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# Grow Up Virginia: Time to Change our Filial Responsibility Law

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## COMMENTS

### GROW UP VIRGINIA: TIME TO CHANGE OUR FILIAL RESPONSIBILITY LAW

Can you be held liable for your parents' living expenses? If you live in Virginia, the answer may be yes.<sup>1</sup> Virginia is one of twenty-nine states with a "filial responsibility law" requiring adult children to financially support their parents under certain circumstances.<sup>2</sup> These rarely enforced laws have created dire consequences for some in states with similar statutes. Virginia should review these antiquated requirements to ensure its citizens are not subject to draconian punishment for situations beyond their control.

In recent years, Virginia's filial responsibility law has been used for purposes not contemplated by its original architects. For example, it has allowed a brother, who had run his mother's finances into the ground, to sue his sister to hold her liable for his financial mistakes, burdening her with substantial litigation fees.<sup>3</sup> The law has provided a forum for a stepfather to retaliate against his wife's children after the children petitioned the court to replace him as their mother's guardian.<sup>4</sup> It has permitted a man to sue his less solvent brother to contribute a greater portion

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1. VA. CODE ANN. § 20-88 (Repl. Vol. 2016).

2. Northwestern MutualVoice Team, *Who Will Pay For Mom's Or Dad's Nursing Home Bill? Filial Support Laws And Long-Term Care*, FORBES: INVESTING (Feb. 3, 2014, 8:45 AM), <http://www.forbes.com/sites/northwesternmutual/2014/02/03/who-will-pay-for-moms-or-dads-nursing-home-bill-filial-support-laws-and-long-term-care/#32913a925620> (listing thirty states that have filial responsibility statutes as of 2014 including Puerto Rico). One of these thirty states—Iowa—repealed its filial responsibility statute in 2015. H.F. 157, 86th Gen. Assemb. (Iowa 2015). Therefore, the total currently stands at twenty-nine states.

3. Telephone Interview with Patrick L. Maurer, Associate, Pender & Coward (Mar. 28, 2016) (estimating billing around twenty to thirty hours for the matter).

4. Telephone Interview with Clay L. Macon, Partner, Glasser & Macon, P.C. (Mar. 26, 2016).

of their parent's luxury assisted living facility bill.<sup>5</sup> It has spurred children of a mentally impaired man to pay for legal advice to avoid significant monetary debt.<sup>6</sup> In contrast, it has benefitted a woman, allowing her to successfully hold her sister equally liable for their mother's costs.<sup>7</sup> Few lawyers or judges seem to be aware of the law,<sup>8</sup> yet its potential impact could be devastating.

Other states' filial responsibility laws have also generated concern. A recent Pennsylvania case, *Health Care & Retirement Corp. of America v. Pittas*, left many alarmed about the prospect that the law may punish individuals solely as a result of their biological relationship.<sup>9</sup> In *Pittas*, a nursing home used Pennsylvania's filial responsibility law to force liability upon a son for his mother's entire nursing home debt after she moved to Greece without paying her bill.<sup>10</sup> Some worry that Virginia nursing homes will begin to use the filial responsibility statute to impose similar liability.<sup>11</sup>

While American life expectancy grows each year, citizens' long-term savings do not keep up.<sup>12</sup> Americans are also becoming increasingly mobile, unlike in the past when extended families tended to reside in the same locality, leaving many parents geographically distant from their children.<sup>13</sup> The trend toward large

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5. Telephone Interview with R. Shawn Majette, Director of Elder Law, ThompsonMcMullan, P.C. (Apr. 7, 2016).

6. *Id.*

7. Acting as a caretaker for her mother, a daughter incurred high monetary costs and physical injuries, including multiple fractured vertebrae and her husband underwent two hernia surgeries due to lifting the ninety-seven-year-old mother. Telephone Interview with Kathy Pryor, Elder Law Attorney, Va. Poverty Law Ctr. (Mar. 30, 2016).

8. Telephone Interview with Patrick L. Maurer, *supra* note 3 (describing little awareness of the statute among both lawyers and judges in the Southeastern Virginia legal community).

9. See Mari Park, *The Parent Trap: Health Care & Retirement Corporation of America v. Pittas, How it Reinforced Filial Responsibility Laws and Whether Filial Responsibility Laws Can Really Make You Pay*, 5 EST. PLAN. & COMMUNITY PROP. L.J. 441, 443 (2013) (discussing the implications of *Health Care & Retirement Corp. of America v. Pittas*, 46 A.3d 719, 720 (Pa. Super. Ct. 2012)).

10. 46 A.3d at 720.

11. See Deborah Elkins, *Family Ties: A Little-Known 'Filial Support' Statute*, VA. LAW. WKLY. (Feb. 17, 2015); Telephone Interview with Kathy Pryor, *supra* note 7 (noting buzz about nursing homes aiming to do this in recent years).

12. See Emily Brandon, *Poverty Increasing Among Retirees*, U.S. NEWS (May 21, 2012, 11:50 AM), <http://money.usnews.com/money/retirement/articles/2012/05/21/poverty-increasing-among-retirees>.

13. Studies show that as adults increase in education level, they become less likely to reside within proximity to their mothers. Janice Compton & Robert A. Pollak, *Proximity*

numbers of elderly Americans with less family nearby is a situation ripe for utilization of filial responsibility laws.

Under Virginia Code section 20-88, joint and several liability may be applied to any person of “sufficient earning capacity or income, after reasonably providing for his or her own immediate family, to assist in providing for the support and maintenance of his or her [parent, if such parent is] in necessitous circumstances.”<sup>14</sup> Though well-intentioned, this statute carries serious implications. First, unlike child support laws, where federal law requires enforcement in all fifty states,<sup>15</sup> it is unclear whether an adult child living outside of Virginia would be liable—state courts conflict on whether other state filial responsibility laws apply to their citizens.<sup>16</sup> Second, the law’s language is open to interpretation, leaving practitioners with little guidance.<sup>17</sup> Third, with the implementation of Medicare and Medicaid in the last century, the statute’s very purpose—to provide a safety net for the aging and indigent—no longer carries the same urgency, leaving the statute open to exploitation for matters of sibling rivalry or parent-child conflicts, rather than providing a social good. For these reasons, Virginia should act preemptively to either repeal or amend the statute.

On its face, the Virginia law seems laudable, requiring private payment by family members for costs that would otherwise be incurred by the state. However, upon closer examination, significant issues regarding implementation and fairness arise. The Virginia statute has not lain dormant, but rather has been implemented without report.<sup>18</sup> Other states have recognized the futility of filial responsibility laws and have preempted such abuse

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*and Coresidence of Adult Children and Their Parents in the United States: Description and Correlates*, 1, 8, 13–14 (Inst. for Study of Lab. (12A)), Discussion Paper No. 7431, 2013 (Ger.).

14. VA. CODE ANN. § 20-88 (Repl. Vol. 2016).

15. 18 U.S.C. § 228 (2012).

16. Compare *California v. Copus*, 309 S.W.2d 227, 232 (Tex. 1958) (enforcing California filial responsibility statute in Texas), with *Pennsylvania ex rel. Dep’t of Pub. Assistance v. Mong*, 117 N.E.2d 32, 34 (Ohio 1954) (not enforcing Pennsylvania law in Ohio).

17. See, e.g., Telephone Interview with Patrick L. Maurer, *supra* note 3 (indicating difficulty of understanding legal standard when faced with lawsuit pursuant to Virginia Code section 20-88); Telephone Interview with R. Shawn Majette, *supra* note 5 (explaining difficulty of predicting when clients may or may not be liable).

18. Most cases are settled out of court or are held in juvenile and domestic relations court, one not of record. See *Elkins*, *supra* note 11.

by repealing their laws.<sup>19</sup> Virginia should act now to either repeal the statute or amend it to ensure its citizens avoid inequitable outcomes like the defendant in *Pittas*.

This comment discusses the background and development of filial responsibility laws in England, the United States, and Virginia in Part I. Part II explains the purpose behind implementation of such laws while Part III discusses the problems enforcing the filial responsibility law may cause. Lastly, Part IV explains why past reasons for keeping the law are no longer valid.

## I. BACKGROUND

Laws requiring children to provide for their parents are far from a recent domestic phenomenon.<sup>20</sup> American filial responsibility laws are statutory creations tracing directly back to the Elizabethan Poor Relief Act of 1601, which directed “the Father and Grandfather, and the Mother and Grandmother, and the Children of every poor, old, blind, lame, and impotent Person or other poor Person not able to work, being of a sufficient Ability, shall, at their own Charges, relieve and maintain every such poor Person.”<sup>21</sup> The statute’s purpose was to relieve the Crown treasury’s burden by imposing financial liability of the poor among private persons instead.<sup>22</sup> The United States inherited these laws during the colonial era.<sup>23</sup> England eventually repealed its filial support law because of its impracticality;<sup>24</sup> however, such laws remained on the books in many American states.

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19. Today, twenty-nine states have filial responsibility laws, down from forty-five in the 1950s. Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society?*, 26 FAM. L.Q. 195, 196 (1992); see also *supra* note 2.

20. See Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, J.L. & POL’Y 709, 710–11 (2001) (referencing how current filial responsibility laws are descended from early Roman and Greek law and Judeo-Christian scriptures).

21. Poor Relief Act, 1601, 43 Eliz. 1, c. 2, VII (Eng.), <http://www.workhouses.org.uk/poorlaws/1601act.shtml>.

22. Michael Rosenbaum, *Are Family Responsibility Laws Constitutional?*, 1 FAM. L.Q. 55, 55 (1967).

23. Park, *supra* note 9, at 444.

24. National Assistance Act, 1948, 11 & 12 Geo. 6, c. 29, (Eng.). A commission conducted to evaluate England’s filial responsibility laws found them largely impractical because, among other things, they “impoverishe[d a] family just when they want[ed] more money” (when a family member became ill) and caused inequitable results. See POOR LAW COMMISSION, NEW POOR LAW OR NO POOR LAW: BEING A DESCRIPTION OF THE MAJORITY & MINORITY REPORTS 1, 62, 107 (1909), <http://babel.hathitrust.org/cgi/pt?id=mdp.35112104.276599>.

In 1965, Congress amended the Social Security Act to create Medicare and Medicaid.<sup>25</sup> Some view the passage of Medicaid as abrogating filial responsibility laws.<sup>26</sup> Congress created Medicaid with the legislative purpose to provide for the sick and indigent,<sup>27</sup> demonstrating the importance of this public policy. In determining eligibility under Medicaid, the government can only take into account the income and resources of the recipient's spouse, *not* of any other family members.<sup>28</sup> In the 1970s and 1980s, Virginia amended its filial responsibility statute, removing liability if the parent became eligible for public benefits under Medicaid.<sup>29</sup>

Virginia is a “typical” example of a filial responsibility law with its roots in colonial times.<sup>30</sup> It was first enacted in 1920 to require “able-bodied persons over sixteen . . . to support their parents in cities of one hundred thousand inhabitants or more” if the parent was in destitute or necessitous circumstances.<sup>31</sup> Since then, the General Assembly has expanded and changed its wording; it now establishes liability only if the parent is in “necessitous circumstances.”<sup>32</sup> *Mitchell-Powers Hardware Co. v. Eaton* defined “necessitous” as “[l]iving in or characterized by poverty,” and determined it to be a question of fact to be evaluated under the relative circumstances.<sup>33</sup> Since the 1938 holding in *Mitchell-Powers Hardware v. Eaton*, the Virginia legislature has omitted the “destitute” requirement in the statute. Thus the standard today is

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25. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 42 U.S.C. § 1396 (2012)).

26. See *Troy v. Hart*, 697 A.2d 113, 117 (Md. Ct. Spec. App. 1997) (stating by passing 42 U.S.C. § 1396a(a)(17)(D), Congress “abrogated the legal duty to support one’s parents”); see also *infra* Part IV.D (discussing states that have repealed filial responsibility laws based on this reasoning).

27. See Lyndon B. Johnson, Special Message to the Congress: Advancing the Nation’s Health, 1 PUB. PAPERS 12 (Jan. 7, 1965) (commenting the nation’s “oldest tradition” was to “give ‘an attention to health’ for all . . . people”).

28. 42 U.S.C. § 1396a(a)(17)(D) (2012); see *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (upholding a regulation permitting determining spousal income in benefits to be a reasonable exercise of power).

29. VA. CODE ANN. § 20-88 (Repl. Vol. 1975); see Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparisons of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, 20 ELDER L.J. 269, 273 (2013).

30. Pearson, *supra* note 29, at 274.

31. VA. CODE, ch. 298 of Acts 1920 (Pollard, 1920).

32. VA. CODE ANN. § 20-88 (Repl. Vol. 2016).

33. 171 Va. 255, 262–63, 198 S.E. 496, 499–500 (1938).

ambiguous; a parent must be somewhat impoverished but not in a “condition of extreme want.”<sup>34</sup>

The Virginia statute establishes joint and several liability on an adult child if he or she is over eighteen, has sufficient earning capacity or income, and only *after* “reasonably providing for [one’s] own immediate family.”<sup>35</sup> Once liability is established, the court “shall have the power to determine and order the payment” for “support and maintenance” of the parent and may revise the order over time.<sup>36</sup> “Support and maintenance” means doing “more than reliev[ing] the pangs of hunger,” providing enough to “comport with the health, comfort and welfare of normal individuals according to their standards of living, considering his or her own means, earning capacity, and station in life.”<sup>37</sup> The juvenile and domestic relations district court (“JDR”) in which the parent resides has original jurisdiction over cases arising from the statute.<sup>38</sup> If a child does not comply with an order pursuant to the statute, Virginia may impose criminal liability in the form of a misdemeanor, punished by either a fine less than \$500 or less than twelve months in jail.<sup>39</sup> Lastly, the statute provides defenses to liability: desertion, neglect, abuse or willful failure to support the child prior to the child’s emancipation, and where the parent is eligible for and already receiving public assistance.<sup>40</sup> The type of conduct that would rise to the level of desertion, neglect, and abuse or willful failure to support has yet to be determined in Virginia.<sup>41</sup>

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34. Compare *Mitchell-Powers Hardware*, 171 Va. at 262, 198 S.E. at 499 (defining “destitute”), with *Peyton v. Peyton*, 8 Va. Cir. 531, 534 (1978) (Arlington County) (interpreting filial responsibility law that no longer required “destitution” to hold a mother owning some jewelry, oriental rugs, and other property insufficient to outweigh evidence of “necessitous circumstances”).

35. VA. CODE ANN. § 20-88 (Repl. Vol. 2016).

36. *Id.* This provision makes Virginia’s filial support statute unique because it allows courts to decide the amount a child is liable for regardless of the initial amount asked for by the plaintiff or prosecutor. See Donna Harkness, *What Are Families For? Re-evaluating Return to Filial Responsibility Laws*, 21 ELDER L.J. 305, 322 (2013).

37. *Mitchell-Powers Hardware*, 171 Va. at 262–63, 198 S.E. at 499–500.

38. VA. CODE ANN. § 20-88 (Repl. Vol. 2016).

39. *Id.*

40. *Id.*; see also *Peyton v. Peyton*, 8 Va. Cir. 531, 532–33 (1978) (Arlington County) (holding social security does not qualify under this exception).

41. States have interpreted similar defenses to filial responsibility laws with very different standards. Compare *Pelletier v. White*, 371 A.2d 1068, 1069–70 (Conn. Super. Ct. 1976) (claiming father willfully deserted son by failing to pay child support and having

Case law interpreting Virginia Code section 20-88 is sparse; its last recorded interpretation was in 1978.<sup>42</sup> This could be for several reasons. First, parties must file filial support petitions in JDR, a court not of record.<sup>43</sup> Second, parties tend to settle out of court, perhaps due to the personal nature of such cases or the parties' effort to avoid extra legal costs.<sup>44</sup> For these same reasons, parties are less likely to appeal to state circuit court.<sup>45</sup> Lastly, the statute is usually a tool of last resort, where one child stubbornly will not voluntarily provide for a parent—a circumstance that, thankfully, is not widespread.<sup>46</sup>

In general, most Virginia cases implementing section 20-88 tend to arise out of tangential disputes, not those between the actual parent and child. Siblings can use the statute to sue each other if they believe one is not providing sufficient financial support for a parent. In one situation, an adult-daughter who was providing for her local mother used the statute to make her out-of-state sister financially liable.<sup>47</sup> The siblings settled in that case, with the defendant sister agreeing to pay a lump sum and half of her mother's future expenses.<sup>48</sup> There were two less successful petitions in Southeast Virginia in which adult children used the statute to sue a sibling to pay for a parent's expenses; the JDR judge in both cases deemed the parent was not in "necessitous circumstances," causing the petition to fail.<sup>49</sup> In *Peyton v. Peyton*,

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little role in his life), *with Mitchell v. Pub. Welfare Div.*, 528 P.2d 1371, 1371–72 (Or. Ct. App. 1974) (maintaining no "abandonment or willful desertion" where even though mother had no part in raising son physically or financially, she did see him occasionally, buying him birthday presents, and her financial struggle was no fault of her own), *and Cannon v. Juras*, 515 P.2d 428, 429–30 (Or. Ct. App. 1973) (forcing child to pay for mother because, although she stood by and allowed her new husband to expel child from home, she did so "unintentionally").

42. *See Peyton*, 8 Va. Cir. at 531.

43. VA. CODE ANN. § 20-88 (Repl. Vol. 2016); Elkins, *supra* note 11.

44. *See, e.g.*, Telephone Interview with Kathy Pryor, *supra* note 7 (providing example of Virginia case ending in settlement).

45. *See, e.g.*, Telephone Interview with Patrick Maurer, *supra* note 3 (indicating example where the plaintiff/mother originally appealed to circuit court, but decided later to withdraw the appeal).

46. *See Elkins, supra* note 11 (citing Northern Virginia lawyer Yahne Miorini who explained, "adult children who have the resources generally step up if and when they can. If they don't have the means, there is no reason to file a petition.").

47. Telephone Interview with Kathy Pryor, *supra* note 7.

48. *Id.*

49. Telephone Interview with Patrick Maurer, *supra* note 3; Telephone Interview with R. Shawn Majette, *supra* note 5.

the most recently recorded Virginia case using section 20-88, a petitioner was successful in bringing an action against a sibling to contribute towards the support and care of his mother.<sup>50</sup> Additionally, when a parent remarries, disputes between stepparents and biological children can arise. This occurred in Virginia Beach where a stepfather allegedly used section 20-88 as a sword against his stepchildren to pay for their mother's costs, rather than apply for Medicaid, in retaliation for the children bringing an action for guardianship of their mother.<sup>51</sup>

## II. JUSTIFICATIONS FOR FILIAL RESPONSIBILITY LAWS

### A. *Moral Theory*

There is undoubtedly a moral justification for filial responsibility laws that stems from the Ten Commandments' requirement to "honor thy mother and father."<sup>52</sup> Some argue filial responsibility statutes "strengthen family bonds" because they codify an already existing cultural and moral obligation to repay parents for their support while instilling the value of caring for elderly parents.<sup>53</sup> Others argue it could help incentivize parents to pay greater attention to their budget and save for retirement, knowing if they do not, the burden may fall on the children.<sup>54</sup> Some even argue it strengthens sibling bonds because one child may be more apt to take affirmative steps to assist a parent knowing he or she may eventually be found liable.<sup>55</sup>

Generally, most Americans *voluntarily* care for their parents, without need of legal action.<sup>56</sup> Evidence points away from the no-

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50. 8 Va. Cir. 531, 532, 534 (1978) (Arlington County) (establishing liability only after finding the mother was in "necessitous circumstances" and the child had "reasonably provid[ed] for his . . . own immediate family").

51. Telephone Interview with Clay L. Macon, *supra* note 4.

52. See Park, *supra* note 9, at 451.

53. See Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support Our Parents Be Effectively Enforced?*, 36 FAM. L.Q. 501, 504 (2002); Katie Sisaket, Comment, *We Wouldn't Be Here If It Weren't For Them: Encouraging Family Caregiving of Indigent Parents*, 36 HAMLIN J. PUB. L. & POL'Y 69, 88-89 (2015).

54. See Park, *supra* note 9, at 452.

55. *Id.*

56. See SUSAN C. REINHARD ET AL., AARP PUB. POL'Y INST., VALUING THE INVALUABLE: 2015 UPDATE 1, 3 (2015), <http://www.aarp.org/content/dam/aarp/ppi/2015/valuing-the-invaluable-2015-update-new.pdf> (generating statistics showing the amount of

tion that a filial support law is necessary to incentivize children. Any adult child who chooses not to care for aging parents would probably not undergo a change of heart solely because of an imposed legal obligation. Although perhaps an outlier, in the example above where a child sued her distant sister for financial support, the defendant sister claimed she withheld support for their mother to protest her exclusion from the decision-making process in her mother's living situation.<sup>57</sup> Although unaware of the details of the defendant's situation, one could speculate the reason given for withholding support was possibly pretextual. The daughter who needed help surely would have attempted to provide a carrot before resorting to a statutory stick, considering her dire financial state. Stubborn siblings do exist, but should be the minority of circumstances when those who, having the means to do so, voluntarily support their parents.

Thus, although most would agree supporting a parent in need is a rational policy, forcing this obligation upon autonomous adults who may have legitimate reasons for turning their backs on a parent, may be counterproductive. Such laws could potentially even violate the First Amendment's Establishment Clause because they entangle religious values with government.<sup>58</sup> No one has yet to challenge a filial support law in court on this theory; however, justifying the enforcement of parental liability because it is the "moral" thing to do could be interpreted as having an impermissible moral purpose (promoting religiously tinged values) or excessively entangling the government with religion by making the state the enforcer of Judeo-Christian values.<sup>59</sup> Under this interpretation, filial support laws could violate the Establishment Clause, making them unconstitutional.

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Americans giving voluntary care to aging parents is on the rise).

57. Interview with Kathy Pryor, *supra* note 7.

58. See Harkness, *supra* note 36, at 326–27 (noting filial responsibility laws' historical roots in religion and the potential for this to result in a First Amendment violation).

59. The Supreme Court interprets the Establishment Clause as requiring a law to: (1) have a secular purpose; (2) not have the primary effect of either advancing or inhibiting religion; and (3) not fostering "excessive entanglement" of the government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (violating any of the three requirements makes such a law invalid under the First Amendment).

## B. *Contract Theory*

Some argue parental liability is justified under a contract theory.<sup>60</sup> This theory holds that an implicit contract forms between parent and child, where in return for raising a son or daughter, that child, will care for the parent during old age. To hold otherwise would allow the child to be “unjustly enriched.”<sup>61</sup> A filial responsibility statute therefore becomes “implicit legislative recognition” of the child’s duty to support a parent.<sup>62</sup>

Opponents of this theory argue implying a contractual obligation on a minor is unjustified as children do not have the capacity to consent.<sup>63</sup> Even if the contract theory were to hold up, the legal obligation to support a child only lasts eighteen years, whereas support of a parent is of indefinite duration.<sup>64</sup> This also contravenes the common law principle presuming transfers between parents and children as gifts.<sup>65</sup> Moreover, the quality of a parent’s support varies in every household. In other states, individuals who grew up in households with arguably absent parents were still held liable under their state’s filial support statute.<sup>66</sup> Although Virginia provides defenses for children whose parents’ conduct rose to the level of “desertion, abuse, or willful failure to support,”<sup>67</sup> it has yet to interpret the extent a parents’ actions must be a bar to liability.

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60. See Park, *supra* note 9, at 451.

61. *Id.*

62. Gregory G. Sarno, Annotation, *Constitutionality of Statutory Provision Requiring Reimbursement by Child for Financial Assistance to Aged Parents*, 75 A.L.R.3d 1159 (1977).

63. See Harkness, *supra* note 36, at 326–27.

64. See Edelstone, *supra* note 53, at 506.

65. See, e.g., *Brousseau v. Brousseau*, 927 A.2d 773, 779 (Vt. 2007) (“[T]he presumption of gifts for transfers between parents and their children, including adult children, is well established.”); *Bowen v. Bowen*, 575 S.E.2d 553, 556 (S.C. 2003) (“[T]he presumption [where property is conveyed to a spouse or child] is that the purchase was designated as a gift or advancement. . . .”). *But see Utsch v. Utsch*, 266 Va. 124, 128, 581 S.E.2d 507, 508 (2003) (not presuming a gift when a parent-child transfer consists of retitling property).

66. See, e.g., *Cheatham v. Juras*, 501 P.2d 988, 989–90 (Or. Ct. App. 1972) (holding child must support mother, despite her absence during his childhood, because her mental illness causing the “abandonment” was not a volitional act).

67. VA. CODE ANN. § 20-88 (Repl. Vol. 2016).

### C. *Easing Government's Medicaid Costs*

The strongest and primary justification for filial responsibility laws is to shift the burden of financing the indigent into the private sector, the same purpose prompting the English Parliament to pass the Elizabethan Poor Relief Act in 1601.<sup>68</sup> In light of the rising costs of Medicaid,<sup>69</sup> using Virginia Code section 20-88 as an alternative may seem to be an appropriate method to trim the state's budget. It is difficult to ignore the financial stress on government as baby boomers become aged and infirm, while the younger generation appears unable to carry these costs.<sup>70</sup> Although no such record of Virginia's legislative intent for passing section 20-88 exists, based on similar statutes' interpretations in other jurisdictions, one can assume this to be a primary justification.<sup>71</sup> Some even attribute the rise of government programs aiding the needy as a direct result of failure to implement or enforce filial responsibility statutes.<sup>72</sup>

Others argue that despite having economic justification, in reality, the administrative burden to implement such statutes far outweigh the benefit.<sup>73</sup> Determining, among other things, whether a parent is in "necessitous circumstances," a child has the financial ability, or whether a parent's historic conduct rose to the level of "desertion, neglect, abuse or willful failure to support," is a complex factual determination. Determining such elements will create an "administrative nightmare," outweighing any benefit the state may devise from the law.<sup>74</sup>

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68. See Rosenbaum, *supra* note 22, at 55.

69. See Abby Goodnough, *Medicaid Costs Rise, but Some States Are Spared*, N.Y. TIMES (Oct. 15, 2015), [http://www.nytimes.com/2015/10/16/us/medicaid-costs-rise-report-says-but-not-more-than-most-states-expected.html?\\_r=0](http://www.nytimes.com/2015/10/16/us/medicaid-costs-rise-report-says-but-not-more-than-most-states-expected.html?_r=0) (discussing rising costs of Medicaid due to its expansion of coverage under the Affordable Care Act).

70. See Matthew Pakula, *The Legal Responsibility of Adult Children to Care for Indigent Parents*, NAT. CTR. FOR POL'Y ANALYSIS (July 12, 2005), [www.nepa.org/pub/ba521](http://www.nepa.org/pub/ba521).

71. See, e.g., *Pickett v. Pickett*, 251 N.E.2d 684, 687 (Ind. App. Ct. 1969) ("We believe the intent of the General Assembly . . . was to relieve the general public of liability for support of those individuals who have children financially able to contribute to their maintenance and support . . .").

72. See Matthew Pakula, *A Federal Filial Responsibility Statute: A Uniform Tool to Help Combat the Wave of Indigent Elderly*, 39 FAM. L.Q. 859, 868 (2005).

73. The administrative burden filial support laws may cause is discussed *infra* Part III.E.

74. See Park, *supra* note 9, at 456.

## III. PROBLEMS WITH IMPLEMENTING FILIAL RESPONSIBILITY LAWS

A. *Contravenes Public Policy*

Few deny that providing a safety net for the old and indigent is an important policy the Commonwealth should stand behind. Enforcing filial support statutes create the effect of greater “equality of treatment among” an older generation, but carry the unintended consequence of unequally burdening their children.<sup>75</sup> This leads to the inquiry of whether it is fair to force children who, through no fault of their own, have indigent parents, while those with parents who adequately prepared for old age bear no responsibility. This idea may also undermine the traditional public policy of maximizing individual autonomy.<sup>76</sup> Historically, the United States dislikes impinging on an individuals’ freedom unless a “compelling” justification exists for doing so.<sup>77</sup> Thus, there exists a tension between the two policies, retaining individual autonomy versus supporting the old and indigent.

Opponents of filial responsibility have challenged the laws’ constitutionality.<sup>78</sup> These challenges have been unsuccessful, likely because “[n]o quasi-suspect classification or fundamental right” was at stake, leaving courts unable to use a heightened scrutiny standard, but rather only evaluate the laws under a “rational basis analysis.”<sup>79</sup> For example, the Supreme Court of South Dakota believed having an indigent parent was a rational enough reason to implement financial liability.<sup>80</sup> These failed challenges only prove that filial responsibility laws will probably withstand most constitutional challenges, not that the laws are fair.<sup>81</sup>

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75. W. Walton Garrett, *Filial Responsibility Laws*, 18 J. FAM. L. 793, 817 (1979).

76. See B. GUY PETERS, *AMERICAN PUBLIC POLICY: PROMISE AND PERFORMANCE* 470 (10th ed. 2015).

77. *Id.* at 470–71 (referencing protecting children and the mentally incompetent is usually a justifiable “compelling” reason to erode one’s individual autonomy).

78. See, e.g., *Americana Healthcare Ctr. v. Randall*, 513 N.W.2d 566, 572 (S.D. 1994); *Swoap v. Superior Court*, 516 P.2d 840, 847 (Ca. 1973); *Maricopa Cty. v. Douglas*, 208 P.2d 646, 649 (Ariz. 1949).

79. *Randall*, 513 N.W.2d at 572.

80. *Id.*

81. Constitutional violations are evaluated on a higher standard than simple fairness. For example, to argue a successful due process violation under the United States Constitution, one must argue the state actor’s culpability to be at least intentional. See *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 848–49 (1998) (noting the “Constitution does not guaran-

Unlike in the seventeenth century, when England first enacted its filial responsibility law, or in 1920 when Virginia enacted its own, it is no longer the trend for families to live in close proximity to each other.<sup>82</sup> Virginia Code section 20-88 is more sensible when applied to a community where children stay in the same locality as parents. Unlike the more agrarian society of the past, members of the millennial generation are less inclined to remain in the community in which they grew up.<sup>83</sup> In this modern society, filial responsibility laws tend to apply inequitably to the poor and less-educated who lack the means to move around.<sup>84</sup> Previously, society deemed it important for children to support parents into old age.<sup>85</sup> Today, our social norms may have shifted.<sup>86</sup>

Some argue filial responsibility laws actually break down family relationships, not promote them.<sup>87</sup> This is because the laws only require financial support, not the physical or emotional support that typically comes with voluntary care.<sup>88</sup> The federal government adopted this view when creating Medicare and Medicaid.<sup>89</sup> Where no voluntary care of a parent exists, there is likely a strained parent-child relationship; that tension becomes exacerbated when a child is forced *de jure* to support a parent. Such re-

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tee due care on the part of state officials” but requires a higher threshold of liability).

82. Rosenbaum, *supra* note 22, at 66.

83. See *Millennials Continue Urbanization Leaving Small Towns*, NPR (Oct. 21, 2014, 6:38 AM), <http://www.npr.org/2014/10/21/357723069/millennials-continue-urbanization-of-america-leaving-small-towns> (discussing large growth of educated millennials moving away from small towns to big metropolitan areas); see also Rosenbaum, *supra* note 22, at 66 (“Where formerly parents and children were apt to share a house or farm, today the trend is to establish independent households instead of sharing homes with relatives.”).

84. See Rosenbaum, *supra* note 22, at 66 (noting how “responsibility laws tend to make the poor or the near-poor live together rather than establish independent households” like their wealthier peers).

85. History and American Studies Professor Hendrik Hartog at Princeton explains how nineteenth-century parents were reliant on children for care, forcing them to promise an inheritance in return. See Stephen J. Dubner, *Should Kids Pay Back Their Parents for Raising Them?*, FREAKONOMICS (Oct. 8, 2015, 10:16 AM), <http://freakonomics.com/podcast/should-kids-pay-back-their-parents-for-raising-them-a-new-freakonomics-radio-episode/>.

86. See *id.* (noting how parents are no longer as dependent on adult children today due to the rise of private pensions and Social Security).

87. Park, *supra* note 9, at 454–55.

88. See Harkness, *supra* note 36, at 344 (“[F]ilial responsibility laws do not address the fundamental need that all persons, and most especially the vulnerable elderly, have to be supported by *caring* relationships.”) (emphasis added).

89. See S. REP. NO. 89-404 (1965), as reprinted in 1965 U.S.C.C.A.N. 1943, 2018 (“Beyond [parents being accountable to children, familial] requirements imposed are often destructive and harmful to the relationships among members of the family group.”).

sentment may be more likely to damage a family relationship rather than heal what was already broken.

Filial responsibility laws may be rarely enforced due to the unease many feel about using legal recourse as an appropriate remedy.<sup>90</sup> Some states, such as Virginia, permit government officials to prosecute individuals who fail to pay funds under filial responsibility statutes.<sup>91</sup> Americans tend to believe there are more important duties for prosecutors besides “forcing people to support their aged relatives against their will.”<sup>92</sup> Virginia’s implementation of section 20-88 so far has only involved private actions; there are no recorded cases of the Commonwealth suing an adult-child on behalf of an agency. One could speculate that the unwillingness of the Commonwealth to enforce a law may be due to its misalignment with general public policy concerns.<sup>93</sup>

### B. *Lack of Uniformity*

The lack of uniformity regarding codified filial responsibility across the country makes it inherently unfair and difficult to implement. Regulating the family is an area of law typically delegated to the states.<sup>94</sup> The obligation to support a parent is statutorily created;<sup>95</sup> thus, states vary widely on whether they require parental support, and if they do, what that encompasses.<sup>96</sup> Stay-

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90. See Rosenbaum, *supra* note 22, at 61–62 (citing FLOYD A. BOND ET AL., OUR NEEDEY AGED: A CALIFORNIA STUDY OF A NATIONAL PROBLEM 200 (1954)).

91. VA. CODE ANN. § 20-88 (Repl. Vol. 2016) (“A proceeding may be instituted . . . in the name of the Commonwealth by the state agency administering the program of assistance or services in order to compel any child of a parent receiving such assistance or services to reimburse the Commonwealth.”).

92. See Rosenbaum, *supra* note 22, at 61 (internal quotation marks omitted) (citing BOND ET AL., *supra* note 90, at 200).

93. Enforcement would probably come from the Office of the Attorney General, who may be reluctant to enforce such laws for political reasons. See *id.* (noting the reason for infrequent court decisions is the reluctance of elected officials to force people to support relatives against their will).

94. See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting the government’s “national productivity” reasoning out of concern that allowing “Congress [to] regulate any activity that it found was related to the economic productivity of individual citizens [could lead to its regulation of] family law (including marriage, divorce, and child custody),” an area of law usually regulated by the states).

95. *Pearson*, *supra* note 29, at 278 (citing *Dawson v. Dawson*, 12 Iowa 512, 514 (1861)) (distinguishing the common law duty of a parent to support offspring from the statutorily created duty of a child to support parents).

96. See *id.* at 304 (providing table of fifty states including whether the state contains a

ing in the same state as one's parents is no longer the norm as Americans have become "highly mobile and increasingly transient."<sup>97</sup> The Supreme Court of Virginia has yet to speak to whether section 20-88 applies to non-Virginians. Meanwhile, other states have ruled differently on whether sister states' filial responsibility laws are applicable to their own residents.<sup>98</sup> It is unclear whether Virginia courts have jurisdiction over non-resident children in the increasingly common situation where children reside in different states.

Until 1992, state child support laws experienced the same issue.<sup>99</sup> It was only federal intervention that allowed state child support obligations to become uniformly enforced in all fifty states.<sup>100</sup> The Child Support Recovery Act ("CSRA") was passed to stabilize "the economic security of children of divorced parents"<sup>101</sup> by holding such "deadbeat parents" accountable.<sup>102</sup> Although child support is a family law issue, members of Congress characterized the law in terms of economics. Senator D'Amato noted how CSRA aimed to "secure [the country's] economic foundation": its children.<sup>103</sup> Senator Schumer prefaced the bill as not purporting to satisfy a *moral* obligation, but rather to stop American children and taxpayers from being "*robbed*."<sup>104</sup> At the state level, child support laws and filial support laws serve the same purpose: both

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filial support law and if so, the case law interpreting it).

97. Harkness, *supra* note 36, at 316–17.

98. Compare *California v. Copus*, 309 S.W.2d 227, 232 (Tex. 1958) (enforcing California filial responsibility law in Texas), with *Pennsylvania ex rel. Dep't of Pub. Assistance v. Mong*, 117 N.E.2d 32, 33–34 (not enforcing Pennsylvania law where it conflicted with Ohio statute).

99. See, e.g., 137 CONG. REC. S7236 (daily ed. June 5, 1991) (statement of Sen. D'Amato) (noting the "tragic practice of delinquency" when fathers flee to another state to avoid paying child support); *Criminal Penalty for Flight to Avoid Payment of Arrearages in Child Support: Hearing on H.R. 1241 Before the S. Comm. on Crime and Criminal Justice*, 102nd Cong. 28 (1992) (statement of Harry W. Wiggins, Dir., Va. Dep't of Soc. Servs. Div. of Child Support Enf't) ("States are unable to effectively work together due to widely differing State regulations and laws.").

100. Child Support Recovery Act of 1992, 18 U.S.C. § 228 (2012).

101. 138 CONG. REC. S16449 (daily ed. Oct. 2, 1992) (statement of Sen. D'Amato).

102. Statement on Signing the Child Support Recovery Act of 1992, 28 WEEKLY COMP. PRES. DOC. 2122 (Oct. 25, 1992).

103. 137 CONG. REC. S7236-37 (daily ed. June 5, 1991) (statement of Sen. D'Amato).

104. *Criminal Penalty for Flight to Avoid Payment of Arrearages in Child Support: Hearing on H.R. 1241 Before the S. Comm. on Crime and Criminal Justice*, 102nd Cong. 1–2 (1992) ("[P]eople who have good families, together families, nothing to do with child support themselves, are directly affected, because the taxpayer is robbed of billions of dollars when the children's mothers can't make ends meet and are forced to rely on welfare.").

enforce a financial obligation on a private person rather than on the state.

The federal government might find difficulty passing a law similar to CSRA to enforce other states' filial support laws. Our culture tends to view "deadbeat parents" who escape child support obligations as "culpable" and the children to whom money is owed as blameless.<sup>105</sup> In contrast, characterizing adult children who escape liability for parents as "deadbeats" seems odd and unjustified,<sup>106</sup> especially if they have endured a strained emotional parent-child relationship. Further, unlike the child support scenario, in many cases, the parent seeking support from the child may be to blame for his or her financial shortcomings,<sup>107</sup> differing greatly from the innocent child who is, by definition, completely dependent upon his parents. The basis for protecting our children, something most Americans agree on, does not smoothly extend into an artificial scheme for parental support.

States could potentially fix the enforcement problem without the federal government's aid. The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Interstate Family Support Act ("UIFSA"), which Virginia, along with its forty-nine sister states, adopted in 1994.<sup>108</sup> Thus, if UIFSA were amended to extend beyond child support to include any type of family support, this inequity could be remedied. Again, however, such a move is unlikely, as UIFSA is based upon the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, which limits its application to child and spousal support.<sup>109</sup> Independent-

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105. *See id.* at 2.

106. *See supra* Part III.A.

107. *See, e.g.,* Health Care & Ret. Corp. of America v. Pittas, 46 A.3d 719, 720 (Pa. Super. Ct. 2012) (mother fled nursing home bill to move to Greece); Amber Spataro, "Prodigal Parent" as a Defense to Proceedings Brought To Require Support from a Child, 11 J. CONTEMP. LEGAL ISSUES 385, 385 (2000) (providing the example of Hal and Wanda, who retired at sixty-five and spent frivolously, leading them to sue their children for support ten years later).

108. UNIF. INTERSTATE FAMILY SUPPORT ACT (UNIF. LAW COMM'N 2008) (explaining that all states adopted UIFSA); UNIF. INTERSTATE FAMILY SUPPORT ACT (UNIF. LAW COMM'N 1992) (changing name from Uniform Reciprocal Enforcement Act); Lawrence D. Diehl, *Uniform Interstate Family Support Act: A Practical Update*, VA. LAW., Feb. 2001, at 24, <http://www.vsb.org/docs/valawyerjournal/feb01diehl.pdf> (discussing Virginia's codification of UIFSA).

109. Hague Conference on Private International Law, *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, Art. 2 (Nov. 23, 2007),

ly amending UIFSA to include parental support is unlikely for the same reasons Congress has not extended CSRA to parental support. The public outcry to care for children is just not the same when it comes to aging parents. Even if UIFSA were amended to include parental support, it would not ameliorate the issue of consistency. One of the issues prompting CSRA's passage was the Uniform Reciprocal Act's inability to make child support enforcement uniform.<sup>110</sup>

### C. Constitutional Concerns

As discussed above, despite the inequities filial support laws may impose, such laws have generally survived constitutional challenges.<sup>111</sup> Virginia's filial responsibility law, however, may violate the U.S. Constitution as applied. Among the various plaintiffs who have challenged filial responsibility laws in other states,<sup>112</sup> some have argued such laws violate individuals' due process rights, both substantive and procedural.<sup>113</sup> Others have argued the laws violate the Equal Protection Clause on various grounds.<sup>114</sup> These challenges have largely been denied because

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<https://assets.hcch.net/docs/14e71887-0090-47a3-9c49-d438eb601b47.pdf>.

110. See *Criminal Penalty for Flight to Avoid Payment of Arrearages in Child Support: Hearing on H.R. 1241 Before the S. Comm. on Crime and Criminal Justice*, 102nd Cong. 29 (1992).

111. See *supra* notes 79–82 and accompanying text.

112. See, e.g., *Americana Healthcare Ctr. v. Randall*, 513 N.W.2d 566, 572 (S.D. 1994); *Swoap v. Super. Ct.*, 516 P.2d 840, 847 (Cal. 1973); *Pennsylvania ex rel. Dep't of Pub. Assistance v. Mong*, 117 N.E.2d 32, 33–34 (Ohio 1954); *Maricopa Cty. v. Douglas*, 208 P.2d 646, 649 (Ariz. 1949); *Morris Cty. Welfare Bd. v. Gilligan*, 31 A.2d 805, 806 (N.J. 1943).

113. Courts have largely upheld such laws. See, e.g., *State v. Webber*, 128 N.E.2d 3, 7 (Ohio 1955) (explaining the law's rational "purpose . . . is to create, as between parents and adult children, a legal obligation which previously was only a moral one resting upon close blood relationships and humanitarian considerations."). But see *Gilligan*, 31 A.2d at 806 (upholding challenge to procedural due process where notice was not required by the statute).

114. Such Equal Protection challenges include arguments that filial support laws unequally burden children of the indigent by "double taxing" them, claiming defendants paid taxes to provide for other aged individuals *plus* their own, see *Douglas*, 208 P.2d at 649, and also by irrationally basing liability on involuntary biological relationships, see *Swoap*, 516 P.2d at 851. State courts found both reasons to survive a rational basis test. In *Swoap*, the court also struck the plaintiffs' challenge to California's law based on impermissible classification by wealth. *Id.* at 850 (noting the law draws no distinction among wealthy versus poor children). While Virginia Code section 20-88 does draw a line based on wealth by determining whether the child is "of sufficient earning capacity" before establishing liability, classification based on wealth should still survive the "rational basis" test. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) ("[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely

courts tend to reason such laws have a rational basis. However, there are no known Equal Protection claims arguing that a filial responsibility law irrationally places a burden on one child in one state but not a sibling residing in another state.

The Ohio Supreme Court held Pennsylvania's filial responsibility law, as applied to an Ohio resident, violated the Equal Protection Clause due to differences in state law.<sup>115</sup> In *Mong*, an Ohio resident was sued under Pennsylvania's filial responsibility law—which, unlike the Ohio version, did not include the defense of abandonment.<sup>116</sup> The court deemed it unconstitutionally unequal to hold the defendant liable under the Pennsylvania law but not under Ohio law, where his evidence of abandonment would have likely permitted an escape from liability.<sup>117</sup> *Mong* demonstrates how a potential challenge to Virginia Code section 20-88 based on classifying persons by residency—in-state siblings being liable versus out-of-state siblings not being liable—may hold sway in court. Virginia's law provides joint and several liability; this leaves the possibility of requiring 100 percent of the financial burden to fall on the in-state child, while his or her sibling living outside the Commonwealth pays nothing.

#### D. *Conflicts with Federal Law*

All Americans aged sixty-five and over are eligible for Medicare, a federal government program paying for certain medical expenses.<sup>118</sup> Medicaid, in contrast, is a program implemented through the state with aid from the federal government; it covers citizens based on need rather than age.<sup>119</sup>

The 1965 Social Security Act Amendments, which established Medicare and Medicaid, limit the scope of the Commonwealth's filial responsibility law so that it will likely only apply to a parent's *non*-medical expenses. This is because Virginia must comply with federal rules to qualify for federal Medicaid funding which,

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equal advantages.”).

115. *Mong*, 117 N.E.2d at 33–34.

116. *Id.* at 33.

117. *Id.* at 33–34.

118. *Medicare and Medicaid*, U.S. DEPT OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/answers/medicare-and-medicaid> (last visited Oct. 4, 2016).

119. *Id.*

expressly prohibit taking into account the applicant's relatives' (except for the spouse) financial means to determine eligibility.<sup>120</sup> Congress created this exemption out of concern that taking non-spousal relatives into account would be "destructive and harmful to the relationships among members of the family group."<sup>121</sup>

Virginia Code section 20-88 will only apply to a person in "necessitous circumstances."<sup>122</sup> Although the standard put forth by *Mitchell-Powers Hardware Co. v. Eaton* has not been tested since 1938, under that precedent, Virginia interprets the element to mean a child is only liable where the parent is "living in or characterized by poverty."<sup>123</sup> It would therefore be unlikely for one to qualify under section 20-88 but *not* qualify under Medicaid. For these reasons, where a parent is in "necessitous circumstances," he or she would likely apply for Medicaid coverage rather than turn to litigation against a child. So in reality, under the 1965 Medicaid Social Security Act Amendments, Virginia's filial responsibility law should only cover *non*-medical expenses. A parent could qualify for Medicaid and attempt to use the statute to require a child to pay for non-Medicaid-covered expenses—perhaps an arguably nicer nursing home than one accepting Medicaid payment—however, such a scenario would probably not satisfy the "necessitous circumstances" element.<sup>124</sup>

Virginia allows a state agency providing assistance or services to sue the parent's child for reimbursement under Virginia Code section 20-88.<sup>125</sup> Most case law involving various filial responsibility statutes arise from a parent being unable to pay the bill for

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120. 42 U.S.C. § 1396a(a)(17) (2012) (prohibiting states from "tak[ing] into account the financial responsibility of any individual for any applicant . . . unless . . . such individual's spouse or such individual's child who is under age 21 or . . . is blind or permanently and totally disabled"); 42 C.F.R. § 435.602(a)(1) (2015) ("Except for a spouse . . . or . . . a child who is under age 21 or blind or disabled, the *agency must not consider income and resources of any relative* as available to an individual.") (emphasis added).

121. S. REP. NO. 89-404 (1965), as reprinted in 1965 U.S.C.C.A.N. 1943, 2018.

122. VA. CODE ANN. § 20-88 (Repl. Vol. 2016).

123. 171 Va. 255, 262–63, 198 S.E. 496, 499.

124. A Newport News JDR judge ruled this way when he held the parent was not in "necessitous circumstances" since she was able to be in a nicer assisted living facility; thus, section 20-88 was inapplicable. Telephone Interview with R. Shawn Majette, *supra* note 5.

125. VA. CODE ANN. § 20-88 (Repl. Vol. 2016). It also provides that if the parent is institutionalized, the children cannot be liable for more than sixty months of institutionalization. *Id.*

the nursing home or medical care center.<sup>126</sup> Nursing homes are a recent phenomenon, only coming about in the twentieth century and becoming even more popular after the 1965 passage of Medicare and Medicaid.<sup>127</sup> Providing care for the elderly today often comes in the form of nursing home expenses, if not hospital expenses.<sup>128</sup> The rising cost of nursing homes, which include *medical* expenses,<sup>129</sup> have exacerbated the growing issue of the elderly's quickening depletion of funds.<sup>130</sup> It follows that Virginia's filial support law typically comes into play when dealing with a parent's *medical or health-related* expenses, especially nursing homes.<sup>131</sup> This creates a conundrum: the elderly need the most financial support with regard to medical expenses, but section 20-88 covers the same medical expenses as Medicaid.

Not only does federal law prohibit taking into account adult children's finances when determining Medicaid eligibility, it also expressly prohibits nursing homes funded by Medicaid or Medicare from requiring a third party to guarantee payment as a condition of admission.<sup>132</sup> The Department of Health and Human Services interpreted this requirement as not allowing any person, even one with legal access to the resident's income, to be held personally financially liable.<sup>133</sup> This federal regulation should bar any claim by a nursing home certified by Medicare or Medicaid against a private person under section 20-88. Thus, combined

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126. See, e.g., *Health Care & Ret. Corp. of America v. Pittas*, 46 A.3d 719, 720 (Pa. Super. Ct. 2012) (nursing home sued son to pay for mother's expenses); *Prairie Lakes Heath Care Sys., Inc. v. Wookey*, 583 N.W.2d 405, 409 (S.D. 1998) (hospital sued son to pay for the parents' medical expenses); *Landmark Med. Ctr. v. Gauthier*, 635 A.2d 1145, 1147 (R.I. 1994) (Medical Center suing daughter for parents' medical expenses).

127. *The History of Nursing Homes*, FATE: FOUNDATION AIDING THE ELDERLY, [www.4fate.org/history.pdf](http://www.4fate.org/history.pdf) (last visited Oct. 4, 2016).

128. See *id.*

129. Federal law defines a "nursing facility" as one that primarily provides "health-related care and services." 42 U.S.C. § 1396r(a)(1) (2012).

130. See *Brandon*, *supra* note 12.

131. All Virginia attorneys interviewed about their experiences with section 20-88 spoke about situations involving children paying for parents' *medical* expenses. See Telephone Interview with Clay L. Macon, *supra* note 4; Telephone Interview with R. Shawn Majette, *supra* note 5; Telephone Interview with Patrick Maurer, *supra* note 3; Telephone Interview with Kathy Pryor, *supra* note 7.

132. 42 U.S.C. § 1396r(c)(5)(A)(ii) (2012).

133. 42 C.F.R. § 483.12(d)(2) (2015) (permitting "an individual who has legal access to a resident's income. . .to provide facility payment from the resident's income or resources" but not allowing the institution to hold her personally financially liable). The author thanks Kathy Pryor for pointing out this conflict. Telephone interview with Kathy Pryor, *supra* note 7.

with the federal prohibition against evaluating an adult child's income in deciding Medicaid eligibility, Virginia's filial responsibility statute becomes effectively useless.

### E. *Administrative Nightmare*

Virginia Code section 20-88 imposes liability on a case-by-case basis. Among other things, a court must determine whether the parent is truly in "necessitous circumstances," the child has "sufficient earning capacity or income," and—if a defense should apply—whether "there is substantial evidence of desertion, neglect, abuse, or willful failure to support."<sup>134</sup> This indicates that parties must spend time and money gathering evidence to support their positions to sway a fact-finder. Some argue these reasons make enforcing filial responsibility essentially an "administrative nightmare."<sup>135</sup> This is because enforcement of the law could cost the government *more* money to implement than it would save the government overall.<sup>136</sup> Although California repealed its filial responsibility statute in 1975,<sup>137</sup> its original law contained a formula to determine the amount of money a child would provide a parent, depending on the adult-child's income level, and gave a state agency the power to make the determination.<sup>138</sup> A 1950s California survey concluded that most welfare agencies found implementing its filial responsibility law cost them *more* than the law saved them.<sup>139</sup>

Currently, Virginia Code section 20-88 does not allocate responsibility to a specific agency to determine liability but leaves it to the courts.<sup>140</sup> Similar to the Department of Medical Assistance

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134. VA. CODE ANN. § 20-88 (Repl. Vol. 2016).

135. *See, e.g.*, Park, *supra* note 9, at 456.

136. *Id.*; *see, e.g.*, Rosenbaum, *supra* note 22, at 59 ("Since the major policy consideration behind the relative responsibility laws is to guard the public purse, the policy would be seriously undermined if, in fact, the administrative costs of collecting money from the legally responsible family outweighed the monies saved by the state in the form of lower welfare payments.").

137. CAL. WELF. & INST. CODE § 12350 (West 2016); *see* 22 CAL. L. REV. COMM. REPORTS 1 (1992) (noting section 12350 substituted the former Civil Code section 206 which provided filial liability).

138. Robin M. Jacobson, *Americana Healthcare Ctr. v. Randall: The Renaissance of Filial Responsibility*, 40 S.D. L. REV. 518, 540 n.230–31 (1995) (citing *Swoap v. Superior Court*, 516 P.2d 840, 842 n.3 (Ca. 1973)).

139. Rosenbaum, *supra* note 22, at 59.

140. Virginia Code section 20-88 gives state agencies the right to file suit under the

Services's ("DMAS") ability to examine whether a person is qualified to receive Medicaid,<sup>141</sup> the Commonwealth could delegate this complex fact-finding mission to a specific Virginia agency rather than clogging up the courts.

In 1983, the Health Care Financing Administration (HCFA)<sup>142</sup> estimated enforcing state filial responsibility laws would reduce Medicaid spending by about twenty-five million dollars.<sup>143</sup> This estimate proved untrue after Idaho conducted a program in 1984 to enforce its filial support laws, raising only about \$32,000 instead of the expected \$1.5 million.<sup>144</sup> The Idaho study may not equally translate elsewhere, but it does note the limited impact such laws may have. Even if the 1983 estimation was accurate, providing for inflation,<sup>145</sup> the amount filial responsibility statutes could save still would not substantially reduce Medicaid costs.<sup>146</sup>

Some argue longer life-spans and population growth have led to Medicaid spending becoming too high to remain sustainable.<sup>147</sup> Yet, effective implementation of Virginia Code section 20-88 would likely not even offset nursing home costs,<sup>148</sup> leaving the potential reduction to Medicaid insignificant. As Northern Virginia attorney Yahne Miorini noted, the cost of healthcare today is so high that an adult child's contribution, which would certainly be in a similar range as child support, would be "just a drop in the bucket."<sup>149</sup>

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statute, but determining applicability of the statute is one for judicial determination. VA. CODE ANN. § 20-88 (Repl. Vol. 2016).

141. VA. CODE ANN. § 32.1-324.1 (Repl. Vol. 2015).

142. The HCFA was created in 1977 for the purpose of providing oversight of Medicare and the federal portion of Medicaid. *Health Care Finance Administration*, FEDERAL REGISTER, <https://www.federalregister.gov/agencies/health-care-finance-administration> (last visited Oct. 4, 2016).

143. See Pakula, *supra* note 70.

144. Kline, *supra* note 19, at 204 (citing ALICE M. RIVLIN & JOSHUA M. WIENER, CARING FOR THE DISABLED ELDERLY: WHO WILL PAY? 173 (1988)).

145. The \$25,000,000 estimated in 1983 would amount to about \$60,000,000 today. See *The Inflation Calculator*, WESTEGG, <http://www.westegg.com/inflation> (last visited Oct. 4, 2016).

146. In 2015, the budget for Medicaid amounted to about \$331.4 billion. *HHS FY2015 Budget in Brief*, HHS.GOV, <http://www.hhs.gov/about/budget/fy2015/budget-in-brief/cms/index.html> (last visited Oct. 4, 2016).

147. See Sisaket, *supra* note 53, at 83.

148. See *supra* Part III.D.

149. Telephone Interview with Yahne Miorini, Attorney, Miorini Law, PLLC (Apr. 5, 2016).

### F. *Potential for Abuse*

Of course, if a person never applies for Medicaid, the federal rule precluding evaluation of a family's finances does not exist. On one hand, this means there are circumstances where Virginia Code section 20-88 is useful; on the other hand, this indicates potential abuse of the statute. Virginia's filial responsibility only extends to where the parent is in "necessitous circumstances." There are few circumstances in which one might be deemed in "necessitous circumstances" yet not qualify for Medicaid.<sup>150</sup> It follows that Virginia Code section 20-88, except for unusual circumstances,<sup>151</sup> should only be utilized where the parent needs funds for non-medical purposes such as food and shelter. If a parent could otherwise qualify for Medicaid, he or she may be using the statute for a non-meritorious purpose.

Recent Virginia cases indicate that Virginia Code section 20-88 has been used more as a weapon of intra-family rivalries than for meritorious purposes. In a Virginia Beach case, the children of a woman suffering from dementia attempted to establish guardianship of their mother. However, their stepfather objected and insisted on keeping her at an assisted living facility, despite the substantial drain on her assets.<sup>152</sup> The woman's children, as well as her guardian ad litem, had recommended applying for Medicaid relief and transferring her to a Medicaid-funded, skilled nursing facility that would better fit her needs. However, the stepfather disagreed.<sup>153</sup> In retaliation, he filed suit against the children under section 20-88.<sup>154</sup> The JDR judge ordered the children to pay the assisted living facility bills.<sup>155</sup> Before reaching the merits on appeal, the Circuit Court judge ordered the stepfather

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150. See *supra* note 33–34 and accompanying text (discussing today's ambiguous standard for "necessitous circumstances").

151. There are situations where a person qualifies for Medicaid and a parent's "necessitous circumstances" include expenses that Medicaid would not cover. In attorney Kathy Pryor's case, her client's ninety-seven-year-old mother spoke little English and had severe dementia, causing her to incessantly scream. The nursing home discharged her because they could not comply with her needs, forcing the client and her husband to physically and financially care for their mother, beyond the hours of care provided by Medicaid. Telephone Interview with Kathy Pryor, *supra* note 7.

152. Telephone Interview with Clay L. Macon, *supra* note 4.

153. *Id.*

154. *Id.*

155. *Id.*

to apply for Medicaid benefits using the necessary documentation, and the application was approved.<sup>156</sup> The mother was then transferred to the Medicaid-funded nursing facility, as requested by the children and over the objection of the stepfather, with no additional expenses accruing to the children or stepfather once the transfer took place.<sup>157</sup> Because the mother's future costs were no longer an issue that needed to be litigated—as the payment of her living expenses had been resolved through the intervention of Medicaid—the parties settled, but not without incurring substantial legal fees.<sup>159</sup>

Another case arising out of Southeastern Virginia involved a mother who could no longer pay her nursing home fees.<sup>160</sup> Her daughter, the defendant, had been physically caring for her over the past ten years while her son, a Charlottesville lawyer, had been in charge of her finances.<sup>161</sup> After allegedly misappropriating her funds, the brother sued himself and his sister on the mother's behalf.<sup>162</sup> The daughter was not held liable because the mother was not in "necessitous circumstances," as she had sufficient Social Security and military retirement funds left by her late husband.<sup>163</sup> Still, the daughter incurred substantial legal fees.<sup>164</sup>

A Newport News man with a substantial income also used section 20-88 to sue his brother, an auto mechanic, because he became tired of carrying a heavier burden in paying the parent's assisted living facility bill.<sup>165</sup> The defendant argued the parent was not in "necessitous circumstances," as evidenced by the nice facility in which she lived.<sup>166</sup> The JDR judge agreed and dismissed the suit.<sup>167</sup>

In all of these cases, one private person was using the statute to obtain money from another private person, who did not cause

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156. *Id.*

157. *Id.*

159. *Id.*

160. Telephone Interview with Patrick Maurer, *supra* note 3.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (estimating he spent around twenty to thirty hours researching this case due to the novel issues presented and lack of clear precedent).

165. Telephone Interview with R. Shawn Majette, *supra* note 5.

166. *Id.*

167. *Id.*

the financial need in the first place. However, other states such as Pennsylvania and South Dakota have used their filial responsibility statutes to allow nursing homes to recover funds from private persons.<sup>168</sup> Virginia Poverty Law Center attorney Kathy Pryor noted her concern that this would start to happen in Virginia.<sup>169</sup> She also expressed concern about the effect this would have on those who cannot afford a lawyer and choose to represent themselves pro se, without awareness of legal defenses available to them.<sup>170</sup> Because judges seem equally unaware of section 20-88,<sup>171</sup> such individuals would likely lack a competent defense and be vulnerable to liability for large nursing home debt. In most cases where a strong family relationship exists, children who can afford to provide for their parents will do so voluntarily.<sup>172</sup> But under the present statutory scheme, there are few mechanisms in place to stop private parties from using the law as a sword for vengeful purposes.

#### IV. WHY VIRGINIA CODE SECTION 20-88 MUST BE REPEALED OR AMENDED

While filial responsibility laws have various justifications,<sup>173</sup> none of them appear sufficient to overcome the unequal treatment they can produce. The strongest incentive for keeping Virginia Code section 20-88 is the burden pressed upon the state if there is no private payment. The policy of using de jure filial support as a mechanism to save taxpayer dollars, while valid in theory, is no longer practical, as it is outweighed by the public policies of maximizing individual autonomy, equal treatment, and avoiding potential abuse.<sup>174</sup>

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168. See *Health Care & Ret. Corp. of America v. Pittas*, 46 A.3d 719, 720 (Pa. Super. Ct. 2012); *Prairie Lakes Health Care Sys., Inc. v. Wookey*, 583 N.W.2d 405, 409 (S.D. 1998).

169. Telephone Interview with Kathy Pryor, *supra* note 7. She further noted how allowing nursing homes to sue private individuals using state filial responsibility statutes conflicts with federal law regulating Medicare- and Medicaid-certified nursing facilities. *Id.*; see also *supra* notes 132–33 and accompanying text.

170. Telephone Interview with Kathy Pryor, *supra* note 7.

171. Telephone Interview with Patrick Maurer, *supra* note 3.

172. See Elkins, *supra* note 11.

173. See *supra* Part II.

174. See *supra* Part III.

A. *Section 20-88 Can Only Be Justified as a Tool to Ease Government Costs*

The purposes for filial support laws, beyond saving taxpayer money, are limited at best. Virginia cannot justify imposing a legal obligation on adult children to support parents based on an implicit contract created in exchange for their parents' support during their minority years. Courts are reluctant to uphold an implicit parent-child contract because they see it as more of a *moral* obligation.<sup>175</sup> Minors may contract for certain necessities such as food and education in Virginia,<sup>176</sup> however this concept has yet to be, nor should be, applied to an *implicit* contract with a parent.

Few would argue society has abandoned the moral duty to support one's parents. Yet, moral obligations do not always, and should not always, become per se legal obligations. The Supreme Court confirmed this policy in *Lawrence v. Texas*, where it found preserving an individual's right to privacy outweighed a legislature's moral viewpoint; the Court explained, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."<sup>177</sup>

Of course, one may argue that child support enforcement laws evoke a similar moral duty to care for those who cannot care for themselves. But, the protected group, minor children, differs greatly from older adults. The obligation to *all* children by society is different than the obligation of society to older adults, with varying income, assets, health, and relations with their children.<sup>178</sup> American society also views those evading child support

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175. See, e.g., *Graham v. Morrison*, 607 S.E.2d 295, 300 (N.C. Ct. App. 2005) ("Past consideration or moral obligation is not adequate consideration to support a contract."); *Jacobs v. Church*, 36 Va. Cir. 277, 279 (1995) (Spotsylvania County) ("It is settled that in the absence of an express contract a child cannot recover for services rendered a parent, the presumption being that such services were performed in recognition of a filial duty.")

176. See *Zelnick v. Adams*, 263 Va. 601, 608, 561 S.E.2d 711, 715 (2002) (upholding a contract entered by a minor where it is "within the general class of necessities").

177. *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (referring to an unconstitutional Texas statute that criminalized two persons of the same sex consensually engaging in sex in their home).

178. See Child Support Recovery Act of 1992, 18 U.S.C. § 228 (2012) (reinforcing support for *all* children).

as impinging on America's "economic foundation," viewing children as the building blocks of the future.<sup>179</sup>

Even if the duty to support one's parents is a worthy goal, it is in direct conflict with an even more important public policy: protecting individual autonomy.<sup>180</sup> American social norms have shifted since the Elizabethan era when the filial responsibility laws were first enacted. Many view forcing children to support their parents as antiquated, from a past era when children lived in the same household as their parents through adulthood.<sup>181</sup>

Finally, even if the moral purpose to care for the indigent and elderly were sufficient to create a legal obligation, the United States has usurped that purpose through the creation of Medicare and Medicaid.<sup>182</sup> The government could never rely solely on filial responsibility statutes to provide for the elderly because they are under-inclusive: such laws do not provide for those with no children, those with children who have predeceased them, or those whose children are indigent.<sup>183</sup> Medicaid and Medicare have become fixtures in American society, creating a safety net for all Americans who cannot afford to take care of themselves.

Because easing the financial burden of the state remains the sole valid justification behind parental support statutes, only this reason should be weighed against the countervailing policies.

#### B. *Section 20-88 No Longer Works in Practice*

The next inquiry becomes whether Virginia should enforce section 20-88 to lessen the burden on the state's expenditure of Medicaid. For Medicaid and Filial Responsibility laws to truly work in harmony, DMAS would have to take into account whether the filial responsibility statute applies when determining Medicaid eligibility. This would entail analyzing the adult child's earnings and the personal history of the parent-child relationship.<sup>184</sup> The

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179. See 137 CONG. REC. S7236-04 (daily ed. June 5, 1991) (statement of Sen. D'Amato).

180. Cf. *Martin v. Zihler*, 269 Va. 35, 42, 607 S.E.2d 367, 370 (2005) (finding Virginia fornication statute failed rational basis test because an "intrusion upon a person's liberty interest" outweighed the moral purpose proffered by the government).

181. See Rosenbaum, *supra* note 22, at 66.

182. See *supra* notes 26–27 and accompanying text.

183. See Harkness, *supra* note 36, at 328.

184. See VA. CODE ANN. § 20-88 (Repl. Vol. 2016) (enforcing only where the child has

first problem this poses relates to a federal statute prohibiting DMAS from taking into account a child's income.<sup>185</sup> Thus, successful implementation would require amending the federal statute. As noted previously, Congress is unlikely to tackle such a political bombshell.<sup>186</sup> Second, the administrative cost for DMAS to determine whether the statutory defenses apply would be exorbitant.<sup>187</sup> DMAS would have to pry into the personal family histories of its applicants, adding to the already burdensome amount of time and money required to obtain coverage.

Some argue Medicaid should take into account the finances of an applicant's children, as many recipients hide their assets through *inter vivos* trusts, making them eligible for Medicaid, when in reality they have sheltered assets for their children.<sup>188</sup> While this is a strong argument to permit evaluating children's assets, the federal government deems protecting the family relationship to be more important.<sup>189</sup> So unless the federal government changes its Medicaid compliance requirements, Virginia can do nothing to close that loophole.

Even in situations in which a person is on Medicaid, yet remains in "necessitous circumstances,"<sup>190</sup> federal law still prohibits nursing homes certified by Medicare or Medicaid to hold a third party *personally financially liable*.<sup>191</sup> Ironically, one of the main reasons the elderly become impoverished is the tremendous cost of healthcare incurred due to aging.<sup>192</sup> Unfortunately, save a few circumstances, federal law prohibits Virginia Code section 20-88 from resolving this issue.

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"sufficient earning capacity or income" and providing defenses of "desertion, neglect, abuse or willful failure to support").

185. 42 U.S.C. § 1396a(a)(17)(D) (2012).

186. See *supra* Part III.B (discussing why the federal government is unlikely to pass a law enforcing filial support that is akin to CSRA).

187. See *supra* Part III.E.

188. See Matthew Pakula, *The Legal Responsibility of Adult Children to Care for Indigent Parents*, NAT. CTR. FOR POL'Y ANALYSIS (July 12, 2005), [www.ncpa.org/pub/ba521](http://www.ncpa.org/pub/ba521).

189. See *supra* notes 86–88 and accompanying text.

190. This was the case in which the petitioner's mother was on Medicaid, but due to her English deficiency and dementia, facilities were unable to provide her with adequate care. This forced her daughter to provide at-home care, which Medicaid did not fully cover for the number of hours needed. Telephone Interview with Kathy Pryor, *supra* note 5.

191. See *supra* notes 132–33 and accompanying text.

192. See Brandon, *supra* note 12 (noting that 70 percent of retirees who are in poverty suffer from acute health conditions).

### C. *Is Keeping Filial Responsibility Worth it?*

Gaps may exist where a parent is not eligible for Medicaid but is still in “necessitous circumstances.” So, next the question becomes whether Virginia Code section 20-88 should remain on the books to cover such situations. The justification for imposing liability on innocent adults must be weighed against countervailing policies, such as protecting individual autonomy and equal treatment under the law.<sup>193</sup> In addition, it is necessary to evaluate the potential for section 20-88 to unintentionally become a vehicle for litigating sour family relationships.

Whether a state can force an individual to pay for a parent’s needs should depend on what caused the parent’s poor financial situation. There are circumstances where assisted living facilities and skilled nursing homes maintain non-Medicaid-covered residents, but because of the parent’s poor planning or past folly, the parents can no longer foot the bill.<sup>194</sup> As it stands, section 20-88 does not take into account the *cause* of the parent’s financial necessity. However, it is unfair to hold innocent children financially liable for their parent’s poor decisions. Last year, a Maryland legislator who was concerned about the law’s fairness, unsuccessfully attempted to amend Maryland’s filial responsibility law. He pointed out the inequity in holding children “legally responsible for payment” when “[p]arents are able to incur bills and expenses without their children having a say.”<sup>195</sup>

Filial responsibility imposes an unequal burden among citizens. A child may be liable for her parent’s expenses while a sibling owes no legal obligation simply because he lives in a state without a similar law. Virginia cannot control whether other states will hold their residents liable under section 20-88.<sup>196</sup> This

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193. *See supra* Part III.

194. *See, e.g.*, *Health Care & Ret. Corp. of America v. Pittas*, 46 A.3d 719, 720 (Pa. Super. Ct. 2012) (mother left nursing home debt and moved to Greece); *Prairie Lakes Health Care Sys., Inc. v. Wookey*, 583 N.W.2d 405, 409 (S.D. 1998) (parents conveyed real estate to children to avoid paying nursing home bill). It should be noted that since most nursing homes are certified by Medicare or Medicaid, federal law’s prohibition on admitting residents in reliance on a third-party guarantee disqualifies the majority of nursing homes from bringing a suit such as in *Pittas*. *See supra* notes 132–33 and accompanying text.

195. H.B. 924, 2015 Reg. Sess. (Md. 2015).

196. *See Commonwealth v. Mong*, 117 N.E.2d 32, 33–34 (Ohio 1954) (holding that Ohio

leads to the unjust result of filial responsibility impacting the less educated and poorer families.<sup>197</sup> This higher burden on the poor typically arises because families with higher education and wealth are more likely to move elsewhere to seek economic opportunities, education, and changes in lifestyle.<sup>198</sup>

Virginia's filial responsibility statute carries a large potential for abuse.<sup>199</sup> Other states' interpretations of their filial responsibility laws have varied widely, leaving any suit based on the statute completely unpredictable.<sup>200</sup> In 2013, AARP estimated that about forty million Americans voluntarily provided an estimated economic value of approximately \$470 billion to a family member—up from the estimated \$450 billion in 2009.<sup>201</sup> This number is actually larger than the amount of money the federal government spent on Medicaid that same year.<sup>202</sup> Thus, it appears most Americans do voluntarily care for their aging parents.<sup>203</sup> The uptick in voluntary care may be attributable to the fact that Americans are living longer now more than ever.<sup>204</sup>

There are numerous reasons a child might not provide for his or her parent. This may include the statutorily acceptable excuse of abandoning the child during youth, or it may simply be due to a lack of an emotional bond. A parent's actions may not have risen to the level of "desertion," but nevertheless may have caused a strained parent-child relationship. It is in these adversarial circumstances a filial responsibility statute would be most inequitable.

Finally, in the recent cases involving Virginia's filial responsibility statute, it has not been the parent-child relationship that prompted the lawsuit; rather, it has been the tangential relation-

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law, not Pennsylvania, would determine the liability of an Ohio resident sued under the Pennsylvania filial responsibility statute).

197. See Rosenbaum, *supra* note 22, at 66.

198. See *id.*; see also Compton & Pollak, *supra* note 13, at 35–36 (showing an increase in correlation between college educated children and proximity of parents).

199. See *infra* Part III.F.

200. See Elkins, *supra* note 11.

201. REINHARD ET AL., *supra* note 56, at 1.

202. *Id.* at 3.

203. See *id.* at 1.

204. See LINDSEY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION: 2010 1, 2 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

ships between other family members that have caused section 20-88 to be used as a tool for retaliation.<sup>205</sup> Virginia should not permit its laws to be used in such an unmeritorious fashion and must repeal or change the law to prevent similar claims from occurring.

*D. Should Virginia Follow Others in Repealing the Statute?*

England repealed its filial responsibility statute from which section 20-88 is derived in 1948.<sup>206</sup> Parliament was reacting to a social-norm shift; it repealed the duty to support parents while simultaneously reaffirming the obligation to support children.<sup>207</sup> As Medicaid came into the picture in the United States as “the dominant focus of relief for the poor,” states started to also repeal filial responsibility statutes.<sup>208</sup>

Some states viewed the passage of Medicare and Medicaid as purporting to alleviate “an often heavy burden on those obligated to pay for assistance under existing State laws.”<sup>209</sup> So, the same public policy of providing for the aged and indigent that was previously facilitated through filial support laws remained, but the means to achieve this goal was transferred to the Medicare and Medicaid programs.

Two states, Idaho and Iowa, very recently repealed their filial support statutes for these reasons. In repealing its filial support law in 2011, the Idaho legislature believed the law no longer had a valid purpose after the passage of Medicaid.<sup>210</sup> It aimed to repeal the law to “remov[e] the possibility” it would be used by individual in Idaho “in ignorance by county indigency programs or Medicaid.”<sup>211</sup> Iowa also repealed its filial support statute in 2015 under the premise that only the poor person himself is liable for any

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205. See *supra* Part III.F.

206. National Assistance Act, 1948, 11 & 12 Geo. 6 c. 29 (Eng.).

207. *Id.*

208. Pearson, *supra* note 29, at 271.

209. State Welfare Comm’r v. Mintz, 280 N.Y.S.2d 1007, 1009 (N.Y. App. Div. 1967) (citing McKinney’s 1966 Session Laws, vol. 2, pp. 2, 2989–90).

210. See S.B. 1043, 61st Leg., 1st Reg. Sess. (Id. 2011); see also S.B. 1043, Statement of Purpose (Id. 2011).

211. S.B. 1043, Statement of Purpose (Id. 2011).

debt he may have caused.<sup>212</sup> Virginia should follow this trend and either repeal or reform its filial support statute.

### E. *Potential Cures?*

The most direct remedy to resolve the issues surrounding filial support is to repeal Virginia Code section 20-88. Few, if any, Virginians would be affected,<sup>213</sup> and it would likely save future citizens from liability for the actions of another. Where Medicaid does not provide coverage and the parent cannot support herself through no fault of her own, the General Assembly should, at a minimum, better define the parameters of when the state requires adult children to contribute for the benefit of their parents.

“Necessitous circumstances” is ambiguous and could lend itself to various interpretations.<sup>214</sup> The 1978 Virginia Circuit Court case *Peyton v. Peyton* does not explicitly re-define “necessitous circumstances” but alludes that “some testimony with respect to certain jewelry, oriental rugs and other property possibly titled in the Mother’s name . . . [was in]sufficient to outweigh the evidence of necessitous circumstances” because no evidence of legal title to such property was given.<sup>215</sup> Overall, this could indicate that the burden lies on the defendant to rebut the element of “necessitous circumstances.” These unclear elements are daunting for practitioners who aim to understand what standard they should prove.<sup>216</sup> Thus, the Virginia legislature should, at the very least, better define this element. Additionally, taking into account the

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212. H.F. 157, 86th Gen. Assemb. (Iowa 2015).

213. Idaho’s repeal of its filial responsibility statute noted there would be zero negative fiscal impact. S.B. 1043, Statement of Purpose (Id. 2011).

214. Jurisdictions have varied in their interpretations of when one is poor enough for its filial support law to be applicable. See *Savoy v. Savoy*, 641 A.2d 596, 597 (Pa. 1994) (holding statute applicable where parent’s reasonable care and maintenance expenses exceeded monthly social security income); *Pavlick v. Teresinski*, 149 A.2d 300, 302 (N.J. Juv. & Dom. Rel. Ct. 1959) (holding parent sufficiently indigent despite owning a house and furniture).

215. 8 Va. Cir. 531, 534 (1978) (Arlington County). It also held social security benefits do not qualify as receiving “public assistance,” which would disqualify a section 20-88 action. *Id.* at 532. Richmond attorney R. Shawn Majette disagreed with this finding, noting that the purpose of providing Social Security benefits is to essentially provide enough assistance so as one would not be in “necessitous circumstances.” Telephone Interview with R. Shawn Majette, *supra* note 5.

216. Patrick Maurer noted the large amount of time spent on defending a suit pursuant to section 20-88 because he was concerned the statute’s ambiguity could lead to negative results for his client. Telephone Interview with Patrick Maurer, *supra* note 3.

way in which the parent got into such circumstances would help to avoid cases where a person is liable due to an irresponsible parent.

Furthermore, the defenses in the statute should be strengthened and better defined. In doing so, the General Assembly could help adult children avoid liability for a parent who took little or no part in his or her life.<sup>217</sup>

The statute could also provide more predictability on the amount of the obligation one could be subjected to if held liable. Virginia provides such predictability when it comes to child support by taking into account the parent's income and other specific factors, producing an easy-to-follow guide to determine the child support obligation.<sup>218</sup> A similar type of chart that takes into account the adult child's income, size of family for which he or she provides, and the parent's expenses would help practitioners guide their clients' expectations.<sup>219</sup> Such a guideline would help lawyers navigate the ambiguous law and provide uniformity in application.

Lastly, Virginia should eliminate the criminal liability imposed.<sup>220</sup> The aim of the statute is to use a private source to fund the elderly, not to punish a child. It makes little sense to impose a penalty that is not tailored to the law's purpose.<sup>221</sup> Richmond attorney R. Shawn Majette analogized imposing a criminal penalty for such a financial obligation to the old-fashioned and unconstitutional debtors' prisons.<sup>222</sup>

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217. See, e.g., *Cannon v. Juras*, 515 P.2d 428, 429–30 (Or. Ct. App. 1973) (holding child liable for mother who permitted her new husband to expel the child from the home at age sixteen).

218. See VA. CODE ANN. § 20-108.2 (Repl. Vol. 2016) (“Guideline for determination of child support”).

219. Attorney R. Shawn Majette noted the difficulty in counseling clients on potential liability under the statute and suggested a chart like this would ameliorate some issues. See Telephone Interview with R. Shawn Majette, *supra* note 5.

220. Virginia currently imposes a misdemeanor charge on a person who violates Virginia Code section 20-88 to “be punished by a fine not exceeding \$500 or imprisonment in jail for a period not exceeding twelve months or both.” VA. CODE ANN. § 20-88 (Repl. Vol. 2016).

221. See Sisaket, *supra* note 53, at 98.

222. See Telephone Interview with R. Shawn Majette, *supra* note 5; see also *Tate v. Short*, 401 U.S. 395, 398 (1971) (“[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.”).

## CONCLUSION

Virginia should repeal or amend Virginia Code section 20-88 as its old-fashioned concepts, unequal coverage, ambiguous requirements, coupled with societal change, federal mandates, and potential for abuse far outweigh any actual benefit that might be derived by the Commonwealth and its citizens. Imposition of a significant long-term financial liability on a person, solely because of a blood relation, is an antiquated concept that has long since passed.

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