

**TAKING CARE OF OUR CARETAKERS:
USING FILIAL RESPONSIBILITY LAWS TO
SUPPORT THE ELDERLY BEYOND THE
GOVERNMENT'S ASSISTANCE**

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Parents bear moral, legal, and ethical responsibilities to care for their children. However, once parents reach an age where they can no longer look after themselves, the duties of their adult children to support them is less clear. In this Note, Ms. Allison Ross examines U.S. criminal and civil filial responsibility laws, which require adult children to financially support their elderly parents, and analyzes why these laws are not actively enforced by reviewing current filial responsibility laws and their close relationship to Medicaid. Next, this Note demonstrates the economic need for filial responsibility laws and analyzes how to improve their enforcement. Finally, Ms. Ross proposes a model civil filial responsibility statute with effective enforcement procedures and powerful incentives.

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I. Introduction

In the summer of 2005, Pennsylvania recodified its filial responsibility law and reaffirmed that adult children are required to provide support to their indigent, elderly parents.¹ During the same period, Pennsylvania tightened the eligibility requirements for Medicaid, making it more difficult for some people to gain access to necessary medical services.² While technically unrelated, these combined acts suggest that as governments look to curtail spending, the role of families in financially supporting each other will be expanding.

Nearly thirty states have enacted either criminal or civil filial responsibility laws requiring adult children to financially support their parents in financial need.³ Yet eleven states have never enforced these laws, and most of the other states only rarely do so.⁴ This Note discusses filial responsibility laws and why states do not actively enforce them. Part II examines which states have filial responsibility laws, why legislatures initially enacted them, provides a background on Medicaid, and explains why Medicaid and filial responsibility laws are closely related. Part III focuses on the economic need for filial responsibility laws, the benefits and barriers to enforcement, examples of enforcement, and other countries' treatment of this issue. Part IV advocates for a model civil filial responsibility statute that provides effective enforcement procedures and incentives to families who contribute to the care of elderly family members.

II. Background

A. What Are Filial Responsibility Laws?

Filial responsibility laws create a statutory duty for adult children to financially support their parents who are unable to provide for themselves.⁵ The requirements vary from state to state, but typically the statutes obligate adult children to pay for necessities such as

1. Katherine C. Pearson, *Re-thinking Filial Support Laws in a Time of Medicaid Cutbacks—Effect of Pennsylvania's Recodification of Colonial-Era Poor Laws*, 76 PA. B. ASS'N Q. 162, 166 (2005).

2. *Id.* at 163–65.

3. Matthew Pakula, *A Federal Filial Responsibility Statute: A Uniform Tool to Help Combat the Wave of Indigent Elderly*, 39 FAM. L.Q. 859, 862 (2005).

4. *Id.*

5. *Id.* at 861.

food, clothing, shelter, and medical attention for their parents in financial need.⁶ The obligation to support a parent is triggered by financial need; although the trigger is usually defined broadly in the statutes.⁷

Historically, a person was considered indigent if he was “so poor that he must be supported at public expense.”⁸ However, this definition of indigency has been expanded; indigency no longer means that a person is necessarily helpless, destitute, or on public welfare programs.⁹ For purposes of filial responsibility laws, indigence includes people with limited income and other means that are not adequate to provide for their basic maintenance and care.¹⁰

There are a few ways in which adult children can avoid liability for the support of their indigent parents. First, before an adult child is held responsible for payment of her parent’s expenses, the party seeking enforcement must establish the financial ability of the adult child.¹¹ Courts will consider several factors when determining whether a child can support the parents and to what extent the child can pay. In addition to the adult child’s income, courts will consider the responsibilities owed by the adult child to their own family and the family’s overall financial situation.¹² Courts hesitate to force an adult child to support her parents when doing so would deprive the child of being able to provide for her own necessities and thereby render her nearly destitute.¹³ Additionally, an adult child can seek contribution from her siblings to aid in the support of their parents.¹⁴ When there are multiple children who could provide financial support, courts will consider the financial situation of each child and determine how much support each child owes based on his or her ability to pay.¹⁵ The law does not consider the spouse of an adult child as a source of support for his or her parents-in-law.¹⁶

6. Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & POL’Y 709, 715 (2001) [hereinafter Moskowitz, *Filial Responsibility*].

7. *Id.*

8. Pearson, *supra* note 1, at 166 (quoting *Case of Rising*, 29 York 146 (1915)).

9. *Id.*

10. Pakula, *supra* note 3, at 863.

11. Robin M. Jacobson, Note, *Americana Healthcare Center v. Randall: The Renaissance of Filial Responsibility*, 40 S.D. L. REV. 518, 536–37 (1995).

12. *Id.* at 537–38.

13. *Id.* at 536–37.

14. *Id.* at 536.

15. *Id.* at 535–36.

16. *Id.* at 536.

Second, an adult child can avoid financial responsibility if she can demonstrate that the parent abandoned him. In California, the abandonment defense requires proof of three elements: “(1) the abandonment occurred during the child’s minority; (2) the abandonment continued for a period of at least two years before the child became 18; and (3) during the period of abandonment the parent was physically and mentally able to support the child.”¹⁷ In practice, however, abandonment may be a difficult defense to establish.¹⁸ If the parent had a good cause for abandoning the child, such as putting her child into foster care so she could earn a living and one day support the child, the child may not be able to rely on the abandonment defense.¹⁹ However, simple abandonment is sufficient in some cases. As a California appellate court noted,

love, respect, loyalty, devotion and the natural and inevitable desire of a child to recompense a parent for the love, service, support and sacrifice usually lavished by a parent upon a child, cannot be legislated nor should the law force a child to make recompense for an assumed standard of upbringing, when a trial court finds on credible evidence that it never existed.²⁰

Third, when a civil filial responsibility law does not provide an applicable defense, the adult child may seek a partial support order to reduce the amount of support. Under an unclean hands doctrine, the parent’s prior conduct could be a relevant factor in determining the requisite support.²¹ When a parent’s prior bad acts would suggest

17. Priscilla Day, *The Abandonment Defense to a Claim for Parental Support*, 11 J. CONTEMP. LEGAL ISSUES 380, 380 (2000).

18. *Id.* at 382–83. Day discusses two abandonment cases from the 1960s in California to support her position that abandonment has stringent requirements. In *In re Stark*, a daughter was required to support her mother even though her mother left her with her father at the age of three due to an “illness.” *Id.* at 382. The mother visited the daughter a few times a year at most, but there was no two-year period before the daughter turned eighteen where the mother failed to see her daughter at all. *Id.* She did not pay any financial support for the daughter and was able to raise three other children, but the court still required the daughter to pay. *In re Stark*, 182 Cal. App. 2d 20, 26 (1960). In *Chryst v. Chryst*, a son was required to support his parents even though the parents relinquished physical custody of the child and did not communicate with him for over a period of two years, because the parents did not intend to completely sever the relationship. 204 Cal. App. 2d 620, 622–23 (1962). They felt that they could not provide for the children and that the best interests of the child would be served if he lived with an aunt. *Id.*

19. Jacobson, *supra* note 11, at 534 (citing *Denny v. Pub. Welfare Div.*, 483 P.2d 463 (Or. Ct. App. 1971)).

20. *Id.* at 533 (citing *Gluckman v. Gaines*, 71 Cal. Rptr. 795, 797 (Cal. Dist. Ct. App. 1968)).

21. *Radich v. Kruly*, 226 Cal. App. 2d 683, 687 (1964).

that a child should have no moral or equitable obligation to support his parent, and yet the statutory obligation still remains, the court can limit the amount of support to the parent's minimum needs.²² The courts may also have discretion based on fairness to establish appropriate remedies after examining each party's circumstances.²³ Factors a court may consider when determining how much support a child owes are: if a parent previously abandoned the child and later returned,²⁴ past treatment of the child,²⁵ and whether the parent paid child support while the child was a minor.²⁶

State statutes vary as to who has standing to bring a claim for parental support. States with civil statutes list several different interested parties with the ability to bring a claim on behalf of an indigent parent.²⁷ Some states only permit the parent to file a claim, some permit the parent or the county, some permit state public agencies to file a claim, and others permit the parent's creditors to initiate the action.²⁸ When the statute does not specify who can bring a claim, "the right to bring a claim is often the responsibility of the organization or entity providing services to the indigent elderly parent."²⁹

22. *Id.*

23. Amber Spataro, "Prodigal Parent" as a Defense to Proceedings Brought to Require Support from a Child, 11 J. CONTEMP. LEGAL ISSUES 385, 387-89 (2000).

24. Jacobson, *supra* note 11, at 533-34 (discussing *Gierkont v. Gierkont*, 134 A.2d 10 (N.J. Super. Ct. App. Div. 1957), where the father abandoned his son for half of the child's minority but eventually returned, and the court determined that the child could be responsible for the amount of support equivalent to the percentage of time the father was present in the son's childhood).

25. *Id.* at 534-35. The author cites *Radich v. Kruly*, where a father seeking support physically and mentally abused his daughter and spread rumors that she was unchaste. *Id.* The court determined that she was liable, but limited the support to the minimum. *Radich*, 226 Cal. App. 2d at 683.

26. Jacobson, *supra* note 11, at 533-34 (citing *Pelletier v. White*, 371 A.2d 1068, 1069-70 (Conn. Super. Ct. 1976)).

27. See Pakula, *supra* note 3, at 863.

28. See *id.* at 863-64. In California, either the indigent parent or the county can bring a support claim. CAL. FAM. CODE § 4403 (Deering 2007). Alaska, Mississippi, and Nevada permit public agencies of the state to bring the lawsuit, while Connecticut and Tennessee allow welfare authorities to initiate an action. ALASKA STAT. §§ 25.20.030, 47.25.230 (2007); CONN. GEN. STAT. § 46b-215 (2007); MISS. CODE ANN. § 43-31-25 (2007); NEV. REV. STAT. § 428.070 (2007); TENN. CODE ANN. §§ 71-15-115, -25-103 (2007). North Carolina permits a parent's creditor to bring the claim against the adult child, and New Jersey requires that if welfare directors bring a claim, the directors must raise the claim for the benefit of the township and not for the benefit of the parent. N.J. STAT. ANN. § 44:7-19 (2007); N.C. GEN. STAT. § 14-326 (2007).

29. Pakula, *supra* note 3, at 864.

B. Historical Roots of Filial Responsibility Laws

1. ANCIENT LAWS

The idea that children have an obligation to support their parents and family members has existed for centuries. Jewish and Christian scriptures require children to honor their parents,³⁰ and early Roman law articulated a support obligation.³¹ Theologians such as St. Thomas Aquinas and Aristotle also argued that children have a moral duty to care for their parents based on a theory of reciprocity.³² Eastern cultures have long required younger generations to support older generations out of respect.³³ The moral obligation to support one's parents is thus historically rooted in Eastern, Roman, and Biblical laws.³⁴

2. ENGLAND'S POOR RELIEF ACT

American filial responsibility statutes are based on an English filial responsibility law, the Elizabethan Poor Relief Act of 1601.³⁵ The English law required "that the 'father and grandfather and the mother and the grandmother, and the children of every poor, old, blind, lame, and impotent person' support that relative to the extent of his or her ability."³⁶ The Elizabethan Act emphasized the principle that the primary source of support for the needy and elderly should be the family, and if a needy person has no one to support him, then public assistance could be available.³⁷ The rationale was that because parents

30. *Exodus* 20:12 (King James) ("Honor thy Father and thy Mother; that thy days may be long upon the land which the Lord thy God giveth thee."); *Matthew* 15:2-4 (King James) ("Why do thy disciples transgress the tradition of the elders? For God commanded, saying, honor thy father and mother: and, He that curseth father or mother, let him die the death.").

31. Jacobson, *supra* note 11, at 526-27; see Moskowitz, *Filial Responsibility*, *supra* note 6, at 710.

32. St. Thomas Aquinas argued that because parents, next to God, are the "closest sources of our existence and developments," children owe their parents "respect, reverence, and services." Moskowitz, *Filial Responsibility*, *supra* note 6, at 710 n.4. Aristotle theorized "[t]hat 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." *Id.* at 710-11 (citing ARISTOTLE, *NICOMACHEAN ETHICS* 244 (Martin Ostwald ed. & trans., Prentice Hall 1962)).

33. See *infra* Part III.F.

34. See Moskowitz, *Filial Responsibility*, *supra* note 6, at 710-11.

35. *Id.* at 711.

36. *Id.* (quoting 43 Eliz. 1, ch. 2. 6 (Eng. 1601)).

37. *Id.*

care for and support their children, the children owe “honor and reverence” to the parents and should support them despite any previous misbehavior by the parents.³⁸

3. AMERICAN FILIAL RESPONSIBILITY LAWS PRE-WORLD WAR II

During colonial times in America, colonies adopted the principles behind the Elizabethan Poor Relief Act when they established the early welfare systems.³⁹ States were solely responsible for poverty relief until the 1930s and the New Deal, and most states continued to base the filial responsibility laws and poverty relief laws on the English model.⁴⁰ Filial responsibility laws were enforced and interpreted “to require [adult children to provide] financial support for their indigent parents in order to relieve state and local authorities from the tax burden of supporting poor persons whose relatives could provide private support for them.”⁴¹ In the 1930s, the federal government began to take an active role in supporting the elderly and the poor with the creation of the Social Security system.⁴² Medicare programs founded in the 1960s continued the trend of federal, not state, programs providing support for the needy.⁴³ After the 1965 enactment of the federal Medicaid program, the use and enforcement of state filial responsibility laws greatly decreased.⁴⁴

C. Which States Have Filial Responsibility Laws?

Prior to the 1960s, nearly all states had some version of a filial responsibility statute.⁴⁵ However, some states have since repealed the laws.⁴⁶ Currently, twenty-eight states have either criminal or civil statutes that require adult children to financially support their parents

38. *Id.* (citing David Thompson, *I Am Not My Father's Keeper: Families and the Elderly in Nineteenth Century England*, 2 L. & HIST. REV. 265, 266 (1984)).

39. *Id.*

40. *Id.* at 712.

41. *Id.*

42. *Id.* at 713.

43. *Id.*

44. *Id.* at 714–15.

45. Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society?*, 26 FAM. L.Q. 195, 196 (1992). In the 1950s, forty-five states had filial responsibility laws. *Id.* Florida, Kansas, Texas, Washington, and Wyoming are the only states which have never had filial responsibility statutes. *Id.* at n.9.

46. See Moskowitz, *Filial Responsibility*, *supra* note 6, at 715 (stating that some states repealed the filial responsibility laws after Congress enacted Medicaid).

if the parent is incapable of self-support.⁴⁷ Four states have both civil and criminal causes of action.⁴⁸ Eight states impose only a criminal penalty upon a person who fails to support an indigent parent.⁴⁹ Sixteen states have filial responsibility laws with only a civil cause of action.⁵⁰ Although twenty-eight states have enacted and retained filial responsibility laws, only a few states actively enforce the laws and eleven states have never enforced them.⁵¹ As the statutes vary by state, it is useful to compare the laws enacted in specific states, especially states that have enforced their laws. The statutes of California, Pennsylvania, South Dakota, and Rhode Island will now be compared to highlight the states' different approaches to filial responsibility laws.

1. CALIFORNIA

California has enforced both its civil and criminal filial responsibility statutes.⁵² California's civil statute provides that "an adult child shall, to the extent of his or her ability, support a parent who is in need and unable to maintain himself or herself by work."⁵³ The statute permits a parent, or a county on behalf of the parent, to enforce the support obligations.⁵⁴ If the county is supporting the parent, the county has the same right as the parent to seek reimbursement and

47. See *infra* notes 48–50.

48. CAL. FAM. CODE § 4400 (West 1994); CAL. WELF. & INST. CODE § 12350 (West 1991 & Supp. 2000); CAL. PENAL CODE § 270c (West 1999); CONN. GEN. STAT. § 46b-215 (1995 & Supp. 2000); CONN. GEN. STAT. § 53-304 (1994 & Supp. 2000); IND. CODE § 31-16-17-1 (1994); IND. CODE § 35-46-1-7 (1998); MONT. CODE ANN. § 40-6-301 (1999); MONT. CODE ANN. § 45-5-621 (1999).

49. KY. REV. STAT. ANN. § 530.050 (LexisNexis 1999); MD. CODE ANN., FAM. LAW §§ 13-101 to -102 (LexisNexis 2006); MASS. GEN. LAWS ch. 273, § 20 (1992); N.C. GEN. STAT. § 14-326.1 (2005); OHIO REV. CODE ANN. § 2919.21 (LexisNexis 2006); R.I. GEN. LAWS §§ 15-10-1, 40-5-13 (2003); VT. STAT. ANN. tit. 15, § 202 (2002); VA. CODE ANN. § 20-88 (2004).

50. ALASKA STAT. §§ 25.20.030, 47.25.230 (2006); ARK. CODE ANN. § 20-47-106 (2001); DEL. CODE ANN. tit. 13, § 503 (1999); GA. CODE ANN. § 36-12-3 (2006); IDAHO CODE ANN. § 32-1002 (2006); LA. REV. STAT. ANN. § 13:4731 (2001); LA. CIV. CODE ANN. art. 229 (2007); MISS. CODE ANN. § 43-31-25 (2004); NEV. REV. STAT. § 428.070 (2006); N.H. REV. STAT. ANN. §§ 167:2, 546-A:2 (2006); N.D. CENT. CODE § 14-09-10 (2004); OR. REV. STAT. § 109.010 (2005); 23 PA. CONS. STAT. § 4603(c) (2007); S.D. CODIFIED LAWS § 25-7-27 to -28 (2007); TENN. CODE ANN. § 71-5-115 (2004); UTAH CODE ANN. § 17-14-2 (2005); W. VA. CODE § 9-5-9 (1990).

51. Pakula, *supra* note 3, at 862 n.20. Alaska, Delaware, Idaho, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Tennessee, Utah, and Vermont have not enforced their filial responsibility statutes. *Id.*

52. See *infra* Part III.C.1.

53. CAL. FAM. CODE § 4400 (West 2004).

54. *Id.* § 4403.

future support.⁵⁵ A court must consider each party's earning capacity and needs, obligations and assets, age and health, standard of living, and "other factors the court deems just and equitable" in determining the appropriate amount of support owed by the child.⁵⁶ It is the "just and equitable" provision that permits courts to consider the prior "bad acts" of the parent.⁵⁷

California's penal code affirms the duty of adult children to support their parents, stating "every adult child who, having the ability so to do, fails to provide necessary food, clothing, shelter, or medical attendance for an indigent parent, is guilty of a misdemeanor."⁵⁸ Both the civil and criminal statutes, however, provide that if a parent abandoned the adult child in his minority the adult child will not be required to pay support.⁵⁹ California's laws regarding public aid and medical assistance, however, do not require support from relatives of a public aid recipient.⁶⁰ The statute states, "No relative shall be held legally liable to support or to contribute to the support of any applicant for or recipient of aid under [the State Supplementary Program for Aged, Blind and Disabled]."⁶¹

2. PENNSYLVANIA

Pennsylvania's recodified civil filial responsibility law requires a spouse, child, or parent of an indigent person to "have the responsibility to care for and maintain or financially assist an indigent person, regardless of whether the indigent person is a public charge[.]"⁶² Similar to California's statute, the Pennsylvania statute does not require support payments if the responsible person does not have the financial ability to support the indigent person, or if the indigent per-

55. *Id.*

56. *Id.* § 4404.

57. *See supra* Part II.A.

58. CAL. PENAL CODE § 270c (West 1999).

59. CAL. FAM. CODE § 4411; CAL. PENAL CODE § 270c. The criminal statute requires the adult children to support the parent "[e]xcept as provided in Chapter 2 (commencing with Section 4410) of Part 4 of Division 9 of the Family Code." CAL. PENAL CODE § 270c. The test is referring to the civil support statute and its abandonment provisions. CAL. PENAL CODE § 270c.

60. CAL. WELF. & INST. CODE § 12350 (West 2001).

61. *Id.* ("[N]otwithstanding Section 3910, 4400, and 4401 of the Family Code, or Section 270c of the Penal Code, or any other provision of this code, no demand shall be made upon any relative to support or contribute toward the support of any applicant for or recipient of aid under this chapter.")

62. 23 PA. CONS. STAT. § 4603(a)(1) (Supp. 2007).

son abandoned the child from whom he now seeks support.⁶³ The statute explicitly states that the abandonment needs to last ten years during the child's minority before it is a viable defense.⁶⁴ Either the indigent person or any person, public entity, or public agency who has "any interest in the care, maintenance or assistance of such indigent person may seek to enforce the statute."⁶⁵

3. SOUTH DAKOTA

South Dakota has also enforced its filial responsibility statutes.⁶⁶ South Dakota's civil support obligations state that "[a]ny adult child, having the financial ability to do so, shall provide necessary food, clothing, shelter, or medical attendance for a parent who is unable to provide for oneself."⁶⁷ However, the statute imposes an additional requirement that the adult child receive written notice that the parent is unable to financially support herself, and only after such notice, and the child's refusal to provide support, can a claim be brought against the adult child.⁶⁸ If an adult child does provide support to her indigent parent, she can provide notice to her siblings and require contributions from them as well.⁶⁹

4. RHODE ISLAND

Rhode Island's criminal filial responsibility statute makes it a crime for any adult to "unreasonably neglect . . . or refuse . . . to provide for the support and maintenance of his or her parent."⁷⁰ The statute is unique in that it requires the indigent parent become destitute through "misfortune" or no fault of his own, in addition to being

63. *Id.* § 4603(a)(2)(i)-(ii).

64. *Id.* § 4603(a)(2).

65. *Id.* § 4603(c).

66. *See infra* Part III.C.2.

67. S.D. CODIFIED LAWS § 25-7-27 (2007).

68. *Id.*

69. S.D. CODIFIED LAWS § 25-7-28 (2006).

In the event necessary food, clothing, shelter, or medical attendance is provided for a parent by a child, he shall have the right of contribution from his adult brothers and sisters, who refuse or do not assist in such maintenance, on a pro rata share to the extent of their ability to so contribute to such support; provided that no right of contribution for support shall accrue except from and after notice in writing is given by the child so providing for his parent.

Id.

70. R.I. GEN. LAWS § 15-10-1(a) (2006).

unable to self-support because of age or sickness.⁷¹ If an adult child fails to support the needy parent, the crime is punishable by a fine of two hundred dollars or less, up to one year's imprisonment, or both.⁷² While the statute does not define what is unreasonable neglect or refusal, there is a provision stating that if a child was not reasonably supported by the parent in his minority, his failure to support the parent will not be considered unreasonable.⁷³ Similar to the South Dakota statute, if an adult child is providing more than her fair share of support to her indigent parents, she can seek contribution from her liable siblings in a civil lawsuit.⁷⁴ Violations of the filial responsibility statute can be prosecuted by the attorney general or a proceeding may be initiated by the director of a licensed private charity.⁷⁵

D. Current Federal Government Programs to Assist the Elderly

Once individuals retire, their ability to provide for themselves depends upon personal savings, pension plans, or government programs such as Social Security, Medicare, and Medicaid. The U.S. government has established these social insurance plans to assist the elder generation with supporting itself and help needy people gain access to medical care.

1. SOCIAL SECURITY

In 1935, Congress enacted the Social Security Act as part of the federal government's response to the Great Depression and general

71. *Id.*

72. *Id.*

73. *Id.* § 15-10-1(b).

No neglect or refusal shall be deemed unreasonable as to a child who shall not during his or her minority, have been reasonably supported by the parent, if the parent was charged with the duty to do so, nor as to any child who, being one of two (2) or more children, has made proper and reasonable contribution toward the support of his or her destitute parent.

Id.

74. *Id.* § 15-10-7.

Any child making more than his or her share of a proper and reasonable contribution toward the support of his or her destitute parents shall have a right of contribution from other children over the age of eighteen (18) years of the parents, who have been supported by the parents, in a civil action subject to any orders and conditions that the court deems that the circumstances of the defendant or defendants may require.

Id.

75. Moskowitz, *Filial Responsibility*, *supra* note 6, at 717.

economic instability.⁷⁶ The Depression caused unemployment and poverty which led the government to enact legislation to protect retirement savings.⁷⁷ The Social Security program provides retirement benefits, disability insurance, and life insurance protection.⁷⁸ All employers and employees must pay a mandatory flat tax rate that applies to cash earnings up to a specified cap.⁷⁹ All workers and their families are entitled to benefits regardless of economic need.⁸⁰ The objective of the Social Security system is twofold. First, it seeks to “provide a minimum standard of living to the elderly, the disabled, and their dependent survivors.”⁸¹ Second, it seeks to “help moderate the decline in living standards when the loss of wages occurs on account of retirement, disability, or death.”⁸²

The U.S. Social Security system is designed as a pay-as-you-go system where benefits for current retirees and other entitled individuals are paid out of payroll taxes from current workers.⁸³ However, Congress altered the Social Security system in the early 1980s so the program could collect funds in excess of its payout obligations.⁸⁴ This “Trust Funds” program attempted to balance the system over a longer period of time so there would be a surplus of funds when the baby boomer generation began to retire, leaving fewer workers to support the system.⁸⁵ Social Security was never intended to be the only income source of retired workers and was designed to provide 45% of the worker’s preretirement wages. However, the majority of retired Americans depend solely on their Social Security income.⁸⁶ Social Security has been an effective tool in combating poverty among the eld-

76. See, e.g., John Burritt McArthur, *Private Pensions and the Justification for Social Security*, 48 S. TEX. L. REV. 1, 4–11 (2006).

77. *Id.* (“As unemployment spread, the finger of economic fate pointed unpredictably at some companies, jobs, professions, and areas of the country but not others. Congress designed the Social Security Trust Fund to shield retirement security from the creative destruction of such business cycles.”).

78. Regina T. Jefferson, *Privatization: Not the Answer for Social Security Reform*, 58 WASH. & LEE L. REV. 1287, 1290 (2001).

79. 26 U.S.C. §§ 3101(a), 3111(a) (2002 & Supp. 2007); see also Jefferson, *supra* note 78, at 1291.

80. Jefferson, *supra* note 78, at 1290.

81. *Id.* at 1314.

82. *Id.* at 1315.

83. Neil H. Buchanan, *Social Security and Government Deficits: When Should We Worry?*, 92 CORNELL L. REV. 257, 270 (2007).

84. *Id.* at 270–71.

85. *Id.* at 271.

86. Jefferson, *supra* note 78, at 1291 n.4.

erly population,⁸⁷ but with the impending retirement of the baby boomer generation, there are concerns about the sustainability of this program in its current form.⁸⁸

2. MEDICARE

Medicare is a universal entitlement government program which focuses on helping the elderly afford medical care. Individuals aged sixty-five or older are automatically entitled to the hospital insurance program which covers inpatient hospital care, skilled nursing facility care, home health care, and hospice care.⁸⁹ Medicare will cover the costs of the first sixty consecutive days of inpatient care within a benefit period, and the individual must make co-payments starting on the sixty-first day.⁹⁰ After ninety consecutive days in a benefit period, the individual either must pay for the care or elect to use nonrenewable lifetime-reserve days.⁹¹

If the individual elects to pay a monthly premium, Medicare acts as a health insurance provider and extends coverage to physicians' costs, emergency room costs, laboratory and diagnostic tests, physical and occupational therapy, home health care, outpatient rehabilitation and psychiatric services, and certain drugs, transplants, and medical equipment.⁹² Medicare also provides some insurance for prescription drugs. All premium paying beneficiaries have access to a subsidized prescription drug insurance program.⁹³ Low-income beneficiaries have access to other programs.⁹⁴ Although Medicare takes significant

87. *Id.* at 1291. Prior to Social Security, half of the elderly population lived below the poverty line, compared to 11% now. *Id.*

88. *See infra* Part II.E.

89. EARL DIRK HOFFMAN, JR. ET AL., DEP'T OF HEALTH & HUMAN SERVS., BRIEF SUMMARIES OF MEDICARE & MEDICAID 6-7 (2005), available at <http://www.cms.hhs.gov/medicareprogramratesstats/downloads/medicaremedicaidsummaries2005.pdf>.

90. *Id.* at 7.

91. *Id.* at 6-7. An individual has sixty nonrenewable lifetime reserve days during which she must still make co-payments. *Id.* at 7. A benefit period "starts when the beneficiary first enters a hospital and ends when there has been a break of at least sixty consecutive days since inpatient hospital or skilled nursing facility care was provided." *Id.* An individual has an unlimited amount of benefit periods. *Id.*

92. *Id.* at 7-8. Coverage under this optional section of Medicare is subject to certain exceptions, limitations, and conditions but operates similarly to a private health insurance plan. *Id.* at 8, 12. The services often involve deductibles and co-insurance. *Id.* at 12.

93. *Id.* at 9.

94. *Id.*

steps toward helping the elderly obtain health care, the elderly are to some extent still financially responsible for their own care, and the program does not cover all medical services.

3. MEDICAID

Unlike non-need based programs such as Social Security and Medicare, Congress enacted Medicaid in 1965, along with the Medicare legislation, as an extension of medical services for the poor.⁹⁵ There are two ways for individuals to qualify for Medicaid assistance; they can qualify as a “categorically needy” person, or as a “medically needy” person.⁹⁶ Categorically needy individuals are those that qualify for government income assistance.⁹⁷ Medically needy refers to those whose incomes are above the poverty level, but qualify for Medicaid because they have incurred medical and long-term care costs which reduce their expendable financial resources.⁹⁸ Before qualifying, most medically needy applicants must calculate their income and assets, and “spend down” the resources to become eligible for the aid.⁹⁹

While Medicaid is federally funded, the program is designed for the states to administer the benefits.¹⁰⁰ Congress established guidelines for states to follow, but states have some flexibility in providing services.¹⁰¹ The majority of Medicaid funds are used to provide institutional care, and Medicaid constitutes 45% of all government funds toward long-term care.¹⁰²

Filial responsibility laws are closely connected to Medicaid provisions because Medicaid regulations are often roadblocks to the effec-

95. *Id.* at 15; *see also* 42 U.S.C. § 1396a(a)(10)(A) (2002); Alison Barnes, *An Assessment of Medicaid Planning*, 3 HOUS. J. HEALTH L. & POL'Y 265, 266 (2003).

96. Barnes, *supra* note 95, at 270.

97. *Id.* This generally encompasses people who have not worked long enough to qualify for Social Security and who receive Supplemental Security Income. *Id.* Supplemental Security Income provides a minimum income to individuals who are poor, elderly, blind, or disabled. *Id.*

98. *Id.* at 270–71.

99. *Id.* at 271. “Spending down” refers to reducing any excess income and assets so that the individual can qualify for Medicaid benefits. *Id.* This can be achieved by incurring health care costs or diverting income to support a spouse. *Id.*

100. *Id.* at 266.

101. *Id.* The federal government requires states to provide institutional care for eligible individuals, but states may choose to expand services and coverage if the federal agency agrees to the expansion. *Id.*

102. Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 358–59 (2004).

tive enforcement of filial responsibility laws.¹⁰³ Although the federal government provides assistance programs for the needy and implements non-need based social insurance programs to help provide the elder generations with basic amenities, these programs are not sufficient to guarantee that the elderly population will have access to adequate and sufficient care.

E. Economic Need for Filial Responsibility Laws

As the American population ages, the economic need for filial support increases. The elderly population is a rapidly growing segment of society, with the population of Americans aged sixty-five to eighty-four expected to grow 113.8% from 2000 to 2050 and the population aged eighty-five and above increasing 388.9% in that same time frame.¹⁰⁴ The current population of Americans aged sixty-five or older is roughly 36.3 million people.¹⁰⁵ The population of this group is expected to grow to 40 million in 2010, 55 million in 2020, and 71.5 million in 2030.¹⁰⁶ The baby boom following World War II has caused this significant projected increase because this is when the baby boomers will turn sixty-five.¹⁰⁷ With the increase in the older American population, life expectancy has also increased and now averages 77.6 years.¹⁰⁸

While advances in technology and health care have made it possible for Americans to live longer, the majority of older Americans have at least one chronic health problem requiring medical attention.¹⁰⁹ Considerably fewer older Americans report being in good

103. See *infra* Parts III.B.1, III.E.

104. U.S. CENSUS BUREAU, U.S. INTERIM PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC ORIGIN tbl.2b (2004), available at <http://www.census.gov/ipc/www/usintermproj/natprojtab02b.pdf>.

105. Press Release, U.S. Census Bureau, Facts for Features, Older Americans Month: May 2006 (Mar. 9, 2006), available at http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006537.html.

106. ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS 1, 2 (2005), available at <http://www.aoa.gov/PROF/Statistics/profile/2005/2005profile.pdf> [hereinafter A PROFILE OF OLDER AMERICANS]. The current population is based on 2004 data. *Id.*

107. *Id.* at 2.

108. *Id.* The life expectancy for a baby born in 2003 is 77.6 years, compared to 47.6 years in 1900. *Id.*

109. The most common health problems were hypertension, arthritis, heart disease, cancer, sinusitis, and diabetes. *Id.* at 12; see also ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A STATISTICAL PROFILE OF OLDER AMERICANS

health than their working-age counterparts.¹¹⁰ Government programs such as Medicare and Medicaid strive to assist the older and poorer members of society in gaining access to requisite care, but as the elderly population grows, the government will need to expend more resources to sustain an already expensive system for the support and care of the elderly population. In 2005, the Medicare program alone cost an estimated \$330 billion, and a new prescription drug plan added in 2006 is expected to cost an additional \$1 trillion over the next ten years.¹¹¹ The Government Accountability Office (GAO) predicts that without some sort of program reform, Medicare's growth will be unsustainable over time, and by 2035 the costs will represent 7.3% of the gross domestic product.¹¹² Medicaid is also an expensive program to maintain as the program cost the federal and state governments nearly \$300 billion in 2004.¹¹³ Because Medicaid is a federal and state sponsored program, the costs also impose a burden on state budgets and account for "more than 20% of states' expenditures."¹¹⁴ The trend of increasing costs for Medicare and Medicaid is likely to continue as the baby boomer generation continues to age and have a longer life expectancy, and this sparks debate over how to sustain the programs, provide the necessary medical care, and respect a budget.¹¹⁵

Even though the Medicare and Medicaid programs strive to meet the health care needs of an expanding elderly population, filial responsibility laws offer an additional protection to ensure that as

AGED 65+, at 2 (2006), available at http://www.aoa.gov/press/fact/pdf/ss_stat_profile.pdf [hereinafter STATISTICAL PROFILE OF OLDER AMERICANS] (similar results were reported in 2000).

110. A PROFILE OF OLDER AMERICANS, *supra* note 106, at 12. Thirty-six percent of noninstitutionalized older persons reported that they were in excellent to very good health, but 66% of persons aged eighteen to sixty-four reported the same. *Id.*

111. U.S. GOV'T ACCOUNTABILITY OFFICE, HIGH RISK SERIES: AN UPDATE 87 (2007), available at <http://www.gao.gov/new.items/d07310.pdf>.

112. *Id.* The GAO has placed Medicare on the high-risk list due to its size and complexity making it vulnerable to inefficiencies and abuse. *Id.* In 2006, Medicare was estimated at 3.2% of the gross domestic product. *Id.*

113. *Id.* at 89. The GAO placed Medicaid on the high-risk list in 2003 after concerns that the protections against inappropriate spending were not efficient enough. *Id.*

114. *Id.* at 89.

115. See, e.g., Patricia M. Wald, *Looking Forward to the Next Millennium: Social Previews to Legal Change*, 70 TEMP. L. REV. 1085, 1088 (1997) ("Do we increase Medicare deductions, decrease benefits levels, confine benefits to the truly needy, raise the recipient age, restrict coverage to main-line services, or require the elderly to pay a bigger share of their medical expenses? All of these have been suggested as remedies to staunch the hemorrhaging of government funds already paying 40% of all medical care and likely to account for a higher share in the future.").

Americans age they will be able to afford requisite care. Because the costs of government programs are rising, these programs may be scaled back to provide fewer services. If policy makers take this route, the elderly population will have to rely on private resources to pay for important health services. In 2003, the average person aged sixty-five years or older spent \$3,899 of his own money on health care.¹¹⁶ According to the Administration on Aging, older Americans spend twice as much on health care compared to the rest of the population.¹¹⁷ While the majority of older Americans have Medicare health coverage, recipients must still contribute, and nearly half of all medical care costs come from a non-Medicare source.¹¹⁸ This requirement places a heavy burden on the elderly who have a limited income and lack private insurance through an employer.¹¹⁹ Thus, if the extended family financially contributes to the care of their older family members, this assistance may help alleviate the financial burden on these individuals, and help them afford important health care and other basic necessities.

While most older Americans do have at least some source of income, almost 10% live below the poverty line and over 6% are near poor.¹²⁰ An overwhelming majority of senior citizens count on Social Security benefits as a major source of income, and a third of this population reports that they rely nearly exclusively on Social Security.¹²¹ For nearly half of all Americans, Social Security is their only pension plan for retirement.¹²² Even though Social Security provides benefits to most of the older population, the benefits are modest.¹²³ Those who

116. A PROFILE OF OLDER AMERICANS, *supra* note 106, at 13. Between 1993 and 2003, the average older American's out-of-pocket health care expenses increased by 46%. *Id.*

117. *Id.* ("Older Americans spent 12.5% of their expenditures on health, more than twice the proportion spent by all consumers (5.9%)).

118. *Id.*

119. *See id.* (only 61% of noninstitutionalized persons over sixty-five had private insurance). As older Americans retire, social security, private pensions, or investments may be their only sources of income. *See id.* 10–11.

120. *Id.* at 11. Near-poor is falling between the poverty line and 125% of the poverty line. *Id.*

121. *Id.* Ninety percent of older Americans report that Social Security is a major source of income, and one-third report that Social Security constitutes 90% of their income. Social Security benefits count for 39% of the total income of all Americans aged sixty-five or older. *Id.*

122. Seymour Moskowitz, *Still Part of the Clan: Representing Elders in the Family Law Practice*, 38 FAM. L.Q. 214, 216 (2004).

123. Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 MARQ. L. REV. 401, 414 (2002) [herein-

do have private pension plans may also find this coverage insufficient.¹²⁴

As older Americans continue to rely on Social Security benefits, the program has shortcomings which, if not addressed, will soon force older Americans to look for other ways to supplement their income. As more older Americans reach the age of Social Security entitlement, fewer workers contribute to the program.¹²⁵ The program is expected to have a revenue shortage and be unable to meet its promised obligations by 2032.¹²⁶ The extent and magnitude of the Social Security crisis is uncertain, and the system may be reformed before benefits are reduced or eliminated.¹²⁷ The problems facing Social Security, however, should raise questions about the ability of future older Americans to rely on this income to the same extent the current generation does. If the Social Security system is unable to provide full benefits to retirees in the future,¹²⁸ they will be forced to find other avenues of support. Filial responsibility laws have the potential to assist older Americans in paying for basic necessities and health care. If adult children are able to contribute to the care of their elderly parents, the potential reduction in Social Security benefits would not have as large of an impact because the elderly would be able to rely on other means of support.

The elderly currently face financial burdens in providing for their own food, clothing, shelter, and medical care. As the population is expected to live longer, at the same time medical costs are increasing, government programs aimed at supporting the elderly are facing rapidly increasing expenditures and insufficient revenues. Requiring capable adult children to financially assist their elderly parents will help ensure that the elderly have the necessary support.

after Moskowitz, *Adult Children*] (“[T]he average retired couple’s monthly Social Security benefit in 1998 was only \$1,248.”).

124. *Id.* at 414–15 (“Perversely, private pension coverage tends to decrease as employer size and annual earnings decrease.”).

125. Wald, *supra* note 115, at 1086. In 1950, there were sixteen workers contributing for the fund for every one retired beneficiary, and by 1997 the number had decreased to five. Projections estimate that in the next few decades the number will continue to decrease. *Id.*

126. Moskowitz, *Filial Responsibility*, *supra* note 6, at 720.

127. See Buchanan, *supra* note 83, at 288 (discussing Social Security deficits, differing viewpoints on the severity of the problems, and potential solutions to the problems).

128. See *id.* at 280 (“Present tax rates would be sufficient to pay 74% of scheduled benefits after Trust Funds exhaustion in 2040 and 70% of scheduled benefits in 2080.”).

III. Analysis

Although many states maintain filial responsibility laws in their criminal or civil codes, these filial responsibility laws are rarely enforced. The few examples of state enforcement have established the constitutionality and scope of filial responsibility laws. The lack of enforcement prevents these laws from reaching their potential as eradicators or alleviators of financial burdens on the elderly.

A. Benefits to Enforcement

Proponents of filial responsibility laws raise several justifications and arguments for why such laws benefit the elderly population and society as a whole. Economic advantages, moral responsibility, and improving family relationships are prevalent arguments in support of these laws.

1. FILIAL RESPONSIBILITY LAWS CAN PROVIDE ECONOMIC ADVANTAGES

Filial responsibility laws can be economically advantageous to the elderly and society in general in one of two ways: they can be designed to reduce government expenditures, or designed to provide the elderly with care beyond the government's minimum assistance. Historically, the justification for filial responsibility laws focused on keeping government expenditures down by shifting the burden to family members.¹²⁹ If adult children provide financial support to their older parents instead of relying on government programs such as Medicare and Medicaid, the government could save millions of dollars every year.¹³⁰ The government would save money and in turn provide public assistance to the elderly who are unable to rely on family support, either due to lack of family itself or because the family is financially unable.¹³¹ One estimate suggested that filial responsibility

129. Kline, *supra* note 45, at 204.

130. Pakula, *supra* note 3, at 876. In 1983, the Health Care Financing Agency estimated that filial responsibility laws, if nationally enforced, would reduce Medicaid expenditures by twenty-five million dollars each year. *Id.* As the author states, “[c]learly, more than two decades later . . . savings could be much higher than \$25 million.” *Id.*

131. Lee Anne Fennell, *Relative Burdens: Family Ties and the Safety Net*, 45 WM. & MARY L. REV. 1453, 1470 (2004) (discussing a “family-first” model of supporting dependents and noting that “the family-first support model retains a role for public assistance to dependent persons when familial resources are absent or inadequate).

laws could reduce welfare expenses up to 30%, and these savings could then allow the government to divert resources toward other societal obligations and public services.¹³²

Additionally, filial responsibility laws may deter the elderly from seeking government assistance, thereby also reducing government expenditures on welfare and administrative costs to investigate whether a person qualifies for aid.¹³³ The laws may also be drafted to prevent the elderly from voluntarily seeking government assistance when they are otherwise able to provide for themselves.¹³⁴ If family members are required to contribute to the support of their elders, the family will then have a “stake in [the] dependence” of the older person and theoretically take measures “to prevent, forestall, shorten, or ameliorate dependence,” thereby saving the family and the government money.¹³⁵

Alternatively, filial responsibility laws may be used to enhance the economic conditions facing the elderly. Rather than focusing on reducing government expenditures, the laws would focus on supplementing the government support currently available. Government support programs such as Social Security and Medicare do not cover all living costs of the elderly, and thus many elderly must have other means of income or forego certain necessities.¹³⁶ “Filial responsibility laws can help to assure that indigent older persons preserve the inherent dignity to which they are entitled as humans” by providing support for food, clothing, shelter, and health care beyond what the government can afford to provide.¹³⁷ If filial responsibility laws are designed to supplement existing government programs, quality of life

132. Moskowitz, *Filial Responsibility*, *supra* note 6, at 722.

133. Kline, *supra* note 45, at 205. If the elderly could rely on family members, they would be less likely to seek out government benefits. *Id.* Common criticisms of this approach are that it would over deter, and elderly individuals who actually do need government assistance would not seek out aid or the necessary medical attention to keep costs low for their family members. *Id.*

134. Fennell, *supra* note 131, at 1482–86. Asset transfers to children or “Medicaid divorces” (when married couples get a divorce so that the ill spouse is eligible for government care, thereby leaving more resources for the couple) are ways in which individuals may structure their finances so that the government must shoulder the burden for their care. *Id.* at 1482–83. While there are rules regulating the use of these techniques, there are still ways that a person may voluntarily qualify for government support while their family has sufficient resources to provide the care themselves. *Id.* at 1483–86.

135. *Id.* at 1487.

136. *See supra* Part II.E.

137. Kline, *supra* note 45, at 207.

for the elderly population would improve as it could gain access to care beyond minimal government assistance.¹³⁸ If, in the future, Social Security is unable to meet all of its obligations and Medicare does not provide full coverage health care at a reasonable cost, filial responsibility laws could fill this gap.

2. RECIPROCITY JUSTIFIES PLACING A LEGAL DUTY OF SUPPORT ON CAPABLE ADULT CHILDREN

The moral obligation to support one's aging parents is rooted in the idea of reciprocity. Reciprocity theory contends that parents raise and provide for their children when the children are unable to do so (in minority), and thus children owe the same duty to provide for their parents when they are unable to do so.¹³⁹ The argument likens filial responsibility to an implicit contract created when parents bring a child into the world and support him through childhood.¹⁴⁰ Children are thereby indebted to their parents, and can repay the debt by supporting their elderly, needy parents.¹⁴¹ The nature of this family relationship imposes a moral duty to care for each other, and thus it is fair to legally impose that inherent moral duty.¹⁴²

The reciprocity argument in support of filial responsibility laws does fall short on two points however. First, parents have a legal obligation to support their children because they chose to have children; whereas children do not volunteer to have parents.¹⁴³ Parents choose to accept financial responsibility for their child, but filial responsibility would remove the adult children's ability to choose to reciprocate and accept financial responsibility for his parents by imposing a legal obligation. Second, a parent is only legally required to financially support his child until it reaches the age of majority, which is eighteen years-old.¹⁴⁴ Under the theory of reciprocity, the adult child should likewise be required to support his parents for only eighteen years. However, filial responsibility laws would impose a duty to care for the parent

138. See Shanon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support Our Parents Be Effectively Enforced?*, 36 FAM. L.Q. 501, 512 (2002).

139. Joann Blair, Note, "Honor Thy Father and Thy Mother"—But for How Long?—Adult Children's Duty to Care for and Protect Elderly Parents, 35 U. LOUISVILLE J. FAM. L. 765, 780 (1997).

140. Moskowitz, *Filial Responsibility*, *supra* note 6, at 721.

141. *Id.* ("To permit adult children to ignore the needs of their own parents who are unable to meet their basic needs is to promote unjust enrichment.")

142. See, e.g., Pakula, *supra* note 3, at 868.

143. Kline, *supra* note 45, at 206.

144. Blair, *supra* note 139, at 781.

for as long as necessary, and with increased life expectancies, the adult child may be required to support his parents for longer than eighteen years.¹⁴⁵ While the concept of reciprocity does not provide a complete justification for filial responsibility, cultural traditions and moral duties to care for family, separate from reciprocity, still support the concept that children should support their needy parents.¹⁴⁶

3. FILIAL RESPONSIBILITY LAWS WILL STRENGTHEN THE FAMILY BOND AND SPARK FAMILY DISCUSSIONS ABOUT RETIREMENT PLANNING

Another benefit to the creation and enforcement of filial responsibility laws is that they have the potential to strengthen the family bond by encouraging communication and care within the family.¹⁴⁷ This viewpoint is controversial, however, because critics strongly argue that enforcement of filial responsibility laws will instead lead to family stress, dissention, and the breakdown of the family unit.¹⁴⁸ While there is a risk of added family tension and stress, this risk may be reduced if filial responsibility laws start conversations within the family concerning elder care and retirement planning.

While parents are able to anticipate and plan for the provision of care for their children once they are born, many caregivers of the elderly have not addressed the challenges associated with elder care before the situation arises.¹⁴⁹ The enforcement of a legal obligation to support one's parents would provide potential caregivers notice so they may start planning for the care of their parents earlier. Enforcement of the laws will motivate communication within the family about the impending care and perhaps families will be able to work through the problems that lead to stress and dissention.¹⁵⁰ A dialogue concerning the future may foster a positive family relationship, even through stressful situations. Family members, such as children, may also be in a better position than the government to assess the needs of

145. *Id.*

146. Kline, *supra* note 45, at 207 ("Notwithstanding the cries of the critics, filial responsibility laws may be properly grounded in legislative notions of community morality that have been observed in American culture.").

147. *See, e.g.*, Jacobson, *supra* note 11, at 541; Kline, *supra* note 45, at 206–07 (both discussing how some supporters believe the laws will encourage family health and harmony and giving the example of the Mormon Church's views that supporting the family will strengthen the unit and contribute to society's stability).

148. Jacobson, *supra* note 11, at 539; Pakula, *supra* note 3, at 869.

149. Smith, *supra* note 102, at 368–69.

150. *See* Pakula, *supra* note 3, at 876.

the individual elderly person and thus respond appropriately based on the unique informational advantage families have.¹⁵¹

Additionally, parents concerned about being a burden on their children may consider retirement planning techniques that limit the child's need to support them.¹⁵² Parents who are aware that their children, in addition to the government, will be responsible for their care may be more motivated to keep savings and investments. This type of planning may ensure that older parents have access to care later in life,¹⁵³ thereby also reducing the tension on the family as a result of the imposition of filial responsibility laws.

B. Barriers to Enforcement

Critics of filial responsibility raise important issues relating to administrative difficulties and concerns over gender, economic, and racial imbalances the laws will reinforce. Furthermore, the cultural climate in America is an additional obstacle to the enforcement of these laws.

1. ENFORCING FILIAL RESPONSIBILITY LAWS MAY BE AN "ADMINISTRATIVE NIGHTMARE"¹⁵⁴

While enforcing filial responsibility laws may save the government welfare costs, designing and maintaining enforcement procedures could create high bureaucratic costs which would reduce the overall savings.¹⁵⁵ Enforcing filial responsibility laws requires knowing extensive information about the elderly individual and his adult children. Enforcers would need to know whether there are children, where they live, if they work and how much income they earn, and the extent of the support necessary for the elderly person.¹⁵⁶ Determining the amount of need and how much each adult child is able to contribute may also be very complicated.¹⁵⁷ Moreover, the process would have to be revisited as situations change and modifications to a current support arrangement become necessary.¹⁵⁸

151. Fennell, *supra* note 131, at 1487–88.

152. Pakula, *supra* note 3, at 869.

153. Fennell, *supra* note 131, at 1487–88.

154. Edelstone, *supra* note 138, at 510.

155. Pakula, *supra* note 3, at 875–76.

156. Edelstone, *supra* note 138, at 510.

157. Moskowitz, *Filial Responsibility*, *supra* note 6, at 727–28.

158. *Id.* at 728.

As a preliminary challenge to filial responsibility enforcement, it would be difficult for enforcers to even know who in the elderly population needs additional assistance.¹⁵⁹ Litigating these cases may also make it more costly to enforce the laws, as the trials may be expensive and the support obligation very small.¹⁶⁰ Enforcing filial responsibility laws would create the need for a new state bureaucracy to investigate, prosecute, and enforce the support obligations.¹⁶¹ However, it can be argued that effective enforcement will lead to voluntary compliance and to a reduction in bureaucratic costs over time.¹⁶²

Applying for Medicaid indicates that an elderly or otherwise eligible person needs financial assistance to provide for themselves.¹⁶³ The Medicaid statute, however, prohibits states from considering the financial situation of an applicant's or recipient's family members, other than a spouse or child under twenty-one years-old, when assessing the eligibility of the individual.¹⁶⁴ Rather than risk losing federal funding, states do not inquire into the existence of children or any child's financial resources in the Medicaid application.¹⁶⁵ Thus, instead of having important information, states do not know whether an adult child would be able to help support the elderly parent.¹⁶⁶ An administrative interpretation of Medicaid suggests that states could require adult children to support their parents and still comply with the Medicaid statute, but the validity of this is unclear in light of other statutory interpretation evidence.¹⁶⁷ States prefer not to inquire into the availability of other sources of support for the indigent parent,¹⁶⁸ and thus even though a person has applied for government assistance, enforcers of filial responsibility laws would have to undertake significant investigation to determine whether there is a support obligation to enforce.

159. Edelstone, *supra* note 138, at 510; Moskowitz, *Filial Responsibility, supra* note 6, at 727. The elderly population is more likely to be isolated or homebound, and without referrals from some person or entity, enforcers other than the parents themselves will be unable to initiate any investigation. *See id.*; Moskowitz, *Filial Responsibility, supra* note 6, at 727.

160. Jacobson, *supra* note 11, at 540.

161. Edelstone, *supra* note 138, at 506-07.

162. *See* Pakula, *supra* note 3, at 876.

163. Edelstone, *supra* note 138, at 513.

164. *See id.* at 508.

165. *Id.* at 513.

166. *Id.*

167. *Id.* at 508.

168. *Id.* at 513.

2. GENDER, RACIAL, AND ECONOMIC IMBALANCES RAISE CONCERNS OVER THE EFFICACY AND EQUITY OF FILIAL RESPONSIBILITY LAWS

Filial responsibility laws trigger questions about the role gender, race, and economics have on elder care. Women often become elder caretakers while also raising their own children, often in addition to working outside the home.¹⁶⁹ Women are much more likely than men to be the family caregiver—whether as wife, daughter, or daughter-in-law¹⁷⁰—and critics assert that adding the extra responsibility of financially providing for elderly parents places an unfair burden on women.¹⁷¹ Imposing filial responsibility laws may exacerbate the current gender imbalance in elder care.

Similarly, filial responsibility laws may reinforce racial imbalances as minorities, and minority women in particular, are more often burdened with providing care to elderly family members.¹⁷² Minority women, according to one report, “are twice as likely as Caucasian women to work nights or rotating shifts, and are more likely to have to provide their own elder care.”¹⁷³ Thus, financially contributing to their parents’ support would add an additional burden on minority families and women who already physically care for their elderly parents.¹⁷⁴

Filial responsibility laws may also overlook cultural differences among a diverse elderly population.¹⁷⁵ Older Hispanic individuals are much more likely to live in multigenerational homes than Caucasians or African Americans and may have additional problems in obtaining the same access to services due to language barriers.¹⁷⁶ African American families often rely more on their entire extended family for care.¹⁷⁷ Critics of filial responsibility laws point to the cultural differ-

169. Moskowitz, *Filial Responsibility*, *supra* note 6, at 724.

170. Smith, *supra* note 102, at 360–61. Women provide 70% of elder care, and studies indicate that women often provide a majority of the physical care for their husband’s parents. *Id.*

171. Moskowitz, *Filial Responsibility*, *supra* note 6, at 724–25.

172. Edelstone, *supra* note 138, at 511.

173. Sue Shellenbarger, *Work & Family: Conflict-Easing Efforts Bypass Many Blacks*, WALL ST. J., Dec. 17, 1993, at B1 (quoting Dr. Dilworth-Anderson on a University of North Carolina study on the disparity between African American and white households’ elder care burdens).

174. Edelstone, *supra* note 138, at 511.

175. Moskowitz, *Filial Responsibility*, *supra* note 6, at 728–29.

176. *Id.* at 728.

177. *Id.* (stating “African-American families, by contract, often build unique patterns of sharing and exchange of favors across networks of siblings, aunts, un-

ences within the elderly population and argue these support laws will not be effective for all families.¹⁷⁸

The current societal economic imbalance may also be reinforced by filial responsibility laws. Requiring adult children to financially support their indigent parents places an extra economic burden on families, and reduces the amount of already tight disposable income and savings these families might have. This has the potential to perpetuate poverty, as the supporting family will be less able to save for their own retirement and thus be forced to become dependent on their children in the future.¹⁷⁹ However, filial responsibility laws are typically designed to only require contributions if the adult child is financially able to contribute, and thus the statutes, as enforced, may not cause a heavy or undue burden on the poor.¹⁸⁰ Also, lower-income families are more likely to already take care of their elderly family members, and thus, enforcement of filial responsibility laws would not impact them as much as middle-income families not already undertaking this responsibility.¹⁸¹ Another valid economic concern, however, is that as the elderly are expected to live longer, the burden of providing for elderly parents may fall on adult children who are elderly themselves.¹⁸² When the elderly adult children retire, they will not only bear the burden of supporting themselves, but also the support of their parents on a more limited income.

3. AMERICA'S CULTURAL ATTITUDES TOWARD WELFARE HINDERS ENFORCEMENT

America's social culture acknowledges families are usually connected by love and relationships, but American society ultimately bears the responsibility to provide some minimal level of support for those in need.¹⁸³ The culture stresses independence and self-reliance, and elderly parents may be uncomfortable accepting money from their children.¹⁸⁴ Even though the elderly individual may have to rely on government care if she declines her child's assistance, she may still

cles, and other family members.”) (quoting Martha Minow, *All in the Family & In All Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275, 324 (1993)).

178. *Id.* at 728–29.

179. See Jacobson, *supra* note 11, at 539.

180. Pakula, *supra* note 3, at 876.

181. *Id.*

182. Moskowitz, *Filial Responsibility*, *supra* note 6, at 725.

183. Fennell, *supra* note 131, at 1468.

184. Edelstone, *supra* note 138, at 511.

feel she has retained some personal autonomy.¹⁸⁵ She may fear the social stigma of relying on her children and lose her sense of self-respect.¹⁸⁶ Elderly parents thus may be reluctant to become a financial burden on their children and choose to forego necessities, resulting in a lower standard of living.¹⁸⁷

Criminal filial responsibility statutes have an additional challenge to enforceability. Although a statute may require adult children to financially support their indigent parent, if the law is not widely supported an elected district attorney will not risk prosecuting an adult child for fear it will ruin reelection chances.¹⁸⁸ Criminal statutes are not likely to be popular as they would inhibit an adult child's ability to support her elderly parents when enforced, likely cause unnecessary family tension, and consequently defeat the goal of ensuring the elderly have access to living necessities.¹⁸⁹

Without the support of society, and especially the elderly, filial responsibility laws may not be able to accomplish their intended goals. Moreover, if the elderly population is not willing to accept financial support from their families, they will not seek out the important care and basic necessities the laws strive to provide for them.¹⁹⁰

C. The Constitutionality of Filial Responsibility Laws

Despite several arguments and challenges to the constitutionality of state filial responsibility laws, state supreme courts have upheld their constitutionality in all but one exceptional case.¹⁹¹ The following cases illustrate the constitutional arguments raised in the course of en-

185. Fennell, *supra* note 131, at 1520.

186. See Jacobson, *supra* note 11, at 539.

187. Kline, *supra* note 45, at 205.

188. Edelstone, *supra* note 138, at 510.

189. See Pakula, *supra* note 3, at 864.

190. See Fennell, *supra* note 131, at 1468 (stating "No account of the allocation of dependence burdens can ignore the impact of the preferences and behavior of the dependent individual herself[.]" suggesting that if the target beneficiaries are unwilling to accept the laws, the efficacy of enforcement will be significantly impacted).

191. *Dep't of Mental Hygiene v. Kirchner*, 388 P.2d 720, 724 (Cal. 1964) (holding the application of the filial responsibility statute unconstitutional when the state attempted to require support for an indigent parent that was a public ward); Edelstone, *supra* note 138, at 507. In *Kirchner*, the state assumed financial responsibility for mentally ill patients living in public institutions, and therefore the court did not permit the state to seek support. *Kirchner*, 388 P.2d at 724.

forcing filial responsibility laws and the reasons why courts generally uphold them as constitutional.

1. *SWOAP v. SUPERIOR COURT OF SACRAMENTO COUNTY*

The Supreme Court of California determined that California's filial responsibility laws were constitutional in 1973.¹⁹² In *Swoap v. Superior Court of Sacramento County*, two elderly people on welfare and their adult children brought a class action to enjoin California state officials from enforcing the law requiring adult children to reimburse the state for public aid which the state has provided the parents.¹⁹³ The plaintiffs argued that the filial responsibility law was unconstitutional because the law violates the equal protection clause due to suspect classifications of people subject to the law.¹⁹⁴

The plaintiffs claimed two suspect classifications: one on the basis of wealth (because only adult children with "parents in need" are required to support their parents), and the other on the basis of ancestry (because only adult children from certain parents are required to support their parents).¹⁹⁵ California's Supreme Court rejected both of these arguments. First, the court determined that the law did not "discriminate between adult children on the basis of their parents' wealth" because the state's interest only involves "needy people," and while the state is attempting to "offset the cost of public assistance to the needy," the state is also providing a benefit to this class of people by ensuring their care.¹⁹⁶ Instead of discriminating on the basis of wealth, the statute "selects the children to bear the burden . . . on the basis of parentage."¹⁹⁷ Second, the court rejected the plaintiff's argument that the classification based on ancestry was discriminatory. Plaintiffs cited a U.S. Supreme Court case, *Hirabayashi v. United States*, in support of their position.¹⁹⁸ However, as the California Supreme Court pointed out, the *Hirabayashi* Court used "ancestry" to represent

192. *Swoap v. Super. Ct. of Sacramento County*, 516 P.2d 840, 840 (Cal. 1973).

193. *Id.* at 842.

194. *Id.* at 849-50.

195. *Id.* at 850-51.

196. *Id.* at 850.

197. *Id.*

198. *Id.* at 851 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded on the doctrine of equality." (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943))).

a racial or ethnic classification, not classifications based on the “general fact of descent.”¹⁹⁹

Because the court held the laws do not create unconstitutional classifications, it directed its attention to determining whether there was a rational relationship between the statute’s requirements and a legitimate state goal.²⁰⁰ California’s goal in enforcing its “relatives’ responsibility statute” is relieving part of the burden on state funds created by the assumption of welfare duties.²⁰¹ Because taking care of the destitute is a legitimate purpose, the question the court next addressed was whether “placing the burden for this support upon the adult children bears some rational relationship to the accomplishment of the state purpose of relieving the public treasury.”²⁰² The court felt it was “eminently clear that the selection of 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 the extent to which they are capable.”²⁰³ The provisions of the filial responsibility law were found constitutional and thus it was proper for California state authorities to enforce the law, despite what some would consider “harsh results” in particular instances of enforcement.²⁰⁴

2. *AMERICANA HEALTHCARE CENTER v. RANDALL*

The Supreme Court of South Dakota also affirmed the constitutionality of the state’s filial responsibility laws in *Americana Healthcare Center v. Randall*.²⁰⁵ In *Americana*, a health care center sued the adult son of a deceased patient who incurred over \$30,000 in unpaid medical bills at the center before passing away.²⁰⁶ The mother’s assets, \$30,000 in a home and \$100,000 in mutual funds, were transferred to a trust five years prior to going into the nursing home.²⁰⁷ The trust permitted the mother to be the income beneficiary and the son was the trustee and residual beneficiary, but the trust did not permit the son to

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 852.

205. 513 N.W.2d 566, 569–70 (S.D. 1994).

206. *Id.*

207. *Id.* at 569.

use the principal in the trust to benefit his mother.²⁰⁸ When the mother entered the nursing home the adult son completed the paperwork and asked that the monthly statements be sent to him, although the payments were paid from the mother's checking account and not the son's.²⁰⁹

Americana sued the son for payment of the mother's unpaid bills as an individual, as a trustee, and as guardian of his mother's estate and claimed that South Dakota Civil Law § 25-7-27 made the son liable for his mother's expenses.²¹⁰ Despite the son's argument that the South Dakota statute was unconstitutional because it denied him equal protection of the law and the right to due process, the trial court found in favor of Americana.²¹¹ The South Dakota Supreme Court used similar reasoning to support its filial responsibility law as the California Supreme Court did in *Swoap*.

First, the court made an important determination that adult children must provide support for their parents when they have the financial ability to do so to the extent that "the financial ability of the adult child may be determined *at any time there is an outstanding debt* which has not been barred by the statute of limitations," especially when the child controls the parent's assets.²¹² Second, the court found that the statute was not unconstitutional on the basis of discrimination against adult children of indigent parents and that economic-based discrimination was permissible so long as it was not invidious.²¹³ The court determined that South Dakota Civil Law § 25-7-27 contained a legitimate state interest—providing for the welfare and care of elderly people—and the requirements were rationally related to that interest.²¹⁴ In this case, the court found the statute particularly legitimate and appropriate because the mother's inability to pay her health care costs was a direct result of the creation of the trust for her son.²¹⁵

208. *Id.*

209. *Id.* at 569–70.

210. *Id.* at 570.

211. *Id.*

212. *Id.* at 571 (emphasis added).

213. *Id.* at 572–73.

214. *Id.* at 573.

215. *Id.*

D. Examples of Enforcement

States that enforce their laws do so for different reasons. The following discussion highlights two approaches: clarification and limiting manipulation.

1. ENFORCEMENT TO CLARIFY THE SCOPE OF THE LAWS

In *Savoy v. Savoy*, the Superior Court of Pennsylvania upheld a lower court's decision to permit a mother to seek financial assistance from her adult son and clarified the definition of indigent.²¹⁶ The woman, who was unable to work due to medical difficulties, filed a state civil complaint for support against her son.²¹⁷ The son objected, challenging the basis for support and his mother's standing to bring the action.²¹⁸ The son argued his mother was not entitled to assistance because she did not fall under the definition of indigent in the public assistance guidelines.²¹⁹ The court rejected that interpretation of indigent and instead determined that the common-law definition applied when a person's reasonable expenses exceed his only sources of income.²²⁰ Under the common law, people are indigent if they do not have sufficient ability to pay for their basic necessities.²²¹ Because the mother's monthly income was \$438.40 in Social Security benefits and her monthly expenses were \$940, the mother was indigent for the purposes of the filial responsibility statute.²²² The son had the ability to support his mother, and thus the court enforced the parental support order.²²³ This case clarified what it means to be indigent with respect to filial responsibility laws and emphasized that a person need not be destitute before seeking support for basic living expenses.

216. 641 A.2d 596 (Pa. Super. Ct. 1994).

217. *Id.* at 598.

218. *Id.*

219. *Id.* at 599.

220. *Id.*

221. *Id.* at 600.

The Act indicates that the indigent person need not be helpless and in extreme want, so completely destitute of property, as to require assistance from the public. Indigent persons are those who do not have sufficient means to pay for their own care and maintenance. Indigent includes, but is not limited to, those who are completely destitute and helpless. It also encompasses those persons who have some limited means, but whose means are not sufficient to adequately provide for their maintenance and support.

Id. at 598 (quoting *Verna v. Verna*, 432 A.2d 630, 633 (Pa. Super. Ct. 1981)).

222. *Id.* at 600.

223. *Id.*

An Ohio Supreme Court case, *Ohio v. Flontek*,²²⁴ clarified what is meant by providing support duties under Ohio's criminal filial responsibility law. In *Flontek*, an elderly woman lived in her home with her adult daughter before she died of pneumonia and gross neglect.²²⁵ Prior to her mother's death, the daughter made substantial improvements to the home, paid for the utilities and food, performed the chores, and prepared meals for her mother.²²⁶ However, at the time of her mother's death, her mother had severe medical problems including bruises and ulcers all over her body, gangrenous tissue, cataracts, and broken bones.²²⁷ Ohio indicted the plaintiff for involuntary manslaughter and nonsupport of a dependent—Ohio's version of a filial responsibility law.²²⁸ The daughter was found guilty of involuntary nonsupport of a dependent and the case was appealed up to the Ohio Supreme Court to determine whether the support law required more than financial support.²²⁹

Ohio's support law states that "[n]o person shall abandon, or fail to provide adequate support to . . . the person's aged or infirm parent or adoptive parent, who from lack of ability and means is unable to provide adequately for the parent's own support."²³⁰ The daughter contended that she satisfied this requirement because she used her own money to provide her mother with a comfortable home, food, and clothes, while the state argued that support includes financial and nonfinancial support, such as medical attention.²³¹ The court determined that the criminal statute only intended to encompass financial support.²³² The court reasoned that an expansive interpretation of the law "could result in continued unwarranted prosecutions of adult children who have elderly parents who may be in need of medical attention or care but have refused to seek treatment."²³³ Any adult child's duty to nonfinancially support the parent is a moral, not legal, obligation under this particular criminal statute.²³⁴ This case clarified

224. 693 N.E.2d 767 (Ohio 1998).

225. *Id.* at 768.

226. *Id.*

227. *Id.*

228. *Id.* at 769.

229. *Id.*

230. OHIO REV. CODE ANN. § 2919.21(A)(3) (LexisNexis 2007).

231. *Flontek*, 693 N.E.2d at 770.

232. *Id.* at 770–71.

233. *Id.* at 771.

234. *Id.*

the scope of the legal obligation adult children have to care for their elderly parents under filial support laws requiring only financial support.

2. ENFORCEMENT WHEN THE PARENT IS UNABLE TO SELF-SUPPORT DUE TO ASSET TRANSFERS

In 2003, the Superior Court of Pennsylvania enforced the state's filial responsibility laws against a daughter for failure to support her poor, elderly mother in *Presbyterian Medical Center v. Budd*.²³⁵ Presbyterian Medical Center (PMC) sued the daughter because the patient owed nearly \$100,000 for her care at the time she died.²³⁶ While PMC tried to collect the bills prior to the patient's death, the daughter insisted her mother's resources were exhausted.²³⁷ The court agreed with PMC that the daughter should have been paying for the care of her mother, and PMC was entitled to reimbursement for their expenses.²³⁸ The filial responsibility law stated that "[the] indigent person or any other person or any public body or public agency having any interest in the care, maintenance, or assistance of such indigent person" has the right to seek enforcement.²³⁹ The court found a nursing home, which provided the care, housing, and sustenance of an indigent elderly parent, had the requisite interest to sustain a support claim.²⁴⁰

If the transfer of assets, or in this case, use of a power of attorney to deplete assets, causes an elderly person to be unable to pay for medical bills, the state may find the adult children who benefit from the assets liable for the unpaid bills under filial responsibility statutes.²⁴¹ In *Presbyterian Medical Center*, the court found that the daughter was potentially liable to the health center under the duty to support statute, especially because she used her power of attorney to

235. 832 A.2d 1066 (Pa. 2003).

236. *Id.* at 1069.

237. *Id.* Because both PMC and the daughter knew that the patient's available resources exceeded Pennsylvania Department of Public Welfare's maximum resource threshold, the daughter agreed to spend down her mother's resources on the medical expenses so the patient would become eligible for aid. *Id.* However, the daughter never did this. *Id.* PMC believed the daughter instead used her power of attorney to transfer at least \$100,000 from her mother's bank account to her own bank account. *Id.*

238. *Id.* at 1075.

239. 62 PA. CONST. STAT. § 1973 (repealed 2005).

240. *Presbyterian Med. Ctr.*, 832 A.2d at 1075.

241. *See, e.g., id.*; Landmark Med. Ctr. v. Gauthier, 635 A.2d 1145, 1155 (R.I. 1994).

deplete her mother's assets—for the daughter's gain—so that the mother was unable to pay for her own care.²⁴²

Similarly, Rhode Island will not permit asset transfers as a method of avoiding expenses, holding the adult children and beneficiaries liable for the expenses under the support statutes. In *Landmark Medical Center v. Gauthier*, Rhode Island's Supreme Court invalidated an asset transfer rendering the parent unable to pay for the medical bill and affirmed a hospital's right to seek payment from a patient's adult children, but only if the patient's spouse is unable to provide the necessary support.²⁴³ In *Landmark*, a couple incurred over \$70,000 in medical expenses at Landmark Medical Center.²⁴⁴ When the man died, his principle asset, his home, transferred to his wife, who later conveyed the property to her daughters to avoid using the equity to pay the medical expenses.²⁴⁵ The hospital filed a lawsuit against the woman for the payment of medical services provided to the couple and a second lawsuit alleging that the conveyance was fraudulent.²⁴⁶ The hospital alleged the woman, as well as her adult daughters, were liable for the medical expenses of the couple.²⁴⁷

The Rhode Island Supreme Court concluded that the woman's conveyance of her primary asset for no consideration to her daughters constituted a fraudulent and invalid conveyance.²⁴⁸ The woman was found liable to the hospital for her and her husband's medical expenses, and because she still retained the house as her own asset, the court determined the daughters were not immediately liable.²⁴⁹ If the woman became "a public charge" or if her interest in the apartment house was insufficient to cover the costs of the medical services, "her children would then be responsible for the debt according to their respective abilities to pay."²⁵⁰ If the asset transfer had been valid and the woman unable to support herself and pay the bills, the daughters would then also be responsible.²⁵¹ Adult children are only required to

242. *Presbyterian Med. Ctr.*, 832 A.2d at 1075.

243. 635 A.2d at 1155.

244. *Id.* at 1146.

245. *Id.*

246. *Id.* at 1147.

247. *Id.*

248. *Id.* at 1148.

249. *Id.* at 1154–55.

250. *Id.* at 1155.

251. *Id.*

support their parent if the parent is unable to pay for his or her debts and expenses.

E. Asset Transfers Create an Incentive for the Creation and Enforcement of Filial Responsibility Laws

In addition to avoiding paying medical bills, asset transfers have also been used to give an elderly person in need of care Medicaid eligibility by giving all of her resources to a spouse or children.²⁵² Filial responsibility laws would counter this trend by shifting responsibility onto children to help support the parent when had there been no asset transfer, the elderly parent would have been able to support themselves without government aid.²⁵³ It seems unfair to put the burden of care on the government when the needy person technically could have supported himself or herself.

The Deficit Reduction Act of 2005 (DRA) makes it more difficult for the elderly to transfer assets to qualify for Medicaid.²⁵⁴ The federal Medicaid laws have generally prohibited asset transfers from creating instant Medicaid eligibility, except for certain transfers to a spouse, disabled or minor child, or other particular situations.²⁵⁵ The pre-DRA laws required an individual applying for Medicaid to report any asset transfers made in the preceding thirty-six months.²⁵⁶ If the applicant gifted money within that time period, the applicant would be ineligible for benefits for as long as that money would have supported the applicant.²⁵⁷

252. See, e.g., Barnes, *supra* note 95, at 272–76 (discussing Medicaid planning and ways individuals will reduce assets to qualify for Medicaid assistance).

253. *Id.* at 272–77.

An undeniable source of dissonance in views of Medicaid planning is an individual's view of the appropriate relationship between parents and their grown children. The question posed by long-term nursing home care costs is: [i]s filial responsibility more important, and more to be sought, because the cost greatly exceeds the cost of living in the community? The question implies that it is unfair to society to require contribution from public funds.

Id.

254. Michael Gilfix & Bernard A. Krooks, *Asset Preservation and Long-Term Care*, 20 PROB. & PROP. 34, 36 (2006).

255. *Id.*

256. *Id.*

257. *Id.*

Under the DRA, all asset transfers are subject to a sixty-month look-back period, regardless of the circumstances of the gift.²⁵⁸ The extension of the look-back period under the DRA makes it more difficult for individuals to become eligible for Medicaid and therefore makes it less beneficial for the elderly to transfer assets to a family member. Additionally, the ineligibility period now begins either on the first day of the month, the date of the transfer, or the date on which the applicant becomes eligible for Medicaid, whichever is later.²⁵⁹ Previously, the ineligibility period began on the date of the transfer.²⁶⁰ If a person is trying to qualify for Medicaid benefits, transferring assets would create a period of ineligibility during which the remaining savings are likely to be depleted.²⁶¹

The DRA reduces the risk that an elderly individual will give all his assets to his children to become eligible for government benefits or avoid paying medical bills,²⁶² similar to the situation in the filial responsibility enforcement cases. However, it also increases the chance an elderly family member will not have sufficient funds to support themselves during the period of ineligibility if she chooses to give away assets to her children.²⁶³ In the latter situation, there would be a need for filial support laws as the children would now possess the money the elderly parent needs for care. Adult children receiving asset transfers should have an obligation to support their elderly parents when government support is unavailable.

F. International Perspectives on Elder Care

The issues concerning how to properly care for the elderly populations are not unique to the United States. Other industrialized nations face similar debates about the proper balance between govern-

258. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6011; *see also* Gilfix & Krooks, *supra* note 253, at 36.

259. Coffey et al., *Analysis of Changes to Federal Medicaid Laws Under the Deficit Reduction Act of 2005*, 2 NAT'L ASS'N ELDER L. ATT'YS J. 189, 197 (2006).

260. *Id.*

261. Gilfix & Krooks, *supra* note 254, at 36-37.

262. Coffey et al., *supra* note 259, at 202 (stating "transfers made exclusively for purposes other than to qualify for Medicaid are not subject to the transfer penalty rules," but if institutionalization and transfers occurred after discovery of the medical condition, Medicaid agencies may presume that the transfer was made for the purpose of qualifying).

263. *Id.* at 196 (stating that the extended look-back period will increase the demand for home or community-based services, and this is potentially harmful as individuals will not have access to the appropriate care).

ment and private responsibility for elder care. Japan and Singapore share common “demographic, fiscal, and social trends” with the United States in relation to their elderly populations.²⁶⁴ Therefore it is useful to consider the support systems those countries have implemented when analyzing what elder care system can be sustained here.

1. JAPAN SEEKS TO PROVIDE INCENTIVES FOR FAMILIES TO TAKE CARE OF THEIR OWN ELDERLY MEMBERS

Japan also faces challenges in providing care for its elderly population because this group is rapidly expanding and the Japanese have a high life expectancy.²⁶⁵ Issues facing the elderly population differ from those in the United States, however, because families traditionally have assumed the care-taking role for their elders.²⁶⁶ In 1996, 70% of the elderly population lived with their families, primarily due to personal choices rather than financial needs.²⁶⁷ This social trend is changing, however, both as more women are working, and therefore unable to take care of the elderly at home, and as more families move to urban areas where there is less space in the home.²⁶⁸

Japan is known as a culture with great respect for its elders.²⁶⁹ Prior to World War II, Japanese law required Japanese adult children to support their elderly parents, even if that would jeopardize the adult children’s ability to pay for their own family and children.²⁷⁰ The financial support and care for the elderly was the primary responsibility of the adult children. After World War II, Japan modified its filial responsibility laws so that the responsibility falls on generations to provide support for each other, rather than the younger generations only supporting the older generation.²⁷¹ The obligation to support elderly parents, however, now comes after the adult child provides for one’s own spouse and children.²⁷² In a separate law,

264. Moskowitz, *Adult Children*, *supra* note 123, at 405.

265. See *id.* at 439; see also Usha Narayanan, Note, *The Government’s Role in Fostering the Relationship Between Adult Children and Their Elder Parents*, 4 ELDER L.J. 369, 387–88 (1996).

266. Narayanan, *supra* note 265, at 387–88.

267. *Id.* at 388–89.

268. Moskowitz, *Adult Children*, *supra* note 123, at 440.

269. Narayanan, *supra* note 265, at 388 (“Most Americans believe that the Japanese revere the elderly. . . [and] the elderly are paid homage in Japanese homes.”).

270. *Id.* at 389.

271. *Id.* at 389–90. The obligation for families to support each other is set out in the Japanese Constitution and Civil Code’s public assistance law. *Id.*

272. *Id.*

adult children only need to support their elderly parents if the adult child lives with the parent; if the parent is in a nursing home, the adult child needs to support the parent only if that child had been previously living with the parent.²⁷³ Although the Japanese government can use these laws to require private responsibility for elders, similar to the United States, it rarely does.²⁷⁴

The Japanese government has implemented policies to offer families positive incentives to assume care-taking duties.²⁷⁵ Public services can then be focused on the elderly who cannot rely on family members. The policies seek to improve housing, medical care, and income of the elderly.²⁷⁶ Japan's housing industry has focused on improving housing designs to incorporate the needs of elderly individuals living with family members.²⁷⁷ Loans are available to families who need to build or remodel homes so that elderly family members are able to live there.²⁷⁸

Japan does have a national health insurance program that extends coverage to nearly all Japanese residents, but to reduce medical costs, the government promotes home care over hospitalization by providing tax benefits to those who must buy and rent products to provide health care for the elderly at home.²⁷⁹ The government also is working to expand the number of home helpers and day-care centers for the elderly, as well as focusing on preventative health care programs to avoid future hospitalization.²⁸⁰ The Japanese policies put an emphasis on familial care for the elderly, rather than more expensive institutional care, and makes the government the secondary care-provider.²⁸¹ Additionally, Japan is working to provide the elderly with postretirement employment in a modified form so the elderly can continue to have an income.²⁸² Japan also is restructuring pension

273. *Id.* at 390. The obligation is set out in the Law for the Welfare of the Elderly Persons.

274. *Id.*

275. *Id.* at 392-94.

276. *Id.*

277. *Id.* at 392 (traditional house design includes a room for an elder, and the newer designs include handrails and ramps).

278. *Id.*

279. *Id.* at 393.

280. *Id.*

281. *Id.* at 393-94 ("Most of these policies reinforce the family as the primary caregiver responsible for the elderly parent and the government as the secondary care-provider.").

282. *Id.* at 394-95.

programs, especially focusing on ensuring that women will not suffer from an inadequate pension due to the gap in employment time when women leave work to take care of the family.²⁸³

Japan's policies seek to provide incentives and benefits for families who choose to undertake the responsibility of providing for their elderly parents. The cultural trends in the United States are not analogous to those in Japan regarding care for the elderly, however. Despite the differences, the United States could benefit from adopting a similar model of elder care and taking steps to encourage families to take a greater role in the care of their elderly with positive incentives.

2. SINGAPORE ACTIVELY ENFORCES ITS FILIAL RESPONSIBILITY LAWS THROUGH THE MAINTENANCE OF PARENTS ACT

Singapore's population is relatively small, but there is a disparity between the younger and elder generations.²⁸⁴ With a growing elderly population, Singapore is concerned about meeting the needs of this segment of the population but lacks a public welfare, pension, or health care program.²⁸⁵ In response to this concern, Singapore enacted the Maintenance of Parents Act (MPA) in 1995.²⁸⁶ The MPA set up a Tribunal that exclusively enforces the obligation of adult children to financially support their elderly parents rather than send every claim through the judicial system.²⁸⁷

The MPA imposes a responsibility on adult children, whether natural, illegitimate, adopted or step-children, to support their elderly parents as a reciprocal duty of a parent's obligations to support their children.²⁸⁸ Because the law is rooted in the reciprocal obligation, the MPA does not require children to support their parents if the parents did not likewise support them in their early years.²⁸⁹ This equitable defense to supporting an elderly parent is similar to the abandonment defense found in many state filial responsibility laws.²⁹⁰ The equity

283. *Id.* at 394.

284. *See* Moskowitz, *Adult Children*, *supra* note 123, at 437.

285. *Id.* at 437–38.

286. Wing-Cheong Chin, *The Duty to Support an Aged Parent in Singapore*, 13 PAC. RIM. L. & POL'Y J. 547, 548 (2004).

287. *Id.* at 549.

288. *Id.* at 554. This duty is imposed on both sons and daughters whether they are married or unmarried, which is somewhat unusual given the patriarchal culture generally considers daughters to have a "transient membership in their family of origin." *Id.* at 554–55.

289. *Id.* at 556.

290. *See supra* Part II.A.

defense releases adult children from obligation if parents were careless with their financial resources, as “those who squander away past savings cannot rightfully call upon the law to force their children to support them.”²⁹¹

Under the MPA, parents may claim support directly, or a third-party caretaker may claim reimbursement for their expenses.²⁹² A person may make a claim on the parent’s behalf if the parent cannot make a claim due to physical or mental incapacity, and the Commissioner for the Maintenance of Parents may make a claim on a parent’s behalf if the parent is older than sixty and it is a worthy case.²⁹³ By allowing others to apply for support on the parent’s behalf, the parent does not need to instigate a dispute within the family but can still collect the requisite support. To qualify for support, the parent must be at least sixty years-old and “unable to maintain” oneself.²⁹⁴ The “unable to maintain” oneself requirement means that a person’s total income and other available resources are insufficient to provide necessities such as shelter, food, and clothing.²⁹⁵

When the Tribunal makes an award of filial support and maintenance, it considers the financial needs of the applicant, the financial resources of the applicant, any disability the applicant may have, the financial resources of the family member, the financial obligations of the family member, and the extent of support the family member has already contributed.²⁹⁶ Additionally, there is a prehearing mediation requirement which successfully resolves a large number of disputes.²⁹⁷ The Tribunal is set up as a nonadversarial proceeding, and to effectuate that goal there are no lawyers permitted and the proceedings are *in camera*.²⁹⁸

While controversial at first, the MPA has been used by elderly parents to receive support from family members, and one survey estimated that 77.4% of people aged fifty-five or older support the

291. See Chin, *supra* note 286, at 556.

292. *Id.* at 554.

293. *Id.* at 554, 563.

294. *Id.* at 559. The Tribunal may make an exception to the age requirement if one suffers from a particular disability or there is another compelling reason to do so. *Id.* at 559–60.

295. See *id.* at 560.

296. *Id.* at 565.

297. *Id.* at 568.

298. *Id.* at 569. The facts of the case may be published so that the public is made aware of their duties, but the identities of the elderly parent and children are not released. *Id.*

law.²⁹⁹ The Tribunal had the most number of applications in the first year the MPA was effective, but there have been a considerable amount of applications every year.³⁰⁰ From 1996 to 2001, the Tribunal received 653 applications and 518 of those applications had successful results for claimants.³⁰¹ The MPA's success in Singapore suggests that filial responsibility laws have potential as a means to provide support for the elderly population. The Tribunal system makes the process of seeking support less adversarial and difficult for the elderly person in need. The MPA is still considered a last resort for obtaining the necessary support because the moral obligation to support a family member still motivates children to support their parents without a legal proceeding.³⁰²

IV. Recommendation

Filial responsibility laws should be created and enforced. Because filial support is predominately a state legislative issue, there should be a model or uniform filial responsibility law for states to enact as opposed to a national law. While states may choose to modify the uniform law, a model law that is substantially the same in each state would aid implementation because if an elderly person has children in more than one state, the children will have general notice of what the law requires. Even if not all states adopt the filial responsibility law, the creation of a model law may raise enough national attention to make adult children aware of a potential obligation to support their elderly parents. The model filial responsibility law should have five key components.

First, filial responsibility laws should require adult children to contribute financially to an elderly parent who is unable to provide the necessary care themselves. The cases indicate a gap between the ability to pay medical bills and for necessities, and qualifying for public aid. If a patient does not yet qualify for public aid but needs medical assistance, a hospital should provide the necessary care. Hospitals and medical centers may show more willingness to take care of lower-income elderly if they knew that either the elderly or their adult chil-

299. *Id.* at 570, 572.

300. *Id.* at 572. In 1996 there were 152 applications, 138 in 1997, 127 in 1999, and 102 in 2000. *Id.*

301. *Id.*

302. *Id.* at 578.

dren can cover the expenses. Thus, filial responsibility laws would fill the gap and ensure the elderly are taken care of even if they are not completely destitute. For people on Medicaid, filial support would supplement public aid. Rather than preventing people from getting any help from the government, people who can rely on their children would receive some, but not necessarily all, benefits, thus reserving more government money for people who lack other means of support. Additionally, if a parent is ineligible for Medicaid due to an asset transfer, the filial support law would ensure the parent receives medical care during the ineligibility period.

Second, because filial responsibility laws are rooted in reciprocal obligations, the abandonment defense should be more readily available. Parents who have not supported their children during childhood should not expect their children to support them later in life. Courts should take a greater look into the parent-child relationship and ensure that an abandoned or abused child does not have an obligation to support that parent. While ideally the court would be able to know if there was abandonment or abuse, evidence of such conditions may be difficult to find and may come down to a credibility determination.

Third, because parents will be hesitant to sue their children for support, states should permit state agencies, hospitals, nursing homes, and other essential care creditors to enforce the statute. This power will reduce tension in the family and ensure all necessary bills are paid. The concern remains that the elderly will not seek medical care because they do not want to be a burden on the family. However, if the process was less adversarial and there were more incentives for families to undertake financial responsibility, this problem may be counteracted. Preventive care is less costly than post-illness care,³⁰³ so families would have an incentive to ensure the elderly parent stays healthy by seeking medical care early. Additionally, if the United States or individual states were to adopt a system similar to the Singapore Tribunal, parents may feel more comfortable seeking support from their children. A system that advocates mediation, rather than contentious trials, and provides for *in camera*, rather than public, proceedings is less adversarial and more likely to be used.

303. William Alvarado Rivera, *A Future for Medicaid Managed Care: The Lessons of California's San Mateo County*, 7 STAN. L. & POL'Y REV., Winter 1995, at 105, 110.

Fourth, the government should permit a tax deduction for a percentage of the support that children voluntarily provide for their elderly parents. If children are able to deduct a percentage of the support from their taxable income, children will have an incentive to provide the necessary care to their parents, and because it is only a percentage of what they pay, this does not take away significant funds from the government. If children willingly support their parents, then enforcement costs will decrease. Similar to the policies implemented in Japan, states should provide positive incentives for families to voluntarily undertake the caretaking duties of family members, whether financial or physical. If children have incentives to support their parents, filial responsibility laws' enforcement costs will decrease and the expenses passed on to the government will also decrease.

Fifth, filial responsibility statutes must be civil and not criminal. Criminal statutes which impose a fine or a prison sentence will fail to provide the necessary care to the elderly parent. If a child is in jail or is paying fines to the state, they are less able to financially support their parent. With civil laws, however, the remedy could be directed at the needy parent or at the institution that rendered care, rather than at the state in general. Also, the remedy should be in line with the amount of support needed, rather than a fine which is not tailored to particular situations. Overall, civil obligations better serve the goals of filial responsibility laws.

V. Conclusion

While almost thirty states have some form of filial responsibility law, these laws are rarely enforced. When government support for the elderly falls short of providing the necessary care, family members should have an obligation to supplement government programs whenever possible. The modification and enforcement of filial responsibility laws is a way the elderly can receive appropriate assistance while relieving some of the financial burden on the government.