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Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective

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ADULT CHILDREN AND INDIGENT PARENTS: INTERGENERATIONAL RESPONSIBILITIES IN INTERNATIONAL PERSPECTIVE

SEYMOUR MOSKOWITZ*

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I. INTRODUCTION

"How sharper than a serpent's tooth it is
To have a thankless child."

WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 4, ln. 286–87 (G. Blakemore
Evans ed., Houghton Mifflin Co. 1972)

Having retired voluntarily, King Lear tastes the bitterness of abandonment. At a time when he needs physical sustenance, medical care, and most importantly, emotional and psychological support, he experiences the pain of neglect, isolation, and ingratitude. Unfortunately, this fictional account of material deprivation and psychological suffering is the all too-real, all too-common experience of many older persons around the world. Thus, Lear's timeless tragedy, a staple of Western literature and theatre for four centuries, has come to typify the tragic stories of older persons who live in poverty, physical isolation, and psychological alienation.¹

In many "developed" nations, the elderly² segment of the population is the fastest growing. In the United States in 2000, for example, persons over sixty-five constituted 12.6% of the population, and they are projected to make up 18.5% of the population in 2025.³ The same demographic trends are replicated in Europe, Japan, China, and

1. In the United States, for example, 17% of American senior citizens were officially classified below, or just above, the poverty line. *See infra* notes 56–72 and accompanying text. The difficulties created and exacerbated by isolation and estrangement of the elderly have been well documented. *See, e.g.*, NATIONAL CENTER ON ELDER ABUSE, ELDER ABUSE AWARENESS KIT 11 (2001). Persons sixty-five and older account for twenty-five percent of suicides in the United States. *Id.* at 14.

2. Because names and labels often carry symbolic meanings that involve the social roles and status of the labeled, the appropriate nomenclature for persons over sixty-five may be significant. "Elderly," "senior citizens," and "older persons" are among the candidates. In the absence of any clear consensus on terminology, this Article employs the general term "elderly," although other names are also used for stylistic purposes.

3. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, IDB POPULATION PYRAMIDS, available at <http://www.census.gov/cgi-bin/ipc/idbagg> (last visited Sept. 22, 2002) [hereinafter IDB POPULATION PYRAMIDS] (revealing that persons sixty-five and over will consist of 20.3% of the population in 2050).

elsewhere.⁴ Decreasing birth rates, declining numbers of multi-generational families living together, rising percentages of women in the paid workforce, and accelerating geographical mobility make caring for the elderly an increasingly complex problem in all developed societies.⁵ As the financial costs of their care escalates, the number of wage earners capable of supporting these costs dwindles.

The "graying" of these nations intersects with various social and economic factors to significantly impact the law. For many countries attempting to cope with these problems, one solution is to shift the cost of caring for their burgeoning elderly population from public authority to the children of the elderly and other private parties. Filial responsibility laws, which mandate that adult children financially support their indigent aged parents, are one aspect of the interwoven demographic and socio-legal issues concerning care for the elderly. The constitutions⁶ and statutes⁷ of many countries embody this legal

4. See *id.* In Japan, persons over sixty-five currently make up 17.1% of the population, and in 2025 they are projected to make up 27.5% of the population. *Id.* Persons sixty-five and older consist of 16.2% of Germany's population. *Id.*

5. Ferdinand von Prondzynski & Ada Kewley, *Social Law in the European Union: The Search for a Philosophy*, 2 COLUM. J. EUR. L. 265, 270 (1996).

6. See, e.g., GRUNDGESETZ [GG] [Constitution] art. 72, para. 2 (F.R.G.) (establishing the German principle of Subsidiarity, which requires relatives in the direct line of descent to furnish maintenance to each other); see also CROAT. CONST. art. 63, available at http://www.uni-wuerzburg.de/law/hr00000_.html (last visited Sept. 14, 2002) ("Children are bound to take care of old and helpless parents."); KAZ. CONST. art. 27, available at <http://www.ecostan.org/laws/kaz/kazakhstanconst.html> (last visited Sept. 14, 2002) ("Adult children who are capable of working are obligated to care for their parents who are unable to work."); KYRG. CONST. art. 26:1, available at <http://www.ecostan.org/laws/kyr/kyrgyzstancon.html> (last visited Sept. 14, 2002) ("Adult children who are able to work are obligated to care for their parents."); RUSS. CONST. art. 38, para. 3, available at http://www.uni-wuerzburg.de/law/rs00000_.html (last visited Sept. 14, 2002) ("Employable children who have reached 18 years of age must take care of their non-employable parents."); SERB. CONST. art. 29, available at http://www.serbia-info.com/facts/constitution_2.html (last visited Sept. 14, 2002) ("Children shall be bound to care for their parents in need of assistance."); TAJ. CONST. art. 34, available at <http://www.ecostan.org/laws/taj/tajikistancon.html> (last visited Sept. 14, 2002) ("Parents are responsible for raising children, and adult children who are able to work are obligated to care for their parents."); TURKM. CONST. art. 25, available at <http://www.ecostan.org/laws/turkm/turkmenistancon.html> (last visited Sept. 14, 2002) ("Adult children have the obligation of caring for parents and providing them with assistance."); UKR. CONST. art. 51, cl. 2, available at <http://www.rada.kiev.ua/const/conengl.htm> (last visited Sept. 14, 2002) ("Adult children are obliged to care for their parents who are incapable of work."); UZB. CONST. art. 66, available at <http://www.ecostan.org/laws/uzb/uzbekistancon.html> (last visited Sept. 14, 2002) ("Adult children capable of working are obligated to care for their parents.");

7. See, e.g., Wanda Stojanowska, *Support Payments by Children to their Parents and Welfare Provisions in Poland*, in AN AGING WORLD 281 (John M. Eekelaar & David Pearl eds., 1989) (stating that §§ 128-144 of the Polish Family and Welfare Code, in force since January 1, 1965, oblige children to support their parents).

principle. In the United States, thirty states have filial responsibility statutes.⁸ Many foreign legal systems, such as Canada's⁹ and Singapore's,¹⁰ have similar laws. Other societies, however, including Germany, Japan, and China, promote filial duties through positive programs and inheritance laws.¹¹

Efforts to judicially enforce parental support obligations often generate intuitive support because parents have given life to their offspring and have cared for and supported those children throughout their youth. However, further reflection and deeper analysis may suggest significant disadvantages and costs that make this legal solution to the poverty of many aged persons a poor policy choice.¹² This Article explores the legal and social issues underlying filial responsibility duties in North America and in other parts of the world.

Analyzing foreign law is valuable for American lawyers and policymakers for several reasons. First, jurisprudence or general legal theory is improved by looking outside one's system.¹³ Second, as Henry Maine noted, a comparative law approach helps "'facilitate legislation and the practical improvement of law.'"¹⁴ Indeed, many reforms in both private and public law in the United States have been "borrowed" from foreign systems, including the English cheque and the German limited

8. See *infra* note 115 for a list of the 30 U.S. states that have enacted filial responsibility statutes.

9. See *infra* note 155 and accompanying text for a discussion of the Canadian filial responsibility statutes.

10. See *infra* note 221 and accompanying text for discussion of Singapore's Maintenance of Parents Act.

11. See *infra* notes 274–93 and accompanying text for discussion of Germany's new initiatives; see *infra* notes 241–46 and accompanying text for discussion of Japan's programs; see *infra* notes 303–25 and accompanying text for discussion of China's behavior-based inheritance rules.

12. See *infra* Part IV.A.4.

13. Comparative approaches have a long pedigree. Aristotle, in considering what form of political community would be best, studied 158 constitutions of Greek and other origins in his treatise, *Politics*. See Min Zhou, *A Comparative Analysis of Contemporary Constitutional Procedure*, 30 CASE W. RES. J. INT'L L. 149, 183 (1998). Likewise, Montesquieu compared the laws of different societies to establish common principles of good government. Joseph P. Rodgers, Note, *Suspending the Rule of Law? Temporary Immunity as Violative of Montesquieu's Republican Virtue as Embodied in George Washington*, 45 CLEV. ST. L. REV. 301, 310 (1997).

14. David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 555 n.8 (1997) (quoting HENRY S. MAINE, *VILLAGE COMMUNITIES IN THE EAST AND WEST* 4 (London, 2d ed. 1872)); see also David S. Clark, *Nothing New in 2000? Comparative Law in 1900 and Today*, 75 TUL. L. REV. 871, 881 (2001) (stating that "comparative law can improve existing domestic legislation by influencing scholarly doctrine and judicial jurisprudence").

liability company.¹⁵ Third, and most importantly, given the commonality of demographic, fiscal, and social trends regarding the elderly in many industrialized societies,¹⁶ comparative analysis helps to broaden the perspective of those addressing shared problems by inviting them to consider and receive guidance from the experience of other nations.

This Article compares various approaches to children's responsibility to provide financial aid to indigent parents. Of course, many other issues—access to and payment for health care, housing and employment policies, tax provisions, and others—intersect this topic and affect the parent-adult child relationship in direct ways. An exploration and analysis of these related issues would require volumes;¹⁷ thus, this Article separates the legal-financial duty from the other issues to facilitate comparative analysis.

Part II of this Article describes some of the religious and secular sources of the obligation linking adult children to their parents. Part III highlights the vulnerabilities faced by many of the world's elderly because of their economic plight, their frequent abuse and neglect, and their often perilous health status. Part IV.A reviews filial responsibility statutes and their judicial construction in the United States and Canada and provides historical perspective on the current status of the law. The arguments for both proponents and opponents of filial responsibility laws are presented and evaluated. Parts IV.B, IV.C, and IV.D address legal and social policies in Singapore, Japan, and Germany. The latter two countries have responded in radically different ways than the United States. Finally, Part V looks at statutes and court decisions that employ inheritance rules to help overcome the neglect of parents by adult children, an alternative approach. Thus, this Article joins the ongoing discussion occurring in societies across the globe regarding what the relative contributions of public and private sources of income should be to indigent aged citizens.

15. RENÉ DAVID & JOHN E. C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 7 (2d ed. 1985).

16. See *supra* notes 2–11 and accompanying text.

17. As anthropologist Edward Bruner has pointed out, "If we write or tell about the French Revolution, for example, we must decide where to begin and where to end, which is not easy, so that by our arbitrary construction of beginnings and endings we establish limits, frame the experience, and thereby construct it." Edward M. Bruner, *Experience and Its Expressions*, in *THE ANTHROPOLOGY OF EXPERIENCE* 3, 7 (Victor W. Turner & Edward M. Bruner eds., 1986). Similarly, in analyzing issues of the aged, beginning and ending points must be delineated or the inquiry sweeps ever outward.

II. PARENTAL SUPPORT OBLIGATIONS IN THEIR WIDER CULTURAL CONTEXT

The concept that children have a duty to support elderly parents has a lengthy history. It has been articulated in both religious and non-religious traditions, and in a variety of geographical places and literary works. This section briefly examines these intellectual precedents for contemporary intergenerational responsibility.

A. Religious Sources

In Judaism, Christianity, and Islam, the status of the aged, particularly parents, is a focus of concern. Additionally, each tradition imposes legal and financial obligations as well as moral duties on the children and family. As illustrated below, all three religious traditions regard the parent-child relationship as analogous to an individual's relationship to God, and all three clearly impose duties upon the younger generation when elders are in need. The Jewish position is anchored to *Exodus* 20:12¹⁸ and *Leviticus* 19:3,¹⁹ which mandate honor and reverence for parents. Maimonides, the great medieval Jewish philosopher and theologian, comments that the first verse is to be analogized to *Proverbs* 3:9²⁰ and the second to *Deuteronomy* 6:13²¹ and concludes that obligations to parents are equal to those honoring and revering God.²² In fact, the modern state of Israel has a statute that requires children to support parents if parents cannot support themselves.²³

18. *Exodus* 20:12 (New Revised Standard Version [hereinafter NRSV]) ("Honor your father and your mother, so that your days may be long in the land that the LORD your God is giving you."); see also *Deuteronomy* 5:16 (NRSV).

19. *Leviticus* 19:3 (NRSV) ("You shall each revere your mother and father . . .").

20. *Proverbs* 3:9 (NSRV) ("Honor the LORD with your substance and with the first fruits of all your produce . . .").

21. *Deuteronomy* 6:13 (NRSV) ("The LORD your God you shall fear; him you shall serve, and by his name alone you shall swear.").

22. Parsing the text, Maimonides asks, what does "honoring" parents imply? "It means providing them with food and drink, clothing and covering." If the father is poor and the son is in a position to take care of his parents, he is compelled to do so." MOSES MAIMONIDES, *MISHNEH TORAH, LAWS OF REBELS* 6:3.

23. Maintenance as Between Other Family Members, 1959, S.H. 276.

Section 4—a person is liable for the maintenance of the other members of his family, vis.—

- a. His parents and the parents of his spouse;
- b. His children of full age and their spouses;
- c. His grandchildren.

The Christian view is similar. While the Mosaic law is, of course, looked to for guidance, the Christian Bible strengthened and supplemented the Fifth Commandment. Jesus expressed concern about the care of older parents in at least two places. First, the controversy with the Pharisees about the Korban Vow²⁴ demonstrates how seriously Jesus takes the biblically ordered care of parents. The text suggests that a shirking of responsibilities reflects a desire to follow one's own will rather than God's. Second, Jesus' provision of care for his mother, even as he hung dying on the cross, vividly depicts his concern for the needs of parents who cannot provide for themselves.²⁵ St. Thomas Aquinas reiterates this view in his *Summa Theologica*.²⁶

A similar approach is also reflected in the Muslim tradition.

Priority of Maintenance

Section 5—a person is not liable to provide maintenance under Section 4, unless and insofar as the following three conditions are fulfilled:

- a. He is able to do [so] after his own requirements and those of his spouse, his minor children and the minor children of his spouse have been supplied;
- b. The family member is unable, in spite of efforts on his part, to supply his own requirements through work or from his property or from any other source;
- c. The family member is unable to obtain maintenance under Section 2 or 3 or from an estate or from a family member who proceeds the person in question according to the order established in Section 4.

Extent of Maintenance

Section 6—the extent, measure and modes of provision of maintenance shall, in the absence of agreement between the parties, be prescribed by the Court, having regard to the circumstances and . . . according to the need of the person entitled and the ability of the person liable.

Id.

24. *Mark* 7:1–23 (NRSV). Verses 9 through 13 read:

Then he said to them, "You have a fine way of rejecting the commandment of God in order to keep your tradition! For Moses said, 'Honor your father and your mother'; and, 'Whoever speaks evil of father or mother must surely die.' But you say that if anyone tells father or mother, 'Whatever support you might have had from me is Cor'ban' (that is, an offering to God)—then you no longer permit doing anything for a father or mother, 13 thus making void the word of God through your tradition that you have handed on. And you do many things like this."

Id. at 7:9–13.

25. *John* 19:26–27 (NRSV) ("When Jesus saw his mother and the disciple whom he loved standing beside her, he said to his mother, 'Woman, here is your son.' Then he said to the disciple, 'Here is your mother.' And from that hour the disciple took her into his own home.").

26. 13 THOMAS AQUINAS, *SUMMA THEOLOGICA*, ques. 101. 1 (Dominican ed., 1948). Aquinas believed that because our parents are, next to God, the "closest sources of our existence and development," we owe them respect, reverence, and services. *Id.* All four articles of Question 101 (IIa/IIae, q.101) discuss obligations of children to parents.

Exhortations demanding strict adherence to Monotheism, the most fundamental tenet of Islam, are followed in the Qur'an by stern warnings and directives that one must be extremely respectful, dutiful, and helpful to one's father and mother both materially and otherwise, particularly if either of them is elderly.

Thy Lord decrees that ye worship none but him
and be nice to the parents, if either or both of them become aged
in my lifetime,
say not a word of disrespect to them nor revile them; and speak
to them kind words;
behave with them with utmost humility
and seek for them thy Lord's protection as they sought it for
thee.²⁷

Numerous other texts repeat this theme. The Qur'an commandments relating to the protection and support of parents are explained and demonstrated by the personal action of Mohammed, the prophet of Islam. In one exhortation he notes:

May he be disgraced!
May he be disgraced!
May he be disgraced, whose parents,
one or both, attain old age during his
life time, and he does not enter Jannah
(by rendering being dutiful to them).²⁸

Thus, three of the world's largest religious traditions regard the parent-child relationship as analogous to an individual's relationship to God, clearly imposing duties upon the younger generation when elders are in need.

B. Secular Sources

Various non-religious sources have also shaped our understanding of parental support obligations. Within Western literary and philosophical

27. *Qur'an* 17:23-24.

28. ALHARAMAIN FOUNDATION, THE QUR'AAN AND SUNNAH ON PARENTS, KIND TREATMENT TOWARDS PARENT AND ESTABLISHMENT OF THE TIES OF BLOOD RELATIONSHIP, available at <http://66.28.228.161/eng/inner.asp?order=3&num=4&number=130> (last visited Sept. 14, 2002).

traditions, however, there is sharp disagreement about the relationship between adult children and their elderly parents. In one philosophical camp, children are obliged to support parents based upon the principle of reciprocity. Aristotle, for example, believed children owe aged parents a duty of support based on this concept:

That is why it would seem that a son does not have the right to disown his father, whereas a father has the right to disown his son. A debtor must pay his debt, but nothing a son may have done (to repay his father) is a worthy return for everything his father has provided for him, and therefore he will always be in his debt.²⁹

Mythological references echo the reciprocity theme. Virgil, for example, celebrates Aeneas for carrying his father Anchises on his shoulders as he traveled to Rome.³⁰ Legal opinions have reflected this philosophical position. For example, in upholding a family responsibility statute, the California Supreme Court observed: "[A] long tradition of law, not to mention a measureless history of societal customs, has singled out adult children to bear the burden of supporting their poor parents. This duty existed prior to, and independent of, any duties arising out of the state assistance to the aged."³¹

Other thinkers have opposed such duties. John Locke wrote that while parents make the decision to bring children into the world and thus assume legal responsibility for them, children have not made a comparable decision. Thus, "without an explicit and voluntary agreement on the part of children to be bound to parents after their majority, the former infants are at liberty to govern themselves and to unite with parents or others as they wish."³² Reflections of Locke's view appear in many concepts of the Western legal tradition. In common law jurisdictions, emancipation typically means the end of the formal support obligation between parents and children. Severance occurs as a result of reaching a statutorily defined age, usually eighteen,³³ or the

29. ARISTOTLE, *NICOMACHEAN ETHICS* § 1163b, 244 (Martin Ostwald ed. and trans., 1962).

30. *THE AENEID OF VIRGIL* 53 (Allen Mandelbaum trans., Bantam Books 3d ed. 1981).

31. *Swoap v. Superior Court*, 516 P.2d 840, 849 (Cal. 1973).

32. JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* 141 (C.B. Macpherson ed., 1980).

33. See, e.g., OHIO REV. CODE ANN. § 3109.01 (West 1999) (providing that persons eighteen years old are of full age for all purposes).

resources are exhausted. The facts that the disabled person no longer functions as a companion, is demanding, and may even be abusive, are rarely acknowledged. While caregiving may be a choice when the disabled person responds with love and actively participates in a mutually rewarding relationship, there is considerable reason to believe that for many people caregiving is a relationship of bondage from which a spouse is unable to escape.³⁹

In addition, caretaking implicates important gender issues. Women, more than men, tend to care for elderly parents.⁴⁰ This work is often unpaid.⁴¹ American social scientists have commented that daughters provide more daily caretaking, emotional support, and social service functions than sons, who typically fulfill advisory roles.⁴² In Europe, long-term care is also predominantly a family-oriented task, placed disproportionately upon women.⁴³ Declining birthrates and increasing labor force participation by women have reduced the number of caretakers for many older people, especially those in poor health.⁴⁴ Women find themselves saddled with the multiple responsibilities of rearing children, working for income outside the home, and providing care for aging or disabled family members.⁴⁵ Caregiving as women's work is deeply ingrained in American and Western culture, and the toll

39. Edgar F. Borgatta & Rhonda J.V. Montgomery, *Aging Policy and Societal Values*, in CRITICAL ISSUES IN AGING POLICY 7, 22 (Edgar F. Bogatta & Rhonda J.V. Montgomery eds., 1987) (citations omitted).

40. See, e.g., Lee Smith, *What Do We Owe to the Elderly?*, FORTUNE, Mar. 27, 1989, at 54, 58 ("Both Christianity and Judaism make it plain that a child's responsibility to a parent is fundamental, maybe even greater than his duty to his offspring Carrying out the Fourth Commandment generally falls to middle-aged daughters and other female relatives."); Nora Underwood, *Mid-Life Panic, Thousands of Canadians are Caught Between Children and Elderly Parents*, MACLEANS, Aug. 19, 1991, at 30, 32 ("You have a situation now in which you have adults, particularly women, caring for their children at a time when their own parents are likely to need help.").

41. See generally J. Lewis, *Women, Work, Family and Social Policies in Europe*, in WOMEN AND SOCIAL POLICIES IN EUROPE (1993).

42. Betsy B. Houser & Sherry L. Berkman, *Sex and Birth Order Differences in Filial Behavior*, 13 SEX ROLES 641-51 (1985); see also Helena Z. Lopata, *Contributions of Extended Families to the Support System of Metropolitan Area Widows: Limitations of the Modified Kin Network*, 40 J. MARRIAGE & FAM. 355, 363 (1978) (finding that, among Chicago area widows, children provide the majority of support, as opposed to siblings or other relatives).

43. ALAN WALKER & TONY MALTBY, AGEING EUROPE 93 (1997).

44. *Id.*

45. Eleanor Palo Stoller, *Males as Helpers: The Role of Sons, Relatives and Friends*, 30 GERONTOLOGIST 229 (1990). In the United States, 70% of all adult children identified by their parents as primary caregivers were women. *Id.*

the caregiver pays is often considerable:

The most severe impact of caring for a dependent adult appears to be that it is totally monopolizing and without respite, twenty-four hours a day, seven days a week, 365 days a year There is gradually isolation . . . [of] the main caregiver. They no longer go out, no longer invite people over, no longer accept invitations, because they cannot leave the dependent person alone and are too nervous about their unpredictable behavior to receive people or to have confidence in substitute care.⁴⁶

III. THE VULNERABILITY OF THE AGED

Although the number of the elderly and their percentage of the total population throughout the developed world are increasing, the aged are vulnerable to risks. These risks include income deprivation, maltreatment, and inadequate health services, and they reflect deep-seated social problems and policy decisions regarding the allocation of scarce resources. The "graying" of populations in advanced industrial nations has been well documented and is a phenomenon produced largely because of the dramatic increase in life expectancy.⁴⁷

In the United States, the most significant demographic trend of the past century was the exponential increase in the percentage of elderly persons in the total population.⁴⁸ In 1900, the aged made up one out of every twenty-five Americans (3.1 million); whereas, in 1994 this demographic grew to one in every eight Americans (33.2 million).⁴⁹ By 2020, the United States will have more than 53 million residents sixty-five and over and almost 7 million aged eighty-five and over.⁵⁰

Likewise, in 1993, nearly 75 million persons in the fifteen countries

46. Nancy Guberman, *The Family, Women and Caring: Who Cares for the Carers?*, 17 RESOURCES FOR FEMINISTS RES. 37, 39 (1988); see also ELAINE M. BRODY, WOMEN IN THE MIDDLE: THEIR PARENT-CARE YEARS 29 (1990); ARLIE RUSSEL HOCHSCHILD, THE SECOND SHIFT 22-32 (1989).

47. Jonathan Barry Forman, *Universal Pensions*, 2 CHAP. L. REV. 95, 101 (1999). "Males born in 1940 had a life expectancy of just 61.4 years;" but in 2000, an American male can expect to live 73.2 years. *Id.* "[A] man reaching sixty-five in the year 2000 can expect to live another 15.8 years." *Id.*

48. See LAWRENCE A. FROLIK & ALISON MCCHRYSTAL BARNES, ELDER LAW 5 (2d ed. 1999).

49. IDB POPULATION PYRAMIDS, *supra* note 3. By the middle of the twenty-first century, Americans over sixty-five will outnumber persons fourteen years or younger by 80 million. *Id.*

50. FRANK B. HOBBS & BONNIE L. DAMON, 65+ IN THE UNITED STATES 2-3 tbl. 2-1 (Current population reports special study number P23-190, 1996).

of the European Union were sixty and over, approximately 20% of its total population.⁵¹ By 2020, they will represent more than 25% of the total population.⁵² Even more significant is the "increase in the numbers of people over eighty, the majority of whom are women."⁵³ Women increasingly dominate the higher ranges of the age pyramid in all countries of Europe so that, as the population becomes predominantly older, it becomes increasingly "feminized."⁵⁴ Many Eastern societies, especially Japan and Singapore, exhibit identical trends.⁵⁵

A. Economic Position

Although the United States is the richest nation in the world, the resources available to the elderly are woefully inadequate. In 1997, one of every six (17%) older Americans was poor.⁵⁶ Thirty-seven percent of all older persons reported income of less than \$10,000; only 21% reported income of \$25,000 or more; and the median income reported was \$13,049.⁵⁷ Despite income deprivation, older households are less likely than younger ones to receive public assistance such as food stamps or to have members covered by Medicaid.⁵⁸ Much of this dismal picture stems from age discrimination in employment, mandatory retirement, and insufficient pensions.

The growing feminization of poverty in the United States mirrors the aging female population. Women tend to live longer than men, and men tend to marry younger women.⁵⁹ As a result, women are five times more

51. WALKER & MALTBY, *supra* note 43, at 11.

52. *Id.*; see also HOBBS & DAMON, *supra* note 50, at 10 fig. 2.1.

53. WALKER & MALTBY, *supra* note 43, at 11.

54. *Id.*; see also HOBBS & DAMON, *supra* note 50, fig. 2.3. "In 1993 for the Union as a whole, among those aged 45-49, the numbers of men and women were roughly equal; at ages 70-74 there were four women for every three men; at 80-84 there were two women for every man; and by the ages of 95 and over the ratio was more than three to one." WALKER & MALTBY, *supra* note 43, at 11.

55. See *infra* Parts IV.B, IV.C.

56. THOMAS P. GALLANIS ET AL., ELDER LAW 11 (Anderson 2000).

57. *Id.* at 10.

58. ADMIN. ON AGING, DEP'T OF HEALTH & HUMAN SERVICES, A PROFILE OF OLDER AMERICANS (1998), available at <http://www.aoa.gov/aoa/stats/profile/profile98.html> (last visited Dec. 30, 2001). One-third (31%) of older renters lived in publicly owned or subsidized housing in 1994 (14% for younger renters), an additional indicia of poverty. *Id.*

59. See STAFF OF THE HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., 1998 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 1031, tbl. A-2 (Comm. Print 1998) [hereinafter 1998 GREEN BOOK]. In 1990, the average life expectancy for women sixty-five years of age was nineteen years, but for sixty-five year old men it was only fifteen years.

likely to be widowed,⁶⁰ and many of these women will find themselves living below the poverty level.⁶¹

As for retirement resources, the Social Security system is the primary vehicle of ensuring income for the aged in the United States, followed by private pensions and retirement savings. Broad coverage is afforded under Social Security,⁶² but benefits are extremely slim. In 1997, the Old Age and Survivors Insurance program paid the average retired worker only \$765 per month.⁶³ Even these modest amounts are subject to income taxation.⁶⁴

Despite the meagerness of the benefits, the advent of the Social Security system in 1935 immeasurably improved the economic situation of the aged in the United States. Although the poverty rate for the elderly was estimated at 50% in 1935, that rate has shrunk to 11% today.⁶⁵ Still, the average retired couple's monthly Social Security benefit in 1998 was only \$1,248 and was usually the only source of income for the poorest 40% of American retirees.⁶⁶

Private pensions are likewise inadequate. Less than 60% of American workers in the private sector are covered by pension plans.⁶⁷ Perversely, private pension coverage tends to decrease as employer size and annual earnings decrease.⁶⁸ Once again, gender differentials

Id.

60. See Camilla E. Watson, *The Pension Game: Age- and Gender-Based Inequities in the Retirement System*, 25 GA. L. REV. 1, 31-32 (1990).

61. See David E. Ott, *Survivor Income Benefits Provided by Employers*, MONTHLY LAB. REV., June 1991, at 13.

62. FROLIK & BARNES, *supra* note 48, at 151. At present, almost 96% of the workforce participate. *Id.*

63. *Current Operating Statistics: List of Tables*, 2 SOC. SEC. BULL. 43, 45, 47-48 (1988). In 1987, the Old Age and Survivors Insurance program paid more than \$316 billion in benefits to almost 38 million Americans. *Id.*

64. See I.R.C. § 86 (1994 & Supp. II 1996). Single taxpayers with incomes over \$25,000, and married couples with incomes over \$32,000, must include as much as half of their Social Security benefits in income, while single taxpayers with incomes over \$34,000 and married couples with incomes over \$44,000, must include as much as 85% of their Social Security benefits as income. *Id.* A sixty-five-year-old spouse of a retired worker receives a benefit equal to 50% of the worker's monthly amount; the widow or widower of the worker is entitled to a monthly Surviving Spousal Benefit of 100% of the worker's monthly benefit. *Id.*

65. See FROLIK & BARNES, *supra* note 48, at 151.

66. U.S. DEP'T OF LABOR, FINAL REPORT ON THE NATIONAL SUMMIT ON RETIREMENT SAVINGS, JUNE 4-5 1998 at 3 (1998).

67. William J. Wiatrowski, *On the Disparity Between Private and Public Pensions*, MONTHLY LAB. REV., Apr. 1994, at 3-4.

68. Mary Ellen Benedict & Kathryn Shaw, *The Impact of Pension Benefits on the Distribution of Earned Income*, 48 INDUS. & LAB. REL. REV. 740, 746 (1995) (revealing that

compound these problems. In 1995, for example, almost twice as many men than women over sixty-five received pension or annuity income, and men received an average of almost two times as much as women.⁶⁹

Nor are private savings likely to rescue senior citizens from poverty. Personal savings have fallen from 9% of disposable personal income in 1975 to less than 5% in 1996.⁷⁰ Further compounding these difficulties is the financial distress of the Social Security Trust Fund, which could be depleted by 2032.⁷¹ The annual income of the then depleted Trust Fund will only cover about 75% of the cost of benefits payable.⁷²

Throughout the European community, the public pension system is the main source of income for older people. The dominant pension scheme pairs an earnings-related public pension with a voluntary occupational one. This paradigm tends to disfavor women and workers in poorer countries. These policies reflect male working patterns and lead to lower incomes for most women in their old age.⁷³ As a result, poverty in old age is becoming increasingly feminized in Europe.⁷⁴ For example, in Germany, "the average pension paid to women in 1990 was just 42 percent of the male average, [but] women formed 76 percent of the social-assistance recipients aged 60 and over and 83 percent of those aged 75 and over."⁷⁵ Moreover, incomes are not uniform across European boundaries. The northern countries have relatively low poverty rates among older persons, while southern countries and the United Kingdom have poverty rates greater than 30%.⁷⁶

empirical evidence shows "high wage workers are more likely to have pensions than are lower wage workers: the probability of pension coverage is greater for workers in large firms, for men, for unionized workers, for high-tenure workers, and for highly educated workers").

69. See, e.g., William E. Even & David A. MacPherson, *Gender Difference in Pensions*, 29 J. HUM. RESOURCES 555 (1994). Women tend to earn less than men and to work for smaller companies that are less likely to have a retirement plan. *Id.* Women also spend more time away from the workplace caring for a family or an aging relative. *Id.*

70. ECONOMIC REPORT OF THE PRESIDENT: FEBRUARY 1997 at 335 (1997).

71. See SOCIAL SECURITY AND MEDICAL BOARDS OF TRUSTEES, STATUS OF THE SOCIAL SECURITY AND MEDICARE PROGRAMS: A SUMMARY OF THE 1998 ANNUAL REPORTS 7-8 (1998), available at www.socialsecurityinfor.com/files/tr98sum.pdf.

72. *Id.*

73. See generally Sara Arber & Jay Ginn, *Connecting Gender and Ageing: A New Beginning?*, in *CONNECTING GENDER AND AGEING: A SOCIOLOGICAL APPROACH* 173 (Sara Arber & Jay Ginn eds. 1995) (discussing effects of public policy on gender differences in income security in old age).

74. WALKER & MALTBY, *supra* note 43, at 45. "[W]omen, particularly widows, comprise some of the poorest and most socially excluded groups in the [European community]." *Id.* at 44.

75. WALKER & MALTBY, *supra* note 43, at 44.

76. *Id.* The southern nations have less highly developed welfare systems than the

B. Elder Abuse and Neglect

Elder abuse, mistreatment, and neglect are shockingly common in many countries. Mistreatment⁷⁷ of the aged is often associated with physical abuse⁷⁸ but may take other less dramatic forms, such as

northern European Community nations. *Id.* Denmark, Germany, Ireland and Luxembourg have poverty rates lower than 10%. *Id.* at 50. Four countries—Belgium, France, Italy, and the Netherlands—have median poverty rates of 10% to 29%. *Id.*

77. The current American federal definition, as set forth by § 144 of the Older Americans Act, 42 U.S.C. § 3002 (2000), includes three major types of elder maltreatment (physical abuse, neglect, and exploitation), which clearly recognizes self-neglect as a form of neglect. Under the federal statute, "abuse" is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or deprivation by . . . a caregiver, of goods or services . . . necessary to avoid physical harm, mental anguish, or mental illness." 42 U.S.C. § 3002(13)(A), (B) (1994). "Neglect" is the "failure to provide for oneself the goods or services that are necessary to avoid physical harm, mental anguish, or mental illness" or the "failure of a caregiver to provide the goods or services." *Id.* § 3002(37)(A), (B). The term "exploitation" means "the illegal or improper act or process of an individual, including a caregiver, using the resources of an older individual for monetary or personal benefit, profit, or gain." *Id.* § 3002(26). A "caregiver" is "an individual who has the responsibility for the care of an older individual, either voluntarily, by contract, by receipt of payment for care, or as a result of the operation of law." *Id.* § 3002(20).

Section 144 notes that "elder abuse" refers to "abuse of an older individual" but does not specify any particular age. *Id.* § 3002(24). However, because other provisions under Title III of the Older Americans Act are applicable to people who are sixty years of age and older, it may be assumed that the congressional intent is to cover the elderly in the same age group with the new elder abuse prevention program. The language clearly implies that the federal elder abuse definitions cover both domestic and institutional abuse. *See generally id.* § 3002.

78. Physical abuse is usually defined as the infliction of non-accidental pain or injury (e.g., slapping, bruising, restraining, molesting, and similar behavior). *See, e.g.,* N.Y. SOC. SERV. LAW § 473(6)(a) (McKinney Supp. 1997) ("Physical abuse" means the intentional or negligent use of force that results in bodily injury, pain or impairment, including but not limited to, being slapped, burned, cut, bruised or improperly physically restrained.") IDAHO CODE § 39-5302(1) (Michie 1997) ("Abuse" means the intentional or negligent infliction of physical pain, injury or mental injury.") Examples of documented physical abuse cases can be found in many sources. The following are two examples:

In New Jersey, a 70-year-old woman was beaten by her 32-year-old son, who did not contribute to the household expenses and whom she suspected of abusing alcohol and drugs. She said she was terrified of his unprovoked attacks and that he had broken her glasses and once attacked her in bed while she was sleeping. A social worker saw her badly bruised left breast, the result of the son punching her.

...

In Texas an elderly woman lived with her son, who was armed, dangerous, often on drugs and threatening to shoot anyone who came to his home. The 94-year-old woman lived in an upstairs bedroom and the rest of her family had not been allowed to see her in a year. A caseworker discovered her nude from the waist down, dehydrated, and lying in her own feces, urine and blood. The stench from her bedsores, which ran to the bone and were covered with maggots, was overpowering.

psychological or emotional abuse,⁷⁹ financial exploitation,⁸⁰ and neglect

She screamed with pain when moved and could not be dressed. Her skin had broken down so badly that she had to be placed in a body bag to be transferred to a stretcher.

When told that his mother's condition was serious enough to warrant placement in a nursing home, the son objected, asking, "Then who will pay the utility bills here?" The woman died 2 weeks later and the son was eventually convicted, under Section 2204 of the Texas Penal Code, of "willful neglect to an elderly individual causing physical harm."

HOUSE SUBCOMM. ON HEALTH LONG-TERM CARE, 101ST CONG., 2D SESS., ELDER ABUSE: A DECADE OF SHAME AND INACTION XI, at 3, 6 (Comm. Print 1990) [hereinafter 1990 ELDER ABUSE HOUSE REPORT].

79. Psychological abuse is the willful infliction of severe mental anguish, *e.g.*, humiliation or threats. *See, e.g.*, NEV. REV. STAT. ANN. 41.1395(4)(a)(1) (Michie Supp. 1997) ("'Abuse' means willful and unjustified . . . infliction of pain, injury or mental anguish."); N.D. CENT. CODE § 50-25.2-01(1) (1995) ("'Abuse' means any willful act or omission of a caregiver . . . which results in . . . mental anguish."). The 1990 ELDER ABUSE HOUSE REPORT illustrates:

[A]n elderly woman in Oregon lived with her son, who was diagnosed as a paranoid schizophrenic and who suffered additional mental impairment from alcohol and drug abuse which began at about age 14. He tormented her in several ways, one day becoming angry, grabbing his mother's arm, twisting it and spinning her around in her wheelchair. He often threatened her verbally and was physically abusive. Once he crept up behind his mother and yelled, "I could make you have a heart attack!"

...

In Montana, the nephew of an elderly woman threatened repeatedly to kill her and set fire to her ranch. On one occasion, he gave her a black eye and bruises when she refused to give him money.

1990 ELDER ABUSE HOUSE REPORT, *supra* note 78, at 17.

80. Financial abuse is the unauthorized or exploitive use of funds, property, or resources of an elder person. *See, e.g.*, MISS. CODE ANN. § 43-47-5(i) (1993). "'Exploitation' shall mean the illegal or improper use of a vulnerable adult or his resources for another's profit or advantage." *Id.* Such financial abuse is exemplified in the following:

Muriel, an elderly woman in Oklahoma, was being terrorized by her adopted son, who would often display his violent temper to obtain and then squander her money.

The son and his wife gained control of Muriel's money by obtaining power of attorney, which allowed them to cash her Social Security and retirement checks each month and to gain access to her savings account. The pair bought a new boat, new car and other luxury items with his mother's money. Soon Muriel, now 78, was penniless.

...

In Delaware, an elderly couple, both suffering from Alzheimer's disease, were the victims of actual and threatened abuse by their granddaughter. She cashed certificates of deposit worth \$35,000, although they were in her grandparents' names. The granddaughter has a history of violent behavior and had previously been admitted to Delaware State Hospital for psychiatric care.

1990 ELDER ABUSE HOUSE REPORT, *supra* note 78, at 12, 13.

of caretaking obligations.⁸¹ Failure to provide needed financial resources for an aged person under the direct care of the adult child is considered neglect.

Shocking numbers of the aged are subject to abuse and neglect in America each year. Both congressional committees⁸² and academic

81. Neglect is generally defined as the willful or passive failure of caregivers to fulfill their care taking obligations or duties, *e.g.*, depriving the elderly of basic services such as food, housing, care for physical or mental health, such as medication. *See, e.g.*, ARK. CODE ANN. § 5-28-101(3)(A) (Michie 1997) ("Neglect' means [n]egligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an endangered or impaired adult."); CAL. WELF. & INST. CODE § 15610.07 (West 2001) ("Abuse of an elder or a dependent adult' means . . . [p]hysical abuse, neglect, . . . or . . . [t]he deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering."). Illustrative examples of neglect include:

An 88-year-old Washington State woman had her prescribed medications withheld by her guardian. Cared for by a home health aide, the woman has reportedly had teeth extracted without any anesthetic and is continually having her tracheotomy and g-tube replaced by unqualified help. She was recently dropped during a move from room to room and now has a broken nose. No X-rays or pain medication were administered. She has been routinely left in her chair for 12 hours at a time and has very fragile skin which is vulnerable to decubiti.

...
A home health aide in New Hampshire was startled to find her client, an elderly woman, in urine and feces-soiled clothing. The woman had suffered severe weight loss, too. The woman's husband, her caregiver, had failed to contact his wife's physician as he had promised the aide he would, although his wife was weak and malnourished and had to be hospitalized.

Upon questioning, the husband became angry. He denied that his wife was neglected—he said he sometimes might seem to be ignoring her but that was only to encourage her to do things by herself.

...
When apartment cleaners and painters entered a Texas apartment vacated by the tenants 3 weeks previously, they discovered an elderly woman in a back room. This stroke victim, in her mid-80's, was bedbound and incontinent, unable to call for help. Her relatives moved out one night, leaving her alone with a glass of water and one plate of food. The woman was found starving, dehydrated and lying in her urine and feces. She had seen no one in the 3 weeks since her family moved. She died in the hospital several days later. Relatives stated that they couldn't afford to take her along.

In Tennessee, an 84-year-old man was found in a urine-soaked, feces-covered bed. He had a staph infection. His care was supposed to be handled by his 50-year-old, low-functioning daughter, who was totally financially dependent on him. She fought the notion of placing him in a nursing home because she would be left without financial support if that happened.

1990 ELDER ABUSE HOUSE REPORT, *supra* note 78, at 5, 8.

82. HOUSE SELECT COMM. ON AGING, 97TH CONG., 1ST SESS., ELDER ABUSE (AN EXAMINATION OF A HIDDEN PROBLEM) (Comm. Print 1981) [hereinafter 1981 ELDER ABUSE HOUSE REPORT]. A decade later, a follow-up congressional panel reported the

researchers⁸³ have estimated that between one and two million cases of elder abuse and neglect occur each year in domestic settings alone.⁸⁴ Ninety percent of states have reported that incidences of mistreatment are increasing.⁸⁵ The magnitude of the epidemic⁸⁶ becomes even clearer when one considers that these numbers exclude what may be occurring in institutions such as nursing homes, assisted living facilities, or other group homes.⁸⁷ Many instances have resulted in criminal prosecutions.⁸⁸ A recent study concluded that elder abuse victims die sooner than non-abused elders.⁸⁹ Although 40% of elders who had no contact with Adult Protective Services were alive at the end of a ten-year period, only 9% of elders who had been maltreated by others were alive at the end of the period.⁹⁰

The situation in the United States is far from unique. A Canadian study, using a nationally representative sample of elders able to respond on the telephone, found 4% had recently experienced one or more

situation had worsened. See 1990 ELDER ABUSE HOUSE REPORT, *supra* note 78, at xi.

83. Karl Pillemer & David Finkelhor, *The Prevalence of Elder Abuse: A Random Sample Survey*, 28 GERONTOLOGIST 51-57 (1988) (estimating 700,000-1,100,000 cases of elder mistreatment, excluding financial exploitation, more than a decade ago).

84. See generally 1990 ELDER ABUSE HOUSE REPORT, *supra* note 78, at ix-x.

85. *Id.* at xiv.

86. Pillemer & Finkelhor, *supra* note 83, at 56.

87. See, e.g., Barry Meier, *States See Problems with Care at Chain of Centers for the Aged*, N.Y. TIMES, Nov. 26, 2000, at A1. For example, in 2000 administrative agencies in at least five states found the largest chain of assisted living facilities in the United States, Alterra Healthcare Corp., which also operates 150 residences for people with Alzheimer's disease, has "inadequate or untrained staffs [who fail] to give elderly residents needed drugs and nutritional supplements or failed to protect their safety." *Id.*; see also Karl Pillemer & David Moore, *Highlights from a Study of Abuse of Patients in Nursing Homes*, 2 J. ELDER ABUSE & NEGLECT 5, 18, 19 (1990) (finding 36% of all nursing home personnel reported seeing at least one incident of physical abuse by staff members; 40% admitted committing psychological abuse in the past year).

88. In one case dealing with neglect, *People v. Heitzmann*, 886 P.2d 1229 (Cal. 1994), the police found the body of the deceased in the home of his two grown sons and three grandsons. The court described his condition:

At the time of his death, decedent had large, decubitus ulcers, more commonly referred to as bed sores, covering one-sixth of his body. An autopsy revealed the existence of a yeast infection in his mouth, and showed that he suffered from congestive heart failure, bronchial pneumonia, and hepatitis. The forensic pathologist who performed the autopsy attributed decedent's death to septic shock due to the sores which . . . were caused by malnutrition, dehydration and neglect.

Id. at 1231-32.

89. Mark Lachs et al., *The Mortality of Elder Mistreatment*, 280 JAMA 428 (1998).

90. *Id.* at 430.

forms of mistreatment.⁹¹ In the United Kingdom, a study found that 6% of individuals aged sixty-five to seventy-four reported recent verbal abuse by a close family member or relative; 2% reported physical mistreatment; and 1% reported financial exploitation.⁹² Written questionnaires and clinical evaluations to determine the rate of abuse and neglect in a small, semi-industrialized town in Finland produced a 2.5% elder mistreatment prevalence rate for men and 7.0% for women.⁹³ In a study of older adults living independently in Amsterdam (the Netherlands), nearly 6% reported abuse and neglect.⁹⁴ Because all of the surveys are based on self-reporting, the percentages are likely to underestimate the problem rather than overestimate it.⁹⁵

C. Health Status

The health status of the aged further contributes to their economic problems. In 1995, 28.3% of older persons assessed their health as fair or poor compared to 9.4% of all persons in the United States.⁹⁶ Most older persons have at least one chronic condition, and almost half of those over sixty-five years of age have multiple conditions, such as arthritis, hypertension, heart disease, hearing impairments, cataracts, orthopedic impairments, and diabetes, that limit their daily activities.⁹⁷ These chronic conditions typically cause irreversible pathology and inactivity. Those seventy-five and older are 40% more likely to spend more than seven days in bed annually than those fifty-five to sixty-four years.⁹⁸ "Perhaps as many as 25 percent of American elderly have some mental health problems . . ."⁹⁹ Despite the popular view that Medicare meets the medical needs of seniors, estimates reveal that when expenses

91. Elizabeth Podnieks, *National Survey of Abuse of the Elderly in Canada*, 4(1/2) J. ELDER ABUSE & NEGLECT 1, 1-2 (1992).

92. Ogg & Bennett, *Elder Abuse in Britain*, 305 BRIT. MED. J. 998, 998 (Oct. 1992).

93. Sirkka-Liisa Kivelä, *Elder Abuse in Finland*, 6 J. ELDER ABUSE & NEGLECT 31 (1994).

94. Hannie C. Comijs et al., *Elder Abuse in the Community: Prevalence and Consequences*, 46 J. AM. GERIATRICS SOC'Y 885, 886 & tbl. 1 (1998).

95. There is room for debate about these estimates because definitions used in studies and statutes vary, and the research methodologies utilized also vary widely. It is generally acknowledged, however, that very large numbers of the elderly are seriously mistreated, that even larger numbers of elders are at-risk in the world today, and that our response to this problem has been ineffective.

96. CARY S. KART & JENNIFER M. KINNEY, *THE REALITIES OF AGING* 107 (Sara L. Kelbaugh ed., 6th ed. 2001).

97. *Id.*

98. *Id.*

99. *Id.* at 134.

are totaled Medicare pays only about 50% of these expenses.¹⁰⁰ The remainder must be paid by the individual through private insurance or sometimes Medicaid.¹⁰¹

In stark contrast with the United States, Canadian law has since 1957 guaranteed universal hospital care coverage (and since 1968 a comprehensive health care system).¹⁰² Such coverage includes the full range of in-patient and out-patient hospital and medical care, both preventive and curative services.¹⁰³ The Canadian system is financed by general tax revenues rather than by premium charges or payments for public health insurance.¹⁰⁴

IV. FILIAL RESPONSIBILITY LAWS

A. North America

1. United States

Although rules requiring support of parents have existed for thousands of years beginning with early Roman law,¹⁰⁵ and all three major Western religious traditions¹⁰⁶ clearly articulate such a duty, the most direct precursor to modern American filial responsibility statutes was the Elizabethan Poor Relief Act of 1601.¹⁰⁷ That law mandated that parents and grandparents support their children and grandchildren, and thus, all poor, old, blind, or lame persons "ought in return to be

100. JOSEPH MATTHEWS, *SOCIAL SECURITY, MEDICARE & PENSIONS* § 12:2 (7th ed. 1999).

101. This is a marked departure from the situation of the aged in many other countries. In Europe, for example, health care is usually provided by national health services funded by general taxation and social insurance systems. Richard Freeman, *Institutions, States and Cultures: Health Policy and Politics in Europe*, in *COMPARATIVE SOCIAL POLICY: CONCEPTS, THEORIES AND METHODS* 82 (Jochen Clasen ed., 1999) (revealing that the United Kingdom, Denmark, Sweden, Italy, and Greece use national health services funded by general taxation and social insurance systems). These health services feature public ownership of health care facilities and salaried health providers. *Id.* Large numbers of the American population lack health insurance. *Id.*

102. CANADA HEALTH ACT DIVISION, *CANADA HEALTH ACT ANNUAL REPORT, 2000-2001* at 315 (2001).

103. *Id.*

104. *Id.* at 316.

105. See, e.g., Catherine Doscher Byrd, *Relative Responsibility Extended: Requirements of Adult Children to Pay for Their Indigent Parent's Medical Needs*, 22 *FAM. L.Q.* 87, 88 (1988).

106. See *supra* Part II.A.

107. Elizabethan Poor Relief Act, 1601, 43 Eliz., c. 2 (Eng.).

supported by their offspring' who owe them 'honour and reverence'" regardless of misbehavior by parents or other factors.¹⁰⁸ This legal mandate remained in place in England until the great reforms enacted after World War II.¹⁰⁹

The Elizabethan system for dealing with elderly poverty was transported across the ocean and transplanted as the prototype for early welfare systems in the American colonies.¹¹⁰ For example, in 1705, Pennsylvania law authorized "overseers of the poor" to impose taxes for the relief of "poor, indigent" persons and imposed a duty of support upon the "father and grandfather and the mother and grandmother *and the children* of every poor, old, blind, lame . . . person."¹¹¹ Until New Deal legislative reforms in the 1930s, most legal provisions granting relief to the poor, including family responsibility provisions, were initiated by state and local governments and largely based on the English model outlined above.¹¹² In modern times, state and local provisions for the indigent elderly are no longer the only responses to their need. The advent of Social Security in the 1930s,¹¹³ health service payments through Medicare in the 1960s,¹¹⁴ and the growth of private pension plans have all created substantial support for the elderly separate from state and local welfare laws.

Today, thirty states have filial responsibility laws, which create a legal duty to support elderly, indigent parents.¹¹⁵ Although these state

108. David Thompson, *I Am not My Father's Keeper: Families and the Elderly in Nineteenth Century England*, 2 LAW & HIST. REV. 265, 266 (1984) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 453 (1765)).

109. See generally BEVERIDGE AND SOCIAL SECURITY: AN INTERNATIONAL RETROSPECTIVE (John Hills et al. eds., 1994). In the United Kingdom, the local Poor Laws were formally disavowed, and a new system of national assistance was instituted in the late 1940s. See generally *id.*

110. See generally Jacob Ten Broek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 291 (1964) (tracing importation of English poor law system into the American legal system).

111. LAWS OF THE PROVINCE OF PENNSYLVANIA (Andr. Bradford ed., 1714), reprinted in THE EARLIEST PRINTED LAWS OF PENNSYLVANIA 1681-1713 at 78 (John Cushing ed., 1978).

112. See generally Daniel R. Mandelker, *Family Responsibility Under the American Poor Laws*, 54 MICH. L. REV. 497 (1956).

113. The Social Security Act, codified in various sections of 42 U.S.C., today provides a large number of benefits.

114. The Medicare statute today is codified at 42 U.S.C. § 1395 (Supp. IV 1998) (Title XVIII of the Social Security Act). The Regulations are found at 42 C.F.R. Parts 405-21.

115. ALASKA STAT. §§ 25.20.030, 47.25.230 (Michie 2000); ARK. CODE ANN. § 20-47-106 (Michie 1991); CAL. FAM. CODE §§ 4400, 4401, 4403, 4410-4414 (West 1994), CAL. PENAL CODE § 270c (West 1999), CAL. WELF. & INST. CODE § 12350 (West Supp. 2001);

statutes are diverse and their rationales, triggering mechanisms, and enforcement procedures vary enormously, most statutes reflect a seemingly reciprocal contract obligation—because parents have provided support in the past, the adult children now owe support to needy parents.¹¹⁶ Throughout the country, courts have interpreted filial responsibility laws to require children to provide financial support for their indigent parents, an obligation that would relieve state and local authorities from the burden of supporting with public funds those poor persons whose relatives could provide private support for them.¹¹⁷

CONN. GEN. STAT. ANN. §§ 46b-215, 53-304 (West Supp. 2001); DEL. CODE ANN. tit. 13, § 503 (1999); GA. CODE ANN. § 36-12-3 (2000); IDAHO CODE § 32-1002 (Michie 1996); IND. CODE ANN. §§ 31-16-17-1 to 31-16-17-7 (West 1997); IND. CODE ANN. § 35-46-1-7 (West 1998); IOWA CODE ANN. §§ 252.1, 252.2, 252.5, 252.6, 252.13 (West 2000); KY. REV. STAT. ANN. § 530.050 (Banks-Baldwin 1999); LA. REV. STAT. ANN. § 4731 (West 1998); MD. CODE ANN., FAM. LAW §§ 13-101, 13-102, 13-103, 13-109 (1999); MASS. GEN. LAWS ANN. ch. 273, § 20 (West 1990); MISS. CODE ANN. § 43-31-25 (2000); MONT. CODE ANN. §§ 40-6-214, 40-6-301 (2000); NEV. REV. STAT. ANN. 428.070 (Michie 2000), NEV. REV. STAT. ANN. 439B.310 (Michie 2000); N.H. REV. STAT. ANN. § 167:2 (1994); N.J. STAT. ANN. §§ 44:4-100 to 44:4-102, 44:1-139 to 44:1-141 (West 1993); N.C. GEN. STAT. § 14-326.1 (1999); N.D. CENT. CODE § 14-09-10 (1997); OHIO REV. CODE ANN. § 2919.21 (Anderson 1999); OR. REV. STAT. § 109.010 (1990); 62 PA. CONS. STAT. § 1973 (1996); R.I. GEN. LAWS §§ 15-10-1 to 15-10-7 (2000); R.I. GEN. LAWS §§ 40-5-13 to 40-5-18 (1997), S.D. CODIFIED LAWS §§ 25-7-28 (Michie 1999); TENN. CODE ANN. § 71-5-115 (1995), TENN. CODE ANN. § 71-5-103 (Supp. 2000); UTAH CODE ANN. § 17-14-2 (1999); VT. STAT. ANN. tit. 15, §§ 202-03 (1989); VA. CODE ANN. § 20-88 (Michie 2000); W. VA. CODE § 9-5-9 (1998).

116. Consistent with this legal theory, in some cases adult children are excused from the duty if the parent failed to support them during their minority, or was guilty of abuse or neglect. See statutes cited *supra* note 115 from California, Indiana, Massachusetts, New Jersey, Ohio, Pennsylvania, Rhode Island, and Virginia for examples of such provisions.

117. See, e.g., *U.S. v. Purdy*, 38 F. 902 (S.D. Ohio 1889); *San Bernardino County v. Simmons*, 296 P.2d 329 (Cal. 1956); *Duffy v. Yordi*, 84 P. 838 (Cal. 1906); *Gluckman v. Gaines*, 71 Cal. Rptr. 795 (Ct. App. 1968); *Britton v. Steinberg*, 24 Cal. Rptr. 831 (Ct. App. 1962); *Alameda County v. Clifford*, 10 Cal. Rptr. 144 (Ct. App. 1960); *Los Angeles County v. Lane*, 248 P.2d 479 (Cal. Ct. App. 1952); *Janes v. Edwards*, 41 P.2d 370 (Cal. Ct. App. 1935); *People v. Curry*, 231 P. 358 (Cal. Ct. App. 1924); *Cotter v. Cotter*, 73 A. 903 (Conn. 1909); *Helen B.M. v. Samuel F.D.*, 479 A.2d 852 (Del. Fam. Ct. 1984); *Faloon v. McIntyre*, 8 N.E. 315 (Ill. 1886); *Cauble v. Ryman*, 26 Ind. 207 (1866); *Pickett v. Pickett*, 251 N.E.2d 684 (Ind. Ct. App. 1969); *McGarvey v. Roods*, 35 N.W. 488 (Iowa 1887); *Jasper County v. Osborn*, 13 N.W. 104 (Iowa 1882); *Greenwell v. Greenwell*, 28 Kan. 675 (1882); *Succession of Guidry*, 4 So. 893 (La. 1888); *Ramos v. Ramos*, 425 So.2d 989 (La. Ct. App. 1983); *City of Springfield v. Siderlund*, 122 N.E.2d 898 (Mass. 1954); *Schwanz v. Wujek*, 128 N.W. 731 (Mich. 1910); *In re Salm's Guardianship*, 12 N.Y.S.2d 678 (Sup. Ct. 1939); *Harrigan v. Cahill*, 164 N.Y.S. 1005 (Sup. Ct. 1917); *Edwards v. Davis*, 16 Johns. 281 (N.Y. Sup. Ct. 1819); *Bismarck Hosp. and Deaconesses Home v. Harris*, 280 N.W. 423 (N.D. 1938); *State v. Flontek*, 693 N.E.2d 767 (Ohio 1998); *Belknap v. Whitmire*, 43 Or. 75 (1903); *Smith v. Juras*, 513 P.2d 824 (Or. Ct. App. 1973); *Cheatham v. Juras*, 501 P.2d 988 (Or. Ct. App. 1972); *Denny v. Pub. Welfare Div.*, 483 P.2d 463 (Or. Ct. App. 1971); *Albert Einstein Med. Ctr. v. Forman*, 243 A.2d 181 (Pa. Super. Ct. 1968); *Commonwealth ex rel. Goldman v. Goldman*, 119 A.2d 631 (Pa. Super. Ct. 1956); *Commonwealth ex rel. O'Malley v. O'Malley*, 161 A. 883 (Pa. Super. Ct. 1932);

Indeed, state appellate courts have upheld filial responsibility statutes against constitutional challenges alleging a violation of the Equal Protection Clause,¹¹⁸ an illegal "taking" of property,¹¹⁹ and double taxation of relatives.¹²⁰

In some statutes, the financial need of a parent that triggers the legal duty is described in general terms, *e.g.*, the aged person is "unable to maintain" himself.¹²¹ With other statutes, financial need is identified in terms of "necessary food, clothing, shelter and medical attention,"¹²² or as the need to provide "necessaries,"¹²³ "medical expenses,"¹²⁴ or "burial

Landmark Med. Ctr. v. Gauthier, 635 A.2d 1145 (R.I. 1994); Americana Healthcare Ctr. v. Randall, 513 N.W.2d 566 (S.D. 1994); Sawyer v. Estate of Hebard, 3 A. 529 (Vt. 1886); Davis v. Commonwealth, 335 S.E.2d 375 (Va. 1985).

118. *See, e.g., Americana HealthCare*, 513 N.W.2d 566 (finding that South Dakota had a rational basis for requiring a financially sound son to support his mother); Groover v. Essex County Welfare Bd., 264 A.2d 143 (D.C. 1970) (determining that the state has a rational basis for requiring a son in its jurisdiction to support his mother).

119. *See, e.g., Atkins v. Curtis*, 66 So. 2d 455 (Ala. 1953) (asserting that the state does not "take" private property because the proceeding must be initiated by the needy person or a relative responsible for support, and not the state); Dep't. of Mental Hygiene v. McGilvery, 329 P.2d 689, 699 (Cal. 1958) (noting that payment of the expense for the care and maintenance of a relative who is incapable of caring for herself does not qualify as a taking because the state agents managing the institution of care required a "substantial equivalent").

120. *See, e.g., Maricopa County v. Douglas*, 208 P.2d 646, 649 (Ariz. 1999) ("The fact that there is both a legal and moral obligation to pay for the maintenance of certain relatives does not in itself constitute double taxation.").

121. *See, e.g., ALASKA STAT. §25.20.030* (Michie 1999) ("Each parent is bound to maintain the parent's children when poor and unable to work to maintain themselves. Each child is bound to maintain the child's parents in like circumstances."); CONN. GEN. STAT. ANN. § 53-304 (West 1994 & Supp. 2000); DEL. CODE ANN. tit. 13, § 503 (1999); IDAHO CODE § 32-1002 (Michie 1996); IND. CODE ANN. §§ 31-16-17-1 to 31-16-17-7 (West 1999); IND. CODE ANN. § 35-46-1-7 (West 1998); IOWA CODE ANN. §§ 252.1, 252.2 (West 2000); MISS. CODE ANN. § 43-31-25 (2000), MONT. CODE ANN. § 40-6-214 (2000); N.D. CENT. CODE § 14-09-10 (1997); OHIO REV. CODE ANN. § 2919.21 (West 1999); OR. REV. STAT. § 109.010 (1990); 62 PA. CONS. STAT. § 1973 (1996); S.D. CODIFIED LAWS § 25-7-27 (Michie Supp. 2001).

122. *See, e.g., IND. CODE ANN. § 31-16-17-1* (West 1999) ("Any individual . . . shall contribute to the support of the individual's parents if either parent is financially unable to furnish the parent's own necessary food, clothing, shelter, and medical attention."); MONT. CODE ANN. § 40-6-301(1) (1999) (revealing that an adult child has a duty to provide "necessary food, clothing, shelter, [and] medical attendance."); S.D. CODIFIED LAWS § 25-7-27 (Michie 1999 & Supp. 2001) (establishing that an adult child has a duty to "provide necessary food, clothing, shelter, or medical attendance").

123. *See, e.g., CAL. FAM. CODE § 4401* (West 1994) ("The promise of an adult child to pay for necessities . . . is binding."); MISS. CODE ANN. § 43-31-25 (2000) ("[T]he descendants of any pauper . . . shall be liable to any governmental entity who supplies such poor relative . . . with necessities . . .").

124. *See, e.g., NEV. REV. STAT. ANN. 428.070* (Michie 2000) ("[C]hildren . . . shall pay to the county which has extended county hospitalization to any person under the provisions of

expenses."¹²⁵ In some states, the obligation to support is even extended to grandchildren.¹²⁶ Statutes will often provide a right of contribution from siblings, if one child has been required to support a parent.¹²⁷

If state or local welfare authorities have provided assistance to an indigent parent, many states require adult children or other relatives to reimburse the public treasury.¹²⁸ This is similar to the original 1601 Poor Law that gave English parishes the power to claim back from relatives the cost of supporting paupers.¹²⁹ Similarly, parents are commonly obligated to reimburse welfare authorities for public assistance provided to children.¹³⁰

Of the thirty states with filial responsibility laws, twenty-two have civil statutes.¹³¹ Standing to bring an action is accorded to varying

NRS 428.030, the amount granted to such person."); TENN. CODE ANN. § 71-5-115 (1995) (allowing the state department of health to be reimbursed by adult children for rendering "medical assistance" to the parent).

125. See, e.g., ALASKA STAT. § 47.25.230 (Michie 2000) ("[C]hildren . . . of the needy person . . . shall reimburse the state or a municipality for the funds expended . . . for the relief or burial of the needy person . . ."); IND. CODE ANN. § 31-16-17-1(2) (West Supp. 2000) ("The individual shall also provide financial support for the parent's burial . . ."); W.VA. CODE § 9-5-9 (1998) ("[T]he relatives of an indigent person . . . shall be liable . . . to pay the expenses of burial . . .").

126. ALASKA STAT. § 47.25.230 (Michie 2000); ARK. CODE ANN. § 20-47-106 (Michie 1998); IOWA CODE ANN. § 252.5 (West 2000); LA. REV. STAT. ANN. § 13:4731 (West 1998); UTAH CODE ANN. § 17-14-2 (1999).

127. S.D. CODIFIED LAWS § 25-7-28 (Michie 1999) (stating that when a child provides for a parent, that child "shall have the right of contribution from his adult brothers and sisters, who refuse or do not assist"); *Gluckman v. Gaines*, 71 Cal. Rptr. 795, 797 (Ct. App. 1968) (construing a California statute to require "children to support [their] parent in proportion to their abilities"); *Wyman v. Passmore*, 125 N.W. 213, 214 (Iowa 1910) (holding that "where one of several children undertakes to keep the parent at the request of others, those at whose request the service is performed are under obligation to make reasonable compensation").

128. See, e.g., CONN. GEN. STAT. ANN. § 46b-215(8)(B) (West Supp. 2002) ("In the case of a person supported wholly or in part by a town, the welfare authority of the town shall notify the responsible relatives of such person of the amount of assistance given . . . and the amount of support expected from each of them . . ."); GA. CODE ANN. § 36-12-3 (2000); IDAHO CODE § 32-1002 (Michie 1996); IND. CODE ANN. § 31-16-17-2 (West 1999); IOWA CODE ANN. § 252.13 (West 2000); MISS. CODE ANN. § 43-31-25 (2000); MONT. CODE ANN. § 40-6-301(2) (2000); TENN. CODE ANN. § 71-5-115 (1995).

129. An Act for the Relief of the Poor, 1601, 43 Eliz., c. 2 (Eng.), reprinted in 7 STAT. AT LARGE (Eng.) 37-38 (Danby Pickering ed., 1762).

130. See, e.g., CAL. WELF & INST. CODE § 903-903.4(b) (West 1999).

131. See ALASKA STAT. §§ 25.20.030, 47.25.230 (Michie 1998); ARK. CODE ANN. § 20-47-106 (Michie 1987); CAL. FAM. CODE §§ 4400, 4401, 4403, 4410-14 (West 1994); CAL. WELF. & INST. CODE § 12350 (West 1991 & Supp. 2000); DEL. CODE ANN. tit. 13, § 503 (1999); GA. CODE ANN. § 36-12-3 (1993); IND. CODE ANN. § 31-16-17-1 to 31-16-17-17 (Michie 1999 & Supp. 2000); IOWA CODE ANN. §§ 252.1, 252.2, 252.5, 252.6, 252.13 (West

persons or entities, including: the indigent parent,¹³² a public body or agency,¹³³ the welfare authority,¹³⁴ or creditors furnishing necessities to the indigent parent.¹³⁵ Many statutes do not specify who may bring suit to recover support. Some statutes provide for the shifting of attorney fees onto the defendant as a means of enabling more aged persons to bring suit.¹³⁶ Eighteen states explicitly condition the child's responsibility on his or her financial ability to pay.¹³⁷

In twelve states, filial responsibility laws are found in criminal statutes. However, these laws defy easy generalization. While many allow the public prosecutor to bring an action,¹³⁸ others surprisingly

2000); LA. REV. STAT. ANN. § 13:4731 (West 1998); MISS. CODE ANN. § 43-31-25 (2000); MONT. CODE ANN. § 40-6-214 (1999); NEV. REV. STAT. ANN. 428.070 (Michie 2000); NEV. REV. STAT. ANN. 439B.310 (Michie 1996 & Supp. 1999); N.H. REV. STAT. ANN. § 167:2 (1994 & Supp. 1999); N.H. REV. STAT. ANN. § 546-A:2 (1997); N.J. STAT. ANN. §§ 44:4-100 to 44:4-102, 44:1-139 to 44:1-141 (West 1993); N.D. CENT. CODE § 14-09-10 (1997); OR. REV. STAT. § 109.010 (1990); 62 PA. CONS. STAT. ANN. § 1973 (West 1996); S.D. CODIFIED LAWS § 25-7-27 (Michie 1999 & Supp. 2000); S.D. CODIFIED LAWS §§ 25-7-25, 28-13-1.1 (Michie 1999); TENN. CODE ANN. §§ 71-5-103, 71-5-115 (1995 & Supp. 1999); UTAH CODE ANN. § 17-14-2 (1999); W. VA. CODE § 9-5-9 (1998).

132. See, e.g., CAL. FAM. CODE § 4403(a)(1) (West 1994) ("A parent . . . may bring an action against the child to enforce the duty of support under this part."); see also IND. CODE ANN. § 31-16-17-4(a)(1) (West 1999); 62 PA. CONS. STAT. ANN. § 1973(b) (West 1996).

133. See, e.g., CAL. FAM. CODE § 4403(a)(2) (West 1994) ("If the county furnishes support to a parent, the county has the same right as the parent to . . . obtain continuing support."); see also GA. CODE ANN. § 36-12-3 (2000) ("Any county having provided for such pauper upon the failure of such relatives . . . may bring an action against such relatives . . .").

134. See, e.g., N.J. STAT. ANN. § 44:4-102 (West 1993) ("[T]he Superior Court, upon the complaint of the director of welfare . . . may summon the persons chargeable . . . and may order and adjudge the able relatives to pay such sum as the circumstances may require . . .").

135. See, e.g., N.D. CENT. CODE § 14-09-10 (1997) ("This liability may be enforced by any person furnishing necessities to the person.").

136. See, e.g., CAL. FAM. CODE § 4403 (West 1994); IND. CODE ANN. § 31-16-17-5 (West 1999); OHIO REV. CODE ANN. § 2919.21 (West 1999).

137. See, e.g., ALASKA STAT. § 47.25.230 (Michie 2000) ("Every needy person shall be supported . . . by . . . children . . . of the needy person, if they, or any of them, have the ability to do so . . ."); see also ARK. CODE ANN. § 20-47-106 (Michie 1991); CAL. FAM. CODE § 4400 (West 1994); CONN. GEN. STAT. ANN. § 53-304 (West Supp. 2000); GA. CODE ANN. § 36-12-3 (2000); IDAHO CODE § 32-1002 (Michie 1996); IND. CODE ANN. §§ 31-16-17-1, 35-46-1-7 (West 1998); IOWA CODE ANN. § 252.2 (West 2000); LA. REV. STAT. ANN. § 13:4731 (West 1998); MONT. CODE ANN. § 40-6-214 (2000); NEV. REV. STAT. ANN. 428.070 (Michie 2000); N.H. REV. STAT. ANN. § 546-A:2 (1997); N.J. STAT. ANN. § 44:4-101(a) (West 1993); N.D. CENT. CODE § 14-09-10 (1997); 62 PA. CONS. STAT. ANN. § 1973 (West 1996); S.D. CODIFIED LAWS § 25-7-27 (Michie Supp. 2001); UTAH CODE ANN. § 17-14-2 (1999); W. VA. CODE § 9-5-9 (1998).

138. See, e.g., IND. CODE ANN. § 31-16-17-4(a)(5) (West 1999) ("Any of the following may prosecute a civil action for support of a parent: . . . The prosecuting attorney. . ."); MD. CODE ANN., FAM. LAW § 13-103(a) (1999) ("A complaint under this section shall be made under oath in writing to a State's Attorney.").

permit suit to be initiated by the court,¹³⁹ the director of any licensed private charity,¹⁴⁰ or others. As in the civil liability statutes, many states explicitly provide for children who were not supported by their parents during their minority,¹⁴¹ or where there is an inability to provide the support.¹⁴²

2. Contemporary Status of American Filial Responsibility Laws

Although these statutes are found in many states, the 1965 enactment of the federal Medicaid statute initially resulted in decreased reliance on filial responsibility laws.¹⁴³ The federal law prohibits states from considering the financial responsibility "of any individual for any applicant or recipient of assistance under the [Medicaid] plan unless such applicant or recipient is such individual's spouse *or such individual's child who is under the age of 21.*"¹⁴⁴ However, this prohibition applies only to eligibility for Medicaid, and not to other benefits; and it does not rule out normal enforcement of state statutes.

139. VA. CODE ANN. § 20-88 (Michie 2000) ("Where the court ascertains that any person has failed to render his or her proper share in such support and maintenance it may . . . on its own motion, compel contribution by that person . . .").

140. R.I. GEN. LAWS § 15-10-4 (2000).

141. *See, e.g.*, IND. CODE ANN. § 35-46-1-7(b) (West 1998) ("It is a defense that the accused person had not been supported by the parent during the time he was a dependent child under eighteen. . . ."); MASS. GEN. LAWS ANN. ch. 273, § 20 (West 1992) (providing that a refusal to support a parent was not unreasonable when parent did not support child); OHIO REV. CODE ANN. § 2919.21(D) (Anderson 1999) (providing an affirmative defense when parent abandoned child or failed to support when child was under eighteen); R.I. GEN. LAWS § 15-10-1 (2000) (refusal to support parent not unreasonable when parent did not support child); VA. CODE ANN. § 20-88 (Michie 2000) (stating that the law does not apply when substantial evidence is shown "of desertion, neglect, abuse or willful failure to support any such child.").

142. *See, e.g.*, CAL. PENAL CODE § 270c (West 1999) ("[E]very adult child who, having the ability so to do . . ."); CONN. GEN. STAT. ANN. § 53-304 (West Supp. 2001) (stating that unless children are "unable to furnish such support," they will be liable); IND. CODE ANN. § 35-46-1-7(c) (West 1998) (providing a "defense that the accused person was unable to provide support."); KY. REV. STAT. ANN. § 530.050(1)(a) (Michie 1999) (stating that support is required when it can be reasonably provided); MD. CODE ANN., FAM. LAW § 13-109(3) (1999) (releasing children from duty when they do not have sufficient means to provide support); MONT. CODE ANN. § 40-6-301(1) (1999) (imposing duty only on those "having the financial ability"); N.C. GEN. STAT. § 14-326.1 (1999) (imposing duty only on those "having sufficient income"); OHIO REV. CODE ANN. § 2919.21(D) (Anderson 1999) (deeming affirmative defense if unable to support); VT. STAT. ANN. tit. 15, § 202 (1989) (imposing duty only on those with "sufficient pecuniary or physical ability" to provide support); VA. CODE ANN. § 20-88 (Michie 2000) (imposing duty only on those with "sufficient earning capacity or income").

143. 42 U.S.C. § 1396a (1994).

144. § 1396a(17)(D) (emphasis added).

After the advent of Medicaid, some states repealed their filial responsibility laws, but the vast majority have remained in effect.¹⁴⁵

Because relatively few cases invoking these laws are reported in appellate court decisions,¹⁴⁶ and trial court cases are rarely printed and reported, enforcement of these state statutes is difficult to gauge. Even so, state courts have uniformly upheld filial responsibility statutes against constitutional attacks. As the South Dakota Supreme Court noted in a recent case challenging its filial responsibility law on equal protection grounds:

The fact that an indigent parent has supported and cared for a child during that child's minority provides an adequate basis for imposing a [legal] duty on the child to support that parent [I]t logically follows that the adult child should bear the burden of reciprocating on that benefit in the event a parent needs support in their [sic] later years.¹⁴⁷

The court found that the statute did not classify citizens arbitrarily, and it determined that the statute furthered the state's legitimate interest in preventing "a parent from being thrown out on the street when in need of specialized care."¹⁴⁸

In *Swoap v. Superior Court*,¹⁴⁹ the California Supreme Court upheld a statute that required children to reimburse the state for public assistance provided to their indigent parents. The court held that the statute did not discriminate on the basis of wealth, but rather selected children to bear the financial burden of indigent elderly on the basis of parentage.¹⁵⁰ Consequently, the statute did not violate the Equal Protection Clause, as the court explained:

It seems eminently clear that the selection of the adult children is rational on the ground that the parents, who are now in need, supported and cared for their children during their minority and that such children should in return now support their parents to

145. See *supra* statutes cited in note 115.

146. California and New York appellate courts reported the greatest number of cases requiring children to support their aging parents; California courts reported eight cases, and New York courts reported three cases. See *supra* note 117 for a list of the cases in each state.

147. *Americana Healthcare Ctr. v. Randall*, 513 N.W.2d 566, 572-73 (S.D. 1994) (citing *Swoap v. Super. Ct.*, 516 P.2d 840 (Cal. 1973)).

148. *Id.* at 573.

149. 516 P.2d 840 (Cal. 1973).

150. *Id.* at 850.

the extent to which they are capable. Since these children received special benefits from the class of "parents in need," it is entirely rational that the children bear a special burden with respect to that class.¹⁵¹

3. Canada

When compared to the United States and European countries, Canada's population still remains relatively young. In 1996, 12.1% of Canadians were sixty-five or older.¹⁵² The 2001 Canadian census revealed that seniors constituted 13% of the population, with that figure increasing to 15% by the year 2011.¹⁵³ Women outnumber men in every age group after sixty-five, and are more than twice the population of men after age eighty-five.¹⁵⁴

Like many states in the United States, the Canadian provinces have codified the duty of support. Between 1922 and 1958, all ten Canadian provinces and territories enacted filial responsibility laws.¹⁵⁵ For example, in Ontario, the first province to enact such a law, Section 32 of the *Family Law Act* provides that "[e]very child who is not a minor has an obligation to provide support, in accordance with need, for his or her parent who has cared for or provided support for the child, to the extent that the child is capable of doing so."¹⁵⁶ Due to the strain that the rapidly increasing elderly population has exerted on the government's ability to provide adequate funding for social issues, Canada is turning to the filial responsibility laws that have existed for over eighty years to support its elderly.

151. *Id.* at 851.

152. Statistics Canada, *Profile of the Canadian Population by Age and Sex; Canada Ages*, available at <http://www12.statcan.ca/english/census01/Products/Analytic/companion/age/canada.cfm>.

153. *Id.*

154. Statistics Canada, Table, *Population by Sex and Age*, available at <http://www.statcan.ca/English/Pgdb/demo10a.htm>.

155. Maintenance Order Act, R.S.A., ch. M-1, § 2(1) (1987) (Can.); Family Relations Act, R.S.B.C., ch. 128, § 90 (1986) (Can.); Parents' Maintenance Act, R.S.M., ch. P10 (1987) (Can.); Family Services Act, R.S.N.B., ch. F-2.2, § 114 (1983) (Can.); Family Law Act, Nfld. R.S., ch. F-2, § 38 (1990) (Can.); Family Maintenance Act, R.S.N.S., ch. 160, s. 1 (1990) (Can.); Family Law Act, R.S.O., ch. F-3, § 32 (1990) (Can.); Family Law Act, R.R.P.E.I., ch. F-2.1 (1988) (Can.); Civil Code of Quebec, § 585 (1980) (Can.); see also Wendy Bernt, *Trend and Development: Lines of Dependence: The Rebirth of Parental Support Legislation in Canada*, 2 APPEAL 53, 53 (1996); Christa Bracci, *Ties That Bind: Ontario's Filial Responsibility Law*, 17 CAN. J. FAM. L. 455, 466 (2000); James G. Snell, *Filial Responsibility Laws in Canada: A Historical Study*, 9 CANADIAN J. OF AGING 268, 270 (1990).

156. Family Law Act, R.S.O., ch. F-3, § 32 (1990) (Can.).

The Canadian statutes enforce the parental support obligation through civil rather than criminal processes.¹⁵⁷ The laws of the various provinces are similar to one another in that all oblige adult children to support their parents in certain circumstances, based on need.¹⁵⁸ However, the statutes differ as to who is eligible for support, who can be required to pay support, what amount may be required, and whether a third party may make a claim against adult children who do not provide such support.¹⁵⁹ Although ambiguities exist because the courts have not had the opportunity to interpret and apply many of the laws, Canadian courts have generally looked to existing child and spousal support principles for guidelines in interpreting the parental support provisions.¹⁶⁰ Canadian courts typically have differed with respect to three issues in filial support cases.

The first issue that Canadian courts consider is whether the aged individual seeking maintenance is eligible. The Ontario Court of Justice, in *Godwin v. Bolsco*, was one of the first courts to provide an in-depth analysis of a statutory provision regarding eligibility.¹⁶¹ In ordering adult children to provide financial support for their mother, a housewife and the primary caregiver in the family,¹⁶² the court interpreted the statute to provide a three-part test: whether the applicant parent had provided support, whether the applicant had provided care, and whether she was in financial need.¹⁶³ This test for determining the parent's eligibility has been adopted in other provinces.¹⁶⁴

The first factor concerns the applicant parent's history of supporting

157. Bracci, *supra* note 155, at 467.

158. See, e.g., *Godwin v. Bolsco*, [1993] 45 R.F.L. 3d 310 (Ont. Prov. Div.); *Dragulin v. Dragulin*, [1998] 43 R.F.L. 4th 55, ¶ 2 (Ont. Gen. Div.) (explaining that early legislation introduced in Ontario in 1921 required a child to support a parent who was destitute and in need of maintenance, whereas current legislation looks only to need); Bernt, *supra* note 155, at 53.

159. Bracci, *supra* note 155, at 469-70.

160. Bracci, *supra* note 155, at 468.

161. [1993] 45 R.F.L. 3d 310 (Ont. Prov. Div.); see also Bernt, *supra* note 155, at 54.

162. *Godwin*, [1993] 45 R.F.L. 3d ¶ 67. Mrs. Bolsco had rarely demonstrated physical affection to her children while they were growing up, stressing duty and responsibility over praise and emotional comfort, and the children did not have much personal contact with their mother as adults. *Id.* ¶ 15. Nonetheless, the court still found that the children owed their mother filial support. *Id.* ¶ 67.

163. *Id.*; see also *Leung v. Leung*, [1996] 20 R.F.L. 4th 48 (Alberta Court of Queen's Bench) (finding that a father who was not certified as destitute or incapable of working was not entitled to support); Bernt, *supra* note 155, at 54.

164. Bernt, *supra* note 155, at 55.

the defendant child, such as the provision of shelter and clothing.¹⁶⁵ The second factor concerns the applicant parent's history of "caring for" the adult child.¹⁶⁶ To receive maintenance under the Act,¹⁶⁷ the parent must have provided either reasonable support or care.¹⁶⁸ The *Godwin* court used *Black's Law Dictionary* to define the terms: "Reasonable care is such a degree of care, precaution, or diligence as may fairly and properly be expected or required, having regard to the nature of the action, or the subject-matter, and the circumstances surrounding the transaction."¹⁶⁹

The quality of the parent's care may become an issue in determining the amount that the child owes.¹⁷⁰ Canadian courts have held that a parent's abandonment of a child during minority can release the adult child from the support obligation.¹⁷¹ In British Columbia, one court has found that the parent's behavior can be considered in deciding the amount of an award, as well as the circumstances of the children.¹⁷²

The third factor concerns the financial need of the applicant parent.¹⁷³ Here, courts examine a variety of individual circumstances, such as the age and the physical capabilities of the applicant parent and their effect on the ability to secure employment; prior work experience or lack thereof, which may have resulted from staying home to raise the defendant child; efforts of the applicant parent to find employment; and the health of the applicant parent.¹⁷⁴

The second issue as to which provinces differ is against whom a filial

165. *Godwin*, 45 R.F.L. 3d ¶ 41. "[Reasonable support] is said to include anything requisite to housing, feeding, clothing, health, proper recreation, vacation, traveling expense, . . . nursing and medical attention in sickness, and suitable burial at death." *Id.* ¶ 46.

166. *Id.* ¶ 41.

167. *Id.*; see also *Dragulin v. Dragulin*, [1998] 43 R.F.L. 4th 55, ¶ 14 (Ont. Gen. Div.) (establishing that a parent must only have provided support or care to fall under the Act).

168. *Dragulin*, 43 R.F.L. 4th ¶ 14; Bracci, *supra* note 155, at 477.

169. *Godwin*, 45 R.F.L. 3d ¶ 54. "[Reasonable care] is such care as an ordinarily prudent person would exercise under the conditions existing at the time he is called upon to act. Substantially synonymous with ordinary or due care." *Id.*

170. Bracci, *supra* note 155, at 483.

171. See *Skrzypacz v. Skrzypacz*, [1996] 22 R.F.L. 4th 450 (Ont. Prov. Div.) (determining that an adult child is not required to support a parent who was not a primary caregiver and who abandoned him); see also Snell, *supra* note 155, at 271 (noting that this principle of reciprocity may be a recognition of the recent increase in divorce rates).

172. *Newson v. Newson*, [1998] 65 B.C.L.R.3d 22, ¶ 15 (B.C. Ct. App.).

173. *Godwin*, 45 R.F.L. 3d ¶ 41; Bracci, *supra* note 155, at 469.

174. *Godwin*, 45 R.F.L. 3d ¶¶ 42-43; *Dragulin v. Dragulin*, [1998] 43 R.F.L. 4th 55 (Ont. Gen. Div.); *Leung v. Leung*, [1996] 20 R.F.L. 4th 48, ¶ 24-25 (Alberta Court of Queen's Bench); Bernt, *supra* note 155, at 55.

support claim may be made. Ontario's filial support law allows parents to make a claim against any or all of their children. A parent's entitlement to spousal support will not preclude a claim against adult children.¹⁷⁵ The provincial statutes vary as to whether the duty of support includes non-biological children.¹⁷⁶ The Ontario statute requires both biological and adoptive children to support their parents,¹⁷⁷ but does not clearly establish whether sons-in-law or daughters-in-law are also required to support their spouse's parents.¹⁷⁸ In contrast, a Nova Scotia court, in *Barrington (Municipality) v. Shand*,¹⁷⁹ concluded that its statute required an adult person not related to an older person by blood or adoption, such as a son-in-law or daughter-in-law, to provide filial support.¹⁸⁰ Quebec has likewise extended eligibility to parents-in-law.¹⁸¹

Canadian courts have applied the "needs and means test" in filial responsibility cases, a test derived from child and spousal support law.¹⁸² The test allows courts to look to the child's ability to support the parent as a defense.¹⁸³ Additionally, in calculating the amount of support, some provinces consider the standard of living provided by the applicant parent to the child when the parties were residing together.¹⁸⁴

175. *Baddeley v. Baddeley*, [1989] 65 D.L.R. 4th 130 (Can.) (holding that a defendant husband could join his ex-wife's children as co-defendants when determining how much support she was owed).

176. *Barrington v. Shand*, [1984] 65 N.S.R.2d 153 (N.S. Fam. Ct.) (interpreting the *Family Maintenance Act*, S.N.S., ch. 160, § 1 (1990) (Can.), to extend the support obligation to persons not related by adoption or blood, such as a son-in-law, where that person has already assumed that support obligation through his own actions). *But see* Bracci, *supra* note 155, at 472-73 (stating that Ontario has not yet construed its *Family Law Act* to include a support obligation for persons not related by blood or adoption).

177. *Family Law Act*, R.S.O., ch. F.3, § 32 (1990) (Can.); *see also* Bracci, *supra* note 155, at 472.

178. *Family Law Act*, R.S.O., ch. F.3, § 32 (1990) (Can.); *see also* Bracci, *supra* note 155, at 473.

179. [1984] 65 N.S.R.2d 153 (N.S. Fam. Ct.).

180. *Id.*; *see also* Bracci, *supra* note 155, at 472.

181. Snell, *supra* note 155, at 270-71.

182. *Re: Blum and Blum*, [1982] 132 D.L.R. 3d 69 (Ont. Prov. Ct. (Fam. Div.)); *see also* *Nevill v. Nevill*, [1998] B.C.J. No. 282 ¶ 22 (British Columbia Master) (holding that the courts will look to the circumstances of the adult child when awarding support); Bracci, *supra* note 155, at 468.

183. Bracci, *supra* note 155, at 468-69.

184. *Dragulin v. Dragulin*, [1998] 43 R.F.L. 4th 55, ¶ 3 (Ont. Gen. Div.); Bernt, *supra* note 155, at 54; Bracci, *supra* note 155, at 475. If necessary, the level may be raised to the subsistence level. *Id.* at 476. Legislators have questioned the validity of different generational standards and quality of care by which a parent may be judged after the fact. Marie Beaulieu & Charmaine Spencer, *Older Adult's Personal Relationships and the Law in Canada, Legal Psycho-Social and Ethical Aspects*, available at <http://www.lcc.gc.ca/en/themes/>

Nonetheless, an Alberta court has ruled that support for parents will only be ordered for needed essentials¹⁸⁵ and not for needless desires, even if the adult child's standard of living increases.¹⁸⁶

Finally, the provinces also differ as to whether third parties may bring a claim for filial support. For example, social security agencies in Ontario may not bring subrogated claims against adult children for reimbursement of benefits provided to the indigent elderly parent.¹⁸⁷ However, many other provinces allow third-party claims.¹⁸⁸ Both the Alberta and Manitoba statutes specifically provide for such suits.¹⁸⁹ Furthermore, in *Barrington*, a Nova Scotia court permitted a nursing home administered by the town to bring a claim under Section 15 of the Family Maintenance Act.¹⁹⁰

pr/oa/spencer/spencer_main.asp (last visited Jan. 2, 2001).

185. Beaulieu & Spencer, *supra* note 184. Essentials include food, clothing, medical aid and lodging. *Id.*; Leung v. Leung, [1996] 20 R.F.L. 4th 48, ¶ 10 (Alberta Court of Queen's Bench).

186. *Dragulin*, 43 R.F.L. 4th ¶ 20-22.

187. Family Law Act, R.S.O., ch. F-3, § 33(3) (1990) (Can.).

188. *See, e.g.*, Maintenance Order Act, R.S.A., ch. M-1, § 2(1) (1980) (Can.); Parents' Maintenance Act, R.S.M., ch. P10 (1987) (Can.).

189. *See* Maintenance Order Act, R.S.A., ch. M-1, § 4(1) (1980) (Can.); Parents' Maintenance Act, R.S.M., ch. P10 (1987) (Can.). The Alberta Act provides:

When a person liable under section 2 or 3 to maintain any other person refuses or neglects to do so,

- (a) the person entitled to maintenance,
- (b) the mayor or reeve of the municipality in which the person entitled to maintenance resides,
- (c) the Minister of Social Services and Community Health if the person entitled to maintenance resides in an improvement district,
- (d) the Minister of Municipal Affairs if the person entitled to maintenance resides in a special area,
- (e) the superintendent of a hospital if the person entitled to maintenance is a patient therein, or
- (f) if the person entitled to maintenance is a minor, a parent or guardian of the child, or the Director of Child Welfare, or the child by its next friend, may apply by originating notice to the Court of Queen's Bench for a maintenance order against the person liable.

Maintenance Order Act, R.S.A., ch. M-1, § 4(1) (1980) (Can.). The Manitoba act provides that "[a] dependent parent, or any other person on his or her behalf, may summon a son or daughter of the parent before a judge of the Provincial Court." Parents' Maintenance Act, R.S.M., ch. P10(3) (1987) (Can.).

190. *Barrington v. Shand*, [1984] 65 N.S.R.2d 153 (N.S. Fam. Ct.).

4. The Contemporary Debate About Filial Responsibility Laws in North America

Despite their longevity, filial responsibility laws continue to be vigorously debated in North America.¹⁹¹ Supporters advance three major arguments. First, because poverty among the elderly is a serious problem,¹⁹² such laws help to achieve the social goal of ensuring adequate income and care.¹⁹³ The legal process is necessary when moral and societal pressures are insufficient to enforce familial responsibility.¹⁹⁴ In the United States, the financial insecurity of the Social Security system highlights this economic argument. The recent Moynihan-Parsons Commission has reported that, starting in 2016, revenue from payroll taxes will fall short of benefit payments.¹⁹⁵ At that point, the Social Security system would need to start relying in part on interest from its holdings of government bonds. Less than a decade later, the system would need to start redeeming the bonds themselves to help pay benefits. By 2034, the bonds would be exhausted, leaving the Social Security system able to pay less than three-quarters of promised benefits out of payroll tax revenues.¹⁹⁶ If Social Security were unable to meet its obligation, American workers and their beneficiaries would suffer enormously.

Second, others support filial responsibility laws as an expression of the value placed upon the family—they "both assume and perpetuate a familist philosophy."¹⁹⁷ It is argued that these laws simply enforce the implicit contract between parent and children that is created when parents give birth to their children and nurture them during their youth. Such a parental investment demands some return, and old age is the time to pay out the dividends. Permitting adult children to ignore the requirements of their own parents who are unable to meet their basic needs would promote unjust enrichment.

Third, supporters of filial responsibility laws argue that the abdication of financial responsibility by adult children forces society to

191. See, e.g., Bernt, *supra* note 155, at 56.

192. See *supra* Part III.A.

193. Bernt, *supra* note 155, at 56.

194. *Id.*

195. Richard W. Stevenson, *Social Security's Fate Hinges on Investing Plan, Panel Says*, N.Y. TIMES, July 25, 2001, at A14.

196. See SOCIAL SECURITY & MEDICARE BOARDS OF TRUSTEES, STATUS OF THE SOCIAL SECURITY & MEDICARE PROGRAMS: A SUMMARY OF THE 1998 ANNUAL REPORTS 7-8 (1998).

197. Bracci, *supra* note 155, at 462.

shoulder the children's burden.¹⁹⁸ Tax resources, they argue, should be utilized for general social obligations; encouraging or forcing support for the elderly by their adult children saves public dollars that may be redeployed to provide education, libraries, recreation, or similar services. Although placing precise figures on the numbers of tax dollars that might be saved is difficult, supporters estimate that filial responsibility statutes can reduce public welfare costs by 11% to 30%.¹⁹⁹ In addition, advocates emphasize that these statutes deter elderly persons from applying for public assistance, further saving tax resources.²⁰⁰ The total number of potential aged applicants may be many times the number of actual applicants.²⁰¹

American and Canadian critics of filial responsibility laws dispute both the general principles and specific details advanced by proponents. First, opponents maintain that families already provide a great deal of voluntary support for their older adult members. In the United States in 1988, approximately 3.2 million persons provided financial support to more than 5.4 million adults not living in their households.²⁰² Almost all of those receiving support were relatives, and parents made up the largest group of non-household adults receiving support.²⁰³

Second, opponents counter that the "reciprocal contract" argument is overbroad. In many cases, parents provided no support for their minor children, abandoned them, or worse, were abusive.²⁰⁴ Additionally, while the legal duty to support minor children is finite, *i.e.*, until eighteen years of age or emancipation,²⁰⁵ the legal duty to provide for parents would have no defined termination. Life expectancy in the

198. *See id.* at 464–65.

199. W. Walton Garrett, *Filial Responsibility Laws*, 18 J. FAM. L. 793, 814 (1980).

200. *Id.* at 817.

201. *Id.*

202. BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, WHO'S HELPING OUT? FINANCIAL SUPPORT NETWORKS AMONG AMERICAN HOUSEHOLDS: 1997, at 2, 6–7 (2002), available at <http://www.census.gov/prod./2002pubs/p70-84.pdf>.

203. *Id.* at 2.

204. *See* CENTER ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILD MALTREATMENT—1994, reprinted in STATISTICAL ABSTRACT OF THE U.S. 217–18 (1996). While it is impossible to determine the frequency of child abuse and neglect, commentators have estimated up to 4.5 million cases annually. *Id.* There were 2.9 million reports of child abuse and neglect in the U.S. in 1994, of which one million were substantiated. *Id.* The amount of unpaid child support in contemporary America is staggering. *See* WALTER WADLINGTON & RAYMOND C. O'BRIEN, FAMILY LAW IN PERSPECTIVE 147 (2001). It is estimated that more than one-third of all non-custodial fathers fail to support their children. *Id.* Others pay less than they owe. *Id.*

205. *See, e.g.,* *Stanton v. Stanton*, 517 P.2d 1010 (Utah 1975).

United States, which was forty-seven years in 1900 and sixty-eight years in 1950, increased to seventy-six years in 1991 and continues to rise.²⁰⁶ Moreover, parents decided to bring children into the world and thus assumed a legal responsibility for them, but children have not made a comparable decision.

Third, critics contend that the burden of care also grows ever heavier as the increasing numbers and the longevity of the aged means having to care for very old, frail relatives.²⁰⁷ More and more adult children in their forties, fifties, and sixties will face the concern, physical labors, and expense of caring for parents that can strain the resources of individuals and marriages.²⁰⁸ Compounding these concerns are demographic and structural trends. The average American family in 1910 had 4.5 children; in 1960, it had only 2.5 children,²⁰⁹ and it has even fewer today. As the number of children decreases, each adult child's proportionate share of the financial and emotional burden increases. Thus, many parents choose to live below the subsistence level rather than invoke legal processes to force assistance from their adult children who may not have the means to provide additional money.²¹⁰

Fourth, practical difficulties abound in the enforcement of filial responsibility laws. Administrative and legal systems, akin to those used in child and spouse support cases, must be in place in order to avoid selective prosecution. Private attorneys, overworked public prosecutors, and welfare attorneys would have few incentives to bring such actions. Invariably, problems would persist in determining the exact amount elder persons need and what the families are able to provide in assistance. Enforcement of filial responsibility laws will inevitably require efforts to locate and sue children living in other states and provinces, and will require additional lawsuits when adult children seek to recover from their parents' estates or seek modification due to changed circumstances.

In addition, parents are unlikely to take their children to court for support or even cooperate with public agency efforts to enforce the

206. Ken J. Moyle, *A Cultural Exchange: Singapore and the United States Can Learn From Each Other in Restructuring Social Security Plans*, 6 PAC. RIM. L. & POL'Y J. 449, 453 (1997) (revealing that life expectancy is increasing in the United States because of better medical care).

207. Bernt, *supra* note 155, at 56.

208. Donow, *supra* note 36, at 709-10.

209. ROBERT C. ACHLEY, *THE SOCIAL FORCES IN LATER LIFE: AN INTRODUCTION TO SOCIAL GERONTOLOGY* 13 (Irene Elmer & Kevin Gleason eds., 1972).

210. Beaulieu & Spencer, *supra* note 184.

support obligation.²¹¹ Litigated cases are rarely reported in Canada and the United States.²¹² Parents are loathe to admit publicly that the child has failed to provide support. Many are so isolated or under the control of the caregiver that they have no opportunity to seek help.²¹³ Finally, such efforts could result in financial support for parents at the cost of losing affective and instrumental support.²¹⁴ The adverse nature of litigation may destroy family bonds.²¹⁵

B. Singapore

In 1990, the population of the Republic of Singapore was estimated to be 2,718,000.²¹⁶ As a result of the introduction of birth control measures, population growth declined by half, creating a great disparity between the younger and elder generations.²¹⁷ The elderly are expected to reach 26% of the population by 2030.²¹⁸ The growing number of aging citizens however, has led to economic, political, and social concerns.²¹⁹ The increase in health care costs, a desire to avoid a Western-style welfare system, and the goal of strengthening family units despite increased intergenerational responsibilities have led to government concern about meeting the needs of the elderly.²²⁰ Because there are no

211. Beaulieu & Spencer, *supra* note 184.

212. Commentators note that claims are not made under Canadian filial support statutes for various reasons. Bracci, *supra* note 155, at 468. Some provinces do not permit social assistance and welfare authorities to make vicarious claims, or require that claims must be made, as they may do with child and spousal support claims. See *supra* notes 187–89 and accompanying text. Elderly parents are reluctant to pursue claims when they are emotionally close to their children. Beaulieu & Spencer, *supra* note 184.

213. Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 81 (1998). Parents are "particularly reluctant to proceed against family members because of embarrassment, shame, lack of third party emotional support, and the failure of the criminal justice system" to accommodate elders' needs. *Id.* at 100.

214. Beaulieu & Spencer, *supra* note 184.

215. See Bernt, *supra* note 155, at 56.

216. 10 ENCYCLOPAEDIA BRITANNICA 831 (15th ed. 1992).

217. *Id.*

218. Moyle, *supra* note 206, at 453.

219. Art Lee, Note, *Singapore's Maintenance of Parents Act: A Lesson to be Learned From the United States*, 17 LOY. L.A. INT'L & COMP. L. REV. 671, 671–72 (1995).

220. *Id.* at 672–73. "In 1995, a committee comprising Singaporeans from various walks of life gathered views from members of the public to identify a set of family values cherished by Singaporeans." SINGAPORE FAMILY VALUES, available at http://www.mcdis.gov.sg/HTML/families/family_sfv.html (last visited Sept. 17, 2002). Five Singapore values were identified; the third value was filial responsibility. *Id.*; see also Lin Boon Heng, *Family Values*, available at <http://www.gov.sg/mita/speech/speeches/v18n6011.htm> (last modified Nov. 19, 1994), for a discussion on the importance of family values in light of filial responsibility laws.

public pension, health care, or welfare systems, support for the aged depends on personal savings and care by family.

A 1984 report by the Committee on the Problems of the Aged led to the enactment of the Maintenance of Parents Act, mandating adult children to support their parents.²²¹ The Act allows elders, who must be unable to support themselves and be age sixty or older,²²² to petition the Special Tribunal for the Maintenance of Parents for an order requiring one or more of their children to pay a monthly allowance or lump sum.²²³ Legal recourse to force financial payment is premised on a reciprocal support duty between parents and children and is viewed as a last resort.²²⁴ The Tribunal, which may use mediation or hearings to determine if support is necessary,²²⁵ employs five factors to determine eligibility for, and the amount of, support: "(1) the financial needs of the applicant [necessary to meet] reasonable expenses for housing and medical costs; (2) the income, earning capacity, property and other financial resources of the applicant; (3) any physical or mental disability of the applicant;"²²⁶ (4) the adult child's financial responsibility to support a spouse or children; and (5) allegations by the adult child of the parent's abandonment, abuse, or neglect.²²⁷ On the day the court first opened, an unexpectedly large crowd of parents petitioning for filial support overwhelmed the Tribunal.²²⁸ This use of the legal system has continued. Over 200 cases were brought to the Tribunal between June 1996 and January 1997.²²⁹

The Maintenance of Parents Act has received varied responses. Critics claim that it is unnecessary to codify an obligation that is recognized in the community and that the vast majority of children discharge,²³⁰ that "filial piety cannot and should not be legislated," and

221. Lee, *supra* note 219, at 685; Seth Mydans, *Singapore's Young Forget Family Values: Caring for the Elderly Slips Through the Cracks*, ROCKY MOUNTAIN NEWS, Jan. 5, 1997, at 40A. Many elders are struggling to make ends meet while their children are increasingly living in affluence and neglecting their parents' needs. *Id.* Medical and social workers reported that an increasing number of children were failing to visit their hospitalized parents or were reluctant to take them home when discharged. *Id.*

222. Mydans, *supra* note 221, at 40A.

223. Lee, *supra* note 219, at 673.

224. *Id.* at 674.

225. Mydans, *supra* note 221, at 40A.

226. Lee, *supra* note 219, at 686.

227. Mydans, *supra* note 221, at 40A.

228. *Id.*

229. Lee, *supra* note 219, at 686.

230. *Id.* at 688. Ninety-five percent of the indigent elderly are supported by their

that such an obligation is difficult and expensive to implement.²³¹ In response, advocates argue that family values and ties are deteriorating; that the minority of elderly not cared for by their families deserve protection, especially because there is no welfare system;²³² that the Tribunal is imposing an obligation in situations where no filial piety exists; and that the Act helps maintain strong families.²³³ Additionally, proponents contend that the law reaffirms the norm that individuals have a responsibility to look after their parents and dissuades adult children from shirking their duty.²³⁴

C. Japan

The population in Japan is aging at a rate greater than that of any other industrialized country,²³⁵ with the Japanese having the highest life expectancy in the world.²³⁶ The increase in the population of elderly is occurring at a time when Japan's caretaking system is breaking down.²³⁷ Traditionally, older parents were cared for by their families.²³⁸ Today, that support is often no longer assured.²³⁹ The proportion of the elderly living with adult children is decreasing rapidly.²⁴⁰ As a result, public policy has now turned to both legal and non-legal sources to support the elderly.

Filial responsibility laws have existed in Japan for centuries.²⁴¹ "Prior

families. *Id.*

231. *Id.*

232. Walter Woon, *Honour Thy Father and Mother—Or Else*, WALL ST. J., June 28, 1994, at A18. In effect, the law acts as a "safety net." *Id.*; see also Mydans, *supra* note 221, at 40A (discussing the common and shocking abandonment of filial responsibility).

233. Lee, *supra* note 219, at 688–89; Moyle, *supra* note 206, at 495; Woon, *supra* note 232, at A18. Countering the argument that it is undignified for a parent to petition a court for maintenance from one's children, Walter Woon comments that "perhaps it would be more dignified to starve quietly and without fuss." *Id.*

234. Woon, *supra* note 232, at A18.

235. Erin E. Lynch, *Late-Life Crisis: A Comparative Analysis of the Social Insurance Schemes for Retirees of Japan, Germany, and the United States*, 14 COMP. LAB. L.J. 339, 342 (1993).

236. *Id.* at 342.

237. Suvendrini Kakuchi, *Population-Japan: Elderly Women Seek, Find Social Support*, INTER PRESS SERVICE, Oct. 1, 2000; Lynch, *supra* note 235, at 343.

238. Lynch, *supra* note 235, at 344.

239. *Id.* at 346.

240. *Id.* at 345.

241. Usha Narayanan, *The Government's Role in Fostering the Relationship Between Adult Children and Their Elder Parents: From Filial Responsibility Laws to . . . What?, A Cross-Cultural Perspective*, 4 ELDER L.J. 369, 389 (1996); see also Lynch, *supra* note 235, at 344–45.

to World War II, the Meiji Civil Code . . . specifically required that adult children[] support . . . their elder parents,²⁴² an obligation that even superseded support of the adult child's own family.²⁴³ The policy favoring the elderly was eliminated in Japan's 1948 Constitution by expressly making the two generations equally and mutually responsible for each other.²⁴⁴ Thus, Article 877 of the present Japanese Civil Code reciprocally requires parents and children to support and care for each other.²⁴⁵ The Law for the Welfare of Elderly Persons further requires adult children to assume financial filial responsibility if they currently live with a parent or if they previously lived with the parent immediately before the parent moved to a nursing home.²⁴⁶ For a variety of reasons, however, the Japanese government seldom enforces these laws, preferring to rely on moral and social pressures and positive incentives to encourage parental support.²⁴⁷

In 1996, Japan had the highest proportion in the world of households with three generations of families living together.²⁴⁸ "[S]even out of ten [elders] live[d] with their adult children, motivated by choice rather than financial constraints or housing shortages."²⁴⁹ However, recent societal changes, "such as the growing number of working women and the migration from rural to urban areas where housing" is more limited, have combined to require public services to assume many familial responsibilities for adult children.²⁵⁰

Through government policy, the Japanese attempt to affirmatively support adult children who care for their elder parents through non-coercive and, from an American perspective, innovative ways.²⁵¹ Japanese national policies include tax deductions or exemptions, institutional care, and support for institutions interacting with families.²⁵² The housing industry offers designs that incorporate elderly concerns,

242. Narayanan, *supra* note 241, at 389.

243. *Id.*

244. Narayanan, *supra* note 241, at 389.

245. MINPO, art. 877, para 1, no. 1 ("Lineal relatives by blood and brothers and sisters shall be under a duty to furnish support to each other."); *see also* Lynch, *supra* note 235, at 344-45.

246. Narayanan, *supra* note 241, at 390.

247. *Id.*; *see also* Lynch, *supra* note 235, at 345.

248. Narayanan, *supra* note 241, at 388.

249. *Id.* at 388-89.

250. Lynch, *supra* note 235, at 345; *see also* Narayanan, *supra* note 241, at 389-91.

251. Narayanan, *supra* note 241, at 372.

252. *Id.* at 392.

such as handrails and ramps.²⁵³ Government loans are available to caregivers to remodel or build in order to provide an additional room for a parent,²⁵⁴ and commonly one or two rooms in a house are set aside for an elder.²⁵⁵ Tax benefits are provided to agencies that promote health care²⁵⁶ and to day-care centers that assist families as the primary caregivers.²⁵⁷

Familial duties are reinforced through the "Japan Efficiency," a "rental family" that provides a surrogate son, daughter-in-law, and grandchild who spend several hours with elders whose biological children have moved away or are too busy to visit.²⁵⁸ A new pension plan for women takes into account the pressure to leave work to care for children or elders,²⁵⁹ and jobs are restructured to accommodate older persons with declining physical abilities in order to supplement the aging individual's income.²⁶⁰ These policy initiatives support family care of the elderly, while maintaining sufficient public services for elders who do not or cannot rely on adult children's support.²⁶¹

D. Germany

Germany confronts great challenges in meeting the needs of its aging population.²⁶² The growing elderly population now comprises 16.2% of the German population and has strained the existing social systems.²⁶³ Demographic factors are exacerbated by the fact that many Germans

253. *Id.*

254. *Id.* at 392-93.

255. *Id.* at 392.

256. *Id.* at 393. For additional information on health care in Japan, see Dana Derham-Aoyama, *U.S. Health Care Reform: Some Lessons from Japanese Health Care Law and Practice*, 9 TEMP. INT'L & COMP. L.J. 365 (1995).

257. Narayanan, *supra* note 241, at 393.

258. *Id.* at 394.

259. *Id.*

260. *Id.* at 394-95.

261. *Id.* at 370.

262. Karl Hinrichs, *Public Pensions and Demographic Change*, 28 SOCIETY 32, 32 (Sept./Oct. 1991); see also Margret Dieck, *Housing Elders in Germany*, in HOUSING FRAIL ELDER 121 (Jon Pynoos & Phobe S. Liebig eds., 1995) (stating that Germans "have experienced a graying of their population" while simultaneously exhibiting "the lowest fertility rates in Europe").

263. Eldon L. Wegner, *Restructuring Care for the Elderly in Germany*, 49 CURRENT SOC. 175, 176 (2001) ("The economic problems resulting from the combination of these conditions resulted in a crushing burden on social welfare expenditures in the 1990's, which was overwhelming local governments."); IDB POPULATION PYRAMIDS, *supra* note 3; see also Lynch, *supra* note 235, at 360 (establishing that "Germany's Chancellor Otto Von Bismark instituted the world's first state social security system in the late 1800s.").

retire before age sixty-five.²⁶⁴ Moreover, the nation's fertility rate is considerably lower than what is needed to maintain a stable population.²⁶⁵ Experts project that by 2010 the "aged dependency ratio [of the] population aged sixty-five and above," when compared to the population between the ages of fifteen and sixty-four, will be 30.6%.²⁶⁶ By 2030, the ratio will increase to 43.6%; in other words, "[one hundred] employed Germans will need to maintain 118 pensioners."²⁶⁷ Unlike in the United States, the public pension plan in Germany was intended as a near-total substitute for earnings, not merely a supplement to private sources of income.²⁶⁸ Public pensions remain the main income source for those in retirement, usually providing the pensioner with 70% of previous net earnings.²⁶⁹ Given demographic trends, to maintain benefits at current levels, workers will have to contribute 37% of their earnings to the public pension plan; if contributions remain at their current rate (18.7%), benefits would need to be reduced by 50%.²⁷⁰

Additionally, the German Constitution establishes a principle of "Subsidiarity,"²⁷¹ which requires larger collectives to assume

264. Lynch, *supra* note 235, at 358-59 (noting that retirement is encouraged by employers due to the high unemployment rate and a belief that it is better for the elderly to be out of work than the young).

265. *Id.* at 357 (noting that in 1984 the fertility rate was 1.4 while a rate of 2.1 would have been required to maintain a stable population); *see also* Hinrichs, *supra* note 262, at 32 (noting that, since the 1970s, Germany has had the lowest birth rate among the countries that are members of the Organization for Economic Cooperation and Development).

266. Hinrichs, *supra* note 262, at 32 (comparing the projected aged dependency ratio in Germany to the United States, where the aged dependency ratio in 2010 is projected to be 18.8%).

267. *Id.* (comparing the projected aged dependency ratio in Germany to the United States, where the aged dependency ratio in 2030 is projected to be 31.7%). This figure is derived from a projected "worker-beneficiary ratio" of 0.85 for 2030. *Id.*

268. *Id.* at 33.

269. SOCIAL INSURANCE IN EUROPE 62 (Jochen Clasen ed., 1997).

270. *Id.*

271. GRUNDGESETZ [GG] [Constitution] art. 72, para. 2 (F.R.G.). The German Constitution states:

The Federation has the right to legislate where:

1. a matter cannot be effectively regulated by the legislation of individual Länder, or
2. regulation by a Land might prejudice the interests of other Länder or the country as a whole or
3. the maintenance of legal and economic unity, especially uniform living conditions beyond the territory of any one Land, calls for federal legislation.

Id. The principle of Subsidiarity, a view of the family-state relation inspired by Aristotle but explicitly stated by Popes Leo XIII and Pius XI, is rooted in natural law. Don Browning,

responsibility for tasks only when smaller units cannot perform them.²⁷² The role of the State is thus limited in all fields closely affecting family life so that adult children and families are primarily responsible for their indigent parents, while only secondary responsibility lies with local, state, and federal governments.²⁷³

Germany's Civil Code requires relatives in the direct line of descent to furnish maintenance to each other.²⁷⁴ The Code does not establish time limits on "[m]aintenance obligations between parents and children or even between grandparents and grandchildren."²⁷⁵ Although these legal duties reinforce family ties, they also force individuals to face competing demands for support from their parents and their children, especially during the years when their own children are enrolled in higher education.²⁷⁶ Persons unable to provide support without jeopardizing their personal maintenance are, however, not so obliged.²⁷⁷ The extent of an adult child's obligation is generally calculated in accordance with maintenance tables, although use of the tables is not a statutory mandate.²⁷⁸

Practical Theology and the American Family Debate: An Overview, INT'L J. OF PRACTICAL THEOLOGY 136, 138 (1997). Under the principle of subsidiarity, the family, because of the energies of kin preference, have a prima facie competence and right to care for their members. *Id.*

272. CARING FOR FRAIL ELDERLY PEOPLE 263 (1997).

273. Wegner, *supra* note 263, at 176-77; see also SUSAN TESTER, COMMUNITY CARE FOR OLDER PEOPLE: A COMPARATIVE PERSPECTIVE 18, 51 (1996). For information regarding Germany's state social security system and the role of public pensions in supporting the elderly, see Lynch, *supra* note 235, at 357-65.

274. § 1601 ¶ 2 BGB (Bürgerliches Gesetzbuch (Civil Code)). "Relatives in direct line are obliged to furnish maintenance to each other." *Id.*

275. Rainer Frank, *Germany: Blood Versus "Mere" Social Ties*, 32 U. LOUISVILLE J. FAM. L. 335, 338 (1993-94).

276. *Id.*

277. § 1603 ¶ 7 BGB. The Law provides:

(1) A person who, taking into account his other obligations, is unable to provide maintenance without jeopardizing his appropriate maintenance of himself, is not obliged to provide maintenance.

(2) If parents are in this situation, they have an obligation to their minor unmarried children to apply all means at their disposal to their own and to their children's maintenance in an equal measure. This obligation does not arise if there is another relative obliged to provide maintenance; neither does it arise in respect of a child whose maintenance can be provided from the principal of his property.

Id.; see also § 1607 BGB ("To the extent that by virtue of § 1603 a relative is exempted from the duty of maintenance, the relative next to him in liability shall provide the maintenance.").

278. Frank, *supra* note 275, at 338. A German court ordered a son to pay 1,050 DM in maintenance to his indigent mother from his monthly income of 4,700 DM. *Id.* This figure

Following the economic crisis in the 1990s, the German government enacted a new National Health Insurance law to encourage family and community support of indigent elders in place of institutionalization.²⁷⁹ Although the legal and social principle of Subsidiarity remains, the new social insurance approach provides direct government payments for community-based services and for family caregivers to provide in-home care.²⁸⁰ Family care is encouraged because it is least expensive and strengthens family bonds.²⁸¹ In 1995, 1.1 million people were entitled to benefits, and 80% chose cash payments to family members instead of professional care.²⁸² Another 10% chose a combination of cash payments and professional services, while only 10% chose strictly professional services.²⁸³ Under this program, the caregiver is treated as an employee and is paid between 400DM (about \$180.00) and 1300DM (about \$587.00) per month, depending on the elder's class of disability.²⁸⁴ That caregiver is also entitled to one month of paid vacation, social insurance benefits—including accident and disability insurance—and a retirement pension.²⁸⁵

All political parties and an overwhelming majority of the population supported the new health insurance law, but debate continues about its efficacy.²⁸⁶ Critics fear that people desiring the available payment will abuse either the system or the elders²⁸⁷ and that family members may not be competent to provide the care needed.²⁸⁸ Advocates of the law note that safeguards, such as assessment and periodic reassessment of the

was arrived at because the defendant's wife was entitled to three-sevenths or approximately 2,000 DM. *Id.* The mother claimed 1,050 DM, leaving 1,650 DM for the defendant, which the Court found sufficient for his own use. *Id.* Therefore, it granted maintenance to the mother in the requested amount. *Id.*

279. Wegner, *supra* note 263, at 176. Services are provided for those with physical illnesses and mental illnesses that require regular assistance with the activities of daily living. *Id.* at 178. There are three levels of benefits available, based on the severity of the need. *Id.* The amounts of payments to the care provider are based on the level of care assigned to the individual receiving care. *Id.* at 179.

280. *Id.* at 179. At level one, the caregiver is paid 400 DM, or approximately \$266.00 per month. *Id.* At level two, the caregiver is paid 800 DM, or \$533.00 per month. *Id.* At level three, the caregiver is paid 1300 DM, or approximately \$867.00 per month. *Id.*

281. *Id.* at 182–83.

282. Adalbert Evers, *The New Long-Term Care Insurance Program in Germany*, 10(1) J. OF AGING & SOC. POL'Y 77, 83 (1998).

283. *Id.*

284. Wegner, *supra* note 263, at 179.

285. *Id.*

286. *Id.* at 177.

287. *Id.* at 184.

288. *Id.* at 185.

aged person, are in place to ensure that appropriate service and adequate care are being provided.²⁸⁹ Although the nonprofessional caregiver receives no formal training, courses are provided to ensure competence.²⁹⁰ Advocates also assert that the law is socially positive because it strengthens emotional family bonds²⁹¹ and addresses a distributive justice issue by paying women for work that was previously unrecognized and uncompensated.²⁹² The fact that many German nursing homes have already been converted into day care centers and assisted living centers demonstrates the law's effectiveness in reorganizing care for the elderly.²⁹³

V. BEHAVIOR-BASED INHERITANCE

A. China

China is facing monumental economic and social problems that affect traditional methods of financially supporting and caring for the elderly. Historically, Chinese children were obliged to support their parents in their old age.²⁹⁴ This tradition dates back to the Western Zhou Dynasty (ca. 800 B.C.E.) and became a core principle of benevolent government during the Period of the Warring States.²⁹⁵ Violation of this duty was considered a sin, was censured, and was punished by law.²⁹⁶

In modern times, a variety of factors have had a severe impact on traditional family bonds.²⁹⁷ Social and geographic mobility have increased the number of children working at sites distant from their parents and decreased the number of aged parents who move in with their children to care for grandchildren in exchange for financial support

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 179. For additional information on pensions in Germany, see Lynch, *supra* note 235, at 357-65.

293. Wegner, *supra* note 263, at 182.

294. Jersey Liang & Shengzu Gu, *Long-Term Care for the Elderly in China*, in *CARING FOR AN AGING WORLD* 270 (Teresa Schwab ed., 1989).

295. Yuan Fang et al., *Support of the Elderly in China*, in *FAMILY SUPPORT FOR THE ELDERLY: THE INTERNATIONAL EXPERIENCE* 251 (Hal L. Kendig et al. eds., 1992).

296. *Id.*

297. Frances H. Foster, *Toward a Behavior-Based Model of Inheritance: A Chinese Experiment*, 32 U.C. DAVIS L. REV. 77 (1998); Gary Jones, *China's Little Emperors*, *THE INDEPENDENT*, Nov. 12, 2000, at 28; Wang Ying, *Population-China: Elderly Want Their Lives Back*, *INTER PRESS SERVICE*, Dec. 20, 2000.

and housing.²⁹⁸ China's one-child policy, created for population control, has led to a radically disparate male to female population ratio resulting from selective abortions.²⁹⁹ Having 90 million more men than women in the population has decreased the number of female caregivers as well as the number of children to bear the burden of supporting their elderly parents.³⁰⁰ Compounding these factors, the population of citizens over sixty years of age is increasing dramatically. In 2000, 9.6%, approximately 120 million, of China's population were over sixty years of age.³⁰¹ By 2030, the proportion over age sixty-five is projected to be between 16% and 24%.³⁰²

Articles 15 and 22 of China's Marriage Law impose a reciprocal duty of support on parents and children.³⁰³ The duty may be imposed in two ways. First, parents have the right to demand cash payments directly from their adult children.³⁰⁴ Second—and more interesting—neglect or abandonment of an elderly, ill, or destitute parent may result in a court-ordered reduction of inheritance after death³⁰⁵ if a legal obligation to

298. See Ying, *supra* note 297.

299. Jones, *supra* note 297, at 28.

300. *Id.*

301. Ying, *supra* note 297. These figures constitute projected populations for the end of the year 2000, as estimated by the Chinese government prior to the end of that year. *Id.*

302. Liang & Gu, *supra* note 294, at 270–87.

303. Huuyin Fa, arts. 15, 22, available at http://www.unescap.org/pop/database/law_china/ch_record003.htm (Marriage Law of the People's Republic of China). Article 15 provides:

Article 15. Parents shall have the duty to bring up and educate their children; children shall have the duty to support and assist their parents

....

If children fail to perform their duty, parents who are unable to work or have difficulty in providing for themselves shall have the right to demand support payments from their children.

Id. Article 22 provides:

Article 22. Grandparents who can afford it shall have the duty to bring up their grandchildren who are minors and whose parents are dead. Grandchildren who can afford it shall have the duty to support their grandparents whose children are dead.

Id. Children include natural, adoptive and stepchildren. Foster, *supra* note 297, at 97.

304. Huuyin Fa, art. 22 (Marriage Law of the People's Republic of China). Beyond blood relatives, Article 11 of the Elderly Person's Law mandates the spouse of a family member with support obligations to assist in the provision of such support. The 1996 Law also requires emotional support and care, medical expenses, accommodation, and other needs of the elder parent to be borne by family members. See generally Michael Palmer, *Caring for Young and Old: Developments in the Family Law of the People's Republic of China, 1996–1998*, in *THE INTERNATIONAL SURVEY OF FAM. L.* 95–107 (Andrew Bainham ed., 2000).

305. Foster, *supra* note 297, at 86.

support the elder was present.³⁰⁶ The system applies to testate and intestate heirs as well as heirs who would otherwise inherit by representation or through a will bequest.³⁰⁷

China's courts utilize a discretionary behavior-based inheritance regime that permits the use of an "arsenal of remedies for penalizing misconduct by heirs."³⁰⁸ Courts may reward relatives as "worthy heirs" or punish "unworthy heirs" for severe neglect, abandonment, abuse, or misconduct.³⁰⁹ Possible penalties range from a reduction in the property passing after the elder's death to total disqualification, based on the severity of misconduct.³¹⁰ Additional remedies include forfeiture or declaring the will partially or entirely void.³¹¹ In some cases, the decedent's property may even escheat to the state.³¹² Inheritance shares may be readjusted to provide larger shares to those who have fulfilled

306. *Id.* at 97-98. The Marriage Law imposes a duty of support on:

- (1) spouses,
- (2) parents and children (including natural, adoptive, and stepparents and stepchildren),
- (3) grandparents and grandchildren (if the grandchildren's parents are deceased), and
- (4) siblings (if their parents are dead or destitute).

Id. at 96. The court will reduce the inheritance share of heirs who had the physical capability and financial resources to support their parent, but failed to fulfill their duty of support, based on the status and circumstances of the claimant. *Id.* at 99. Failure to financially support a parent constitutes neglect if the parent is elderly, ill, and destitute. *Id.* at 96. Lack of support of an elderly heir may constitute abandonment based on a balancing of three factors: (1) "the decedent's physical and financial condition at the time of the alleged abandonment;" (2) "the heir's behavior"; and (3) "the status and circumstances of the claimant." *Id.* at 96-97.

307. *See generally id.*

308. *Id.* at 95. In contrast, in the United States, the courts take an all or nothing approach to inheritance by either barring heirs from inheritance or allowing them to take. *Id.*; *see also* Louis B. Schwartz, *The Inheritance Law of the People's Republic of China*, 28 HARV. INT'L L.J. 433, 433-56 (1987) (summarizing the 1985 Inheritance Laws).

309. Foster, *supra* note 297, at 98.

310. *Id.* at 86, 102-04. Article 7 of the PRC Inheritance Law provides:

An heir who commits one of the following acts forfeits his or her inheritance rights:

- (1) intentionally killing the decedent;
- (2) killing another heir in fighting over the estate;
- (3) abandoning the decedent or maltreating the decedent under serious circumstances;
- (4) forging, tampering with or destroying the will under serious circumstances.

Id. at 87.

311. *Id.* at 95.

312. *Id.*

the primary duty of supporting the decedent.³¹³ Application of these principles allows deserving non-heirs to inherit even at the expense of the decedent's closest family members.³¹⁴ While such results are not mandatory, cases indicate that Chinese courts do use this power,³¹⁵ but intervene in only the most egregious cases.³¹⁶

When determining whether punishment is warranted, Chinese courts examine whether the heir's misconduct was "sufficiently egregious to put the decedent in perilous circumstances."³¹⁷ In cases of abandonment, the courts generally look to see if the decedents had no independent source of income and were unable to support themselves due to age or disability.³¹⁸ The courts may consider mitigating factors, including reform and repentance, to reduce the penalties.³¹⁹

China's behavior-based model of inheritance attempts to activate private sources of support for aged parents placed at risk by various overarching social trends—the escalating geographic mobility, the imbalancing effect of the one-child policy, the increasing numbers of elderly, and the looming welfare crisis. Commentators consider it to be a fair system of estate distribution, one that functions to increase gender equality and strengthen family bonds.³²⁰ But the flexibility that this system affords has a significant cost: the burden resulting from the case-by-case approach that must be applied to the large number of cases.³²¹ The Chinese system "emphasizes judicial fact-finding, evaluation, and creativity, but at the expense of efficiency and predictability,"³²² as the "duration, means, outcome, and societal impact" of the maltreatment of each individual is evaluated.³²³

313. *Id.* at 102–04.

314. *Id.* at 106–12.

315. *Id.* at 103.

316. *Id.* at 118.

317. *Id.* at 96–97 (citation omitted).

318. *Id.* at 96.

319. *Id.* Mitigating factors include failure to perform one's duty due to "illness, poverty, military service, or historical reasons," such as being separated from one's parent during the cultural revolution or the elder's declination of proffered support. *Id.* at 100 (citations omitted). Reform and repentance are considered if written or oral evidence is offered to the court that definitely and unambiguously demonstrates that the decedent forgave the heir for his or her wrongdoing during the decedent's lifetime. *Id.* at 101–02.

320. *Id.* at 117–18.

321. *Id.* Professor Foster's article is based on more than 100 recent decisions. *Id.* Although the timeframe over which these cases were decided was not mentioned, the number of cases gives some indication of the frequency with which this provision is used. *Id.*

322. Foster, *supra* note 297, at 117.

323. *Id.* at 98.

The continuing viability of this behavioral model of inheritance is questionable in light of the economic, social, and legal reforms in China that have occurred since the policy was enacted in 1985.³²⁴ China has recently expanded the freedom of testation, which works against the behavior-based model because it permits property distribution without regard to behavior.³²⁵

B. United States

Western cultures have long recognized an individual's prerogative to determine how property will be distributed after death. The Statute of Wills first guaranteed this right to English citizens in 1540.³²⁶ Natural rights theorists have supported testamentary freedom, arguing that the creators of wealth may dispose of their property as they see fit.³²⁷ Utilitarians also support testamentary freedom because they believe it encourages industry and saving.³²⁸

In the United States, testamentary transfers are governed by state law.³²⁹ The United States Supreme Court has never held the ability to devise property to be a federal constitutional right. Government has "broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause."³³⁰ Nonetheless, the Supreme Court has commented that "total abrogation of the right to pass property [would be] unprecedented and likely unconstitutional."³³¹ Because American states have generally been loathe to impose restrictions upon testamentary freedom, behavior of the beneficiary toward the deceased is rarely a factor in determining

324. *Id.* at 118.

325. *Id.*

326. 32 Hen. VIII, Ch. 1 (1540).

327. Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6 n.18 (1992) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. 2, §§ 27, 65 at 305-06, 329 (Peter Laslett ed., 2d ed. 1970) (1690) and 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRE TRES 265 (Francis W. Kelsey trans., 1925) (1625)); Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse but Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 554 (2001).

328. Hirsch & Wang, *supra* note 327, at 8 n.25 (citing HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 182 (George E. Woodbine ed. & Samuel E. Thorne ed. & trans., 1968) (ms. c. 1230)). Korpus, *supra* note 327, at 554.

329. See, e.g., WILLIAM M. MCGOVERN & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES § 1.2, at 23 (2d ed. 2001).

330. *Hodel v. Irving*, 481 U.S. 704, 717 (1987).

331. *Id.* at 716.

whether a will is enforced, so long as the will was validly executed.³³² If no will exists, state intestate succession statutes determine the distribution of property.³³³ These apply rigid rules of inheritance and set out shares of an estate based on status, such as the decedent's closest relatives by blood, adoption, or marriage.

Courts and legislatures have, however, carved some exceptions to normal distribution of property upon death by (1) creating forced heirships aiding persons not satisfactorily provided for in a testamentary document³³⁴ and (2) extinguishing the inheritance rights of persons deemed to be "unworthy heirs."³³⁵ In the first category, most states have determined that certain responsibilities or relationships that the deceased had with others in life should not be disregarded after death.³³⁶ Virtually every state, for example, protects surviving spouses, especially spouses still raising children, from accidental or intentional disinheritance.³³⁷ Homestead³³⁸ and family³³⁹ allowances are examples of other exceptions to normal distribution of a testator's property. In addition, many states grant some protection to children against accidental, but not intentional, disinheritance³⁴⁰ and from undue hardship resulting from a testator's will.³⁴¹

An additional exception to testamentary freedom centers on persons deemed to be "unworthy heirs." The best-known example is a "slayer statute," which extinguishes inheritance rights of a killer in the estate of a victim.³⁴² These statutes codify the common law principle that

332. MCGOVERN & KURTZ, *supra* note 329, § 7.3, at 281-82, 284. Courts will refuse to probate a will if it was fraudulently made or if undue influence or duress was exercised upon the testator in its creation. *Id.* An exception to the ability to direct where one's property goes after death, however, has been created where the will lacks social utility, such as an attempt to commit waste or destruction of the property. *Id.* § 3.10, at 168.

333. *Id.* § 2.1, at 42.

334. Korpus, *supra* note 327, at 557-59.

335. *Id.* at 559-62.

336. *Id.* at 557.

337. See MCGOVERN & KURTZ, *supra* note 329, § 2.1, at 43.

338. See UNIF. PROBATE CODE § 2-402 (1998), 8 U.L.A. 140-41 (1998).

339. See UNIF. PROBATE CODE § 2-404 (1998), 8 U.L.A. 141-42 (1998).

340. UNIF. PROBATE CODE § 2-302 (1998), 8 U.L.A. 135-36 (1998); see also MCGOVERN & KURTZ, *supra* note 329, at 130-31. Children born after an execution of a parent's will, for example, in the absence of a clear intent to the contrary, will often be read into the will and treated equally with the decedent's other children. *Id.*

341. Korpus, *supra* note 327, at 557-58 (stating that "[a]s a public policy matter, those persons ought to be provided for instead of allowing a decedent to satisfy some debt, grudge, or angry whim by leaving his family impoverished").

342. MCGOVERN & KURTZ, *supra* note 329, at § 2.7.

individuals should not benefit from their own evil.³⁴³ In an analogous context in 1886, the United States Supreme Court held that "[i]t would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken."³⁴⁴ The Uniform Probate Code, adopted by a majority of states, codifies this exception.³⁴⁵

Another "unworthy heir" scenario is used by some jurisdictions to penalize parents who abandon their children during minority by preventing the parents from inheriting from their children when the children die.³⁴⁶ Connecticut, for example, bars a parent from inheriting from a deceased child if the parent abandoned the child as a minor and continued the abandonment until the child passed away.³⁴⁷ In New

343. See Brian W. Underdahl, Note, *Creating a New Public Policy in Estate of O'Keefe: Judicial Legislation Using a Slayer Statute in a Novel Way*, 44 S.D. L. REV. 828, 835 (1998-1999).

344. N.Y. Mut. Life Ins. Co. v. Armstrong, 117 U.S. 591, 600 (1886).

345. UNIF. PROBATE CODE § 2-803(b), 8 U.L.A. 211 (Supp. 2002).

An individual who feloniously and intentionally kills the decedent forfeits all benefits under this Article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his [or her] intestate share.

Id.

346. MCGOVERN & KURTZ, *supra* note 329, at § 2.9. See generally Paula A. Monopoli, "Deadbeat Dads": Should Support and Inheritance be Linked?, 49 U. MIAMI L. REV. 257 (1994) (discussing the costs and benefits of a behavior-based model of intestate succession). Some states ban recovery by parents who have abandoned or failed to support their children explicitly, but many others achieve the same goal by compensating parents based on their losses, which are not easily demonstrated by parents who have abandoned their children. *Id.* at 265-66. The first state to enact a law explicitly denying a parent the right to inherit was North Carolina in 1927. *Id.* at 267. Other states and territories that have enacted similar laws include Connecticut, Montana, New York, North Dakota, Ohio, Pennsylvania, Virginia, Puerto Rico, and the Virgin Islands. *Id.*; see also Alison M. Stemler, Note, *Parents Who Abandon or Fail to Support Their Children and Apportionment of Wrongful Death Damages*, 27 J. FAM. L. 871, 874 (1988-1989).

347. CONN. GEN. STAT. § 45a-439 (1999). The statute provides:

Distribution when there are no children or representatives of them.

(a)(1) If there are no children or any legal representatives of them, then, after the portion of the husband or wife, if any, is distributed or set out, the residue of the estate shall be distributed equally to the parent or parents of the intestate, provided no parent who has abandoned a minor child and continued such abandonment until the time of death of such child, shall be entitled to share in the estate of such child or be deemed a parent for the purposes of subdivisions (2) to (4), inclusive, of this subsection.

York, parents generally may not inherit from their deceased children if the parents failed to provide for, or abandoned their children when they were minors.³⁴⁸ An exception is made if the parental relationship and duties were resumed after the initial abandonment and continued until the death of the children.³⁴⁹ The Uniform Probate Code further provides that natural parents are precluded from inheriting from or through a child unless the natural parents have openly treated the child as their own and have not refused to support the child.³⁵⁰ Some states disqualify a spouse from inheritance if the spouse abandoned or refused to support the decedent.³⁵¹

Analogously, adult children who fail to support their indigent parents could also be viewed as "unworthy heirs" in order to strengthen intergenerational ties and responsibilities. Where there has been a prior judicial determination of neglect, or facts are presented to a probate court that one or more of the children has not provided support and care, inheritance rights should be determined in accordance with the conduct of the heirs and claimants toward the decedent. As in China, designated beneficiaries and their decedents should be punished for their conduct by either partial or total reduction of their inheritance shares, depending upon the circumstances in each case. Abandonment, mistreatment, abuse, and failure to support the decedent would constitute conduct leading to the "unworthy heir" designation. This would add a financial incentive to existing social duties governing the relationship between adult children and their elderly parents.

One state has taken a small step in this direction. California Probate Code section 259, effective on January 1, 1999,³⁵² bars persons found

Id.

348. N.Y. EST. POWERS & TRUSTS LAW § 4-1.4(a) (McKinney 1998).

349. *Id.*

350. UNIF. PROBATE CODE § 2-114(c) (1998), 8 U.L.A. 91 (1998).

351. *See, e.g.*, KY. REV. STAT. ANN. § 392.090 (Michie 1998); N.Y. EST. POWERS & TRUST LAW § 5-1.2 (McKinney 1998); VA. CODE ANN. § 64.1-16.3 (Michie 1998).

352. CAL. PROB. CODE § 259 (West Supp. 2000). The statute reads:

(a) Any person shall be deemed to have predeceased a decedent to the extent provided in subdivision (c) where all of the following apply:

(1) It has been proven by clear and convincing evidence that the person is liable for physical abuse, neglect, or fiduciary abuse of the decedent, who was an elder or dependent adult.

(2) The person is found to have acted in bad faith.

(3) The person has been found to have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent.

guilty of elder abuse and neglect from inheriting from their deceased victims by deeming such a person to have died before the victim and thus unable to inherit. Likewise, persons are barred from inheriting who have falsely imprisoned³⁵³ or perpetrated offenses against the testator by causing pain or mental suffering, endangering health, or stealing or embezzling property.³⁵⁴ The California Legislature justified the enactment with reasons similar to those justifying the "slayer statutes"—individuals should not benefit from their evil acts.³⁵⁵ In fact, section 259 was an addendum to the California slayer statute, and legislative deliberations frequently associated it with that statute.³⁵⁶

California Probate Code section 259 is, however, only a small step toward an inheritance system that better reflects the behavior of the children. To date, no cases have been reported under the statute, and few are likely in the future. Parents without minimal resources or support are unlikely to be devising substantial amounts of property, unless that property is under the legal or *de facto* control of a third party, typically a family member.³⁵⁷ Moreover, the California statute requires that the disinherited heir be proven guilty of abuse or neglect

(4) The decedent, at the time those acts occurred and thereafter until the time of his or her death, has been found to have been substantially unable to manage his or her financial resources or to resist fraud or undue influence.

(b) Any person shall be deemed to have predeceased a decedent to the extent provided in subdivision (c) if that person has been convicted of a violation of Section 236 of the Penal Code or any offense described in Section 368 of the Penal Code.

(c) Any person found liable under subdivision (a) or convicted under subdivision (b) shall not (1) receive any property, damages, or costs that are awarded to the decedent's estate in an action described in subdivision (a) or (b), whether that person's entitlement is under a will, a trust, or the laws of intestacy; or (2) serve as a fiduciary as defined in Section 39, if the instrument nominating or appointing that person was executed during the period when the decedent was substantially unable to manage his or her financial resources or resist fraud or undue influence. This section shall not apply to a decedent who, at any time following the act or acts described in paragraph (1) of subdivision (a), or the act or acts described in subdivision (b), was substantially able to manage his or her financial resources and to resist fraud or undue influence within the meaning of subdivision (b) of Section 1801 of the Probate Code and subdivision (b) of Section 39 of the Civil Code.

Id.

353. CAL. PENAL CODE § 236 (West 1991).

354. CAL. PENAL CODE § 368 (West Supp. 2001).

355. Korpas, *supra* note 327, at 569–70.

356. S. B. 1715, 1998 Regular Sess. (Cal. 1998) (preamble). Decedents who were "substantially able to manage his or her financial resources and to resist fraud or undue influence" are excepted, a bow to the freedom of testators to distribute their property as they wish. *Id.* at (2) (preamble).

357. See generally CAL. PROB. CODE (West 1999).

by "clear and convincing evidence" before the barring provision is activated,³⁵⁸ and standards of proof beyond the normal preponderance test of civil cases are typically difficult to meet. These factors make it unlikely that section 259 will have any significant effect.

The California statute does, however, initiate a debate about using inheritance laws to promote desirable social conduct and to deter undesirable conduct. Because remaining heirs and beneficiaries would receive larger shares, there would be a financial incentive to attempt estate reallocation, provided appropriate statutes or case precedents are available in the jurisdiction. The California statute has been praised for its potential to punish, as well as to "prevent abuse, encourage reconciliation of families, and facilitate the strengthening of family bonds and private support systems."³⁵⁹ It may also motivate beneficiaries to report abuse to public authorities.³⁶⁰ Furthermore, awareness of the costs of abusing an elderly relative may lead to greater self-vigilance, which in and of itself may eliminate some elder abuse.³⁶¹

The California statute bears some resemblance to the Chinese system discussed earlier.³⁶² Unlike China, the United States has traditionally placed great value on testamentary freedom.³⁶³ Whether this California effort will be successful or replicated in other states remains an issue for future development. Nonetheless, it has provided a model for other states as they seek to design new and creative methods for dealing with familial support issues. An important strength of our federal system is that states may serve as "laboratories" for such innovations.³⁶⁴

VI. CONCLUSION

The question of whether the family or the state shoulders the duty of caring for the elderly is an ancient and recurring one. This debate ebbs and flows with general economic trends, the adequacy of public

358. CAL. PROB. CODE § 259(a)(1) (West 1999).

359. Korpus, *supra* note 327, at 572.

360. *Id.* at 572-73 (noting that the statute may also lead to over-reporting but concluding that this is a small price to pay for the benefits that will be reaped).

361. *Id.* at 573.

362. *See supra* Part V.A.

363. *See supra* notes 326-33 and accompanying text.

364. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.*

pensions, health care delivery systems, and other factors. Demographics—the graying of the population in most developed societies—and other social factors add to this mix. Each national system surveyed in this Article has chosen its own distinct path. However, legal rules are often not applied in daily practice. This itself reflects significant social choices. A number of societies opt for incentives and positive programs in lieu of coercive legal measures. Despite our overall wealth, the United States confronts significant issues of lack of income and health social services for its elderly. The experiences of other societies may help us make more informed choices about policies here in the United States.

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