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Relative Burdens: Family Ties and the Safety Net

Lee Anne Fennell

The University of Texas School of Law

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RELATIVE BURDENS: FAMILY TIES AND THE SAFETY NET

LEE ANNE FENNELL*

TABLE OF CONTENTS

INTRODUCTION	1455
I. THE NATURE OF THE PROBLEM	1459
<i>A. Defining Dependency</i>	1460
<i>B. Distribution and Efficiency</i>	1464
<i>C. Shared Concerns, Divergent Interests</i>	1467
<i>D. Implications of a Constrained Policy Spectrum</i>	1470
1. <i>Bracketing the Feasible Spectrum</i>	1470
2. <i>Counterintuitive Results</i>	1473
II. FAMILY STRATEGIES	1479
<i>A. Exiting (or Not Entering) the Circle of Support</i>	1481
<i>B. Influencing Dependence of Existing Family Members</i>	1487
<i>C. Spending Less on Dependent Care</i>	1489
<i>D. Childbearing Decisions</i>	1490
<i>E. Shifting Costs onto Other Family Members</i>	1495
<i>F. Using Financial Products To Address Illiquidity and Risk</i>	1500
III. TOWARDS A THEORETICAL APPROACH TO DISTRIBUTING DEPENDENCE COSTS	1500
<i>A. The Valence and Use of Familial Strategies</i>	1501
<i>B. Categorizing Dependence</i>	1503
1. <i>Controllability</i>	1503
2. <i>Predictability</i>	1506

* Assistant Professor, University of Texas School of Law; Associate Professor, University of Illinois College of Law (beginning Fall 2004). For useful comments and conversation on earlier drafts, I thank Angie Bentz, Christopher Fennell, Richard Kaplan, Douglas Laycock, Warren Schwartz and Amy Wax. I am also grateful for the helpful comments and questions I received when presenting earlier versions of this Article at the North American Regional Conference of the International Society of Family Law, the University of Illinois College of Law, and the 2003 Meetings of the Canadian Law and Economics Association. All errors are mine.

3. <i>Verifiability</i>	1508
4. <i>Temporal Lumps and Variances in Outcomes</i>	1509
5. <i>Availability of Familial Exit and Nonentry</i>	1512
C. <i>Policy Directions</i>	1514
1. <i>Harnessing Family Advantages</i>	1515
2. <i>Altering the Relative Attractiveness of</i> <i>“Good” and “Bad” Strategies</i>	1515
3. <i>Disaggregating Liquidity from Public Assistance</i> . . .	1516
4. <i>Recognizing the Potential of</i> <i>Public Risk Pooling</i>	1517
D. <i>Some Complications</i>	1518
1. <i>Individuals and Families</i>	1519
2. <i>Society Plays Games, Too</i>	1520
CONCLUSION	1523

INTRODUCTION

Vast numbers of people require unreciprocated assistance from others in order to enjoy a minimally decent life.¹ Dependency is endemic to the human condition,² touching everyone for at least part of the life cycle.³ Its causes are heterogeneous,⁴ but its manifestations are always expensive.⁵ How should the costs be distributed?

1. Such people are “dependent,” in the sense in which I will use the term in this Article. Differing definitions make precise estimates of dependency rates problematic, but a significant proportion of the population would be considered dependent on any reasonable definition. *See, e.g.*, Eva Feder Kittay, *Human Dependency and Rawlsian Equality*, in *FEMINISTS RETHINK THE SELF* 219, 227 (Diana Tietjens Meyers ed., 1997) (relating that some estimates suggest “as many as one-third of the people in the United States are dependent”). The shorthand formulation given in the text raises at least two sets of definitional questions. The first of these involves the meaning of “require unreciprocated assistance,” and will be addressed in some detail below. *See infra* notes 14-22 and accompanying text. The second involves the meaning of a “minimally decent life.” I will not attempt to address the second set of questions here, except to note that a minimally decent life would be one in which the most basic physiological and psychological needs usually associated with a fully human existence are met. *See* JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991*, at 250-52 (1993) (discussing two different conceptions of a “social minimum”).

2. *E.g.*, EVA FEDER KITTAY, *LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY AND DEPENDENCY* 1, 29-30 (1999) (discussing diverse manifestations of dependence and the centrality of them to human life); ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* 1-4 (1999).

3. *E.g.*, MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* 35 (2004) (observing that everyone is dependent during childhood and many people are dependent at other times as well); Kittay, *supra* note 1, at 221 (observing that “[a]ll of us are dependent in childhood; most of us are dependent in old age; and many of us are dependent for long periods of time (sometimes throughout a life) because of ill health”).

4. Dependence can arise from developmental, physical, mental, economic, or situational factors—including the burden of providing unremunerated dependence care to others. *See, e.g.*, MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 8 (1995) (discussing the “derivative dependency” of caretakers who must look to others for resources).

5. Demographic patterns are likely to drive these costs up in coming years. *See, e.g.*, RICHARD A. POSNER, *AGING AND OLD AGE* 35 tbls.2.1, 2.2 (1995) (presenting statistics on growth over time of older population segments in America). Even though medical advances have “reduced the prevalence of disability and hence dependency among the old,” *id.* at 46, many older people will require medical care or daily assistance at some point. *See, e.g.*, NADINE F. MARKS & JAMES D. LAMBERT, *FAMILY CAREGIVING: CONTEMPORARY TRENDS AND ISSUES* (Ctr. for Demography and Ecology, Univ. of Wisconsin-Madison, NSFH Working Paper No. 78, 1997), *available at* <http://www.ssc.wisc.edu/cde/nsfhwpp/nsfh78.pdf> (explaining that greater life expectancy has brought with it “the greater likelihood that persons will live to ages where more long-term chronic illnesses and health conditions occur” and observing that many of the currently leading causes of death “often include an extended period of disability

No domestic policy question of our time carries higher stakes or triggers more divisive public discourse.

One significant axis of controversy concerns the appropriate respective roles of the family and the state—society acting collectively—in bearing dependency burdens.⁶ The modern welfare state serves some of the purposes that family units and larger voluntary social networks have served historically: insuring individuals against risk, smoothing fortunes over the life cycle, and providing for those who are not capable of self support.⁷ Yet, families continue to bear much of the burden associated with dependency.⁸ Whether the role of families should expand or continue to shrink is a subject of much debate. The large and diverse body of scholarship on this topic resists simple generalizations,⁹ but both

and need for caregiving before death”) (citations omitted).

6. In this Article, I will use the terms “the state” and “society” interchangeably to refer to institutional collective action at any level of government. Individuals also often have the capacity, through the use of capital markets and products such as insurance, to bear some or all of their own dependency costs, or to undertake actions that will reduce the likelihood or severity of dependence. Although my primary focus in this Article is on the relative responsibility assigned to families and to society, the role of individual control will surface repeatedly.

7. See, e.g., NANCY FOLBRE, WHO PAYS FOR THE KIDS? 108 (1994) (describing social support systems provided by hunting and gathering tribes and by patriarchal families); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 294 (1989) (noting that while “families have always shared their functions with other social institutions,” in the twentieth century these function-sharing institutions tended to be “distant bureaucratic entities—large school systems, social welfare agencies, and so forth—rather than neighbors, patrons, and the local school or parish”).

8. See, e.g., KAREN I. FREDRIKSEN-GOLDSSEN & ANDREW E. SCHARLACH, FAMILIES AND WORK: NEW DIRECTIONS IN THE TWENTY-FIRST CENTURY 3 (2001) (reporting that more than one in seven adults is involved in caring for ill or disabled friends or relatives, and that eighty-five percent of the care provided to the disabled elderly is provided informally and without pay by family members and others); Nadine F. Marks, *Caregiving Across the Lifespan: National Prevalence and Predictors*, 45 FAM. REL. 27, 30 tbl.1 (1996) (presenting 1987-88 data from the National Survey of Families and Households showing that nearly 18% of women and 14% of men had provided in-home care to a disabled or chronically ill person during the twelve months preceding the survey); see also GLENDON, *supra* note 7, at 306 (“Even in advanced welfare states, families at all income levels are a major resource for government, sharing the burdens of dependency with public agencies in various ways and to greater or lesser degrees.”).

9. Much of the scholarship offers deeply contextual explorations of the arrangements that societies—our own and others—have made for addressing particular manifestations of dependence. See, e.g., Christa Bracci, *Ties That Bind: Ontario’s Filial Responsibility Law*, 17 CAN. J. FAM. L. 455 (2000); Francis H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199; Richard L. Kaplan, *Financing Long-Term Care in the*

those who favor a larger cost-bearing role for the family and those who favor a larger cost-bearing role for the state tend to give insufficient attention to three crucial facets of society's cost-allocation problem. By engaging these shortcomings, this Article illuminates underappreciated features of the dependence allocation task, and takes some tentative steps towards outlining a policy agenda that accounts for them.

First, society's feasible choice set does not comprise an unlimited spectrum that runs from the extreme of no dependence assistance at all to the other extreme of completely socialized assistance. In fact, because unaddressed dependence is extremely costly to society as a whole, society has committed itself to provide at least a minimal level of public support for dependents who lack personal or familial resources.¹⁰ The conventional tack of evaluating policy interventions against an implicit baseline of complete nonintervention misapprehends the nature of society's choice. Moreover, recognizing that society will serve at least a gap-filling function in addressing dependence leads to radically different policy prescriptions than those that might follow from an inquiry that assumes all options lie open.

Second, and closely related, dependence costs left to fall on families will not necessarily come to rest upon families.¹¹ Current and potential family members have at their disposal a number of

United States: Who Should Pay for Mom and Dad?, in AGING: CARING FOR OUR ELDERS 65 (David N. Weisstub et al. eds., 2001); Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 MARQ. L. REV. 401 (2002); Art Lee, Note and Comment, *Singapore's Maintenance of Parents Act: A Lesson To Be Learned from the United States*, 17 LOY. L.A. INT'L & COMP. L. REV. 671 (1995).

10. See Amy L. Wax, *Disability, Reciprocity, and "Real Efficiency": A Unified Approach*, 44 WM. & MARY L. REV. 1421, 1428 (2003) (observing that society guarantees "basic subsistence on the condition that individuals make a reasonable effort to minimize the assistance needed through self-help efforts"). While my primary focus in this Article is on the impact of the societal "fall back" in shortening the feasible spectrum, societal reactions to cost bearing can also truncate the "fully socialized" end of the spectrum.

11. The same is true of costs nominally placed on individuals, where society cannot believably precommit to withholding assistance in the event the individual fails to bear those costs appropriately. See, e.g., Lee Anne Fennell, *Interdependence and Choice in Distributive Justice: The Welfare Conundrum*, 1994 WIS. L. REV. 235, 259-60. My focus here, however, will be on families, based on the assumption that dependent persons are, at least at the moment of dependence, unable to bear costs except in the unproductive and socially costly form of unmitigated suffering.

strategies designed to reduce their exposure to dependence costs. These strategies produce results ranging from desirable cost reductions to costly deadweight losses. A high-profile example of costly family strategizing is the “Medicaid divorce” undertaken to qualify a dependent spouse for publicly funded, means-tested benefits.¹² Such cost-shifting techniques carry the potential to alter not only the final distribution of the costs, but also the total costs involved, and hence the efficiency of the arrangement. Yet, cost-shifting strategies are usually treated as isolated epiphenomena to be attacked *in situ*, rather than as symptoms of an overarching set of interactions between families and society that should globally influence our thinking about arrangements for dependence care. As a result, they have received relatively little sustained or systematic theoretical attention.

Third, the true impact of dependence burdens on families turns, in part, on the ability of families to spread costs temporally, or to pool the risks that give rise to them. Risk exposure and periods of illiquidity can lead to suboptimal investments in human capital, yielding results that are both distributionally problematic and inefficient. The question of access to financial products capable of spreading costs temporally and pooling risks, however, is often conflated in policy discussions with the question of who should pay for those financial products. Although linked in often complex ways, these issues can be separated, as the existence of private, market-based financial products designed to address liquidity shortfalls and risk attests. Where market products are unavailable, as is generally the case where the asset in need of protection and timely investment is human capital, policy interventions could focus on making appropriate products available rather than on directly altering the

12. See, e.g., Michael Farley, Note, *When “I Do” Becomes “I Don’t”: Eliminating the Divorce Loophole to Medicaid Eligibility*, 9 ELDER L.J. 27 (2001); Randy Cohen, *The Ethicist: Get a Divorce*, N.Y. TIMES MAG., July 28, 2002 at 14 (responding to the query of an individual considering a Medicaid divorce); *infra* note 68 and accompanying text (discussing the Medicaid eligibility rules that create this dilemma). The disutility that the couple suffers from strategically divorcing and the costs it incurs in carrying out that plan represent deadweight losses. The couple is made worse off by the behavioral distortion, but society as a whole is made no better off as a result of their actions. Indeed, society is also arguably made worse off, if we think that marriage is an institution with positive societal spillovers aside from the spouses’ assumption of dependence burdens.

allocation of the costs of dependency.¹³ The desirability of such alternatives depends on their relative performance in harnessing the useful elements of familial strategies while limiting the more destructive manifestations of family strategizing.

The analysis proceeds in three parts. Part I frames society's cost allocation problem. Of central importance is the convergence of societal and familial interests on the goal of appropriately addressing dependence. This convergence has the effect of limiting the feasible spectrum of policy choices. When coupled with often divergent interests about cost bearing, it sets the stage for strategic interactions between families and society as each attempts to bluff the other into bearing a larger share of dependency care costs. Part II details the strategies that families might employ in their attempts to reduce dependency exposure. Part III shows how this analysis generates a more useful way of approaching the question of distributing dependence burdens.

I. THE NATURE OF THE PROBLEM

This Part examines the nature of society's cost allocation task and the constraints it faces in making allocation choices. Part I.A discusses some possible meanings of "dependence" and arrives at a working definition capable of meaningfully guiding our inquiry. Part I.B discusses two criteria that typically inform a society's choice about allocating dependency burdens—distributive justice and allocative efficiency. Part I.C sets out the ingredients of the strategic dynamic that society faces in assigning dependent care costs and explores how this dynamic restricts the feasible spectrum of policy

13. Both forced savings and mandatory insurance have received considerable attention as policy instruments. However, other possibilities have been relatively neglected. For example, the possibility of using government loans to address dependence-related liquidity shortfalls and facilitate timely human capital investments has received little attention, despite a general recognition that capital markets do not operate adequately in this arena. See, e.g., GARY S. BECKER, *HUMAN CAPITAL* 93 (3d ed. 1993) (explaining that "it is difficult to borrow funds to invest in human capital because such capital cannot be offered as collateral"); SHIRLEY P. BURGGRAF, *THE FEMININE ECONOMY AND ECONOMIC MAN* 174-75 (1997) (noting families' lack of access to investment capital and the desirability of moving to a model in which they would be viewed more like small businesses); Lynn A. Stout, *Some Thoughts on Poverty and Failure in the Market for Children's Human Capital*, 81 *GEO. L.J.* 1945, 1948 n.15 (1993) (collecting sources discussing these market imperfections).

choices. Part I.D illustrates how this restricted spectrum suggests very different policy approaches than those generated under the assumption that any and all cost assignments are feasible.

A. *Defining Dependency*

The first task is to specify with some precision what dependence means in the context of this Article's analysis. I have already suggested that a dependent person is someone who requires unreciprocated assistance in order to lead a minimally decent life, but I have not yet fleshed out what I mean by "requires" and "unreciprocated" and "assistance." By doing so here, I distinguish the meaning of dependence I employ from broader and narrower meanings that the term might plausibly be given. Defining dependence is often an ideologically charged exercise. Moreover, a society's legal, cultural, and institutional features set the background conditions against which the notion of dependence is constructed.¹⁴ My objective here is not to take sides in ideological debates or to state what "is" and "is not" dependence for all times and purposes. Instead, I seek to arrive at a workable definition that fits with broad societal intuitions and that represents a meaningful category for which cost allocations are open to ongoing, broad-based debate. Only by using such a definition can the analysis developed here have meaningful traction for law and policy.

To start, consider how we might best construe the idea of *assistance*. None of us is truly self-sufficient.¹⁵ A healthy, working-age person with plenty of marketable skills and no disabilities is still incapable of single-handedly constructing, concocting, and cultivating all of the things necessary for a minimally decent life, while simultaneously protecting those things from theft and

14. See KITTAY, *supra* note 2, at 29-30 (observing that while dependence is inherent to human existence, cultural and other factors help set its precise parameters).

15. See, e.g., Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 22-23 (2000) (observing that "[i]n complex modern societies no one is self-sufficient, either economically or socially"); Robert E. Goodin, *Social Welfare as a Collective Social Responsibility*, in SOCIAL WELFARE AND INDIVIDUAL RESPONSIBILITY 97, 133-34 (David Schmidtz & Robert E. Goodin eds., 1998) (observing that everyone must rely on other people and institutions, as well as natural laws, in order to survive).

destruction.¹⁶ Thus, what is generally regarded as “dependence” in America relates only to those needs for outside assistance that arise within a societal framework featuring a well-developed market economy and governmental institutions capable of reliably protecting resources. Those arrangements, themselves quite costly,¹⁷ are essential in constructing the condition we think of as “independence.”

This line of reasoning presents a plausible case for viewing everyone as dependent in some sense, but such an expansive view of dependence is not very useful for present purposes. Society has already chosen to spread the costs associated with maintaining our particular form of social order throughout society, rather than to concentrate those costs on individuals, families, or other voluntary social networks. That fundamental decision is so firmly rooted in our system of government as to represent a fixed and immobile feature of our social structure, part of the background against which any policy-oriented vision of dependence must be constructed. If we wish to make our definition of dependence narrow enough to helpfully guide an inquiry into legal and policy choices, we cannot count as dependent those who receive assistance through familiar societal features such as the protection of property, the enforcement of contracts, and the regulation of markets. Nevertheless, it is worth underscoring that society never writes on a blank slate when it makes decisions about allocating the costs of dependence. Recognizing the costly assistance that society already provides to those we deem independent or self-sufficient becomes especially important when the distributive justice of a particular arrangement is considered.

On the definition applied here, the assistance that a dependent person requires must not only fall outside of the ordinary course of societal business, but must also be *unreciprocated*. Persons who require assistance, but who are able to pay for that assistance in some fashion are not “dependent” on this definition. This proviso

16. Even Robinson Crusoe, the most well-known literary approximation of this ideal, was protected by his geographic isolation from many of the usual threats to individual resources.

17. See, e.g., STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 59-76 (1999); LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 16-17 (2002).

removes from the ranks of the dependent those who are interdependent on others by virtue of the specialization of labor.¹⁸ By and large, people in modern industrialized societies do not produce the items that are necessary to a minimally decent life, but rather obtain them through trade or other reciprocal interactions. For example, a lawyer who owns no livestock or gardens and knows nothing about butchering, milking, or cultivating can obtain sustenance by trading dollars for food. The lawyer is indeed dependent on the other market actors for her dinner, but the other market actors are similarly dependent on things that the lawyer's money can buy. The interaction is reciprocal and mutually beneficial, and the specialization that brings it about creates wealth.¹⁹

Similar divisions of labor can also occur within households.²⁰ A couple might decide that one spouse will perform childcare and other in-home work, while the other spouse devotes himself to work in the marketplace. The market-earning spouse would then provide part of his salary to the stay-at-home spouse as compensation for the services provided in the home. The stay-at-home spouse in this example is receiving financial assistance from the market-earning spouse, but the assistance is not unreciprocated. Instead, the stay-at-home spouse is providing services in the informal household market. She is therefore not "dependent" in the sense in which I am using the term here.²¹

18. See Harold Demsetz, *Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership*, 31 J. LEGAL STUD. 653, 672 (2002) (discussing "the dependency that comes with specialization"); see also Amy L. Wax, *Social Welfare, Human Dignity, and the Puzzle of What We Owe Each Other*, 27 HARV. J. L. & PUB. POLY (forthcoming), available at http://ssrn.com/abstract_id=478561 (using the notion of reciprocity to counter arguments suggesting that all people are comparably dependent on others).

19. Demsetz, *supra* note 18, at 672 (noting that specialization generates wealth even as it creates risk).

20. See, e.g., Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385, 397 (1993) (discussing possible gains from the division of labor within marriage).

21. However, the stay-at-home spouse might easily *become* dependent if her marital partnership ends and if no outside market exists for the services she is providing in the household. It is also quite possible that the resources the stay-at-home spouse receives from the market-earning spouse do not fairly reflect her contributions to the familial enterprise. See *infra* note 117 and accompanying text (discussing intrafamilial power structures and the possibility of intrafamilial cost-shifting).

An additional refinement involves placing constraints on the notion of reciprocation. When an adult child provides care to an elderly parent who provided him with care some fifty years earlier, should the two instances of caregiving be viewed in isolation as spells of dependence, or taken together as a single reciprocal interaction? When a widow who had cared for an ailing spouse during the last ten years of his life becomes ill herself and receives assistance from that spouse's sibling, should we view her as dependent, or as on the receiving end of a reciprocal interaction? Can either of these cases be meaningfully distinguished from that of a man who pays taxes his entire life and becomes seriously disabled in his old age, without ever having had the occasion to personally assist any other person? In all three situations, a strong case can be made that the apparently dependent person is actually a participant in a broadly-framed reciprocal interaction. However, an unconstrained view of reciprocity makes the category of "unreciprocated assistance"—our touchstone for dependence—unduly narrow and prohibitively unwieldy to apply.²² The shorthand formulation of "unreciprocated assistance" thus requires the following clarifying gloss: that the assistance must be part of an *ongoing* reciprocal exchange between the parties. On this definition, all three of the people described above would clearly qualify as dependent.

Finally, consider what it means to say that someone *requires* unreciprocated assistance in order to enjoy a minimally decent life. By using this wording, I mean to confine the class of dependents under discussion here to those who have no present choice about their dependency. The fact that an individual has no *present* choice about her dependence does not rule out the possibility that her past choices may have influenced her present dependency, nor does it rule out the possibility that her current or future choices might affect the persistence or path of her dependency. My definition

22. If a completely unconstrained view of reciprocation were adopted, only those few individuals who go through their entire lives without contributing either in cash or in kind to the assistance of anyone else would be candidates for dependency. Such a definition would plainly omit the vast majority of people who require assistance. It would also be impossible to apply such a broad reciprocation test. One could not say for certain whether an instance of assistance was truly unreciprocated until the assisted person's death extinguished all chances for reciprocation.

therefore encompasses dependency that stems from a lack of marketable skills and similar forms of preventable economic disadvantage, as well as that which stems from disabilities, illnesses, childhood, or old age. By specifying that the dependency at issue is presently involuntary, we can establish that some outside assistance is now needed to enable the dependent person to enjoy a minimally decent life. This permits us to focus exclusively on how costs might best be allocated between the two societal institutions that are most likely to provide assistance—the family and the state.

B. Distribution and Efficiency

Two normative criteria feature prominently in most discussions about dependence cost allocations: efficiency²³ and distributive justice.²⁴ Efficiency, as applied here, involves minimizing the overall cost of dependence and its treatment throughout society. Distributive justice relates to the fairness of the distribution among members of society of the cost of dependence and its treatment. The distinction between these two types of normative goals is easiest to see if we compare two phenomena that are often confused in discussions of dependence: cost shifting and cost reduction.

Commentators often assert that placing dependence costs on the family “saves money” or is “efficient.”²⁵ It is certainly true and

23. The term “efficiency” has more than one meaning. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 11-16 (6th ed. 2003) (discussing Pareto and Kaldor-Hicks varieties of efficiency).

24. There are, of course, many theories of distributive justice, including theories based on efficiency criteria. When I invoke distributive considerations here, I mean to reference a set of additional normative criteria that includes factors such as desert, greater equality in opportunities or resources, and intergenerational and gender equity. Such considerations could be accommodated within a sufficiently broad efficiency analysis based on people’s preferences for them or for the results they produce. However, the point of considering them separately is to suggest that they provide compelling reasons for action *on their own*, quite apart from the numbers of adherents they enjoy or the consequences they generate.

25. See, e.g., John Walters, *Pay unto Others as They Have Paid unto You: An Economic Analysis of the Adult Child’s Duty To Support an Indigent Parent*, 11 J. CONTEMP. LEGAL ISSUES 376, 378 (2000) (arguing that “[u]niform recognition and enforcement of filial support laws could lead to substantial savings”); Katie Wise, Note, *Caring for Our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 563, 584 & nn.133-34 (2002) (citing literature observing that care of dependent elderly persons by family members will save money, and asserting that “the public as a whole would benefit from this efficient use of resources”).

important that privatizing these costs removes them from the public budget; indeed, the attraction of minimizing public costs often drives policy choices.²⁶ But we must carefully distinguish changes that merely shift burdens from one party to another from those that actually represent cost reductions. To begin with the easiest case, if an elderly person is receiving nursing home care that costs \$2000 per month, simply changing the payor from a public agency to the person's own adult child does not "save" \$2000 in costs each month; it merely moves the costs from a public agency to a private party. This scenario involves a distributive change that we might view as normatively desirable or undesirable, but the costs themselves remain.²⁷ This is quite easy to see when the costs in question continue to take the form of a check to a third party.

Now suppose instead that the adult child can care for the elderly person in her own home for an out-of-pocket cost of \$300 per month, in contrast with the out-of-pocket cost of \$2000 per month for institutional care. We cannot say whether the home-care arrangement actually reduces costs until we know the opportunity costs of the caretaker's time,²⁸ and the intangible costs or benefits associated

26. See, e.g., Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1644-46 (2003) (discussing states' promotion of marriage as a means of privatizing female dependency within the family); Jacobus ten Broek, *California's Dual System of Family Law: Its Origin, Development, and Present Status, Part III*, 17 STAN. L. REV. 614, 624 (1965) (explaining that divergent treatment of the property and resources of spouses under the laws governing the support of the poor, as compared with their treatment under ordinary family law, stems from the use of the spousal relationship in the former case as "a device for minimizing the public cost of supporting the poor by tapping what would otherwise be the separate property or income of one spouse for the support of the other").

27. See, e.g., Usha Narayanan, Note, *The Government's Role in Fostering the Relationship Between Adult Children and Their Elder Parents: From Filial Responsibility Laws to ... What?, A Cross-Cultural Perspective*, 4 ELDER L.J. 369, 379 (1996) (discussing this cost shifting and citing a dissent in *Swoap v. Superior Court*, 516 P.2d 840, 859-60 (Cal. 1973) for the proposition that the shift may move costs to a politically vulnerable group).

28. See, e.g., Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1411-12 (2001) (explaining that caretaking costs include "a caretaker's need to focus energy and time on dependency work rather than investing that energy and time in building market and other skills that would increase her value in the compensated sphere"). Opportunity costs are sensitive to changes in women's wages. See GARY BECKER, *A TREATISE ON THE FAMILY* 140 (enlarged ed. 1991) (explaining that "[t]he relative cost of children is significantly affected by changes in the value of the time of married women, because the cost of the mother's time is a major part of the total cost of producing and rearing children"). Women's wages, in turn, may be affected by the decisions that women, on the whole, make based on those wages.

with providing in-home care, such as the impact of having an additional person in the household.²⁹ If we could somehow determine that the in-home care costs would work out to just \$1500 per month after taking into account the opportunity costs and intangible factors involved, then we could say that the in-home care reduces overall care costs. However, this still does not establish, by itself, that shifting the burden of care to the family generates cost savings. To see this requires keeping conceptually separate the question of what is the cheapest *type* of care, and *who should bear the costs* of that care. In this example, in-home care provided by a relative is cheaper than institutional care. In theory, these same savings could be achieved in a regime that placed the costs of the care on the government rather than on the family member. For example, the family member providing in-home care might receive reimbursement for that care from the public fisc through a tax credit.

If, however, there are additional administrative costs associated with a regime in which government reimbursement is provided, or if behavioral changes in light of government reimbursement result in more dependence, more costly dependence, or more costly dependent care than otherwise would be the case, these *would* represent net additions to the overall cost. By the same token, there may be behavioral responses to efforts to place (or leave) costs on the family that will themselves change the total costs. If economic efficiency is one's normative goal, then one should pay close attention to all of the ways in which the allocational arrangement affects the total amount of cost that must be borne by *someone*. If one is concerned with achieving a particular vision of distributive justice, then the distribution of costs matters for its own sake,

Moreover, a person's opportunity cost at a given point in time is the product of earlier choices that may have been influenced by the possibility of later needing to sacrifice paid work in favor of caretaking. *See infra* note 111 and accompanying text.

29. *See, e.g.*, Fineman, *supra* note 28, at 1412 (invoking "psychological or spiritual" costs "resulting from the attenuated and compromised relationships a caretaker is forced to have with both market and family if she works in both, or from the need to choose, thus sacrificing one to gain the other"); NADINE F. MARKS & JAMES DAVID LAMBERT, TRANSITIONS TO CAREGIVING, GENDER, AND PSYCHOLOGICAL WELL-BEING: PROSPECTIVE EVIDENCE FROM THE NATIONAL SURVEY OF FAMILIES AND HOUSEHOLDS (Ctr. for Demography and Ecology, Univ. of Wisconsin-Madison, NSFH Working Paper No. 82, 1999), *available at* <http://www.ssc.wisc.edu/cde/nsfhwf/nsfh82.pdf> (presenting empirical work suggesting that negative psychological effects are often associated with assuming the role of caregiver for a disabled family member).

regardless of whether it generates any net gains or losses overall. As this discussion suggests, the way in which costs are distributed may affect the total amount of cost that must be borne—whether due to impacts on administrative costs, incentives, or other dynamics that alter the quantity and severity of dependence or the burdens associated with addressing it.³⁰

C. Shared Concerns, Divergent Interests

Typically, at least three parties are deeply interested in whether dependency is adequately addressed: the dependent person herself, the dependent person's family, and society at large.³¹ One way of framing the question of how to allocate dependency burdens—asking who should pay³²—usefully emphasizes that dependence is inherently costly and that the costs must be borne by *someone*.³³ Costs do not disappear when they are allocated to the government, nor when they are borne privately within families through unremunerated caregiving, nor even when they are thrown back upon the dependent people themselves through neglect or substandard care.

However, society cannot simply choose a payor from a slate of choices. While society can, for example, make families nominally responsible for a given kind of dependency, current and potential

30. The distribution itself might affect overall utility because of the diminishing marginal utility of money—a dollar paid for care by a poor relative (or a poor taxpayer) arguably “costs” more in utility terms than a dollar paid by a wealthy person. Well-known difficulties in making interpersonal utility comparisons make this argument controversial, *see, e.g.*, POSNER, *supra* note 23, at 470; Bertrand de Jouvenel, *The Ethics of Redistribution*, in INEQUALITY AND POVERTY 6, 6-7 (Edward C. Budd ed., 1967), but the basic principle remains intuitively plausible, *see, e.g.*, Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CAL. L. REV. 815, 848-49 (1990). In any case, two other factors—inefficient risk bearing due to imperfections in markets for insurance, and liquidity constraints resulting from imperfections in capital markets—continue to blur the boundaries between efficiency and distribution.

31. There might be other interested parties as well, such as friends, neighbors, or fellow members of religious groups.

32. *See, e.g.*, FOLBRE, WHO SHOULD PAY FOR THE KIDS?, *supra* note 7; Kaplan, *Who Should Pay for Mom and Dad?*, *supra* note 9; Eric Rakowski, *Who Should Pay for Bad Genes?*, 90 CAL. L. REV. 1345 (2002).

33. The usual suspects for cost bearing include the former and future selves of the dependent person, the dependent person's family, and society at large. Dependence costs, or elements of those costs, could also be placed on other groups within society, such as employers, health care providers, or landlords.

family members can undertake strategies that shift costs back to society. The reason that such cost shifting is possible inheres in the shared interest of families and society in seeing that dependency is addressed appropriately. Families are typically bound to their dependent members by love and other forms of interdependence, but society is also invested in the care of its members. While our welfare state is not as extensive as that which exists in some other countries, minimal care for those in need, especially those who clearly lack the present capacity to care for themselves, is ingrained in our social and political structure.³⁴ This might be attributed to altruism, interdependence of utility functions, interest group politics, a particular view of the purpose of government, or enlightened self-interest (unalleviated suffering is both intrinsically unpleasant to behold and likely to generate negative societal effects).

Whatever the origin of society's normative commitments to dependent people, society will suffer greatly if it fails to keep those commitments. Society's interest in dependent care therefore serves to bracket the feasible spectrum of policy choices. Certain options, such as withdrawal of all societal support for dependent care, are not on the table.³⁵

Strategic interactions between families and society structurally resemble the game of "Chicken."³⁶ Leaving the needs of a dependent

34. See Wax, *supra* note 10, at 1428-29.

35. This is not to suggest that change is impossible, only that its shape will necessarily be limited by society's deeply held normative commitments. In addition, the interests of those who have already "paid into" a certain program or have made other choices based on the "old rules" introduce a variety of complications. See, e.g., MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 218 (2000) (explaining that "one cannot change the rules midstream without creating tremendous hardship for people who are already in the system"); DANIEL N. SHAVIRO, WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY 198-215 (2000) (discussing transition issues implicated by Social Security reform proposals and possible approaches for addressing them).

36. In the highway game of "Chicken," two cars drive toward each other, and the first driver to swerve is called a "chicken" and loses the game. However, each driver prefers this unpleasant result to the head-on collision that results if neither party swerves. See CHARLES J. GOETZ, LAW AND ECONOMICS: CASES AND MATERIALS 17-18 (1984). This same dynamic applies somewhat less dramatically in situations where parties have a convergent interest in avoiding some extremely bad outcome, but divergent interests about how that outcome should be avoided. Recognizing the convergence of interests in avoiding the disastrous outcome, each attempts to bluff the other party (or parties) into "swerving"—that is, bearing the costs of

person unmet represents the worst outcome for everyone involved—not just for the dependent person and the dependent person's family, but also for society at large. Although the interests of the parties converge with regard to the desirability of addressing dependence, interests tend to diverge on the crucial question of who should bear the costs.

The divergence of interests will not always be present; there may be instances where all parties agree that the dependent person herself should bear the cost in an earlier or later period of independence, through borrowing or saving. Yet, given limitations in capital markets, this option will not be available for all forms of dependence. In addition, not all dependents will enjoy an earlier or later period of independence sufficient to cover the costs of dependence. Finally, even people who have a sufficient period of productivity to cover their periods of dependence may miscalculate and end up unable to cover those costs. Providing for one's future dependence involves interactions among temporal selves, and those interactions may be influenced by cognitive biases, such as over-optimism or hyperbolic discounting.³⁷

In all cases where the dependent person has not provided for her own care, either family or society, or some subset thereof, must bear the costs. While society will usually try to limit its own exposure to these costs, the family would prefer that society bore the costs.³⁸ This assumption is not inconsistent with the family's love and altruism towards the dependent person, nor is it inconsistent with the desire that family members might have for personally providing the care. Recall that we are talking only about who will bear the costs, not who actually provides the care.³⁹

avoiding the outcome.

37. See, e.g., Thomas S. Ulen, *The Law and Economics of the Elderly*, 4 *ELDER L.J.* 99, 114 (1996) (reviewing RICHARD A. POSNER, *AGING AND OLD AGE* (1995)) (discussing the "multiple selves" problem as it relates to savings behaviors and societal provision for the elderly).

38. See, e.g., POSNER, *supra* note 5, at 286:

[W]hile many adult children are sufficiently altruistic toward their aged parents to be willing to incur substantial costs in money, time, irritation, distress, and even revulsion rather than neglect or abandon them, they would greatly prefer to shift the burden of caring for their parents, or at least a part of the burden, onto other shoulders.

Id.

39. It is of course imaginable that some family members would actually prefer to bear the

D. Implications of a Constrained Policy Spectrum

As noted above, shared interests in dependent care constrain the spectrum of feasible policy choices. Given divergent interests in the cost allocation, this constrained spectrum can yield very different policy prescriptions than would an unlimited choice set. Part I.D.1 identifies two models for cost allocation that mark opposite ends of the feasible spectrum. Part I.D.2 illustrates why recognizing the constraints on the range of choice matters.

1. Bracketing the Feasible Spectrum

Two approaches occupy opposite ends of the spectrum of possible cost-sharing arrangements between families and society. American social policy mixes these two approaches, and adopts various intermediate approaches. The first approach views the government's role as limited to patching holes in familial support networks, so that assistance is supplied to a dependent person only where familial arrangements are insufficient or absent.⁴⁰ I term this model "family-first support," to highlight its emphasis on placing costs of dependent care on families whenever families are capable of providing that care. Importantly, however, the family-first support model retains a role for public assistance to dependent persons when familial resources are absent or inadequate. This model of public assistance can be distinguished from an opposing model, in which the government provides an additional safety net for certain categories of dependent individuals regardless of their familial resources or arrangements. I call this second model "categorical support."

costs of caretaking—that is, they would refuse reimbursement for the care, even if it were offered. For example, perhaps the dependent person's dependence is the result of some negligent action taken by the family member, and the family member views full cost bearing as a form of penance that will bring her peace and forgiveness in this life, or redemption in the next. Such individuals would not be embroiled in a strategic interaction; they would quietly bear the cost under any cost allocation rule.

40. This model encompasses a variety of approaches, given that government can choose how broadly or narrowly to define the relevant familial support network.

This taxonomy aligns in interesting ways with two other distinctions commonly employed in the social welfare literature: the distinction between universal and means-tested programs,⁴¹ and the largely parallel distinction between social insurance programs and public assistance programs.⁴² Means-tested programs target assistance directly at the financially needy, while so-called “universal” programs use some criterion other than financial need as the basis for dispensing benefits.⁴³ Once a particular program is styled as a means-tested one, however, policymakers must decide how broadly or narrowly to construe the unit that must meet the means test. This Article assumes that dependent persons are *themselves* needy, in the sense of being incapable of securing for themselves a minimally decent life.⁴⁴ However, they are often linked by ties of blood or law to other people with substantial resources. In deciding if assistance should be provided, policymakers must decide whether the resources of those at the other end of some or all of those familial ties should be included in the means test.

Any program that provides assistance to a dependent person without regard to the availability of familial resources would constitute categorical support within my schema. To the extent such a program examines the resources of the dependent person herself in determining eligibility or calculating benefits, it might be characterized as a means-tested program that limits its inquiry to the individual applicant. However, means-tested programs typically examine the existence and resources of at least some specified family or household members.⁴⁵ Means-tested programs that examine familial resources correspond to the family-first support model.

41. See, e.g., NATHAN GLAZER, *THE LIMITS OF SOCIAL POLICY* 86-97 (1988) (discussing the distinction between universal and income-tested programs); Fennell, *supra* note 11, at 320-25 (same).

42. See, e.g., MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING AMERICA'S WELFARE STATE* 4, 10-12 (2001) (discussing America's two-track system of social support).

43. See *supra* note 41.

44. The fact that many persons may be partially rather than fully dependent does not change this analysis; they are nonetheless needy with regard to the amount by which their own resources fall short of the sum necessary to secure a minimally decent life.

45. The reason for this pattern is obvious: A means test would become meaningless if individuals could qualify simply by shifting assets to close family members.

Next, consider the distinction that is often drawn between social insurance programs and public assistance programs.⁴⁶ Public assistance programs dispense benefits as a last resort on the basis of need,⁴⁷ and historically have required that family members provide the front line of support.⁴⁸ Such programs would correspond to the family-first support model. Social insurance programs, in contrast, operate on a basis rhetorically patterned after market exchange. An individual *earns* a benefit through engagement in socially approved behavior (e.g., market-based work) or by linking herself to a “market worker” in socially approved ways (e.g., through marriage). By responding categorically to vulnerable populations, these social insurance programs often relieve family members of support burdens that would otherwise fall to them.⁴⁹ Because they provide assistance without regard to familial resources, such programs correspond to the categorical support model.

Given the parallels just noted, one might wonder what my classification scheme adds to the well-established dichotomies between means-tested and universal programs and between social insurance programs and public assistance programs. These familiar ways of slicing up the universe of social welfare programs emphasize important strains of thought about the social meaning of assistance and the behavioral standards for full membership in society. Yet, these taxonomies focus primarily on the individual recipient’s characteristics, tracking the focus in popular discourse on personal responsibility. Focusing explicitly on whether a policy requires contribution of family members’ resources directs our attention to an important fact: The choice in many contexts is not between self-help and dependence, but rather between two different

46. See KATZ, *supra* note 42, at 4.

47. *Id.*

48. See GLENDON, *supra* note 7, at 306:

Historically, most social welfare programs were developed on the premise that individuals should receive public assistance only when their families (understood to include a wide circle of relatives) were unable to care for them. That assumption gradually shifted.... But even with the proliferation of various kinds of public assistance, services, and institutional care, families are still the major means through which societies deal with dependency.

Id.

49. See, e.g., POSNER, *supra* note 5, at 285 (“In the absence of social security, the burden of maintaining the old would fall to a great extent on the younger members of their families.”).

sources of dependence support.⁵⁰ In other words, this classification scheme squarely engages the question of how broadly, and to whom, the costs associated with a dependent person should be spread.

2. Counterintuitive Results

The foregoing establishes the value of explicitly considering the way in which a given policy divides dependency burdens between families and society. But why is it important to frame our analysis with cognizance of the limits that society's interests place on the options for dividing burdens? This question is best answered with an example that illustrates how a policy prescription that seems completely sensible for achieving a particular goal under an unconstrained choice set can turn counterproductive when the limits on the feasible spectrum are taken into account.

In past times, families provided reciprocal care to each other though an unspoken intergenerational pact.⁵¹ Parents cared for children during dependency, and, in turn, children cared for parents during their old age. The fact that the state has taken on support of aged dependents has, therefore, arguably reduced the incentive to build family structures capable of providing such reciprocal care.⁵² More specifically, it is thought to have diminished parental

50. Cf. Goodin, *supra* note 15, at 134-35 (observing that often notions of "self-reliance" deployed in welfare debates encompass reliance on family members and friends).

51. See, e.g., Margaret F. Brinig, *Parent and Child*, in 2 ENCYCLOPEDIA OF LAW AND ECONOMICS 230, 250-57 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000) (discussing and critiquing various views of the implicit contract or pact between parents and children, beginning with Blackstone's).

52. See, e.g., BECKER, *supra* note 28, at 357 (suggesting that public programs, in addition to market insurance, displaced family care for the ill and unemployed and hence "weakened the ties of family members by further eroding the traditional role of the family in protecting members against hazards"); *id.* at 357-58 (making similar arguments with regard to public education for children and Social Security payments for the retired); Laurence J. Kotlikoff & Avia Spivak, *The Family as an Incomplete Annuities Market*, 89 J. POL. ECON. 372, 389 (1981) (presenting analysis that "suggests that the current instability in family arrangements may, to some extent, reflect recent growth in pension and social security public annuities"); see also Joseph Persky, *Retrospectives: Classical Family Values: Ending the Poor Laws as They Knew Them*, 11 J. ECON. PERSP. 179, 187 (1997) (positing that "[t]he driving force" in both the current welfare debate and in the welfare debate that took place in 1834 England was "a widespread perception that public support of dependents leads to a breakdown in family structure").

investment in children.⁵³ Because important benefits flow from parental investments in children, and because stronger family structures have additional positive spillovers for society, it might appear that society would be better off if the state were to pare back its role in providing assistance to aged dependents, so that the burden of support is thrown back on the family.⁵⁴ If society faced an unrestricted choice set, so that “family-only” support were an option, this reasoning would make sense—at least in the absence of countervailing factors. Given the restricted choice set that society actually faces, however, moving in the direction of “more family, less state” is likely to have the opposite effect of the one intended.

To see this, it is necessary to first recognize that in making family formation decisions, people take into account many different considerations. For purposes of this simple example, we can divide the considerations into two categories: (1) the impact on expected exposure from dependence; and (2) all other considerations (e.g., love, companionship, economies of scale, social advantages, biological impulses). The first factor, the impact on expected exposure from dependence, has two components: (a) reductions in personal dependence exposure resulting from family formation; and (b) acceptance of dependence exposure of others owing to family formation.

With these factors in mind, we can compare three states of the world, only two of which are located within our feasible spectrum. Figure 1 sets out the options.

53. See Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings*, 1996 UTAH L. REV. 393, 427 (arguing that legal interventions such as Social Security have reduced the focus on investing in children); Antonio Rangel, *Forward and Backward Intergenerational Goods: Why is Social Security Good for the Environment?*, 93 AM. ECON. REV. 813, 826 (2003) (suggesting that mandatory government provision of transfer payments to the elderly could “crowd out investment in children within the family”); see also BRINIG, *supra* note 35, at 124 (discussing empirical findings based on national and international data showing that “more positive investment [in children] (reflected in test performance) occurred where a lower percentage of elderly lived alone, more negative investment (abuse or nonsupport) where there were more elderly on their own”). One possible explanation of Brinig’s results is that “parents who expect to be supported by their children in their declining years are likely to make greater investments in them.” *Id.* at 125.

54. See, e.g., BRINIG, *supra* note 35, at 125 (“[I]f public provision for the elderly results in less investment in children, some thought might be given to discontinuing or limiting public support.”).

Figure 1:
Impact on Dependence Costs of Family Formation Under
Three Support Regimes

Support Regime Decision Factors	Family-Only Support	Family-First Support with State as Gap- Filler	Categorical Support Provided by Society
Exposure to Costs of One's Own Depend- ence	family formation reduces exposure	family forma- tion leaves costs unchanged	family forma- tion leaves costs unchanged
Exposure to Costs of Others' Dependence	family formation increases exposure	family forma- tion increases exposure	family forma- tion leaves costs unchanged
Other Considerations	----- same under all three support regimes (?) -----		

In deciding whether to get married or have children, it is likely that people will take into account the impact of that decision on their exposure to the costs of dependence—both their own dependence, and the dependence of the other potential family members. Of course, this will be in addition to many other factors, which may, separately or in combination, swamp and render irrelevant the costs related to dependence exposure in the great majority of cases. However, if we are concerned about the impact of policy on families, then this suggests that we believe the support regime can have some impact at the margin, for at least some people. Beginning with that premise, we can evaluate whether a given support regime is likely to increase family formation or decrease it, at the margin.

The column for the family-only support regime looks at a societal arrangement in which the family is the only source of outside support for dependent persons (that is, the state provides no support at all to any dependents).⁵⁵ In this support regime, the chance to

55. Of course, even in the absence of any state support, people could still look to private nonfamilial support networks, such as charities, churches, or social groups. *See generally*

reduce one's own exposure to dependence costs represents an additional motive for family formation.⁵⁶ This incentive is counter-balanced somewhat by the exposure to the dependence costs of others that attends adding members to one's family. However, if we assume that people are risk averse and market opportunities for pooling risk are absent or inadequate, the chance to pool risks even within the small group represented by the family makes it very likely that the disadvantages associated with taking on the dependence costs of others are outweighed by the advantages associated with reducing one's own exposure to the risks of unassisted dependence. Moreover, families are, in general, less liquidity-constrained and in a better position to spread costs temporally than are individuals, at least in the absence of well-developed capital markets that would permit seamless transfers from past or future selves. On balance, the expected impact of dependency costs would most likely weigh in favor of family formation. This expectation matches with the intuition that a purely familial dependence care regime serves to motivate and solidify family bonds.

The rightmost column in Figure 1, in contrast, represents a world in which society provides categorical assistance to all dependent persons. Where this is the case, neither the advantages of reducing one's own exposure to dependency nor the disadvantages of taking on the dependency of other people weighs into the decision about whether to form a family. When this support regime is compared

DAVID T. BEITO, *FROM MUTUAL AID TO THE WELFARE STATE: FRATERNAL SOCIETIES AND SOCIAL SERVICES, 1890-1967* (2000) (discussing social insurance functions formerly provided by fraternal societies). Likewise, the availability of market products and services would reduce the need to rely on family, even in the absence of state support. See BECKER, *supra* note 28, at 347-48 (discussing ways in which market insurance reduces the need to "insure" through the family); FOLBRE, *supra* note 7, at 116 (observing that "[t]he development of capital markets encourages savings, and the expansion of labor markets makes parents and children less economically dependent on one another"). The availability of such alternatives provides another reason why a "family-only" model is infeasible, even aside from the political infeasibility of the state withholding all dependence support under all circumstances. To the extent these other private arrangements offer good substitutes for familial support, they arguably weaken the incentive to form families in the same manner as public support.

56. See Kotlikoff & Spivak, *supra* note 52, at 388 (presenting a model that suggests, in the absence of market opportunities for risk pooling, "individuals have strong economic incentives to establish relationships which provide risk-mitigating opportunities," and suggesting that "pooling the risk of death can be an important economic incentive for family formation").

with the family-only regime just surveyed, one can see that the move to categorical support eliminated what previously had represented a positive factor in the family formation equation. This is precisely the comparison that sometimes prompts commentators to suggest moving back in the direction of family-based support. But there is a problem with this analysis. A family-only support regime (to the extent such a thing ever existed) is no longer accessible to us as a policy option. To its great credit, American society has reached a point at which it will not allow people to starve to death simply because they lack family members capable of caring for them. Once we acknowledge that the family-only model is infeasible, then the question becomes whether we still should move as far as possible towards a family-centric model of dependence care.

To answer this question, we must compare categorical support not to the infeasible family-only support regime, but rather to the family-first model that occupies the middle column. Under a family-first model, primary dependent care responsibility is placed on the family, but if there is no family, or no solvent family, the dependent care burden falls to the state. Consider the incentives for a person to form a family under this regime. Because the state performs a gap-filling function by providing support to dependent people who do not have family members capable of providing support, the incentive to form a family for the purpose of reducing exposure to the costs of one's own dependence is eliminated, or at least greatly reduced.⁵⁷ However, because dependence care falls to the family where the family exists, forming a family *does* expose one to the costs associated with the expected dependence of others.

Thus, one does not gain much benefit in terms of personal dependence cost reduction by forming a family, but one does become liable for the dependence costs of others. To put it another way, categorical public support *removes* a disincentive associated with forming families when compared to a family-first regime—the exposure to

57. If there are substantial quality differentials between the care one would receive through state-provided support and from one's family, then the incentive is not eliminated, but only reduced. Because of the state's desire to shift costs onto the family, it is likely to attempt to introduce quality differentials to encourage extant families to bear costs. It is questionable, however, whether these marginal quality differences would be sufficiently salient to people contemplating family formation decisions to influence their choices.

the dependent care costs of family members. The net impact of family formation on exposure to dependence costs is, therefore, likely to be unfavorable under a family-first regime. This does not mean that people will not form families—other considerations may easily overwhelm all concerns about dependence costs—but it does mean that at the margin, holding all other factors constant, people will be less likely to form families, and more likely to exit their families, where possible, than in a regime where dependence costs are borne by the state.

This conclusion is subject to a number of qualifications. Figure 1 suggests that the other considerations impacting decision making about family formation are not themselves affected by the support regime—but I included a question mark to suggest some doubt about that assumption. One might argue that a society in which people are made to support their dependent family members is a society in which family ties receive more emphasis and social support. This arguably yields a more family-friendly set of cultural norms that positively influence decisions about family formation. On the other hand, one might argue that a society that forces people to support dependent family members fosters a culture in which family is perceived as a constraint on freedom and autonomy and a drag on one's potential, such that the actual disincentive associated with dependency cost bearing is magnified culturally.

Another possibility is that a family-first regime would perform a useful screening function. Because forming a family represents a larger commitment and entails a larger degree of sacrifice under such a regime, the result might be that only the most serious and committed people would form families, while those who feared the possibility of caring for others would not.⁵⁸ In other words, even if fewer families were formed under such a regime, perhaps they would be stronger families, and less prone to break-up. If the policy goal is not to maximize the sheer number of families formed, but

58. Likewise, a willingness to form a family under such a support regime arguably would signal one's commitment and capacity to take on risk, because family formation would be more costly for those unwilling or unable to take on the added risk. *See* DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994) (discussing signaling and screening). If such signaling enabled people with similarly strong commitment levels to pair up more confidently, it could contribute to stable, long-lasting matches.

rather the number of strong, abiding, and committed families formed, then placing dependent care costs on the family might not necessarily work at cross-purposes with that goal—provided we believe the screening function operates sufficiently well. It is unlikely, however, that it would function with much precision. In addition to potentially discouraging people with low levels of personal commitment from forming families, the family-first model would also likely discourage those with low incomes, uneven career prospects, or few marketable skills or liquid assets—that is, those for whom assumption of additional risk is particularly costly.

There are many other factors that would have to be considered before arriving at a conclusion about the appropriate policy prescription. The purpose of this example is not to take a policy position. Instead, this analysis merely illustrates how prescriptions that appear to have one set of implications under the assumption of an unconstrained spectrum can have very different implications when one recognizes that the spectrum of feasible policies is constrained. Given the policy limitations discussed above, the conventional approach of weighing policy interventions against the unrealistic and unavailable baseline of complete nonintervention proves less helpful than an approach that takes a backdrop of residual societal support as a starting point. The next Part uses the latter approach to examine the full range of family reactions to dependency burdens.

II. FAMILY STRATEGIES

The same factors that generate the constrained policy spectrum and the counterintuitive implications that flow from it—alignment of interests in dependent care, and divergence of interests over cost allocations—also complicate policymakers' attempts to select a particular point along the spectrum of feasible policy choices. Regardless of what point is chosen, families will be inclined to do things to limit their exposure to costs.⁵⁹ These efforts have implica-

59. Families are not alone in their desire to limit costs. Society attempts to limit its exposure both by choosing to allocate some dependent care costs to families explicitly, and by attempting to encourage further voluntary provision of care through various policy design features.

tions for both efficiency and distributive justice. Some actions that families take in reaction to cost allocations are efficient in that they actually reduce the sum total of costs associated with dependence and dependence care. In many other cases, however, families will take actions that are not designed to reduce costs, but rather to shift costs onto another party. These cost-shifting efforts, whether fully successful or not, generate deadweight losses. To the extent the cost shifts are successful, they will also effect distributive changes that may be deemed normatively desirable or undesirable.⁶⁰ Therefore, the desirability of a particular cost allocation cannot be evaluated without understanding the full range of potential familial responses.

Before I begin to detail those responses, two caveats are in order. First, notwithstanding my focus on strategic behavior and cost shifting, I do not assume that people narrowly seek to maximize wealth to the exclusion of all other goals. On the contrary, I recognize that many factors will influence how family members will behave towards each other, and that a great degree of heterogeneity in such responses is a social fact. Bonds of love and altruism among family members⁶¹ will temper their resort to certain strategies. Moreover, the very reason that a strategic dilemma exists is because people care about what happens not only within their own families but within larger society. We all want dependent people to enjoy at least a minimally decent life. If this were not the case, there would be no strategic interaction presented, because nobody would be susceptible to being bluffed into bearing the costs of addressing dependency. I do assume that at the margin, pecuniary incentives can make a difference in behavior, but I make no claims about the size or universality of the response.

60. If the distributive changes that result from successful cost shifting are deemed desirable, then efficiency and distributive goals could be advanced simultaneously by changing the initial cost allocation so that the cost shifting is no longer required. This assumes that the change in the initial allocation would not also generate new costs that exceed the savings.

61. Or, to put it in economic terms, "interdependent utility functions." See BRINIG, *supra* note 35, at 83.

Second, I do not propound an invariance principle.⁶² The fact that families will try to shift and otherwise reduce costs does not mean that society's efforts to place costs on them are wholly in vain, or that the same end-state will result regardless of where society initially places the costs. On the contrary, society's initial assignment of responsibility to families *does* make a difference to the final incidence of those costs. It is expensive to shift costs, and cost shifting cannot be done completely. Moreover, not all family strategies shift costs; some strategies have the capacity to reduce overall dependency costs, thereby securing efficiency gains.

A. Exiting (or Not Entering) the Circle of Support

A system that undertakes to fill gaps in familial support must first be able to detect whether a gap exists. Policymakers must, therefore, metaphorically draw a circle around the dependent person that encompasses some statutorily or administratively defined categories of family members, and examine the ability of the people within that circle to provide appropriate support. Regardless of how expansively or narrowly that circle of support is drawn,⁶³ the very act of drawing it immediately creates a new set of incentives for potential and existing family members. Because of these incentives, a government assistance program that employs a gap-patching approach inevitably will operate to some extent as a gap-enlarging or gap-creating mechanism.

One manifestation of this has already been introduced above: the decreased incentive (or increased disincentive) to form families.⁶⁴ I

62. Cf. Herbert Hovenkamp, *Marginal Utility Theory and the Coase Theorem*, 75 CORNELL L. REV. 783, 785-87 (1990) (discussing invariance thesis of the Coase Theorem, in which society's initial assignment of entitlements makes no difference to the final result).

63. The modern trend has been to draw this circle much more narrowly than in earlier times. See MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 47-51 (1981) (describing the shift from broad-ranging kinship liability under the early Poor Laws to the current approach, in which legal support obligations extend only to spouses and dependent children).

64. There are two distinct aspects to this manifestation. One involves reluctance to ally oneself with existing persons who might become dependent and the other involves reluctance to bring new dependent people into the world. In both cases, assessment of the costliness of the avoidance behavior depends on one's beliefs about the societal spillovers created by these alliances and births—and by the activities that are substituted for them if they do not occur.

turn now to the incentives that face people who find themselves already within a legally defined circle of support. Such individuals have an incentive to exit the circle of support, or to move their assets outside of it so that they are no longer available for the support of the dependent person. Accomplishing this would either shift costs onto other family members, or back onto the state in its role as gap-filler.

Society need not sit idly by and watch the exodus of people and resources from the circle of support. Whatever rules are formulated for gap detection will be augmented by support-forcing rules that require those within the bureaucratically defined circle to actually provide the support.⁶⁵ We often think of family members' contributions to dependent care as voluntary rather than compelled. However, unless the coercive force of the state stands ready to enforce support obligations, the support regime cannot truly be understood as falling under the family-first rubric. Family members are free to donate resources voluntarily under a categorical support regime, but voluntary family choices about how to allocate resources are likely to be shaped in predictable ways by the assistance regime.

The enforcement of support-forcing rules is costly, however, and does not always preclude people and their resources from exiting the circle of support. Affinity-based ties can be broken voluntarily, and the state is powerless to prevent such terminations. The so-called "Medicaid divorce" is a classic example. In order for a dependent individual to qualify for government-funded, long-term care under Medicaid,⁶⁶ the resources of that dependent individual, and typically

As noted above, it is not altogether clear whether particular failures to marry are socially costly. Likewise, as will be discussed at some length in Part II.D, *infra*, it is not obvious whether the choice not to bear a child is socially costly.

65. This can be accomplished in a variety of ways. One particularly interesting example of a support-forcing rule is the requirement that, in order to receive welfare benefits under the Temporary Assistance to Needy Families program, underage mothers must live in the homes of their own parents (subject to some exceptions). *See* 42 U.S.C. § 608(a)(5) (2000). This effectively forces the parents of minors receiving assistance to provide in-kind assistance in housing, and may as a practical matter lead to other assistance and behavior monitoring as well. *See* Goodin, *supra* note 15, at 136-37 (discussing possible rationales for such a rule).

66. Medicaid is a means-tested health program. Medicare is a categorical program for people over age sixty-five and for most disabled people. *See* HARVEY S. ROSEN, PUBLIC FINANCE 168-69 (6th ed. 2002) (describing Medicaid); *id.* at 205-09 (describing Medicare). Medicare does not provide coverage for most long-term care, while Medicaid does. *See, e.g.,*

all but a specified portion of the resources of their spouse, must first be “spent down.”⁶⁷ This creates an incentive to stop being a spouse to a dependent person who will need expensive long-term care.⁶⁸ Knowing that the government will step in to “fill the gap” and care for the dependent person, a spouse contemplating filing for divorce for Medicaid purposes need not experience any lapse of love for the dependent person. Indeed, the dependent person may prefer and encourage the arrangement if it leaves more resources with loved ones while not materially worsening her own care situation.

Similarly, family structure and household composition may determine who falls inside and outside of the circle of support in contexts involving poverty relief for families with children. As a result, welfare policy arguably has generated perverse incentives.⁶⁹ Rules for imputing the availability of income and other resources can have predictable effects on incentives to configure households and families in particular ways.⁷⁰

Policymakers can try to control perverse incentives towards gap creation, although not costlessly. For example, a transfer program can place limits on the alienation of resources from inside the circle of support to outside the circle. In the context of Medicaid, “look-back” provisions limit the ability of dependents and their families to benefit from the transfer of resources during the period preceding

Kaplan, *supra* note 9, at 66-69.

67. *See, e.g.*, 42 U.S.C. § 1396r-5 (2000) (setting out rules governing treatment of spousal resources); Kaplan, *supra* note 9, at 69 (discussing process of spending down resources to qualify for Medicaid). In some states, notably New York, these spousal contribution requirements are effectively weakened by laws that permit “spousal refusal.” *See* NY CLS Soc. Serv. 5, § 366(3)(a) (2003); John A. Miller, *Voluntary Impoverishment to Gain Government Benefits*, 13 CORNELL J.L. & PUB. POL’Y 81, 95 (2003).

68. *See supra* note 12. In determining Medicaid eligibility, states are forbidden to consider the resources of, or impose liability on, any person other than the spouse of the recipient or a child of the recipient who is under the age of twenty-one. 42 U.S.C. § 1396a(a)(17)(D) (2000). This, then, is an example of a limited family-first model, where the circle of support is drawn rather narrowly.

69. *See, e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 610 (1987) (Brennan, J., dissenting) (“The Government has told a child who lives with a mother receiving public assistance that it cannot both live with its mother and be supported by its father.”).

70. *See, e.g.*, Robert C. Ellickson, *The Household: The Law, Economics, and Sociology of an Underexamined Institution* 51 (2003) (unpublished manuscript, on file with author) (discussing potential influence of governmental welfare and benefit programs on household composition choices).

the onset of long-term care.⁷¹ Likewise, garnishment of wages provides a mechanism for enforcing support obligations before the opportunity for alienating the resources arises.⁷² Of course, the government cannot force family members to contribute resources they do not have,⁷³ nor can it garnish earnings that it does not know about.⁷⁴

Making the gap-filling support substandard to some extent also will help to discourage gap creation by those whose families would be able to privately afford better care. For example, because of the relatively low reimbursement amounts payable under Medicaid, not all long-term care facilities provide care to Medicaid patients.⁷⁵ Hence, the care available under Medicaid may be of lower quality than that which could be obtained privately in some of the better facilities.⁷⁶ This quality differential keeps the withdrawal of spousal support from being costless for the dependent person—and to the extent the able-bodied spouse's utility is bound up in that of the dependent person, it will not be costless for the able-bodied spouse either.

This does not necessarily mean that the able-bodied spouse will be deterred from divorcing. The spouse must weigh the marginal increase in quality attainable through private funding against the total cost of the private funding.⁷⁷ Where public assistance takes the

71. 42 U.S.C. § 1396p(c) (2000) (setting thirty-six month look-back period for alienating resources; sixty months for trusts); *see also* Kaplan, *supra* note 9, at 71-72 (discussing these provisions).

72. *See, e.g.*, 42 U.S.C. § 666(a)(1), (b) (2000) (setting out state plan requirements for withholding wages to enforce child support obligations).

73. Any change in work effort prompted by a support obligation would depend on the interplay between substitution and income effects, just as with taxation. *See, e.g.*, Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1919-20 (1987) (discussing these effects in the context of taxation).

74. *See* Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 37 n.68 (2002) (noting the "practical obstacles of garnishing wages of men who are self-employed, men who work for different people (such as construction workers), men who move from job to job, men who work in largely cash businesses, and men who move out of state").

75. *See* Kaplan, *supra* note 9, at 69.

76. *See id.* (noting that "Medicaid recipients often find themselves shut out of certain nursing homes, especially the more desirable ones").

77. For example, assume for purposes of illustration that the dependent person could receive care at a 20% higher quality level privately than he could achieve under Medicaid. In

form of cash, families and friends can try to quietly augment that support without paying the entire bill. For example, many welfare mothers receive unreported supplements from family members, friends, and boyfriends.⁷⁸ Indeed, the grant amounts are so low that some form of supplementation is a virtual necessity.⁷⁹ The result is a form of unofficial cost sharing between the public and those close to the dependent person.

A primary difficulty with using quality differentials to leverage contributions from the dependent person's family and affiliates inheres in the heterogeneity of recipients' access to such private resources. Dependents without family or friends who are motivated by the quality differential to provide assistance must simply suffer the consequences of the low-quality care. As with all incentive schemes in the public assistance arena, we must examine what happens to those who cannot or do not respond to the incentive in the preferred manner. Policymakers are faced with a familiar dilemma: Making assistance too generous makes people more likely to make choices that increase the cost of the public program, while making it too stingy keeps it from accomplishing its objectives. In this case, however, the people potentially making decisions that will raise costs of the public program are not the recipients themselves, but those close to them.

When blood ties link a solvent person to a dependent person, exiting the relationship is difficult.⁸⁰ Opportunities for "virtual exit" still exist, however. People can try to disavow their relationship with the dependent person, mask their solvency, or evade enforcement attempts. These attempts, and costs incurred in attempting

that case, the question for the able-bodied spouse is whether to stay married and foot 100% of the bill for a 20% quality improvement, or to divorce and pay none of the costs for the care. In other words, until all her nonexempt resources are exhausted, on these facts the able-bodied spouse receives only a 20% return on each dollar she contributes to her spouse's long-term care, plus whatever nonpecuniary benefits she receives by staying married.

78. See KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 143-91 (1997) (detailing the "survival strategies" employed by the mothers on Aid to Families with Dependent Children (AFDC) that were the subject of the authors' empirical study).

79. See *id.*

80. See *infra* Part III.B.5 (discussing relative ease of exit from various sorts of relationships).

to thwart them, represent deadweight losses. The state's ability to counter such efforts depends not only on the technologies available for confirming relationships and enforcing support obligations, such as paternity testing and nationwide computer networks, but also on human factors.

For example, child support enforcement efforts often depend on the cooperation of the custodial parent—usually the mother. Under current welfare law, custodial parents who fail to cooperate in the state's efforts to secure child support are subject to the denial or reduction of welfare benefits.⁸¹ Unfortunately, cooperation can expose women to the risk of domestic violence.⁸² Recognizing this, many states have taken advantage of a welfare policy option that allows them to relieve mothers who are the victims of domestic violence from the duty to cooperate in child support enforcement efforts.⁸³ Currently, the principal problem with this solution seems to be that women applying for welfare are not made aware of this provision or are reluctant to reveal that they are victims of domestic violence. Hence, the provision does not fully protect women against violence.⁸⁴ Yet, even if the provision were widely known, well-understood, and appropriately invoked, it still would not be a costless solution. Because relieving women of disclosure obligations effectively relieves men of support obligations, the provision could provide men with an incentive to pressure women into nondisclosure, and might even lead some men to resort to the level of threats and battery necessary to support nondisclosure.

81. 42 U.S.C. § 608(a)(2) (2000). Welfare recipients must assign their right to receive child support to the state. *Id.* § 608(a)(3).

82. *See, e.g.,* FINEMAN, *supra* note 4, at 212-13.

83. *See* 42 U.S.C. § 602(a)(7) (2000) (setting out the terms of the Family Violence Option); Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L.J. 47, 57-58 (2003) (reporting that twenty-four states have used the Family Violence Option to waive child support cooperation obligations). A "good cause waiver" is also available under Temporary Assistance to Needy Families, and can be used by states to exempt women from child support cooperation. *See id.* at 49-50.

84. *See, e.g.,* Stern, *supra* note 83, at 49-50.

B. Influencing Dependence of Existing Family Members

Familial behavior can sometimes influence the incidence, length, severity, and costliness of spells of dependence experienced by family members. Thus, a more constructive response to dependency burdens would be for family members to take actions designed to prevent, forestall, shorten, or ameliorate dependence among those to whom they are linked. Placing the burden of support on the family gives the family a stake in dependence, and an incentive to reduce dependence costs.

For example, parents might take actions early in a child's life that reduce the child's risk of future dependency. These might include measures designed to develop the child's human capital (such as education) or measures designed to keep the child from developing a costly problem (such as therapy to address an incipient learning disability).⁸⁵ Likewise, the family might provide various forms of instrumental support—both material and emotional—designed to move a presently dependent person into an independent position. Families are arguably better positioned than government agencies to deliver the appropriate quantity and type of assistance and to monitor and enforce particular norms of behavior.⁸⁶ A family member can exhort, cajole, threaten, supervise, shame, and

85. Parents' decisions on these fronts may be influenced not only by dependency cost allocations but also by institutional and legal arrangements for addressing particular conditions. For example, a learning disability diagnosis might trigger various institutional accommodations (e.g., in test taking). See MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE* (1997).

86. See David D. Haddock & Daniel D. Polsby, *Family as a Rational Classification*, 74 WASH. U. L.Q. 15 (1996) (discussing families' heightened capacity and motivation to monitor and control the behavior of their members, as compared with most groups of unrelated persons); cf. Daryl Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 359 (2003) (explaining how making medieval merchants of a town liable for each other's debts "would leverage these intra-borough and intra-guild governance structures, creating incentives for local merchants to police one another's debts"); Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 888-89 (1999) (discussing heightened ability of rotating credit association to engage in peer monitoring, given social, ethnic, and cultural ties). The same rationale can be used to support group punishment in various contexts. See Levinson, *supra*, at 348 (explaining that "[g]roup members might be punished not because they are deemed collectively responsible for wrongdoing but simply because they are in an advantageous position to identify, monitor, and control responsible individuals, and can be motivated by the threat of sanctions to do so").

otherwise influence a dependent person in many ways that would be inappropriately intrusive for a governmental actor.

Placing dependence costs on the family also effectively privatizes eligibility and termination determinations—decisions whether someone is truly capable of self-support at a given point. Family members have obvious informational advantages over government actors,⁸⁷ and can more cheaply ascertain whether someone really requires outside support. The family-first model gives family members a direct incentive to make this judgment as accurately as possible, because doing so will minimize the family's dependence costs. If the family finds that a family member is only pretending to need assistance, it can move the costs of support onto the shoulders of the individual herself. This shift may have the effect of helping to develop the individual's human capital, as well as that of her would-be caretakers. Such human capital development could, in turn, make later spells of dependency less likely.

While these strategies have the potential to reduce dependence, they are subject to important limitations. First, some kinds of dependence neither produce serious eligibility disputes nor provide meaningful opportunities for preventing or reducing dependence. One cannot, for example, convince an infant to be more self-sufficient. In such cases, the family will not be able to resort to the set of strategies described here.

Second, the family's interests in cost minimization may not align perfectly with the individual's interests in human capital development or personal fulfillment. For example, a family concerned with getting a teenager into a position of self-support as quickly as possible might push her to enroll in a vocational training program rather than a four-year liberal arts college.⁸⁸ While the interdependence of utility functions among family members can cause the

87. See Haddock & Polsby, *supra* note 86, at 20 (discussing informational advantages that parents often have).

88. Similarly, in traditional societies, “[f]amilies held accountable for the performance of their members would guide and, if necessary, force members into activities where they could contribute most to the reputation and opportunities of the whole family.” BECKER, *supra* note 28, at 345. Even if the individual's long-run earnings would be optimized through the course of action pushed upon her, personal autonomy is compromised when family members dictate choices.

family to identify with the dependent person's goals and thereby prevent such outcomes, other factors, such as liquidity constraints facing the family, may contribute to them.⁸⁹

Finally, notwithstanding the family's informational advantages, families can make mistakes about what the dependent person really needs, or even about whether an apparently dependent person is really dependent. If the family falsely believes that a person is dependent when she could actually care for herself, this presents the sort of costly eligibility mistake that society expends so much effort attempting to avoid. If, instead, the family falsely believes that the individual is capable of self-support when she actually is not, the family's efforts to motivate the person to accept responsibility for her own support may become inappropriate or even abusive.

C. Spending Less on Dependent Care

Where dependent care costs fall to the family, the family has an incentive to reduce the costs associated with care. This incentive serves a useful function where it induces families to select the least expensive type of care.⁹⁰ However, it also could induce family members to attempt to offload some of the costs onto the dependent person by providing substandard care.⁹¹ In the typical case, strong bonds of love between family members limit this possibility. Yet, where support-forcing rules impose burdens on family members who lack both altruism and the ability to exit from the circle of support, unproductive cost shifting onto the dependent person becomes a serious risk. Public agencies can and do monitor and punish such behavior when it becomes extreme enough to constitute abuse or

89. For society, the situation is reversed: Society generally has less concern for the individual's long-range goals, once some minimal level of self-support is attained, but it also has more liquidity.

90. Recreating such incentives through a socially funded program would be possible, but would involve heightened administrative and enforcement costs. For example, each person caring for a dependent individual could be reimbursed based on the "going rate" for institutional care, and could then keep any surplus they could generate for themselves through home care or other arrangements. This would require careful monitoring to prevent fraud, and would introduce administrative costs associated with providing reimbursement.

91. Abuse and neglect can be understood as "negative 'investments'" in individuals, rather than positive ones. See BRINIG, *supra* note 35, at 124.

neglect, but enforcement is imperfect and a great deal of problematic conduct goes undeterred.

Family members can also chisel on care in smaller ways without triggering legal intervention. Sometimes this does not represent a volitional choice, but rather the imperative of poverty and illiquidity. For example, a parent who lacks funds to purchase high-quality day care, and who has no savings that would permit her to suspend working for a period of time to provide the care herself, may opt instead for substandard care.

D. Childbearing Decisions

So far, I have been considering the family's interaction with existing dependent persons, or existing persons who might become dependent. Of course, family members also determine whether new dependent persons enter society. The decision to bear a child entails bringing into the world a person who will be dependent for a significant period of time. Thus, one way families can reduce their exposure to dependent care costs is to have fewer or no children. While many factors influence the decision whether to have a child, a family that must bear the costs of childrearing will have less incentive to have a child (or more incentive to avoid having a child) than would be the case if society assumed some or all of the costs of raising the child.⁹² Moreover, to the extent that parents cannot fully spread costs of childbearing over the parents' lifetime earnings, birth timing may vary depending on the societal arrangement.⁹³

92. In the United States, the costs of childrearing fall primarily on the family. However, an estimated 38% of the costs of childrearing are covered by society. Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1775 (2001). A major subsidy comes in the form of the public provision of elementary and secondary schooling. Parents also receive tax credits and exemptions, which are estimated to total roughly 8% of direct childrearing costs. FOLBRE, *supra* note 7, at 200. Additional support takes the form of "family-friendly" legislation, assistance that reaches children in low-income families, assistance targeted at disabled children, and assistance that reaches the children of workers covered under public or private benefit programs.

93. Decisions that might be perceived initially as merely ones of timing ultimately may have impacts on the overall birthrate or on the chances of longer-term dependency. *See, e.g.*, Brinig, *supra* note 51, at 231 (observing that "the difficulty of conception and incidence of genetic problems both increase with the age of the mother"); Joseph Pliskin et al., *Optimizing*

Does the decision not to have a child represent a reduction in overall costs for society, or merely an expensive shifting of costs? On one account, costs saved by the parents are borne by the unborn child, who does not get to enjoy the benefits of existence. It is possible that the child would get more benefit from living than this would cost the parents, and were the child able to negotiate in advance with the parents to, for example, obligate some fraction of her future earnings, a Pareto-improving bargain could ensue.⁹⁴

Another view is that the parental cost savings come at the expense of society at large, which loses a potentially productive worker. Because society could have tapped the would-be worker's productive capacity to help pay for later dependency costs, the argument runs, the worker's nonexistence pushes greater dependency burdens onto other members of the now-smaller birth cohort. The fact that there are alternative ways of expanding the workforce, notably through a liberalized immigration policy,⁹⁵ undermines this argument considerably.

While the societal benefits flowing from well-raised children are beyond dispute,⁹⁶ assessment of the benefits flowing from good *childrearing* should be kept analytically separate from assessments of the social impact of decisions about *childbearing*. Clearly, once

the Prenatal Detection of Down's Syndrome: A Decision-Analytic Economic Policy Analysis, in WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS 185, 186, 187 fig. 11-1 (Richard J. Zeckhauser et al. eds., 1996) (noting correlation between increased maternal age and the risk of Down's syndrome).

94. See Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J.L. & ECON. 1, 15 (1988) (presenting a thought experiment involving such a pre-birth contract); see also BURGGRAF, *supra* note 13, at 76 (explaining that "[u]nborn children obviously can't sign prebirth contracts, but it is not unreasonable to hypothesize what kind of contract a child would be willing to sign with parents for quality care when he or she is old enough to understand the terms"); *id.* at 69-85, 193-210 (proposing, describing, and defending a "parental dividend" that would replace Social Security and give parents a stake in their children's earnings).

95. See, e.g., POSNER, *supra* note 5, at 43 (observing that "the United States could by liberalizing its immigration laws lower the dependency ratio pretty much at will"); Case, *supra* note 92, at 1774 (discussing the ability of immigrants to take up any demographic slack).

96. See, e.g., FOLBRE, *supra* note 7, at 254 (asserting that "[c]hildren, like the environment, are a public good"); Allison Moore, Book Note, "From Opportunity to Entitlement" and Back Again—Or Beyond, 106 YALE L.J. 923, 926 n.12 (1996) (observing that "[w]elfare benefits can be seen as directly analogous to public works programs, with 'rearing children' seen as work that has an important public component").

a child is born, it is overwhelmingly in society's best interest to ensure that the child receives adequate care and appropriate investments in developing her human capital. But the sign and significance of the externalities, if any, associated with bringing a child into existence in the first place are far less clear. When one has a child, is one performing a valuable public service, or merely making a consumption decision?⁹⁷ It is not possible to answer this question in the abstract without knowing something about the underlying population dynamics, including immigration trends and policies, as well as something about what will happen to the child once she is born. The contribution that an individual makes to society is not a fixed quantum, but rather depends on the human capital that a given individual can bring to the table under a particular set of social and economic conditions. The fact that the spillovers associated with choices about the bearing of children depend on later human capital investments made with regard to those children, and the further fact that these later actions depend to some degree on personal financial resources, complicate matters enormously.

Consider the following stylized example: Imagine there are two possible levels of care and investment in a child—high and low. Each new child will generate a positive spillover for society if she receives the high level of care, and a negative spillover for society if she receives the low level of care.⁹⁸ Further, assume (as seems

97. See, e.g., Fineman, *supra* note 15, at 21 n.15 (attacking the argument that a preference for a child is no more entitled to a subsidy than any other consumer preference, such as a preference for a Porsche). One need not believe that having a child is analytically similar to a consumer purchase to question the magnitude and direction of externalities flowing from the childbearing decision, however. See, e.g., Case, *supra* note 92, at 1779-80 (suggesting that a child be viewed not as a Porsche, but rather as a poem—a creative endeavor that can produce positive or negative externalities); ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS (Oxford Univ. Press forthcoming 2004) (manuscript at 95, on file with author) (observing that children may create both negative and positive externalities). Moreover, even if we grant that the externalities associated with childbearing are generally positive, this would not tell us *how much* of the cost of childrearing should be borne by society. See, e.g., Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, 52 EMORY L.J. 1, 32 (2003) (observing that the existence of positive externalities associated with children would not necessarily lead to the conclusion that the government should pay all of the costs associated with their care).

98. There might be decreasing marginal positive externalities from additional children receiving high-level care, and increasing marginal negative externalities from children

realistic in the usual case) that parents are moved by love to provide the high level of care for an extant child if able to do so,⁹⁹ but that many parents can derive value from having a child even if they do not have the capacity to provide a high level of care. At first blush, this set of assumptions suggests subsidizing the childbearing of parents who will provide high-level care, and taxing the childbearing of those who will provide low-level care.¹⁰⁰ But consider what happens when we add a further assumption—that financial resources play some role in determining whether a parent is able to provide a high level of care.¹⁰¹ If the correlation between financial resources and the ability to provide a high level of care were strong enough, our earlier logic would seem to lead us to the troubling prospect of taxing the poor for bearing children (or, alternatively, paying them not to have children), but subsidizing the solvent when they bear children. The distributive justice concerns associated with this solution should be apparent, although one can find some hints of this idea in policy discourse.¹⁰²

There is also a problem from an efficiency perspective: Any subsidy or tax designed to influence decisions about whether to have a child could also affect the ability of parents to provide high-level care. If we believe that parents are heterogeneous with regard to both resources and the utility they derive from having a child, we

receiving low-level care, but these complications are ignored for purposes of the example.

99. See Becker & Murphy, *supra* note 94, at 3-4 (discussing parental altruism). While parents may not always invest optimally in their children, *see id.* at 5-6 (discussing circumstances in which investments will be suboptimal), the “high” level of care in this simple example does not require optimal investments, merely investments above the minimum threshold sufficient to raise a productive citizen who generates positive spillovers for society.

100. The practical and philosophical problems with such an approach are obvious. See Case, *supra* note 92, at 1778 (observing that “some people ... make better parents than others,” and asking rhetorically, “[s]hould state subsidization take this into account?”).

101. Factors other than finances obviously affect the capacity of a parent to provide a high level of care. See generally SUSAN E. MAYER, WHAT MONEY CAN’T BUY: FAMILY INCOME AND CHILDREN’S LIFE CHANCES (1997) (examining the relationship between parents’ money and children’s outcomes). The fact that money may not be *sufficient* to secure good outcomes for children does not alter the fact that some minimal baseline of resources is *necessary* to the achievement of such outcomes. See, e.g., *id.* at 148 (observing that nonmonetary factors gain importance in determining outcomes after “basic material needs are met” and suggesting that meeting these basic needs remains crucial).

102. Policies designed to discourage welfare-dependent women from bearing children might be understood in these terms. See Christopher Jencks & Kathryn Edin, *Do Poor Women Have a Right to Bear Children?*, AM. PROSPECT, Dec. 1, 1995, at 43.

cannot expect a tax on childbearing by the poor to discourage all childbearing by the poor. Imposing a tax on children of the poor would, on the simplified assumptions above, make it more likely that the low level of care would be provided, because parents who already have few resources would be further deprived of resources. The same is true to a lesser degree when childbearing by the poor goes unsubsidized, if poor parents lack the wherewithal to provide the high level of care.

Society could instead provide parents with enough money to support the high level of care for each child that they bear. In the case of very poor parents, however, this would mean not just subsidizing childrearing, but supporting it wholly. Complete support costs society more while producing no greater benefits in the form of positive spillovers than would be achievable with a smaller subsidy (or no subsidy) to the more well-off. Moreover, we might expect this complete support to increase the rate of childbirth among the less well-off.¹⁰³ This would in turn increase the need for such total support in order to stave off negative externalities and ensure the production of positive externalities.

If some parents know they are more likely to have children who will be permanently dependent, their choices require special attention.¹⁰⁴ Other things equal, we would expect fewer parents to choose to have children at high risk of permanent dependency if society is unwilling to share in the costs of providing for the child's care—both during childhood and throughout the child's adult life.

103. While the argument that welfare encourages women to have more children is often greatly overblown, it does make children relatively more affordable (or relatively less unaffordable), than would otherwise be the case, and so may make a difference at the margin in a woman's decision to bear a child that she could not support on her own. *See, e.g.*, BRINIG, *supra* note 35, at 60-61 (discussing the possibility that these incentive effects play some role in explaining unwed birthrates); Fennell, *supra* note 11, at 288-90.

104. While there are many conditions leading to long-term dependency that cannot be predicted, it is sometimes possible (and may be increasingly possible in the future) to obtain information about the likelihood of certain costly conditions by testing parents before conception, embryos before implantation, or the fetus before birth. *See, e.g.*, Pliskin et al., *supra* note 93, at 185 (noting that "[m]any birth defects, especially ones resulting from chromosomal abnormalities, are now detected prenatally"). The welter of knotty issues raised by these possibilities is discussed in, *e.g., id.* at 195-98; Rakowski, *supra* note 32; Jonathan Glover, *Future People, Disability, and Screening*, in *JUSTICE BETWEEN AGE GROUPS AND GENERATIONS* 127 (Peter Laslett & James S. Fishkin eds. 1992).

However, parents typically lack precise information about the chances of a child ending up permanently dependent. If parents are very risk averse about the prospect of liability for the lifelong care of a severely disabled child,¹⁰⁵ perhaps they will be reluctant to have *any* children unless they can somehow insure against that risk. And if we think that children usually generate positive externalities for society, then society might wish to buffer the risk associated with bearing a severely disabled child by taking on some of the costs.

In sum, we might expect the level of public support for child-rearing to have an impact at the margin on the number, timing, and potentially even the characteristics of children. Parents' decisions whether to bear children will also be influenced by the societal arrangements for the care of dependent elders. If a family-first model of public assistance for the aged were employed and quality differentials were used to discourage familial default, then the extra increment of quality that would be available through the private funding of care during old age could influence choices about childbearing.¹⁰⁶ If an acceptable level of assistance is provided regardless of family resources, then there is little incentive to use childbearing as a way of privately funding one's dependence needs during old age.¹⁰⁷

E. Shifting Costs onto Other Family Members

Up to this point, the discussion has treated the nondependent family members as a monolithic decision-making unit. This is rarely

105. See BURGGRAF, *supra* note 13, at 48 (noting that the risk of bearing a severely disabled child is one of several risks parents face).

106. Such finely tuned calculations may not be realistic when quality differentials are relatively small and the floor of care provided offers a minimally decent life, but would seem more plausible if the quality differential were such that dependent elderly people without family support lived lives that were obviously miserable. However, it is also possible that people are so unduly optimistic about their own future prospects or so unaware of future societal provisions that these calculations would not be made at all. The relative unpopularity of long-term care insurance may be rooted, at least in part, in such a combination of optimism and obliviousness. See Kaplan, *supra* note 9, at 73-74 (citing popular misunderstandings about long-term care coverage under Medicare, as well as the fact that "[n]o one wants to imagine himself or herself as disabled and requiring full-time assistance with the basic activities of daily living" as reasons for the unpopularity of the coverage).

107. See *supra* Part I.D.

the case. Indeed, another potential strategy is for individual family members to attempt to shift costs onto each other. Such intrafamilial cost shifting has historically followed gender lines.¹⁰⁸ Unfairness imposed on women through this private cost shifting occurs out of the public eye, and unless some statute is violated, beyond the law's reach.¹⁰⁹ Moreover, because the opportunity costs women incur in providing care to dependents have not been fully recognized, an illusion of relatively cheap or costless dependent care has emerged that is wholly inaccurate.

There is a self-perpetuating character to these gendered patterns. A woman's opportunity costs in caring for dependent people in the household are a function of her earning capacity in the marketplace, as well as of tax and benefit policies.¹¹⁰ However, her earning capacity in the marketplace at a given point in time depends on investments she (or others) made in her human capital during earlier periods. In those earlier periods, investments were made (or not) based on predictions about their returns. If women are more likely to foresee interrupting their careers for caregiving, then this decreases their expected returns on the human capital investments that they make in the earlier periods.¹¹¹ By the time the decision is

108. See Fineman, *supra* note 28, at 1406:

One focus for the dissatisfaction with the privatization of dependency is the continuing unequal and gendered division of family labor, which burdens women more than men. Within the family, there is also delegation of responsibility for dependency—caretaking has traditionally been and largely remains gendered work, assigned to those in the family roles of wife, mother, grandmother, daughter, and daughter-in-law.

Id.

109. See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 239 (1989) (explaining that men's domination of women triggers no constitutional protections, so long as the law does not grant men a positive right to dominate women). The law gives women recourse against crimes, however, as well as the ability to undertake a legally binding "exit" through divorce. See Carolyn Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004) (discussing the significance of a free exit to marriage as an egalitarian liberal community).

110. See, e.g., Mary Louise Fellows, *Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures*, 10 YALE J.L. & FEMINISM 307, 358-63 (1998) (discussing untaxed imputed income associated with household work and the effects of tax credits for dependent care expenditures required to facilitate work).

111. See VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 61 (1988) (explaining that "because most young women expect to be mothers, they (and their parents) are less likely than men to invest in wage-enhancing human capital while in school and in their first job or

made to forgo market work in favor of dependent care within the household, the opportunity costs of doing so are often lower than they would have been had the woman not made investment choices with an eye to later caregiving. Contributing to the lowered opportunity costs of women's caretaking are tax schedules that penalize two-earner married couples,¹¹² and Social Security benefit rules that often provide married women with no greater benefits than they would have received without working at all.¹¹³ Though these policies greatly improve the lot of those who choose caretaking roles within marriage, they also tend to encourage women to continue to choose those roles within marriage.¹¹⁴ Any other factors that depress women's wages or opportunities relative to men's will

two after leaving school"); Becker, *supra* note 20, at 394 (explaining that because women's traditional work patterns were more likely to be part-time and intermittent, "they had fewer incentives to invest in education and training that improved earnings and job skills").

112. Recent legislation has alleviated this penalty, at least temporarily. Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (2003); see Mary Curtius, *House Committee Approves \$2.4-Trillion Budget for '05*, L.A. TIMES, Mar. 18, 2004 (discussing ongoing negotiations in Congress over tax cut extensions, and observing that both the House and Senate support extending marriage penalty relief). Significant penalties for two-wage earners within certain income ranges remain in the Earned Income Tax Credit. See Allan J. Samansky, *New Developments in Marriage Penalties and Bonuses*, 96 TAX NOTES 1745 (Sept. 23, 2002). Fixing a "marriage penalty" is not as easy as it sounds; it is logically impossible to simultaneously equalize the position of single workers, two-wage couples, and single-wage couples within a progressive tax system. See, e.g., Henry E. Smith, *Intermediate Filing in Household Taxation*, 72 S. CAL. L. REV. 145, 145-47 (1998) (summarizing and illustrating this "trilemma").

113. The lower-earning spouse, usually the wife, has a choice between receiving Social Security retirement benefits based on her own earnings record, or receiving 50% of the amount that her spouse is entitled to receive on his earnings record. See 42 U.S.C. § 402(b) (wives' benefits); *id.* § 402(c) (husbands' benefits). Thus, for women or men whose lifetime earnings record entitles them to benefits that are less than half of their spouse's benefits, years of work and payment into the Social Security system yield absolutely no marginal benefits, compared with the payout they would have received had they never worked outside the home. For secondary earners whose earnings are high enough that benefits on their own records exceed 50% of their spouses' benefit levels, the marginal returns on tax payments into the system are still far lower than they would be for a primary wage-earner. See FOLBRE, *supra* note 7, at 199 ("Since women tend to specialize in non-market work, this [Social Security rule] effectively lowers the cost of housewives to husbands, discouraging women's participation in paid employment.").

114. The policies do not, however, help all caretakers—only those who are (or, in some cases, were) married to a wage-earner. See FOLBRE, *supra* note 7, at 199.

also have the effect of artificially depressing women's opportunity costs in providing dependent care.¹¹⁵

The fact that one person in the household *provides* the care does not mean, necessarily, that she must be the one who is *bearing the cost* of the care. A couple might rationally decide that the person earning the lower market wage will stay home with kids or other familial dependents, and the person with the higher wage will share that wage with the stay-at-home spouse. By following such a plan, both spouses might be better off than they would have been had the higher-earning spouse assumed the dependent care.¹¹⁶ Yet, the fact that one spouse is receiving pay while the other is not can perpetuate a power imbalance that makes such equitable cost sharing less likely.¹¹⁷ Even if the spouse with the larger salary reimburses the stay-at-home spouse for her forgone wages dollar-for-dollar, this fails to compensate fully for her opportunity costs. Such a payment

115. See Fellows, *supra* note 110, at 347 (explaining that gendered "wage stratification itself encourages women to remain in their homes to do the unwaged childcare"). For a detailed discussion of various explanations for the gender wage gap, see Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 714-59 (2000). Differential parental behavior towards daughters and sons could also have an impact on the relative positions of women and men later in life. See GORDON B. DAHL & ENRICO MORETTI, THE DEMAND FOR SONS: EVIDENCE FROM DIVORCE, FERTILITY, AND SHOTGUN MARRIAGE (NBER Working Paper No. W10281, Jan. 2004), available at <http://www.nber.com/papers/w10281> (presenting empirical evidence indicating that parents of boys in the United States are more likely to get married and stay married than parents of girls, and noting possible connections between these findings and the gender wage gap).

116. Cf. Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 525-26, 595-96 (1998) (explaining that, where the wife can do housework more efficiently than the husband, side-payments from husband to wife could make an allocation of more housework to the wife Pareto-superior to an even division of work).

117. See, e.g., ALSTOTT, *supra* note 97, at 147-48 (observing that "[s]tudies of marital decisionmaking suggest that the spouses' relative earning power is one factor in determining whose opinion counts, and who has control over (or some input in) family spending and other economic decisions"); Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413, 1427-29 (1996) (discussing factors that influence marital sharing, and suggesting that control over resources is often determined in part by earning power). A power imbalance would be harder to sustain in a two-earner household, because the money that the less-powerful spouse receives in her own name increases her "exit threat." See Wax, *supra* note 116, at 566 (discussing how a spouse's earned income can affect her "exit threat" and thereby influence marital bargaining and the prospects for an egalitarian marriage). Power imbalances aside, the very fact that one party is receiving cash while the other party is not likely will impact the parties' subjective valuations of the contributions each is making. *Id.* at 584-85.

would not take into account the costs of forgoing a growing income profile over time, nor the different human capital investments that might have been made in the absence of cultural and economic pressures towards gendered specialization in dependent care. If the marriage ends, the financial impact of these forgone opportunities will be borne by the caregiving spouse.¹¹⁸

Privatizing dependency within the family also moves decisions about intergenerational priorities to the family forum.¹¹⁹ Human capital investments in the younger generation might be sacrificed to finance the care of the older generation, for example, or the older generation might be slighted in favor of the younger generation. Opportunities for strategic behavior among members of the same generation can also arise. Consider a situation in which an elderly dependent person has three adult children. Each strongly prefers that the dependent person receive high-quality, personal care, but each strongly prefers that the care be provided by her siblings rather than by herself.¹²⁰ In other words, each sibling has an incentive to be a free-rider, and to avoid being a “sucker.”

Siblings bound together by “love, guilt, and generalized emotional intermeshings,”¹²¹ might try to work out an amicable solution. Yet, these solutions are unlikely to be easy or obvious, especially if the

118. *See, e.g.*, Wax, *supra* note 116, at 517-18 n.12 (citing research on financial status of women following divorce); *id.* at 546-47 (observing that “[w]omen generally make greater idiosyncratic, marriage-specific investments than men, and those investments often come at the expense of labor market opportunity costs”; in contrast, men tend to make “portable” investments in market work). Alimony does little to make up for forgone market opportunities. *See, e.g.*, Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2069 (1996) (observing that “relatively few women receive alimony of any kind” and noting criticisms of “rehabilitative alimony”); BRINIG, *supra* note 35, at 218 (asserting that “[r]ehabilitative alimony’ is ineffective ... for when a parent remains out of the job force or otherwise changes work to accommodate children, the loss is permanent”).

119. *See, e.g.*, NORMAN DANIELS, AM I MY PARENTS’ KEEPER: AN ESSAY ON JUSTICE BETWEEN THE YOUNG AND THE OLD 7 (1988) (“Shifting costs out of public budgets ... will not eliminate competition between the elderly and the young for resources. It will only shift the locus and burden of that competition—from public budgets to family budgets.”); WALDRON, *supra* note 1, at 381 (discussing costs of uncertainty for the elderly person or reduced mobility and risk taking for the younger, or both, that accompanies leaving care for the aged to the family).

120. *See* Brinig, *supra* note 53, at 411 (observing that “[c]hildren sometimes vie not to support their parents” even though “they have a common interest in maintaining the family name and perhaps in keeping the family property intact”).

121. *Id.* at 412.

siblings are heterogeneous in terms of resources, earning capacity, and other familial obligations. For example, some family members may be better able to bluff others into providing care by pretending personal indifference. The strategic maneuvering among family members generates deadweight losses that either will be borne by the caretaker family members or perhaps off-loaded, in whole or in part, on the dependent person in the form of lower quality (and perhaps grudgingly provided) care.¹²²

F. Using Financial Products To Address Illiquidity and Risk

Dependence burdens often weigh more heavily on families than the expected value of the dollar amounts involved would suggest. There are two primary reasons why this might be the case: illiquidity and risk aversion. Families can sometimes turn to financial products in an effort to control exposure to these facets of dependence burdens.¹²³ Specifically, they can reduce their exposure to risk by purchasing insurance and can temporally spread costs by borrowing and saving. However, market imperfections, as well as factors such as moral hazard and adverse selection, impose serious constraints on the availability of these products in many dependency contexts.

III. TOWARDS A THEORETICAL APPROACH TO DISTRIBUTING DEPENDENCE COSTS

How might the foregoing analysis inform theory and policy? Because the familial strategies detailed above affect both the distributive and efficiency outcomes of societal arrangements for

122. *Id.* at 418-19 (describing the possibility that siblings faced with an aging parent and an estate containing no property will “engage in a ‘hot potato’ avoidance game, which may hurt their elderly parent directly ... or indirectly as she sees she is no longer valued or even wanted by the children for whom she sacrificed so much”). The fact that some family members may take advantage of other family members also creates issues of distributive justice, but it is unclear what the state’s role should be in policing intrafamilial unfairness.

123. While dependent individuals can sometimes access these products themselves during a pre-dependency period, this will not always be possible. Family members can either serve as agents for the dependent person in securing these products or purchase the products on their own behalf.

dependence, it makes sense that those strategies should feature centrally in deciding how to allocate dependence burdens. In the sections that follow, I explore how a focus on familial responses provides a framework for addressing the allocation task. As I will explain, that framework suggests a system of categorizing dependence costs and generates potential policy innovations. I close with some qualifications that represent avenues for further research.

A. The Valence and Use of Familial Strategies

In deciding whether to place dependence care burdens on the family, it is essential to consider what potential and existing family members will do in response. Some of the familial strategies described in Part II represent net cost savings, and hence provide arguments for making families primarily liable for dependence care. Other strategies represent familial attempts to shift costs; because cost-shifting strategies generate deadweight losses, their availability argues against placing burdens on families. Whether placing dependence burdens on the family makes sense in a given context depends, among other things, on the mix of “good” and “bad” strategies that this will trigger.

Figure 2 categorizes the principal familial strategies discussed above, based on whether they typically generate “good” cost savings, “bad” deadweight losses, or ambiguous results. Even though these categories are framed in efficiency terms, there is a significant degree of convergence between the results that are normatively troubling on standard accounts of distributive justice and those that are inefficient.

Figure 2:
Family Strategies: The Good, the Bad, and the
Ambiguous¹²⁴

	“Good” Strategies (Net Cost Reduction)	“Bad” Strategies (Deadweight Losses)	Strategies Producing Ambiguous Results
A.		Exiting Circle of Support; Evading Support Obligations	Failing to Enter Circle of Support
B.	Influencing Extent and Incidence of Dependence; Making Accurate Eligibility and Termination Decisions	Reducing Near-Term Dependence at the Expense of Long-Term Human Potential	
C.	Choosing Least Costly Form of Dependent Care	Chiseling on Care; Abuse and Neglect	
D.			Choosing Not to Bear Children
E.		Shifting Costs Intrafamilially	
F.	Purchasing Products to Spread Costs Temporally or Reduce Risk	Changing Behavior in Light of Insurance (Moral Hazard)	

It would be possible to quibble with some of these classifications. The important point conveyed by Figure 2 is that different strategy options carry different valences.

The familial response to dependency exposure in a given context turns on two factors: (1) the availability of each strategy, and (2) the cost savings each available strategy generates for the family per increment of cost expended employing the strategy. Strategies that are unavailable in a given context cannot be pursued. Among the available strategies, a rational family member (or potential family member) will begin with the one that offers the largest marginal payoff—that is, the greatest reduction in exposure to dependence costs per unit of input. The family member then will pursue that

124. The letters in the leftmost column correspond to the Sections of Part II, *supra*.

strategy up to the point at which another strategy begins to offer a larger marginal payoff. In order for any strategy to be worth pursuing, of course, it must produce benefits that exceed its costs.

The decision pattern I have just described, when coupled with the classification of strategies by their valence, permits us to construct a framework for allocating dependence burdens. We can begin by categorizing dependence based on functional factors that affect the availability, desirability, and cost of the various exposure-reduction actions open to families. Policy can then focus on increasing the availability of certain good strategies (most notably risk reduction and temporal cost spreading), and on making good strategies more attractive than bad ones. A review of good and bad strategies also helps to identify those instances in which the case for societal support is at its strongest—where families do not have access to any good strategies for reducing dependence exposure, and making additional good options available would cost society more than simply taking on the dependency burden.

B. Categorizing Dependence

What follows is a nonexhaustive list of functional factors for distinguishing among types of dependence, based on the availability and desirability of the strategies discussed above.

1. Controllability

When the incidence, extent, or cost of addressing a particular dependency condition is under the control of any person, societal arrangements for handling payment can produce incentive effects. Controllability,¹²⁵ understood broadly, provides a way to distinguish those forms of dependence where familial actions (including the prior actions of the dependent person) can impact *overall* costs from those where familial strategies are limited to cost shifting or to the purchase of financial products. Put simply, where dependence costs

125. The category of “controllable” costs referenced here diverges somewhat from Martha Fineman’s category of “inevitable” dependence, which includes at least some kinds of dependence that are the function of *someone’s* choice—such as the dependence that accompanies childhood. See Fineman, *supra* note 15, at 18.

are controllable, an argument exists for attempting to harness the informational and motivational advantages of the family and to provide incentives for their cost-reducing actions.

Controllability corresponds to the insurance concept of moral hazard. If a particular loss is preventable, then insuring against it could change the behavior of the insured by reducing the insured's incentive to avoid the loss.¹²⁶ For this reason, controllability of a condition is likely to affect the availability of insurance for that condition.¹²⁷ Precisely the same problem arises with public provision of assistance, which represents a socialized form of insurance.¹²⁸ Arguably, this explains why society makes different provisions for payment depending on the cause of the dependency.¹²⁹ Insurers can attempt to address moral hazard and encourage people to undertake cost-limiting actions. One way to do this is to design policy so that people are allowed to keep all or part of the cost savings they generate. A flat grant for a particular dependence condition would have this effect; if the dependence could be resolved at an actual cost that was lower than the grant amount, the recipient would get to keep the difference. The use of lump sum payments to divert people from the welfare rolls and bonuses for rapid reemployment

126. See, e.g., Kenneth J. Arrow, *Insurance, Risk, and Resource Allocation*, reprinted in 4 COLLECTED PAPERS OF KENNETH J. ARROW: THE ECONOMICS OF INFORMATION 77, 85 (1984) (defining "moral hazard" as follows: "The insurance policy might itself change incentives and therefore the probabilities upon which the insurance company has relied."); Göran Skogh, *Mandatory Insurance: Transaction Costs Analysis of Insurance*, in 2 ENCYCLOPEDIA OF LAW AND ECONOMICS, *supra* note 51, at 521, 524-25 (discussing moral hazard and possible ways of addressing it).

127. See, e.g., BENJAMIN I. PAGE & JAMES R. SIMMONS, WHAT GOVERNMENT CAN DO: DEALING WITH POVERTY AND INEQUALITY 59 (2000) (noting that "[a]ny insurance system in which risks are affected by controllable behavior" is vulnerable to moral hazard); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 193-97 (1987) (contrasting situations in which insureds can and cannot influence risk, and discussing the moral hazard concerns that arise when risks can be influenced by insureds); Skogh, *supra* note 126, at 525 (stating that moral hazard may affect availability of insurance).

128. See, e.g., KATZ, *supra* note 42, at 343 (observing that concerns about moral hazard have become important in public assistance discussions); ALSTOTT, *supra* note 97, at 129-30 (discussing moral hazard problems that attend efforts to assist people in distress *ex post*); cf. BEITO, *supra* note 55, at 45, 49 (discussing measures taken by fraternal societies to weed out the claims of malingerers and those who contributed to their own condition).

129. Of course, the fact that a condition is controllable does not establish that family members are in a position to exercise control over it, or even have any influence with respect to it. See Part III.D.1, *infra*.

in the unemployment insurance context provide good examples of this technique.¹³⁰

Other ways of controlling moral hazard in the insurance context include experience rating and other forms of monitoring, coverage conditions, coverage limits, deductibles, co-payments, partial coverage, and norms.¹³¹ These correspond to measures available in the public arena where dependent care is provided by the state. Consider welfare policy, which includes monitoring (e.g., home visits, caseworker appointments), coverage conditions (e.g., work requirements, living arrangement requirements), coverage limits (e.g., time limits that effectively deny coverage after a certain number of “claims,” and “family cap” provisions that deny coverage for additional children conceived on welfare), partial coverage (e.g., benefits in some states that are too low to support a subsistence existence), and norms (e.g., stigma and shaming).¹³² Alternately, society could subsidize or reward risk-reducing behavior.

130. See, e.g., David Leonhardt, *How To Give Job Seekers a Tastier Carrot*, N.Y. TIMES, June 8, 2003 (discussing incentive advantages of re-employment accounts that would give unemployed workers a single fixed sum rather than a weekly payout); Kathleen A. Maloy et al., *Description and Assessment of State Approaches to Diversion Programs and Activities Under Welfare Reform: An Interim Report of the Findings of the First Phase of the Research* (August 1998), available at <http://www.aspe.hhs.gov/hsp/isp/diverzn/INDEX.HTM#TOC> (discussing welfare diversion programs, including lump-sum payments), discussed in Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1152-53 (2000).

131. See e.g., Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 947, 949-50 (1988) (discussing mechanisms for addressing moral hazard, including experience rating—adjusting premiums based on the insured’s previous loss experience); Kenneth J. Arrow, *The Economics of Moral Hazard: Further Comment*, 58 AM. ECON. REV. 537, 538 (1968), reprinted in 4 COLLECTED PAPERS OF KENNETH J. ARROW: THE ECONOMICS OF INFORMATION, *supra* note 126, at 103, 104 [hereinafter Arrow, *Moral Hazard*] (explaining possible ways an insurer might limit an insured’s behavior, including reliance “on the willingness of the individual to behave in accordance with some commonly accepted norms”); Kenneth J. Arrow, *Information and Economic Behavior*, Lecture Presented to the Federation of Swedish Industries (1973), in 4 COLLECTED PAPERS OF KENNETH J. ARROW: THE ECONOMICS OF INFORMATION, *supra* note 126, at 136, 149 [hereinafter Arrow, *Information and Economic Behavior*] (noting that moral hazard problems could be eliminated if insurers had perfect information about the causes of the loss, and whether the insured contributed to it or could have prevented it); Skogh, *supra* note 126, at 524-25.

132. See, e.g., R. KENT WEAVER, ENDING WELFARE AS WE KNOW IT 350 (2000) (suggesting that a variety of welfare reform features were prompted by the desire to alter incentive structures for poor families); KATZ, *supra* note 42, at 343 (noting efforts to address moral hazard problems through welfare policy).

There is another side to the controllability of costs, however. Some things that families might do to control costs are not in the long-term interests of either the dependent person or the caretaker. In these cases, creating or maintaining incentives towards cost control actually could prove counterproductive. To put this another way, there is a potential silver lining to what we normally think of as “moral hazard.” Sometimes people make decisions that are normatively better when they are not given an incentive to control costs. In these cases, public provision of assistance would not create a distortion against controlling costs, but rather would work to correct a distortion in favor of controlling costs.

When costs are not controllable, the problem of moral hazard disappears. We still must differentiate, however, between two categories under the general heading of “uncontrollable”: those that are predictable by the family, and those that are not.

2. Predictability

Predictability, like controllability, bears on the likelihood that a family will be able to pool risk through insurance. However, a dependency cost that is merely predictable, but not also controllable, does not afford opportunities for familial cost reduction. For example, it may be predictable that a family member will develop a certain disease, but the course of the disease may be uncontrollable.

If a particular sort of dependency is highly predictable, those who expect the dependency to befall them will disproportionately seek to purchase insurance against that eventuality, while those who know that the dependency is very unlikely to befall them would be less likely to do so.¹³³ This phenomenon of adverse selection creates a market-destroying dynamic in settings where it is not possible or feasible for insurers to charge different premiums based on different expected losses.¹³⁴ This might be due to inadequate information that

133. See, e.g., Andy C.M. Chen & Keith L. Hylton, *Precompetitive Theories of Vertical Control*, 50 HASTINGS L.J. 573, 581-82 (1999) (using the example of insurance coverage for pregnancy and delivery, which would be more attractive to those who plan to have children, to illustrate adverse selection); Abraham, *supra* note 131, at 946 (describing adverse selection process).

134. E.g., Arrow, *Information and Economic Behavior*, *supra* note 131, at 143 (describing

would enable the insurer to tell good risks from bad risks,¹³⁵ or regulations that prohibit use of certain kinds of information or otherwise mandate equal premiums.¹³⁶ For example, there might be genetic conditions that an individual or family knows about, but that an insurer either cannot discover or for which it cannot charge higher premiums.¹³⁷

An insurer must charge premiums that, on average, exceed average expected losses by an amount sufficient to cover administrative costs and afford a reasonable return on investment. If the same premium must be charged to everyone, then people for whom the insurance is a bargain—those whose expected losses exceed the premium price—will flock to the insurance. This drives up expected losses and requires a hike in premiums. People, even if risk averse, will not pay premiums that are vastly out of proportion to their expected losses. As premiums rise in response to the large expected losses of the customers who are adversely selecting the insurance, better risks begin to drop out. This further drives up the average expected loss and requires additional premium hikes, driving out the next tier of risks. The eventual result is a risk pool frequented only by the worst risks—an insupportable outcome. Adverse selection can be avoided by establishing mandatory insurance pools

how private information destroys markets for risk pooling); *id.* at 147-48 (describing the adverse selection dynamic); Skogh, *supra* note 126, at 525.

135. *E.g.*, Skogh, *supra* note 126, at 525; Chen & Hylton, *supra* note 133, at 581-83.

136. *See, e.g.*, RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? 123-27 (1997) (discussing “community rating”).

137. If the insurer can both find out about the condition and charge for it, the adverse selection problem disappears. *See* Arrow, Information and Economic Behavior, *supra* note 131, at 149. A new problem takes its place, however, if those most in need of insurance cannot afford it. *See* Eric Mills Holmes, *Solving the Insurance/Genetic Fair/Unfair Discrimination Dilemma in Light of the Human Genome Project*, 85 KY. L.J. 503, 558 (1997). Of course, insurance can only be made more affordable for bad risks by requiring better risks to cross-subsidize them—a result that is not uncontroversial, even aside from the adverse selection problem it might be expected to generate. *See* EPSTEIN, *supra* note 136, at 122 (observing that arguments against insurers’ use of information that would permit accurate risk assessments “reduces to the single proposition that it is appropriate for healthier people to pay the health insurance premiums for sicker ones”); Russell Korobkin, *Determining Health Care Rights from Behind a Veil of Ignorance*, 1998 U. ILL. L. REV. 801, 816-28 (discussing whether individuals behind a Rawlsian veil of ignorance would prefer health care rights that involved such cross-subsidization).

from which better risks cannot flee.¹³⁸ To the extent that a particular risk is not predictable, adverse selection does not play a role.

3. Verifiability

An additional factor—the ease with which a particular dependency condition can be verified and the extent of its costs assessed—also bears on policy choices and impacts the feasibility of insurance. Particularly in the contexts here at issue, which relate to a person’s ability to engage in self-support, it may be difficult to determine whether a person really has suffered a loss.¹³⁹ Mistakes can run in both directions and track the “eligibility determination” problems raised earlier.

While unverifiable conditions may not lend themselves to market-based risk pooling, families often have important informational advantages about whether someone really requires assistance. Having someone in the family serve as a “gatekeeper” to assistance makes use of this advantage.

An interesting tension exists between approaches, such as flat grants, that might induce recipients to control costs when receiving public assistance and approaches that would deal well with conditions that are difficult to verify. In the latter case, it makes sense to base reimbursements on actual costs. This eliminates any possibility that an individual could profit from the condition by obtaining funding in excess of their actual expenditures. Yet, allowing people to “profit” from their own cost-reducing efforts lies at the heart of a plan to incentivize cost reductions through a flat grant.¹⁴⁰ Reimbursing only for actual expenditures removes that

138. See Skogh, *supra* note 126, at 530 (explaining that mandatory insurance pools may be beneficial because “if bad as well as good risks are forced to pay a premium (tax), all can be insured, which may be preferable as compared to a situation where no one is insured”); see also Richard L. Kaplan, *Taking Medicare Seriously*, 1998 U. ILL. L. REV. 777, 793-94 (describing how permitting withdrawal of good risks from Medicare would create an adverse selection problem).

139. See, e.g., Kotlikoff & Spivak, *supra* note 52, at 373 (observing that “the ability of the public market to determine the extent to which the individual actually suffered an earnings loss or is simply lying about his backache is highly questionable”); ALSTOTT, *supra* note 97, at 273 (discussing potential for families to misrepresent their circumstances and claim falsely to have suffered a severe loss).

140. See *supra* note 130 and accompanying text.

incentive. Hence, a stronger case for leaving costs on the family is presented when a condition is both controllable and difficult to verify than when simply one or the other of these characteristics is present.

4. Temporal Lumps and Variances in Outcomes

Additional distinctions among types of dependence relate to the uniformity of impacts across families, and the degree of temporal concentration of dependence costs. These distinctions relate to the significance of opportunities to pool risk and spread costs temporally.

Consider four kinds of hypothetical dependence that produce the same expected loss of \$25,000. The first form of dependence, Type *A*, affects every family in society and generates a \$500 loss for each of fifty years. The second form of dependence, Type *B*, also affects every family in society, but the loss is entirely concentrated upon some randomly occurring five year stretch of time; it will generate losses of \$5000 for each of those five years. The third form of dependence, Type *C*, affects one out of every 100 families, and imposes a loss of \$2.5 million, spread out over a fifty-year period. The fourth form of dependence, Type *D*, also affects one out of every 100 families and imposes a loss of \$2.5 million, this time concentrated upon a randomly occurring five-year stretch.

Of course, no real-world type of dependence perfectly patterns itself after any of these four highly stylized types. However, these four stylized types of dependence allow us to examine the additional costs associated with temporally concentrated dependence “lumps” and unpooled risk, respectively. Because one or both of these problems accompany many real-world dependence burdens, it is helpful to break out the work each does in generating extra disutility for families bearing dependence burdens.¹⁴¹

We would expect most families to prefer the Type *A* loss to any of the other types, and to dislike the Type *D* loss the most. The Type

141. By “extra disutility,” I mean that which exceeds the disutility associated with the expected value of the loss. For purposes of this simple example, I ignore the impact of discounting on the relative disutility of the various dependence burdens, and assume that the expected financial impact is equivalent in present value terms for each type of dependence.

A loss affects all families equally; hence, there is no risk associated with it. It also produces no temporal “lumps” of costs. Putting aside the impacts of the progressive tax system used to fund dependence costs, Type A is virtually indistinguishable from socially provided dependence care. Every family pays the same relatively low amount every year, just as they would if they were paying taxes to support paying for dependent care.

Type B differs from Type A in that it features temporal expenditure lumps. Viewed over the life cycle, there are no interfamilial differences in dependence burdens; however, families’ dependence costs fluctuate temporally. If the family can make use of savings to cover the expenditure lumps, or can borrow against future earnings to finance the dependence, no change in the life cycle consumption profile will result. However, capital markets do not provide low-income individuals with meaningful mechanisms for shifting costs to different portions of the life cycle.¹⁴² Close-knit extended families can sometimes substitute for imperfect capital markets by helping each other through difficult portions of the life cycle. This spreads the costs of dependency beyond the nuclear family and replicates, on a family scale, the life-cycle-smoothing effects of public provision for dependency.¹⁴³ If the family is large enough, the randomly distributed lumps may begin to even out.

Where neither an extended family nor financial products exist to smooth the life cycle consumption profile, liquidity shortfalls can result. This creates added pressures to limit or shift costs. Optimal investments in the human capital of the dependent person may be forgone in the interest of cost savings. Liquidity shortfalls that are temporally concentrated on periods of dependency care, or the anticipation of those shortfalls, can also have profound effects on the development of the human capital of caretakers, or on that of other

142. See, e.g., ALSTOTT, *supra* note 97, at 114 (noting the liquidity shortfalls that people often face during the childrearing years).

143. Cf. Kotlikoff & Spivak, *supra* note 52, at 373 (explaining how family arrangements can mimic annuities by protecting against the misallocation of consumption over the life cycle). Similar observations have been made about close-knit rotating credit groups, such as the Korean “kye.” See Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 174-75 n.118 (1996) (observing the ability of these credit groups to “flatten out” consumption over time, to achieve an effect similar to that obtainable through lending and savings instruments), *quoted and discussed in* Cao, *supra* note 86, at 909-10.

members of the dependent's family. The impact would be greatest on young, poor people who have no assets other than their own (as yet undeveloped) human capital to use as collateral, but who stand to reap large gains from human capital investments.

Type *C* dependence does not involve a temporal "lump" for the family to contend with, but it does generate large variances in outcomes. Ninety-nine out of 100 families get away with no burden, but the unlucky one percent is hit with an extraordinarily large burden. If people are risk averse, this increase in the variance of outcomes is extremely costly.¹⁴⁴ In some cases, this problem can be addressed by insurance. When insurance is unavailable or unaffordable, families remain exposed to increased risk and hence are worse off than in a world where risk is buffered.

Of course, the extended family can serve as a private risk-pooling entity.¹⁴⁵ This type of risk pooling has a number of advantages over insurance available in the open market. Owing to the small number of players, the bonds of trust that typically exist among them, and the high level of information they have about each other, moral hazard, adverse selection, mistakes in identifying losses, and transactions costs all may be diminished.¹⁴⁶ However, the family group may be too small to effectively pool risk, or may find that its members suffer risks that are correlated with one another.¹⁴⁷ Moreover, as noted before, when the risks of individuals without

144. See, e.g., A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 53 (2d ed. 1989) (defining risk aversion and noting that it is generally realistic to assume that people are risk averse, at least when risks are large); ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 47 (3d ed. 2000) (noting that economists presume most people are risk averse); SHAVELL, *supra* note 127, at 190 (explaining that "[t]he presence of risk-averse parties means that the distribution or allocation of risk will itself affect social welfare").

145. See, e.g., BECKER, *supra* note 28, at 343 (explaining that a kinship group in traditional society operates to protect its members against uncertainty); Kotlikoff & Spivak, *supra* note 52, at 372 ("The institution of the family provides individuals with risk-sharing opportunities which may not otherwise be available.").

146. Kotlikoff & Spivak, *supra* note 52, at 372; see also BECKER, *supra* note 28, at 343 ("A kinship group is a reasonably effective 'insurance company,' in that even an extended group is sufficiently small to enable members to monitor other members—to prevent them from becoming lazy or careless, and in other ways taking advantage of the protection provided by their kin.").

147. See Yoram Ben-Porath, *The F-Connection: Families, Friends, and Firms and the Organization of Exchange*, 6 *POPULATION DEV. REV.* 1, 21-22 (1980) (discussing the possible impacts of group size and wealth on the ability of families to successfully self-insure, and noting the problem of risks that are positively correlated).

families are publicly borne, the family provides a less appealing locus for risk pooling.¹⁴⁸

The Type *D* condition combines risk with temporal cost lumps. To the extent that the risk of a Type *D* event cannot be alleviated, it exacerbates the problem of liquidity shortfalls discussed earlier.¹⁴⁹

5. Availability of Familial Exit and Nonentry

Another set of distinctions involves the degree of volition required to form relationships upon which support obligations might be based, and the degree of difficulty one confronts in dissolving those relationships. To begin with the first point, familial relationships¹⁵⁰ are formed with varying degrees of volition. Many family relationships are formed automatically upon birth (such as one's relationship with one's parents, grandparents, siblings, and so on) and are completely nonvolitional. Marriage, adoption, and childbearing all result from voluntary actions, although distinctions are possible here as well.¹⁵¹ Familial relationships also vary in the ease with which they may be broken. The marital bond is notoriously easy to break. Bonds with children can be legally severed, but the law typically makes this break quite costly and irreversible.¹⁵² Bonds with parents and other relatives are usually not severed, but they are also not currently paired with significant support obligations in our society.¹⁵³ Interestingly, the policy implications suggested by

148. See *supra* Part I.D.2.

149. See *supra* text accompanying note 142.

150. I use the term "relationships" here to reference the legally cognizable tie between parties, not the qualitative, experiential and emotional bond that may (or may not) develop between the parties. See FINEMAN, *supra* note 3, at 300 (discussing how law defines family by creating or recognizing particular ties).

151. In marriage, one is choosing not only to become a spouse in the abstract, but to become the spouse of a particular, identifiable individual with certain relatively well-defined personal characteristics. Parent-child relationships implicate a spectrum of volitional choices. In a nontrivial proportion of cases, people become parents not as the result of any volitional decision to assume the role of parent, but because they engaged in sexual activity (with or without birth control). See, e.g., TONY HONORÉ, MAKING LAW BIND 127 (1987) (observing that "it is far from the case that all children are voluntarily conceived"). Even those who consciously choose to take on the role of parent usually have little detailed knowledge about the personal characteristics of the child with whom they are forming a relationship.

152. See ALSTOTT, *supra* note 97, at 57, 62-63.

153. Filial support laws are still on the books in some states, but broad-based social programs such as Social Security, Medicare, and Medicaid have rendered them largely

these distinctions are far from clear, and vary depending on the normative goals one is seeking to achieve. Some conceptions of fairness would evaluate the appropriateness of a particular dependence burden based on whether the burdened person voluntarily chose to create the relationship upon which the burden is based. Having one's fate tied to another individual with whom one did not choose to forge an alliance can seem unfair.¹⁵⁴ On this view, parental and spousal support obligations appear more fair than a requirement that children support parents or other relatives.

A focus on behavioral distortions, however, leads to a different set of judgments. When a choosable or breakable relationship is at stake, dependence burdens might be expected to result in fewer bonds of that type, other things equal. Distortions in the number of relationships formed and broken will obviously be minimized if dependence burdens are placed on those relationships that are both involuntary and cannot be easily unchosen. However, where a legal relationship is difficult to break, those who wish to avoid support obligations based on that relationship still have some troubling strategies available to them.

A tax analogy may help. Placing a tax on less elastic items makes sense from a tax policy perspective, assuming our goal is to generate revenue and not to change behavior. Placing a tax on elastic items can lead to significantly different consumption patterns that do the government no good, but that leave the individual consumers worse off than they otherwise would be. This is a deadweight loss.¹⁵⁵ Likewise, we might think of dependence burdens as essentially "taxing" a relationship. Taxes placed on very "elastic" relationships

irrelevant. *See, e.g.*, Walters, *supra* note 25, at 376; Lee, *supra* note 9, at 677-79.

154. For example, one argument against making children liable for their parents' care is that people do not choose to *have* parents, whereas they do choose to *be* parents. *See, e.g.*, DANIELS, *supra* note 119, at 29 ("Children did not ask to be brought into existence. Moreover, their desire for care and their need for it, once born or adopted, cannot be the sole basis for claiming they have 'implicitly consented' to being bound by the duty to care for their parents."); Moskowitz, *supra* note 9, at 409-10 (discussing the influence of this idea in Western legal thought); ten Broek, *supra* note 26, at 642 ("Presumably, there is the same consanguinity, though perhaps not the same bond, between child and father as between father and child, but the voluntary assumption inference cannot operate in reverse.").

155. *See, e.g.*, SIMON JAMES & CHRISTOPHER NOBES, *THE ECONOMICS OF TAXATION: PRINCIPLES, POLICY, AND PRACTICE* 23 (1996-97 ed.) (presenting example in which a tax on margarine generates excess burden by leading individuals to substitute butter).

(those that can be easily forgone or forsaken) would be expected to distort the demand for those relationships. Individuals would suffer costs when they forgo or forsake relationships in which they would otherwise be involved, but the government gains nothing as a result—hence, a deadweight loss.

Of course, even when taxable items are perfectly inelastic, people can still try to evade taxes. The costs they incur in doing so, and the costs that the government incurs in countering their attempts, generate deadweight losses that are just as real as those generated by consumption distortions. The same is true of relationships. If a dependence burden attaches to a relationship that one cannot exit, one can still attempt to evade the financial responsibility that attaches to the relationship. Alternatively, one can try to reduce that financial responsibility by offloading costs onto the dependent person herself. Thus, while taxing relationships that are easy to unchoose will alter the quantity of bonds of those types, taxing relationships that are hard to exit could have an even more worrisome effect on the quality and content of the bonds.

C. Policy Directions

Some tentative policy directions can be distilled from the foregoing classification scheme and analysis. These are meant to be illustrative only, and to suggest the capacity of the framework presented here to further policy design. Context-specific analysis would be necessary to apply any of these general prescriptive statements to particular manifestations of dependence. In addition, other factors not explored in depth here, such as the ease of administering various sorts of rules, or the symbolic or norm-reinforcing values associated with a particular cost allocation scheme, would also bear on the desirability of particular policy options. Nevertheless, these preliminary points emphasize the necessity of considering the full range of potential familial reactions to dependence burdens in setting policy, and offer some ideas about how society might begin to design policy with those familial responses in mind.

1. Harnessing Family Advantages

One important theme of the analysis has been that families have a comparative advantage with regard to certain kinds of dependence cost-reduction actions. However, these advantages do not exist in equal measure for all kinds of dependence. When dependence conditions are hard to verify, when resolution or prevention of them lies within human control, and when families are in a position to choose the less costly of alternative care arrangements, the case for directly involving the family in dependence care is heightened.¹⁵⁶ In contrast, when families have little or no capacity to reduce dependence costs through their actions, placing dependence burdens on the family does not generate cost savings of this sort.

The fact that families have few or no opportunities to reduce dependence costs does not necessarily mean that the family is an inferior bearer of dependence costs. Placing the burden on the family may produce desirable distributive results, or may reduce administrative costs associated with the system. However, if families have access to some of the negative strategies discussed earlier, the potential impacts of those strategies must be considered in deciding whether assigning dependence costs to families makes sense.

2. Altering the Relative Attractiveness of "Good" and "Bad" Strategies

Where families do have a comparative advantage in controlling dependence costs, they may resort to the "bad" (cost-shifting) strategies rather than to the "good" (cost-saving) ones, if the bad strategies produce cost savings more cheaply. In addition to the deadweight losses associated with cost-shifting behaviors, there are some potentially troubling interfamilial and intrafamilial distributive results. For example, some family members may be deterred by

156. This does not mean, however, that families will not resort to some of the harmful cost-shifting measures outlined above. Even when costs are left on the family in an effort to harness familial advantages, policy interventions may be necessary to make the "good" cost-reducing alternatives more attractive than the counterproductive cost-shifting options.

norms, altruism, or other factors from taking advantage of socially costly strategies, such as exit from the family, while others take advantage of those strategies. Given society's commitment to gap-filling support, exemplary individuals must not only bear the costs associated with their own family members' dependence, but must collectively bear the dependence costs of the erstwhile family members of their less-exemplary counterparts. This amounts to something like a tax on one's conscience, or on family loyalty.

Society might resolve this problem by simply providing categorical support. If this is not an attractive option for other reasons, there may be a role for policy in altering the relative attractiveness of the positive and negative strategies. For example, if exit from the circle of support is a serious concern, then the cost of exit could be raised by conditioning other benefits upon staying in the relationship. This already occurs to some extent with marriage, in which a bundle of legal and social advantages accompanies the alliance, increasing the costs associated with breaking the bond. Policymakers might experiment with allowing people to form other sorts of voluntary alliances that provide a bundled mix of benefits and care obligations.

3. Disaggregating Liquidity from Public Assistance

Another recurrent theme has been the importance of making appropriate, and appropriately timed, investments in human capital. Dependence care is deeply intertwined with questions about the development of human capital—whether that of the dependent person, the caretaker, or both. These concerns have figured at least implicitly in many calls for greater government support of dependence care. Yet, where human capital is at stake, the problem is not so much about the funding of dependence care itself, but rather about access to the necessary liquidity to carry out a particular plan of investment concurrently with dependence care responsibilities. Too often, policy discussions fail to emphasize the importance of liquidity itself in remedying the problems that can result from allocating dependence care to families.

Providing additional liquidity in the form of loans, rather than direct grants, can preserve incentives for optimal decision making

on the part of families while minimizing the chance that families will resort to tactics that sabotage the development of human capital. In other words, sufficiently attractive loans would offer a way of harnessing the comparative advantages of families, while offering some protection against the more pernicious manifestations of family cost-shifting strategies. Loans offer a particularly attractive solution when the decision at issue has consequences that are ambiguous—such as the decision to have a child. Additional liquidity facilitates investments in the child's human capital, thus increasing the chances that the child will grow up to be a productive member of society. A loan, however, would have a much smaller impact on incentives to bear children than would a direct grant.

To be sure, an implicit subsidy would be built into any loan program that offered terms more attractive than those available on the open market, or that took on risks that ordinary markets would not accept. Yet, such implicit subsidies are also built into government loans for things like higher education and home mortgages, and usually are not thought to be particularly problematic. At any rate, the much smaller subsidy associated with a loan program would perform better at preserving familial incentives in areas where they play the largest role than would a direct grant.

4. Recognizing the Potential of Public Risk Pooling

The entire social welfare system is, in some sense, about controlling certain kinds of risks. Where losses are controllable or difficult to verify, the prospects for market-based insurance dip, but so too does the attractiveness of the public funding of dependence care. However, a special niche for government risk pooling exists with respect to risks that are predictable, but not controllable or difficult to verify. By mandating participation in a society-wide (or population segment-wide) risk pool, government can avoid adverse selection problems that would plague private insurers.¹⁵⁷

Controllable and difficult to verify conditions present undeniable policy challenges. Here, however, it would be possible for government to experiment with some of the tools that private insurers

157. See *supra* note 138 and accompanying text.

have used successfully to control information and moral hazard problems. Alternatively, government could support risk pooling among those who are in a better position to control and verify losses—family and friends. To draw together several of the ideas mentioned above, a program might encourage groups of family and friends to voluntarily form for purposes of pooling risk. This risk pooling could be bundled with incentives for the group, such as easy access to loans¹⁵⁸ or tax breaks.¹⁵⁹ Group members then would be liable for any losses sustained by other group members. By giving the group a tangible stake in the success of each member, such pooling arrangements might be expected to capitalize on social norms¹⁶⁰ and build solidarity.¹⁶¹ Exit from the group would be possible, but would come at the price of repaying one's share of any loans or tax benefits received through the program, and forgoing the benefits of future group membership.

D. Some Complications

This Article has focused almost exclusively on the family. The other players in the dependence drama—principally society and dependent individuals—have been relegated to cameo appearances. It goes without saying that these parties, too, can engage in a variety of strategies designed to reduce and off-load dependence costs. While a comprehensive study of the interactions of all parties

158. By making members of the group jointly liable for loan repayment, financial institutions or government lenders could capitalize on the same kinds of internal group dynamics that have generated success in informal rotating credit arrangements. *See, e.g.*, Cao, *supra* note 86, at 919-20 (describing how lending methods that rely on joint liability for repayment, such as the model employed by the Grameen Bank of Bangladesh, conceptually resemble rotating credit arrangements used by close-knit groups); Levinson, *supra* note 86, at 395-98 (discussing microcredit institutions and the advantages of group lending).

159. *See, e.g.*, Posner, *supra* note 143, at 146 (discussing the potential for the state to subsidize cooperation by offering tax advantages or other sorts of legal advantages to families and other cooperative groups). *But see id.* at 147 (noting the potential for perverse results).

160. *Cf.* Cao, *supra* note 86, at 883-84 (discussing use of informal intragroup pressures to enforce loan repayment obligations in rotating credit associations).

161. *Cf.* Levinson, *supra* note 86, at 386 (observing that “[b]y motivating groups to create and strengthen mechanisms for cooperating, collective sanctions build group solidarity”). *But cf. id.* at 386-91 (discussing two potentially problematic side effects of solidarity—the misuse of control over group members, and a greater ability to pursue collective ends that may be normatively problematic).

is beyond the scope of this Article, it is worth noting a few places where the analysis I have presented is complicated by the preferences and reactions of the other parties.

1. Individuals and Families

One potential advantage of leaving certain kinds of dependence costs on the family relates to the incentive effects of tightening the connection between familial actions and familial burdens. Those families who make cost-reducing choices are “rewarded” with lower dependence care burdens, the argument runs, while those who fail to make those choices are “punished” with higher dependence care burdens. But even though families may be better situated informationally and motivationally than is society at large, currently or potentially dependent individuals can make choices that affect their own dependence. This generates a potential disconnect between familial actions and resulting dependence costs.

In some cases, families that have made all the right choices will nonetheless experience high dependence burdens due to the actions of the dependent person, while in other cases, families that have done little or nothing to influence dependence costs will be relieved of them through the industry and choices of the dependent person.¹⁶² Here we see a place where considerations of equity and efficiency may point in opposite directions. Harnessing the advantages of the family in cost-reduction efforts may be impossible without leaving families to suffer differential impacts that result from the independent choices of dependents or potential dependents.

Dependent individuals also have preferences of their own. While some of the analysis above has considered the degree to which the family would serve as faithful agents for the interests of the dependent individuals, there is also the simple question of where the dependent person would prefer to have her care come from. For

162. Dependence burdens also are impacted by good and bad luck, which introduces a further disconnect between inputs and results. The tendency of individuals to attribute good outcomes to their own skill and bad outcomes to bad luck, *see, e.g.*, ERIC VAN DEN STEEN, SKILL OR LUCK? BIASES OF RATIONAL AGENTS 1 (MIT Sloan Sch. of Mgmt., Working Paper No. 4255-02, June 2002), *available at* http://www.ssrn.com/abstract_id=319972 (discussing literature suggesting that “[p]eople tend to attribute success to their own skills and failures to bad luck”), complicates the question of personal agency in influencing dependence costs.

example, it is possible that an elderly person will feel more “independent” when receiving government assistance than she would when receiving family assistance.¹⁶³ Any system that requires family members to look to each other for support will operate in some tension with principles of personal autonomy.¹⁶⁴ No account of the allocation of dependence burdens can ignore the impact of the preferences and behavior of the dependent individual herself.

2. *Society Plays Games, Too*

The analysis above portrayed society as an essentially benevolent and unified entity that is capable of speaking with one voice and pursuing policy objectives rationally and systematically. That portrayal was a helpful simplification for purposes of fleshing out the familial responses to dependence burdens, but it falls short of a full account in at least two important ways.

First, society’s decision-making apparatus is under the control of a confusion of competing interests. An analysis of the allocation of dependence burdens must contend with the reality of rent seeking, which generates deadweight losses as different groups within society attempt to win transfers for themselves.¹⁶⁵ The possibility of

163. See, e.g., Dora L. Costa, *Displacing the Family: Union Army Pensions and Elderly Living Arrangements*, 105 J. POL. ECON. 1269 (1997) (using data on Union Army pensions to examine preferences for independent living over family living); see also DORA L. COSTA, *THE EVOLUTION OF RETIREMENT: AN AMERICAN ECONOMIC HISTORY, 1880-1990*, at 106-32 (1998) (relating recent trends in elderly living arrangements to her findings); Ellickson, *supra* note 70, at 36 (discussing Costa’s findings and demographic changes in elderly living arrangements); Moskowitz, *supra* note 9, at 410 (observing that elderly people value their autonomy and may “actually prefer professionals or third parties to provide needed support” rather than their children).

164. See GLENDON, *supra* note 7, at 296 (noting that avoidance of economic dependence on relatives was among the goals of the Social Democratic Party in Sweden); Persky, *supra* note 52, at 187 (explaining that the “acceptance by classical economists of the family as an instrument for coping with dependency sits uneasily with core liberal principles, which emphasize the right of individuals to determine their own destinies”); see also Michael G. Peletz, *Ambivalence in Kinship Since the 1940s*, in *RELATIVE VALUES: RECONFIGURING KINSHIP STUDIES* 413 (Sarah Franklin & Susan McKinnon eds., 2001) (discussing mixed feelings towards kinship that emerge from kinship studies).

165. See Robert D. Tollison, *Rent Seeking*, in *PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK* 506 (Dennis C. Mueller ed., 1997) (“Rent seeking is the socially costly pursuit of wealth transfers.”); see also FOLBRE, *supra* note 7, at 116 (describing rent-seeking behavior in the context of welfare state policies).

generational interest groups presents a special concern.¹⁶⁶ If differential treatment of different age groups holds constant over time, all people can expect to spend some portion of their lives receiving favored treatment.¹⁶⁷ It is possible, however, that changes in demographics or other factors could cause shifts in the differential treatment of different age groups, creating unfairness for particular generational cohorts.¹⁶⁸

Second, at the level of politics, the allocation of dependence burdens cannot be untangled from other questions about the distribution of income and wealth. Placing dependence burdens on families tends to entrench existing interfamilial resource inequalities. In contrast, placing dependence burdens on society under a progressive tax system that uses income or wealth as its base would have a broadly redistributive effect. While these varying distributive implications might matter little in an idealized world where any desired distributive goal can be achieved separately through a frictionless tax and transfer system, they play an important, perhaps decisive, role in the real world. Later “settling up” of distributive infelicities wrought by other parts of law and policy is at worst impossible, and at best extraordinarily costly.

Of course, a categorical redistributive program based on some criterion other than wealth or income does a much worse job of focusing assistance on the poor than would an idealized tax and transfer system. Hence, if the true goal is to help the poor, it might seem that we would want to design a program that does just that,

166. *But see* POSNER, *supra* note 5, at 48 (arguing that “[t]he widespread belief that the elderly constitute a selfish voting bloc which is distorting the optimal functioning of democratic government is exaggerated”).

167. *See* DANIELS, *supra* note 119, at 41:

If we treat the young one way and the old another, then over time, each person is treated both ways. The advantages (or disadvantages) of consistent differential treatment by age will equalize over time. An institution that treats the young and the old differently will, over time, still treat people equally.

Id.; *see also* Becker & Murphy, *supra* note 94, at 10-12 (showing how any apparent disproportionality in expenditures for the elderly disappears when one considers the earnings stream over the life cycle).

168. *See* POSNER, *supra* note 5, at 48 (considering the possibility that today’s transfers from young to old “may actually reduce the probability of generous transfers to today’s young when they are old by increasing the federal government’s budget deficit and reducing the rate of economic growth,” and “may engender resentment of, and political opposition to, future transfers to the old”).

rather than a program that delivers benefits to both the well-off and the poor.¹⁶⁹ This misapprehends the choice situation, however. Society does not begin with a sack of money that it can use in any way it wishes to help the poor, so that the task is simply to find the most efficient way of getting money out of the sack and into the pockets of poor people.¹⁷⁰ Instead, the amount of redistribution that society realistically can accomplish depends crucially on how it goes about doing it.¹⁷¹ Experience suggests that it is politically harder to redistribute from the wealthy to the poor than it is to redistribute to some group that shares a characteristic other than wealth—such as family status or work history. If a program can manage to address the leading causes of poverty without addressing the poor as such, it is likely to increase the total amount of resources flowing to the poor.¹⁷²

To put the point slightly differently, I have been assuming for purposes of this Article that our goal is to find the best way of allocating dependence burdens, not the best way to redistribute wealth. But if one has normative commitments to improving circumstances for the less well-off, then the potential for using a program aimed at squaring up dependence burdens to pursue other distributive goals cannot be ignored.

169. See, e.g., BURTONA, WEISBROD, COLLECTIVE ACTION AND THE DISTRIBUTION OF INCOME: A CONCEPTUAL APPROACH 186 (1969) (discussing the criterion of “vertical efficiency”—the extent to which assistance meant to help the poor achieves that goal). Weisbrod discusses the example of subsidized higher education, which is often lauded as a measure that helps the poor, but which actually “performs rather badly by the vertical efficiency criterion” because students who take advantage of the subsidy are more likely to come from high-income families than from low-income families. *Id.*

170. See ALSTOTT, *supra* note 97, at 135-36; Steven Kelman, *A Case for In-Kind Transfers*, 2 *ECON. & PHIL.* 55, 57-59 (1986).

171. See, e.g., ALSTOTT, *supra* note 97, at 136 (explaining that “a universal program may be more popular, and disproportionately better-funded, than an income-tested one”); Fennell, *supra* note 11, at 320-24 (discussing and citing literature on this point).

172. The resulting redistribution is also less stigmatizing for the poor than is relief that is narrowly focused on the poor. See, e.g., KITAY, *supra* note 2, at 117-18 (discussing the stigma associated with welfare, which is arguably attributable to the narrow group it targets); WEISBROD, *supra* note 169, at 194 (discussing “the conflict between the criteria of non-demeaning benefits and of vertical target efficiency”); Fennell, *supra* note 11, at 323-24 (discussing and citing literature on this point).

CONCLUSION

My goal in this Article has been to present a new structure for thinking about dependence burdens that could facilitate more fruitful dialogue on the topic—especially between people approaching the topic from different normative perspectives. Recognizing the existing constraints on societal choice and the family strategies that unfold against that backdrop provides a way of framing the problem that can be applied cross-contextually. This approach also highlights both the distributive and the efficiency implications of dependence choices. As the complications raised at the end suggest, this Article does not offer a neatly tied package of policy prescriptions. The policy ideas drawn from this Article’s reframing of the problem are only tentative ones, meant to suggest possible directions for further work. I hope that by clarifying certain aspects of the problem, this Article has shed sufficient new light on this important set of issues to generate renewed interest and innovation in this area.