

# **Grandma in the White House: Legal Support for Intergenerational Caregiving**

*Jessica Dixon Weaver\**

I. INTRODUCTION.....	2
II. MULTIGENERATIONAL LIVING .....	10
A. Brief History of Multigenerational Living in America.....	13
B. Grandparents as Transmitters of Culture and Values .....	16
C. Grandparents as Stabilizers and Protectors .....	18
D. Race, Class, and Gender Dynamics Among Grandparents.....	23
III. EMPLOYMENT LAWS AND POLICIES AFFECTING GRANDPARENT CAREGIVERS .....	33
A. Family Medical Leave Act.....	36
B. Social Security Benefits & Pensions.....	43
IV. TAX LAWS AFFECTING THE SUPPORTING GENERATION .....	48
A. Grandparent Credits .....	55
B. Decreased Tax Rate.....	55
C. Household and Child Care Expenses.....	56
D. Unpaid Services .....	56
V. HOUSING ISSUES FOR MULTIGENERATIONAL FAMILIES .....	57
A. Accessory Dwelling Units .....	59
B. Ordinances Restricting ADUs.....	61
C. ADU Model State Act and Local Ordinance.....	62
VI. SOCIAL, ECONOMIC & LEGAL POLICY TENSIONS AT THE HEART OF CAREGIVING.....	63
A. Interest Convergence of Babes and Elders .....	64
1. Vulnerability.....	64
2. Lower Resources .....	65
3. Limited Choices .....	66
B. A Difficult Dance .....	67
C. Leave Me Alone .....	68
D. The Sandwich Generation .....	69
E. Altruistic Care Work vs. Paid Grannies .....	70
F. Footing the Granny-Care Bill.....	71
VII. CONCLUSION.....	72

*Our cultural norms are shifting. There is a great renaissance of what we think about when we think about family.*<sup>1</sup>

## I. INTRODUCTION

Marian Robinson exemplifies many characteristics of the classic modern day grandmother. She is a widow, former homemaker, retired worker, and provider of part-time care for two of her grandchildren.<sup>2</sup> Dubbed the “First Granny,” she had been called a dream grandmother.<sup>3</sup> She retired in order to be chief caretaker of Malia and Sasha Obama during President Obama’s first presidential campaign.<sup>4</sup> First Lady Michelle Obama refers to her as the rock of the family, saying that she provides stability for her granddaughters.<sup>5</sup>

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\* Assistant Professor, SMU Dedman School of Law. For helpful comments and suggestions on earlier drafts of this article, I thank Martha Fineman, Richard Kaplan, Naomi Cahn, Barbara Bennett Woodhouse, Dorothy Brown, Lolita Inness, Linda C. McClain, Phyllis C. Smith, Peggie Smith, Angela Onwauchi-Willig, Tonya Brito, Adele Morrison, Victoria Dawson, Margaret Brinig, Leslie Harris, Alicia Kelly, Nancy Dowd, Cheryl Nelson Butler, Charlene Luke, Grayson McCouch, Christine Klein, Jonathan Cohen, Martin McMahon, Tom C.W. Lin, Xuan-Thao Nguyen, Sarah Tran, Meghan Ryan, Anthony Colangelo, Nathan Cortez, Lackland Bloom, Thomas Mayo, Mary Spector, John Lowe, Fred Moss, Jonathan Todres, Lauren Lucas, Tanya Washington, Erin Fuse Brown, Wendy Gerzog, and the participants at the January 2011 Feminism and Legal Theory Project at Emory University School of Law, the 2011 Lutie A. Lytle Black Women Law Faculty Writing Workshop, the 2012 Mid-West Family Law Consortium, the University of Florida Levin College of Law Faculty Enrichment Workshop, and the Georgia State University School of Law Faculty Development Brown Bag. For their diligent research and editing assistance, I thank students Alison Reddoch, Ana Garza, Madelyn Arellano, and my former library research assistant Lynn Murray. Finally, I thank my husband, Charles Weaver, for his continuous support.

<sup>1</sup> Penelope Green, *Your Mother is Moving In? That’s Great*, N.Y. TIMES, Jan. 15, 2009, at D1, available at <http://www.nytimes.com/2009/01/15/garden/15mothers.html> (quoting Elinor Ginzler, AARP senior vice president for livable communities).

<sup>2</sup> *Will Obama mum-in-law make it a family affair in the White House?*, ASSOCIATED PRESS, Nov. 22, 2008, available at [http://www.firstladies.org/documents/art\\_inlawAFP.pdf](http://www.firstladies.org/documents/art_inlawAFP.pdf); Amie Parnes, *‘First grandma’ embraces life in D.C.*, POLITICO (Sept. 12, 2011, 7:28 AM), <http://www.politico.com/news/stories/0811/61719.html>; Marian Robinson, N.Y. TIMES, May 4, 2009, available at [http://topics.nytimes.com/top/reference/timestopics/people/r/marian\\_robinson/index.html?8qa](http://topics.nytimes.com/top/reference/timestopics/people/r/marian_robinson/index.html?8qa).

<sup>3</sup> *Will Obama mum-in-law make it a family affair in the White House?*, *supra* note 2; Parnes, *supra* note 2.

<sup>4</sup> Philip Sherwell, *Michelle Obama persuades First Granny to join new White House team*, THE TELEGRAPH, Nov. 8, 2008, available at <http://www.telegraph.co.uk/news/3407525/Michelle-Obama-persuades-First-Granny-to-join-new-White-House-team.html>.

<sup>5</sup> *Id.*

She is also known to be fiercely independent, active in her community, and a great cook.<sup>6</sup> After the historical election of the first African-American President, Mrs. Robinson reluctantly relocated to Washington, D.C. to live in the White House, after residing in the south side of Chicago for over forty years.<sup>7</sup> “They’re dragging me with them, and I’m not that comfortable . . . [b]ut I’m doing exactly what you do: You do what needs to be done . . . .”<sup>8</sup> Her role in the family is pivotal—she is the support network for a two-career couple—shuttling the girls to and from school, to play dates and after school activities.<sup>9</sup>

Mrs. Robinson says caring for her granddaughters is not like a job—“if anyone is going to care for them other than their parents, it had better be me,” she says.<sup>10</sup> She also comments that her daughter Michelle is a strong woman, stating that “she is doing things that I couldn’t do—that is what you want for your children—to live without the restrictions that you had.”<sup>11</sup> The restrictions to which Mrs. Robinson refers reflect the limitations placed on both women and minorities during the 1960s when she was a young mother. Her comments echo those of another grandmother featured in the New York Times article entitled “Your Mother is Moving In? That’s Great.” Dr. Ellen Pulleyblank Coffey is a family therapist and author living in Berkeley, California who shares in the care work of her two-year-old grandson.<sup>12</sup> She calls herself a “feminist grandmother” because she and her husband use their flexible work schedule to care

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<sup>6</sup> Parnes, *supra* note 2; Rachel L. Swarns, *An In-Law Is Finding Washington to Her Liking*, N.Y. TIMES, May 3, 2009, at A12, available at <http://www.nytimes.com/2009/05/04/us/politics/04robinson.html>; “First Grandmother” Likes White House Life, CBS NEWS (Feb. 16, 2010, 11:07 AM), [http://www.cbsnews.com/2100-250\\_162-6212545.html](http://www.cbsnews.com/2100-250_162-6212545.html). Mrs. Robinson resides on the third floor of the White House (the First Family occupies the second floor), goes shopping on her own, visits the Kennedy Center, and socializes with the personal secretary to former President Bill Clinton. *Id.*

<sup>7</sup> Sherwell, *supra* note 4.

<sup>8</sup> Bill Plante, *The Other Mother In The White House*, CBS NEWS (May 10, 2009, 9:55 PM), [http://www.cbsnews.com/2100-500185\\_162-5001526.html](http://www.cbsnews.com/2100-500185_162-5001526.html).

<sup>9</sup> See Katie Roiphe, *It Takes a Grandma*, N.Y. MAG., Mar. 23, 2009, available at <http://nymag.com/news/politics/55375/> (describing the arrangement as a “supremely elegant solution to the dilemma of the two-career family” and noting “how heavenly it must be to have built-in babysitting by someone who loves your child as much as you do”); “First Grandmother” Likes White House Life, *supra* note 6.

<sup>10</sup> Scott Helman, *Holding down the Obama family fort: ‘Grandma makes race possible’: Marian Robinson: The key to the Obama family*, THE BOSTON GLOBE, Mar. 30, 2008, available at [http://www.boston.com/news/nation/articles/2008/03/30/holding\\_down\\_the\\_obama\\_family\\_fort/](http://www.boston.com/news/nation/articles/2008/03/30/holding_down_the_obama_family_fort/).

<sup>11</sup> *Id.*

<sup>12</sup> Green, *supra* note 1.

for her grandson a few days a week partly so that her daughter and her daughter's spouse can achieve work-life balance while pursuing their careers.<sup>13</sup>

Mrs. Robinson and Dr. Coffey are not alone. Many other grandparents labor to provide home stability and security for their families. In fact, they are a vital key to the family machine, enabling parents to stay professionally, financially, and emotionally afloat while guiding the next generation into the future. According to data from the U.S. Census Bureau, sixteen percent of the total population, or forty-nine million Americans, lived in multigenerational households in 2008.<sup>14</sup> This trend has grown significantly over the last thirty years; in 1980 this figure was just twelve percent of the population, or twenty-eight million.<sup>15</sup> The reintegration of elders into the nuclear family appears to be both a necessary and welcome change.

Several factors account for this change in the structure of these American families. The recession has accounted for the rapid increase over the last five years, but other factors—such as the crisis in home foreclosures, a rise in immigration, and the surge of aging baby boomers who are taking on financial, physical, and emotional responsibilities of the normative home—also explain this intergenerational dynamic.<sup>16</sup> Grandparent caregiving is necessary because of the demands on working parents and the difficulty of finding affordable child care.<sup>17</sup> The need increases for single parents, who often utilize the care and financial resources of grandparents as

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<sup>13</sup> *Id.*

<sup>14</sup> *The Return of the Multi-Generational Family Household*, PEW RES. CTR. 4 (Mar. 18, 2010), <http://www.pewsocialtrends.org/files/2010/10/752-multi-generational-families.pdf>. The term “multigenerational,” as it pertains to households, is defined as homes where there are two adult generations (with the youngest adult being twenty-five years or older) or three or more generations living together. *Id.* at 20. The term also includes homes with “skipped generations,” which is a household with a grandparent and a grandchild. *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Amy Goyer, *More Grandparents Raising Grandkids*, AARP (Dec. 20, 2010), available at [http://www.aarp.org/relationships/grandparenting/info-12-2010/more\\_grandparents\\_raising\\_grandchildren.html](http://www.aarp.org/relationships/grandparenting/info-12-2010/more_grandparents_raising_grandchildren.html); Jim Shelton, *Grandma in the house: Days of three generations under one roof have returned*, NEW HAVEN REGISTER, May 23, 2010, available at <http://www.nhregister.com/articles/2010/05/23/life/doc4bf89f5a7a4db347642564.txt>; Kathleen Curtis Wilson, *The Other Side of Grandparenting*, GRANDPARENTS.COM (Feb. 9, 2009), <http://www.grandparents.com/gp/content/expert-advice/family-matters/article/other-side-of-grandparenting.html>.

<sup>17</sup> URSULA ADLER FALK & GERHARD FALK, GRANDPARENTS: A NEW LOOK AT THE SUPPORTING GENERATION 49–50 (2002).

though they were the other parent.<sup>18</sup>

Scholars have identified the failure of the government to recognize and support the ways contemporary families are raising their children.<sup>19</sup> This Article delves deeper into analyzing how various laws work together to disadvantage today's modern grandparent. It also identifies ways in which other countries are attempting to adapt to this shift in family caretaking culture.

Few legal scholars have analyzed how laws outside the family law spectrum of custody and visitation rights affect the caretaking work of grandmothers. The three areas of law highlighted in this Article—employment, tax, and housing—are critical fields of law that have a tremendous effect on the lifestyle of elderly women. They are what this Article refers to as “living room laws” because they are the core economic laws that affect everyday activities of citizens.<sup>20</sup> Family law is transubstantive, meaning that the laws that apply to family structure and conduct extend beyond state family codes. There are many other areas of law that impact the family, including property, tax, criminal, employment, and tort laws. Since family law intersects with a host of other laws, it is important that we examine how a renaissance movement in family structure would impact the life circumstances and legal rights of grandparent caregivers. In many

<sup>18</sup> *Id.* at 25 (“[A]fter the 1950s things changed so dramatically in American social life that the role of grandparents also changed from that of occasional visitor to that of backup parent to the millions of children born to single mothers each year.”).

<sup>19</sup> MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* 27 (2010) (noting that American law is based upon problematic assumptions regarding individual liberty and equality, dependency, family issues and families' internal dynamics); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 263–69, 292–93 (2004); Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL'Y REV. 3, 3–4 (2010) (noting that family law acts as social insurance for families when normative family structure is disrupted by unfortunate life circumstances affecting work in the labor market); Nancy E. Dowd, *Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL'Y 219, 219–20 (2004); Lee Ann Fennell, *Relative Burdens: Family Ties and the Safety Net*, 45 WM. & MARY L. REV. 1453, 1457 (2004) (presenting a critique of three models of cost-sharing arrangements between family and society for support of dependent caregiving); Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 85–86 (2004) (arguing that the rule of the exclusive family is a central problem in family law in the United States and proposing a care-based legal standard to allow protection for adults with beneficial caregiving relationships with children); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 436–38 (2008).

<sup>20</sup> I coined the term “living room laws” to explain the basic laws that impact most families on a day-to-day basis, as well as from year to year. These laws impact families where they live—in their home, at work, and in their economic relationship with the federal government.

ways, this Article builds upon the scholarly discourse developed by other scholars regarding kinship care<sup>21</sup> and continues the conversation that family law scholar Melissa Murray began when she insightfully argued in favor of various new approaches to reframe the legal understanding of caregiving by a network of people, including parents, extended family members, friends, neighbors, and paid caregivers.<sup>22</sup>

Specifically, this Article examines how advocacy for grandparents should reach beyond traditional family laws in order to change the concept of care work within the family. This Article's focus is not only the manner of caregiving provided by grandparents, but the manner of living—the arrangement in which the family has chosen to reside. What are the legal implications of living under one roof, sharing financial resources to raise children, and sharing in the work of home? Reforms in all three aforementioned areas of law often focus on the burden of work-life balance on parents rearing children without considering the impact on other caretakers who share a primary role in the development of the next generation. This Article argues that expanding grandparents' rights entails revising the concept of what constitutes the realm of social welfare laws.

This Article argues that current employment, tax, and housing laws discourage elderly females from taking on the role of part-time or full-time caregiver for their grandchildren. Surely, there are many

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<sup>21</sup> Elizabeth Barker Brandt, *De Facto Custodians: A Response to the Needs of Informal Kin Caregivers?*, 38 FAM. L.Q. 291, 291 (2004) (noting “[a]lthough grandparents are not the only relatives raising the children of family members, they are, by far, the largest group of kinship caregivers”); Sacha M. Coupet, “Ain’t I A Parent?”: *The Exclusion of Kinship Caregivers from the Debate Over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 597 (2010) (noting that “[a]lthough far from a recent phenomenon, an increasing number of children are currently being ‘parented’ in the homes of relatives by nonparent caregivers, predominantly grandparents . . .”); Jane E. Cross et al., *Families Redefined: Kinship Groups that Deserve Benefits*, 78 MISS. L.J. 791, 792 (2009) (advocating for the expansion of legal concepts of family to include kinship relationships); C. Quince Hopkins, *The Supreme Court’s Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL’Y 431, 440 (2004) (suggesting approach in analyzing the scope of fundamental rights concerning families should be fluid enough to account for cultural differences in kinship structures); Barbara Bennett Woodhouse, “It All Depends On What You Mean By Home”: *Toward a Communitarian Theory of the “Nontraditional” Family*, 1996 UTAH L. REV. 569, 582-84 (1996) (characterizing “kinships of responsibility” as relationships of household members that are grounded in a sense of obligation rising from cultural, religious, or morally imposed duty, and arguing that these relationships merit legal recognition, including autonomy under the law, protection, and public support).

<sup>22</sup> Murray, *supra* note 19, at 389–90.

grandmothers who do not wish to “retribute”<sup>23</sup> their families through caretaking—they have reared their families and are enjoying their golden years comprised of free time to pursue individual interests. In fact, sixty-eight percent of Americans adults believe it is not a grandparent’s responsibility to help with child care for grandchildren.<sup>24</sup>

Seventy-two percent of grandparents, however, take care of their grandchildren on a regular basis, and thirteen percent are primary caregivers for their grandchildren.<sup>25</sup> The discrepancy in these statistics illustrates several tenets. First, there is a large segment of American parents who either have no other better option for affordable, quality care for their children, or like the First Lady, prefer to have their children cared for by a grandparent.<sup>26</sup> Second, there is a large segment of American grandparents who are either willing or coerced to care for their grandchildren, typically without pay.<sup>27</sup> Third, though Marian Robinson and other grandparents may be not be thrilled by the prospect of retributing, something altruistic drives them to take on the responsibility of caregiving for a second generation.<sup>28</sup>

Whether amenable or coerced, a grandparent’s choice to provide child care has a major socio-legal impact on their lives and

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<sup>23</sup> “Retribalization” is defined as “the act of forming or returning to a tribal group or division.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2008). In this Article, I define “retribute” as the act of forming a social and cultural community with a new generation.

<sup>24</sup> *The Return of the Multi-Generational Family Household*, *supra* note 14, at 9; *Baby Boomers Approach Age 60: From the Age of Aquarius to the Age of Responsibility*, PEW RES. CTR., 3–4 (Dec. 8, 2005), <http://pewsocialtrends.org/files/2010/10/socialtrends-boomers120805.pdf>.

<sup>25</sup> *Surprising Facts About Grandparents*, GRANDPARENTS.COM (Sept. 13, 2008), <http://archive.grandparents.com/surprising-facts-GPs.pdf>.

<sup>26</sup> Sharon C. Nantell, *The Tax Paradigm of Child Care: Shifting Attitudes Toward a Private/Parental/Public Alliance*, 80 MARQ. L. REV. 879, 898 (1997) (noting “[w]orking parents in America today need to provide some form of child care assistance to nearly 10 million children under the age of 5. Whether by preference or necessity, more than 40% of these children are cared for by a parent, grandparent or other relative either in their own home or in the home of a relative”); Sharon Jayson, *Most grandparents provide care for the grandkids*, USA TODAY, Sept. 6, 2012, available at <http://usatoday30.usatoday.com/news/health/story/2012-09-06/grandparents-support/57611480/1>.

<sup>27</sup> Nantell, *supra* note 26, at 898.

<sup>28</sup> *Id.* (noting that seventy-two percent of grandparents think being a grandparent is the single most important and satisfying thing in their life, sixty-three percent say they can do a better job caring for their grandchildren than they did with their own children, and ninety percent enjoy talking about their grandkids to just about everyone).

on society. Grandparents who serve as full-time or part-time caregivers provide approximately \$39.2 billion worth of unpaid service to their grandchildren.<sup>29</sup> Most of this work is borne by women, the burden carriers in most family units, who typically give of themselves sacrificially until an accident, disease, or old age catches up with them.<sup>30</sup> Many of these grandparent caregivers face financial, health, housing, education, and employment challenges that often foil their retirement plans.<sup>31</sup> With life expectancy increasing and sources of income decreasing, senior citizens are realizing that they need to continue working or re-enter the workforce in order to sustain themselves.<sup>32</sup> This Article further explores the question of how government should aid families in supporting its most dependent, vulnerable members. It also analyzes the underlying tensions in balancing the senior citizen's desire for autonomy and the government's responsibility to aid in the changing lifestyles of families. Each part of this Article underscores how culture, class, and gender impact the role of modern grandparenting.

This Article proceeds in six parts. Part II sets forth a brief history of the multigenerational family in America and the various types of caretaking arrangements between grandparents and the nuclear family. The Article also discusses the importance of intergenerational caregiving as a means of transmitting culture and values, as well as a means of providing stability and protection from child abuse and neglect.

Part III explores the impact of employment laws on the supporting generation of grandparents. This part analyzes how the different types of grandparent caregiving affect the key sources of retirement income, social security and pension benefits. This part also considers the limitations of the Family Medical Leave Act for grandparents who are intermittent caregivers. Finally, the section

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<sup>29</sup> TED C. FISHMAN, SHOCK OF GRAY: THE AGING OF THE WORLD'S POPULATION AND HOW IT PITS YOUNG AGAINST OLD, CHILD AGAINST PARENT, WORKER AGAINST BOSS, COMPANY AGAINST RIVAL, AND NATION AGAINST NATION 269 (2010).

<sup>30</sup> *Id.*

<sup>31</sup> Goyer, *supra* note 16.

<sup>32</sup> Henry H. Drummonds, *The Aging of the Boomers and the Coming Crisis in America's Changing Retirement and Elder Care Systems*, 11 LEWIS & CLARK L. REV. 267, 271-74, 299-300 (2007); Alexandra Cawthorne, *The Not-So-Golden Years: Confronting Elderly Poverty and Improving Seniors' Economic Security*, CTR. FOR AM. PROGRESS 3-4 (Sept. 27, 2010), [http://www.americanprogress.org/wp-content/uploads/issues/2010/09/pdf/not\\_so\\_golden\\_years.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2010/09/pdf/not_so_golden_years.pdf); Luci de Haan, *AARP New York Survey: African Americans 50+ Very Concerned About Retirement, Finances, and Working Longer*, BUS. WIRE (Mar. 8, 2011, 9:56 AM), <http://www.businesswire.com/news/home/20110308006354/en/AARP-York-Survey-African-Americans-50-Concerned>.



notes how the persistent undervaluing of care work in society perpetuates inequality within and outside the workplace for aging grandmothers.

Part IV analyzes how current tax laws affect grandparent caregiving. While acknowledging the additional tax benefits allowed for senior citizens, the Article considers how the lack of flexibility within the tax code with respect to who receives benefits for the provision of dependent care does not permit equitable treatment of grandparents who devote a considerable amount of their resources to their grandchildren. This part also notes how Australia provides tax credits for family caregivers and examines whether the United States could implement different tax schemes to buffer the financial sacrifices made by grandparents for the family.

Part V investigates how local housing ordinances can negatively impact the multigenerational family. While aging in place, or staying in their own homes or communities, is ideal for older people, relocation is sometimes necessary. Multigenerational living can be complex with regard to family members having their own space within one residence. This part will explore how accessory dwelling units (ADUs), also known as granny flats or garage apartments, help extended families accommodate one another, and how certain local ordinances hinder the construction of ADUs.

Part VI briefly explores the various tensions created by the multigenerational family structure, including encroachment on the autonomy of senior citizens, health concerns of grandparent caregivers, and economic efficiency and equity considerations. This section catalogs the policy issues that need to be addressed in order to legally support intergenerational caregiving. Finally, this part lays the foundation for theoretical considerations to be addressed in the future regarding how the law can be utilized to create certain social rights and responsibilities shared between the government, individuals, and families.

The Article concludes by arguing that changes to the “living room laws” in America are necessary in order to have sustainable modern-day families. During tough economic times, it will be difficult to find the political will to make the major changes necessary to allow for flexible work schedules for parents in today’s marketplace, additional financial support for child care centers, and other suggested reforms to achieve work-life balance. Before the United States could adopt methods similar to those of other modern countries to deal with the issues of multigenerational living and grandparent caretaking, legislatures and policymakers must address

the social, economic and legal tensions at the heart of caregiving. Making changes in the law to incentivize grandparents to care for their grandchildren could serve as a way to prevent senior citizens from seeking assistance from the government later in life and greatly enhance the lives of children and families in general.

## II. MULTIGENERATIONAL LIVING

Marian Robinson's role at the White House as an integral member of the First Family highlights her value to the First couple and their children. Their family also symbolizes a trend within the larger society. The American Association of Retired Persons' (AARP) President, Elinor Ginzler, says that many of the arrangements between grandparents and adult children exist not because the grandparent cannot live on his or her own anymore, but instead, because families believe that having a grandparent in the same household as his or her family makes life better, in part because it allows the grandparent to look after his or her grandchildren.<sup>33</sup> The arrangement is also vital to families like the Obamas that include two working parents. Though Mrs. Robinson was reluctant to move away from all things familiar,<sup>34</sup> she seems to be enjoying her new life. She has said, "I'm able to take care of my two grandchildren when their mother's busy . . . and I am glad to be taking care of them . . . [s]o my life is wonderful."<sup>35</sup> Four years later, Marian Robinson remains a fixture at the White House.<sup>36</sup> Now that President Obama has won a second term, she may continue to reside with the Obamas to guide her grandchildren through adolescence while enjoying her newfound life in the nation's capital.

The populations of the United States and other countries around the world are rapidly aging, and the incredible rise in the senior citizen population in particular is changing the structure of families. Grandparents' roles in the lives of their families have been

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<sup>33</sup> "First Grandmother" Likes White House Life, *supra* note 6.

<sup>34</sup> Eli Saslow, *From the Second City, An Extended First Family*, WASH. POST, Feb. 1, 2009, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/31/AR2009013101876.html> (noting Mrs. Robinson's five surviving siblings lived within fifteen miles of her home, and almost all of her activities revolved around family, including her weekly routine of carpooling with one sister to work, taking a yoga class taught by her brother on Thursdays, going to the hair salon, and shopping with another sister on Saturdays).

<sup>35</sup> *First Grandmother's "Wonderful" W.H. Life*, CBS NEWS (July 23, 2009), <http://www.cbsnews.com/stories/2009/07/23/politics/main5182150.shtml>.

<sup>36</sup> Marian Robinson, Opinion, *Marion Robinson: Election 2012 is 'too important' to 'sit on the sidelines'*, THE GRIO (Nov. 2, 2012), <http://thegrio.com/2012/11/02/marian-robinson-election-2012-is-too-important-to-sit-on-the-sidelines/>.

increasing over the last decade. A record forty-nine million Americans (16.1 percent) live in a family household that contains at least two adult generations, or a grandparent and at least one other generation.<sup>37</sup> The return of the multigenerational family represents a sharp reversal from the past; between 1940 and 1980, the number of Americans living in such households declined from twenty-five percent to twelve percent.<sup>38</sup> There are several reasons for the growth in multigenerational households since 1980, including an increase in the population of immigrants and the rising median age of first marriage of all adults.<sup>39</sup> The main reason for the sudden spike in the last five years, however, is the Great Recession.<sup>40</sup> During poor economic times the multigenerational family has reemerged, driven partly by job losses and home foreclosures.<sup>41</sup> In some cases, adult children are moving back home with their parents, often with their nuclear families in tow. In other instances, grandparents are moving in with their adult children and grandchildren. For the most part, the grandparents are not in need of physical care—the choice is made for both financial and social reasons.<sup>42</sup>

Today, there are various types of multigenerational living, as well as caretaking arrangements, among family members. For example, forty-nine percent of parents have one of their own parents living thirty minutes or less from them, and ten percent have a parent living with them in their home.<sup>43</sup> Sixty-one percent of parents of two-year-olds to seventeen-year-olds say that grandparents assist with rearing their children.<sup>44</sup> The number of grandparents, as well as senior

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<sup>37</sup> *The Return of the Multi-Generational Family Household*, *supra* note 14, at 4.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 5; Rakesh Kochar & D'Vera Cohn, *Fighting Poverty in a Bad Economy, Americans Move in with Relatives*, PEW RES. CTR., 2 (Oct. 3, 2011), <http://www.pewsocialtrends.org/files/2011/10/Multigenerational-Households-Final1.pdf>.

<sup>40</sup> Kochar & Cohn, *supra* note 39, at 2.

<sup>41</sup> *Id.*; Peter Francese, METLIFE MATURE MARKET INSTITUTE, *SHARING THE NEST: A LOOK AT MULTI-GENERATIONAL HOUSEHOLDS IN AMERICA 1* (Feb. 2012), *available at* <https://www.metlife.com/assets/cao/mmi/publications/studies/2012/market-trends/mmi-february-market-trends.pdf>; Les Christie, *The new American household: 3 generations, 1 roof*, CNN MONEY (Apr. 3, 2012, 11:04 AM), [http://money.cnn.com/2012/04/03/real\\_estate/multi-generation-households/index.htm](http://money.cnn.com/2012/04/03/real_estate/multi-generation-households/index.htm).

<sup>42</sup> *The Return of the Multi-Generational Family Household*, *supra* note 14, at 4 (noting “a mix” of social and economic forces).

<sup>43</sup> *Generation Gap Narrows: Parents, Kids See Eye-to-Eye on More Things: Nickelodeon*, MARKETINGCHARTS (Nov. 25, 2009), <http://www.marketingcharts.com/topics/behavioral-marketing/generation-gap-narrows-parents-kids-see-eye-to-eye-on-more-things-11188/>.

<sup>44</sup> *Id.*

citizens, is increasing at a fast pace. The 2010 United States Census notes that between 2000 and 2010, the population of citizens sixty-five and older increased at a faster rate (15.1 percent) than the total population (9.7 percent).<sup>45</sup> While the number of older men has increased over the last decade, females continue to have longer life expectancy and lower mortality rates than men.<sup>46</sup> This unprecedented growth in the number of senior citizens will affect society as a whole, and families will be the first to deal with the increased number of grandparents at the table. Because women make up the largest percentage of caregivers, this Article focuses specifically on the grandmothers caring for grandchildren.

There are three predominant types of multigenerational living/caretaking arrangements in our modern day society: (1) custodial grandparenting, (2) “granny-care,” and (3) live-in grandmothers. Custodial grandmothers have steadily increased over the last thirty years due to various circumstances affecting parents, including drug addiction, incarceration, AIDS/HIV illness or death, child abuse, and neglect.<sup>47</sup> According to some scholars, “[t]he escalation in custodial grandparents is [also] partially the result of the high rate of single-parent families and families in which both partners work outside of their home.”<sup>48</sup> According to the Pew Research Center, there has also been a sharp rise in the number of children being raised by grandparents since the beginning of the Great Recession in 2007 and 2008.<sup>49</sup> Approximately 6.2 million persons over the age of sixty-five live with their grandchildren, and forty-one percent of these senior citizens are full time caregivers for their grandchildren.<sup>50</sup> There are 2.9 million children who live with a

<sup>45</sup> CARRIE A. WERNER, U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS C2010BR-09, THE OLDER POPULATION: 2010 1 (2011).

<sup>46</sup> *Id.* at 4–6.

<sup>47</sup> Barbara Grinwis, Andrea B. Smith, & Linda L. Dannison, *Custodial Grandparent Families: Steps for Developing Responsive Health Care Systems*, 9(1) MICH. FAM. REV. 37, 37 (2004).

<sup>48</sup> Bert Hayslip, Jr. et al., *Determinants of Role Satisfaction Among Traditional and Custodial Grandparents*, in CUSTODIAL GRANDPARENTING: INDIVIDUAL, CULTURAL, AND ETHNIC DIVERSITY 21, 21 (Bert Hayslip, Jr. & Julie Hicks-Patrick eds., 2006).

<sup>49</sup> Gretchen Livingston & Kim Parker, *Since the Start of the Great Recession, More Children Raised by Grandparents*, PEW RES. CTR., 1 (Sept. 9, 2010), <http://www.pewsocialtrends.org/files/2010/10/764-children-raised-by-grandparents.pdf>.

<sup>50</sup> *Id.*; U.S. DEP’T OF COMMERCE, FACTS FOR FEATURES CB09-FF.16, GRANDPARENTS DAY 2009: SEPT. 13 (2009), *available at* [http://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb09-ff16.html](http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb09-ff16.html).

grandparent or grandparents who serve as the primary caretaker.<sup>51</sup> Almost half of these children being raised by grandparents also live with a single parent.<sup>52</sup> Although this phenomenon is more prevalent among African Americans and Latinos, the sharpest increase in such statistics since the recession began has been among whites, rising by nine percent as compared to a two percent rise among black grandparents and no change among Hispanic grandparents.<sup>53</sup>

“Granny-care” is the combination of nanny work and day care in that these grandmothers provide daily care for their grandchildren either in the home of their adult children or in their own home.<sup>54</sup> Granny-care may also encompass part-time care of grandchildren for a parent who works part-time.<sup>55</sup> Live-in grandmothers offer a range of care for grandchildren. Since they live with their grandchildren, there are usually many shared activities with the parents, such as meals, family time, and religious observations. They typically serve in the role as third parent, transporting their grandchildren to school and other activities, helping with homework, cooking meals, and providing after-school care.<sup>56</sup>

#### A. *Brief History of Multigenerational Living in America*

American family members are groomed in the tradition of self-sufficiency. The United States practices neolocality, a residence pattern that encourages newly married couples to establish a household independent of extended family.<sup>57</sup> This is the least common residence pattern of most societies; the majority of the world’s cultures are patrilocal societies, where the couples live with or very near the husband’s parents.<sup>58</sup> Most societies use family systems to perform several functions—primarily reproduction, regulating sexuality, and socializing children.<sup>59</sup> Legal age of maturity coincides

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<sup>51</sup> Livingston & Parker, *supra* note 49, at 1.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* From 2000 to 2008, there has been a nineteen percent increase in the number of white grandparents serving as primary caregivers for their grandchildren. Livingston & Parker, *supra* note 49, at 1.

<sup>54</sup> I coined the term “granny care” to reflect that these grandmothers serve in same capacity as paid nannies.

<sup>55</sup> *Id.*

<sup>56</sup> Georgia Witkin, *When Families Live Together: A Survival Guide*, GRANDPARENTS.COM (Nov. 12, 2012), <http://grandparents.com/family-and-relationships/family-matters/when-families-live-together>.

<sup>57</sup> ROBERTA L. COLES, *RACE AND FAMILY: A STRUCTURAL APPROACH* 56 (2006).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 57.

with assent to independent living,<sup>60</sup> although the law is inconsistent as to when a child's age or actions are indicative of adulthood.<sup>61</sup>

The history of American families has not always reflected independent living. As society has evolved, the residential habits of families have changed. Roberta Coles divides American history into three economic eras: agricultural, industrial, and service.<sup>62</sup> During the agricultural era, between 1500 and 1800, the population consisted of mostly young immigrants, whose elders remained in their country of origin.<sup>63</sup> Households were large and consisted of parents, numerous children, and unrelated people, such as boarders, hired hands, slaves, or servants.<sup>64</sup> Life expectancy was short and homes were small, usually consisting of only one to two rooms.<sup>65</sup> The industrial era, between 1800 and 1970, was a time of new advancements in technology, industry, and medicine, which brought an increase in life expectancy.<sup>66</sup> The United States expanded geographically and in population—38 million immigrants came to the country from Mexico, Asia, and Europe.<sup>67</sup> Multigenerational family households became more common, reaching twenty percent in the mid-to-late 1800s.<sup>68</sup> The service era, which began in the 1970s and continues today, created more jobs in service-sector occupations, and there was a reduction in the need for factory workers due to automation and globalization.<sup>69</sup> Job security has eroded, and an increase in co-provider or dual-income families has forced the renegotiation of gender roles in the home.<sup>70</sup> Postponement of marriage, increased single-parent households because of divorce and nonmarital births, low fertility rates, and a rapidly aging population have resulted in modifications to the normative household structure.<sup>71</sup>

There was a dramatic decline in multigenerational living between elderly individuals and couples over the twentieth century in

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<sup>60</sup> GERALD P. KOOCHEK & PATRICIA C. KEITH-SPIEGEL, CHILDREN, ETHICS, AND THE LAW: PROFESSIONAL ISSUES AND CASES 10 (1990).

<sup>61</sup> Jonathan Todres, *Maturity*, 48 Hous. L. Rev. 1107, 1118–20 (2012).

<sup>62</sup> COLES, *supra* note 57, at 33.

<sup>63</sup> *Id.* at 35.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 37.

<sup>67</sup> *Id.*

<sup>68</sup> COLES, *supra* note 57, at 39.

<sup>69</sup> *Id.* at 41–42.

<sup>70</sup> *Id.* at 42.

<sup>71</sup> *Id.* at 42–44.

the United States. Economists have explained this shift to more feasible independent living by noting increases in incomes, a sharp rise in Social Security benefits, and general improvement of economic conditions.<sup>72</sup> During the first part of the twentieth century, the rise of big government, the promotion of corporate interests, and the advent of the post-industrial age reduced the importance of grandparents and the elderly.<sup>73</sup>

In the 1940s, adult children made the choice to stay near their parents<sup>74</sup> when determining their career paths and starting their families. This may have been due in part to the experiences that flowed out of the Great Depression. Twenty years later, as the United States rebounded from financial instability and entered the Vietnam War and the Korean War, the civil rights and women's movements seemed to coincide with the sexual revolution of young adults. Supreme Court decisions reflect the society's cultural movement from one generation to the next. *Griswold v. Connecticut*,<sup>75</sup> *Eisenstadt v. Baird*,<sup>76</sup> *Roe v. Wade*,<sup>77</sup> and *Planned Parenthood of Missouri v. Danforth*<sup>78</sup> reflect the Supreme Court's growing recognition of privacy within the family sphere. These decisions, however, still undergirded the traditional nuclear family, which has been "deeply rooted" in American history.<sup>79</sup> The extension of the law's protection to relatives beyond the nuclear family was established by the Supreme Court's ruling in *Moore v. City of East Cleveland*, which held that a local zoning ordinance that did not allow a grandmother to live with her two grandsons was unconstitutional.<sup>80</sup>

For low-income families, immigrants, African Americans, and

<sup>72</sup> Suzanne M. Bianchi et al., *Intergenerational Ties—Theories, Trends, and Challenges*, in INTERGENERATIONAL CAREGIVING 19 (Alan Booth et al., eds., 2008).

<sup>73</sup> FALK & FALK, *supra* note 17, at 13.

<sup>74</sup> See KIM PARKER, THE BOOMERANG GENERATION: FEELING OK ABOUT LIVING WITH MOM AND DAD, PEW RES. CTR. 1, 2 (Mar. 15, 2012), available at <http://www.pewsocialtrends.org/files/2012/03/PewSocialTrends-2012-BoomerangGeneration.pdf>.

<sup>75</sup> 380 U.S. 947 (1965) (establishing the right to marital privacy for couples using contraception).

<sup>76</sup> 405 U.S. 438 (1972) (extending the right to privacy to unmarried couples using contraception).

<sup>77</sup> 410 U.S. 113 (1973) (extending the right to privacy to a woman's decision to have an abortion within the first trimester).

<sup>78</sup> 428 U.S. 52 (1976) (upholding a woman's right to privacy regarding her decision to have an abortion and striking down restrictions requiring parental consent for minors and spousal consent requirements for married women).

<sup>79</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); Michael H. v. Gerald D., 491 U.S. 110, 124 (1989); *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978).

<sup>80</sup> 431 U.S. 494 (1977); see also *Village of Belle-Terre v. Boraas*, 416 U.S. 1 (1974).

Latinos, co-residence is more common.<sup>81</sup> In fact, in their concurrence in *Moore*, Supreme Court Justices Brennan and Marshall noted that the extended family pattern of living was prominent among immigrants and minorities as a means for survival.<sup>82</sup> Dating back to the nineteenth century, black grandmothers, especially in the rural south, have served as matriarchs of the family.<sup>83</sup> For example, the 1940 census indicated that black children were more likely to reside in the home of at least one grandparent than were white or Hispanic children.<sup>84</sup> This tradition of kinship care was prevalent in the African-American family because women historically worked outside of the home for long hours each week and relatives and neighbors were necessary allies in the care of children.<sup>85</sup>

*B. Grandparents as Transmitters of Culture and Values*

“Retribing” is defined as forming a social and cultural community with a new generation.<sup>86</sup> Grandparents often take on the responsibility of passing down family and cultural history to their grandchildren, which can play a large part in establishing the identity of children.<sup>87</sup> Because they are not typically burdened with the more difficult tasks involved in childrearing, i.e., setting boundaries and disciplining, grandparents can enjoy leisure time with their grandchildren and discover new activities to share with them. On the other hand, some grandparents may literally engage in a “do over,” where they stand in place of absent parents armed with the wisdom they have gained while rearing their own children. In general, grandparents of various ethnic groups value the cultural traditions that form their identity, such as language, religious practices,

<sup>81</sup> Kochar and Cohn, *supra* note 39, at 4–5.

<sup>82</sup> *Moore*, 431 U.S. at 508, 510.

<sup>83</sup> E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* 103 (1966).

<sup>84</sup> Robert Taylor et al., *Recent Demographic Trends in African American Family Life*, in *FAMILY LIFE IN BLACK AMERICA* 14, 15 (Robert Joseph Taylor et al., eds., 1997).

<sup>85</sup> Green, *supra* note 1, at D1; *Moore*, 431 U.S. at 509 n.6 (“The extended family often plays an important role in the rearing of young black children whose parents must work. Many such children frequently ‘spend all of their growing-up years in the care of extended kin . . . .’ Often children are ‘given’ to their grandparents, who rear them to adulthood . . . . Many children normally grow up in a three-generation household and they absorb the influences of grandmother and grandfather as well as mother and father.”) (quoting J. LADNER, *TOMORROW’S TOMORROW: THE BLACK WOMAN* 60 (1972)).

<sup>86</sup> See definition of “retribalization,” *supra* note 23.

<sup>87</sup> Susanne Frost Olsen, Alan C. Taylor & Kelly DiSpirito Taylor, *An Irreplaceable Influence*, *BYU MAGAZINE* (2001), <http://magazine.byu.edu/?act=view&a=561>.



clothing, food, and holidays.<sup>88</sup> In the African-American community, grandparents play a central role in the enculturation of grandchildren, with grandmothers offering a home to their grandchildren, as well as to other orphaned and abandoned children in the community.<sup>89</sup> The West African tradition of grandparents and grandchildren sharing close intergenerational ties continues in many black communities where grandmothers still play a major part in the stabilization of families.<sup>90</sup> Traditionally, “Native American elderly were highly prized for their life experience and roles as cultural transmitters in the community.”<sup>91</sup> Foreign immigrants, including Japanese, Korean, and Middle Eastern families, often hold the elderly in high esteem, as they assume a position of authority and/or responsibility for the care and instruction of the youngest family members.<sup>92</sup>

At times, the culture of the country of origin contrasts with “American” culture. For example, Chinese children are taught that grandparents are honored members of the household.<sup>93</sup> It is a common belief among Chinese that they take care of each other while Americans take care of themselves.<sup>94</sup> For many immigrants, including Vietnamese and Puerto Ricans, first-generation immigrants emphasize family values and filial obligation with respect to family unity and closeness.<sup>95</sup> They encourage married children to live close to their parents and to discuss important life decisions with family members before taking action.<sup>96</sup> As additional descendants of immigrants are born and reared in America, acculturation<sup>97</sup> occurs,

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<sup>88</sup> *Id.*; AMY GOYER, METLIFE MATURE MARKET INSTITUTE, GRANDPARENTS INVESTING IN GRANDCHILDREN: THE METLIFE STUDY ON HOW GRANDPARENTS SHARE THEIR TIME, VALUES, AND MONEY 15 (Sept. 2012), available at [https://www.metlife.com/assets/cao/mmi/publications/studies/2012/studies/MMI\\_GrandparentsStudy\\_WEB.pdf](https://www.metlife.com/assets/cao/mmi/publications/studies/2012/studies/MMI_GrandparentsStudy_WEB.pdf).

<sup>89</sup> Linda W. Rosenweig, “If They Have Any Orders, I Am Theirs to Command”: *Indulgent Middle-Class Grandparents in American Society*, in AMERICAN BEHAVIORAL HISTORY 58, 71 (Peter N. Stearns ed., 2005); FRAZIER, *supra* note 83, at 115.

<sup>90</sup> Rosalyn D. Lee et al., *African American Grandmothers: The Responsibility Continuum*, in CUSTODIAL GRANDPARENTING, 119, 120 (Bert Hayslip, Jr. & Julie Hicks-Patrick eds., 2006).

<sup>91</sup> COLES, *supra* note 57, at 136.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 234.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 237.

<sup>96</sup> *Id.* at 237.

<sup>97</sup> “Acculturation” is the dual process of cultural and psychological change that takes place as a result of contact between two or more cultural groups and their individual members.” John W. Berry, *Acculturation: Living Successfully in Two Cultures*,

and mainland immigrants lose some of the values that older adults cherish.<sup>98</sup>

### C. *Grandparents as Stabilizers and Protectors*

The sense of stability that grandparents offer is well documented.<sup>99</sup> From an anthropological standpoint, a grandmother's presence and help have been shown to influence the reproductive success of kin.<sup>100</sup> Beyond that, multigenerational housing can serve important social policy goals such as strengthening family ties and promoting age integration.<sup>101</sup> The presence of grandparents in the home promotes sharing of parenting responsibilities, decreases involvement of children in delinquent activities, reduces episodes of depression among children, and improves children's academic performance.<sup>102</sup> Another benefit includes increasing generational solidarity, which helps erode ageism.<sup>103</sup>

From a historical viewpoint, families who immigrated to America from Europe were typically centered around bonding and sharing time with one another.<sup>104</sup> For example, children remained with their

29 INT'L J. INTERCULTURAL REL. 697, 698 (2005).

<sup>98</sup> COLES, *supra* note 57, at 237.

<sup>99</sup> James W. Gladstone & Ralph A. Brown, *Grandparent Involvement in Child Welfare Intervention with Grandchildren*, 4 MARQ. ELDER'S ADVISOR 11, 12 (2002); Jennifer C. Soloman & Jonathan Marx, "To Grandmother's House We Go": *Health and School Adjustment of Children Raised Solely by Grandparents*, 35 GERONTOLOGIST 386, 386-94 (1995) (noting that children raised by grandparents "evidenced better physical health and fewer behavioral problems than children living with only one biological parent"); Marcia Zug, *Deporting Grandma: Why Grandparent Deportation May Be the Next Big Immigration Crisis and How to Solve It*, 43 U.C. DAVIS L. REV. 193, 201, 231 (2009).

<sup>100</sup> SARAH BLAFFER HRDY, *MOTHERS AND OTHERS: THE EVOLUTIONARY ORIGINS OF MUTUAL UNDERSTANDING* 258-59 (2009) (noting that the presence of a maternal grandmother reduced child mortality among the Mandinka tribe in Africa, the Khasi tribe in Indian, European, and North American farming communities, and in Australia and Japan); David A. Coall & Ralph Hertwig, *Grandparental Investment: Past, Present, and Future*, 33 BEHAV. & BRAIN SCI. 1, 3 (2010).

<sup>101</sup> FRANCIS G. CARO, *FAMILY AND AGING POLICY* 160 (2006).

<sup>102</sup> Peter Uhlenberg, *Integration of Old and Young*, 40 GERONTOLOGIST 276, 276-79 (2000); Caro, *supra* note 101, at 161; BARBARA M. NEWMAN & PHILIP R. NEWMAN, *DEVELOPMENT THROUGH LIFE: A PSYCHOSOCIAL APPROACH* 510 (2008).

<sup>103</sup> CARO, *supra* note 101, at 161.

<sup>104</sup> GENERATIONS UNITED, *FAMILY MATTERS: MULTIGENERATIONAL FAMILIES IN A VOLATILE ECONOMY* 8 (2011), available at <http://www.gu.org/LinkClick.aspx?fileticket=QWOTaluHxPk%3D&mid=606&tabid=157> (noting that "[f]or much of American history, the multigenerational household was so common that most took it for granted. On a farm, all generations needed to work together and the more hands the better. With the rise of industry, waves of immigration created more multigenerational households.").

parents into adulthood, even once they married and started their own family, and family homes were larger and accommodated three different generations on distinct floors or wings of the home.<sup>105</sup> The children benefitted by the constant presence of family and were often raised communally.<sup>106</sup> This is somewhat similar to how Michelle Obama was raised on the south side of Chicago, and perhaps is the type of upbringing she would like to provide for Malia and Sasha Obama in the White House, albeit on a much smaller scale. The First Lady grew up sharing a bedroom with her brother, living with her parents in an apartment above her aunt.<sup>107</sup> Other aunts and uncles lived in close proximity to her family, and she and her brother attended the public school in the neighborhood and attended the church across the street.<sup>108</sup>

Interestingly, there have been significant changes in how the family network coexists around the world. Demographic changes in the nuclear family within the past thirty to forty years—such as parental separation, single parenthood, the formation of stepfamilies, and the increase in working mothers with young children—have impacted children’s well-being in a surprising way. A longitudinal study of intergenerational relationships in Southern California challenges the notion that the decline of the traditional family has resulted in the downfall of American youth.<sup>109</sup> The study was based upon four generations of the same families.<sup>110</sup> The children in the study were born in the 1970s and 1980s, and their parents were born in the 1940s and 1950s.<sup>111</sup> The parents of the children had been studied in 1971, along with their parents and grandparents.<sup>112</sup> The findings revealed that the children were doing “quite a bit better” than their elders as young persons in terms of their aspirations, values, self-esteem, and family relations.<sup>113</sup> The fact that nontraditional or alternative family structures have been successful is supported by the proposition that families have adapted by expanding support across generations. The increased

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Saslow, *supra* note 34, at A01.

<sup>108</sup> *Id.*

<sup>109</sup> Judy Dunn et al., *Grandparents, Grandchildren, and Family Change in Contemporary Britain*, in *FAMILIES COUNT: EFFECTS ON CHILD AND ADOLESCENT DEVELOPMENT* 299, 299 (Alison Clarke-Stewart & Judy Dunn eds., 2006).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

interdependence of family members has protected and enhanced the well-being of new generations of children.

Research has also shown that grandparents serve an important role in the prevention of child abuse<sup>114</sup> and childhood injury.<sup>115</sup> Grandparents are another set of eyes, ears, hands, and feet for parents. Working couples and single parents are stretched between demands on the job and demands at home. Grandparents who can drop off and pick up children from day care and school, or babysit in the evenings and on weekends, relieve the demands at home. Depression, material deprivation, and social isolation are contributing factors to child abuse and neglect.<sup>116</sup> Societal isolation has been linked to one theory that explains the prevalence of neglect in our prosperous society.<sup>117</sup> Studies have shown that separation from grandparents and other extended members eliminates a vital support network of material and physical assistance with raising children.<sup>118</sup> In addition to helping with the daily tasks of caregiving, grandparents also pass along their wisdom to parents about handling tough situations with children.<sup>119</sup> They provide another mental perspective to parents, and often serve as a sounding board or confidant for their grandchildren when they are experiencing problems at school, with peers, or with their parents.<sup>120</sup> Finally, grandparents are typically very aware of changes in their grandchildren and can be their strongest advocate when they sense that protection is necessary.<sup>121</sup> Nationally,

<sup>114</sup> Carol Coohey, *Child Maltreatment: Testing the Social Isolation Hypothesis*, 20(3) CHILD ABUSE & NEGLECT: THE INT'L J. 241, 249-50 (1996); Carol Coohey, *Neglectful Mothers, Their Mothers, and Partners: The Significance of Mutual Aid*, 19(8) CHILD ABUSE & NEGLECT: THE INT'L J. 885, 886 (1995).

<sup>115</sup> American Bar Association, *Grandparents are a Safe Source of Child Care*, 27 No. 10 CHILD L. PRAC. 160 (2008).

<sup>116</sup> Mark D. Joffe, *Child Neglect and Abandonment*, in RECOGNITION OF CHILD ABUSE FOR THE MANDATED REPORTER 39, 42 (Angelo P. Giardino & Eileen R. Giardino eds., 2002).

<sup>117</sup> *Id.*

<sup>118</sup> Bruce D. Perry, *Children & Loss*, SCHOLASTIC, <http://www.scholastic.com/browse/article.jsp?id=4040> (last visited Aug. 31, 2012).

<sup>119</sup> Carole B. Cox, *Why Grandchildren Are Going to and Staying at Grandmother's House and What Happens When They Get There*, in TO GRANDMOTHER'S HOUSE WE GO AND STAY: PERSPECTIVES ON CUSTODIAL GRANDPARENTS 3, 5 (Carole B. Cox ed., 2000) (noting "[g]randparents may be expected to act as a type of 'safety valve' that can be called upon to provide immediate assistance during a family crisis, such as divorce or unemployment").

<sup>120</sup> *Id.* (noting "the most important function expected of grandparents has simply been to 'be there' . . .").

<sup>121</sup> Beatriz Carlini-Marlatt, *Grandparents in Custodial Care of their Grandchildren: A Literature Review* 12 (Dec. 2005) (noting "[i]t is important for custodial grandparents to be aware of potential behavior problems in their grandchildren and to know when

twenty-six to twenty-eight percent of calls to child protective services come from nonprofessionals, including relatives, parents, friends, neighbors, and anonymous sources.<sup>122</sup>

If child abuse or neglect is an issue, oftentimes grandparents eventually become temporary or permanent guardians of the child.<sup>123</sup> The term “kinship care”<sup>124</sup> refers to the role that extended family play in taking responsibility for the custody of children whose parents are unable or unwilling to raise them.<sup>125</sup> The rise in kinship care in the United States has been tremendous with “more than 2.7 million children in this country, an increase of almost 18 percent over the past decade”<sup>126</sup> being placed with relatives or close friends of the family. Grandparents play a huge role in the foster care system,<sup>127</sup> essentially subsidizing the state by providing homes to thousands of children at no cost. Over sixty percent of the children involved in child welfare cases come from homes that are at or below the poverty level.<sup>128</sup> Because many of the grandmothers who sought to gain custody of their grandchildren faced financial challenges, Congress

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those behaviors warrant psychotherapeutic intervention”), *available at* [http://www.mentorfoundation.org/uploads/UK\\_Grandparents\\_Lit\\_Review.pdf](http://www.mentorfoundation.org/uploads/UK_Grandparents_Lit_Review.pdf).

<sup>122</sup> *Breaking the Silence on Child Abuse: Protection, Prevention, Intervention, and Deterrence: Hearing Before the Subcomm. on Children and Families of the Comm. on Health, Educ., Labor and Pensions* (2011) (statement of Bryan Samuels, Comm’r, Admin. on Children, Youth, and Families), *available at* [http://www.hhs.gov/asl/testify/2011/12/t20111213a.html#\\_ftnref10](http://www.hhs.gov/asl/testify/2011/12/t20111213a.html#_ftnref10).

<sup>123</sup> Cox, *supra* note 119, at 10.

<sup>124</sup> Anna Leonard, *Grandparent Kinship Caregivers*, 6 MARQ. ELDER’S ADVISOR 149 150–51 (2004) (noting the definition of kinship care varies and providing the definition “any living arrangement in which a relative or someone else emotionally close to a child takes primary responsibility for rearing that child”).

<sup>125</sup> CHILDREN’S DEF. FUND, KINSHIP CARE RESOURCE KIT FOR COMMUNITY AND FAITH-BASED ORGANIZATIONS: HELPING GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN 1, 1, *available at* <http://www.childrensdefense.org/child-research-data-publications/data/kinship-care-organization-resource-kit.pdf>.

<sup>126</sup> THE ANNIE E. CASEY FOUND., STEPPING UP FOR KIDS: WHAT GOVERNMENT AND COMMUNITIES SHOULD DO TO SUPPORT KINSHIP FAMILIES 1 (2010), *available at* <http://www.aecf.org/KnowledgeCenter/~media/Pubs/Initiatives/KIDS%20COUNT/S/SteppingUpForKids2012PolicyReport/SteppingUpForKidsPolicyReport2012.pdf>.

<sup>127</sup> *Kinship Care, U.S. OFF. OF PERSONNEL MGMT.*, [http://www.opm.gov/Employment\\_and\\_Benefits/WorkLife/OfficialDocuments/handbooksguides/Kinshipcare/index.asp](http://www.opm.gov/Employment_and_Benefits/WorkLife/OfficialDocuments/handbooksguides/Kinshipcare/index.asp) (last visited Dec. 7, 2012); Patricia A. Wilkerson & Gloria J. Davis, *Grandparents in Kinship Care: Help or Hindrance to Family Preservation*, 11 J. FAM. STRENGTHS 1, 1 (2011); Brandt, *supra* note 21, at 291.

<sup>128</sup> Clare Huntington, *Familial Norms and Normality*, 57 DUKE L.J. 1245, 1164 (2010) (noting fifty percent of child welfare cases are poverty-related); Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1301 (2008); JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT* 124–25 (1998).

enacted the Kinship Caregiver Support Act.<sup>129</sup> This Act provides for three primary services: (1) a Kinship Navigator Program to help kinship caregivers better utilize existing programs for services to meet their needs and the needs of the children they are rearing; (2) federal assistance to states for subsidized guardianship programs to financially assist relative caregivers and their children; and (3) notice to all grandparents (and other adult relatives) regarding the removal of grandchildren from the custody of their parents.<sup>130</sup> Though this Act goes a long way in providing a helping hand for struggling grandparents raising grandchildren on their own, much more needs to be done in the way of support for families.

In addition to being formal kinship caregivers, grandparents also serve as informal caregivers for their grandchildren. Extended families in low-income communities often have a system of exchange where redistribution of resources occurs regularly or on an emergency basis, and can include household or child-care services.<sup>131</sup> Child care may be provided on a short-term basis, consisting of a couple of hours a day or week, or on a long-term basis, spanning weeks or months until the parents can get back on their feet.<sup>132</sup> Often referred to as “swapping” or informal adoption (when offered on a long-term basis) in the black community, the practice is also common amongst Puerto Ricans, who refer to it as “hijos de crianza.”<sup>133</sup> Kinship care in the African-American community has a long history, dating back to the adaptive response to the destruction of families during slavery and the welfare practices of the mid-twentieth century.<sup>134</sup> Children placed informally with grandparents fare much better than those who are placed in foster care, even though the grandparents are typically poorer, have less formal education, are

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<sup>129</sup> Molly M. Ginty, *Grandmothers Strain Resources to Raise Grandkids*, WOMENSENEWS.ORG (Aug. 19, 2007), <http://womensenews.org/story/aging/070819/grandmothers-strain-resources-raise-grandkids>; CHILDREN’S DEF. FUND, CHILD WELFARE & MENTAL HEALTH DIV., QUESTIONS AND ANSWERS ABOUT THE KINSHIP CAREGIVER SUPPORT ACT (S. 661/H.R. 2188), *available at* <http://education.missouri.edu/orgs/parentlink/Kinship%20Caregiver%20Legislation%20info.pdf>.

<sup>130</sup> Ginty, *supra* note 129; Patrick Lester & Christina Vamvas, *Kinship Caregiver Support Act* (Jun. 21, 2007), *available at* [http://www.alliance1.org/sites/default/files/pdf\\_upload/report\\_pp/Kinship\\_Caregiver.pdf](http://www.alliance1.org/sites/default/files/pdf_upload/report_pp/Kinship_Caregiver.pdf).

<sup>131</sup> COLES, *supra* note 57, at 70.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Ellen E. Pinderhughes & Brenda Jones Harden, *Beyond the Birth Family: African American Children Reared by Alternative Caregivers*, in AFRICAN AMERICAN FAMILY LIFE 285, 292 (Vonnice C. McLoyd et al., eds., 2005).

older, and are in worse health compared to non-kin foster parents.<sup>135</sup>

*D. Race, Class, and Gender Dynamics Among Grandparents*

While there are many differences among grandparent caregivers with regard to race, class, and gender, they usually derive motivation from one factor: an immense love for their grand progeny. Over time, the role of grandparents has remained the same in certain cultures, while in others it has changed depending on societal changes and the particular needs of the nuclear and extended family as a whole.<sup>136</sup> Ethnicity has a major impact on the status and role of grandparents, and while many minority groups elevate grandparents to a higher social standing, “postmodern” culture threatens to undermine this status.<sup>137</sup> Patriarchal and religious traditions of American families distinguish the role of grandmothers in most families as nurturers and caregivers, but the increase of women in the workplace since the 1960s has partially changed the function of grandmothers from strictly homemakers to employed caregivers.<sup>138</sup> Cultural norms of multigenerational living are more common among multicultural families.<sup>139</sup> In the United States, twenty-five percent of Asians, twenty-three percent of African Americans, and twenty-two percent of Hispanics live in multigenerational homes, in contrast to

<sup>135</sup> *Id.* at 293–95; see David M. Rubin et al., *Impact of Kinship Care on Behavioral Well-Being for Children in Out-of-Home Care*, 162 PEDIATRICS & ADOLESCENT MED. 550, 554 (2008); Marc A. Winokur et al., *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 FAMILIES IN SOC’Y: CONTEMP. SOC. SERVS. 338, 344–45 (2008).

<sup>136</sup> See FALK & FALK, *supra* note 17, at 122, 146 (noting how the status and role of grandparents depends largely on the culture of the nation of origin and the subculture in which they live). As family structures change, family roles change also. *Id.* at 140.

<sup>137</sup> *Id.* at 14 (noting how high mobility and reduction of the traditional family because of divorce, technology, and low birth rates negatively affect the status of grandparents).

<sup>138</sup> *Id.* at 48–49. The authors note that nineteen percent of a studied group of grandmothers were “homemaker” grandmothers while twenty-three percent were “young-and-connected” grandmothers. *Id.* at 48. The “homemaker” grandmothers were less educated than the “young-and-connected” grandmothers, but all of them provided care to their grandchildren on a regular basis. *Id.* at 48–49. Only one-fifth of the “homemaker” grandmothers lived with their grandchildren. *Id.* at 49. The “young-and-connected” grandmothers were lucratively employed, but eighty-three percent still provided care to their grandchildren on a regular basis. *Id.* at 49. Half of the “young-and-connected” grandmothers were under fifty-five years old and twenty percent lived with their grandchildren. *Id.* at 49.

<sup>139</sup> Amy Goyer, *Multigenerational Living is Rising, and May be to Everyone’s Benefit*, AGING TODAY, Sept./Oct. 2011, available at <http://www.asaging.org/blog/multigenerational-living-rising-and-may-be-everyones-benefit>.

thirteen percent of whites.<sup>140</sup> Interestingly, regardless of culture, class, and gender differences, the emotional ties between grandparents and grandchildren in today's society tend to be stronger when grandparents live in close proximity to their grandchildren.<sup>141</sup>

The African-American family has historically been an embedded household, meaning there is a kin system of generational members and collaterals living in one home, and the "household draws upon a multigenerational approach to the life course."<sup>142</sup> Interdependence is essentially a means by which vulnerable family members draw upon the strengths of others in the family.<sup>143</sup> During slavery, the black grandmother played an instrumental role in the black family—she served as cook, mid-wife, wet-nurse, seamstress, gardener, caretaker to orphaned and abandoned children, family historian, keeper of family secrets, and defender of family honor.<sup>144</sup> She is often credited with keeping the generations together after emancipation and the responsibility of rearing and supporting grandchildren fell upon her when parents abandoned their offspring<sup>145</sup> or moved North during the Great Migration to find better work opportunities.<sup>146</sup> During slavery, grandparents played prominent roles in families by

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<sup>140</sup> FALK & FALK, *supra* note 17, at 48–49.

<sup>141</sup> AARP, THE GRANDPARENT STUDY 2002 REPORT 39 (May 2002), *available at* [http://assets.aarp.org/rgcenter/general/gp\\_2002.pdf](http://assets.aarp.org/rgcenter/general/gp_2002.pdf); COLES, *supra* note 57, at 144; ANDREW J. CHERLIN & FRANK F. FURSTENBERG, JR., THE NEW AMERICAN GRANDPARENT: A PLACE IN THE FAMILY, A LIFE APART 106–09 (1986) (noting that the closer grandparents live to their grandchildren, the more likely they are to visit them).

<sup>142</sup> MARGARET B. SPENCER ET AL., BEGINNINGS: THE SOCIAL AND AFFECTIVE DEVELOPMENT OF BLACK CHILDREN 29, 30, 38 (1985).

<sup>143</sup> *Id.* at 37.

Failed marriages and careers frequently lead adult sons and daughters back to the parental household, and have profound implications for the parents' life plans. Early misfortune, such as pregnancy in adolescence, may postpone home leaving. Similarly, economic setbacks and divorce among the parents of adolescents may impede their transition to adulthood by postponing home leaving, higher education or employment, and marriage. Each generation is bound to fateful decisions and events in the other's life course.

*Id.*

<sup>144</sup> FRAZIER, *supra* note 83, at 114–15.

<sup>145</sup> *Id.* at 116–17.

<sup>146</sup> Melvin N. Wilson, *Child Development in the Context of the Black Extended Family*, 44(2) AM. PSYCHOL. 380, 380–85 (1989); Priscilla A. Gibson, *African American Grandmothers Raising Their Grandchildren: Stepping Up to the Plate While Facing the Challenges*, THE CONFERENCE (Sept. 30, 2011), <http://theconference.ca/african-american-grandmothers-raising-their-grandchildren>.



socializing and enculturating the young.<sup>147</sup> They also had the ability to check the parents' authority over the child, creating a "relation of friendly familiarity and almost social equality" with grandchildren.<sup>148</sup>

The role of African-American grandparents today reflects their high family status from the past. Many see themselves as protectors of the family, "bulwarks against the forces of separation, divorce, drugs, crime—all of the ills [to which] low-income black youth can fall prey[]." <sup>149</sup> They often take on a pseudo-parental role when one parent is absent and the adult child and grandchild are living in the home or nearby.<sup>150</sup> Interestingly, black grandmothers, regardless of family income, marital dissolution, and other factors, tend to exhibit more parent-like behavior towards their grandchildren.<sup>151</sup> This distinctive pattern, though developed during centuries of adversity, has become part of the culture of black families. Middle-income blacks receive a substantial amount of assistance from kin; mothers report that child care was the most important type of help they received from kin, while fathers cite financial help as most important.<sup>152</sup> First Grandmother Marian Robinson models this pattern in the African-American family and "many upwardly mobile parents," such as Michelle Obama, "stated that they would not have succeeded without the support of kin."<sup>153</sup>

Among African Americans and Hispanic families, single parenthood increases the likelihood that a grandparent lives with the single-parent family.<sup>154</sup> These households are typically low-income and the exchange system between the adults ensures collective economic survival and builds community.<sup>155</sup> High rates of teen pregnancy among African Americans and Latinos appear normative in many of these communities and indeed, a past study shows that

<sup>147</sup> HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM 1750–1925*, at 198–99 (1976).

<sup>148</sup> *Id.* at 199 (noting that this West African tradition was called the merging of alternate generations).

<sup>149</sup> CHERLIN & FURSTENBERG, *supra* note 141, at 129.

<sup>150</sup> *Id.* at 127–28.

<sup>151</sup> *Id.* at 131.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; Claire Shipman, et al., *The First Grandma: Who is Marian Robinson?*, ABC News (Jan. 22, 2008), <http://abcnews.go.com/print?id=6703161> (noting how Michelle Obama has been vocal about how appreciative she is for her mother's help with Malia and Sacha during the transition to Washington, D.C., and quoting the First Lady, "We couldn't do this without her").

<sup>154</sup> COLES, *supra* note 57, at 68.

<sup>155</sup> *Id.* at 70.

young grandmothers are available and willing to help rear children.<sup>156</sup> There is no expectation of reward when family members give and sacrifice, but ultimately, exchanges come with a sense of mutuality.<sup>157</sup>

Latino grandparents have a different cultural expectation of their children than black grandparents, and in many ways, the difference is attributed to their status as first-generation or successive generation immigrants in the United States. There have not been as many studies conducted on Hispanic grandparents and the prevalence of multigenerational living and intergenerational caregiving, but the studies that have been done show that the extended family plays a similarly significant role in the Latino community.<sup>158</sup> Studies show that Mexicans and Puerto Ricans exhibit higher rates of co-residence and proximate living than whites do.<sup>159</sup> Some analyses suggest that socioeconomic standing matters more in assessing the ethnic differences in kin ties and family structure than culture, and that family integration is based primarily on a combination of ability and need.<sup>160</sup> These studies also show that different Latino groups have similar, yet varied, familial experiences. For example, Mexicans have a higher fertility rate than Puerto Ricans, and this family dynamic makes a difference in the type of instrumental help they offer one another.<sup>161</sup> Because of this variable, Mexicans offer more child care to their family members than Puerto Ricans.<sup>162</sup> Mexican-American grandparents have a high degree of involvement with their grandchildren, socializing them by teaching and speaking Spanish, and imparting other cultural values.<sup>163</sup>

Latino values of familism are reflected in grandparent caregiving in Hispanic-American communities, as well as a strong emphasis on intergenerational ties.<sup>164</sup> There is a general belief that family

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<sup>156</sup> *Id.* at 79–81.

<sup>157</sup> *Id.* at 70.

<sup>158</sup> Natalia Sarkisian et al., *Extended Family Ties Among Mexicans, Puerto Ricans, and Whites: Superintegration or Disintegration?*, 55 FAM. REL. 331, 331 (2006).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 341 (noting that higher socioeconomic standing was associated both with less co-residence and proximity and with a greater likelihood of giving financial support).

<sup>161</sup> *Id.* at 342.

<sup>162</sup> *Id.*

<sup>163</sup> Karen Kopera-Frye & Richard Wiscott, *Intergenerational Continuity: Transmission of Beliefs and Culture*, in GRANDPARENTS RAISING GRANDCHILDREN: THEORETICAL, EMPIRICAL, AND CLINICAL PERSPECTIVES 65, 69–70 (Bert Hayslip, Jr. et al., eds., 2000).

<sup>164</sup> Esme Fuller-Thomson & Meredith Minkler, *Central American Grandparents Raising Grandchildren*, 29 HISP. J. BEHAV. SCI. 5, 6 (2007) (noting that familism is a value in which “all members strongly identify with their respective family units and

members are morally obligated “to help extended family members who are experiencing financial, health, or other problems.”<sup>165</sup> The extensive caregiving role Latino grandparents play has often “enabled young mothers to complete their education or obtain a job.”<sup>166</sup> When adult children experience financial or other difficulties, Hispanic grandparents perceive themselves as a vital source of assistance, and play “a pivotal role in passing on cultural traditions, common values, language, and customs to their grandchildren.”<sup>167</sup> Like contemporary African-American grandparents, Hispanic-American grandparents now care for their grandchildren at higher rates in response to crises.<sup>168</sup> These crises include “substance abuse, teen pregnancy, female incarceration, and HIV/AIDS, which have severely affected many low-income Hispanic-American communities.”<sup>169</sup> As a result, grandparent caregivers experience high levels of stress, poverty, poor health, unemployment, depression, and linguistic barriers to accessing services.<sup>170</sup>

In Asian and Middle Eastern families, there is a multigenerational pattern known as “stem family households” in which “the adult sons . . . and their families live with the sons’ parents in the parents’ household.”<sup>171</sup> The grandparents usually maintain the leadership of the household, and “income is often pooled under the authority of the grandfather or the eldest son.”<sup>172</sup> When the grandfather dies, the eldest son will assume control of the household, and the grandmother exercises authority over the daughter-in-laws until the eldest daughter-in-law assumes authority.<sup>173</sup> The practice of stem family extension has declined with immigration—in “60 to 85% of Asian-American extended households, the grandparents reside in their adult children’s households.”<sup>174</sup> Elderly Asian-Americans are more likely to live apart from their children when they have higher education and income, similar to other American senior citizens.<sup>175</sup>

In Chinese, Filipino, and other Asian groups, grandparents have

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feel a deep sense of family loyalty”).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 6–7.

<sup>170</sup> Fuller-Thomson & Minkler, *supra* note 164, at 6–7.

<sup>171</sup> COLES, *supra* note 57, at 67.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 67–68.

<sup>174</sup> *Id.* at 68.

<sup>175</sup> *Id.*

a distinct role. Filial piety is of utmost importance. Family, not the individual, is the most significant unit of social organization in Chinese culture.<sup>176</sup> Filipino culture also places a high value on putting family welfare before oneself.<sup>177</sup> Intergenerational obligations are prescribed—child care and elder care are part of a mutual exchange among generations that live together.<sup>178</sup> Grandparents teach grandchildren about their language, ancestors, country, and heritage.<sup>179</sup> One Filipino grandmother provides domestic help for her working adult children, including cooking, cleaning, and physically caring for her grandchildren.<sup>180</sup>

In Native-American homes, grandparents are also keepers of culture. While there are various types of families with respect to preservation of traditional values, an in-depth case study showed that “Apache grandmothers were instrumental in sustaining customs, beliefs, and traditions from the past.”<sup>181</sup> Relational bonding provided by relatives is important to cultural identity development in youth and critical to preserving Native-American ways in various tribes.<sup>182</sup>

Among the Anishinaabe communities indigenous to the upper Great Lakes region in the United States, there is a vocation of grandparenthood organized around educating grandchildren through example, reproof, and storytelling.<sup>183</sup> The relationship between grandchild and grandmother or grandfather is a central social relation, which the Ojibwe myths and other narratives often

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<sup>176</sup> Sara H. Qualls & Karen A. Roberto, *Diversity and Caregiving Support Intervention: Lessons from Elder Care Research*, in CUSTODIAL GRANDPARENTING: INDIVIDUAL, CULTURAL, AND ETHNIC DIVERSITY 37, 40 (Bert Hayslip, Jr. & Julie Hicks-Patrick eds., 2006); MARSHA E. SHAPIRO, ASIAN CULTURE BRIEF: CHINA, 2(2) NTAC-AAPI Culture Brief Series, *available at* <http://www.ntac.hawaii.edu/downloads/products/briefs/culture/pdf/ACB-Vol2-Iss2-China.pdf> (“The family is the most important social and economic unit of society among the Chinese.”).

<sup>177</sup> Qualls & Roberto, *supra* note 176, at 40.

<sup>178</sup> GENERATIONS UNITED, FAMILY MATTERS: MULTIGENERATIONAL FAMILIES IN A VOLATILE ECONOMY 3 (2011), *available at* <http://www.gu.org/LinkClick.aspx?fileticket=QWOTaluHxPk%3D&mid=606&tabid=157> (noting “numbers of Hispanic and Asian households, both native-born and immigrant, [have] cultural traditions [that] encompass caring for young and old in multigenerational setting”).

<sup>179</sup> Bert Hayslip Jr. et al., *Cross-Cultural Differences in Traditional and Custodial Grandparenting: A Qualitative Approach*, in CUSTODIAL GRANDPARENTING: INDIVIDUAL, CULTURAL, AND ETHNIC DIVERSITY 169, 171 (Bert Hayslip, Jr. & Julie Hicks-Patrick eds., 2006) (viewing grandparents as mentors for younger parents, as transmitters of cultural values, and heritage); Kopera-Frye & Wiscott, *supra* note 163.

<sup>180</sup> FALK & FALK, *supra* note 17, at 131.

<sup>181</sup> KOPERA-FRYE & WISCOTT, *supra* note 163, at 70.

<sup>182</sup> *Id.*

<sup>183</sup> MICHAEL D. McNALLY, HONORING ELDERS: AGING, AUTHORITY, AND OJIBWE RELIGION 124 (2009).

reflect.<sup>184</sup> Grandparents primarily or partially raise grandchildren, and their bond is marked by mutuality, intimacy, trust, and respect.<sup>185</sup> There is an expectation for grandchildren to assist grandparents when requested, as well as for grandparents to serve as the caretakers of the grandchildren whenever needed.<sup>186</sup> Grandparents who are no longer actively working often remain home with small grandchildren while the parents are engaged in other economic pursuits.<sup>187</sup> Interestingly, the relationship is one of equals—grandparents and grandchildren have camaraderie because they are together so often.<sup>188</sup> Fundamentally, they are part of the same circle of life.<sup>189</sup>

In contrast to many ethnic cultures, many American grandparents have a sense that they deserve to enjoy their own pleasures now because they worked hard to raise their children.<sup>190</sup> “The new American grandparent” does not want to lose her autonomy just because she is involved in her grandchildren’s lives.<sup>191</sup> A comparison of Russian immigrant grandparents and Jewish-American grandparents demonstrates a central contradiction in the expressed wistful reminiscence of the fullness of familial bond throughout the generations when they were children:

[L]ike most other Americans, Jewish American grandparents want intimate, satisfying, stable family ties, but at the same time, they want to retain their independence from kin. They want affection and respect from their children and grandchildren, but they do not want to be obligated to them. The price paid for strong family ties by the Russian immigrants—and by family members in developing countries around the world—is a substantial loss of autonomy. It is a price most American grandparents are not willing to pay.<sup>192</sup>

Cultural variations impact the functions that accompany the grandparent role. In comparing the various cultural differences, some grandparents are viewed as mentors for younger parents, transmitters of cultural values and heritage, agents of socialization for and influence over their grandchildren, or persons who can enjoy

<sup>184</sup> *Id.* at 126.

<sup>185</sup> *Id.* at 126, 128.

<sup>186</sup> *Id.* at 128.

<sup>187</sup> *Id.* at 130.

<sup>188</sup> *Id.*

<sup>189</sup> McNALLY, *supra* note 183.

<sup>190</sup> CHERLIN & FURSTENBERG, JR., *supra* note 141, at 189.

<sup>191</sup> *Id.* at 190.

<sup>192</sup> *Id.* at 187.

their grandchildren but not be responsible for their raising.<sup>193</sup> Familism, a primary influence in Latino and African-American cultures, determines how family members define their relationships with one another, the independence of roles within the family system, role boundaries connected with parenthood and grandparenthood, and household composition and living arrangements.<sup>194</sup> Grandparents have a similar role in most minority families because they hold a great deal of family authority, and adult children, whether married or single, often rely on grandparents for child-care assistance.<sup>195</sup> This function of caregiving is less altruistic and more rooted in the traditional institution of the kinship system, which revolves around shared notions of obligation, mutuality, and reciprocity among specific groups of people.<sup>196</sup>

Women comprise the bulk of caregivers for grandchildren. They account for seventy-seven percent of custodial grandparents.<sup>197</sup> There have not been many studies conducted on grandfather caregivers of grandchildren, but one study showed that forty-five percent of custodial grandfathers still worked, seventy-three percent of them were married, and over half owned their own homes.<sup>198</sup> These statistics reveal that grandfathers have less time to provide hands-on care for their grandchildren, but may have more disposable income to alleviate the financial burdens of being a caregiver.<sup>199</sup> A few noteworthy gender differences exist among custodial grandparents: grandfathers are more likely to suffer higher rates of depression and have lower levels of social support than grandmothers.<sup>200</sup> Grandfathers also reported more difficulties with self-care and felt less confident in a parental role.<sup>201</sup> These

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<sup>193</sup> Bert Hayslip Jr. et al., *Cross-Cultural Differences in Traditional and Custodial Grandparenting: A Qualitative Approach*, in CUSTODIAL GRANDPARENTING: INDIVIDUAL, CULTURAL, AND ETHNIC DIVERSITY 169, 171 (Bert Hayslip, Jr. & Julie Hicks-Patrick eds., 2006).

<sup>194</sup> *Id.*

<sup>195</sup> CHERLIN & FURSTENBERG, JR., *supra* note 141, at 130-31.

<sup>196</sup> Woodhouse, *supra* note 21, at 601.

<sup>197</sup> Hayslip, Jr., *supra* note 48, at 22.

<sup>198</sup> Phillip McCallion & Stacey R. Kolomer, *Depression and Caregiver Mastery in Grandfathers Caring for Their Grandchildren*, in CUSTODIAL GRANDPARENTING: INDIVIDUAL, CULTURAL, AND ETHNIC DIVERSITY 105, 110 (Bert Hayslip, Jr. & Julie Hicks-Patrick eds., 2006).

<sup>199</sup> *Id.* at 114.

<sup>200</sup> Bert Hayslip, Jr. et al., *Gender Differences Among Custodial Grandparents*, in CUSTODIAL GRANDPARENTING: INDIVIDUAL, CULTURAL, AND ETHNIC DIVERSITY 151, 160 (Bert Hayslip, Jr. & Julie Hicks-Patrick eds., 2006).

<sup>201</sup> *Id.*

differences could be a result of the traditional grandparent role as well as the historical socialization of men.<sup>202</sup>

There exists an interesting dichotomy in the legal construction of youth and the elderly. Both have the capacity for independence, yet great vulnerability lies all around them. Martha Fineman's concept of the "vulnerable subject" defines both children and aging adults.<sup>203</sup> Though both will become or were at some point a liberal subject capable of independence and personal responsibility, they each will grow from or deteriorate to a physical and mental state of dependency.<sup>204</sup> Moreover, the two groups comprise the largest number of poor in the United States. According to the 2010 United States Census, the poverty rate of the elderly is ten percent, and twenty-one percent of American children live in families below the federal poverty level, with an additional forty-two percent of children living in low-income families.<sup>205</sup> In addition to their physical and cognitive weaknesses, the economic class status of children and the elderly increases their vulnerability. Environmental risks and lack of access to proper nutritious food and health care are some of the issues poor elderly individuals and children face.<sup>206</sup> The vulnerabilities they deal with are quite similar and where their interests converge, an opportunity arises for the state to consider legal and policy changes such that each group could help meet the needs of the other.<sup>207</sup>

"Compared with traditional grandparents, custodial

<sup>202</sup> *Id.* at 162. The article notes that some evidence suggests that "men perceive the grandfather role as an outlet for their need to express themselves emotionally later in life." *Id.* Whereas they served as provider and disciplinarian for their children, they enjoy indulging grandchildren. *Id.*

<sup>203</sup> Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8 (2008).

<sup>204</sup> *Id.* at 12.

<sup>205</sup> *Census: Income gap between rich and poor got wider in 2009*, USA TODAY, Oct. 1, 2010, available at [http://www.usatoday.com/money/economy/2010-09-28-census-income-gap\\_N.htm](http://www.usatoday.com/money/economy/2010-09-28-census-income-gap_N.htm).

<sup>206</sup> Edith Miguda, "The Distant 'Big' Hospital": Linking Development, Poverty, and Reproductive Health—A Gender Mainstreaming Approach, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 113 122 (2009) (noting that "[b]ecause poverty may lead to diminished access to medical care, increased exposure to environmental risks, and malnutrition, ill health is also often a consequence of poverty.").

<sup>207</sup> Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). In this article, Bell established the principle of interest convergence. *Id.* In this instance, "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites." *Id.* This Article uses the term broadly to denote that when the interests of children converge with the interests of the elderly, their comparable vulnerabilities can be addressed.

grandparents are 60% more likely to be living below the poverty threshold.”<sup>208</sup> Their numbers are also increasing—nineteen percent of custodial grandparents were living below the poverty line according to the 2000 United States Census and in 2010, this number jumped to twenty-five percent.<sup>209</sup> There are many grandparents who struggle to make ends meet each month and are forced to return to the workforce in order to supplement their social security and/or pension.<sup>210</sup> Other grandparents live far away from their families and rarely see their grandchildren.<sup>211</sup> Because of financial constraints, frequent travel is not an option.<sup>212</sup> These grandparents are resigned to forego caregiving for their grandchildren, and they age without the comfort of having loved ones nearby.

While a certain segment of grandparents are indigent, a much larger percentage of senior citizens in this country spend two trillion dollars on consumer goods and services, which equals one-third of consumer spending overall.<sup>213</sup> In fact, grandparents control the majority of financial assets in the United States today.<sup>214</sup> Grandparents typically own their homes outright, and persons over sixty-five have experienced a greater increase in employment than younger adults during the recession.<sup>215</sup> They also lead thirty-seven percent of U.S. households.<sup>216</sup> This means the voting power of senior citizens is quite considerable and will continue to grow as their numbers and lifespan increase.

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<sup>208</sup> Hayslip, Jr. et al., *supra* note 48, at 23.

<sup>209</sup> *Id.* at 22–23.

<sup>210</sup> Susan L. Waysdorf, *Families in the AIDS Crisis: Access, Equality, Empowerment, and the Role of Kinship Caregivers*, 3 TEX. J. WOMEN & L. 145, 197 (1994) (noting that “kinship caregivers may be forced out of retirement and back into the work force in order to make ends meet.”).

<sup>211</sup> *The Grandparent Study 2002 Report*, *supra* note 140, at 10–13.

<sup>212</sup> *Id.* at 13.

<sup>213</sup> Peter Francese, *The Grandparent Economy: A Study of the Population, Spending Habits and Economic Impact of Grandparents in the United States*, GRANDPARENTS.COM 1, 8 (Apr. 20, 2009), available at <http://www.grandparents.com/binary-data/The-Grandparent-Economy-April-2009.pdf> [hereinafter Francese, *The Grandparent Economy*] (noting that grandparent spending makes up one-third of consumer spending in the United States, buying \$2 trillion worth of goods and services annually).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 4, 13.

<sup>216</sup> *Id.* at 3.



### III. EMPLOYMENT LAWS AND POLICIES AFFECTING GRANDPARENT CAREGIVERS

Marian Robinson's life in the White House is an interesting paradigm for considering the impact of employment rights on grandparents who, like her, opted to work full-time as family caregivers. Grandparents make up a larger percentage of today's workforce than they did in the past, primarily because the average age of a first-time grandparent is forty-eight.<sup>217</sup> There is a significant difference between forty-eight and seventy-one, the age of Marian Robinson when she retired from her bank job to help take care of her granddaughters before the 2008 presidential election.<sup>218</sup> Many grandparents could arguably have seventeen to twenty-four more years of employment before considering retirement. For this reason, it is important to consider how laws governing employment and retirement impact this growing segment of the population.

Before exploring how employment and tax laws affect grandparent caretaking, it is important to acknowledge gender inequities that exist for women and men in the workplace.<sup>219</sup> This gender inequality increases as women and men become parents.<sup>220</sup> Much of the inequality that exists for young mothers in the marketplace continues as they age and enter the rank of grandmother. For example, women who choose to remain out of the

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<sup>217</sup> *The Grandparent Study 2002 Report*, *supra* note 141, at 1; Jerry Mann, *Generations in the Workplace*, 74 THE BULLETIN (Jan. 2006), available at <http://www.acui.org/publications/bulletin/article.aspx?issue=398&id=888>; MetLife Mature Market Institute, Peter Francese, *The MetLife Report on American Grandparents: New Insights for a New Generation of Grandparents* 2 (2011), available at <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-american-grandparents.pdf>; Alexandra Cawthorne, *The Not-So-Golden Years: Confronting Elderly Poverty and Improving Seniors' Economic Security*, CTR. AM. PROGRESS 5 (Sept. 27, 2010), [http://www.americanprogress.org/wp-content/uploads/issues/2010/09/pdf/not\\_so\\_golden\\_years.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2010/09/pdf/not_so_golden_years.pdf).

<sup>218</sup> Sherwell, *supra* note 4.

<sup>219</sup> Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 708–709 (2000); Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2002 (1996); Alicia Brokars Kelly, *Better Equity for Elders: Basing Couples' Economic Relations Law on Sharing and Caring*, 21 TEMP. POL. & CIV. RTS. L. REV. 387, 391 (2012).

<sup>220</sup> JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1–3 (2001) (noting the ways in which the American arrangement of market work and family work economically marginalizes mothers of all classes); ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED xii (2002) (noting the inequality in lifetime income that can be expected once a woman becomes a mother); Lorraine A. Schmall, *Women and Pension Reform: Economic Insecurity and Old Age*, 35 J. MARSHALL L. REV. 673, 694 (2002).

workforce after marriage so they can remain home to rear their children never realize any income for their work as caregiver.<sup>221</sup> While their husbands and families benefit from the imputed income derived from their household services, they do not earn any individual social security benefits or enjoy any of the other benefits made available to employees by the federal or state government or private employers.<sup>222</sup>

Similarly, grandmothers who choose to leave the workplace or reduce work hours in order to provide care for grandchildren, or who retire and subsequently end up providing granny-care, do not earn any additional social security benefits or pension for this type of work. They could even end up reducing the amount of money available to them through the Social Security system and their 401K or pension plan after they retire, depending on their age at the time of retirement and the terms of their plans.<sup>223</sup> Grandparents essentially save the parent(s) from having to pay a large part of child-care expenses for children under the age of five. Once children enter school, grandparents often provide vital after-school care, which is an extra expense parents could incur. While this is a huge windfall for the parent, the grandparent sacrifices present and future income. This may not be a problem for middle to upper class grandmothers, but for poor and lower-middle class grandmothers, many of whom are minorities, this loss of income can be a major issue. Moreover, the assumption that women have a choice between family life and work life neglects the fact that the majority of caretakers in the United States are women, due to traditional gender roles and socialization.<sup>224</sup> Like Marian Robinson, many women feel that they must do what they have to do for family.<sup>225</sup> Long-established customs of kinship caregiving amplify this sense of obligation in many minority families.<sup>226</sup>

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<sup>221</sup> Schmall, *Women and Pension Reform*, *supra* note 220, at 677; Jennifer L. Morris, Note, *Explaining the Elderly Feminization of Poverty: An Analysis of Retirement Benefits, Health Care Benefits, and Elder Care-Giving*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 571, 588 (2007).

<sup>222</sup> M. L. Reig, *The Unspoken Poor: Single Elderly Women Surviving in Rural America*, 9 ELDER L.J. 257, 267-68 (2001).

<sup>223</sup> See *infra* notes 312-321 and accompanying text.

<sup>224</sup> Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 189-192 (2000) (noting that the development of a separate domestic sphere for women was not a choice, but a reflection of the circumscribed roles for women).

<sup>225</sup> Plante, *supra* note 8.

<sup>226</sup> CAROL STACK, *ALL OUR KIN* 62-67 (1974) (noting the reasons why mothers in poor black communities must depend on kinsmen to help raise their children and the methods of exchange for child-keeping).

Moreover, research suggests that grandchildren are disadvantaged in co-residence family structures that are affected by the marital status and gender of the head of household, as well as the presence of parents within the household.<sup>227</sup> The grandmothers who are raising grandchildren alone suffer because they have no one to help shoulder the burden of providing care and financial support.<sup>228</sup> In addition, “they suffer because of their low earnings and labor force participation relative to grandfathers—grandmother householders earn on average about \$13,000 less a year and are 15% less likely to be employed than grandfather householders.”<sup>229</sup>

Employment policies regarding insurance coverage also negatively affect grandparents raising grandchildren. Because most insurance policies do not allow grandparents to obtain coverage for their grandchildren under their employer-provided health insurance, they are forced to purchase an individual policy, which may be prohibitively expensive.<sup>230</sup> Moreover, grandparents who must leave the workforce or reduce their work hours may forfeit health care coverage all together or have access to limited-benefit health care coverage for part-time employees.<sup>231</sup> It should be noted that the implementation of the Affordable Care Act (ACA) in 2014 will allow for all employees to have health care coverage regardless of the type of coverage offered by an employer.<sup>232</sup> It remains to be seen how this will affect the number of hours worked by older employees, but a

<sup>227</sup> Lynne M. Casper & Kenneth R. Bryson, *Co-Resident Grandparents and Their Grandchildren: Grandparent Maintained Families* 15 (U.S. Census Bureau, Population Division, Working Paper No. 26, Mar. 1998); Timothy J. Biblarz, Lynne M. Casper & Radheeka Jayasundera, *Co-Resident Grandparents and Their Grandchildren: Family Structure Matters* 1, 11–15 (Paper Session 153, 2009), available at <http://paa2009.princeton.edu/papers/91845>.

<sup>228</sup> Casper & Bryson, *supra* note 227, at 14.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 14.

<sup>231</sup> Ann O’Leary, *Protecting Workers and Their Families with Paid Family Leave and Caregiving Credits: Why Social Security Should Guard Against 21st Century Economic Insecurities*, CTR. FOR AM. PROGRESS 1–2 (Apr. 2012), [http://www.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/gender\\_equity.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/gender_equity.pdf); Michelle Andrews, *Part-time Workers to Get Help on Health Insurance—But Not Now*, KAISER HEALTH NEWS (June 2012), <http://www.kaiserhealthnews.org/Features/Insuring-Your-Health/Part-Time-Workers-Health-Insurance.aspx>; Sarah Kliff, *Health-care coverage still eludes some workers*, WASH. POST, Oct. 22, 2011, available at [http://www.washingtonpost.com/national/health-science/health-care-coverage-still-eludes-some-part-time-workers/2011/10/21/gIQAPmEp7L\\_story.html](http://www.washingtonpost.com/national/health-science/health-care-coverage-still-eludes-some-part-time-workers/2011/10/21/gIQAPmEp7L_story.html).

<sup>232</sup> THE HENRY J. KAISER FAMILY FOUND., *FOCUS ON HEALTH REFORM: SUMMARY OF NEW HEALTH CARE REFORM LAW 1* (Apr. 15, 2011), available at <http://www.kff.org/healthreform/upload/8061.pdf>; Kliff, *supra* note 231.

stronger safety net in places like Australia have produced more part-time employees among mothers and older employees.<sup>233</sup>

From an economic perspective, it appears as if the intergenerational transfer of time by grandparents toward the care of their grandchildren, rather than toward work or leisure time, has positive benefits for the labor market.<sup>234</sup> This altruistic act by retired grandparents encourages labor supply since the parents can increase the amount of time they spend on market work with free child care. Higher income for parents results in capital accumulation that might be comparable to monetary transfers by grandparents, if they had money to bequest to their adult children or grandchildren.<sup>235</sup> In other countries, like Japan, where multigenerational living comprises one-third of the households, the female labor supply is higher when a married couple of childbearing age lives with their parents or in-laws, and child care provided by the grandparents is the major reason for co-residence.<sup>236</sup> The question remains whether this intergenerational transfer is cost-effective and healthy for grandparents.

#### A. *Family Medical Leave Act*

Congress passed the Family Medical Leave Act (FMLA) in 1993.<sup>237</sup> The Act is designed to give employees flexibility to take time away from work for urgent family or medical needs.<sup>238</sup> One of the provisions of the FMLA entitles an employee to twelve weeks of leave for the birth or placement of a son or daughter, to bond with a newborn or newly placed son or daughter, or to care for a son or daughter with a serious health condition.<sup>239</sup> The private sector workforce in America limits utilization of this law—only employees who work for companies with fifty employees or more have the right to take up to twelve weeks of job-protected leave per year<sup>240</sup> and the employees must have worked at least 1,250 hours for the employer

<sup>233</sup> Robert Drago, et al., *Who Wants and Gets Flexibility? Changing Work Hours Preferences and Life Events*, 62 INDUS. & LAB. REL. REV. 394, 398, 411 (2009).

<sup>234</sup> Emanuela Cardia & Serena Ng, *Intergenerational Time Transfers and Childcare*, 6 REV. OF ECON. DYNAMICS 431, 452–53 (2006); ALESSANDRA CASARICO & ALESSANDRO SOMMACAL, *TAXATION, CHILD CARE AND GROWTH* 6–7 (2007).

<sup>235</sup> Cardia & Ng, *supra* note 234, at 452–53.

<sup>236</sup> *Id.*

<sup>237</sup> Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(a)–(b) (West 2012).

<sup>238</sup> *Id.* § 2601(b)(1)–(2) (West 2012).

<sup>239</sup> 29 U.S.C.A. § 2612(a)(1)(A)–(C) (West 2012).

<sup>240</sup> JANE WALDFOGEL, *WHAT CHILDREN NEED* 178 (2006).

before they have standing to request the leave.<sup>241</sup> About half of the U.S. workforce is not covered by FMLA because of the number of employers with fewer than fifty employees, and fifty-six percent of women are not covered.<sup>242</sup> It is also not available to part-time employees.<sup>243</sup>

Furthermore, the FMLA “makes no provision for paid leave and is thus unaffordable for lower-income workers.”<sup>244</sup> Notwithstanding these restrictions, the law only allows certain persons to qualify as family members. The Act was amended in 2009 and part of the revisions clarified who qualifies as a family member.<sup>245</sup> Only spouses, children, or parents count.<sup>246</sup> The FMLA does not allow grandparents to take intermittent leave to care for grandchildren, unless they are *in loco parentis*—standing in the place of parents.<sup>247</sup> It is important to note that Congress realized that many children in the United States do not live in traditional “nuclear” families with their biological father and mother.<sup>248</sup> There are an increasing number of persons, including adoptive, step, or foster parents, guardians, and grandparents or other relatives, who are in need of workplace accommodation for their child-care responsibilities.<sup>249</sup> Whether an employee stands *in loco parentis* to a child will depend on the

<sup>241</sup> 29 U.S.C.A. § 2611(2)(A)(ii) (West 2012).

<sup>242</sup> Evelyn Nakano Glenn, FORCED TO CARE: COERCION AND CAREGIVING IN AMERICA 200 (2010).

<sup>243</sup> 29 U.S.C.A. § 2612(b)(1) (West 2012). In the United States, nearly seventy percent of the part-time workforce is comprised of women. Nancy E. Dowd, *Resisting Essentialism and Hierarchy: A Critique of Work/Family Strategies for Women Lawyers*, 16 HARV. BLACKLETTER L.J. 185, 200 (2000).

<sup>244</sup> WALDFOGEL, *supra* note 240, at 178.

<sup>245</sup> 29 U.S.C.A. § 2611(7), 2612(a)(1)(c) (West 2012).

<sup>246</sup> 29 U.S.C.A. § 2611(7), (12)(A)–(B), (13) (West 2012) (stating that “spouse” means a husband or wife, “son or daughter” means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability, and “parent” means the biological parent of an employee or an individual who stood *in loco parentis* to an employee when the employee was a son or daughter).

<sup>247</sup> 29 U.S.C. § 2611(7) (2010); Robin R. Runge, *Redefining Leave From Work*, 19 GEO. J. ON POVERTY L. & POL’Y 445, 454 (2012); Peggine R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 394 (2004).

<sup>248</sup> WAGE & HOUR DIV., U.S. DEP’T OF LABOR, ADMINISTRATOR’S INTERPRETATION NO. 2010-3, CLARIFICATION OF THE DEFINITION OF “SON OR DAUGHTER” UNDER SECTION 101(12) OF THE FAMILY AND MEDICAL LEAVE ACT (FMLA) AS IT APPLIES TO AN EMPLOYEE STANDING “IN LOCO PARENTIS” TO A CHILD (June 22, 2010), *available at* [http://www.dol.gov/WHDOpinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.htm](http://www.dol.gov/WHDOpinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm).

<sup>249</sup> *Id.*

particular circumstances of the situations.<sup>250</sup>

There are a few cases that have considered the issue of whether a grandparent stood *in loco parentis* to a child in order to take time off work to care for the family member. In some of the cases, the grandchild was the adult worker, and one of the legal issues before the court was whether or not the grandparent was in fact a caretaker for the adult worker when he or she was a child. In *Ruble v. American River Transportation Co.*, an employee in Missouri filed suit against his employer alleging that his statements to his employer regarding his relationship with his grandmother and his grandmother's illness were sufficient to trigger FMLA protection.<sup>251</sup> Jack Ruble asserted that his employer unlawfully denied his FMLA leave request and terminated his employment by construing his FMLA leave as an unauthorized absence.<sup>252</sup> In order for an employee to seek FMLA benefits based on an *in loco parentis* relationship, the employee must furnish his employer with enough facts to show that such a relationship must exist.<sup>253</sup> Though Ruble made different statements to his supervisor and personnel manager regarding his grandmother, he did indicate that his grandmother took care of him, which was enough to create a factual issue to survive summary judgment according to the District Court.<sup>254</sup>

In *Dillon v. Maryland-Natural Capital Park and Planning Commission*, the court held that an adult grandchild cannot take FMLA leave in order to care for a grandparent under normal circumstances.<sup>255</sup> The adult grandchild can only attain FMLA approval if she can prove that the grandparent was a primary caregiver and acted as a parent when she was a child.<sup>256</sup> In *Dillon*, Cynthia Dillon requested time to visit with her seriously ill grandmother and find a suitable place for her to live in the midst of an approved vacation time period.<sup>257</sup> At issue was whether her grandmother stood *in loco parentis* for her when she was a child.<sup>258</sup> Ms. Dillon claimed that her grandmother raised her, and that although

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<sup>250</sup> *Id.*

<sup>251</sup> 799 F. Supp. 2d 1017, 1018 (E.D. Mo. 2011).

<sup>252</sup> *Id.* at 1022.

<sup>253</sup> *Id.* at 1023 (citing *Sherrod v. Phila. Gas Works*, 57 Fed. App'x 68, 72–73 (3d Cir. 2003)).

<sup>254</sup> *Id.* at 1024–25.

<sup>255</sup> 382 F. Supp. 2d 777, 785 (D. Md. 2005), *aff'd*, 257 Fed. App'x 577 (4th Cir. 2007).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 779–80.

<sup>258</sup> *Id.* at 781–82.

her mother was around, she was with her grandmother all of the time.<sup>259</sup> Furthermore, Dillon's mother became a mother at sixteen and her grandmother financially provided for both of them for a substantial part of Dillon's life.<sup>260</sup>

An interesting part of the court's legal analysis was that it was not necessary for the adult grandchild's parents to be absent from the child's life. Significantly, the court's consideration of child care giving and support reached beyond the normative opposite-sex married couple to acknowledge ways in which some families must raise children according to different life circumstances. The court's recognition of alternative family caregiving networks should be an important foothold for the argument that FMLA should be extended to grandparent caregivers who do not necessarily take the place of a parent, but rather stand alongside parents providing necessary care for children. Ultimately, Dillon's case went to trial and a jury did find that her grandmother stood *in loco parentis* and that her employer unlawfully interfered with her rights under the FMLA.<sup>261</sup>

In other cases, the matter before the court dealt with whether the worker stood *in loco parentis* to a grandchild. In *Martin v. Brevard County Public Schools*, a grandfather was fired while on FMLA leave that was approved so that he could take care of his infant grandchild while his daughter was deployed overseas.<sup>262</sup> Regarding whether Anthony Martin was *in loco parentis*, the court determined that the factual circumstances surrounding Martin's role in his granddaughter's life were sufficient to create a genuine issue of material fact.<sup>263</sup> Martin's daughter, a single mother, lived with him and his wife, along with his granddaughter.<sup>264</sup> He provided his grandchild with a home, food, and health insurance, and he assumed sole responsibility in caring for his grandchild when his daughter was at school or Army Reserve drills.<sup>265</sup>

In *Hoskins v. Pridgeon & Clay, Inc.*, the United States District

<sup>259</sup> *Id.* (noting that she slept with her grandmother and that her grandmother fed her, took her to church, and combed her hair).

<sup>260</sup> *Id.* at 785–86. The court noted that her grandmother also took her in her home when she became a teen mother and was kicked out of her mother's home. *Id.* at 786. Dillon stated that she relied on her grandmother for financial and emotional support throughout her life, and she loved her as dearly as if she were her own mother. *Id.* at 786.

<sup>261</sup> *Dillon v. Maryland-National Capital Park & Planning Com'n*, No. WGC-04-994, 2007 WL 4557850, at \*1 (D. Md. Mar. 9, 2007) (mem.).

<sup>262</sup> 543 F.3d 1261, 1264–65 (11th Cir. 2008).

<sup>263</sup> *Id.* at 1266.

<sup>264</sup> *Id.* at 1264.

<sup>265</sup> *Id.*

Court of Michigan granted summary judgment against the plaintiff where the plaintiff had been terminated for abusing her FMLA leave.<sup>266</sup> Although Doreen Hoskins was approved for intermittent FMLA leave due to asthma, she lied about taking two days off for FMLA over a holiday weekend when she was actually watching her grandchild because her daughter had no babysitter.<sup>267</sup> The court agreed with the *Dillon* court's interpretation of the term *in loco parentis* when it stated that babysitting was not an FMLA-protected activity.<sup>268</sup>

Some states have different coverage than FMLA, with more generous definitions of relatives for which employees can care. For example, Oregon's definition of "family member" includes the employee's grandparent, grandchild, or parent-in-law, or person with whom the employee has or had an *in loco parentis* relationship.<sup>269</sup> The District of Columbia has a very broad definition of "family member" that includes all relatives by blood, legal custody, or marriage, and anyone with whom an employee lives and has a committed relationship.<sup>270</sup> In Hawaii, the legislature has included "grandparent" and "grandparent-in-law" to fit within their statutory definition of family.<sup>271</sup> Comparatively, more states recognize domestic or civil union partners as family members than grandparents under their definitions of the term.<sup>272</sup> The growing trend of state governments recognizing a variety of different types of families within their leave laws should eventually lead to mobilization to amend the FMLA.

Another recent amendment to the FMLA for military families may also push the envelope for expanding the federal law to address work-life balance.<sup>273</sup> The National Defense Authorization Act for

<sup>266</sup> No. 1:05-CV-816, 2007 WL 1031636 (W.D. Mich. 2007).

<sup>267</sup> *Id.* at \*2.

<sup>268</sup> *Id.* at \*7.

<sup>269</sup> OR. REV. STAT. ANN. § 659A.150 (West 2010).

<sup>270</sup> D.C. CODE § 501 (West 2001).

<sup>271</sup> HAW. REV. STAT. § 398.1 (West 2005).

<sup>272</sup> Six states, California, Maine, New Jersey, Oregon, Rhode Island, and Vermont, have expanded definitions of family that include domestic partner or civil union partner. See CAL. FAM. CODE § 297.5 (West 2007); ME. REV. STAT. ANN. Tit. 26 § 843(4)(D) (2008); N.J. STAT. ANN. § 37:1-31 (West 2007); OR. REV. STAT. § 659A.150(4) (West 2010); R.I. GEN. LAWS § 284-48-1(5) (West 2006); VT. STAT. ANN. tit. 21, § 471 (West 2012).

<sup>273</sup> See generally Marcy Karin, *Time Off for Military Families: An Emerging Case Study in a Time of War . . . and the Tipping Point for Future Laws Supporting Work-Life Balance?*, 33 RUTGERS L. REC. 46 (2009) (exploring whether the provisions added to FMLA through the National Defense Authorization Act for FY 2008 will lead to further government expansion of work-life balance policies).



Fiscal Year 2008 (NDAA) added two new provisions that provide time off for a “qualifying exigency” related to a covered service member on active duty or call to active duty status and for “caregiving” of a covered service member with a serious injury or illness.<sup>274</sup> The NDAA extends the amount of time an employee can take off to twenty-six work weeks (six months), does not cap the age of a child at eighteen years, and expands the definition of a family member to “next of kin,” which is defined as “the nearest [other] blood relative.”<sup>275</sup> For the first time, siblings, grandparents, and others have federal job-protected time off because of the inclusion of “next of kin” in the NDAA’s caregiver provision.<sup>276</sup> Inevitably, policymakers will raise questions regarding “why next of kin only qualify within the military provision.”<sup>277</sup>

Some European governments have expanded their employment policies to allow grandparents to request “flexible working” and transfer of parental leave.<sup>278</sup> For example, Germany and Hungary allow parents to transfer parental leave to a grandparent if they are seriously ill or disabled or if they are a teenage parent.<sup>279</sup> In an emergency, working grandparents are entitled to up to ten days paid leave to care for a grandchild.<sup>280</sup> Portugal’s leave policies are more generous—grandparents can take up to thirty days per year and receive a financial allowance to care for a sick child when working parents are unable to do so.<sup>281</sup> British groups have rallied for the government to support two weeks of “granny leave” and other flexible working options, citing the hardship endured by vulnerable grandparents living on low incomes.<sup>282</sup> The Equality and Human

<sup>274</sup> Pub. L. No. 110-181, § 585 (2008).

<sup>275</sup> 29 U.S.C.A. § 2612(a)(3)–(4) (West 2009); 29 C.F.R. § 825.127(b)(1) (2009); 29 U.S.C.A. § 2611(18) (West 2009); 29 C.F.R. § 825.127(b)(3) (2009).

<sup>276</sup> Karin, *supra* note 273, at 60.

<sup>277</sup> *Id.* (inquiring why military families have legally recognized relationships that are not available to other families).

<sup>278</sup> JUNE STATHAM, CHILDHOOD WELLBEING RES. CTR., GRANDPARENTS PROVIDING CHILD CARE 7 (2011), *available at* <https://www.education.gov.uk/publications/eOrderingDownload/Grandparent%20care%20briefing%20paper.pdf>; Katherine Sellgren, *UK ‘behind’ on grandparent child care provision*, BBC NEWS (June 8, 2010), <http://www.bbc.co.uk/news/10264005>.

<sup>279</sup> Statham, *supra* note 278, at 7.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> Sellgren, *supra* note 278; Hilary Osborne, *Grandparents risk hardship by taking on childcare*, THE GUARDIAN, Mar. 2, 2010, *available at* <http://www.guardian.co.uk/money/2010/mar/02/grandparents-childcare-pay-hardship> (noting that nearly two-thirds of grandmothers who had given up work or reduced their hours to care for their grandchildren were managing on a very low household incomes).

Rights Commission and Grandparents Plus found that among single-parent families, two-thirds rely on grandparents for child care, and “children of these families are nearly twice as likely to experience economic hardship as the wider population.”<sup>283</sup> The groups further stated that the contribution of grandparents should not be ignored because without their free child care, many parents would not be able to work.<sup>284</sup> These organizations highlight the need for recognition of grandparents and better emotional, financial, and practical support for them.<sup>285</sup> Their argument is essentially that the government should recognize that “grandparents provide the last line of defense between millions of children and the poverty line.”<sup>286</sup>

The situation of grandparents in many European countries mirrors that in the United States and the government should consider utilizing some of the methods used in those countries to expand the FMLA to include grandparents and grandchildren. Prominent family law scholar Joan Williams has argued that the FMLA should expand its definition of family to include grandparents and other nontraditional families.<sup>287</sup> While case law such as *Ruble*, *Dillon*, and *Martin* illustrate that grandparents who live in multigenerational homes and act in ways similar to parents regarding the care and responsibility of their grandchildren could be considered to be *in loco parentis* to a child, FMLA should provide job-protected leave for grandparents who provide substantial short-term care for their grandchildren when there is no other safe, affordable alternative.<sup>288</sup> Stark choices for vulnerable members of the workforce lead to a reduction in work hours or an early and unplanned exit from the labor market. In the worst-case scenario, the choice between work and child care could lead to an increase in child neglect, with some young children being left home alone or in the care of unsafe adults. Amending the FMLA to accommodate modern family dynamics could help families provide safe care for children as well as assist elderly women caretakers in avoiding poverty.

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<sup>283</sup> Osborne, *supra* note 282. More than half of families with a disabled child live in poverty, and grandparents provide considerable support in these families. *Id.* Ethnic minority households are more likely to be multigenerational, which often leads to the expectation that grandparents will take on high levels of childcare. *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> JOAN WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 73 (2010).

<sup>288</sup> Currently, under FMLA, rights pertaining to job-protected leave are triggered only if the grandparents are deemed to function *in loco parentis* or in place of the grandchild's parents. 29 U.S.C.A. § 2611(7), (12) (West 2006).

### B. Social Security Benefits & Pensions

For the average American, Social Security and pension payments provide the basis for income after retirement from work. Social Security benefits have been in place as universal insurance for loss of income caused by retirement, disability, or death for over seventy years.<sup>289</sup> The Social Security system has been credited with lifting a large portion of elderly Americans out of poverty.<sup>290</sup> It provides forty percent of the income of people age sixty-five and older.<sup>291</sup> Notably, significant portions of the elderly that survive off of social security are women.<sup>292</sup>

In order to be eligible for social security retirement benefits, a person must be at least earn forty Social Security Work Credits over her lifetime, which is the equivalent of ten years of earning full credits.<sup>293</sup> A credit is based on a certain amount of taxable income, and a maximum of four credits can be earned per year.<sup>294</sup> In order to be entitled to the full retirement benefits, a worker must be between sixty-five and sixty-seven years old, depending on when the person was born.<sup>295</sup> At sixty-two, a worker can retire early, but with reduced benefits.<sup>296</sup> The average age of retirement is sixty-five, and some individuals are not retiring until their seventies.<sup>297</sup> The presence of

<sup>289</sup> 42 U.S.C.A. § 402 (West 2000); NANCY J. ALTMAN, *THE BATTLE FOR SOCIAL SECURITY: FROM FDR'S VISION TO BUSH'S GAMBLE* 29 (2005) (noting that President Franklin D. Roosevelt recognized the need to provide social insurance to "safeguard against misfortunes which cannot be wholly eliminated in this man-made world of ours"); Julia J. DiPasquale, *Social Security Reform: Keeping Elderly Women Out of Poverty*, 4 NAELA J. 183, 185 (2008).

<sup>290</sup> Thomas N. Bethell, *Social Security: Where Do We Go From Here?*, AARP BULLETIN (July 1, 2010), [http://www.aarp.org/work/social-security/info-07-2010/social\\_securitywhere\\_do\\_we\\_go\\_from\\_here.html](http://www.aarp.org/work/social-security/info-07-2010/social_securitywhere_do_we_go_from_here.html) (noting that the poverty rate among the elderly in 1960 was thirty-five percent and after social security was implemented it decreased to less than ten percent); Kathryn L. Moore, *Redistribution Under the Current Social Security System*, 61 U. PITT. L. REV. 955, 959–60 (2000).

<sup>291</sup> Bethell, *supra* note 290.

<sup>292</sup> DiPasquale, *supra* note 289, at 189; Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values it Reflects*, 33 COMP. LAB. L. & POL'Y J. 5, 44 (2011) (noting that women are far more likely to claim spouse and surviving spouse benefits than are men).

<sup>293</sup> O'Leary, *supra* note 231, at 13.

<sup>294</sup> *Id.* (noting that in 2011, \$1,120 in taxable income earned one credit).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> Marshall Goldsmith, *Why 70 is the New 50*, Bloomberg Businessweek (July 10, 2007), available at <http://www.businessweek.com/stories/2007-07-10/why-70-is-the-new-50businessweek-business-news-stock-market-and-financial-advice> (noting that approximately sixty to seventy percent of senior citizens say that they want to work into their sixties and seventies because they will miss the camaraderie and the

senior citizens in today's workforce is commonplace. Research shows that approximately thirty-four percent of men and twenty-four percent of women in the workforce are sixty-five years old or older.<sup>298</sup>

Social Security is considered only one of the three stools of retirement.<sup>299</sup> Pension and individual savings are the other two income sources upon which senior citizens have depended for sustenance during their non-working years.<sup>300</sup> A variety of circumstances have changed for Americans over time—there are fewer employers that provide pensions, a third of the population do not earn enough money to save, and increased health costs threaten to outpace retirement income.<sup>301</sup> The fact that people are living longer, and half of the baby boomer generation will depend on Social Security benefits for half or more of their retirement income is an indicator that the three-legged stool is not enough to cover the costs of retirement living.<sup>302</sup> Multigenerational living may increase in the future because it will help the older generation live within their means. It also provides a way for younger family members to help with daily tasks for elderly grandparents who are unable to afford living on their own without paid health care workers to tend to them.

Pensions are a vehicle by which a worker can receive a portion of her compensation and accrue investments on the return at a tax-free rate until the benefits are paid, which is usually after retirement or when the worker reaches a certain age.<sup>303</sup> There are two major types of pension plans, defined benefit plans and defined contributions plans.<sup>304</sup> Most workers whose jobs are covered by defined benefit

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challenge of work or because they can't afford to retire); *see also* D'Vera Cohn & Paul Taylor, *Baby Boomers Approach 65—Glumly*, PEW RES. CTR. (Dec. 20, 2010), <http://pewresearch.org/pubs/1834/baby-boomers-old-age-downbeat-pessimism> (noting that the typical baby boomer believes that old age begins at seventy-two, and six out of ten state that they may have to postpone retirement).

<sup>298</sup> REPORT OF THE TASKFORCE ON THE AGING OF THE AMERICAN WORKFORCE 8 (Feb. 2008), *available at* <http://www.aging.senate.gov/letters/agingworkforcetaskforce-report.pdf>.

<sup>299</sup> Moore, *An Overview of the U.S. Retirement Income Security*, *supra* note 293, at 5.

<sup>300</sup> *Id.*

<sup>301</sup> AARP PUBLIC POLICY INSTITUTE, BOOMERS APPROACHING MIDLIFE: HOW SECURE A FUTURE? 18, 30, 43 (1998), *available at* [http://assets.aarp.org/rgcenter/econ/d16687\\_boomers.pdf](http://assets.aarp.org/rgcenter/econ/d16687_boomers.pdf).

<sup>302</sup> *Id.* at 9, 41.

<sup>303</sup> *See* ALAN L. GUSTMAN, ET AL., PENSIONS IN THE HEALTH AND RETIREMENT STUDY 24, 26–27 (2010).

<sup>304</sup> *Id.* at 6. Defined benefit plans usually provide a lifetime benefit, where the amount of the benefit is established by a formula that bases periodic disbursement on earnings history at the company, time worked under the plan, and age. *Id.* Defined contribution plans are investment accounts held in the name of the

plans are required to participate in the plan, while workers whose jobs are covered by defined contributions plans typically participate on a voluntarily basis.<sup>305</sup> The value of a pension plan depends on whether an employee has tenure and reached a certain age, or with regard to a defined contribution plan, whether the assets have vested, or become the property of the employee.<sup>306</sup> Depending on the type of plan, there may be some benefits or detriments to working beyond retirement age.<sup>307</sup> Two-fifths to one-half of the baby boomer generation do not have current pension coverage, but by 2030, four-fifths of this generation will have pension coverage.<sup>308</sup> However, the value of the pensions will not be much greater than they were in 1990.<sup>309</sup> This is mostly due to women having lower pensions than men, and workers having shorter job tenure and lower wages.<sup>310</sup>

One of the primary financial consequences of grandparent caregiving is the loss of income from either leaving a job altogether or reducing the number of hours worked.<sup>311</sup> For retired grandparents, this intergenerational time transfer of care is a worthy cause.<sup>312</sup> A reduction in work hours before retirement, however, could permanently reduce a pension payout.<sup>313</sup> Switching from full-time to part-time results in a decrease in income as well as time contributed toward pension or retirement benefits. The average

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employee where the firm, employee, or both contribute to the account. *Id.* The return that the account earns depends on how the balance is invested, and the employee decides the rate of withdrawal from the account. *Id.*

<sup>305</sup> *Id.* at 7–8.

<sup>306</sup> *Id.* at 8–9.

<sup>307</sup> *Id.* at 9–10. With defined benefit plans, the rate at which the benefit accumulates with additional time on the job is not always even with time. *Id.* at 9. “The benefit increase is typically greatest from working the year just preceding eligibility for early retirement.” *Id.*

<sup>308</sup> AARP PUBLIC POLICY INSTITUTE, *supra* note 302 at 18, 21.

<sup>309</sup> *Id.* at 22.

<sup>310</sup> *Id.*

<sup>311</sup> Rachel Pruchno & Dorothy McKenney, *Grandmothers Raising Grandchildren: The Effects of Work Disruptions on Current Work Hours and Income*, in CUSTODIAL GRANDPARENTING: INDIVIDUAL, CULTURAL, AND ETHNIC DIVERSITY 3, 5–6, 15–18 (Bert Hayslip, Jr. & Julie Hicks-Patrick eds., 2006).

<sup>312</sup> Cardia & Ng, *supra* note 234, at 432–33 (noting that intergenerational time transfers in the form of grandparenting are substantial because they allow for working parents to devote more time to market work and they reduce the budget demand for purchased childcare, such as day care or nannies).

<sup>313</sup> Toddi Gutner, *Pitfalls of Working Past Retirement Age*, WALL ST. J., Apr. 29, 2008, available at <http://online.wsj.com/article/SB120943979704551987.html> (noting that where a company’s pension benefits are typically based on a worker’s salary at the time of retirement, a change from full-time to part-time will reduce the pension benefit because the pension payout would be based on the lower salary, and thus permanently reduced).

working-class person would not be able to afford a twenty-five to fifty percent reduction in his or her pension.<sup>314</sup> Moreover, a retirement or pension plan is not available for grandmothers in certain types of jobs<sup>315</sup> and they are entirely dependent on social security.<sup>316</sup> For example, elderly women who live in rural areas are more likely to have been employed as agriculture workers or within a family business.<sup>317</sup> These jobs do not have employer-provided pension plans, and some women are only eligible for Social Security benefits as spouses at the minimum wage level.<sup>318</sup> Women also tend to have more part-time positions, are less likely to be union members, and work at smaller firms.<sup>319</sup> The combination of longer life spans for women and inequitable Social Security benefits, especially for divorced women and women of color,<sup>320</sup> means that grandmothers who forego paid work to care for their grandchildren are more vulnerable to poverty.

In the United Kingdom, the government has found a solution to assist grandparents who provide a large share of caregiving for their grandchildren. It offers Grandparents' National Insurance Credits, which allow grandparents to continue receiving credits toward their full state pension when they take time off to care for children.<sup>321</sup> At least thirty years of National Insurance contributions are needed to qualify for the full basic pension.<sup>322</sup> About half of the eleven to fourteen million grandparents in the United Kingdom are under the age of sixty-five and about a third spends the equivalent of three days

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<sup>314</sup> Anne Kadet, *Will you need a job when you're 75?*, MSN.COM (Apr. 11, 2012, 4:01 PM), <http://money.msn.com/retirement/will-you-need-a-job-when-you-are-75-smartmoney.aspx>.

<sup>315</sup> M. L. Reig, *The Unspoken Poor: Single Elderly Women Surviving in Rural America*, 9 ELDER L.J. 257, 265–72 (2001); Lorraine A. Schmall, *Transnational Issues of Women and Pension Security and Reform*, 14 N.Y. INT'L L. REV. 87, 93–95 (2001); Schmall, *Women and Pension Reform*, *supra* note 220, at 677.

<sup>316</sup> Jennifer L. Morris, *supra* note 221, at 576.

<sup>317</sup> Reig, *supra* note 307, at 268–69.

<sup>318</sup> *Id.* at 269.

<sup>319</sup> Schmall, *Women and Pension Reform*, *supra* note 220, at 677.

<sup>320</sup> Jennifer L. Morris, *supra* note 221, at 572–73, 577–79; Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1514–1518 (2004); WOMEN'S INST. FOR A SECURE RETIREMENT, *UNIQUE CHALLENGES FACED BY WOMEN IN PREPARING FOR AND MANAGING THEIR RETIREMENT YEARS* (Mar. 15, 2006), *available at* [http://www.wiserwomen.org/index.php?id=250&page=Women\\_Face\\_Uniq](http://www.wiserwomen.org/index.php?id=250&page=Women_Face_Uniq).

<sup>321</sup> 1 DEC. 2009, EARLY DAY MOTION, Grandparents' National Insurance Credits, H.C. (2009) (U.K.).

<sup>322</sup> National Insurance Contributions Act, (2011) (Eng.), *available at* <http://www.legislation.gov.uk/ukpga/2011/3/enacted>.

a week caring for grandchildren.<sup>323</sup> The proposed motion recognizes the sacrifices of grandparents in many ways, stating that they “are fundamental to the success of the Government’s welfare reform strategy as lone parents are particularly reliant upon grandparental child care.”<sup>324</sup> The proposed motion further notes that “9 out of 10 grandparents who provide child care do so for no payment or financial reward.”<sup>325</sup> Finally, it acknowledges that the grandparents who provide this care are overwhelmingly women.<sup>326</sup>

Recent United Kingdom studies regarding intergenerational patterns of support and involvement of family members outside of the household reveal that grandparents have frequent contact with their grandchildren and seventy-six percent of those with a grandchild under six reported they felt “very close” to their grandchild.<sup>327</sup> The research further revealed that because of the sharp increase in maternal employment (from twenty percent in 1981 to forty-nine percent by 1999), between twenty and forty percent of families had grandparents providing care for grandchildren.<sup>328</sup> The “frequency of grandparent care varied with access to other types of care, with grandparents less involved in families who had access to paid help.”<sup>329</sup> Grandchildren were more likely to be cared for by grandparents in families with financial problems, unstable marital status, and where grandchildren were born to single mothers.<sup>330</sup> The study also showed that grandparents provided protection for children and decreased their risk of behavior problems, emotional difficulties, and problems at school as a result of parental separation and formation of new partnerships.<sup>331</sup> Grandchildren who were part of the study reported that they intimately confided in grandparents most frequently about family worries and transitions.<sup>332</sup>

A recent study showed that grandparents in the United Kingdom

<sup>323</sup> Rosa Prince, *Grandparents who care for youngsters to keep pension rights*, THE TELEGRAPH (Oct. 15, 2010, 6:00 AM), <http://www.telegraph.co.uk/news/politics/8064960/Grandparents-who-care-for-youngsters-to-keep-pension-rights.html>.

<sup>324</sup> *Id.*

<sup>325</sup> EDM, Grandparents’ National Insurance Credits, H.C. (2009) (U.K.).

<sup>326</sup> GRANDPARENTS PLUS, GRANDPARENTING IN EUROPE 2 (June 2010), *available at* <http://www.grandparentsplus.org.uk/wp-content/uploads/2011/03/Grandparenting-in-Europe-Report.pdf>.

<sup>327</sup> Judy Dunn et al., *Grandparents, Grandchildren, and Family Change in Contemporary Britain*, in FAMILIES COUNT, *supra* note 109, at 299, 300–02.

<sup>328</sup> *Id.* at 306.

<sup>329</sup> *Id.* at 307.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 308–11.

<sup>332</sup> *Id.* at 311.

are the dominant form of care for infant children where the mother was employed or in school.<sup>333</sup> Once children enter school, grandparents continue to have a significant role in child-care arrangements, particularly during holiday periods.<sup>334</sup> They pick children up from child care, preschool, or school and look after them until parents finish their workday.<sup>335</sup> Grandparent care can be more flexible than formal care because grandparents can step in when care is needed, such as in an emergency or when other care provisions break down.<sup>336</sup>

The idea of social security credits, or “homemaker credits,” for stay-at-home mothers has been suggested and critiqued by tax scholars.<sup>337</sup> If the United States were to adopt a solution similar to the United Kingdom’s to expand the Social Security options for grandparent caregivers, it would not help the most vulnerable grandparents. The majority of custodial grandparents do not receive Social Security benefits and eighty-five percent do not receive any type of public assistance.<sup>338</sup> They typically have a lower level of education, which impacts their ability to earn a living while raising a grandchild.<sup>339</sup> It would help the grandparents who are the working poor—those who need financial assistance but are caught in between the official poverty line and basic subsistence. It would also help those grandparents in the middle class stay firmly within the standard of living to which they are accustomed.

#### IV. TAX LAWS AFFECTING THE SUPPORTING GENERATION

The United States Tax Code assumes that parents, whether married or single, are the primary caretakers for children, and offers various ways for parents to account for the expense and care costs of children.<sup>340</sup> There are four ways that parents with dependent children can benefit from the tax code: (1) household and

<sup>333</sup> Statham, *supra* note 278, at 5.

<sup>334</sup> *Id.* at 6.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> Karen C. Holden, *Supplemental OASI Benefits to Homemakers Through Current Spouse Benefits, a Homemaker Credit, and Child-Care Drop-Out Years*, in *A CHALLENGE TO SOCIAL SECURITY* 41, 54-59 (Richard V. Burkhauser & Karen C. Holden, eds., 1982); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1642 (1996); Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, *supra* note 219, at 2063-66.

<sup>338</sup> Bert Hayslip, Jr., *supra* note 48, at 23.

<sup>339</sup> *Id.*

<sup>340</sup> See generally, Allan J. Samansky, *Child Care Expenses and the Income Tax*, 50 FLA. L. REV. 245, 246-49 (1998); Nantell, *supra* note 26, at 883-87; Allan J. Samansky, *Tax Policy and the Obligation to Support Children*, 57 OHIO ST. L.J. 329, 331 (1996).



dependent care credit for expenses necessary for gainful employment; (2) employer dependent care assistance programs; (3) allowance of deductions for dependents; and (4) a child tax credit for being a parent of a child.<sup>341</sup> The tax code does not account for the fact that other family members sacrificially support children in significant ways. There are limited ways in which a grandparent who provides substantive care for a grandchild can obtain tax benefits.

Grandparents or other related caregivers of children can take advantage of tax benefits if they can show that the children are living with and dependent on them for care, shelter, and support.<sup>342</sup> If the grandparent stands *in loco parentis* and is the physical and/or legal custodian of the child for at least six months out of a year, she can obtain a tax benefit for financially supporting her grandchild as a dependent.<sup>343</sup> The earned income tax credit or the child care tax credit may be available, depending on the age of the grandparent and/or on the age of the child.<sup>344</sup> In skipped-generation multigenerational families where the grandmother is a single head of household and responsible for the full-time care of her grandchildren, she can take advantage of the same tax deductions as a single parent.<sup>345</sup> The type of tax benefit a parent or grandparent can obtain depends on his or her income tax bracket.<sup>346</sup>

Grandmothers who provide “granny-care” or live-in grandmothers who reside with their adult children and grandchildren have fewer options under the tax code than custodial grandmothers. Grandparents can claim a dependent tax credit as long as the grandparent is not generating a dependency exemption under section 151 to the employed parent or parent’s spouse.<sup>347</sup> Most grandmothers are not paid in monetary terms for the care service they provide because their services are considered as in-kind income

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<sup>341</sup> I.R.C. §§ 21, 24, 32, 129, 151 (West 2007).

<sup>342</sup> *The Earned Income Credit and Child Tax Credit Can Help Workers Who Are Grandparents Raising Grandchildren*, THE CTR. ON BUDGET & POL’Y PRIORITIES, <http://eitc outreach.org/wp-content/uploads/2009/09/Grandparent-fact-sheet-2011.pdf> (last accessed Dec. 7, 2012).

<sup>343</sup> I.R.C. §§ 151(c), 152(a), 152(c)(1)–(3) (West 2012).

<sup>344</sup> I.R.C. §§ 32(a), 32(c), 24(a), 24(c) (West 2012).

<sup>345</sup> I.R.C. §§ 1(b), 2(b) (West 2012).

<sup>346</sup> Andrew D. Pike, *No Wealthy Parent Left Behind: An Analysis of Tax Subsidies for Higher Education*, 56 AM. U. L. REV. 1229, 1235 (2007) (noting that “[c]onsequently, the tax benefit that a tax deduction generates depends on the taxpayer’s tax bracket because the deduction offsets income that would have been taxed at that rate of tax”).

<sup>347</sup> I.R.C. §§ 21(d)(6), 151(c), 151(d) (West 2012).

or imputed income.<sup>348</sup> If grandmothers are paid for their services, these payments are considered taxable income under current tax law.<sup>349</sup> However, the tax code treats intra-family transfers of in-kind income from services as invisible domestic work.<sup>350</sup>

Some might argue that it is the role of grandparents to spoil their grandchildren and give them what their adult children are unable to provide. While this may be a true assessment of the function of many grandparents today,<sup>351</sup> another truth must be recognized. The world and the United States are aging at shocking rates, and while the number of senior citizens explodes, their life span extends as well. Many recent publications have noted that the baby boomer generation will outlive their retirement and savings, so all of the money and time that they are sacrificing today for their children and grandchildren may come back to haunt the baby boomers in the future.<sup>352</sup> Moreover, a number of elderly women are poor—ten percent live below the poverty line, and a striking fifty percent would be poor without Social Security.<sup>353</sup> While class is a vital barometer to access whether senior citizens will be solvent in the future, how the government taxes caregiving could have an impact on the financial status of the elderly across the spectrum.

It should be acknowledged that there are a variety of tax benefits for elderly citizens over the age of sixty-five. The tax code provides for a credit for the elderly, and the amount depends on the individual's marriage and filing status.<sup>354</sup> The federal government does privilege individuals sixty-five years and older by allowing certain income to be non-taxable. Only a certain amount of Social Security benefits, including Medicare benefits, are taxable.<sup>355</sup> In addition, public assistance payments, grants for home rehabilitation, veteran's benefits, compensation for sickness or injury, and certain mortgage

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<sup>348</sup> See Mary Louise Fellows, *Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures*, 10 YALE J.L. & FEMINISM 307, 358–59 (1998). In-kind income is income that should be taxed. See Treas. Reg. §161-2(d). Imputed income, while theoretically taxable, is not taxed mainly because of practical difficulties. See Staudt, *supra* note 337, at 1575–78.

<sup>349</sup> Commissioner vs. Duberstein, 363 U.S. 278, 285–86 (1960).

<sup>350</sup> Fellows, *supra* note 348, at 360.

<sup>351</sup> Francese, *The Grandparent Economy*, *supra* note 213.

<sup>352</sup> Ruthie Ackerman, *Don't Let Your Grown Kids Ruin Your Future*, WALL ST. J., Jan. 8, 2012, available at <http://online.wsj.com/article/SB10001424052970203391104577124641028271170.html>.

<sup>353</sup> *Social Security Is Important to Women*, SOC. SECURITY ADMIN. (Jan. 2012), <http://www.ssa.gov/pressoffice/factsheets/women.htm>.

<sup>354</sup> I.R.C. § 22(a)–(c) (West 2012).

<sup>355</sup> I.R.C. § 86(a)–(c) (West 2012).

assistance payments are also non-taxable income.<sup>356</sup> Senior citizens and their spouses (if sixty-five years or older) also are each allowed an additional \$1,000 exemption for age, which results in double the total deductions from gross income.<sup>357</sup>

Notwithstanding the tax benefits already available to senior citizens, this Article argues that grandparents who take on the role of caregiver for a grandchild should be able to take advantage of some tax allowances for family responsibilities. Family laws and “living room laws” that constrict legal recognition of caregiving to the parental dyad must expand to account for extended family members who serve as a member of a tripecta, or in some instances as the other parent. This Article proposes two different schemes for grandparent caregiving, with limitations depending on the income of the grandparent. The first scheme involves grandparent tax credits, and the second scheme establishes a decreased tax rate.

Before expounding on these two proposed schemes, it would be impossible to suggest changes to the federal tax code for grandparents caring for children without acknowledging the tax treatment of child caregivers and the devaluation of work in the home. These complex issues have been addressed by many other scholars and various suggestions for change have been proposed to combat the inherent inequality for married mothers who remain out of the marketplace, as well as single mothers who work, in order to raise their children.<sup>358</sup> Moreover, critical tax theorists have highlighted the ways in which the outdated tax code is biased against minority families as well.<sup>359</sup>

Tax laws favor a traditional family model where there is one single earner and the other spouse remains home in order to care for the children.<sup>360</sup> It has long been established that child care

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<sup>356</sup> *Id.* at 385–86.

<sup>357</sup> *Id.* at 387 (citing I.R.C. § 151(c)).

<sup>358</sup> Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, *supra* note 219, at 2004; Edward J. McCaffery, *Slouching Toward Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595 (1993); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Bias in the Code*, 40 UCLA L. REV. 983 (1993); Martha T. McCluskey, *Taxing the Family Work: Aid for Affluent Husband Care*, 21 COLUM. J. GENDER & L. 109, 197–198, 202–204, 216–217 (2011); Samansky, *supra* note 340, at 282–88; Staudt, *supra* note 337, at 1571.

<sup>359</sup> Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 287, 299 (1999); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 799–801 (1996).

<sup>360</sup> Jennifer R. Johnson, *Preferred by Law: The Disappearance of the Traditional Family and Law's Refusal to Let It Go*, 25 WOMEN'S RTS. L. REP. 125, 127 (2004) (noting that

expenditures are personal in nature and cannot be deducted even when incurred so that parents can work.<sup>361</sup> For couples with children where both parties work, their taxes increase because of the additional market income, whereas couples with a single earner enjoy the benefit of joint marital taxation and the marital rate structure.<sup>362</sup> This tax policy effects middle income parents a great deal because most middle income families require both parents to work in order for the family to remain in the middle class.<sup>363</sup> Since the person that typically earns the most income in white families is the male, tax incentives favor women remaining out of the workplace where they are uncompensated for their child-care labor.<sup>364</sup> Additionally, the racial implications of the marriage bonus for traditional family models are that more married African-American women work in the market place than married white women, and they contribute a higher percentage of income to the household.<sup>365</sup>

Though the value of household services for child care is over \$145 billion, taxes are only imposed on market activities; therefore, a significant portion of household income is sheltered from taxation.<sup>366</sup> Feminist tax scholars maintain that this lower tax liability comes at the price of encouraging women to take financially insecure, subordinate roles within the family.<sup>367</sup> Moreover, because Social Security benefits are directly tied to taxation, women's access to this resource is greatly restricted if they remain at home and out of the job market for the majority of their lives.<sup>368</sup> Although married women can derive Social Security benefits based on their husbands' waged labor, women often fail to obtain these benefits due to divorce, death,

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"[f]or [f]amilies with two earners, joint [filing] requires an accounting of who comes first" (e.g., the primary and secondary earner) and that the secondary earner (generally the wife) is taxed at a higher rate); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 309 n.7 (2004) (noting that married workers with non-earning spouses (or spouses with significantly lower earnings) receive a bonus and have a lower tax liability than single, equal earning workers; thus, creating an incentive for couples to conform to the traditional family model).

<sup>361</sup> *Smith v. Comm'r*, 40 B.T.A. 1038, 1039 (1939) (holding that hiring a nanny to care for an infant child of a working couple is not deductible as an ordinary and necessary business expense of the wife), *aff'd without opinion*, 113 F.2d 114 (2d Cir. 1940); I.R.C. § 262 (West 2012).

<sup>362</sup> McCluskey, *supra* note 358, at 121.

<sup>363</sup> See Edward J. McCaffery, *TAXING WOMEN* 138–39 (1999).

<sup>364</sup> Fellows, *supra* note 348, at 387.

<sup>365</sup> See Dorothy Brown, *The Marriage Bonus/Penalty in Black and White*, *supra* note 359, at 45, 49.

<sup>366</sup> *Id.* at 357; Staudt, *supra* note 358, at 1589, 1599.

<sup>367</sup> Staudt, *supra* note 358, at 1599.

<sup>368</sup> *Id.*

or because their husbands do not qualify for Social Security.<sup>369</sup> As a result, women, especially minority women, suffer high poverty rates as they become senior citizens.<sup>370</sup>

Scholars have analyzed the tax systems in various countries in order to consider how the U.S. tax system could be readjusted to improve the work-life balance for parents and caregivers of children.<sup>371</sup> Norway, Sweden, Denmark and Finland provide paid leaves of absence for all working parents as well as high quality universal daycare for children regardless of their parents' income.<sup>372</sup> The social insurance system and tax generated revenue cover a large portion of these benefits and the financial burden is shared amongst all individuals, with or without children.<sup>373</sup>

Australia has devised a tax system that theoretically provides tax credits for parents and third-parties caring for children, as long as the third-parties are partial or sole caregivers of children.<sup>374</sup> This tax system provides assistance for grandparents who do not live in the same household as the parents of the child.<sup>375</sup> Grandparents or other "carers" may be eligible for the Family Tax Benefit, Childcare Benefit, or the Childcare Rebate.<sup>376</sup> The Family Tax Benefit Part A helps with

<sup>369</sup> *Id.* at 1598.

<sup>370</sup> *Id.*

<sup>371</sup> See generally Janet C. Gornick, *For Real Utopia Proposal Session: Work-Family Reconciliation Policies and Gender Equality* (Jan. 3, 2012), <http://www.ssc.wisc.edu/~wright/ASA/Gornick%20Real%20Utopia%20Proposal%20—%20Family%20Division%20of%20Labor.pdf> [hereinafter Gornick, *For Real Utopia Proposal Session*]; Marcia K. Meyers & Janet C. Gornick, *Work/Family Reconciliation Policies for the United States: Lessons from Abroad* (May 11, 2004), [http://www.ssc.wisc.edu/~wright/Meyers\\_Gornick\\_Princeton\\_chapter1.pdf](http://www.ssc.wisc.edu/~wright/Meyers_Gornick_Princeton_chapter1.pdf); Sheri Todd, *Improving Work-Life Balance—What are Other Countries Doing?* (2004), <http://www.peoplefirstsolutions.com/resources/reports/improving-work-life-balance.pdf>; Ayla A. Lari, *Sharing Alike: French Family Taxation as a Model for Reform*, 37 DUQ. L. REV. 207 (1999).

<sup>372</sup> Gornick, *For Real Utopia Proposal Session*, *supra* note 371, at 23, 30.

<sup>373</sup> *Id.* at 26, 32.

<sup>374</sup> Hila Shamir, *What's the Border Got To Do With It?: How Immigration Regimes Affect Familial Care Provision—A Comparative Analysis*, 19 AM. U. J. GENDER SOC. POL'Y & L. 601, 632–33 n.140 (2011); see *A New Tax System (Family Assistance) Act 1999* (Cth) § 41(2) (Austl.) (providing child care benefits exclusively for approved and registered caregivers); see also HILA SHAMIR, CARE COMMODIFIED: A REEVALUATION OF THE LEGAL REGULATION OF CARE WORK IN GLOBALIZING ECONOMIES 102–04 (2008) (dissertation, Harvard Law School) (elaborating that Australia utilizes instruments, such as its Child Care Benefit System ("CCB" or "CCBS"), to subsidize *approved child care*, mainly group care in centre-based settings, and *registered child care*, individualized care in the child's or caregiver's home, through a subsidy or a cash payment in addition to tax benefits, child care rebates and care payments).

<sup>375</sup> *A New Tax System (Family Assistance) Act 1999* (Cth) § 41(2) (Austl.).

<sup>376</sup> *A New Tax System (Family Assistance) (Administration) Act, 1999*, c. 81, § 48

the cost of raising children, and payment is assessed based on the family's combined income.<sup>377</sup> It is paid per child, similar to the Child Tax Credit in the United States.<sup>378</sup> The Family Tax Benefit Part B provides extra assistance for families, including single-parent families, with one primary income.<sup>379</sup> Rent assistance is available for "carers" and the amount depends on the family situation and the amount of fortnightly (bi-weekly) rent.<sup>380</sup> The Australian tax code appears to allow both parents and third-party caregivers to claim tax benefits based on their care of the child, in contrast to the United States tax code which allows only one person (either one parent filing separately, parent filing jointly, or third-party who can prove child dependence) to claim benefits.<sup>381</sup> Australia's tax system effectively supplements the fixed income of elderly relatives and rewards them for caregiving work performed outside the marketplace.

In addition to the tax credits given for raising children, there has been an extension of tax initiatives and pension schemes that would serve to compensate family caregivers. According to the Australian Government Family Assistance Office, grandparents or relatives caring for a child in a formal or informal arrangement may be eligible for assistance.<sup>382</sup> Formal arrangements include those where there is some state or territory welfare authority management over the care of the child or a family law parenting order is in place.<sup>383</sup> Informal arrangements are those where family members have come to a private agreement about who cares for the child, but grandparents and relatives are generally not eligible for assistance if the parents of the child also live in the same household as them.<sup>384</sup>

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(Austl.); Childcare Rebate Act, 1993, c. 112, § 46 (Austl.); see also Linda A. White, *The United States in Comparative Perspective: Maternity and Parental Leave and Child Care Benefits Trends in Liberal Welfare States*, 21 YALE J.L. & FEMINISM 185, 206 (2009).

<sup>377</sup> AUSTL. GOV'T DEP'T HUM. SERVS., *Family Tax Benefit Part A and B*, <http://www.humanservices.gov.au/customer/services/centrelink/family-tax-benefit-part-a-part-b> (last visited Dec. 7, 2012).

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> AUSTL. GOV'T DEP'T HUM. SERVS., *Rent Assistance*, <http://www.humanservices.gov.au/customer/services/centrelink/rent-assistance> (last visited Dec. 7, 2012).

<sup>381</sup> *Compare* A New Tax System (Family Assistance) Act 1999 (Cth) § 41(2) (Austl.), *with* I.R.C. § 152 (West 2007).

<sup>382</sup> Austl. Bureau of Stat., *Child Care*, No. 4102.0 Australian Social Trends 1,1 (June 2010), *available at* [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication30.06.106/\\$File/41020\\_ChildCare.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication30.06.106/$File/41020_ChildCare.pdf).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

*A. Grandparent Credits*

One possible solution this Article proposes for consideration is to give caregiving grandparents a non-refundable tax credit on their taxes if they can show proof of child care for fifteen to twenty hours of a forty-hour work week. As a result, such grandparents would either have less of their income taxed or would receive a tax refund.

The current Dependent Care Tax Credit only benefits custodial grandparents because it covers expenses incurred for child care for the taxpayer who maintains the household in which the child resides.<sup>385</sup> Additionally, the grandparent must be employed and have provided fifty percent of the dependent's support for the taxable year.<sup>386</sup> If married, both spouses must be employed or seeking gainful employment.<sup>387</sup> Thus, retired custodial grandparents are not eligible, and neither are couples where one spouse is retired.<sup>388</sup>

*B. Decreased Tax Rate*

A public policy action that could help support custodial caretakers for children is a decrease in the overall tax rate for custodial grandparents who acquire custody via certain situations, such as incarceration of a parent, death of a parent, or mental illness of a parent. Though relatives caring for a child on a full-time basis can take advantage of the child-care tax credit and the dependent care exclusion, these may not be enough for elderly caregivers living on a fixed income with a greater likelihood of continuing and/or worsening health conditions. Economic support through expansion of welfare, child support payments, Medicaid, and housing subsidies are unlikely to occur during the current economic recession and with the rising United States debt.<sup>389</sup> A tax cut would provide direct material assistance to the grandparent and could increase the economic stability for the household.

With respect to custodial single grandmothers, the idea of a decreased tax rate would increase the grandparent's take-home pay (if still employed) and decrease the amount of taxes taken out of

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<sup>385</sup> Frank C. Morris, Jr., *Vice President Biden's Middle Class Task Force—Supplemental Material*, CS006 ALI-ABA 1577, 1620 (2010) (noting “the Child and Dependent Care Tax Credit provides no break for out-of-pocket caregiving expenses paid on behalf of an elderly relative who does not live in the taxpayer's home. We should consider modifying this credit to cover taxpayers who do not live with their elderly parents.”).

<sup>386</sup> I.R.C. § 152 (West 2007).

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

pension/retirement payments. The decreased tax rate could be limited to custodial grandparents with an income less than a certain amount, such as \$40,000, and this amount could increase depending on how many children resided with the grandparent, i.e., \$5,000 extra per child (with a maximum of four children). Child support would ordinarily not be feasible because of the parent's circumstances.

*C. Household and Child Care Expenses*

Grandparents cover an increasing amount of child care expenses for their grandchildren including day care, education costs, and clothing.<sup>390</sup> Even though grandparents are paying a substantial amount of child-care expenses, they are not able to claim their grandchild as a dependent unless the custodial parent is absent.<sup>391</sup> The question of who constitutes head-of-household in a multigenerational home is worthy of reconsideration. Should it be the homeowner or the parent of the child? This Article argues that it could be a shared benefit when there is a multigenerational home and the grandparent is technically head-of-household, but the parent(s) are contributing significantly to the household and care of the children.

This reform would not cost the government any money because the head-of-household deduction would be split between two persons instead of one. It would allow the grandparent to replenish a small portion of the resources expended to support grandchildren who are draining the income of aging citizens. There is a stronger argument for this reform to be allowed for senior citizens on fixed incomes. Allowing the rising number of grandparents under the age of sixty-five who are actively part of the workforce to take advantage of this deduction, however, would incentivize family members to share in the responsibility of raising children as opposed to the state picking up the tab via welfare payments.

*D. Unpaid Services*

Even if parents wanted to pay a grandmother some amount of money for her care work, tax law prevents the parent from claiming a credit for these payments unless the grandparent is treated similarly to a nanny or daycare provider, and is not a dependent of the parent. Section 262 of the Internal Revenue Code denies all deductions for

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<sup>390</sup> Francese, *The Grandparent Economy*, *supra* note 213, at 7–8.

<sup>391</sup> I.R.C. §§ 151–52 (West 2007).



personal, living, or family expenses.<sup>392</sup> Dependent care is not an exception under this section of the code. Although payments to a grandmother for child care are taxable wage income, it could be treated as a tax-free gift to a relative, and gifts are similarly not deductible because of the prohibition on personal, family, or living expenses.<sup>393</sup>

In order to get around this long-settled tax law, the United States tax code would have to be reformed through legislation to allow parents the option of paying grandparents for the care of their children regardless of the dependency status of the grandparent. While this may conflict with the altruistic motivation of grandparents to care for their grandchildren, it would enable grandparents who choose to retire early in order to provide full-time caregiving for grandchildren the opportunity to obtain their full Social Security benefits by continuing to earn credit for working. Allowing grandparents to be paid for their care work gives value to their contribution, recognizes their sacrifice for the family, and incentivizes a choice that would support their grandchildren's well-being. A tax credit could be given to the parent—which they could give back to the grandparent—and the grandparent could be taxed at a significantly lower rate.

#### V. HOUSING ISSUES FOR MULTIGENERATIONAL FAMILIES

Multigenerational living requires sufficient space to house up to three generations. While Marion Robinson occupies the third floor of the White House,<sup>394</sup> many other families face the practical issue of accommodating a large number of people in a smaller residence. A rapid increase in the United States senior citizen population makes affordable housing a critical issue for aging baby-boomers. By 2050, senior citizens are expected to comprise almost twenty-one percent of the country's total population.<sup>395</sup> The majority of this group will be female, due in part to the shorter life expectancy of males, and ten to fifteen percent of seniors will be living at or below the federally defined poverty threshold.<sup>396</sup> The General Accounting Office (GAO)

<sup>392</sup> I.R.C. § 262 (West 2007).

<sup>393</sup> Fellows, *supra* note 348, at 359–60.

<sup>394</sup> Darlene Superville, *Marian Robinson, Obama Mother-In-Law, Enjoying White House Life*, HUFFINGTON POST (Feb. 16, 2010, 1:06 PM), [http://www.huffingtonpost.com/2010/02/16/marian-robinson-obama-white-house\\_n\\_463380.html](http://www.huffingtonpost.com/2010/02/16/marian-robinson-obama-white-house_n_463380.html).

<sup>395</sup> PATRICIA E. SALKIN, *Zoning for an Aging Population*, ST020 ALI-ABA 881, 883 (2011).

<sup>396</sup> Linda A. Jacobsen, Mary Kent, Marlene Lee, & Mark Mather, *America's Aging*

identified housing affordability as the “single greatest problem facing elderly households” in 2003.<sup>397</sup> Because many seniors are on a fixed income and require specialized housing, which is not always readily available, it is important for municipalities to provide alternatives to nursing homes and assisted-living facilities. Most seniors prefer to “age in place” so that they can maintain their independence in the community with which they are familiar.<sup>398</sup> Others may be required or desire to relocate, like Marion Robinson, to the location where their adult children reside. In either situation, when multiple generations share space, different housing options must be considered.

Affordable housing is also a growing issue for young adults and families.<sup>399</sup> Since “American family composition has become more diverse and smaller[,] young singles and older persons living alone have become a dominant group.”<sup>400</sup> Less than one-quarter of American households are comprised of married couples with children.<sup>401</sup> Increased debt, record unemployment, and nearly three million housing foreclosures have affected a large number of families

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*Population*, 66(1) POPULATION BULLETIN 3 (Feb. 2011), available at <http://www.prb.org/pdf11/aging-in-america.pdf> (noting “[b]y 2050, females will make up just over half (52 percent) of the population ages 65 to 74, a decline of 2 percentage points from 2009”).

<sup>397</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-03-512, ELDERLY HOUSING: PROJECT FUNDING AND OTHER FACTORS DELAY ASSISTANCE TO NEEDY HOUSEHOLDS 1 (2003), available at <http://www.gao.gov/new.items/d03512.pdf>; Patricia E. Salkin, *A Quiet Crisis in America: Meeting the Affordable Housing Needs of the Invisible Low-Income Healthy Seniors*, 16 GEO. J. ON POVERTY L. & POL’Y 285, 288 (2009).

<sup>398</sup> Margaret F. Brinig, *Grandparents and Accessory Dwelling Units: Preserving Intimacy and Independence* 1, 7 (2012) (on file with the author); SALKIN, *supra* note 395, at 884.

<sup>399</sup> Dan Reed, *Millennials Entering the Workforce Need Affordable Housing*, GREATER GREATER WASH. (Jan. 24, 2012, 11:43 AM), <http://greatergreaterwashington.org/post/13453/millennials-entering-the-workforce-need-affordable-housing/>; Anna L. Georgiou, *Nimby’s Legacy—A Challenge to Local Autonomy: Regulating the Siting of Group Homes in New York*, 26 FORDHAM URB. L.J. 209, 210 (1999) (noting that “[t]here has been and remains a severe shortage in affordable housing, particularly for newly employed young adults and the elderly.”); William W. Merrill III & Robert K. Lincoln, *Linkage Fees and Fair Share Regulations: Law and Method*, 25 URB. LAW. 223, 223 (1993) (noting “a lack of available, affordable housing is a public policy problem [that] has led to the development of innovative programs in recent years, designed to increase the supply of housing that is affordable to low- and middle-income families”).

<sup>400</sup> Phoebe S. Liebig et al., *Zoning, Accessory Dwelling Units, and Family Caregiving: Issues, Trends, and Recommendations* (2006), reprinted in FAM. & AGING POL’Y 155, 159 (Francis Caro ed., 2006).

<sup>401</sup> *Policy: Ensure Land Use and Zoning Policies Support a Diversity of Housing Types*, HOUSINGPOLICY.ORG-MINNESOTA, [http://www.housingpolicy.org/toolbox/strategy/policies/diverse\\_housing\\_types\\_MN.html](http://www.housingpolicy.org/toolbox/strategy/policies/diverse_housing_types_MN.html) (last updated June 15, 2012, 9:46 AM).

during the Great Recession.<sup>402</sup> Families who lose their homes may move in with other family or friends, and high numbers of foreclosures are predicted to continue as an increasing number of families walk away from their homes.<sup>403</sup> In sixty-five percent of multigenerational households, the grandparent is the owner of the house.<sup>404</sup>

While the White House is quite a large dwelling space for the multigenerational First Family, most American homes are not equipped to provide an adjoined, separate area for adult family members' independent living. As discussed above, the United States practices neolocality, a residence pattern that "encourages newly married couples to establish a household independent of either extended family."<sup>405</sup> Zoning restrictions serve to encourage and reinforce neolocality, setting limitations on property use from the type of structure that can be built to the number and type of people who can reside therein.<sup>406</sup> While multigenerational families are not restricted from living together anymore, there are still housing ordinances that restrict the manner in which families can share space.<sup>407</sup>

#### A. Accessory Dwelling Units

In particular, there are zoning policies and actions that inhibit accessory dwelling units (ADUs), also known as granny flats, accessory apartments, or second units.<sup>408</sup> ADUs are separate living quarters on single-family lots that "are equipped with kitchen and bathroom facilities, and can either be attached or detached from the main residence."<sup>409</sup> There are many benefits of ADUs. All family members

<sup>402</sup> John W. Schoen, *Study: 1.2 Million Households Lost to Recession*, MSNBC.COM (Apr. 8, 2010, 9:53 AM), [http://www.msnbc.msn.com/id/36231884/ns/business-eye\\_on\\_the\\_economy/t/study-million-households-lost-recession](http://www.msnbc.msn.com/id/36231884/ns/business-eye_on_the_economy/t/study-million-households-lost-recession).

<sup>403</sup> *Id.*

<sup>404</sup> COLES, *supra* note 57, at 139.

<sup>405</sup> *Id.* at 56.

<sup>406</sup> Liebig et al., *supra* note 400, at 157–159.

<sup>407</sup> The Supreme Court recognized the constitutional right of extended family members to reside in a single-family home together in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). A zoning ordinance which narrowly defined "family" was determined to violate the Fourteenth Amendment Due Process Clause. *Id.* at 499–500.

<sup>408</sup> OFFICE OF POL'Y DEV. & RES., U.S. DEP'T OF HOUS. & URBAN DEV., ACCESSORY DWELLING UNITS: CASE STUDY 1 (2008), *available at* <http://www.huduser.org/portal/publications/adu.pdf>.

<sup>409</sup> *Id.*; MUN. RES. AND SRVS. CTR. OF WASH., ACCESSORY DWELLING UNITS (Oct. 1995), *available at* <http://www.mrsc.org/publications/textadu.aspx>.

can enjoy the independence of homeownership by utilizing ADUs as an intergenerational approach to housing, as any one generation can “host” another generation.<sup>410</sup> ADUs allow aging grandparents who may be exhibiting some health issues to maintain a level of independence without the high costs of moving to assisted living and nursing home environments.<sup>411</sup> Furthermore, seniors who struggle to meet rising property tax bills and energy costs as well as routine maintenance expenses can utilize ADUs to age in place, which is healthier for them.<sup>412</sup>

Many states do permit ADUs and have allowed for former illegal buildings to become legal.<sup>413</sup> There are many more states that do not permit ADUs, however, because of restrictions on housing density “as a means of retaining neighborhood character and limiting problems of noise, parking, [and] loss of privacy . . . .”<sup>414</sup> The states where ADUs are legal have found ways to address these concerns within ADU programs that require special permit review and also require that the occupant of the ADU be a member of the immediate family and of a certain age.<sup>415</sup> There may also be limitations on the number of persons who can reside in an ADU. Every three to five years, the permit usually must be renewed with current proof of all conditions.<sup>416</sup> There are some instances where these restrictions serve as a roadblock to multigenerational housing. For example, when there is a separate living space that could be rented by a homeowner, local ordinances require that the head-of-household live in the main house.<sup>417</sup> Essentially, a grandmother could not allow her adult child and his or her family to live in the main house and take the apartment above the garage. This type of restriction would also prevent a senior citizen from aging in place by inhibiting them from

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<sup>410</sup> SALKIN, *supra* note 395, at 907.

<sup>411</sup> Patricia E. Salkin, *Act Now: Accessory Dwelling Units Can Aid in Intergenerational Housing Crisis*, ST020 ALI-ABA 923, 925 (2011).

<sup>412</sup> *Id.* at 925–26.

<sup>413</sup> SALKIN, *supra* note 395, at 907–08, 910–11, 917, 919 (noting that cities in Massachusetts, Vermont, Michigan, California, and New York have local ordinances that provide zoning guidelines for communities to create compact, mixed-use senior housing and residential ADUs).

<sup>414</sup> Helen Jarvis, *Housing to Manage Debt and Family Care in the USA*, in *THE BLACKWELL COMPANION TO THE ECONOMICS OF HOUSING* 361, 371 (Susan J. Smith & Beverly A. Searle, eds., 2010).

<sup>415</sup> Salkin, *supra* note 411, at 926.

<sup>416</sup> *Id.*

<sup>417</sup> ACCESSORY DWELLING UNITS: CASE STUDY, *supra* note 408, at 4 (noting “[n]o more than one ADU per lot is allowed and the property owner must occupy the primary or accessory dwelling unit.”).

living in the smaller unit while renting out the main home to a young family.

In Hawaii, the government has allowed the construction of “ohana” dwelling units for well over thirty years.<sup>418</sup> The Hawaiian word “ohana” means extended family.<sup>419</sup> Though the initial law did not restrict the use of the additional housing to family members, use of the term “ohana” gave homeowners that mistaken impression.<sup>420</sup> Multigenerational living is a common residence pattern in Hawaii because of the land scarcity, the high cost of property, and economic constraints.<sup>421</sup> In addition, family culture in Hawaii supports older relatives being taken care of by their adult children, and adult children often remain at home with their parents in order to save up to purchase their own home.<sup>422</sup> Hawaii has the highest percentage of multigenerational families in the U.S.<sup>423</sup> The ohana law has been amended over time, and the current law allows for counties to adopt reasonable standards to permit the construction of two single-family dwelling units on any residential lot.<sup>424</sup>

#### B. Ordinances Restricting ADUs

Many local ordinances make it difficult for single family homeowners to add a grandmother suite on to an existing home. In most communities, landowners are required to obtain a permit to build an ADU.<sup>425</sup> The permit can be acquired “as of right” by a simple application process or through a more arduous conditional use process that involves a hearing.<sup>426</sup> Municipalities may impose standards on ADUs that include parking, height, setback, lot

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<sup>418</sup> Jody Lynn Kea, *Honolulu’s Ohana Zoning Law: To Ohana or Not to Ohana*, 13 U. HAW. L. REV. 505, 505 (1991) (noting that the State of Hawaii enacted legislation in 1981 that permitted property owners to build additional dwelling on residential lots).

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Multigenerational Living: A Home for the Whole Family in Hawaii*, National Association of Home Builders, <http://www.nahb.org/generic.aspx?sectionID=1217&genericContentID=185463>.

<sup>422</sup> *Id.*

<sup>423</sup> Haya El Nasser, *More multigenerational households in immigrant areas*, USA TODAY, Oct. 25, 2012, <http://www.usatoday.com/story/news/nation/2012/10/25/census-multigenerational-households/1653159/> (noting that 11.1 percent of Hawaiians live in multigenerational households).

<sup>424</sup> HAW. REV. STAT. § 46-4 (c) (West 2012).

<sup>425</sup> *Id.* at 3–7.

<sup>426</sup> RODNEY L. COBB & SCOTT DVORAK, AARP PUB. POL’Y INST., *Accessory Dwelling Units: Model State Act and Local Ordinance* 18 (2000), available at [http://assets.aarp.org/rgcenter/consume/d17158\\_dwell.pdf](http://assets.aarp.org/rgcenter/consume/d17158_dwell.pdf).

coverage, architectural review, and maximum size of unit.<sup>427</sup> These standards can be quite prohibitive depending on the size of the lot or the density of the municipality's population. For example, a local ordinance could require at least one parking space for each bedroom of an ADU.<sup>428</sup> A smaller size lot may not be able to accommodate the prescribed number of parking spaces, and there may also not be enough spaces available on the street.

*C. ADU Model State Act and Local Ordinance*

The ADU Model State Act and Local Ordinance set forth by the AARP Public Policy Institute provides states and local jurisdictions with model legislation to assist them in developing regulations for the creation of ADUs.<sup>429</sup> Three factors were highlighted as reasons for necessary policy changes in housing: changing demographics, changing economics, and changing community goals.<sup>430</sup> All state and local ADU legislation, ordinances and court cases were reviewed by the authors, and they also conducted interviews with state and local officials and ADU experts over a period of two years.<sup>431</sup> The authors completed further analysis and follow-up interviews across various regions and states in order to obtain a national perspective on ADU issues.<sup>432</sup>

The Model State Act provides a method to authorize and adopt a local ADU ordinance. It sets forth justifications for ADUs and establishes rules that local officials must follow for the aforementioned adoption. The Model Local Ordinance includes provisions that local officials can incorporate into their existing zoning ordinance to specify the requirements that must be met by a homeowner in order to obtain a permit to build an ADU.<sup>433</sup> The local ordinances provide three different options for varying communities, ranked as "optimal," "favorable," and "minimal," based on their potential to increase the availability of ADUs.<sup>434</sup> Comments that would help policymakers and community members draft ordinances that reflect their desires and concerns are also listed after each

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<sup>427</sup> *Id.*

<sup>428</sup> *Id.* at 21.

<sup>429</sup> COBB & DVORAK, *supra* note 426, at 6.

<sup>430</sup> *Id.* at 8.

<sup>431</sup> *Id.* at 6.

<sup>432</sup> *Id.* at 18.

<sup>433</sup> *Id.* at 11.

<sup>434</sup> *Id.* at 13.

option.<sup>435</sup> If all fifty states were to adopt the Model State Act and local ordinances were to follow suit and design ADU-friendly laws, grandparents could have national support on this housing issue. In order for large-scale action to be taken, the federal government could tie release of federal funding for housing to compliance with the ADU Model State Act and Local Ordinance.

#### VI. SOCIAL, ECONOMIC & LEGAL POLICY TENSIONS AT THE HEART OF CAREGIVING

Several family law scholars and practitioners have examined the idea of the American social contract, government support of families, and the need to address the conflict between work and family.<sup>436</sup> Others have explored issues regarding employment and tax from a child-centered perspective.<sup>437</sup> The solutions offered range from transformation of the work environment in order to better accommodate parents to provision of universal quality day care. Grandparent caregiving is often a substitute for paid child care by parents, and until recently, by the state as well. The multigenerational family is being utilized in the private sphere as a tool to support family members who are interdependent—and it either reflects the choice of citizens to reject autonomy for a more co-dependent life experience, or the coerced decision of seniors to sacrifice independence, economic solvency, and personal health for family survival. Increased government support for grandparents would undergird the familial bonds that already exist and naturally converge between young and old. The benefit that society receives from this interest convergence includes more stability and security for children as they are groomed into citizens, more support for marital

<sup>435</sup> COBB & DVORAK, *supra* note 426, at 13.

<sup>436</sup> JOAN WILLIAMS, UNBENDING GENDER, *supra* note 220; Nancy E. Dowd, *Essay: (Re)Constructing the Framework of Work/Family*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 331 (2010) (arguing for an alternative model based on function and relationships rather than marriage as a foundation for policy development regarding balance of families and work); Martha Albertson Fineman, *Contract and Care*, 76 CHI-KENT L. REV. 1403 (2001); Karen Kornblush & Rachel Homer, *The New Family Values Agenda: Renewing Our Social Contract*, 4 HARV. L. & POL'Y REV. 73 (2010) (identifying inequities within the Social Security Act for caregivers and tax penalties for working parents among other gender inequalities for working mothers); Symposium, *Panel Two: Who's Minding the Baby?*, 49 AM. U.L. REV. 901 (2000) (discussing how gender segregation in part-time work reinforces caretaking structure); Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI-KENT L. REV. 1441 (2001).

<sup>437</sup> WALDFOGEL, *supra* note 240 (setting forth key elements of a policy package for children, families, and working parents that center on family choice, quality care for children, and support for employment).

and non-marital couples, and rescue for struggling single parents. Imagine grandparents as the third wheel for a tricycle or the second wheel for a regular two-wheel bike. In either situation, they provide the necessary support for the family structure that exists to keep moving forward.

There are a host of tensions that arise from legally supporting intergenerational caregivers. While this Article is unable to fully address each of these challenges, it will set forth the issues that need to be resolved through careful analysis in a future piece. The following is a roadmap of the territory that must be traversed to promote valued care work for children and eventually, grandparents themselves.

A. *Interest Convergence of Babes and Elders*

1. Vulnerability

As mentioned earlier, the very old and the very young share the same kind of vulnerability. Martha Fineman's concept of the "vulnerable subject" contrasts children and the elderly, the prototypical examples of vulnerable populations, with the universal human condition.<sup>438</sup> Rather than utilize the limited and negative association of the term "vulnerable," Fineman expands the definition to encompass every person who is susceptible to harm, injury, or misfortune.<sup>439</sup> By virtue of human embodiment, Fineman asserts that the possibility of devastating accidental or intentional events in life is unavoidable.<sup>440</sup> By acknowledging this universal position, she argues that societal institutions, including the government, should provide assistance during these periods of vulnerability.<sup>441</sup> It is difficult to rebut that the state should not be a responsive and responsible institution when there is a shared vulnerability tied to the human reality.<sup>442</sup> Human beings need one another, and the commonality of caretaking by family members as they age marks a point where the human condition of children and the elderly converge.

One example of an important way that seniors and youth interests converge is through the Social Security system. As stated before, the pay-as-you-go structure relies on present-day workers to pay into the reserve so that elderly retired workers can receive

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<sup>438</sup> Fineman, *The Vulnerable Subject*, *supra* note 203, at 8.

<sup>439</sup> *Id.* at 8–9.

<sup>440</sup> *Id.* at 9.

<sup>441</sup> *Id.* at 10.

<sup>442</sup> *See id.* at 12.



benefits.<sup>443</sup> Because of the swell in the number of baby boomers, the ratio of workers to retirees will be reversed and significantly lower than in the past.<sup>444</sup> Moreover, the quality of education provided to youth now will affect their ability to rise to the middle class.<sup>445</sup> Since there is a higher birth rate among minorities than whites, Latino, African American, and other minority children will make up the majority of the workforce in twenty years.<sup>446</sup> The quality of secondary education for minority youth has long been called into question because of underfunded and often segregated school systems.<sup>447</sup> Unless the majority of white baby boomers recognize the link between them and tomorrow's generation, they may be living on much less than they expected if educational and economic opportunities for minority youth do not improve.<sup>448</sup>

## 2. Lower Resources

A glaring similarity between the youngest and oldest members of our society is the commonality shared between their caregivers. They are mostly women who work outside the home, and they spend more than twenty hours per week providing unpaid care to a child or elderly parent.<sup>449</sup> Their unpaid contributions total more than \$450 billion.<sup>450</sup> Just as family members comprise the nation's core long-

<sup>443</sup> Benjamin A. Templin, *Social Security Reform: Should the Retirement Age Be Increased?*, 89 OR. L. REV. 1179, 1185 (2011).

<sup>444</sup> *Id.* at 1186; Smith, *supra* note 247, at 352.

<sup>445</sup> Templin, *supra* note 443, at 1202 (noting "a correlation exists between higher education and the ability to work longer. And, [w]orking longer will improve the retirement savings of individuals, reducing the possibility of exhausting their resources in old age"); MELISSA M. FAVREAU & RICHARD W. JOHNSON, URB. INST., *RAISING SOCIAL SECURITY'S RETIREMENT AGE* (2010), available at <http://www.urban.org/uploadedPDF/412167-Raising-Social-Security.pdf>.

<sup>446</sup> William H. Frey, *Baby boomers had better embrace change*, WASH. POST, June 8, 2012, available at [http://www.washingtonpost.com/opinions/baby-boomers-had-better-embrace-change/2012/06/08/gJQAwe5jOV\\_story.html](http://www.washingtonpost.com/opinions/baby-boomers-had-better-embrace-change/2012/06/08/gJQAwe5jOV_story.html).

<sup>447</sup> *Id.*

<sup>448</sup> *Id.* (noting that the cultural gap between the white boomers and the growing population of immigrants is reflected in a Pew Research Survey that sets forth that half of white boomers believe that the growing number of newcomers from other countries represents a threat to traditional U.S. customs and values).

<sup>449</sup> Mary Jo Gibson & Ari Houser, *Valuing the Invaluable: A New Look at the Economic Value of Family Caregiving*, AARP PUB. POL'Y INST. 1, 4, 10 (2007), available at [http://assets.aarp.org/rgcenter/il/ib82\\_caregiving.pdf](http://assets.aarp.org/rgcenter/il/ib82_caregiving.pdf).

<sup>450</sup> *Id.* at 1; see Lynn Feinberg, Susan C. Reinhard, Ari Houser & Rita Choula, AARP PUB. POL'Y INST., Fact Sheet, *Valuing the Invaluable: 2011 Update: The Economic Value of Family Caregiving in 2009*, at 1, (June 2011), available at <http://assets.aarp.org/rgcenter/ppi/ltc/fs229-ltc.pdf> ("The estimated economic value of [family caregiver's] unpaid contributions was approximately \$450 billion in 2009, up from an estimated \$375 billion in 2007.").

term care (LTC) system, grandparents make up at least thirty percent of the caregivers for children under the age of five whose mothers are employed.<sup>451</sup> They both suffer the loss of wages, health insurance, and other job benefits, retirement savings, and social security benefits, which has serious consequences for caregivers.<sup>452</sup> “The cost of funding more services and supports for caregivers is minute compared to the value of their contributions.”<sup>453</sup>

Some of the suggested support for caregivers of the elderly emulates the suggestions made in this Article and by other legal scholars regarding caregivers of children. Expansion of the FMLA to cover more workers, for longer periods, with pay, is a similar solution. Further, allowing care for more than just “a serious health condition” would enlarge the scope of options caregivers would have in order to provide ongoing health or educational assistance to an elderly relative or young child. Another analogous suggestion is the provision of financial assistance through a tax credit for caregiving.<sup>454</sup> The theories for additional government support of the elderly and the very young stem from the recognition that the family as a private entity is a necessary societal institution for fulfillment of the public social contract.<sup>455</sup> As the needs of seniors and children synchronize, it is useful and efficient for law and policy considerations to coordinate the comparable demands on their caregivers.

### 3. Limited Choices

Young children and the elderly face another common circumstance because of their vulnerable condition—limited choices in care providers. Care for elders and babes is either provided by a spouse, an adult child or parent in the home; by a paid caretaker in a facility such as an assisted living home or daycare; or by a relative or friend in their home or the home of the vulnerable subject. While the federal government provides some options for care for small children and senior citizens, only persons in certain categories qualify for these programs. A relatively small group of children from lower-

<sup>451</sup> See U.S. CENSUS BUREAU, *Who's Minding the Kids? Child Care Arrangements: Spring 2010 – Detailed Tables*, Table 1A (2010).

<sup>452</sup> Gibson & Houser, *supra* note 449, at 3; Richard Kaplan, *Federal Tax Policy and Family-Provided Care for Older Adults*, 25 VA. TAX REV. 509, 511–515 (2005).

<sup>453</sup> Gibson & Houser, *supra* note 449, at 7.

<sup>454</sup> *Id.* at 8 (“A \$3,000 tax credit . . . would help to offset some of the direct expenses of eligible caregivers.”).

<sup>455</sup> See FINEMAN, *THE AUTONOMY MYTH*, *supra* note 19, at 228, 233; see also Martha Albertson Fineman, “Elderly” as *Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L.J. 71, 86–88 (2012).

income families are eligible to attend Head Start, a federally sponsored educational program for children from birth to age five.<sup>456</sup> Only poor senior citizens with few assets can obtain Medicaid in order to pay for long-term care.<sup>457</sup> Private paid care for children and the elderly is expensive.

Since the government identifies provision of care to individuals as a private family matter, there is no comprehensive program such as universal daycare for children or the elderly provided to the general public. In lieu of an extension of the social welfare net, the government could opt to incentivize the social assets<sup>458</sup> already in place to deal with the vulnerability that comes with age at the beginning and end of life. There are many other worthy social services that the federal government incentivizes through tax refunds and credits for individuals and corporations.<sup>459</sup>

### B. *A Difficult Dance*

Studies on the impact of caring for grandchildren on grandparents' health are mixed. The effect of grandparent care depends on several factors, namely the characteristics and context of the caregiving situation.<sup>460</sup> One study illustrates that senior citizens who babysit for children actually have health benefits because they lead more active lifestyles, eat healthier meals, or reduce smoking.<sup>461</sup> The National Institute of Health conducted a study to examine the health effects of caring for grandchildren on grandparents' health in 2007. The study revealed that there was "no evidence to suggest that

<sup>456</sup> ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *Head Start Program Fact Sheet Fiscal Year 2011*, at 1 (2011) available at <http://eclkc.ohs.acf.hhs.gov/hslc/mr/factsheets/docs/hs-program-fact-sheet-2011-final.pdf>.

<sup>457</sup> Richard L. Kaplan, *Retirement Planning's Greatest Gap: Funding Long-Term Care*, 11 LEWIS & CLARK L. REV. 407, 422–23 (2007).

<sup>458</sup> Fineman, *The Vulnerable Subject*, *supra* note 203, at 13 (noting the systems in society that provide resources, advantages, or coping mechanisms when people face misfortune). Fineman cites to Peadar Kirby and his reference of these systems as "assets" that give individuals resilience in the face of vulnerability. *Id.* Social assets are "networks of relationships from which we gain support and strength, including family and other cultural groups and associations." *Id.* at 15.

<sup>459</sup> Nancy J. King & Brian J. King, *Creating Incentives for Sustainable Buildings: A Comparative Law Approach Featuring the United States and the European Union*, 23 VA. ENVTL. L.J. 397, 410–11 (2005); Marianne Tyrrell & John C. Dernbach, *The "Cash For Clunkers" Program: A Sustainability Evaluation*, 42 U. TOL. L. REV. 467, 487–88 (2011).

<sup>460</sup> Mary Elizabeth Hughes et al., *All in the Family: The Impact of Caring for Grandchildren on Grandparents' Health*, 62(2) J. GERONTOL. B. PSYCHOL. SCI. SOC. SCI. S108, S109 (2007).

<sup>461</sup> *Id.*

caring for grandchildren has dramatic and widespread negative effects on grandparents' health and health behavior."<sup>462</sup> Where health disadvantages appear among grandparent caregivers, the findings suggest that these health issues are as a result of prior characteristics rather than provision of care.<sup>463</sup> Grandmothers who care for children in skipped-generation households are more likely to experience negative changes in health, behavior, depression, and self-rated health.<sup>464</sup>

C. *Leave Me Alone*

*Grandmothers everywhere should beware. Their quiet years—playing Scrabble, reading books, drinking tequila sunrises—are distinctly imperiled.*<sup>465</sup>

A conflict arises when one pushes a certain type of family structure, even an intergenerational one; namely, it subverts the will of some family members. One of the social tensions highlighted by intergenerational caregiving is the lack of desire on the part of some grandparents to provide care for their grandchildren. This attitude could be from the notion that they want to be left alone or from the inability to provide care due to health issues. The gendered construction of caregiving results in what may be a forced choice and continuing inequalities for aging women. Historically women have usually sacrificed much for their family's well-being. Mrs. Robinson's comment that "you do what you have to do for family,"<sup>466</sup> typically equates to some negative consequence for the women in the family. Because women are typically the caregivers in most families, this issue of choice affects them the most. Reforms in the areas of employment, tax, and housing are intended to expand their choices, not constrict them into a definite role. It must also be acknowledged that there could be negative consequences for the grandchildren, depending on the aptitude for caretaking of the grandmother, as well as whether her disinterest in caretaking creates a precarious environment for the children. Striking a balance between incentivizing options for grandparents and forcing decisions based on economic circumstances must be addressed.

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<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> *Id.*; Jessica Dixon Weaver, *African-American Grandmothers: Does the Gender-Entrapment Theory Apply? Essay Response to Professor Beth Richie*, 37 WASH. U. J. L. & POL'Y 153, 167 (2011).

<sup>465</sup> Roiphe, *supra* note 9.

<sup>466</sup> Plante, *supra* note 8.

D. *The Sandwich Generation*

While government may not take on the burden of providing care for all children, it does bear the cost of family instability affecting children. The legal treatment of care work provided by family members is significant in determining questions of equity and efficiency pertaining to government shouldering familial responsibilities. Caregiving by grandparents is a two-sided coin. On the one hand, they often provide a critical, free, or low-cost support network for the offspring of their adult working children. On the other hand, as they age, their need for care increases, and their adult children must juggle aiding them in daily activities while balancing the needs of their own nuclear family and work. The “sandwich generation” consists of working, middle-aged, baby boomers caught in between raising children and caring for aging parents at the same time.<sup>467</sup> The dilemma that the sandwich generation faces is an economic standoff between payment for their children’s future or their parents’ decline.

Approximately a quarter of adult children over the age of fifty care for their aging parents.<sup>468</sup> “The percentage of adult children providing personal care and/or financial assistance to a parent has more than tripled over the last fifteen years.”<sup>469</sup> Both women and men lose a significant amount in wages, pensions, and social security benefits because they leave the labor force earlier than expected due to caregiving responsibilities.<sup>470</sup> A conservative estimate of the total loss for the average fifty-year-old male or female caregiver is \$303,880.<sup>471</sup> The difference between the loss of earnings in income and retirement benefits for men and women is approximately a little over \$50,000.<sup>472</sup>

The sandwich generation is short on time and money. They do not have enough time to provide on-going, long-term care for their aging parents, continue to work full-time, and parent, nor do they have enough money to put their children through school, pay for the

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<sup>467</sup> Peggie R. Smith, *supra* note 247, at 365; Beverly Sanborn & Sally Bould, *Intergenerational Caregivers of the Oldest Old*, in *FAMILIES: INTERGENERATIONAL AND GENERATIONAL CONNECTIONS* 125, 135 (Susan K. Pfeifer & Marvin B. Sussman eds., 1991).

<sup>468</sup> THE METLIFE MATURE MARKET INSTITUTE, *THE METLIFE STUDY OF CAREGIVING COSTS TO WORKING CAREGIVERS: DOUBLE JEOPARDY FOR BABY BOOMERS CARING FOR THEIR PARENTS* 2 (June 2011).

<sup>469</sup> *Id.*

<sup>470</sup> *Id.*

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

additional costs of caretaking for their parents, and cover the costs of their life after retirement. As with child care, women bear the brunt of caretaking of elderly family members, but men also do a fair share of caretaking of aging parents. As support amongst family members is exchanged, another fundamental question to address is how much the government should aid families in supporting its dependent members.

*E. Altruistic Care Work vs. Paid Grannies*

The very essence of being a member of a family is being a part of a group that loves and cares for one another because of blood ties or committed life-long relationships. Because grandparents care for their grandchildren and sacrifice for them out of love, the argument could be made that there is no reason that the government should intervene in the private choices of senior citizens when they opt to take on unpaid care work rather than continue to build their nest egg. However, this argument does not justify turning a blind eye to the needs of the elderly population when their altruistic choices or family obligations will ultimately result in a burden on the state.

Marketized care has been criticized by those on the left and the right. The assumption made by both camps is that paid and unpaid care workers are motivated by very different things. Caregivers “who work for money are motivated purely by materialism, self-interest, and greed, whereas those who work without pay are motivated by altruism, spiritual values, and affection.”<sup>473</sup> Ethnic studies scholar Evelyn Nakano Glenn discusses the idea of “social citizenship” and how it should be redefined in order to “make care central to the rights and entitlements of citizens.”<sup>474</sup> She argues that reversing the present situation where care is defined as a private responsibility will entail three elements: 1) establishing a right to care as a core right of citizens; 2) establishing caregiving as a public social responsibility; and 3) according caregivers recognition for carrying out a public social responsibility.<sup>475</sup> The extent to which a ‘cheer factor’<sup>476</sup> motivates grandparents to care for their grandchildren despite any negative drawbacks on their physical, social or financial status is important when considering legal and policy issues regarding

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<sup>473</sup> Glenn, *supra* note 242, at 197.

<sup>474</sup> *Id.* at 190.

<sup>475</sup> *Id.*

<sup>476</sup> Professor Jonathan Cohen coined the term ‘cheer factor’ to mean the high degree of satisfaction that grandparents derive from being in the company of and caring for grandchildren.

whether care work should be treated as a right or responsibility.

#### F. *Footing the Granny-Care Bill*

The United States is weathering what perhaps may be its longest recession and highest deficit in history.<sup>477</sup> Demands for tax increases and spending cuts consume the partisan politics of the United States Congress,<sup>478</sup> so any additional spending requests will likely be met with resounding negativity. It is fairly well known that the bulk of the United States budget is allocated to the national defense system, Social Security, and Medicare.<sup>479</sup> As previously mentioned, there are concerns regarding the large number of senior citizens who make up the baby boomer generation, particularly the notion that they may turn the Social Security system on its head because it was not set up to accommodate a citizenry where the retired outnumber the working masses.<sup>480</sup> However, the country and its governing bodies have declared the need for comprehensive tax reform, and the suggestions offered in this Article could be part of the new tax scheme to address the modern family. Moreover, many of the proposals for incentivizing intergenerational caregiving will not cost the United States any more money than it is already spending. For example, the benefits of grandparent caregiving far outweigh the alternative—inadequate and unsafe child care. Early child care programs and

<sup>477</sup> CONG. BUDGET OFF., AN UPDATE TO THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2012 TO 2022, at 1 (Aug. 2012), available at [http://cbo.gov/sites/default/files/cbofiles/attachments/08-22-2012-Update\\_to\\_Outlook.pdf](http://cbo.gov/sites/default/files/cbofiles/attachments/08-22-2012-Update_to_Outlook.pdf) (“Although this year will be the fourth in a row with a deficit exceeding \$1 trillion, the deficit this year will be about three-quarters the size it was three years ago when measured relative to the size of the economy.”); NAT’L BUREAU OF ECON. RES. BUS. CYCLE DATING COMM. REP. 1 (Sept. 20, 2010), <http://www.nber.org/cycles/sept2010.pdf>; Murrey Jacobson, *Recession Was Longest in Modern Record, Report Reveals*, PBS NEWSHOUR (Sept. 20, 2010 3:40 PM), <http://www.pbs.org/newshour/rundown/2010/09/recession-was-longest-in-modern-record.html>; Steve Matthews, *Longest U.S. Slump Since ‘30s Ended in June ‘09, Group Says*, BLOOMBERG (Sept. 20, 2010, 4:01 PM), <http://www.bloomberg.com/news/2010-09-20/u-s-recession-ended-in-june-2009-was-longest-since-wwii-nber-panel-says.html>.

<sup>478</sup> Assoc. Press, *Recession, \$1 trillion deficit likely without U.S. budget deal*, NEWSDAY (Aug. 22, 2012, 12:41 PM), <http://newyork.newsday.com/news/nation/cbo-recession-1-trillion-deficit-likely-without-u-s-budget-deal-1.3919917>.

<sup>479</sup> CTR. BUDGET & POL’Y PRIORITIES, WHERE DO OUR FEDERAL TAX DOLLARS GO? 1 (Aug. 13, 2012), available at <http://www.cbpp.org/files/4-14-08tax.pdf>.

<sup>480</sup> Janet Stidman Eveleth, *Baby Boomers Retire*, 42-FEB MD. B.J. 4, 5 (2009) (noting “[t]he first wave of baby boomers is hitting the age of retirement and the ripple effect of this powerful generation transitioning into senior citizens will reverberate across every sector of American society. Baby boomer retirees are likely to flood Social Security, Medicare, Medicaid and our country’s health care system and change the tide of our labor force, economy and the practice of law.”) *Id.*

after-school programs provide significant benefit to communities and reduce delinquency risk factors and later adult crime.<sup>481</sup> More productive adults in society produce more economic returns for the market, rather than the costs of housing a juvenile or adult offender in jail, or providing for a child in foster care.<sup>482</sup> What the country deems worthy of funding is important to whether intergenerational caregiving and multigenerational living find support within state legislatures and the U.S. Congress.

## VII. CONCLUSION

Marian Robinson's status as the live-in First Grandmother is an example of a growing trend in the United States—the multigenerational family. Mrs. Robinson also reflects another new development in American families: grandparents helping their adult children with caregiving. Marian Robinson gave up a lot to move into the White House—her job, her home environment, and part of her autonomy.<sup>483</sup> For the sake of family, Mrs. Robinson has sacrificed much. Many grandparents treat their role as caregiver like a profession, and they sacrifice jobs, residences, money, time, and part of their independence in order to 'retribute' their family. Often times, these grandparents are not as fortunate as Mrs. Robinson, and their selfless commitment to family not only reduces their current income, but also negatively affects their retirement funds and ability to care for themselves in the future. As the number of citizens over the age of sixty-five increases and the average age of grandparents decreases, these fundamental changes in the family caregiving network pose a threat to a significant portion of our population, particularly women, who make up the majority of grandparent caregivers.

When "doing what you have to do" for family significantly impacts a growing number of grandparents in our country, it is vital that the law adjusts in order to accommodate differences in the family structure. This Article sets forth a foundational analysis regarding how various laws work together to disadvantage today's modern grandparent. There are three legal areas where

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<sup>481</sup> David R. Katner, *Delinquency and Daycare*, 4 HARV. L. & POL'Y REV. 49, 50 (2010).

<sup>482</sup> See *id.*

<sup>483</sup> Katherine Skiba, *Michelle Obama's Brother Writes a Memoir*, CHI. TRIB., Apr. 4, 2010, [http://articles.chicagotribune.com/2010-04-02/news/ct-met-craig-robinson-book-0403-20100402\\_1\\_fraser-robinson-craig-robinson-marian-robinson](http://articles.chicagotribune.com/2010-04-02/news/ct-met-craig-robinson-book-0403-20100402_1_fraser-robinson-craig-robinson-marian-robinson) (quoting Marian Robinson's foreword, "[a]s a compromise, I opted to move to the White House after all, at least temporarily—while still reserving lots of time to travel and to maintain a certain amount of autonomy").



grandparents are discouraged from taking an active caretaking role in their grandchildren's lives—employment, tax, and housing—which directly impact the financial landscape of elderly caregivers. The impact of this family evolution on the older generation has yet to be examined from a legal perspective that goes beyond the traditional spectrum of family law. This Article fills a gap in the legal analysis of family law reform in that it focuses on two underdeveloped topics: 1) grandparents who are an integral part of the family, and 2) the impending crisis of a significant aging population. It argues that the transubstantive nature of family law requires advocacy for grandparents beyond custody and visitation rights. Expanding social welfare for grandparent caregivers can revise the concept of the system of laws that supports family care work and can reform the administration of federal, state, and local regulations governing work and family.

This Article explores how the multigenerational family is being utilized in the private sphere as a tool to support family members who are interdependent and how it reflects the choice of citizens to reject autonomy for a more co-dependent life experience. The multigenerational home can better equip the next generation and serve as a safety net for children and aging yet able members of our society. Cultural traditions of many minority families promote intergenerational caregiving as a means of transferring values, customs, religion, and language. Although research shows that grandparent involvement in their grandchildren's lives results in multiple positive outcomes, government support for the extended family network lags behind the social framework of today. Because of the growing record numbers of older citizens, this Article argues that federal and local governments should be pressed to provide public financial support for both normative and alternative caregiving networks.

Amending the Family Medical Leave Act to include grandparents and expand the reasons allowed for taking a leaves of absence from work would be one way of supporting contemporary extended families who share the daily tasks of child care. Considering how to provide better retirement benefits to working grandmothers who are split between caretaking and the market is another means by which the federal government could lend assistance. Comprehensive tax reform that lowers tax rates for lower-income custodial grandparents and allows tax credits for grandparents who provide a home and substantive child care for their grandchildren would help the financial bottom line for many

struggling elderly caregivers. Adoption of the ADU Model State Act and Local Ordinance would establish the basis for encouraging seniors to age in place while still maintaining some autonomy. While other modern countries in Europe and Australia have seriously examined the role of grandparent caretakers within the scheme of their national economy and workforce, the United States lags behind in tangibly acknowledging the growing importance of intergenerational caregiving. The United Kingdom, France, and Sweden are some of the countries that have adopted laws to reduce the economic strain of grandparent caregiving. Undergirding senior citizens, women, and children has been the crux of the benevolence of U.S. social welfare, but several social, economic and legal tensions at the heart of caregiving must be addressed before significant changes can occur.

In the final analysis, there are theoretical questions that this Article posits for future research. Can the common dependent care interests of young children and senior citizens be conflated to create a unified approach for family caregiving in the U.S.? Can the U.S. afford to place a more tangible value on care work for the benefit of children and the elderly? Does the role that altruism plays in the provision of care for family members defeat efforts to expand public government support for what has historically been a private responsibility? These inquiries must be fully addressed in order for America to embrace the reality of the shift in cultural norms that intergenerational caregiving creates for families.