us Why.*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/upshot/americans-are-having-fewer-babies-they-told-us-why.html>.

40. *Id.*

41. *Id.*; Parker & Patten, *supra* note 6, at 2.

42. Parker & Patten, *supra* note 6, at 17, 22. "[T]hree-in-ten [adult children] say their aging parent or parents need help to handle their affairs or care for themselves . . ." *Id.* at 17. Thirty five percent of adults with a parent age sixty-five years or older say that at least one parent relies on them frequently for emotional support. *Id.* at 22.

programs.<sup>43</sup> Either an adult child (31%) or another relative (39%) provides the majority of the caretaking, and a combination of family and/or paid help accounts for 11% of care provided to elderly parents.<sup>44</sup> Strictly paid help accounts for just 14% of the aging parent caretaking.<sup>45</sup> As the baby boomer generation continues to age and live longer, the strains on the American family will continue to deepen.

For example, Brett and Sara Peterson are in couples' therapy dealing with the strain on their marriage from raising two young kids and caring for Brett's elderly parents.<sup>46</sup> While Sara's fifty-five-year-old parents had plans and funds set aside to reside in an independent living cottage, Brett's mother and father, eighty-eight and ninety-years-old respectively, had no plans for care other than Brett.<sup>47</sup> Sara describes how Brett misses their toddlers' lives while he is dedicated to helping his parents continue to live with declining sight, mobility, and cognitive function.<sup>48</sup> "Our family feels the strain of the push and pull of love and duty and care and family bonds."<sup>49</sup> They represent the one in seven middle-aged adults who are providing financial support to both aging parents and children.<sup>50</sup> By 2020, this number will increase to one in five workers who will be over the age of fifty and managing at once the needs of emerging adult children and elderly parents.<sup>51</sup>

These demographic changes raise the theoretical question of what inhibits the state from increasing its support of intergenerational caregiving to families—especially those who are poor and lower middle class. The Petersons are a financially stable couple whose family has some means to pay for their living expenses and medical

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43. *Id.* at 18.

44. *Id.*

45. *Id.*

46. Sara Petersen, *Caring for Young Children and Elderly Parents, and Wrestling with Resentment*, WASH. POST (Jan. 16, 2018), [https://www.washingtonpost.com/news/parenting/wp/2018/01/16/caring-for-young-children-and-elderly-parents-and-wrestling-with-resentment/?noredirect=on&utm\\_term=.dd2ddf8573ee](https://www.washingtonpost.com/news/parenting/wp/2018/01/16/caring-for-young-children-and-elderly-parents-and-wrestling-with-resentment/?noredirect=on&utm_term=.dd2ddf8573ee).

47. *Id.*

48. *Id.*

49. *Id.*

50. Parker & Patten, *supra* note 6, at 3. The sandwich generation is defined as those who have a living parent age sixty-five and older and are either raising a child under age eighteen or supporting a grown child. *Id.* The majority (71%) of this group is aged forty to fifty-nine. *Id.*

51. THE NAT'L ALL. FOR CAREGIVING (NAC) & AARP, CAREGIVING IN THE U.S. 2020: EXECUTIVE SUMMARY ES-1 (2020), <https://www.aarp.org/content/dam/aarp/ppi/2020/05/executive-summary-caregiving-in-the-united-states.doi.10.26419-2Fppi.00103.003.pdf> [<https://perma.cc/Y3XJ-YXKF>] (noting an increase of 7.6 million U.S. caregivers for recipients ages fifty and older from 2015 to 2020).

care. Older citizens with economic security will be able to take care of their growing care needs. They are easily identifiable as those with good educations, good family connections, family inheritance, good jobs, solid pensions, and fringe benefits. However, families who earn less than \$75,000 per year are more likely to have aging parents who say they need help.<sup>52</sup> Sixty-six percent of the respondents in the National Alliance for Caregiving (NAC) and AARP 2020 survey stated that they had no choice but to provide caregiving to their spouse or partner.<sup>53</sup>

In some instances, elder relatives who survive on Social Security benefits are able to age in place. However, this increases the time that adult children and relatives must spend checking in on their family members to ensure their safety and well-being. Mary Seay, the seventy-three-year-old daughter of Walter Williams, who is ninety-three years old, decided to keep her father in his home in Atlanta.<sup>54</sup> A major part of her decision was that the proceeds from the sale of his home might not last past seven years if he were to move to apartment with subsidized rent. Her father, who had his own lawn care business, survives only on his Social Security payment. Mary's retirement time is spent keeping track of her father's medications, driving him to the doctor, visiting with him for hours, and worrying about his food, blood sugar, and the possibility of him falling.<sup>55</sup> Other families are similarly situated. Michelle North and her brother also pitch in to help take care of their mother, Mary North, who is eighty-five-years-old.<sup>56</sup> Michelle routinely visits her mother after picking up her own grandchildren from school and heading off to work on a night shift. Mary worked as a shampooer at a beauty shop for fifty years, but does not have a pension. In addition to Social Security payments, her children help her pay for groceries and bills so that she can remain in the home she owns.<sup>57</sup>

Intergenerational family care is a mainstay in American society. Even so, the federal government initiated Medicare to ensure the health

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52. Parker & Patten, *supra* note 6, at 17.

53. Richard Eisenberg, *Caregiving in America: The Strain, the Pain, the Emotional Drain*, FORBES (May 14, 2020, 12:14 PM), <https://www.forbes.com/sites/nextavenue/2020/05/14/caregiving-in-america-the-strain-the-pain-the-emotional-drain/?sh=2dc23ec179da>.

54. Christopher Rowland, *Adult Children Pay the Price of Keeping Aging Parents at Home*, WASH. POST (May 11, 2020), <https://www.washingtonpost.com/business/2020/05/11/sandwich-generation-retirement/>.

55. *Id.*

56. *Id.*

57. *Id.*

security of the elderly. It is a health care plan funded largely via payroll taxes of working Americans, and viewed as a federal entitlement program similar to Social Security.<sup>58</sup> Medicaid, which began as a welfare program for poor women and their children, also contributed to elevating many elderly women out of poverty. Both programs began in 1965 as part of President Lyndon Johnson's "Great Society" or "New Deal."<sup>59</sup> Over the last sixty-five years, both programs have evolved and play a big role in the ability of elderly working-class citizens to retire independently. However, the missing piece in the U.S. social insurance program is long-term care, or assistance with basic tasks of daily life, such as bathing, eating, and toileting.<sup>60</sup> As the population bulge of elders rises, it is predictable that more people will need long-term care and will not be able to pay for it. The question remains whether the government will step in to support one of its most vulnerable groups.

### B. *The Costs of Caregiving*

Caregiving costs. It costs in the literal sense of time, resources, physical exertion, as well as mental and emotional energy. On average, caregivers spend fifty-four hours per week fulfilling their roles.<sup>61</sup> In addition to their time, 62% of caregivers spend their own money on caregiving expenses, about \$7,000 per year.<sup>62</sup> Approximately 21% of caregivers fear that caregiving expenses will prevent them from retiring.<sup>63</sup> Half of caregivers say they experience added stress trying to balance their time and financial commitments, and about one quarter of caregivers state that their own health has been negatively impacted.

Women are the primary caregivers for both aging family members and young children. They perform as much as 75% of long-term care

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58. MEDICARE AND MEDICAID AT 50: AMERICA'S ENTITLEMENT PROGRAMS IN THE AGE OF AFFORDABLE CARE xiii (Alan B. Cohen et al. eds., 2015).

59. Freedman & Lind, *supra* note 18.

60. Judith Feder, *The Missing Piece: Medicare, Medicaid, and Long-Term Care*, in MEDICARE AND MEDICAID AT 50: AMERICA'S ENTITLEMENT PROGRAMS IN THE AGE OF AFFORDABLE CARE, *supra* note 58, at 253, 253.

61. Press Release, Nationwide, Caught in the Middle: Today's Older Adults are Caring for Adult Children and Aging Parents (Oct. 16, 2016), <https://www.prnewswire.com/news-releases/caught-in-the-middle-todays-older-adults-are-caring-for-adult-children-and-aging-parents-300939105.html> [<https://perma.cc/9WB3-RM56>].

62. *Surprising Out-of-Pocket Costs for Caregivers*, AARP (Oct. 1, 2019), <https://www.aarp.org/caregiving/financial-legal/info-2019/out-of-pocket-costs.html> [<https://perma.cc/3AET-BKFK>].

63. Nationwide, *supra* note 61.

of aging citizens.<sup>64</sup> Caregiving has typically been a gendered task because only women can bear children and biologically provide the sustenance necessary for a child's growth. More importantly, beyond the early years of childhood, the social and legal structure of society assigned caregiving to women. Many scholars have noted that caregiving is frequently invisible and devalued.<sup>65</sup> How caregiving will be defined in the future will be affected by the rising number of elders, the evolution of American family structure, the increase in the number of employed women, and the change in authority granted to local government as compared to the federal government. The pandemic demonstrated this in many ways. The spread of the virus began with elders in nursing homes, then spread among families living in multigenerational homes. It caused the departure of almost three million women from the workforce because of the closing of daycares and schools,<sup>66</sup> and relegated families to local and state stay-at-home orders. The pandemic exposed the lack of policies and support from private employers, and placed intense burdens on single mothers left to balance caregiving and work responsibilities on their own.<sup>67</sup> The expectations that women can do it all deeply contrast with the increasing number of dependent persons and the declining numbers of caregivers.<sup>68</sup>

The major support system that the U.S. government does provide for aging citizens is the Social Security benefits system, which is an important means of intergenerational transfer of wealth in the United States today.<sup>69</sup> The government implemented the Social Security

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64. Madonna Harrington Meyer, *Decreasing Welfare, Increasing Old Age Inequality: Whose Responsibility Is it?*, in *THE NEW POLITICS OF OLD AGE POLICY*, *supra* note 27, at 65, 77.

65. Lara N. Dotson-Renta, *The Invisible Work (and Value) of Parenting*, WASH. POST (Mar. 28, 2016), [https://www.washingtonpost.com/news/parenting/wp/2016/03/28/the-invisible-work-and-value-of-parenting/?utm\\_term=.19e58823c83e](https://www.washingtonpost.com/news/parenting/wp/2016/03/28/the-invisible-work-and-value-of-parenting/?utm_term=.19e58823c83e); NANCY FOLBRE, *THE INVISIBLE HEART: ECONOMICS AND FAMILY VALUES* xi-xiii (2001); WILLIAMS, *supra* note 16, at 1-2; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 266 (2010) [hereinafter Fineman, *Responsive*].

66. Megan Cerullo, *Nearly 3 Million U.S. Women Have Dropped Out of the Labor Force in the Past Year*, CBS NEWS (Feb. 5, 2021), <https://www.cbsnews.com/news/covid-crisis-3-million-women-labor-force/>.

67. *Id.*

68. *See id.*

69. Drew Desilver, *5 Facts About Social Security*, PEW RSCH. CTR. (Aug. 18, 2015), <http://www.pewresearch.org/fact-tank/2015/08/18/5-facts-about-social-security/> [<https://perma.cc/5EVE-4JX2>]. Although approximately one-third of Americans think that taxes paid by today's workers and their employers go into individual accounts, in reality the "benefits



system in 1935 to provide monthly income to aged Americans.<sup>70</sup> It initially discriminated against communities of color and women because it excluded agricultural and domestic workers, the self-employed, and employees of religious, charitable, and educational organizations.<sup>71</sup> Over time, coverage expanded to include nearly all senior citizens—97% of persons ages sixty to eighty-nine receive or will receive Social Security benefits.<sup>72</sup> Social Security has lifted many elderly citizens out of poverty and enabled them to continue living on their own, rather than living with adult children or other relatives.<sup>73</sup> More than 40% of the elderly—14.8 million—would be poor without Social Security.<sup>74</sup>

Women and communities of color benefit the most from Social Security. Women comprise 56% of beneficiaries ages sixty-two and older and 64% of beneficiaries ages eighty-five and older.<sup>75</sup> Social Security is important for women because “they tend to earn less than men, take more time out of the paid workforce, live longer, accumulate less savings, and receive smaller pensions.”<sup>76</sup> Many of these factors are directly tied to the disproportionate amount of caregiving women provide within the family for both young children and elderly relatives. Social Security is particularly important for families of color because it is the sole source of income for a large percentage of African Americans (33%), Hispanics (40%), and Asians (26%) ages sixty-five and older.<sup>77</sup> These groups typically have lower lifetime earnings and higher disability rates than whites, as well as less opportunity to save and earn pensions.<sup>78</sup>

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received by today’s retirees are funded by . . . today’s workers [and] when those workers retire, their benefits will be paid for by the next generation of workers’ taxes.” *Id.*

70. Meyer, *supra* note 64, at 78.

71. *See id.*

72. *Id.* at 79; POLICY BASICS: TOP TEN FACTS ABOUT SOCIAL SECURITY, CTR. ON BUDGET & POL’Y PRIORITIES 3 (2015) [hereinafter, POL’Y BASICS] <http://www.cbpp.org/research/social-security/policy-basics-top-ten-facts-about-social-security> [<https://perma.cc/J4T7-X573>].

73. POL’Y BASICS, *supra* note 72, at 7; Weaver, *supra* note 4, at 43.

74. POL’Y BASICS, *supra* note 72, at 7; KATHLEEN ROMIG, CTR. ON BUDGET & POL’Y PRIORITIES, SOCIAL SECURITY LIFTS MORE AMERICANS ABOVE POVERTY THAN ANY OTHER PROGRAM (2020), <https://www.cbpp.org/sites/default/files/atoms/files/10-25-13ss.pdf> [<https://perma.cc/8RK6-ZYJ7>].

75. POL’Y BASICS, *supra* note 72, at 9.

76. *Id.*

77. *Social Security and People of Color*, NAT’L ACAD. OF SOC. INS., <https://www.nasi.org/education/social-security-and-people-of-color/> [<https://perma.cc/97AH-2E6G>] (last visited Nov. 18, 2021) (as compared to 35% of whites).

78. POL’Y BASICS, *supra* note 72, at 8.

Another social aspect of care that differs along racial lines is the expectation of multigenerational living. “[O]lder Blacks and Hispanics are more likely than older non-Hispanic Whites to agree that each generation should provide coresidence assistance when needed.”<sup>79</sup> This cultural expectation stems from longstanding customs within Black and Hispanic races of extended families, kinship care, and familism.<sup>80</sup> It should be noted that men do provide intergenerational care within families, although not to the same extent as women. Laws and policies, while gender neutral, do not encourage men to take leave in order to care for children or elderly family members. Men are often expected to be present at work and absent from home.

Distinguished economist Shirley Burggraf, has noted “[w]omen’s traditional responsibility for child rearing has been taken for granted in economic theory as either something that isn’t very valuable and/or something that will automatically get done as it always has.”<sup>81</sup> She notes that the dependency phases of women “have always claimed a substantial share of the economy’s resources, the major resource being the efforts and labor of women.”<sup>82</sup> Burggraf names the entire social structure of supporting and caretaking roles “the feminine economy.”<sup>83</sup> She asserts that this feminine/caretaking/family economy is the other side of the competitive/market/business economy, and one cannot function without the other.<sup>84</sup>

While female caregivers are stretched thin caring for adult relatives, African American caregivers are the most likely racial/ethnic group to be in the labor force.<sup>85</sup> Sixty-one percent of all employed caregivers report that providing care for an adult family member or friend impacts their job.<sup>86</sup> Over half say they have to go in late, leave early, or take time off to provide care. Fifteen percent reported reducing

79. Jeffrey A. Burr & Jan E. Mutchler, *Race and Ethnic Variation in Norms of Filial Responsibility Among Older Persons*, 61 J. MARRIAGE AND FAM. 674, 674 (1999).

80. Weaver, *supra* note 4, at 24-27.

81. Shirley P. Burggraf, *How Should the Costs of Child Rearing Be Distributed?*, in *THE ECONOMICS OF THE FAMILY* 667, 667 (Nancy Folbre ed., 1996) [hereinafter Burggraf, *Child*].

82. SHIRLEY P. BURGGRAF, *THE FEMININE ECONOMY AND ECONOMIC MAN: REVIVING THE ROLE OF THE FAMILY IN THE POST-INDUSTRIAL AGE* 20 (1997) [hereinafter BURGGRAF, *FEMININE*].

83. *Id.* at x.

84. *Id.* at xii.

85. LYNN FRISS FEINBERG & LAURA SKUFCA, AARP PUB. POL’Y. INST., *MANAGING A PAID JOB AND FAMILY CAREGIVING IS A GROWING REALITY* 2 (2020), <https://doi.org/10.26419/ppi.00103.024> [<https://perma.cc/8H DU-THV2>].

86. *Id.* at 5.

their hours, 14% took leave, and many reported receiving warnings about their performance or attendance, turning down a promotion, quitting, retiring, or losing benefits.<sup>87</sup> For younger and lower-income employed caregivers, significant numbers of them report being unable to afford necessities or pay bills, and having to borrow money from family or friends.<sup>88</sup>

When women stay or step out of the market to care for children or an elderly family member, they not only lose salary, but federal Social Security benefits, company benefits like health care and disability, and funds for retirement when they are in need of care.<sup>89</sup> With respect to the cost of care, two questions exist: (1) how much should society value the service of care? and (2) who should do the caring? Answering these two questions brings to bear the shortcomings of the market and the state, largely because the value placed on caregiving is directly tied to the expectations of the gender that typically does the caring.

### C. *The Coronavirus Pandemic*

On January 20, 2020, the United States confirmed its first case of COVID-19 in the state of Washington.<sup>90</sup> Just ten months later, it led the world with over ten million positive cases and close to 240,000 deaths.<sup>91</sup> By early June of 2021, there were more than thirty-three million positive cases, and over 594,000 deaths from the virus.<sup>92</sup> Despite the fact that the United States is among the richest countries on earth, with some of the leading scientists and technological advances, novel coronavirus spread from state to state without a strategic national plan or approach from President Donald J. Trump or the federal

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87. *Id.*

88. *Id.* at 6.

89. Weaver, *supra* note 4, at 65-66.

90. Bill Whitaker, *Lack of Readiness, Questionable Federal Inspection Helped Fuel First U.S. COVID-19 Outbreak*, CBS NEWS (Nov. 1, 2020), <https://www.cbsnews.com/news/covid-19-outbreak-nursing-facility-kirkland-washington-60-minutes-2020-11-01/> [<https://perma.cc/54XR-BQ45>].

91. *Id.*; Rob Stein, *U.S. Confirmed Coronavirus Infections Hit 10 Million*, NPR (Nov. 9, 2020, 2:08 PM), <https://www.npr.org/sections/coronavirus-live-updates/> [<https://perma.cc/8HDU-THV2>].

92. John Elflein, *Total Number of U.S. Coronavirus (COVID-19) Cases and Deaths as of August 24, 2021*, STATISTA (Aug. 25, 2021), <https://www.statista.com/statistics/1101932/coronavirus-covid19-cases-and-deaths-number-us-americans/> [<https://perma.cc/5LWS-FZT4>].

government.<sup>93</sup> The airborne disease can cause symptoms ranging from a fever, cough, and extreme fatigue to neurological issues, blood clots, multiple organ damage, and respiratory failure resulting in death.<sup>94</sup> Doctors have learned about the virus in a trial-by-fire manner over a short period. During the first several months, nursing homes and assisted living facilities were COVID-19 hotspots and people over the age of sixty were more at risk of having physical conditions that exacerbated the virus and eventually caused a rapid decline of older patients often leading to death.

### 1. Initial Hot Spots: Long-Term Care Facilities

By the end of February, a nursing home in Washington became ground zero for COVID-19.<sup>95</sup> In a facility with eighty-one residents, thirty-eight patients died from coronavirus, and the virus infected sixty-seven staff members. Although neither the director of the facility nor the staff understood exactly what they were dealing with, nursing homes around the country would soon be facing the same crisis of care. By the beginning of December, over 100,000 nursing home residents had died from COVID-19 nationwide.<sup>96</sup> Surges continued to surface at long-term care facilities in Washington and around the country.<sup>97</sup>

The Centers for Disease Control and Prevention (CDC) issued recommendations for elder care facilities due to their congregate residential nature and the large number of residents with underlying

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93. Chris Wilson, *How Coronavirus Has Spread Across the United States: Track the "Eye of the Epidemic,"* TIME (Dec. 1, 2020, 10:23 AM), <https://time.com/5881897/coronavirus-spread-united-states/>; Christian Paz, *All the President's Lies About the Coronavirus,* ATLANTIC (Nov. 2, 2020, 2:20 PM), <https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/>.

94. Mayo Clinic Staff, *COVID-19 (Coronavirus): Long-Term Effects,* MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351#:~:text=Even%20in%20young%20people%2C%20COVID,Parkinson%27s%20disease%20and%20Alzheimer%27s%20disease> [https://perma.cc/TVV6-269R] (last updated Nov. 8, 2021); Sonya Collins, *What We've Learned About Treating COVID,* WEBMD HEALTH NEWS (Sept. 10, 2020), <https://www.webmd.com/lung/news/20200910/what-weve-learned-about-treating-covid> [https://perma.cc/EC5P-Y8CR].

95. Whitaker, *supra* note 90.

96. Christopher Rowland & Will Englund, *Beleaguered Nursing Homes Prepare for Monumental Task of Vaccinating Residents and Staff,* WASH. POST (Dec. 4, 2020, 2:24 PM), <https://www.washingtonpost.com/business/2020/12/04/nursing-homes-residents-vaccine-cvs-walgreens/>.

97. Paige Cornwell & Sandi Doughton, *94 People Test Positive in Second Big Coronavirus Outbreak at Washington Care Facility,* SEATTLE TIMES (Nov. 14, 2020, 6:24 PM), <https://www.seattletimes.com/seattle-news/health/long-term-care-facility-in-stanwood-records-94-coronavirus-infections/>.

chronic medical conditions.<sup>98</sup> Restricting visitors, isolating residents, having personal protection equipment (PPE) available for staff members, and tracking COVID-19 infections were among the first set of preventative measures taken in most nursing homes and assisted living facilities. In the first couple of months when COVID-19 began to spread in the United States, there was not a sufficient supply of PPE and the test to detect coronavirus issued by the CDC was faulty.<sup>99</sup> Ultimately, the public health response to the initial hotspots that affected elders was subpar for a nation known for having the brightest scientists and infectious disease control professionals.

One of the most significant reasons that the virus spread so rapidly among these centers is the transient, part-time, low wage essential workers who care for the elderly.<sup>100</sup> They often work at multiple care facilities in order to make a living, and this significantly increased their risk of contracting COVID-19, as well as the chances that they would spread it to their immediate families, and the elders for whom they care.<sup>101</sup> Multiple reports about insufficient PPE as well as workers coming to work sick fueled the thought that the people providing daily care for elders were spreading COVID-19 to their patients.<sup>102</sup> These care workers are disproportionately women and women of color. Smart phone location data tracking the movement of people among the facilities confirmed the primary source of the spread of the virus was shared staff.<sup>103</sup> During the first wave of the pandemic, nursing homes and other care facilities accounted for half of U.S. deaths.

It is important to note that even before COVID-19 blazed through communities, nursing homes and long-term care facilities have lacked

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98. Temet M. McMichael et al., *COVID-19 in a Long-Term Care Facility—King County, Washington, February 27—March 9, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 339, 340-41 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6912e1-H.pdf> [<https://perma.cc/6VSL-JL8E>].

99. Whitaker, *supra* note 90.

100. Jackie Fortiér, *They Work in Several Nursing Homes to Eke out a Living, and That May Spread the Virus*, NPR NEWS (Oct. 26, 2020, 4:27 PM), <https://www.npr.org/sections/health-shots/2020/10/26/927841874/they-work-in-several-nursing-homes-to-eke-out-a-living-and-that-spreads-the-virus> [<https://perma.cc/723A-MXYW>].

101. *Id.*

102. *Id.*; Kimiko de Freytas-Tamura, “*They Call Me a Criminal*”: *Nursing Home Workers Who May Spread the Virus*, N.Y. TIMES (Aug. 21, 2021), <https://www.nytimes.com/2020/09/10/us/virus-florida-nursing-homes-contract-workers.html>.

103. Ben Mattison, *Smartphone Data Shows How Shared Staff Spread COVID-19 Through Nursing Homes*, YALE INSIGHTS (Aug. 20, 2020), <https://insights.som.yale.edu/insights/smartphone-data-shows-how-shared-staff-spread-covid-19-through-nursing-homes> [<https://perma.cc/N9UC-RM38>].

adequate state oversight to prevent negligence and the spread of other communicable diseases among residents.<sup>104</sup> According to the 2004 National Nursing Home Survey, the one-and-a-half million people living in U.S. nursing homes experienced approximately two million infections per year.<sup>105</sup> These infections have been associated with high rates of morbidity and mortality, re-hospitalization, extended hospital stays, and substantial healthcare expenses. “The single most important aspect of an infection prevention control program is hand hygiene . . . [but] compliance among [health care workers] remains well below 50%,” in addition to the nursing home residents’ noncompliance with personal hygiene and hand washing.<sup>106</sup> Coupled with the increase of sicker, older patients in nursing homes who require more intense medical supervision and are more prone to infections, nursing homes have experienced challenges with infection prevention programs.<sup>107</sup>

## 2. Sheltering in Place: Multigenerational Family Challenges

Families who share living space with more than one generation have been challenged by the coronavirus pandemic. Latinx, Asian, and African American families living together for economic and social reasons are a greater risk for transmitting the virus to each other because often there is little room to isolate if one person gets sick.<sup>108</sup> Often the younger members of the family are going to school, and the adult children are essential workers. This poses a danger for elder family members with underlying health conditions. In California, the high cost of housing often forces families to live together. Latinx families in the state comprised 59% of the COVID-19 cases, and 47% of the deaths.

As the pandemic continued to rage through the summer of 2020, reports indicated that COVID-19 was being spread in shared homes to elders through young people who were not as observant of safety

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104. See Ana Montoya & Lona Mody, *Common Infections in Nursing Homes: A Review of Current Issues and Challenges*, 7 AGING HEALTH 889, 889-99 (2011).

105. *Id.*

106. *Id.*

107. *Id.*

108. Elly Yu, *Extended Families Living Together Raise Risks for COVID-19 Transmission*, NPR (Aug. 8, 2020, 7:00 AM), <https://www.npr.org/2020/08/08/899841137/extended-families-living-together-raise-risks-for-covid-19-transmission> [<https://perma.cc/T6UB-SBKF>].

measures like mask wearing and social distancing.<sup>109</sup> Twenty percent of the population lives in multigenerational homes, and the percentages are higher since the economic hardships brought by the pandemic have forced some younger adults back into their parents' homes.<sup>110</sup> The majority of states enacted shelter-in-place orders to get community spread under control. These orders expired in May, and afterwards states varied the measures put in place to limit movement and contact with others in public places. Opening of bars and restaurants appeared to cause young people to relax their guard and gather socially. Young people are more likely to be asymptomatic, and unknowingly bring the virus home to their grandparents. Though the number of young people who tested positive for COVID-19 significantly increased over the summer, the number of persons age sixty-five years and older hospitalized for COVID-19 also significantly increased from 40% to 55%.<sup>111</sup>

### 3. COVID-19 and Racial Disproportionality

One of the stark realities of COVID-19 is the disproportionate impact the virus has had on African American and Latinx communities. African Americans are three times more likely to become infected with COVID-19 and twice as likely to die from it.<sup>112</sup> Even though African Americans only make up 13% of the U.S. population, they account for 23% of the deaths from COVID-19.<sup>113</sup> A number of factors are contributing to the substantial race gaps in who contracts and who dies from the virus, including a greater prevalence in Black families of underlying health conditions such as hypertension, obesity, diabetes, and lung disease.<sup>114</sup> Social determinants of health, such as where a

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109. Lenny Bernstein, *Young People are Infecting Older Family Members in Shared Homes*, WASH. POST (July 29, 2020), [https://www.washingtonpost.com/health/young-people-are-infecting-older-family-members-in-shared-homes/2020/07/28/b8cdc810-cd0a-11ea-b0e3-d55bda07d66a\\_story.html](https://www.washingtonpost.com/health/young-people-are-infecting-older-family-members-in-shared-homes/2020/07/28/b8cdc810-cd0a-11ea-b0e3-d55bda07d66a_story.html).

110. *Id.*

111. *Id.*

112. Scott Neuman, *COVID-19 Death Rate for Black Americans Twice That for Whites, New Report Says*, NPR (Aug. 13, 2020, 5:24 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/08/13/902261618/covid-19-death-rate-for-black-americans-twice-that-for-whites-new-report-says> [https://perma.cc/R5PV-4A7D].

113. Berkeley Lovelace, Jr., *As U.S. Coronavirus Deaths Cross 100,000, Black Americans Bear Disproportionate Share of Fatalities*, CNBC (May 27, 2020, 6:37 PM), <https://www.cnbc.com/2020/05/27/as-us-coronavirus-deaths-cross-100000-black-americans-bear-disproportionate-share-of-fatalities.html>.

114. Tiffany N. Ford et al., *Race Gaps in COVID-19 Deaths are Even Bigger than They Appear*, BROOKINGS: UP FRONT BLOG (June 16, 2020), <https://www.brookings.edu/blog/up->

person lives, the quality of healthcare to which they have access, and where they work, play key roles in these racial disparities in health. Black workers and their families are more likely to live in densely populated housing, and therefore face greater risk of exposure to coronavirus.<sup>115</sup> Black workers are also more likely to live in multigenerational households with older family members who are at high risk—they are twice as likely as white workers to live in households with three or more generations.

The health issues faced by African Americans during the pandemic are further worsened by the reality of employment for African Americans. Black workers are disproportionately employed in essential jobs, which places them at a higher risk of contracting COVID-19. Frontline health care workers in nursing homes, sanitation, and early childcare educators are among the “essential” occupations determined to be critical in allowing the rest of society to stay at home and “flatten the curve.”<sup>116</sup> Black workers only make up 12.3% of the workforce, but they account for almost 28% of nursing care facility workers.<sup>117</sup>

Latinos have also been disproportionately affected by COVID-19. Both Black and Hispanic death rates are higher than whites in every age group.<sup>118</sup> Deaths among young adults in communities of color are significant. Hispanic Americans between the ages of twenty-five and thirty-four have died at more than four times the rate as whites, and this rate of death increases to over six times the rate as whites between the

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front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/ [https://perma.cc/32G7-9588].

115. ELISE GOULD & VALERIE WILSON, ECON. POL’Y INST., BLACK WORKERS FACE TWO OF THE MOST LETHAL PREEXISTING CONDITIONS FOR CORONAVIRUS—RACISM AND ECONOMIC INEQUALITY 10 (2020), <https://www.epi.org/publication/black-workers-covid/> [https://perma.cc/JN7S-N5S5].

116. Ana Sandoiu, “A No-Win Situation”—Expert Weighs in on COVID-19 Racial Disparities, MED. NEWS TODAY (May 22, 2020), <https://www.medicalnewstoday.com/articles/a-no-win-situation-expert-weighs-in-on-covid-19-racial-disparities> [https://perma.cc/5TLX-8KGD].

117. Steven Brown, *How COVID-19 Is Affecting Black and Latino Families’ Employment and Financial Well-Being*, URB. INST.: URB. WIRE (May 6, 2020), <https://www.urban.org/urban-wire/how-covid-19-affecting-black-and-latino-families-employment-and-financial-well-being> [https://perma.cc/ZEU7-7MZ3].

118. *Black Americans Make up 13% of the US Population. They Make up 23% of COVID-19 Deaths*, USA FACTS (Sept. 22, 2020, 3:55 PM), [https://usafacts.org/articles/covid-deaths-race-state-age-black-hispanic-white/?utm\\_source=google&utm\\_medium=cpc&utm\\_campaign=ND-Race&gclid=Cj0KCQjwzYGGBhCTARIsAHdMTQx7N3KQRs1EPUNh-b2-IoMx-Fq2a1TjMHgwLf0sy9OJNtMVj1KB4aAno0EALw\\_wcB](https://usafacts.org/articles/covid-deaths-race-state-age-black-hispanic-white/?utm_source=google&utm_medium=cpc&utm_campaign=ND-Race&gclid=Cj0KCQjwzYGGBhCTARIsAHdMTQx7N3KQRs1EPUNh-b2-IoMx-Fq2a1TjMHgwLf0sy9OJNtMVj1KB4aAno0EALw_wcB) [https://perma.cc/5EYP-NM2M].



ages of thirty-five and forty-four.<sup>119</sup> COVID-19 has made up the largest proportion of deaths among Hispanic populations since February of 2020, who also comprise a large segment of the essential worker population in certain states.<sup>120</sup>

Essential workers are exposed to greater risks to contract COVID-19 in many ways. First, it is not often possible to engage in physical distancing in these types of jobs, which contributes to the spread of the virus. Second, many essential workers take public transportation, which also makes it difficult to engage in physical distancing. Third, the lack of adequate compensation in terms of both salary and benefits contributes to the lack of access to healthcare. Many of these jobs provide employees with very little to no healthcare insurance. The initial lack of proper personal protective equipment provided by nursing homes and hospitals also put them at great risk of infection.

On a host of levels, the disease had greater physical access to African American and Hispanic communities. What coronavirus revealed was that from location to occupation, Blacks were positioned to be disparately impacted by the pandemic. The comorbidities reflect broader racial inequities that cause people of color to live sicker and die quicker.<sup>121</sup> The COVID-19 pandemic has exacerbated and elevated pre-existing issues in the African American community. “Robust empirical evidence suggests that these social determinants—occupation, lack of insurance coverage, and institutionalized and interpersonal discrimination—all lead to these racial and ethnic disparities in morbidity and mortality in general. They are just thrown into even sharper relief when we have a pandemic.”<sup>122</sup>

As of November 4, 2021, the U.S. has documented over forty-seven million cases of COVID-19 and over 770,000 deaths.<sup>123</sup> Over time, the disparities between minority groups and whites have narrowed and decreased, but African Americans are still more likely to contract COVID-19, be hospitalized, and die from it.<sup>124</sup>

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119. *Id.*

120. *Id.*; Sandoiu, *supra* note 116.

121. See generally DAYNA BOWEN MATTHEW, JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE (2015) (examining how racism is a cause of health disparities in America).

122. Sandoiu, *supra* note 116.

123. *United States*, WORLDMETER, <https://www.worldometers.info/coronavirus/country/us/> (last visited Nov. 18, 2021).

124. William Mude et al., *Racial Disparities in COVID-19 Pandemic Cases, Hospitalisations, and Deaths: A Systemic Review and Meta-analysis*, 11 J. GLOB. HEALTH (June 26, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8248751/>.

D. *Federal and State Response to COVID-19*

The U.S. government's response to COVID-19 has been fraught with confusion and disharmony. While the CDC issued guidelines and recommendations as doctors and scientists learned more about the viral pathogenesis of coronavirus, President Donald Trump downplayed the virus and made many contradictory and dangerous statements.<sup>125</sup> The CDC also initially did not endorse mask wearing, testing for COVID-19 was rife with misfires, and the United States has been slow to implement mass testing across the country.<sup>126</sup> Unlike most other industrialized democratic nations, President Trump did not call for a national response to the health care crisis.<sup>127</sup> Instead, he encouraged each state to handle the virus at the local level. This caused strife among states competing to obtain PPE for hospital and essential workers, and it also created legal tensions between city council members, mayors, and governors regarding how best to control the spread of COVID-19.<sup>128</sup> The patchwork state and local responses regarding business and school shutdowns and re-openings has caused multiple waves of the virus and the highest numbers of positive COVID-19 cases and deaths in the world.<sup>129</sup>

Although the national public health response was abysmal, the federal government did respond to the economic fallout from COVID-19 by passing the Coronavirus Aid, Relief, and Economic Security (CARES) Act in late March of 2020.<sup>130</sup> There was bipartisan support for the CARES Act as well as the Families First Coronavirus Response Act (FFCRA), signed into law in mid-March 2020. These bills were critical in helping Americans stay afloat during the first part of the year when states issued shelter-in-place orders. Ironically, the United States

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125. Paz, *supra* note 93.

126. Meg Kelly et al., *What Went Wrong with Coronavirus Testing in the U.S.*, WASH. POST (Mar. 30, 2020), <https://www.washingtonpost.com/politics/2020/03/30/11-100000-what-went-wrong-with-coronavirus-testing-us/>.

127. Paz, *supra* note 93.

128. Andrew Soergel, *States Competing in "Global Jungle" for PPE*, U.S. NEWS (Apr. 7, 2020), <https://www.usnews.com/news/best-states/articles/2020-04-07/states-compete-in-global-jungle-for-personal-protective-equipment-amid-coronavirus>.

129. See Ed Yong, *America's Patchwork Pandemic Is Fraying Even Further*, ATLANTIC (May 20, 2020), <https://www.theatlantic.com/health/archive/2020/05/patchwork-pandemic-states-reopening-inequalities/611866/>; WHO Coronavirus (COVID-19) Dashboard, WORLD HEALTH ORG., <https://covid19.who.int/table> [<https://perma.cc/9EFG-ZRTG>] (last visited Nov. 18, 2021).

130. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178, 196-199 (2020); CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

provided the safety net that was necessary for survival in record time, and the amount of money provided was two trillion dollars. Public health and testing received smaller amounts of money, considering the enormity of the pandemic. The emphasis of the CARES Act was on supporting businesses, and the majority of the money was designated for big corporations and small businesses. The CARES Act increased the amount and time period for unemployment payments, allowed tenants to avoid eviction, and allowed homeowners to avoid foreclosure. Individuals and state and local governments also received significant amounts of funding. Individuals and married couples earning less than the established minimum received cash payments or recovery rebates. Families with children received an additional \$500 per child. People receiving Social Security payments and people experiencing homelessness were also eligible to receive a recovery rebate.

The FFCRA was the package that addressed huge issues for families during the first several months. It provided paid sick leave, free testing, and expanded unemployment benefits. It also temporarily increased federal payments to Medicaid for states. While the Family Medical Leave Act (FMLA) normally applies to employers with fifty employees or more, the FFCRA established a federal emergency paid-leave benefits program to employers with fewer than 500 employees.<sup>131</sup> This was significant because it mandated that small businesses had to pay two weeks' worth of paid sick leave at the employee's regular rate of pay if the employee was unable to work because of being quarantined or experiencing COVID-19 symptoms and seeking a medical diagnosis.

Under the FFCRA, employees could also receive two weeks of paid sick leave at two-thirds the employee's regular rate of pay if the employee was unable to work because of a bona fide need to care for an individual subject to quarantine, or to care for a child whose school or childcare provider was closed, or unavailable for reasons related to COVID-19.<sup>132</sup> An additional ten weeks of paid expanded family and medical leave at two-thirds of the employee's regular rate of pay was available for any employee who had been employed for at least thirty calendar days.<sup>133</sup> However, this additional ten weeks was only available

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131. Temporary Rule: Paid Leave Under the Families First Coronavirus Response Act, U.S. Dep't of Lab., <https://www.dol.gov/agencies/whd/ffrca> (last visited Dec. 7, 2021).

132. *Id.*

133. *Id.*

for employees who were unable to work due to lack of childcare. Left out of the expanded paid leave were those employees who needed to care for an elderly family member who was COVID-19 positive or brought home from a nursing home or assisted living facility where there was a COVID-19 outbreak or a fear of spread in the home or facility.

It should be noted that there was significant aid regarding unemployment benefits and nutrition assistance for those with food insecurity and many work requirements for those receiving state aid were suspended.<sup>134</sup> This was necessary relief for those who were suddenly unemployed when states shut down schools and everything but essential businesses. A record number of people filed for unemployment, and a significant percentage of businesses, particularly businesses owned by people of color, were closed during the spring of 2020.<sup>135</sup>

While parents forced to stay home with their children in the spring had some job protection and potential paid leave (or unemployment benefits), the fall brought no additional funding from Congress. In fact, many working parents were denied benefits due to unreasonable burdens set up by states.<sup>136</sup> Some states require that workers be able to certify that they are available for work even if they cannot actually take a job because their children are stuck at home due to COVID-19.<sup>137</sup> In addition, even with significantly decreased availability of child daycare, as long as some childcare is available in a given area, working parents are being denied unemployment benefits.<sup>138</sup> Many mothers have been forced to remain jobless at home or to seek jobs that allow for remote

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134. Barbara Sprunt, *Here's What Is in the "Families First" Coronavirus Aid Package Trump Approved*, NPR (Mar. 19, 2020, 5:12 PM), <https://www.npr.org/2020/03/19/818322136/heres-what-is-in-the-families-first-coronavirus-aid-package-trump-approved> [<https://perma.cc/C2CS-WV6F>].

135. Rakesh Kochhar, *Unemployment Rose Higher in Three Months of COVID-19 than It Did in Two Years of the Great Recession*, PEW RSCH. CTR. (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/> [<https://perma.cc/3V5E-LPV4>]; Jonnelle Marte, *Minority-Owned Businesses Struggle to Access Credit During Pandemic, Fed Survey Finds*, REUTERS (Feb. 3, 2021, 11:32 AM) <https://www.reuters.com/article/us-usa-fed-smallbusiness/minority-owned-businesses-struggle-to-access-credit-during-pandemic-fed-survey-finds-idUSKBN2A32OS>.

136. Mitchell Hartman, *This Fall, Back-to-School May Block Back-to-Work for Many Parents*, MARKETPLACE (Aug. 18, 2020), <https://www.marketplace.org/2020/08/18/back-to-school-may-block-back-to-work-for-many-parents/> [<https://perma.cc/C4PN-NRQN>].

137. *Id.*

138. *Id.*

work because their child's daycare or school is not available for in-person care or education.<sup>139</sup> Some parents have also chosen to keep their children home to learn virtually because of the risk of community spread of COVID-19.

One parent stated it plainly, “[i]n the Covid-19 economy, you’re allowed only a kid *or* a job.”<sup>140</sup> For those without family help or a decent amount of savings, the continuation of COVID-19 into the fall and winter season has been devastating. While this issue is affecting over a million people, burnout and a lack of time to organize prevents them from bringing more public or political attention to the matter. They are also comprised of those without the resources to push for solutions. Unfortunately, the situation will disproportionately affect mothers, many of whom will be forced to drop out of the workforce to take care of children.<sup>141</sup> The wealthy will be able to find the resources for help and provide for the elders they love and their children. Those without a safety net, health insurance, and a livelihood will be “erased from the economy.”<sup>142</sup>

This has in fact been the situation for many women in 2020 and 2021. Some have said that this pandemic has caused a “she-cession” because 55% of jobs lost were by women.<sup>143</sup> The U.S. Congress is currently considering a comprehensive recovery plan that initially came with a three trillion dollar price tag.<sup>144</sup> It was broken down into two parts: the first part is a bipartisan infrastructure bill that has been passed by Congress, and the second part is the Build Back Better Act that focuses on education, climate, and the social safety net.<sup>145</sup> The second part of President Biden’s recovery plan has been reduced from a three-and-a-half trillion dollar cost to one and three quarter trillion dollars. The reduction in costs comes at the expense of several major

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139. *Id.*

140. Deb Perelman, *In the Covid-19 Economy, You Can Have a Kid or a Job. You Can't Have Both*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/02/business/covid-economy-parents-kids-career-homeschooling.html>.

141. *Id.*

142. *Id.*

143. Alisha Haridasani Gupta, *Why Some Women Call This Recession a 'Shecession'*, N.Y. TIMES (June 18, 2021), <https://www.nytimes.com/2020/05/09/us/unemployment-corona-virus-women.html>.

144. Richard Cowan & Susan Cornwell, *U.S. Senate Pivots to \$3.5 Trillion Bill, Key to Biden's Agenda*, REUTERS (Aug. 10, 2021), <https://www.reuters.com/world/us/us-senate-poised-pass-1-trillion-infrastructure-bill-debate-35-trillion-budget-2021-08-10/>.

145. Jim Probasco, *Understanding the Infrastructure Bills*, INVESTOPEDIA (Nov. 6 2021), <https://www.investopedia.com/here-s-what-s-in-the-usd1-trillion-infrastructure-bill-passed-by-the-senate-5196817>.

supports for families caring for elders. Initially Biden's plan proposed a 400 billion dollar proposal to expand long-term care services under Medicaid, which would have eliminated the wait list for hundreds of thousands of people, and provided more opportunity for elders to receive care at home through community-based services or from family members.<sup>146</sup> Part of the money was allocated to improve the wages of home health workers, who earn only twelve dollars per hour, and some funding would provide an infrastructure to give caregiving workers the opportunity to join a union.<sup>147</sup> While these two sections of the Plan are still included, the amount dedicated to them has been significantly reduced to one-and-a-half billion dollars.<sup>148</sup> Finally, another component of the bill that has been removed altogether is a federally-funded paid family medical and sick leave program. Caregivers essentially need both the safety net options to pay for their elder family member's care at home or in a facility, as well as the benefit of being able to take time off from work when necessary and still have protection of their job.

### III. CAREGIVING & VULNERABILITY

Vulnerability theory is a concept that sets up an ideal paradigm for crafting a purposefully interdependent society with a universal human subject.<sup>149</sup> Rather than focusing on individual human rights, vulnerability theory is institutionally focused, and the law is intended to be central to the establishment of the state, or system of governance, and the reproduction of society.<sup>150</sup> A key factor in vulnerability theory is that it embraces the potential of the state to be "a unique mechanism for the construction of a just society."<sup>151</sup> It imagines a unified, comprehensive legal subject (the human being), incorporating all variations of human development, as well as capacities, characteristics, and abilities.<sup>152</sup>

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146. Katie Lobosco & Tami Luhby, *Here's What's In the Bipartisan Infrastructure Bill*, CNN, (Nov. 5, 2021), <https://www.cnn.com/2021/07/28/politics/infrastructure-bill-explained/index.html>.

147. *Id.*

148. Tami Luhby & Katie Lobosco, *Here's What's In and What's Out in President Biden's New \$1.75 Trillion Economic Plan*, CNN, (Oct. 28, 2021) [https://www.cnn.com/politics/live-news/infrastructure-spending-bill-biden-10-28-21/h\\_d0f99eec5ff28edb9d8a77facb3d1ecb](https://www.cnn.com/politics/live-news/infrastructure-spending-bill-biden-10-28-21/h_d0f99eec5ff28edb9d8a77facb3d1ecb).

149. Fineman, *Universality*, *supra* note 19.

150. *Id.*

151. *Id.*

152. *Id.* at 3 n.2.

The concept of vulnerability and its analysis is complicated by current social and cultural norms, like racism and sexism, even though it is general enough to apply to every human being. Our universal human embodiment presents risks of “harm, injury, and misfortune” that are “constant, . . . complex, . . . particular” and out of our control.<sup>153</sup> If vulnerability theory is applied to the problem of the Elder Catch, the law would adjust to build an equitable and responsive state such that our social institutions, i.e., families and employers, could maintain themselves and the relationships upon which they rely. In reality, the role of government has been intentionally ineffective during the COVID-19 health crisis. Many have argued that the pandemic highlights the ways in which the government is set up to continue a state of inequality.<sup>154</sup>

Using the traditional definition of the term “vulnerable,” elders, children, and caretakers are all at some point vulnerable groups within the family. The word vulnerability is derived from the Latin word *vulnus*, which means “wound.”<sup>155</sup> The concept of vulnerability is used in various contexts to identify “a state of high exposure to certain risks and uncertainties, in combination with a reduced ability to protect or defend oneself against those risks and uncertainties and cope with their negative consequences.”<sup>156</sup> The U.N. Department of Economic and Social Affairs identifies groups that are especially vulnerable, including the elderly and the young, and further sets forth that vulnerability can affect any group in society because “all groups face vulnerabilities that are largely the outcome of economic, social and cultural barriers restricting opportunities for and impeding the social integration and participation . . . of the groups.”<sup>157</sup>

This is exactly the pathway that COVID-19 has taken within the United States. While the virus has affected all groups of people, it

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153. Fineman, *Responsive*, *supra* note 65, at 266-69.

154. See, e.g., Matiangai Sirleaf, *Racial Valuation of Diseases*, 67 UCLA L. REV. 1820, 1820 (2021) (setting forth how racial valuation influences the distribution of material conditions in health that are informed by ideas of race that perpetuate and reinforce existing hierarchies).

155. Catriona Mackenzie et al., *Introduction: What Is Vulnerability and Why Does It Matter for Moral Theory?*, in VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY 1, 4 (Catriona Mackenzie et al. eds., 2014).

156. PEADAR KIRBY, VULNERABILITY AND VIOLENCE: THE IMPACT OF GLOBALISATION 4-5 (2006) (quoting U.N. DEP'T OF ECON. AND SOC. AFFS., REPORT ON THE WORLD SOCIAL SITUATION, 2003: SOCIAL VULNERABILITY: SOURCES AND CHALLENGES 8 (2003)).

157. U.N. DEP'T OF ECON. & SOC. AFFS., REPORT ON THE WORLD SOCIAL SITUATION, 2003: SOCIAL VULNERABILITY: SOURCES AND CHALLENGES 8-9 (2003).

disproportionately affected people who were already marginalized within society. People over the age of sixty-five had preexisting conditions that accelerated the illnesses caused by COVID-19, causing them to die at faster rates. Elders typically have some body ailments and are more susceptible to mental decline such as dementia and Alzheimer's disease. In addition to the health danger that COVID-19 presents, social isolation from family and friends also posed a grave danger to elders in long-term care facilities across the country. The nurses and staff members at these facilities were also vulnerable because of historical and present-day socioeconomic legal factors caused by structural sexism and racism. For those elders who are cared for at home with two other generations, they still faced higher risks by interacting with grandchildren who are attending school and family members who continue to work outside the home.

COVID-19 created the perfect storm for examining how the state responds to a host of competing human groups. It also laid bare the fact that individualism—an American concept grounded in freedom—is the exact opposite of what is needed to control the spread of a deadly virus. “Everyone is vulnerable. Everyone’s health depends on the health of others.”<sup>158</sup> In the perfect storm, vulnerability theory highlights that *to be human is to be vulnerable*, and that the state should seek to assist the all-encompassing person who is both a child and an elder, a young hourly paid health care worker, and a middle-aged working parent caught in the Elder Catch.

“The fundamental realization of vulnerability theory is that the individuals and groups [labelled] as ‘vulnerable populations’ should *not* be labelled vulnerable, nor should they be sequestered in discreet categories for the purposes of law and policy.”<sup>159</sup> Their situation posits them as having a shared fragility of human wellbeing, and their harm is communal in a way that the state has a collective responsibility to develop a universal social-justice project that considers state action for injury or harm conceived as general and structural, not individual or group-based.

This Part discusses vulnerability theory and sets forth how the concept and terminology applies to elders and caretakers. This Part introduces the term “resistant assets” to the taxonomy of vulnerability theory, and illustrates how the traditional family and the unpaid

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158. George Packer, *America's Plastic Hour Is Upon Us*, ATLANTIC (Oct. 15, 2020), <https://www.theatlantic.com/magazine/archive/2020/10/make-america-again/615478/>.

159. Fineman, *Universality*, *supra* note 19, at 5.



caregiving provided by mostly women are examples of the term. Resistant assets are situated within a cultural context, and this Part analyzes how the legal treatment of the family is foundational to patriarchy and structural racism. It concludes with exploring if resistant assets can be made receptive within a non-responsive state.

A. *Vulnerability Theory & Care for Elders*

As the physical and cognitive functioning of elders declines, more caregiving time is required. The ability of caregivers to work full time, provide long-term care for aging parents, and save enough for their own retirement is challenged. For those caregivers who are also raising children, the balance of time and money is more precarious because not only are there additional caregiving demands, but there is also the long-term financial investment in the future of their children that appears out of reach.

It is helpful to analyze the conception of vulnerability theory by other scholars in order to consider how it has been utilized to assess care for elderly persons and children. Various theorists have used vulnerability theory as a connection to dependency in order to “reframe some of the founding assumptions of contemporary moral and political theory.”<sup>160</sup> It has been used to support a variety of solutions to the elder care dilemma—from increasing male political pressure exerted on the government to provide for elderly people—to using the theory to evaluate older citizens in specific contexts in order to construct a new social welfare policy.<sup>161</sup>

Fineman has used vulnerability theory as a means to expand her exploration of dependency and to provide the foundation for a more responsive state government.<sup>162</sup> The vulnerability of older adults is distinguished from dependency, and paternalism causes a tension between offering protection for the elderly while at the same time

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160. Mackenzie et al., *supra* note 155, at 4.

161. See Rosemarie Tong, *Vulnerability and Aging in the Context of Care*, in *VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY*, *supra* note 155, at 288, 290-93; Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 *YALE J.L. & FEMINISM* 1, 2-3 (2014).

162. See Fineman, *Responsive*, *supra* note 65, at 251; see generally Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1 (2008) [hereinafter Fineman, *Anchoring*] (arguing that human vulnerability is inherent to the human condition and should be incorporated into social policy).

acknowledging their autonomy.<sup>163</sup> The fact that the United States provides “no constitutional guarantee to basic social goods, such as housing, education, or healthcare” is highlighted in her analysis.<sup>164</sup> Linking human vulnerability to state responsibility, Fineman notes that state mechanisms bring institutions into legal existence that can provide resources to build resilience to risks.<sup>165</sup> She also recognizes that institutions like corporations, schools, families, workplaces, and churches are also vulnerable themselves, and therefore need to be monitored, evaluated, updated, and reformed when necessary by the state.<sup>166</sup>

Because the state creates and maintains these institutions, Fineman argues that there is a requirement that the state “be vigilant in ensuring that the distribution of such assets is accomplished with attention to public values, including equality or justice, or objectives beyond private or profit motivation.”<sup>167</sup> Fineman does account for the fact that the state itself is fallible. One of the criticisms of vulnerability theory as an ideal is that upending the various societal hierarchies proves to be an impossible enterprise.<sup>168</sup> The state is the entity that sets in motion the various “isms” that vulnerability theory attempts to fracture. In fact, COVID-19 has laid bare how ageism and racism create human vulnerability through state structures, policies, and practices. In order to eliminate inequality within institutions, we must first examine the resources of the state, the beneficiaries of those assets, and who ultimately owns these assets.

### *B. The Taxonomy of Vulnerability Theory*

This Article expands the terminology of vulnerability theory by recognizing a missing piece in the puzzle of human interdependence and government response. Peeling back the layers of vulnerability allows greater examination of how society is shaped and who shapes it. This is key because the framework of society is not inherently equal. In reality, society’s framework begins with the creation and regulation of assets in various forms. These assets intersect and support one

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163. See generally Martha Albertson Fineman, “Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 20 ELDER L.J. 71 (2012) [hereinafter Fineman, *Elderly*] (discussing the stigmatization of vulnerability and the elderly).

164. Fineman, *Responsive*, *supra* note 65, at 254.

165. *Id.* at 272.

166. *Id.* at 272-73.

167. *Id.* at 272.

168. *Id.* at 269.

another for those who control the institutions that created them in the first place. This institutional power is not guided by an ideal sense of morality; but rather, it is quite selfish and rooted in self-preservation. As such, the touchstones of the pillars of government and its correlative institutions must be examined within vulnerability theory.

Resilience is the counterpoint to vulnerability, and Fineman defines a variety of assets or resources that societal organizations and institutions provide to individuals that enable them to be resilient in the face of common vulnerability.<sup>169</sup> She also indicates that these assets interlock and overlap, creating layered opportunities and support for individuals, but also contain gaps and potential pitfalls.<sup>170</sup> Fineman maintains that understanding the state's relationship to asset-conferring institutions provides a vocabulary in arguing for state accountability for ensuring equality in response to individual and institutional vulnerability.<sup>171</sup> She accounts for a broad idea of asset categories, including asset-conferring, asset-preserving, and asset-enhancing systems.<sup>172</sup> This Article argues that there will not be any changes with regard to the state's response to vulnerability unless the institutions that design and accumulate assets are dismantled. If the system and institutions that distribute assets are viewed as a machine, in order for fundamental changes to occur that could affect inequality, the machine would have to be taken apart and rebuilt again because the foundation must be reset.

Peadar Kirby utilizes the term assets because of the World Bank's use of the term in its 2000-2001 World Development Report on the subject of poverty.<sup>173</sup> Assets are descriptors of elements needed to measure a household's exposure to vulnerability.<sup>174</sup> Kirby sets forth four different types of assets: (1) physical, (2) human, (3) social, and (4) environmental.<sup>175</sup> Physical assets are described as institutions that impart physical or material goods through distribution of wealth and property.<sup>176</sup> They essentially determine the quality of life and accumulation of resources. The Internal Revenue Service (IRS), U.S. Congress, and state congresses are physical assets because they set

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169. *Id.* at 269-70.

170. Fineman, *Anchoring*, *supra* note 162, at 13.

171. Fineman, *Responsive*, *supra* note 65, at 70.

172. *Id.*

173. KIRBY, *supra* note 156, at 18, 55.

174. *Id.* at 55.

175. *Id.*

176. *Id.*

forth tax and inheritance laws, banking rules and regulations, and credit policies. Corporations would also be included as an institution impacting physical assets. “Kirby notes that residential property is the single biggest asset class, accounting for [40-60%] of total household wealth in Europe and about 30% in the United States.”<sup>177</sup>

Human assets are innate or developed abilities to make the most of a situation.<sup>178</sup> They provide for the accumulation of human capability. Health and education are chief among human assets, making institutions governing these two assets important to evaluate with respect to a vulnerability analysis.<sup>179</sup> Employers, corporations, and small businesses would also be key players in considering how institutions allow participation in the market (particularly for women) and facilitate the accumulation of material resources that help bolster individuals’ resilience in the face of vulnerability.

Social assets are networks of relationships from which we gain support and strength, including family and other cultural groupings and associations. Kirby argues that social assets are also accumulated through political collectives in which individuals bolster their resilience by joining together to address vulnerabilities generated by the market—trade unions, political parties, welfare state, and insurance.<sup>180</sup> He also maintains that social assets are a “means through which the state or the market offer forms of social protection against risks.”<sup>181</sup> He notes that the emergence of the welfare state and forms of insurance offered by the market became widespread instruments through which people protected themselves against risk.<sup>182</sup> “It is . . . through social assets that people’s entitlement, enfranchisement and empowerment . . . are primarily achieved.”<sup>183</sup>

Environmental assets are those things upon which human life depends such as soil, water, air, and species.<sup>184</sup> Kirby states that environmental assets tend to be taken for granted and treated as “externalities” by neoclassical economists, who prioritize monetary value.<sup>185</sup> Human activity has resulted in climate change that has

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177. Fineman, *Anchoring*, *supra* note 162, at 14 n.37.

178. KIRBY, *supra* note 156, at 60.

179. *Id.*

180. KIRBY, *supra* note 156, at 64.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 69.

185. *Id.*

affected access to clean water for billions of people and land degradation has caused the disruption of the ecosystem and the extinction of many species.<sup>186</sup> Environmental assets can also include the neighborhood park that builds community among residents.<sup>187</sup> Fineman refers to them as “[e]cological resources [that] can be conferred through our position in relation to the physical or natural environments in which we find ourselves.”<sup>188</sup>

Fineman extends the number of assets to five, incorporating existential assets to include a person’s religion or belief system as a means to address vulnerability.<sup>189</sup> These systems can also include culture, art, and politics.<sup>190</sup> Fineman states that existential assets help people find their place in the world, and allow people to see meaning and beauty in their existence.<sup>191</sup> Because assets are conferred by institutions that are created and legally exist due to state mechanisms, there is some state responsibility for ensuring that the distribution of assets is equitable and fair.<sup>192</sup> Fineman has also used vulnerability theory as a “powerful theoretical lens for reconfiguring legal and political approaches to inequality and disadvantage.”<sup>193</sup>

Rather than an identity-based discrimination model, Fineman asserts that equality can be achieved by focusing on the power and privilege of systems that interact to produce webs of advantages and disadvantages.<sup>194</sup> Fineman contends that the primary issue with achieving equality for various groups of people is that the current laws and policies in place only seek to equalize treatment for all groups rather than changing the institutions that disadvantaged the groups.<sup>195</sup> The privilege that the institutions and people running them still hold is the same and continues to operate so as to disadvantage the same groups as they always have in the past. Vulnerability analysis “provides a means of interrogating the institutional practices that produce the identities and inequalities in the first place.”<sup>196</sup>

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186. *Id.* at 69-71.

187. *See* Fineman, *Responsive*, *supra* note 65, at 271.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 274.

193. Mackenzie et al., *supra* note 155, at 5.

194. Fineman, *Anchoring*, *supra* note 162, at 16.

195. *Id.*

196. *Id.*

Scholars have highlighted the fact that because of certain social and cultural barriers, such as racism, sexism, classism, and ageism, vulnerability theory has limitations and must be critiqued in order to fully allow for some historically disadvantaged groups to achieve equality.<sup>197</sup> Fineman argues that the vulnerable subject should replace the autonomous and independent subject in the liberal tradition.<sup>198</sup> But can this vulnerable subject account for the ways in which state laws and systems have historically been designed to achieve a certain result? While Fineman acknowledges that profound inequalities are tolerated—even justified—this acknowledgement does not go far enough.

The fact of the matter is that profound inequalities were *intentionally created* and continue to be perpetuated against specific groups, thereby advancing only one certain group.<sup>199</sup> Families fail not because of an individual or cultural failure, but because of a lack of physical, human, and social assets. Even though families have built up a certain resilience in the face of state-created or endorsed obstacles, often this resilience prevents the total breakdown of the unit, but sacrifices the well-being of the individual. How is vulnerability theory's emphasis on institutions focused on law and maintenance of state authority over the universal human subject any different than what exists now? Arguably the current politic focuses on individuality, but in reality, certain individuals function together as an interdependent, exclusionary group that uses the state to maintain authority that benefits their group.

When it comes to caregiving, biological, social, and cultural factors have laid the foundation for the experience of care provision within families today. These factors established ideologies typically based upon the notion of separate spheres for men and women. Although state statutes set forth the responsibilities of care for both children and elders in gender-neutral language, the fact of the matter is

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197. See generally Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339 (2015) (arguing that vulnerability theory should be revised such that it acknowledges the ways that identities and privilege influence social practices); Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support* 25 YALE J.L. & FEMINISM 317 (2014) (noting that vulnerability theory should take into account intersectionality and the ways that it affects the state's response to certain individuals and families); Kohn, *supra* note 161 (noting that vulnerability theory is limited because of its tendency to promote unduly paternalistic policies).

198. Fineman, *Anchoring*, *supra* note 162, at 2.

199. See Bach, *supra* note 197, at 336-67.

that women still do the majority of caretaking in families today. Prominent legal scholar Joan Williams has argued in various books that the only way this will change is if America makes a cultural and political shift in how it views masculinity and class privilege.<sup>200</sup> She notes that the lack of social supports for working families in the United States is unusual as compared to every other advanced industrialized country, especially those in Europe.<sup>201</sup> She attributes the failures of public policy within our government as the key reason that Americans face an acute work-family conflict and connects the dominance of the business elite over the white working class to this failure.<sup>202</sup> The economic ties of the family, caretaking, and the workplace are heavily entrenched with ideas of true motherhood, manliness, and economic efficiency. These concepts are part and parcel of social, human, and physical assets within vulnerability theory.

In contemplating how and to whom the assets are distributed, or perhaps how the assets are acquired, it is important to consider who owns the assets. The government must promulgate physical assets, which are those created by institutions or systems. Federal, state, and local laws that set forth boundaries for land and banking institutions control real estate. For example, the government, enacted the G.I. Bill for veterans of World War II so that soldiers returning from home could benefit from a free college education or job training, low-cost mortgages for home ownership, and low-interest loans for starting a business.<sup>203</sup> This Act was responsible for assisting over 2.2 million veterans, and it is largely credited for creating the middle class of the 1950s.<sup>204</sup> However, the benefits of the G.I. Bill were not granted in an equitable manner to Black veterans because of Jim Crow (state-sanctioned) discrimination. As a result, there were fewer African American families that were able to acquire higher education or real property during this time period, which ultimately has had the lingering effect of widening the wealth gap between Caucasians and African Americans.<sup>205</sup>

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200. See JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 4-11 (2010).

201. See *id.* at 6-7.

202. See *id.* at 8-11.

203. Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CALIF. L. REV. 967, 973-74, 976 (2008).

204. See *id.* at 979-80.

205. *Id.* at 979-83.

The government has direct or indirect control over many social assets such as health and education. While this Article uses government as a general term, it includes all three branches including the Executive and Judiciary alongside Congress. Changes in asset distribution and political rules are relevant to changing the norms and preferences associated with economic development.<sup>206</sup> “Family failure is an institutional, not merely a cultural problem.”<sup>207</sup>

### C. *Resistant Assets and the Non-Responsive State*

This Article fills a gap in the legal literature about vulnerability in that it offers a parallel lens to critique the notion that the state will be moved to increase support for groups susceptible to risk of harm because of the universal nature of vulnerability. It is vital to critique the state and how it uses institutions to support a defense to the argument of expansion of the social safety net. It is also important to note how the acceptance of common terms like “safety net” and “entitlements” can color citizens’ understanding of the role of society and the government within the organization of the family.

This Article introduces the concept of “resistant assets.” Resistant assets are those structures or social constructs used by the state to reinforce the status quo or resist change that would positively address vulnerability. For purposes of this Article, they are usually laws or public policies that support the normative family construct, and can include social mores that rely upon racial and gender stereotypes. Resistant assets can work in concert with certain resilience factors to negate state responsibility for vulnerability. This Article analyzes whether unpaid family caregiving is a resistant asset of the state, and if so, what would justify additional state support of both child and elder care for poor and middle-class families.

#### 1. Defining Resistant Assets

The term resistant assets tracks the taxonomy used by vulnerability theorists to describe the institutional resources or capital that exists because of laws and public policy to combat or shield groups from vulnerability. The term resistant assets is perhaps a difficult term to encapsulate the idea of both a positive and negative. Once broken down, the concept magnifies the two-sided nature of state structures as

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206. FOLBRE, WHO PAYS, *supra* note 17, at 119.

207. *Id.*



social network frameworks. Resistant or resistance means anti, resilience, or opposition.<sup>208</sup> It also means unaffected by or impervious to something.<sup>209</sup> Assets are possessions, properties, or resources.<sup>210</sup> The idea is that the state has built-in mechanisms for pushing back against any argument grounded in vulnerability because of the normative institutional structures that exist in society that provide resilience to groups experiencing injury.

For example, arguments in support of grandparent caregivers or support for multigenerational families experiencing economic hardships are often negatively impacted by resilient social assets of the family that buffer vulnerable groups from injury, such as the kinship care system in the African American community or multigenerational living among immigrant families. The term resilient does not embody how this type of asset works *against* families needing assistance, typically poorer families struggling to hang on to the small bit of physical assets they possess. When families bound by love and biological ties provide the support necessary for survival, they are resilient; however, this resilience acts as a resistant asset of the state in that it provides a reason for the government *not* to enter into the private place of families to offer vital support. The word resistant brings to mind the notion of the state as a negative arbiter of resources, controlling them in ways that are usually most advantageous for groups that are in fact rarely ever vulnerable, or at least are most likely to have the highest number of physical and human assets to rebound from calamity to a stable place. While the society and state want to encourage families and communities to support one another, there are specific times when families are caught between the safety net of welfare and adequate assistance from family—times when there is no amount of altruism that will save them.

Families have been responsible for a large part of economic activity in all societies because they have produced much of the consumption, education, health, and other human capital of their members. Therefore, altruism is of primary importance in economic life in part because it dominates family behavior.<sup>211</sup> Altruistic families

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208. See *Resistance*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/resistance> [<https://perma.cc/XT47-EYNH>] (last visited Nov. 18, 2021).

209. See *id.*

210. See *Asset*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/asset> [<https://perma.cc/3FG6-LJ68>] (last visited Nov. 18, 2021).

211. FOLBRE, VALUING, *supra* note 17, at 15.

are the foundation and safety net for all human beings and thus are considered social assets under Kirby's vulnerability theory. The market and the state are fully aware of this norm and continue to push it as a necessary part of the entire capitalist system, but without according the family members who sacrifice the most (usually women) for their time and efforts. In this way, the family is a resistant asset for the state—there is no need for the state to provide any welfare or basic social services for families when there is an intrinsic hierarchy that dictates altruistic behavior as the norm.

The term assets implies monetizing or placing a value on something that people generally protect—that which the state says we cannot monetize—*love*. There is strong resistance to mingling economic exchange and intimacy, particularly within the family, but legal scholars and others have critiqued the argument that extrinsic rewards will “crowd out” intrinsic motivations of love.<sup>212</sup> In noting the terms that are used to define welfare as “entitlements” or “hand-outs,” it presents support as a negative requirement made on society to take from those who have and give to those who do not, similar to the Robin Hood theory.<sup>213</sup> Similar to Fineman's argument about the taxonomy of equality in the United States, the language focuses on people's actions (or lack thereof) rather than the institutions or systems that created the situation in the first place. Altruism is a concept that comes from a biological tie between a species and the concept of family is a social institution that creates and grooms citizens. Both are promoted by state laws and policies designed to create and maintain order and stability within related groups of people. Because altruism is both a societal expectation and part of many state laws, it serves as a resistant asset of the state in that it is used to excuse the state from creating any comprehensive policy on caregiving.

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212. See generally Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997) (exploring whether unpaid domestic labor should be analyzed under an economic or noneconomic framework); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005) (debating whether obligations between family members should be legally enforced); ARLIE RUSSELL HOCHSCHILD, *THE OUTSOURCED SELF: INTIMATE LIFE IN MARKET TIMES* (2012) (discussing the modern phenomenon of monetizing intimate interests); Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167 (2015) (introducing the concept of intimate work, or intimate services paid for by consumers).

213. See generally HOWARD PYLE, *SOME MERRY ADVENTURES OF ROBIN HOOD OF GREAT RENOWN IN NOTTINGHAMSHIRE* (1883) (classic English folktale). Robin Hood, the fairy-tale character, was known for stealing from the rich to give to the poor as a way to equalize the opportunities the poor had to move forward in life. *Id.*

In a neoliberal society, resistant assets support continued arguments for freedom and independence from government intrusion on individual autonomy. For example, the descriptions of part-time workers as those who work forty hours or less in the workforce have a damaging effect primarily on women who are caregivers. Though the Department of Labor does not provide a definitive number of hours designated as part-time work, each state provides a government code that quantifies the number of work hours that qualify state employees as part-time workers. State codes have a direct influence on private employers, and most corporations define part-time work in the same way as the state. The label enables employers to offer less in compensation for the same work, no promotion opportunities, and fewer if any benefits like access to retirement funds, healthcare, and vacation time. Part-time workers are also frequently subjected to abusive scheduling practices. The majority (62%) of part-time workers choose part-time or freelance work for “non-economic reasons,” with a quarter of them citing caregiving obligations.<sup>214</sup> A recent study found that almost half of those seeking part-time work cite work-life balance as their first priority.<sup>215</sup> In many cases, the hostility towards part-timers drives talented workers out of the workplace entirely and into entrepreneurship.<sup>216</sup> The single biggest motivator for U.S. women to start their own business is a desire for more flexible work hours.<sup>217</sup>

The analysis of whether part-time work is financially beneficial for those who need the time to spend on running a household and caregiving is clear. The average cost of daycare is \$12,000 annually and the estimated cost of household help to replace a traditional at-home mom is about \$96,261.<sup>218</sup> Add to this number the cost of taking care of an elderly family member, and you have a salary over \$150,000.<sup>219</sup> The benefits of part-time work often do not outweigh the costs of a substitute caregiver.

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214. Denise Cummins, *Column: Working Parents Have Two Jobs—and Both are Important to the Economy*, PBS NEWSHOUR, (June 28, 2016, 12:22 PM), [http://www.pbs.org/newshour/making-sense/column-working-parents-have-two-jobs-and-both-are-important-to-the-economy/#.V3QnFf\\_3zbA.email](http://www.pbs.org/newshour/making-sense/column-working-parents-have-two-jobs-and-both-are-important-to-the-economy/#.V3QnFf_3zbA.email) [<https://perma.cc/VV6D-F2XJ>].

215. *Id.*

216. *Id.*

217. *Id.* “Fifty-five percent of American women entrepreneurs said they wanted better work-life balance.” *Id.*

218. *Id.*

219. Marilyn Geewax, *Discovering the True Cost of At-Home Caregiving*, NPR (May 1, 2012, 2:57 AM), <https://www.npr.org/2012/05/01/151472617/discovering-the-true-cost-of-at-home-caregiving> [<https://perma.cc/Q2LB-5LZN>]; Weaver, *supra* note 4, at 51.

Other examples of resistant assets include federal and state child support enforcement laws that use economic contributions as the only measure of a father's contribution toward support of his child; federal and state tax policies that favor single-earner married couples (who only comprise 20% of the population),<sup>220</sup> state family laws that favor kinship care in child protection cases, but do not provide adequate state subsidies for these relatives' free childcare.<sup>221</sup> How do resistant assets affect caregiving? These assets continue to place the burden of caregiving on women, limit the state's obligation to provide family support for caregivers, and increase the vulnerability of both dependents and caregivers.

## 2. Making Resistant Assets Receptive

Even though families are struggling to juggle care work with market work, there has not been a large political demand for state solutions to this problem. American families have demonstrated little inclination for translating their private care problems into political demands for social policy reform.<sup>222</sup> The traditional belief in family responsibility for the social welfare of others persists even in the face of well-documented unmet needs and government policies that exacerbate these difficulties. Existing social policies shape the political imagination, and in many cases the law reinforces longstanding values about family responsibility, which subverts grievances grounded in notions of social responsibility.<sup>223</sup>

There are some examples of joint federal and state efforts to compensate family members for their time caring for their elder parent or spouse. Benefits, coverage, eligibility, and rules vary from state to state, and this is part of the problem. Similar to the variance with fifty different approaches to COVID-19, the lack of a national response to the overwhelming needs of most families today results in inconsistencies and inequality across states. Most states allow for adult children caregivers to be paid via Medicaid through a Cash and

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220. U.S. BUREAU OF LAB. STATS., COMPARING CHARACTERISTICS AND SELECTED EXPENDITURES OF DUAL-AND SINGLE-INCOME HOUSEHOLDS WITH CHILDREN, 2-3 (2020), <https://www.bls.gov/opub/mlr/2020/article/comparing-characteristics-and-selected-expenditures-of-dual-and-single-income-housholds-with-children.htm>.

221. Weaver, *supra* note 4, at 51.

222. SANDRA R. LEVITKSY, CARING FOR OUR OWN: WHY THERE IS NO POLITICAL DEMAND FOR NEW AMERICAN SOCIAL WELFARE RIGHTS 3-5 (2014).

223. *Id.*

Counseling program.<sup>224</sup> The elderly relative must be eligible for this program and the cash can be used to pay a caregiver. Arizona, California, Colorado, Delaware, Florida, Kentucky, Louisiana, Minnesota, Montana, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, and Vermont allow spouses to be paid caregivers.<sup>225</sup>

President Joe Biden's infrastructure and economic recovery bill is the first time since President Franklin D. Roosevelt's New Deal that a U.S. President has sought to pass such a comprehensive social contract with Congress. President Biden's agenda is fully supported by the progressive members of the House, but centrists like Joe Manchin and Kyrsten Sinema are holding out to determine the possible hidden costs of the recovery bill.<sup>226</sup> During this period of reconciliation in Congress, there were some advocates, mostly females, outside at the Capitol making their voices known on this issue.<sup>227</sup> However, there are not throngs of people there to make their case. The Plan is aimed at providing more access for low-income and minority workers. As resistant assets, most of them are relegated to their space and can only watch from afar as the country's leaders hash out their future.

### 3. Caring for Vulnerable Elders

As the world's population ages, there will continue to be more focus on the care workers available in order for older people to sustain themselves in their environment. Vulnerability theory assists in several ways to readjust the way we think of care work for the elderly. Rosemarie Tong's analysis is important to note because she argues that "both the family breadwinner ideal and the adult worker ideal need to

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224. *Cash & Counseling Programs: Get Paid as a Family Caregiver*, PAYING FOR SENIOR CARE, <https://www.payingforseniorcare.com/paid-caregiver/cash-and-counseling-program> [<https://perma.cc/3XXZ-QFCX>] (last updated Aug. 21, 2019).

225. *Spouses Can Be Paid Caregivers for Their Husbands or Wives*, PAYING FOR SENIOR CARE, <https://www.payingforseniorcare.com/paying-spousal-caregivers> [<https://perma.cc/DB67-W4CE>] (last updated June 16, 2021).

226. Deirdre Walsh, *2 Senate Democrats Are Holding Up Biden's Spending Package—With Conflicting Demands*, NPR (Oct. 12, 2021 5:00 PM), <https://www.npr.org/2021/10/12/1045423624/2-senate-democrats-are-holding-up-bidens-spending-package-with-conflicting-deman>.

227. See Lorie Konish, *Democrats Manage to Get 4 Weeks of Paid Leave Back into Social Spending Bill. But It's Still Too Early for Americans to Count On*, CNBC (Nov. 3, 2021), <https://www.cnbc.com/2021/11/03/democrats-get-4-weeks-paid-leave-back-in-social-spending-bill-for-now.html>.

be replaced by the adult caring worker ideal.”<sup>228</sup> Robert Goodin theorizes that family has the primary responsibility for caring for elderly members when they are in need.<sup>229</sup> Goodin acknowledges that there is not a formal agreement that creates this obligation of care, which is not quantitative, contractual, or reciprocal. It is purely based on the elderly parents’ needs and includes moral and material support when the adult children have the means to provide it. “If they cannot help their parents financially, then the state should rise to the occasion.”<sup>230</sup> The responsibility of the state is greater where the vulnerabilities are greater; Goodin asserts “the state may not stand idly by as some of its oldest and most frail citizens suffer.”<sup>231</sup>

Eva Feder Kittay emphasizes a different theory that focuses on the dependency of the care worker, including familial caregivers and paid caregivers.<sup>232</sup> She dispels the assumption that the responsibility for providing care to vulnerable dependents is shared equitably. She illustrates that “those who engage in the work of caring for dependents are themselves vulnerable to becoming dependent on others for their own care.”<sup>233</sup> This secondary dependency of care workers is an example of pathogenic vulnerability—a type of dependency that is the result of how social-institutional structures generate dependency.<sup>234</sup> It is pathogenic because political institutions and policies fail to recognize the social contribution of care and the inequitable distribution of responsibility for caring, and they also fail to ensure social support for caregivers.<sup>235</sup>

Kittay argues that we have a collective responsibility to take care of each other and maintains that the state’s functions can most effectively help to discharge this mutual obligation.<sup>236</sup> She makes a vital observation—“the family is just as vulnerable as those of its members who currently need help.”<sup>237</sup> The first goal of public policy must be “to empower the dependency worker with respect to her own

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228. Tong, *supra* note 161, at 288.

229. *Id.* at 296.

230. *Id.* at 297.

231. *Id.*

232. *Id.* at 298.

233. See Susan Dodds, *Dependence, Care, and Vulnerability*, in *VULNERABILITY: NEW ESSAYS IN ETHICS AND FEMINIST PHILOSOPHY*, *supra* note 155, at 181, 193.

234. *Id.* at 196.

235. *Id.*

236. Tong, *supra* note 161, at 298.

237. *Id.*

interests, and, whenever possible, to decrease the dependency of the dependent as well."<sup>238</sup>

Kittay provides three essential remedies for reducing the vulnerabilities of both dependency workers and the dependent people for whom they are caring. First, she offers that the state could provide education, counseling, and respite time for familial caregivers at relatively low costs.<sup>239</sup> The downside to this measure would be that some education and counseling programs might teach caregivers to do more work than they should and many "women who care for elderly persons in the family will think something is wrong with them if they do not sacrifice their well-being to ensure that of others."<sup>240</sup> This type of obligatory feeling tracks with the definition of altruistic reciprocal exchange and is often the dominant feeling of many women who provide care for their own children or elderly family members.

The second method that Kittay proposes to reduce the dependency of familial caregivers is to increase the role of the state through structural reforms in the workplace such as job sharing, flex time, family leave policies, and on-site eldercare.<sup>241</sup> This fix is not a one-size-fits-all solution because it does not fit ambitious workers who seek to advance their careers.<sup>242</sup> This solution also places much of the onus on private employers rather than the state, which means the availability of these multiple support benefits could vary greatly depending on the size and financial capabilities of the employer.

Payment for care work of family members is the third remedy Kittay suggests to improve familial care workers' lives.<sup>243</sup> The form of payment could vary from a tax credit or tax deduction for expenses incurred by helping elderly family members to actual financial assistance.<sup>244</sup> It is noted that very low-income familial caregivers would need actual payment for caregiving because their elderly family members would not likely have much in the way of assets to pay caregivers through a personal care agreement.

In the past, the traditional expectation that families have primary responsibility for eldercare was feasible because adult children lived

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238. *Id.* at 299 (quoting EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* 39 (1999)).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

close to their parents, parents did not live as long, and more women stayed at home.<sup>245</sup> It was assumed that familial care was given somewhat freely, but the truth is that caregiving has always cost something, and women throughout the ages have paid the costs. The difference now is that families often live far apart from one another, and whereas before siblings lived in close proximity to their adult parents, now they all live in various cities, or only one adult child lives close to the parents and bears the brunt of the caretaking responsibilities. Furthermore, contemporary families may feel that they must sacrifice their life savings and even life plans to take care of their elderly members, even though this may not be feasible or desirable for them. Finally, the majority of women are in the workplace, so the number of “free” available caregivers within the family has been significantly reduced.

#### 4. Caring for Vulnerable Children (In Between)

Children, especially preschoolers, are easily the most vulnerable among humans because of their small stature and helplessness. Astounding poverty among children in America creates an unlikely picture in one of the wealthiest countries in the world. There are two-and-a-half million children who experience homelessness and the child poverty rate is 19.9%.<sup>246</sup> When we discuss issues of child poverty, by necessity we must consider women’s poverty issues because children living in poverty do not exist in a vacuum. They are connected to caretakers, who are for the most part young, poor women who are unable to provide the basic necessities for their families. Valerie Polakow’s book, *Who Cares For Our Children?*, tackles the childcare crisis of poor women in America who are trying to work their way out of poverty with little to no success.<sup>247</sup> Polakow argues that childcare is

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245. *See id.* at 298.

246. ELLEN L. BASSUK ET AL., NAT’L CTR. ON FAM. HOMELESSNESS, AMERICA’S YOUNGEST OUTCASTS: A REPORT CARD ON CHILD HOMELESSNESS 15 (2014), <http://www.homelesschildrenamerica.org/mediadocs/280.pdf> [<https://perma.cc/6WGR-YTF2>]; LISA DUBAY & ELENA ZARABOZO, URB. INST., ECONOMIC INSECURITY IN CHILDREN’S LIVES: CHANGES OVER THE COURSE OF THE GREAT RECESSION 5 (2013), <https://www.urban.org/sites/default/files/publication/44316/412900-Economic-Insecurity-in-Children-s-Lives-Changes-Over-the-Course-of-the-Great-Recession.PDF> [<https://perma.cc/2RMN-LPGP>].

247. VALERIE POLAKOW, WHO CARES FOR OUR CHILDREN? THE CHILD CARE CRISIS IN THE OTHER AMERICA 1-3 (2007).



a human right, not just a domestic policy agenda for women's and children's advocacy groups.<sup>248</sup>

Various scholars' prescriptions for change as to the childcare dilemma within the concept of vulnerability are equally expansive. Vulnerability theory applies to both women and children alike.<sup>249</sup> Women and children have interdependent rights and interests, and therefore shared vulnerabilities. In some instances, the dependency of children is a specific form of vulnerability that exists across several domains: the physical, cognitive, emotional, autonomy, social, and legal.<sup>250</sup> Children rely upon care of one or more specific persons before they can realize their own needs and develop their autonomy.<sup>251</sup> The first five domains relate to children's capacities or status and the sixth arises from the relationship between those who care for their dependents and the development of autonomy. It has been argued that the caregivers for dependent children are not supported and are exposed to increased situational vulnerability and increased dependency. This fact has been made plain during the COVID-19 pandemic—the perfect storm.

In theory, vulnerability theory posits that universal childcare should exist in the United States.<sup>252</sup> Where there is a responsive state, it would acknowledge children's vulnerability and the fact that children are deeply tied to larger family vulnerabilities.<sup>253</sup> The responsive state should structure institutions so as to cultivate resilience in children, and promoting their resilience often will require broader structural supports for their families and other institutions in which they are embedded.<sup>254</sup>

The COVID-19 crisis has illustrated how the state can and does acknowledge how children and their families' vulnerabilities are tied together, and when forced, it can expend large amounts of funding to prevent catastrophic outcomes. A more salient question arises when things return back to “normal.” The reality for many poor working parents is that things were already desperate before coronavirus turned the world on its axis. Will the state be willing to mandate and support

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248. *Id.* at 161.

249. See Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817, 820 (2009).

250. Susan Dodds, *supra* note 155, at 183-85.

251. *Id.* at 188.

252. See Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL'Y REV. 459, 517 (2019).

253. *Id.* at 490.

254. *Id.*

paid family medical leave to all employees after the pandemic is over? Will unemployment benefits be increased to adjust for inflation and the cost of living in most U.S. cities? Does there have to be a public health crisis in order for lawmakers to notice the plight of family caregivers?

The plain answer to these questions is directly tied to the economic well-being of the United States. Vulnerability theory must account for the fact that the state is reticent to expend the capital necessary to support vulnerable groups and would rather support institutions that enable it to function with less investment. The federal government is only willing to support families on a short term basis in order to avoid a humanity catastrophe on the world stage. It was only because of the pandemic that paid family medical leave became a reality in 2020, unemployment benefits were extended, and adult eligible taxpayers received three economic impact or stimulus payments, with additional money paid per minor child. It remains to be seen whether paid family leave will ever be passed into law. The United States Congress is battling to pass President Joe Biden's Build Back Better spending package, and this particular benefit was removed from the reconciliation bill because it could not garner any bipartisan support, and two Democrats raised objections to the social safety net bill.<sup>255</sup> The United States is a global outlier, "one of just six countries without any form of national paid leave and one of eight without national maternity leave."<sup>256</sup>

## 5. Vulnerable Caregivers

The word caregiving brings many things to mind, but usually the first thing one thinks of is a close, personal relationship between two people, most often related by blood. Caretaking and caregiving are interchangeable words, and both describe roles that are similar and yet very different. Taking care of young children under the age of five and providing daily care for elderly family members may involve similar tasks, but adults have agency whereas young children do not. The legal duties, federal privileges, and state support provided for the care of children and the elderly are also very different. However, caring for

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255. Teaganne Finn, *Supporters of Paid Family Leave 'Disappointed' After Democrats Slash It from Biden's Plan*, NBC NEWS (Oct. 28, 2021), <https://www.nbcnews.com/politics/congress/supporters-paid-family-leave-disappointed-after-democrats-slash-it-biden-n1282636>.

256. *Id.*

both vulnerable groups entails many considerations that are often overlooked or taken for granted by society.

Besides space, time, and consistent resources, caregiving requires a commitment to do whatever it takes to ensure the well-being of the person in need of the care. For example, no matter how many poopy diapers a caregiver must change, and how many times the bedding must be washed, there has to be something that motivates the caregiver to keep going in the face of emotionally difficult situations, financial constraints, and limited time. Caregiving costs are often thought of in the literal sense of money and time dedicated toward the care of children or elderly family members. However, in addition to these resources, there is another major expense—the physical, mental, and emotional tax of caring for dependents.

Part of the analysis regarding how caregivers become vulnerable requires a review of how market choices influence caregivers to either remain in the workforce or exit it. Economists have not focused on factors that motivate people to care for others, but those that do study how non-market institutions affect the competitive market “assume that individuals make altruistic decisions based on personal preferences.”<sup>257</sup> Altruism toward children is viewed as a natural, unchanging instinct.<sup>258</sup> Parental altruism is an assumption that is supported by many sacrifices made by parents for children, such as money, time, effort through childcare, expenditures on education and health, gifts, and bequests.<sup>259</sup> This stance tends to lead the state to treat altruism as if there is an infinite, costless supply.<sup>260</sup>

Psychologists and other scientists have studied altruism and there are various theories that are relevant to consider regarding the sandwich generation’s dilemma. The reciprocal altruism theory is one that mirrors the traditional relationship between parents and children over the period of a lifetime. This theory describes an organism that acts to reduce its own fitness in order to support another organism’s fitness,

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257. Nancy Folbre, *Disincentives to Care: A Critique of U.S. Family Policy*, in *THE FUTURE OF THE FAMILY* 231, 233 (Daniel P. Moynihan et al. eds., 2004) [hereinafter *Folbre, Disincentives*].

258. *Id.*

259. Gary S. Becker & Kevin M. Murphy, *The Family and the State*, in *THE ECONOMICS OF THE FAMILY*, *supra* note 81, at 633, 635.

260. Folbre compares altruism to air, water, or a stable climate and implies that the appearance of the infinite supply of tangible characteristics will also be jeopardized by inattentiveness. *See Folbre, Disincentives supra* note 257.

while expecting that this behavior be returned at a later date.<sup>261</sup> Parents sacrifice a great deal of time and attention to raise children, especially women, over an eighteen-year period. As research shows, in the United States the time period when adult children depend on parents has extended about seven years to the age of twenty-five.<sup>262</sup> As parents age and become less independent, adult children have been expected to provide care and often shelter for them, typically until death.<sup>263</sup>

#### IV. THE FAMILY AS A RESISTANT ASSET

“Rethinking care involves dismantling the dichotomies that have delimited care: private versus public, love versus money, and altruism versus self-interest.”<sup>264</sup>

What is the opposite of resistant assets? Flexible or malleable assets that the state can mold into whatever components are necessary to live decently in the United States? Perhaps our economic model or base assumption about the relationship of families to the public sphere is incorrect. Currently the state and the market value efficiency, lower costs, and limited state intrusion. Even the term “safety net” plainly indicates that the structures and institutions surrounding the family are insufficient to keep a good proportion of families in a safe place. Approximately 25% of families with school-aged children are food insecure.<sup>265</sup> Further, 30% of households nation-wide spend more than a third of their income on housing.<sup>266</sup> This cycle of poverty continues where lack of familial and state support for women results in their inability to gain traction in the workplace. In vulnerability terms, this is the equivalent of a lack of physical, human, and social assets.

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261. See generally Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOLOGY 35, 35–57 (1971) (discussing the theory of reciprocal altruism).

262. See Amanda Barroso et al., *Majority of Americans Say Parents Are Doing Too Much for Their Young Adult Children*, PEW RSCH. CTR., (Oct. 23, 2019), <https://www.pewresearch.org/social-trends/2019/10/23/majority-of-americans-say-parents-are-doing-too-much-for-their-young-adult-children/> [<https://perma.cc/7SKL-UY46>].

263. HENDRIK HARTOG, *SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE* 22-24 (2012).

264. GLENN, *supra* note 22, at 10.

265. POONAM GUPTA ET AL., URB. INST., *FORTY PERCENT OF BLACK AND HISPANIC PARENTS OF SCHOOL-AGE CHILDREN ARE FOOD INSECURE* 2 (2020), <https://www.urban.org/sites/default/files/publication/44316/412900-Economic-Insecurity-in-Children-s-Lives-Changes-Over-the-Course-of-the-Great-Recession.PDF> [<https://perma.cc/TB3Y-EGEC>].

266. JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING 2020* 1 (2020), [https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard\\_JCHS\\_The\\_State\\_of\\_the\\_Nations\\_Housing\\_2020\\_Report\\_Revised\\_120720.pdf](https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2020_Report_Revised_120720.pdf) [<https://perma.cc/KZ5S-YX52>].

What if women, whether married or not, were the center of legal policies? In other words, what if caregivers had to be listed as head of household for tax purposes, and state funding flowed to the family based on this role? This is more congruent with modern day family composition. Would centering the caregiver in the tax, employment, and housing models make a difference in policy direction? Perhaps the care work of women and families should be the core part of the economy. How would that change the ownership and distribution of assets within vulnerability theory?

A. *Gendered Family Economics*

Women often do not feel like they have a choice when it comes to caregiving of elderly parents or young children. This certainly seemed to be the case when COVID-19 shut down child and elder daycare. Historically, women were legally relegated to the home as homemakers and mothers.<sup>267</sup> Even with the evolution of women's rights through U.S. Supreme Court cases on birth control,<sup>268</sup> abortion,<sup>269</sup> and employment discrimination,<sup>270</sup> women still perform the bulk of responsibilities of caring for family members. Legal scholar Martha Mahoney notes:

Exit—the door with the glowing red sign—marks the road not taken that proves we chose our path. Prevailing ideology in both law and popular culture holds that people are independent and autonomous units, free to leave any situation at any time, and that what happens to us is therefore in some measure the product of our choice. When women are harmed in love or work, the idea of exit becomes central to the social and legal dialogue in which our experience is processed, reduced, reconstructed and dismissed. Exit is so powerful an image that it can be used both to dispute the truth of our statements and to keep people from hearing what we say at all. The image of exit hides oppression behind a mask of choice, forces upon us a discourse of victimization . . . and conceals the possibility and necessity of alliance and resistance to oppression.<sup>271</sup>

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267. See *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873).

268. See *Eisenstadt v. Baird*, 405 U.S. 438, 438-39 (1972); *Griswold v. Connecticut* 381 U.S. 479, 485-86 (1965).

269. See *Roe v. Wade*, 410 U.S. 113, 116-17 (1973).

270. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 632-33 (1974); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 57-58 (1986); *Davis ex rel LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 629-32 (1999); *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 133-36 (2000).

271. Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1283-84 (1992).

So, although traditionally the women in the family have been resistant assets, they did not always choose their place and role as caregiver.

It has been widely recognized that the family is the “primary producer of our workforce and of our citizenry,”<sup>272</sup> and Burggraf has argued that the production of wealth in the form of human capital will require an increased socialization of the costs of care and/or privatization of the return on family investment.<sup>273</sup> Caretaking costs both time and money and the declining fertility rate in the United States is an indication that modern couples seriously consider the economic tradeoffs to having a child or multiple children. The fact that there will eventually be fewer adult children to care for elderly parents within the family will also impact the workplace. So, while there is an immediate dilemma of the sandwich generation, it should be noted that intergenerational caregiving issues will continue to be relevant for Generation X and Millennials.

Employment law scholar Peggie Smith emphasizes the role of elder care in work-family legal strategies, highlighting how the FMLA is inadequate to deal with the number of employees providing care for baby boomer aging parents who increasingly need assistance with daily care.<sup>274</sup> She notes the differences in caregiving for children and the elderly and how these differences impact the manner of time and assistance necessary to deal with the physical and/or mental decline and death of a parent or elderly family member.<sup>275</sup> While approximately 25% of corporations offer informal, financial, and flexibility benefits, the majority of employees depend on the FMLA to take time off work to care for a parent.<sup>276</sup> Smith highlights how the language and limited timeframe of twelve weeks of unpaid leave may not cover the type or length of care required for elderly people with degenerative diseases, such as Alzheimer’s or Parkinson’s.<sup>277</sup>

Smith has written more extensively about the work of paid health care workers and domestics. She has compared the role of the informal

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272. BURGRAFF, FEMININE, *supra* note 82, at xi; *see also* FOLBRE, VALUING, *supra* note 17, at 2 (discussing the resources parents put into children and how the economy then depends upon them once they enter the work force); Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 435 (2006) (discussing how caregiving cultivates adult citizenship).

273. BURGRAFF, FEMININE, *supra* note 82, at xi.

274. Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 354-55 (2004).

275. *Id.* at 365-66.

276. *Id.* at 380-82.

277. *Id.* at 384-87.

caregiver with the formal health care worker, and her research in this area focuses on how law and policy regulate paid care workers to a status where they are unable to collectively bargain for basic rights afforded to those who work outside the home environment.<sup>278</sup> She has argued that the state superficially emphasizes autonomy with regard to policies of “‘consumer-directed’ care,” which impedes government efforts to respond to vulnerability.<sup>279</sup> She further asserts that the state should recognize the mutual vulnerability of the caregiver and the consumer, and should position itself as an employer accountable for improving standards for care recipients and care providers because both groups are deserving of state and market support.<sup>280</sup>

In the context of intergenerational caregiving, personal care agreements are one way that adult children who are the primary caretakers of elderly relatives can be paid for their services. These agreements have specific requirements, including being in writing, detailing the type of care services provided, having a set start date, and a set amount for hourly compensation or transfer of specific assets.<sup>281</sup> While this type of agreement can be very beneficial for the caregiver who has to reduce her hours at work or leave a job all together in order to care for an aging parent, the compensation has to be commensurate with the market rate for similar services, which is typically low to moderate hourly pay.<sup>282</sup> Additionally, family members should not be paid retroactively or set a past date for the activation of the agreement to cover months or even years of care provided before the personal care agreement is executed.<sup>283</sup>

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278. See generally Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U.L. REV. 851 (1999) (examining the historical context around paid female labor roles, and how those have shaped the relationship between family and economic justice); Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1837 (2007) (arguing for the increased protection of home health care workers); Peggie R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, 15 EMP. RTS. & EMP. POL'Y. J. 157 (2012) (noting the multi-layered devaluation of domestic workers in the United States).

279. Dianne Avery & Martha T. McCluskey, *When Caring Is Work: Home, Health, and the Invisible Workforce*, 61 BUFF. L. REV. 253, 266 (2013) (noting that policies of “consumer-directed care” are aimed at increasing individual control and dignity for those in need of care).

280. *Id.* at 259.

281. Kerry R. Peck, *Creating Effective Agreements for Payment of Family Caregivers* 37 BIFOCAL 63, 64 (2016); Vincent G. Rapp & Michael C. Weeks, *The Use of Personal Care Contracts in Light of Reed v. Dept. of Social Services*, 63 J. MO. BAR 86, 87-88 (2007).

282. Peck, *supra* note 281; Rapp & Weeks, *supra* note 281, at 86-87.

283. Peck, *supra* note 281.

Finally, there are financial considerations that must be noted for both the employer (elderly family member) and the employee (family caregiver). The elderly family member may have to forfeit Social Security Insurance and Medicaid benefits depending on the timeframe of when pay or assets are paid to the caregiver in relation to an application for assisted living assistance or nursing home care.<sup>284</sup> This could negatively affect the elderly family member as well as the family caregiver if the situation is one where care needs have changed and must be received outside the home. The employee must pay taxes on her income, including self-employment taxes. Many of the complexities involved in the proper execution of personal care agreements would be difficult for families without resources or access to legal, tax accountant, and bookkeeping services.

“Economic models of behavior are largely silent on motivations, linking them to preferences without explaining how these preferences have been produced.”<sup>285</sup> The law has either created or reinforced the preferences that drive economics—both within the family and outside of it. Perhaps the primary issue that we battle with is the initial separation of the spheres in and of themselves, which separate the family from the market. It allows for limited consideration of exchange of pay or wages for what occurs within the family and devalues the work of care. If the family is the bedrock of society, and society is composed of businesses and government, there should be a recognized business of the family as well as a government of the family. The government of the family is the set of statutes in family, probate, tax, employment, business, and criminal law that structure the normative framework of the who, what, where, when, and why of family.<sup>286</sup>

Within vulnerability theory, the government of the family is defined by both physical assets and human assets. State institutions set forth the public policy of the family and the statutes that guide behavior and thought. These physical assets determine in many ways the development of human assets. The network of the family is a social asset, and the means by which it has used human assets to move the family unit forward builds resilience. This forms the basis of the

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284. Rapp & Weeks, *supra* note 281, at 87.

285. Melissa Hardy, *Developing Interdisciplinary Approaches to Study Intergenerational Relationships*, in INTERGENERATIONAL CAREGIVING 67, 71 (Alan Booth et al. eds., 2008).

286. The five “w’s” refer to (1) who belongs to the family, (2) what family members can and cannot do to and with each other, (3) where family relationships are recognized and by whom, (4) when they can form families, (5) and why do families matter (family law policies set forth by each state).



resistant assets—where social assets fortify into bricks of resilience. This resilience is not intentionally set forth to show strength, but more commonly shows wear and tear, similar to the exhausted caregiver who would like a different situation. The caregiver does not have the time or resources to force a responsive state to do more to offset the harms and inequality that result from the imbalance caused by unpaid care work.

*B. Love as Law: Legal Reliance on Cultural Norms*

“Filial support is also rooted in the ethical notion of reciprocity: Parents support their children when they are young, and the young owe the same to their parents as they age.”<sup>287</sup>

Legal scholars have noted how exchange among humans is a cornerstone of families. Families are grounded in mutual exchanges, and these exchanges exist because of certain contracts within the family based on the role of gender.<sup>288</sup> However, whether or not this mutual exchange was held together by love or duty is up for debate. Involuntary obligations that exist among family members can be framed by three elements: (1) membership in a community is a foundation for moral responsibility, (2) membership in a community carries community expectations or assumptions about the nature of the particular obligations, and (3) there is a reflexive identity of the community and the member because they are part of each other.<sup>289</sup>

The role of women within the family as caretakers of both young and old members is tied to a legal framework of different areas of laws that have had a direct impact on family economics, including tax, employment, and housing laws. These three areas of law are designated as “living room laws” because they “impact families where they live—in their home, at work, and in their economic relationship with the federal government.”<sup>290</sup> In many ways, state refusal to consider ways to buttress caregiving provided by family members is undergirded by family laws and public policies as well as other federal and state

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287. Beth Baker, *Paying for Mom: Little-Known Laws Force Families to Fund Parents' Care*, AARP (Jan. 2009) (on file with author).

288. Martha M. Ertman, *Exchange as a Cornerstone of Families*, 34 W. NEW ENG. L. REV. 405, 407 (2012).

289. Patricia Smith, *Family Responsibility and the Nature of Obligation*, in KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY 44-46 (Diana Tietjens Meyers et al. eds., 1993).

290. Weaver, *supra* note 4, at 5 n.20.

valuations considered when analyzing government spending on children and the elderly.

For example, family law scholar Jill Hasday keenly identifies how family law's canonical treatment of family as being separate from the market or market concerns in certain areas is contradicted by courts consistently upholding contractual agreements between certain family members in particular situations.<sup>291</sup> Hasday points out that the symbolic expression of family law's rejection of the market causes disproportionate harm to women and poorer people.<sup>292</sup> In the instance of the law's refusal to recognize interspousal contracts for domestic labor, Hasday asserts that this enforces female dependence and mandates female altruism.<sup>293</sup> She also adeptly illustrates the inequality generated by states' enforcement of prenuptial agreements where wives receive a certain amount of money for each child they bear. She further exposes the one-sidedness of the state's legal prohibition or restrictions on payments to surrogates or birth mothers (the poorest parties in surrogacy or adoption arrangements), while allowing high-status professionals such as doctors and lawyers to collect their fees.<sup>294</sup> She argues, "more vulnerable people frequently shoulder the weight of family law's desire to declare its separation from the market."<sup>295</sup>

Intergenerational caregiving has become an increasingly important concern for families in America and across the globe. Though the private family has traditionally been responsible for the basic health, housing, food, and other essentials of living for both the very young and the very old, the state typically provides government assistance for infirm parents.<sup>296</sup> Theoretically, there is a difference in the responsibility that family members feel when contemplating their financial or in-kind caregiving contributions to children versus older relatives. Altruism is often associated with intergenerational caregiving

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291. JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 41, 67-69, 86 (2014). In this chapter entitled, *Family Law and Economic Exchange*, Hasday highlights courts' prohibition on interspousal contracts for domestic services and refusal to recognize human capital as divisible marital property at divorce as being antithetical to the many more legally permissible and enforceable economic exchanges routinely upheld or compelled by courts, including pre and post-nuptial agreements, caregiving agreements among adult siblings, and alimony payments. *Id.*

292. *Id.* at 88.

293. *Id.* at 92.

294. *Id.* at 88-90.

295. *Id.* at 90.

296. See Steven L. Nock et al., *The Distribution of Obligations*, in *INTERGENERATIONAL CAREGIVING*, *supra* note 285, at 279, 280-81.

of the very young. It is defined as the principle or practice of unselfish concern for or devotion to the welfare of others.<sup>297</sup> Care for the elderly falls under the auspices of obligation because it is generally thought of as a moral or customary duty or commitment. Perhaps this is a matter of semantics, but from a legal perspective, parents have a clear state-imposed legal responsibility to care for children.

While there are some laws that provide that adult children can be held financially responsible for the care of their elderly parents, they are not enforced in the same way as child welfare laws. Filial laws obligating adult children to support their parents exist in thirty states, and they are based on the moral principle of filial piety, which holds that adult children have a duty to respect, obey, and personally care for elderly parents and relatives.<sup>298</sup> However, only a few states actually enforce these laws, such as Pennsylvania, North Dakota, and South Dakota.<sup>299</sup>

For elders who receive Medicaid, a claw back or reimbursement provision allows the federal government to collect money from the estate or heirs of a person whose care was paid for by Medicaid.<sup>300</sup> There is state discretion regarding how aggressively it pursues reimbursement. Typically, when there are exempt assets that were available when the elder person applied for Medicaid, the state will seek payment from the estate.<sup>301</sup> If the elder relative gave away assets to become qualified for Medicaid or there is a cash value on an insurance policy that is payable to the estate or family members, the state may seek reimbursement.<sup>302</sup>

The rising percentage of older Americans has resulted in more lawsuits being brought against adult children for failing to care for indigent parents.<sup>303</sup> Most filial laws allow for private nursing homes

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297. See *Altruism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/altruism> [<https://perma.cc/ZFN8-AHNX>] (last visited Nov. 18, 2021).

298. Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & POL'Y 709, 710 n.4 (2001).

299. Lisa McElroy, *More Filial Support Cases Ending Up in Court*, AARP BLOG (Oct. 28, 2013, 6:25 PM), <https://blog.aarp.org/legal-grounds/more-filial-support-cases-ending-up-in-court>. [<https://perma.cc/YAJ7-6WBG>].

300. Bob Carlson, *When Adult Children Can Be Required to Pay for Their Parents' Long-Term Care*, FORBES (Nov. 22, 2019, 7:30 AM), <https://www.forbes.com/sites/bob-carlson/2019/11/22/when-adult-children-can-be-required-to-pay-for-their-parents-long-term-care/?sh=53d254e87a44>.

301. *Id.*

302. *Id.*

303. McElroy, *supra* note 299.

and government agencies to sue for recovery of the costs of caring for the parents, and in some states, there are criminal penalties allowing for imprisonment for failure to provide filial support.<sup>304</sup> However, most of these laws are enforced sporadically.<sup>305</sup> Half of these laws require that financial ability to pay is an explicit condition of enforcement, and approximately one-third “make failure to provide support a criminal act.”<sup>306</sup> There are a host of problems that states encounter regarding enforcement of these laws, including jurisdictional, comity, and equity issues.<sup>307</sup> A lawsuit in Pennsylvania, *Pittas v. Health Care & Retirement Corp. of America*, caused a great deal of concern because an adult son was held liable for almost \$100,000 in health care costs after his mother’s six-month stay at a nursing facility.<sup>308</sup> In states where filial laws exist, the question for adult children is whether nursing homes will begin to come after them to recover expenses for patients who cannot afford the costs of care.<sup>309</sup>

Failure to care for a parent could also result in criminal prosecution. The Ohio Supreme Court ruled on a case in 1998 regarding the duty of adult children to support their aged or infirm parents. In *State v. Flontek*, a woman was prosecuted for the death of her elderly mother.<sup>310</sup> The court held that the statute addressed only financial support, and no other types of support such as care, feeding, and medical attention. The court reversed the conviction because the adult daughter had financially cared for her mother by providing her with a nice, clean home environment, food, and clothing. The elderly mother died from severe medical problems due to “gross neglect.” The

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304. Allison E. Ross, *Taking Care of Our Caretakers: Using Filial Responsibility Laws to Support the Elderly Beyond the Government’s Assistance*, 16 ELDER L.J. 167, 177 (2008).

305. Seymour Moskowitz, *Responsibility Statutes: Legal and Policy Considerations*, 9 J. L. & POL’Y 709, 709 (2001).

306. *Id.*

307. See Donna Harkness, *What Are Families For? Re-evaluating Return to Filial Responsibility Laws*, 21 ELDER L.J. 305, 312-15 (2014); Shannon Frank Edelstone, Comment, *Filial Responsibility: Can the Legal Duty to Support Our Parents Be Effectively Enforced?*, 36 FAM. L.Q. 501, 505 (2002).

308. Kelly Greene, *Are You on the Hook for Mom’s Nursing-Home Bill?*, WALL ST. J. (June 22, 2012, 3:35 PM ET), <http://www.wsj.com/articles/SB10001424052702303506404577446410116857508>.

309. See Jamie P. Hopkins et al., *Leveraging Filial Support Laws Under the State Partnership Programs to Encourage Long-Term Care Insurance*, 20 WIDENER L. REV. 165, 195 (2014) (arguing for an increase in the enforcement of filial support laws and personal liability to incentivize private insurance purchase).

310. CHENWEI ZHANG, MEMBERS ONLY, DUTY OF ADULT CHILDREN TO SUPPORT AN AGED OR INFIRM PARENT I (2018), <https://www.lsc.ohio.gov/documents/reference/current/membersonlybriefs/132adultsupport.pdf> [<https://perma.cc/2BVC-KFQ3>].

adult daughter claimed that she had advised her mother to seek medical attention when her health began to fail, but the mother refused to do so. There was a different criminal statute that did allow for criminal prosecution of an adult child if they knowingly or recklessly failed to provide treatment, care, goods, or service necessary to maintain the health or safety of the person and the failure caused harm to the person. This statute was not the law at issue in *Flontek*. The court interpreted that the legislative intention of the statute at issue was not to place adult children in untenable situations and create grounds for unreasonable and excessive prosecutions.

Adult children in many cultures are expected to provide care for their aging parents and elders. The expectation of filial responsibility varies depending on the ethnicity and culture of the family. For example, among Asian American families, “[t]aking care of parents in old age is understood as a major part of carrying out filial obligations.”<sup>311</sup> Psychologist Robert Kurzban sets forth evidence of altruism as a stable evolutionary behavior that results from reciprocity.<sup>312</sup>

In some cases, reciprocal care may also be fueled by the fact that aging parents will have an inheritance to pass down to adult children or grandchildren. Since the older generation is living longer, this has implications for what adult children financially prioritize. “If your parents live into their nineties, you may well have to wait until you are sixty-five before you inherit their money. This means that life-time transfers—money for college, for a down payment on your dream

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311. ADA C. MUI & TAZUKO SHIBUSAWA, *ASIAN AMERICAN ELDERS IN THE TWENTY-FIRST CENTURY: KEY INDICATORS OF WELL-BEING* 92 (2008).

312. Kurzban sets forth four minimum requirements that must be met in order for reciprocal altruism to work:

[t]he environment must be one in which there are benefits to be conferred...; [o]rganisms must have repeated interactions with one another...; [o]rganisms must have sufficient information-processing abilities that they are able to distinguish among individuals and remember which ones have and have not delivered benefits in the past...; [and] [o]rganisms must have sufficient information-processing sophistication and behavioral flexibility that they can interact with other organisms contingent on the history of interaction.

Robert Kurzban, *Biological Foundations of Reciprocity*, in *TRUST & RECIPROCITY: INTERDISCIPLINARY LESSONS FROM EXPERIMENTAL RESEARCH* 105, 111-17 (Elinor Ostrom & James Walker eds., 2003).

house—are more important in your life than inheritance.”<sup>313</sup> Probate and state welfare laws incentivize family caregiving by adult children.

Within vulnerability theory, laws that shape family behavior and set enforced expectations are physical assets. Entrenched physical assets are normative frameworks for social assets. Over time, cultural influence can expand the normative framework while still building resilience, hence the creation of resistant assets. However, this resilience is in response to a *non-responsive* state. If family commitment and obligation to care for elders is a combination of learned behavior and cultural expectations, perhaps the only way to disrupt the conduct is to change the laws that hold family responsible, or create laws that incentivize interdependency of corporate earnings to employee work-life balance.

### C. *The Politics of Care*

“[W]hat happens to men is politics . . . but what happens to women is culture . . . .”<sup>314</sup>

—Gloria Steinem

The question of who cares for the elderly is as much a social question as it is an economic and political question. Who cares for the vulnerable members of our society is central to examining the role of the state within the family care framework. Evelyn Nakano Glenn astutely addresses this issue in her book, *Forced to Care: Coercion and Caregiving in America*. The main thesis of her book is that “the social organization of care has been rooted in diverse forms of coercion that have induced women to assume responsibility for caring for family members and that have tracked poor, racial minority, and immigrant women into positions entailing caring for others.”<sup>315</sup> She asserts that the net consequence of the various forms of coercion has restricted choice for women and relegated caring labor as free or low waged.<sup>316</sup> In situating the social organization of care as the centerpiece of “a number of important ethical, political, and economic dilemmas in American

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313. LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 14 (2004) (citing John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 735 (1988)).

314. Gloria Steinem, *Why Mama Grizzlies Vote Pro-Choice*, WOMEN’S MEDIA CTR. (Oct. 29, 2010), <https://www.womensmediacenter.com/news-features/why-mama-grizzlies-vote-pro-choice> [https://perma.cc/KU4P-GS6N].

315. GLENN, *supra* note 22, at 5.

316. *Id.*

society,” she essentially argues that it is predominantly a public issue.<sup>317</sup> As a public issue, the social organization of care can be placed within vulnerability theory as a type of asset that serves the state by lowering or eliminating a public expense and perpetuating economic and social injustice, gender and racial inequality, and class and citizenship inequity.

The politics of care have been part of the dialogue of most politicians, but typically state and federal legislatures fall short of approving any bills that would offer substantial assistance to caregivers of children or the elderly. Those who focus primarily on women’s issues or poverty are quickly relegated to a lesser status within the political conversation. Bernie Sanders, a 2016 and 2020 presidential candidate and self-identified socialist, took a liberal position on the expansion of Social Security, Medicare for all, and paid leave for all workers who need to care for a family member.<sup>318</sup> Connecticut Senator Chris Murphy introduced the Social Security Caregiver Credit Act that provides modest retirement benefits for those who have had to leave the workforce or reduce their hours in order to care for a loved one.<sup>319</sup> Sanders notes that women are disproportionately represented among unpaid caregivers, making up two-thirds of the sixty-five million people who leave the workforce or reduce their hours significantly to care for family members during some point in their career.<sup>320</sup> The fact that the government is saving money on the backs of women has been called amoral by feminist scholars, while conservatives maintain that Sanders’ suggested changes are bad for businesses and the overall economy.<sup>321</sup>

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317. *Id.*

318. Scott Detrow, *8 Key Moments That Helped Define Bernie Sanders’ Presidential Runs*, NPR (Apr. 9, 2020, 5:06 PM), <https://www.npr.org/2020/04/09/830728501/8-key-moments-that-helped-define-bernie-sanders-presidential-runs> [<https://perma.cc/8ZQD-ARWU>]; Heather Marcoux, *Sen. Bernie Sanders Answers Our Questions on Paid Leave, Childcare & Maternal Burnout*, MOTHERLY (Mar. 2, 2020), <https://www.mother.ly/life/news/news-trending/bernie-sanders-on-paid-leave-childcare-costs-and-maternal-burnout> [<https://perma.cc/L2DT-EYEP>].

319. Bryce Covert, *One Small Fix to Help People Who Leave Their Jobs to Care for Loved Ones*, THINKPROGRESS (Mar. 18, 2016, 1:11 PM), <https://thinkprogress.org/one-small-fix-to-help-people-who-leave-their-jobs-to-care-for-loved-ones-bf5c1ef066c2> [<https://perma.cc/BYA6-ZP5B>].

320. Press Release, Bernie Sanders U.S. Senator for Vermont, Sanders, Murphy Introduce Bill to Provide Retirement for Family Caregivers (Mar. 18, 2016), <https://www.sanders.senate.gov/press-releases/sanders-murphy-introduce-bill-to-provide-retirement-for-family-caregivers/> [<https://perma.cc/YBU7-WQ75>].

321. BROWNE, *supra* note 17, at 187.

Family caretaking, while predominately viewed as a private affair, is a core part of the capitalist economic system that reinforces patriarchal power. Paul Ryan's 2010 Policy Paper, *A Roadmap for America's Future*, discourages the expansion of government social programs because they threaten to "smother the economy" and undermine the personal initiative and responsibility central to success of both individuals and society.<sup>322</sup> Since the passage of Ryan's tax plan in 2018, it has been noted that the majority of the tax benefits received are by the top 1% of earners, while the middle class and poor either reap very little or nothing in comparison.<sup>323</sup> Regardless of class, the free market economy has disadvantaged families because the government provides very little regulation of employers in setting reasonable work limitations, paying a living wage, and providing the infrastructure families need to care for and educate its youngest members.<sup>324</sup>

Anne-Marie Slaughter suggested in her widely acclaimed media article, *Why Women Still Can't Have It All*, that if more women were in leadership positions, they could make it easier to stay in the workforce.<sup>325</sup> Now that the United States has its first female Vice-President and a record number of women in Congress, it is uncertain whether political leadership will influence the corporate sector. Americans elected President Joseph Biden and Vice-President Kamala to lead the country out of the COVID-19 crisis, and there is a possibility for fundamental change in a physical asset. The Biden Plan to Create a 21st Century Caregiving and Education Workforce is comprehensive.<sup>326</sup> The Plan includes funding for new and existing programs in elder care and childcare. The focus on supporting and expanding the physical and human assets available to female caregivers is evident throughout the Plan.

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322. PAUL RYAN, *A ROADMAP FOR AMERICA'S FUTURE: A PLAN TO SOLVE AMERICA'S LONG-TERM ECONOMIC AND FISCAL CRISIS*, iv, 1-3 (2010), <https://web.archive.org/web/20140703112933/http://roadmap.republicans.budget.house.gov/uploadedfiles/roadmap2final2.pdf>.

323. Avi Selk, *Paul Ryan Celebrated the Tax Cut with a Tweet about a Secretary Saving \$1.50 a Week*, WASH. POST (Feb. 4, 2018), [https://www.washingtonpost.com/news/the-fix/wp/2018/02/03/paul-ryan-celebrated-the-tax-cut-with-a-tweet-about-a-secretary-saving-1-50-a-week/?noredirect=on&utm\\_term=.b778edb3870a](https://www.washingtonpost.com/news/the-fix/wp/2018/02/03/paul-ryan-celebrated-the-tax-cut-with-a-tweet-about-a-secretary-saving-1-50-a-week/?noredirect=on&utm_term=.b778edb3870a).

324. See MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)*, at xxiv-xxvi (2020).

325. Anne-Marie Slaughter, *Why Women Still Can't Have It All*, ATLANTIC (July/Aug. 2012), <https://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/>.

326. *The Biden Plan for Mobilizing American Talent and Heart to Create a 21st Century Caregiving and Education Workforce*, BIDEN-HARRIS DEMOCRATS, <https://joebiden.com/caregiving/> [<https://perma.cc/73B3-BPKW>] (last visited Nov. 18, 2021).



First, Democrats have billed the Biden Plan as an economic recovery plan, and as such, it provides a host of new caregiving pillars grounded in treating caregivers like the professionals they are. This equates to an increase in salary and benefits, including twelve weeks of paid family and medical leave. Support for informal caregivers includes a \$5,000 tax credit, Social Security credits for people who care for their loved ones, and professional and peer support for caregivers of veterans. The Biden Plan also expands access to long-term services and supports establishing a state innovation fund to help expand home and community-based alternatives to institutional care. Alongside this fund are incentives for investing in the recruitment of 150,000 community health workers in communities that suffer from racial health disparities due to chronic underfunding and systemic racial discrimination. The Plan also includes programs to provide home repairs and modifications to create safer, more functional home environments for older adults. The entirety of the Plan provides a new state infrastructure to support families as a whole—children, elders, and the caregivers of both.

The gendered nature of what is a social, economic, and political question is personified in that “[t]he real issues that surround caregiving are those of money and [what] the role of government and families (i.e., women) should be in providing such care.”<sup>327</sup> An example of the politics of care is seen by a closer examination of the average cost of care for frail elderly individuals, 80% of whom are cared for by families rather than institutions.<sup>328</sup> The average cost of nursing home care in an institution is \$60,000 annually.<sup>329</sup> Federal and state governments via Medicaid are the primary payees; thus, the “free” informal care provided to the frail by women is a real cost-saver to the nation.<sup>330</sup> Any type of government intervention that could provide financial support or pay for a caregiver would typically make women’s lives easier, but will likely be ignored or neglected by male politicians.<sup>331</sup> Gender-responsive policy changes in caregiving could include an increase in the number of years that workers are allowed to drop in their benefit calculation for years they spend outside of the workforce as a result of

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327. BROWNE, *supra* note 17, at 186.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

caregiving.<sup>332</sup> While Canada has dropped all caregiving years from benefit calculation, the United States has a limit of five years.

The idea of care as a right or common principle alongside the assurance of liberty, equality, and justice is idealistic—mostly because the aforementioned rights are integral to the Declaration of Independence and the U.S. Constitution. Care and family rights are constitutionally protected under the umbrella of the Bill of Rights and the Fourteenth Amendment. To the extent they are part of the national political dialogue, they exist both legally and socially as autonomous rights. The constitutional system is designed to protect citizens from interference by the state. Parents can raise their child as they see fit.<sup>333</sup> Individuals have the right to marry whom they desire.<sup>334</sup> Parents have the right to limit which relatives have access to their children or restrict access entirely.<sup>335</sup> The myth of autonomy was debunked because the American rights' scheme is set forth as one grounded in negative entitlements.

“If the lack of an available and affordable child-care and long term care system makes life difficult for so many women, is not the nation’s unwillingness to develop such a system a form of gender discrimination?”<sup>336</sup> Political scientist Mona Harrington argues in her book, *Care and Equality: Inventing A New Family Politics*, that “[t]he first premise of a serious liberal politics of family care must be to recognize care as a national social value rightfully calling on Americans for meaningful support as a matter of high priority.”<sup>337</sup> Nancy Folbre essentially supports the same ideal in her book, *Valuing Children*, where she asserts that the United States should have a new and improved social contract that provides a more equitable and efficient institutional framework for child rearing.<sup>338</sup>

From a political standpoint, the United States is an outlier among industrialized countries that provide both universal childcare<sup>339</sup> and

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332. *Id.* at 187.

333. See *Meyer v. Nebraska*, 262 U.S. 390, 394 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 515 (1925).

334. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967); *Obergefell v. Hodges*, 576 U.S. 644, 645-46 (2015).

335. *Troxel v. Granville*, 530 U.S. 57, 75 (2000).

336. BROWNE, *supra* note 17, at 186-87.

337. MONA HARRINGTON, *CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS* 44 (1999).

338. FOLBRE, *VALUING*, *supra* note 17, at 3.

339. Brigid Schulte, *The U.S. Ranks Last in Every Measure When it Comes to Family Policy*, in *10 Charts*, WASH. POST (June 23, 2014), <https://www.washingtonpost.com/blogs/>

paid parental leave<sup>340</sup> for its citizens. Developing countries in Bangladesh and Africa have made economic investments in the community with women rather than men<sup>341</sup> because men are more self-interested and will not use the money to advance or nurture children or others. Rather, men spend money to satisfy their own needs or pleasures without thinking of the well-being of those family members connected to them. This model is working to advance the economy in these countries because it improves the country's overall development when women can contribute to the economy. In 2014, women controlled twenty trillion dollars in annual, global, consumer spending, and this number is expected to rise to eighty trillion by 2019.<sup>342</sup> An Ernst & Young study shows that the next emerging global market is the women's market.<sup>343</sup>

However, in this twenty-four-page report, there are only three paragraphs about parenthood and one paragraph each regarding flexibility and health and well-being. Corporations appear to be more attentive to the needs of working parents, but they are short on ways in which employers should assist employees with the dual demands of care posited by elderly family members. And even though some corporations offer these benefits to some employees, they are usually the highest-paid employees who do not lack the means to hire paid care if work demands increase.

What we know is that, politically, the development of the global market is intimately related to the way that states have used their power. "While technology may open new opportunities for production, distribution and communication, it is states that have created the frameworks of laws, norms and regulations that shape the ways these

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she-the-people/wp/2014/06/23/global-view-how-u-s-policies-to-help-working-families-rank-in-the-world/?utm\_term=.705ff16ac2e8.

340. Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), <http://www.pewresearch.org/fact-tank/2016/09/26/u-s-lacks-mandated-paid-parental-leave/> [https://perma.cc/Y6JB-VSG8].

341. OECD DEVELOPMENT ASSISTANCE COMMITTEE, *INVESTING IN WOMEN AND GIRLS: THE BREAKTHROUGH STRATEGY FOR ACHIEVING ALL THE MDGS 1-2* (2010), <https://www.oecd.org/social/gender-development/45704694.pdf> [https://perma.cc/3DDG-979N].

342. Geraldine J. Fraser Moleketi, *Investing in Women Means Investing in Africa's Future*, AFR. DEV. BANK GRP., (Oct. 9, 2014), <https://web.archive.org/web/20170326233753/https://www.afdb.org/en/blogs/investing-in-gender-equality-for-africa%e2%80%99s-transformation/post/investing-in-women-means-investing-in-africas-future-13581/>.

343. ERNST & YOUNG, *WOMEN: THE NEXT EMERGING MARKET: SUPPORTING WOMEN TO FULFILL THEIR POTENTIAL 2* (2013), [https://assets.ey.com/content/dam/ey-sites/ey-com/en\\_g/topics/growth/WomenTheNextEmergingMarket.pdf](https://assets.ey.com/content/dam/ey-sites/ey-com/en_g/topics/growth/WomenTheNextEmergingMarket.pdf) [https://perma.cc/X9QU-7NQ4].

opportunities are used.”<sup>344</sup> The state plays a crucial role in shaping economic and social outcomes. States lose legitimacy when they are unable to satisfy citizens’ demands, and in places like Latin America, there is a “profound crisis of governability.”<sup>345</sup> Welfare states have been under pressure to reduce costs and the amount and extent of protection they provide.<sup>346</sup> At the same time, these same democratic governments have prompted a state versus working-class political environment because of the severe shift in the balance of class power, with a concentration of wealth among the governing elites.<sup>347</sup> Therefore, vulnerability is increasing among those who are not able to fit within the new technological, global economy.

To the extent that caregivers fit within the old economy, it was only as a presumed free labor force that enabled the private market to work more efficiently. There has been little movement to fix this presumption in the United States, even as other modern industrialized countries offer a great deal more support for families raising children or caring for elderly family members.<sup>348</sup> An interesting new development in Japan is that elder care may be transferred to technology via robots. There are new technological developments in caretaking for elderly citizens in Japan and China where expensive robots are able to perform daily tasks, such as cleaning or cooking, for senior citizens that allow them to remain in their own homes.<sup>349</sup> While technology may replace the tasks of the human caregiver, an electrical robot cannot replace the emotional attachment formed between the caregiver and the person for whom she cares.

Perhaps the ability of women to break out of their emotional attachment to caring and withholding caring services would disrupt the state’s reliance on them to provide free care for family members.<sup>350</sup> If women could fight their tendencies to express a caring preference and

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344. KIRBY, *supra* note 156, at 89.

345. *Id.* at 91 (quoting PEADAR KIRBY INTRODUCTION TO LATIN AMERICA: TWENTY-FIRST CENTURY CHALLENGES 148 (2003)).

346. *Id.*

347. *See id.*

348. Hoffman, *supra* note 36, at 219-25 (discussing how Japan, the Netherlands, and Germany have long-term care social insurance funded primarily by payroll taxes, which either discourages family care or allows for a flexible choice between in-kind home care and cash for paid care).

349. Mark Hay, *Why Robots Are the Future of Elder Care*, GOOD (June 24, 2015), <https://www.good.is/articles/robots-elder-care-pepper-exoskeletons-japan> [<https://perma.cc/9BWZ-WH68>].

350. Nancy Folbre, *Reforming Care*, 36 POL. & SOC’Y 373, 377 (2008).

act more like men, they could not only improve their own economic position, but also increase the price that must be paid for those in care services.<sup>351</sup> However, there is a great deal of disapproval of women who abdicate the option to care.<sup>352</sup>

In order to turn the feminine economy on its head, it is necessary to use the resistant asset of caretaking by women as the crux for a new market economy where caretakers take center stage and can be incorporated into the development of a stronger business economy. Folbre asserts that the current methods of accounting for public spending and taxation should be reformed to account for the amount of public money devoted to child and elder care.<sup>353</sup> Additionally, the state should consider the amount of money saved by the failure of the market or the state to pay family caregivers decent salaries much less allow them to receive benefits provided to employees. Intergenerational care can be incentivized if women are able to recoup the costs of time and money lost when the state relies on the resistant asset of unpaid family caregiving.

The state would be responsible for passing laws that incentivized corporations to provide the type of workplace that could accommodate family members to care for children and elders collectively. The family would organize the care either among one another or alongside paid caregivers. The issues highlighted earlier regarding how formal paid caregivers deserve protection and fair treatment would be simultaneously addressed by the market and state. With care at the center of the market economy, both the public and private markets would have an ideal worker and yield better productivity.

It can be envisioned that our current laws allow for care within the family. If a caregiver can take advantage of FMLA and lives in a state that provides funding for caregivers through Medicare, it is possible that a caregiver could receive some compensation for her services. While those aging citizens with long-term disability insurance are able to better weather the financial strains that come with daily in-home care or care within an assisted living facility or nursing home, most families attest to the fact that they supplement these costs with their own money.<sup>354</sup> The best way for the economy to account for the extra costs

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351. *Id.*

352. *See id.*

353. *Id.* at 384.

354. Michele Lerner, *Caring for Aging Parents and Young Kids? Lessons for the Sandwich Generation*, FORBES (May 23, 2016, 10:08 AM), <https://www.forbes.com/sites/>

associated with daily care of an aging parent is to either put more money into the pockets of poor working-class families or provide some form of universal caregiving. The costs of care are growing, as well as the percentage of family members expected to provide this financial support.<sup>355</sup> America should face this care crisis by seeking to undergird or offset the resistant asset of family caregiving to allow women a more equitable shared role within both the family and workplace.

The COVID-19 pandemic reveals that the millions of workers and the corporations they worked for were impacted by the struggle over caregiving. The crisis of 2020 highlighted the fragility of the U.S. care infrastructure, and the equitable economic recovery of the country will depend on investments in care work so that all groups—women as well as those at various intersections—Black women, Hispanic women, Asian women, immigrants, and others are financially compensated for the care work they provide our communities.<sup>356</sup> The pandemic simultaneously revealed that the U.S. government can find money to support families in very tangible ways when necessary. Supporting caregivers should be a national priority via federal dollars, expansion of home and community-based services, universal childcare, and universal paid leave.<sup>357</sup> The financial security of families is at stake, and the market (as an institution) will step up with a push from the responsive state.

## V. CONCLUSION

While changes in the family structure continue to shape who provides care within families, women are still the predominant caregivers of both children and the elderly. They continue to bear the disadvantage of their altruistic nature and the gendered framework of care in our country. Rather than reliance on the woman as an unpaid caregiver, the state should pivot its economic and political policies around the feminist economy because it is central to the business

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johnhancock/2016/05/23/caring-for-aging-parents-and-young-kids-lessons-for-the-sandwich-generation-2/#3e3e08ee4af8.

355. Sarah O'Brien, *Caring for Elderly Parents Can Put a Dent in Your Budget*, CNBC (Apr. 6, 2018, 1:06 PM), <https://www.cnbc.com/2018/04/04/caring-for-elderly-parents-can-put-a-dent-in-your-budget.html>.

356. Fatima Goss Graves & Sean McGarvey, Opinion, *Striking an Infrastructure Deal Without Investing in Child and Elder Care Is a Huge Mistake*, CNN (June 26, 2021, 8:58 PM), <https://www.cnn.com/2021/06/26/opinions/child-elder-care-givers-infrastructure-deal-goss-graves-garvey/index.html>.

357. *Id.*

economy. Instead of increasing the trifecta of harm to the universal subjects comprised of female caretakers, young children, and aging relatives, U.S. citizens should seek to reallocate the resistant assets of the state that prevent real change from occurring within the public and private sectors to support families.

Creating a paradigm to support caretaking as central to the U.S. economy may be difficult to implement. While the Biden Plan was not ideal, it did receive the bipartisan support necessary to become the law of the land.<sup>358</sup> The President has vowed to pursue money for caregiving in a separate bill that could pass with Democratic votes alone, but that is not guaranteed.<sup>359</sup> While it is not as simple as requiring paid family leave for those caretakers who have jobs that qualify, the relief secured during the coronavirus pandemic is proof that there are ways to support employees of smaller businesses. Some of the suggestions made in the Biden Plan were part of the legal support for intergenerational caregiving set forth in my previous Article that focused on changing living room laws to support caregivers and their family.<sup>360</sup> While there is not a realistic way to pay all the caregivers across the country the money they truly deserve, there may be some legitimate ways to adjust the tax scheme for them such that they receive a significant tax deduction or perhaps keep the majority of their income, i.e., pay very little in the way of federal and state taxes.

Families are not what they used to be, and marriage is no longer at the center of the family network. The global increase in the percentage of elderly citizens in need of daily care and housing, the lack of affordable childcare for infants and toddlers, along with the permanent presence of the majority of women in the workforce, points toward a need to explore caregiving solutions for a new generation. Exploring an expansion of vulnerability theory can help break down some of the barriers that exist for the state to be responsive. This Article shows that developing a unified approach to intergenerational caregiving requires some level of dismantling the resistant assets of the state. The reorganization can begin with centering economic reform on

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358. Suzy Khimm, *Biden's Pledge to Boost Home Caregiver Funding Excluded from Infrastructure Deal*, NBC NEWS (June 26, 2021, 3:30 AM), <https://www.nbcnews.com/news/us-news/biden-s-pledge-boost-home-caregiver-funding-excluded-infrastructure-deal-n1272435> [<https://perma.cc/SMA8-6F8J>].

359. *Id.*

360. Weaver, *supra* note 4, at 62-70.

the caregiver within most families—as they work both in and outside of the home to further the well-being of her family.



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