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THE ROLE OF PRIVATE RESPONSIBILITY IN CLOSING THE GAP BETWEEN KNOWLEDGE AND PRACTICE IN LONG-TERM CARE

Marshall B. Kapp, J.D., M.P.H.*

INTRODUCTION

My friend and nationally respected aging policy analyst Dr. Larry Polivka is absolutely correct about the very important goal of closing the gap between knowledge and practice in the United States long-term care financing and delivery system. He is also correct about many of the challenges that must be surmounted if we are to reasonably achieve this paramount objective in time to avert social and political disaster. Dr. Polivka offers a straightforward public policy prescription for overcoming the current challenges; although I concur with certain aspects of his policy prescription, it is his overwhelming emphasis on the public sector while substantially minimizing private sector potential with which I must find fault.

I briefly enumerate in the next section some basic points of congruence between Dr. Polivka's viewpoint and my own. I then offer, in response to his policy recommendations, my own ideas about the significance of personal responsibility as a vital

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1. Larry Polivka, Closing the Gap Between Knowledge and Practice in the U.S. Long-Term Care System, 10 ELDER'S ADVISOR (forthcoming Jan. 2008). Dr. Polivka uses the word "system" to describe the long-term care picture in the United States, although that word is not really an accurate descriptor for the present situation. See generally Martin Kitchener & Charlene Harrington, U.S. Long-Term Care: A Dialectic Analysis of Institutional Dynamics, 45 J. HEALTH & SOC. BEHAV. 87 (2004). For reasons made clear below, I prefer to characterize the long-term care picture as a "marketplace" rather than a "system".

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component of any appropriate strategy for moving the United States away from our present long-term care practice, toward a financing and delivery paradigm that is more attuned to the kinds of care we should be making available to older and disabled individuals needing help in navigating the inevitable vicissitudes of daily living.2

WHAT WE KNOW: POINTS OF AGREEMENT

There is probably little serious dispute, even by the professional representatives of the American nursing home industry,3 that—as thoroughly documented by Dr. Polivka4—we know by now that it is better for most people needing long-term care to receive that care in home and community-based settings rather than in nursing homes.5 In other words, it is best in terms of individual and family desires,6 as well as considerations of quality and economic efficiency,7 to minimize (and ideally eliminate altogether) premature or unnecessary admissions to


3. The primary national trade associations advocating the positions of the American nursing home industry are the American Health Care Association (AHCA), http://www.ahcancal.org (last visited August 26, 2008), and the American Association of Homes and Services for the Aging (AAHSA), http://www.aahsa.org (last visited August 26, 2008). AHCA represents both for-profit and not-for-profit nursing homes. AAHSA represents only not-for-profit entities.

4. See Polivka, supra note 1.

5. See Kevin Eckert et al., Preferences for Receipt of Care Among Community-Dwelling Adults, 16 J. AGING & SOC. POL’Y 49 (2004); Michelle Doty et al., Health Care Opinion Leaders' Views on the Future of Long-Term Care, Commonwealth Fund Data Brief, Pub. 1157, Vol. 10, 3 (July 2008). Even AHCA now includes as members, besides its nursing home core, assisted living and subacute care providers. See http://www.ahca.org/about_ahca (last visited August 26, 2008). AAHSA, in addition to its nursing home base, also represents adult day care providers, home health agencies, assisted living facilities, continuing care retirement communities, senior housing providers, and adult community centers.

6. See Eckert et al., supra note 5, at 60.

nursing homes and to reduce the lengths of stay following necessary admissions as much as possible.

We also know, albeit unhappily, that too many public and private dollars being used to purchase long-term care today continue to go toward paying for nursing home care despite the largely successful efforts of the American aging enterprise to keep, or move, many extremely disabled persons out of nursing homes and to care (quite adequately for those clients) in home and community-based settings. Put differently, perhaps the major gap between knowledge and practice is the disparity between long-term care service delivery, on one hand, and the allocation and expenditure of financial resources devoted to buying long-term care, on the other; succinctly, the money has not followed the clients.

Unless this gap (which in many states is really more of a chasm) is addressed effectively and expeditiously, American society runs the substantial risk of repeating many of the same mistakes that were made as part of the concerted, largely litigation-assisted, deeply flawed movement to deinstitutionalize huge state mental illness institutions in the late 1960s and the 1970s. It was a social movement in which the

8. In fiscal year 2005, the national Medicaid spending for home and community-based long-term care amounted to just 37% of total Medicaid spending for long-term care, even though fewer than 5% of Americans over age 65 are nursing home residents at any particular moment. ARi Houser et al., Across the States: Profiles of Long-Term Care and Independent Living 11, AARP Pub. Pol’y Inst. 10 (7th ed. 2006).

9. This phrase is borrowed from Carol L. Estes, The Aging Enterprise (1979).


12. For example, in fiscal year 2005, Mississippi Medicaid spending for home and community based long-term care amounted to only 13% of its total Medicaid long-term care spending. For the District of Columbia, the figure was just 16%. Houser et al., supra note 8, at 11. But see generally Tracy Bach, Choices for Care: Consumer Choice and State Policymaking Courage Amid Medicaid’s Shifting Entitlement to Long-Term Care, 9 Elder’s Advisor 269 (2008) (describing the Vermont Medicaid waiver success story).

13. See generally Deinstitutionalizing Long-Term Care: Making Legal
failure of sufficient public dollars to accompany the people who were swept or kept out of the public institutions resulted not in would-be institutionalized mental patients becoming happily and productively integrated into a welcoming community environment, but rather in *de facto* trans-institutionalization of the erstwhile mental institution population into homeless shelters, the criminal justice system, or nursing homes.¹⁴

Dr. Polivka is on the mark in identifying and lamenting this gap in the current long-term care context. Nonetheless, a couple of cautions ought to be considered by those who might be too intent on quickly and aggressively eliminating the disequilibrium between long-term care client need and the funding to address that need. First, despite enormous progress in the capacity of home and community-based long-term care providers to serve very disabled individuals outside of nursing homes, it is inevitable that there will always be some people—because of a combination of chronic, severe disabling conditions and the lack of an adequate family and community support structure—who will need nursing home care for some period of time during their lives.¹⁵ We must be careful to fund surviving nursing homes sufficiently well so that they can provide decent care for the residents who need to be cared for there on either a short-term or lengthy basis.¹⁶

Second, we should not be overly optimistic about the likely impact of the United States Supreme Court’s 1999 decision in

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¹⁶ Joshua M. Wiener, An Assessment of Strategies for Improving Quality of Care in Nursing Homes, 43 Special Issue, Gerontologist 19, 24 (2003) ("The nursing home industry has warned that Medicaid reimbursement rates are already too low and that further reductions would adversely affect the quality of care.").
Olmstead v. L.C. ex rel. Zimring on radically transforming the American long-term care financing scenario.\textsuperscript{17} The Court majority interpreted Title II of the Americans With Disabilities Act and its implementing regulations to require that, when the government finances services for a disabled person (such as states do when they subsidize long-term care through their respective Medicaid programs), the purchased services must be provided in the most integrated, least restrictive available setting consistent with the disabled person’s needs.\textsuperscript{18} This judicial decision has spawned significant activity at both the national and state levels aimed at exploring alternatives to nursing home placements for many chronically disabled individuals.\textsuperscript{19} Nevertheless, as earlier social activists in other contexts ultimately came to learn when they sought to use litigation as an instrument to reform institutions such as schools, prisons, and hospitals for the mental ill and developmentally disabled, the judicial branch of government lacks any legal power to authorize or appropriate the expenditure of funds; that spending function is solely the province of the politically accountable legislative branch of government.\textsuperscript{20} Thus, in light of the American constitutional concept of separation of powers,\textsuperscript{21} the judiciary may proclaim ambitious constitutional or statutory rights and responsibilities, but only the legislature has the power to spend whatever money is necessary to actually effectuate those judicially enunciated rights and responsibilities.\textsuperscript{22} Consequently, the potential for bold systemic or marketplace change embodied in the Olmstead precedent is not self-executing.

\begin{itemize}
\item \textsuperscript{17} Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 604 (1999).
\item \textsuperscript{18} See id. at 587-601.
\item \textsuperscript{20} GERALD N. ROSENBERG, THE HOLLOW HOPE 1-3 (1991).
\item \textsuperscript{21} JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 151-220 (10th ed. 2006).
\item \textsuperscript{22} ROSENBERG, supra note 20.
\end{itemize}
With those caveats in mind, then, I endorse Dr. Polivka’s call for a hearty (and thus far largely absent outside the boundaries of academic journals and conferences)\textsuperscript{23} national conversation regarding the optimal mix of public and private responsibility\textsuperscript{24} for correcting the gap between what we know about where long-term care should be provided (and where it increasingly is being provided), on one hand, and our continued tangible spending patterns skewed toward institutional providers, on the other. Dr. Polivka and I diverge somewhat, however, in our respective views about the specific policies toward which that needed national conversation ultimately ought to lead.

**POLICY CHOICES: LEVERAGING PUBLIC AND PRIVATE RESPONSIBILITY**

The broad policy alternatives available for addressing the gap between knowledge and practice in United States long-term care, that is, for addressing the problem of dollars not following the clients in need, are rather limited. I presume that Dr. Polivka and I would concur, as would virtually everyone else except the most extreme libertarian thinkers,\textsuperscript{25} that simply abandoning older disabled individuals totally to their own luck in weathering the contingencies of life—as those contingencies of health and wealth might apply to long-term care needs—is not a viable ethical and political option. Eliminating the survival-of-

\textsuperscript{23} David G. Stevenson, *Planning for the Future--Long-Term Care and the 2008 Election*, 358 N. Eng. J. Med. 1985, 1985 (2008) ("[T]he candidates in the 2008 presidential race have been virtually silent about long-term care policy. Health care received substantial attention during the 35 Democratic and Republican [primary] debates (garnering more than 1000 mentions), but almost nothing has been said about long-term care.").


the-fittest approach of social Darwinism from the conversation essentially leaves three possibilities on the policymaking table: "enhancing private long-term care insurance, replacing the current welfare-based system with a public social insurance program, and introducing a hybrid public-private system."27

I present public and private responsibility here in a basically dyadic, either/or way, but of course in this arena they are not mutually exclusive. Rather, these approaches need to be symbiotic and mutually reinforcing.28

Any solution will require shared responsibility among individuals, families, and government. However, the mechanisms that would be needed to extend the Medicaid safety net or to create a new benefit under Medicare, as well as the trade-offs inherent in such moves, differ substantially from those that would be needed to expand incentives for private long-term care insurance or to offer greater support to informal caregivers. The former strategies emphasize government's role in targeting a defined set of services to those in need, whereas the latter strategies primarily subsidize the ability of individuals and families to meet their own current or future care needs.29

PUBLIC RESPONSIBILITY

Dr. Polivka argues in favor of establishing a universal, non-means tested social insurance program as a primary vehicle to finance long-term care in the United States.30 As a first (rather than a last or catastrophic) resort, this proposal is seriously flawed. A broadly expanded entitlement program of the sort advocated would impose an enormous financial burden on

26. See e.g. DAVID P. CROOK, DARWIN'S COAT-TAILS: ESSAYS ON SOCIAL DARWINISM (2007).
27. Howard Gleckman, How Can We Improve Long-Term Care Financing? Boston College Center for Retirement Research, Number 8-8, 1 (June 2008).
28. Doty et al., supra note 5, at 3 ("[T]he most endorsed approach among leaders from all sectors is that government and individuals should share the responsibility for paying for long-term care.").
30. Polivka, supra note 1.
future generations, on top of all the other suffocating financial burdens\textsuperscript{31} that the Baby Boomers have already heaped upon those who will follow us.\textsuperscript{32} Even putting aside fundamental moral principles of social justice as they apply to those who contribute the most resources to society,\textsuperscript{33} basic considerations of fiscal prudence and political accommodation counsel against such an intrusive approach. Yet another permanent, uncontrollable assault on the federal and state budgets—and thus on the taxpaying segment of the American public—would threaten, perhaps beyond repair, the delicate intergenerational balance that is increasingly strained by the insatiable entitlement obligations of Medicare and Social Security.\textsuperscript{34}

The common response to these concerns, that any potential intergenerational inequity problem could be avoided or substantially mitigated if only current federal budget priorities were wholly rearranged (i.e., if funds were diverted from the Departments of Defense and Homeland Security to expanded social welfare programs), is unconvincing. Although budget priorities are a legitimate topic for robust, continuing public

\textsuperscript{31} See PHILLIP LONGMAN, BORN TO PAY: THE NEW POLITICS OF AGING IN AMERICA (1987).

\textsuperscript{32} I say "us" because, as a matter of full disclosure, I am a member of the Baby Boom generation and quickly approaching an age category placing me at increased risk of needing long-term care.

\textsuperscript{33} See generally JUSTICE ACROSS GENERATIONS: WHAT DOES IT MEAN? (Lee M. Cohen ed., 1993).


Fundamental to these discussions [about long-term care financing] will be the level of inter- versus intra-generational transfer. Social Security, Medicare, and Medicaid are all "pay-as-you-go" programs, with current generations of workers paying the benefits of today's elderly and disabled. To add long-term care to these existing entitlements as a largely inter-generationally financed program might be particularly difficult for the majority of workers whose wages have not grown substantially in the past decade and who need to continue to purchase health insurance for their own families.
debate, altering those priorities—even radically—would hardly eliminate the reality of finite (albeit more abundant) resources available to be spent on long-term care for an aging population; consequently, there will be a need at some juncture for difficult choices—put bluntly, for rationing decisions. In the final analysis, demand always will exceed supply, even if there were a much greater supply of resources than current budgetary priorities now make available.35

Moreover, a universal social insurance entitlement program for long-term care would eliminate or greatly discourage private responsibility even more than the current combination of Medicaid availability and learned public complacency has already exerted a "crowding out" effect.36 The crowding out impact of a completely government financed program on the willingness of individuals to shoulder any personal responsibility to save or invest money or purchase private insurance policies to prepare for their future needs would be inevitable,37 unless the guaranteed public benefit coverage turns out to be so deficient that consumers feel the need to escape or supplement the public system.38 Given the enormous, and


36. Regarding the "crowding out" effect, see generally Cong. Budget Off., FINANCING LONG-TERM CARE FOR THE ELDERLY xi (2004); cf. David Baer, Establishing a Moral Duty to Obey the Law Through a Jurisprudence of Law and Economics, 34 FLA. ST. U. L. REV. 491, 500 (2007) ("Even when benefits are directly and voluntarily received, because the government has monopolized the market by crowding out all other alternatives, there is no choice for individuals but to accept its services.").


38. We have certainly seen such opting out of a universal entitlement system because of the perceived deficiency of the public benefit package in other contexts, such as primary and secondary education. See, e.g., Kimberly A. Yuracko, Education Off the Grid: Constitutional Constraints on Homeschooling, 96 CAL. L. REV. 123, 123
indeed ultimately unsustainable, financial burden that a universal social insurance entitlement program for long-term care would place on the involuntary backs of taxpaying members of future generations, crowding out the private sector—an objective explicitly embraced by Dr. Polivka and other universal entitlement advocates—seems to be the last, not the first, result we should be seeking.

**PRIVATE RESPONSIBILITY**

Thus, excessive reliance on public responsibility is highly problematic. The alternative, preferable policy direction is to encourage and facilitate more individual responsibility for advance planning, through various savings and investment vehicles (including Health Savings Accounts (HSAs)) and the purchase of private long-term care insurance, in anticipation of eventual long-term care expenses.

When we target Medicaid’s scarce resources to the genuinely needy, those needy will get better care across a wider spectrum of services. When more people pay privately for long-term care, they will command red-carpet to top-quality care at the most appropriate level of care. When people with money have to pay for their own long-term care, they will buy long-term care insurance and use their home equity, which means those businesses will boom, provide more jobs, and pay more taxes. When long-term care providers have more private payers, nursing homes, assisted living facilities, and all other caregivers will be more financially solvent. Debt and equity capital, which are desperately

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needed to finance the construction and operation of long-term care facilities, will return to the marketplace.\textsuperscript{41}

There are a number of strategies that might be employed to move more individuals toward planning responsibly and timely for their own future long-term care financial needs, including the provision of individual or employer tax incentives (deductions or direct credits) to create incentives for those individuals who save money\textsuperscript{42} and/or purchase private insurance policies.\textsuperscript{43} Certainly, it would be unfair to drastically curtail public spending for long-term care too quickly. That action would seriously and unjustly disadvantage a current older age cohort that has miserably failed to plan adequately for its own long-term care contingencies largely because of repeated "don't worry, be happy" assurances by public officials and academic commentators that the government could be depended upon to generously fulfill all their needs (if not all their desires).\textsuperscript{44} There is no good reason, though, that—if given sufficient advance notice, incentive, and opportunity—today's younger population, with many likely healthy and economically productive years ahead of them in which to make and effect sound financial planning choices, should not be expected—indeed required—to make and effect choices that direct a reasonable amount of private resources toward the long-term care needs of the individual saver/insurance policy purchaser.

Contrary populist claims notwithstanding, policy initiatives emphasizing and encouraging more private responsibility for anticipating and preparing for long-term care expenses do not

\textsuperscript{41} Id.


\textsuperscript{43} See LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL 146-49 (3rd ed. 2003) (discussing "tax qualified" long-term care insurance policies).

\textsuperscript{44} As Alexis de Toqueville warned several hundred years ago, "The American Republic will endure until the day Congress discovers that it can bribe the public with the public's money." Brainy Quote, http://www.brainyquote.com/quotes/authors/a/alexis_de_tocqueville.html (last visited Nov. 6, 2008).
equal the abandonment of poor people. The autonomy and dignity of individuals—regardless of their current financial status—is served, not hindered, by making long-term care financing alternatives available to them that reduce their reliance on the vagaries and risks of government safety net programs. As a matter of fact, instead of equating the absence of complete government hegemony with a calculated neglect of the less fortunate, society's commitment to the general welfare could be optimized by using public dollars to leverage private dollars to economically empower people who otherwise would lack sufficient personal resources to control their own long-term care destinies.

Public dollars could be employed to subsidize (or, in a more extreme version, mandate) individuals to purchase private long-term care insurance, thereby overcoming one of the chief, obvious current barriers to purchase: high premium costs. Public dollars can also work to leverage private resources if they are used to provide objective, comprehensive information and counseling to prospective long-term care insurance purchasers, thereby eliminating or reducing the impediment to private responsibility now imposed by consumers' perceptions of

45. In the United States, there is opportunity for the movement of individuals from one economic stratum to another. See generally DOWELL MYERS, IMMIGRANTS AND BOOMERS: FORGING A NEW SOCIAL CONTRACT FOR THE FUTURE OF AMERICA (2007). Commentators (representing the overwhelming majority of the academic community) who prefer to keep individuals permanently dependent on government largess rather than to empower them tend to disparage the possibilities of upward mobility. See, e.g., Richard Delgado, The Myth of Upward Mobility, 68 U. Pitt. L. Rev. 879, 883 (2007).


47. Lawrence A. Frolik, An Essay on the Need for Subsidized, Mandatory Long-Term Care Insurance, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 517, 533-35 (2007); Diane L. Dick, Tax and Economic Policy Responses to the Medicaid Long-Term Care Financing Crisis: A Behavioral Economics Approach, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 379, 387 (2007) (advocating "that federal and state governments work together to develop a universal compulsory [long-term care insurance] program, so that consumers are obligated to make a relatively small present-day sacrifice to provide benefits for the future incapacitated self."); id. at 420-21 ("When consumer choice cannot be sufficiently modified to achieve the desired governmental outcome, a compulsory program may be necessary.").
insufficient unbiased information available to enable intelligent comparisons among competing investment and long-term care insurance products.

The United States will continue to need, as Dr. Polivka convincingly emphasizes, a social safety net regarding long-term care. However, the safety net concept implies a fallback last resort, to be relied upon only when other alternatives have failed.\textsuperscript{48} Dependence upon the government \textit{qua} protective intrusive nanny\textsuperscript{49} may be minimized by treating individuals who legitimately need public subsidies as consumers to be empowered with prodding and support, but not coercion, to plan and act in a timely fashion, rather than by relegating them to the diminished status of public wards eager to be infantilized.

An important problem with the personal responsibility argument, as Dr. Polivka forcefully notes and I readily but reluctantly acknowledge, is that thus far the private sector—and especially the private long-term care insurance industry—has not shown itself to be up to the formidable but important task outlined above. For several reasons, the available private long-term care insurance products marketed have not been very attractive heretofore to a significant percentage of potential consumers.\textsuperscript{50} For one thing, premium prices have been very expensive, in large part because of an adverse selection problem consisting of insurance policies being bought primarily by those who are most likely to file claims for benefits;\textsuperscript{51} insurers have, quite literally, priced themselves out of the market.\textsuperscript{52} Second,

\begin{itemize}
\item \textsuperscript{48} See MOSS, supra note 46, at 294-95 (the government is weak as a risk manager, and risk-management policies could unleash moral hazard).
\item \textsuperscript{49} See Jonathan Garthwaite, ABC News, Nanny State, USA: We should expect more from ourselves and our government officials, available at http://abcnews.go.com/US/Story?id=2995594&page=1 (last visited Sept. 22, 2008) ("If you want a dictionary definition, 'A government perceived as having excessive interest in or control over the welfare of its citizens, especially in the enforcement of extensive public health and safety regulations.' A shorter version might be: Government acting like your mommy -- like a nanny.").
\item \textsuperscript{50} Leslie A. Curry et al., Individual Decisionmaking in the Non-Purchase of Long-Term Care Insurance, 49 GERONTOLOGIST (forthcoming May 2009).
\item \textsuperscript{51} Frolik, supra note 47, at 529-30.
\item \textsuperscript{52} "Pricing out of the market" is an idiom meaning "to eliminate the demand
long-term care insurance is unavailable to many potential consumers at any price (or at the least, at nearly any price) because insurers have imposed extremely stringent medical eligibility standards for underwriting individual policies. The coverage limits contained in many policies offered for sale are too limited in the typical consumer's eye to make the probable benefits of owning a policy worth the certain costs.

For private responsibility to succeed as a reasonable, indeed desirable, alternative to a totally public long-term care financing system, it will be incumbent upon the American insurance industry to develop and offer an array of desirable quality products at an affordable price to enough customers, along with sufficient, comprehensible, accurate information to enable intelligent, voluntary shopping within the long-term care financing marketplace by those potential customers. If the private sector can rise to this challenge and public policy supports (as it should) the private options thus made available, those private initiatives will succeed. If, however, the private long-term care insurance industry finds that the challenges of adverse selection, high care costs, and objective information needs are insurmountable in the face of the industry's legitimate profit objectives, then the private portion of the private/public partnership will fail—as well it should in a properly functioning free enterprise system that punishes the


53. One of the ancillary benefits of a combined private/public long-term care insurance marketplace is “that partnerships of this type also present an opportunity for consumer-protective regulation of the insurance industry if certain conditions are met.” Note, Public-Private Partnerships and Insurance Regulation, 121 HARV. L. REV. 1367, 1368 (2008).

54. Besides using tax policy to create incentives for the purchase of private products, “[f]or long-term care insurance to play an important role, government needs to foster genuine price competition and better informed consumers.” Richard L. Kaplan, Retirement Planning’s Greatest Gap: Funding Long-Term Care, 11 LEWIS & CLARK L. REV. 407, 449 (2007).

failure to satisfy consumer demands effectively, efficiently, and affordably.

**CONCLUSION**

There is a rapidly growing need in the United States for long-term care services of various types for an expanding population of older and younger disabled individuals. This situation presents many difficult questions, not the least of which concerns how the needed services will be financed. There is substantial public sentiment for some sort of private/public collaborative effort to respond to the financing challenge. The threshold unresolved issue is the shape and contours of that collaboration.

Proponents of a broad, first-resort governmental financing role—articulately represented by Dr. Polivka—portray the future of long-term care as a set of social needs in danger of otherwise going unfulfilled because of massive, preordained private sector failure. This perspective might ultimately turn out to be correct. Certain vital social needs (such as national defense) require exclusive or nearly exclusive public sector responses. Before we resign ourselves to an excessive governmental role in long-term care financing, however, with all the problems attendant upon such a policy course, the private sector should be afforded a fair, even chance to offer alternatives that—when done correctly—economically empower people to exercise optimal control over the concluding segment of their aging journeys.
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