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PICKING UP THE TAB FOR MOM AND DAD: THE CLASH OF FILIAL LAWS WITH LIBERTY, MORALITY, AND CULTURE

Daniel H. Brown^{*}

I. Introduction

Suppose waking up to any normal day. You walk outside to check the mail. As you file through bills, advertisements, and typical credit card offers, you come across something disturbing. You realize that your mother's nursing home is billing you for \$100,000 in outstanding bills incurred by your parent. You never signed any paperwork or agreed to take responsibility for any bills your mother may have acquired. Alarmed, you think this must be a mistake—a nursing home cannot possibly bill you for something you never agreed to, can they?

Upon contacting your attorney, you learn that the nursing home is holding you accountable for your mother's bill based on a statutorily imposed duty known as filial responsibility. After deliberating with your attorney and researching the statute, you learn that you very well may be on the hook for your mother's debts. This hypothetical does not stray much from reality: in America, filial responsibility laws exist in over half of all states.¹ Although enforcement varies, over the years, courts have been found to compel adult children to financially support their parents.²

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¹ See *infra* pt. II n.28.

² See *generally*, e.g., *Pickett v. Pickett*, 251 N.E.2d 684 (Ind. App. 2d Div. 1969); *Jasper County v. Osborn*, 13 N.W. 104 (Iowa 1882); *Health Care & Ret. Corp. of Am. v. Pittas*, 46 A.3d 719 (Pa. Super. 2012).

The act of regarding one's parents has played a role in many societies. Acts of reverence toward one's parents occur in many ways, such as emotional support, physical caregiving, and financial backing. While the virtuous adult child may be motivated to financially support their parent, they may be further compelled under filial law to provide monetary support. The goal of parent-oriented filial law—to assist indigent adults in paying outstanding bills and expenses—is admirable, but does it comport with foundational American values?

This paper argues that filial responsibility, a concept rooted in emotional ties and parental affection, should not be imposed upon Americans because it violates American principles of liberty and individualism. Using a comparative approach, this paper explores filial law in China, and the resentment it has stirred amongst Chinese citizens, to argue that if a collectivist society shows distaste toward filial law, they cannot possibly comport with the values of individualistic America. In conclusion, alternative solutions are proposed to address the care and support the elderly population needs.

II. History and Development of Filial Law in the United States

Filial law in the United States is rooted in the Elizabethan Poor Act of 1601—English laws that required the “‘father and grandfather and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person’ support that relative to the extent of his or her ability.”³ The primary implication of the Elizabethan “Poor Laws” was to compel close family members to care for indigent relatives, which included the elderly; if this was not practicable, the indigent person could then utilize public assistance.⁴ This English system served as the framework for the American colonies, which imposed a similar duty for people to

³ Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & POL’Y 709, 711 (2001).

⁴ *Id.*

take care of their indigent relatives in order to alleviate the strain on governmental support.⁵ For example, similar to the Poor Laws, an early colonial law in Pennsylvania utilized a familial and welfare approach, authorizing overseers of the poor to impose taxes for the relief of “poor, indigent and impotent persons” and created a duty to support “the father and grandfather and the mother and grandmother and the children of every poor, old, blind, lame and impotent person.”⁶

Over the years, the United States federal government has had little to add to filial support law because filial duties have been largely developed and maintained at the state level.⁷ Among the states that impose such responsibilities, statutory law is the primary source of the adult child’s duty to financially support their indigent parent.⁸ Codification of filial laws began in the 1850s, which laid the framework in providing care for the elderly.⁹ These statutes peaked in popularity around the 1950s, with as many as forty-five states adopting filial support statutes; only Florida, Kansas, Texas, Washington, and Wyoming never adopted such legislation.¹⁰ However, it was around this same time that a wave of federal programs was enacted to help alleviate the financial strain of elderly

⁵ *Id.* at 711–12.

⁶ COLONIAL LAWS OF PENN., 1705–06, ch. CLIV, § V, at 253; Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society?*, 26 FAM. L.Q. 195, 197–98 (1992).

⁷ Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, 20 ELDER L.J. 269, 270 (2013).

⁸ Twyla Sketchley & Carter McMillan, *Filial Responsibility: Breaking the Backbone of Today’s Modern Long Term Care System*, 26 ST. THOMAS L. REV. 131, 133–134 (2013).

⁹ *Id.*

¹⁰ Kline, *supra* note 6, at 196, n.9.

indigents.¹¹ In lieu of the support these new programs provided, many filial responsibility laws were subsequently repealed.¹²

Federal support began in 1935 with the Social Security Act,¹³ which provided payments to elderly persons who fulfilled certain work-related requirements during his or her history of employment.¹⁴ Following the Social Security Act, many other programs were introduced in the ensuing decades, including the United States' preeminent healthcare programs—Medicare¹⁵ and Medicaid.¹⁶ Medicare offered older individuals with federally-backed health insurance, and Medicaid was launched as a joint federal-state program that provided various health care benefits, such as long-term nursing care, to disabled or low-income elderly adults.¹⁷ These governmental programs, combined with worker retirement benefit programs, significantly decreased the perceived need of using filial support laws to help older persons.¹⁸ With access to federal programs, many adult children and other family members ceased to be viewed as the primary source of support for their elderly relatives.

III. Modern Filial Law in the United States and China

In the United States, federal programs available to the elderly have helped ease the financial burden of paying for healthcare.¹⁹ With Social Security, Medicare, and Medicaid revolutionizing retirement and healthcare for elders in the mid-1900s, filial law

¹¹ Katherine C. Clark, *A Duty to Reform: Updating Connecticut's Filial Responsibility Statutes*, 29 QUINNIPIAC PROB. L.J. 45, 49 (2015).

¹² *Id.*

¹³ See Moskowitz, *supra* note 3, at 713.

¹⁴ 42 U.S.C. § 401 (2015).

¹⁵ 42 U.S.C. § 1395 (2015).

¹⁶ 42 U.S.C. § 1396 (2015).

¹⁷ Pearson, *supra* note 7, at 285.

¹⁸ *Id.* at 285–86.

¹⁹ See generally, e.g., Frank R. Lichtenberg, *The Effects of Medicare on Health Care Utilization and Outcomes*, 5 FRONTIERS IN HEALTH POL'Y RES. 27 (2002) (explaining the impact of Medicare).

began to recede as the primary source of support for indigent older adults.²⁰ Some may view filial law as a thing of the past, while others are not even aware of its existence.²¹ Consistent with the view that filial law is outmoded in modern times, some states have outright repealed their filial legislation.²² Despite their decline in the 20th century,²³ a recent resurgence in enforcement has swept the nation.²⁴ One explanation for this is current wave of aging “baby boomers” that has prompted an increased need for broader medical coverage.²⁵ Aside from generational considerations, “public health campaigns, behavioral changes, and medical advances” have further contributed to a growing elderly population.²⁶ In 2013, there were 44.7 million Americans aged 65 years or older, representing approximately fourteen percent of the population.²⁷ This proportion is expected to grow to nearly twenty-two percent by 2040, meaning approximately one in five Americans will be 65 years or older.²⁸

Currently, every state has laws that create duties for adults to care for or financially help other family members, with common examples being alimony for divorced spouses or child support for

²⁰ Clark, *supra* note 11, at 49.

²¹ See Northwestern Mutual Voice Team, *Who Will Pay For Mom's Or Dad's Nursing Home Bill? Filial Support Laws and Long-Term Care*, FORBES (Feb. 3, 2014), <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/#7b19d1f85620>.

²² See e.g. IDAHO CODE § 32-1002 (Repealed effective July 1, 2011).

²³ See Pearson, *supra* note 7, at 271 (outlining the waning of U.S. filial laws).

²⁴ See e.g., *Health Care & Ret. Corp. of Am. v. Pittas*, 46 A.3d 719 (Pa. Super. 2012).

²⁵ Sketchly & McMillan, *supra* note 7, at 137.

²⁶ Jennifer M. Ortman, Victoria A. Velkoff, & Howard Hogan, *An Aging Nation: The Older Population in the United States*, U.S. CENSUS BUREAU (May 2014), <https://www.census.gov/prod/2014pubs/p25-1140.pdf>.

²⁷ Admin. on Aging, *A Profile of Older Americans: 2014*, DEPT. OF HEALTH & HUMAN SERVICES, <https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2014-Profile.pdf>.

²⁸ *Id.*

minors.²⁹ Nearly half of all states have filial responsibility statutes in force that require adult children to provide care to parents.³⁰ In some states, if an adult child is absent or does not have sufficient means to care for the parent, the parent may call upon other relatives.³¹ For example, in Utah, children are first in line to care for their parents; if the children are unable to provide support, the duty then shifts to other family members in the following order: the indigent person's parents, siblings, then grandchildren.³² West Virginia follows the order of children, father, siblings, then mother.³³

Enforcement of statutes that create a duty for adult children to support their indigent parents are rare when compared to other family-relation based laws,³⁴ but nevertheless, these statutes are still

²⁹ Pearson, *supra* note 7, at 270.

³⁰ These states are as follows: Alaska (ALASKA STAT. § 25.20.030 (2019), § 47.25.230 (2019)); Arkansas (ARK. CODE ANN. § 20-47-106 (2019)); California (CAL. FAM. CODE §§ 4400-4405 (2019), §§ 4410-4414 (2019); CAL. WELF. & INST. CODE §§ 12350-12351 (2019); CAL. PENAL CODE § 270(c) (2019)); Connecticut (CONN. GEN. STAT. ANN. § 53-304 (2019)); Delaware (DEL. CODE ANN. TIT. 13 §§ 503-506 (2019)); Georgia (GA. CODE ANN. § 36-12-3 (2019)); Indiana (IND. CODE ANN. §§ 31-16-17-1-31-16-17-7 (2019), § 35-46-1-7 (2019)); Kentucky (KY. REV. STAT. ANN. § 530.050 (2019)); Louisiana (LA. C.C. ART. 236 (2016)); Mississippi (MISS. CODE ANN. § 43-31-25 (2019)); Montana (MONT. CODE ANN. §§ 40-6-214-40-6-301(2019)); Nevada (NEV. REV. STAT. ANN. § 428.070 (2019), §439B.310 (2019)); New Jersey (N.J. STAT. ANN. §§ 44:4-100-44:4-103 (2019), §§ 44:1-139-44:1-142 (2019)); North Carolina (N.C. GEN. STAT. § 14-326.1 (2019)); North Dakota (N.D. CENT. CODE § 14-09-10 (2019)); Ohio (OHIO REV. CODE ANN. § 2919.21 (2019)); Oregon (OR. REV. STAT. § 109.010 (2019), § 163.205 (2019)); Pennsylvania (23 PA. CONS. STAT. ANN. §§ 4601-4606 (2019)); Rhode Island (R.I. GEN. LAWS §§ 15-10-1-15-10-1-7 (2019), §§ 40-5-13-40-5-21 (2019)); South Dakota (S.D. CODIFIED L. §§ 25-7-27-25-7-28 (2019), § 28-13-1.1 (2019)); Tennessee (TENN. CODE ANN. §§ 71-5-103-71-5-115 (2019)); Utah (UTAH CODE ANN. § 17-14-2 (2019)); Vermont (VT. STAT. ANN. TIT. 15, §§ 202-203 (2019)); Virginia (VA. CODE ANN. § 20-88 (2019)); and West Virginia (W. VA. CODE § 9-5-9 (2019)).

³¹ *See, e.g.*, UTAH CODE ANN. § 17-14-2.

³² *Id.*

³³ W. VA. CODE ANN. § 9-5-9.

³⁴ Pearson, *supra* note 7, at 272.

used today as mechanisms for indigent parents or the state to commence civil legal proceedings against the adult child.³⁵ Notwithstanding civil consequences, some statutes also impose criminal penalties on adult children for violating filial duties.³⁶ Four states: Kentucky,³⁷ Massachusetts,³⁸ North Carolina,³⁹ and Ohio,⁴⁰ only impose criminal liability for failing to support an older parent, which prevents a parent from pursuing a civil suit to recover against a child.⁴¹

In most cases, an adult child facing civil or criminal consequences can argue defenses for failing to uphold the duty to their indigent parent.⁴² A common defense is simply showing the indigent parent is already supported by a state or federal program.⁴³ Other defenses are rooted in the parent's negative behavior towards the child, which generally consists of the parent's neglect, abuse, or desertion of the child when the child was a minor.⁴⁴ For example, Virginia's filial statute provides a defense if the adult child can show "substantial evidence of desertion, neglect, abuse or willful failure to support any such child by the father or mother" or "if a parent is

³⁵ Kline, *supra* note 6, at 201.

³⁶ ALASKA STAT. § 11.51.210; CAL. PENAL CODE § 270(c) (2019)); CONN. GEN. STAT. ANN. § 53-304 (2019); IND. CODE ANN. § 31-16-17-7 (2019); KY. REV. STAT. ANN. § 530.050 (2019); MASS. GEN. LAWS ch. 273 § 20; MONT. CODE ANN. § 40-6-302; N.C. GEN. STAT. § 14-326.1 (2019), OHIO REV. CODE ANN. § 2919.21 (2019); OR. REV. STAT. § 163.205 (2019); R.I. GEN. LAWS § 15-10-6 (2019); VT. STAT. ANN. tit. 15 §§ 202–203 (2019). For a comprehensive list of U.S. filial support statutes by state, including the relationship of liable parties to the indigent elder, who is entitled to enforce, required monetary contributions, criminal liabilities, and defenses, see Sketchley & McMillan, *supra* note 8, at 160–64.

³⁷ KY. REV. STAT. ANN. § 530.050.

³⁸ MASS. GEN. LAWS ANN. ch. 273 § 20.

³⁹ N.C. GEN. STAT. ANN. § 14-326.1.

⁴⁰ OHIO REV. CODE ANN. § 2919.21.

⁴¹ Pearson, *supra* note 7, at 276.

⁴² Sketchley & McMillan, *supra* note 8, at 148.

⁴³ VA. CODE ANN. § 20-88 (2019).

⁴⁴ Sketchley & McMillan, *supra* note 8, at 148.

otherwise eligible for and is receiving public assistance or services under a federal or state program.”⁴⁵

To bring a successful legal action against the adult child, there are a number of factors on which the parent must succeed. The parent must first show they are indigent—a definition that varies somewhat amongst the states.⁴⁶ The definition in Iowa is “those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor.”⁴⁷ Pennsylvania courts have defined indigent as “needy; destitute of means of comfortable subsistence.”⁴⁸ In order to impose a duty of support on an adult child, the adult child must have sufficient income.⁴⁹ If the adult child only has the means to support his or her spouse or children, then they are relieved of any duty of care for an indigent parent.⁵⁰ Another factor courts must consider is the amount of support one must provide—some states enact a specific amount, whereas others call for the recovery of outstanding medical bills.⁵¹

It is also imperative to consider *who* has standing to bring the action. The indigent parent may be authorized to file suit,⁵² or the statute may allow state or welfare entities to so.⁵³ Additionally, some statutes allow creditors, such as nursing homes, to bring the action.⁵⁴ A common modern trend is commercial entities pursuing adult children for outstanding long-term care costs.⁵⁵ This is exemplified

⁴⁵ VA. CODE ANN. § 20-88.

⁴⁶ Kline, *supra* note 6, at 201.

⁴⁷ IOWA CODE ANN. § 252.1 (2019) (explaining that the definition is not intended to exclude people who have *some* means of support).

⁴⁸ *Commw. v. Hallman*, 3 Pa. D. & C.2d 233, 235 (Pa. Quar. Sess. 1955).

⁴⁹ Kline, *supra* note 6, 201.

⁵⁰ *Commw. ex rel. Goldman v. Goldman*, 119 A.2d 631, 633 (Pa. Super. 1956).

⁵¹ Sketchly & McMillan, *supra* note 8, at 148.

⁵² *See* IND. CODE ANN. § 31-16-17-2 (2019); LA. STAT. ANN. § 13:4731 (2019).

⁵³ *See* N.J. STAT. ANN. § 44:4-102 (2019); TENN. CODE ANN. § 71-5-115 (2019).

⁵⁴ *See* 23 PA. CONS. STAT. ANN. § 4603(c)(2) (2019) (A petition may be filed by the indigent person or “any other person or public body or public agency having any interest in the care, maintenance or assistance of such indigent person.”).

⁵⁵ Sketchly & McMillan, *supra* note 8, at 138.

by *Health Care & Retirement Corporation of America v. Pittas*.⁵⁶ In *Pittas*, the mother of Mr. Pittas sustained severe injuries from a car accident and was admitted to a nursing home after treatment.⁵⁷ After recovery, she left for Greece, leaving many of her medical bills unpaid.⁵⁸ The nursing home sought to hold her son liable for the outstanding debt, which was roughly \$93,000.⁵⁹ The Pennsylvania Superior Court agreed with the trial court that the son, Mr. Pittas, was liable for the bill, despite the mother's pending Medicaid claim.⁶⁰ The court even acknowledged that the nursing home had the right to choose which relatives to pursue to pay the medical bills.⁶¹

Similarly, in *Americana Healthcare Ctr. v. Randall*,⁶² a South Dakota nursing home sought action against a previous resident's son for unpaid bills.⁶³ Mr. Randall, who lived in the District of Columbia, contested the action, questioning the constitutionality of the South Dakota filial statute.⁶⁴ The statute stated, in part, "Any adult child, having the financial ability to do so, shall provide necessary food, clothing, shelter, or medical attendance for a parent who is unable to provide for oneself."⁶⁵ The Supreme Court of South Dakota ruled that the statute did not violate equal protection or due process principles, finding that the son was liable for his deceased mother's outstanding medical bills.⁶⁶

The aging of the global population has increased the demand for elderly financial support.⁶⁷ As a result, there is a potential for parties

⁵⁶ 46 A.3d 719 (Pa. Super. 2012).

⁵⁷ *Id.* at 720.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 724.

⁶¹ *See id.* at 723.

⁶² 513 N.W.2d 566 (S.D. 1994).

⁶³ *Id.* at 570.

⁶⁴ *Id.* at 571.

⁶⁵ S.D. CODIFIED LAWS § 25-7-27 (2019).

⁶⁶ *Americana Healthcare Ctr.*, 513 N.W.2d at 571.

⁶⁷ *See Clark, supra* note 11, at 47.

to use filial support statutes to help an elderly population who often lack the means to cover their own medical expenses.⁶⁸ Additionally, the trend of commercial entities suing under filial laws,⁶⁹ as seen in *Pittas*, could become the norm, thus complicating the matter of who filial statutes actually benefit. Even if there is a question as to whether filial law has had a positive or negative impact in the United States, there is no doubt that they have played a role in challenging the legal system in recent times.⁷⁰ But the United States is not alone; many other countries have also imposed filial duties.⁷¹ China amongst them holds as a notable example.⁷²

A. Chinese Cultural Foundations

China has a rich and longstanding history, with written records dating well before 1000 B.C.⁷³ Historically, Chinese children were expected to care for their parents in their old age—a tradition practiced as far back as 800 B.C. under the Western Zhou Dynasty.⁷⁴ During this era, “violati[ng] . . . filial duty was considered a sin and was punishable by law.”⁷⁵ Understanding the ancient philosophies in which much of China’s values and beliefs are rooted, such as Confucianism, better helps one understand the role filial duty plays

⁶⁸ *Id.* at 48.

⁶⁹ *Id.*

⁷⁰ 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. & CMTY. PROP. L.J. 441, 444 (2013) (explaining the role of filial laws in U.S. history).

⁷¹ See Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 MARQ. L. REV. 401, 429–46 (2002) (analyzing the filial statutes and responsibilities of Canada, Singapore, Japan, and Germany).

⁷² *Id.* at 445.

⁷³ See William G. Boltz, *Early Chinese Writing*, 17 WORLD ARCHEOLOGY 420, 420–21 (1986).

⁷⁴ Moskowitz, *supra* note 71, at 445.

⁷⁵ *Id.*

in China today.⁷⁶ China's history of rich religious philosophies have created distinct features of the country's culture, the most prominent of which include: respect for hierarchal differences, collectivism, and loyalty to family—especially parents and elderly.⁷⁷ These cultural values offer insight into the Chinese perspective on filial duties in relation to a Western vantagepoint.

Confucianist values of hierarchy and harmony have greatly contributed to this perspective.⁷⁸ According to Confucianism, a number of institutions have clear and structured hierarchies, including the education system and the family unit.⁷⁹ A hierarchal approach emphasizes one's acceptance and fulfillment of a given role, which is clearly defined in relation to others.⁸⁰ Upholding this role has vast implications as it connects personal duty to a "moral belief [that] the social hierarchy is considered as part of the natural cosmic order."⁸¹

Collectivism in China stresses that "family interests and goals take priority over those of the individual, with members expected to sacrifice their own needs and wishes for the preservation of relationships and the social unit."⁸² Thus, the social harmony prioritized by collectivism stands in stark contrast to the autonomy championed by individualism.⁸³ Collectivism can extend beyond the

⁷⁶ Yishan Xu & Bailey L. Ocker, *Discrepancies in Cross-Cultural and Cross-generational Attitudes Toward Committed Relationships in China and the United States*, 51 FAM. CT. REV. 591, 591 (2013).

⁷⁷ Grace Hui-Chen Huang & Mary Gove, *Confucianism and Chinese Families: Values and Practices in Education*, 2 INT'L J. HUMAN. AND SOC. SCI. 10, 11 (2012).

⁷⁸ *Id.* at 12.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Olwen Bedford & Kwang-Kuo Hwang, *Guilt and Shame in Chinese Culture: A Cross-cultural Framework from the Perspective of Morality and Identity*, 33 J. THEORY SOC. BEHAV. 127, 139 (2003).

⁸² Patricia L. Sullivan, *Culture, Divorce and Family Mediation in Hong Kong*, 43 FAM. CT. REV. 109, 110 (2005).

⁸³ Xu & Ocker, *supra* note 76, at 592.

family to other groups, often where people are expected to help each other.⁸⁴ In collectivist scenarios, the “individual tends to prioritize the group’s interests higher than” the interests of the individual and is likely to “make decisions that benefit the group,” even if it is detrimental to that individual.⁸⁵ Furthermore, promises are not taken lightly in Chinese collectivism—to go against one’s word not only damages the individual’s reputation, but brings shame to his or her family and extended network.⁸⁶ Because collectivists generally have a more interdependent worldview, they may often “place more importance on relationships and nurturing them with more care than individualists.”⁸⁷ Due to China’s economic developments in the 20th century, along with a reprioritizing of collectivist notions, the country has seen a shift towards individualism.⁸⁸ However, research has shown that China is still a relatively collectivist country.⁸⁹

Traditional Chinese culture is rooted in one’s loyalty to family and can be best captured by the Confucian concept of “xiao,” also known as filial piety, that describes the “respect, obedience, loyalty, material provision, and [] care” a child extends to his or her parents.⁹⁰ Xiao tradition highly values those who are advanced in age.⁹¹ Conversely, disrespect of elders violates Chinese values and

⁸⁴ Snezhina Michailova & Kate Hutchings, *National Cultural Influences on Knowledge Sharing: A Comparison of China and Russia*, 43 J. MGMT. STUD. 383, 393 (2006).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Lenard Huff & Lane Kelley, *Levels of Organizational Trust in Individualist versus Collectivist Societies: A Seven-Nation Study*, 14 ORG. SCI. 81, 82 (2003) (examining trust with respect to the United States and other cultures).

⁸⁸ See Generally Liza G. Steele & Scott M. Lynch, *The Pursuit of Happiness in China: Individualism, Collectivism, and Subjective Well-Being during China’s Economic and Social Transformation*, 114 SOC. INDICATORS RES. 441 (2013).

⁸⁹ *Id.* at 442.

⁹⁰ Xu & Ocker, *supra* note 76, at 592. Serving one’s parents through emotional or financial support is a common example of filial piety.

⁹¹ See Kyu-taik Sung, *Respect for Elders: Myths and Realities in East Asia*, 5 J. AGING AND IDENTITY 197, 198 (2000).

norms of filial piety.⁹² The Confucian treatise, *Classic of Filial Piety*, explains that “[i]n serving his parents, a filial son reveres them in daily life; he makes them happy while he nourished them; he takes anxious care of them in sickness; he shows great sorrow over their death; and he sacrifices to them with solemnity.”⁹³ This statement exemplifies the traditional Chinese practice of filial piety: serving, caring, and providing support for one’s parents during their life and the worshipping them as ancestors after their deaths.⁹⁴

B. Contemporary Chinese Filial Piety: Virtues, Values, and the Law

There is no doubt that China’s legacy is highly centered on respect toward family, but how prevalent is this today? A variety of factors have contributed to changing familial customs among the Chinese. For example, an increasing number of children work further away from home and their parents, due to a revolution in social and geographic mobility.⁹⁵ China’s one-child policy has created a sharply unbalanced male to female ratio in China’s population, which “has decreased the number of female caregivers as well as the number of children” a mother may have—children who would have inevitably reduced the burden of caring for older generations.⁹⁶ Meanwhile, China’s elderly population has increased

⁹² Sandra Tam & Sheila M. Neysmith, *Disrespect and Isolation: Elder Abuse in Chinese Communities*, 25 CAN. J. AGING 141, 148 (2006).

⁹³ Lihong Shi, “Little Quilted Vests to Warm Parents’ Hearts”: Redefining the Gendered Practice of Filial Piety in Rural North-Eastern China, 198 CHINA Q. 348, 349 (2009).

⁹⁴ *Id.*

⁹⁵ Moskowitz, *supra* note 71, at 445.

⁹⁶ *Id.* at 446. China’s one-child policy has presented other challenges to the nation as well, including contributing to China’s rising elderly population. See Will Thompson, *China’s Rapidly Aging Population*, 20 TODAY’S RES. AGING 1, 1 (2010). For a detailed analysis of the effects of China’s one-child policy see Therese Hesketh, Li Lu & Zhu Wei Xing, *The Effect of China’s One-Child Family Policy after 25 Years*, 353 N. ENGL. J. MED. 1171 (2005).

substantially over the past few decades.⁹⁷ By the year 2000, China's population of people aged 65 or older was nearly 90 million—by 2050 that same demographic could surpass 300 million.⁹⁸ These factors, coupled with the information revolution and China's expanding role in the global economy, are a challenge to filial piety in China today.⁹⁹

In modern-day China, filial piety is still a highly esteemed virtue, “especially in rural areas where the majority of elderly peasants do not receive any state-sponsored retirement pension.”¹⁰⁰ Reports show that seventy-one percent of adults older than the age of 60 benefited from pensions, while twelve percent depended upon social security. By contrast, in rural areas only five percent reported pension benefits, and one and a half percent relied upon social security, with most (about eighty-five percent) of the elderly population dependent on family support.”¹⁰¹ Thus, a considerable number of Chinese value and rely on filial support, especially those living in rural areas. However, “because of a weakening of parental power and an increase in self-interest among Chinese youth under China's current market economy,” traditional forms of filial practice have seen a decline, including the son's devotion to his parents' well-being.¹⁰² Filial practices also had to adapt to democratic

⁹⁷ Thompson, *supra* note 96.

⁹⁸ *Id.*

⁹⁹ See generally *The World Bank China: Overview*, THE WORLD BANK IN CHINA, <http://www.worldbank.org/en/country/china/overview> (last updated Dec. 13, 2019) (select “Context”) (analyzing China's economy and its national and global impact).

¹⁰⁰ Shi, *supra* note 93, at 349. China's recent economic prosperity has spurred a significant cultural distinction between rural and urban areas as more people migrate to cities. See generally Kevin Honglin Zhang & Shunfeng Song, *Rural–urban migration and urbanization in China: Evidence from time-series and cross-section analyses*, 14 CHINA ECON. REV. 386 (2003).

¹⁰¹ Peng Gong et al., *Urbanisation and health in China*, 379 THE LANCET 843, 848 (2012).

¹⁰² Shi, *supra* note 93, at 350.

political influences in the wake of Chinese communism.¹⁰³ Despite these societal shifts in values and norms throughout the years, “filial piety has not been eroded by modernization and democratization.”¹⁰⁴ Chinese law has played a crucial role in maintaining filial duty in the midst of these advances.

The Marriage Law of the People's Republic of China states, “Parents shall have the duty to bring up and educate their children; children shall have the duty to support and assist their parents.”¹⁰⁵ Furthermore, “[i]f children fail to perform their duty, parents who are unable to work or have difficulty in providing for themselves shall have the right to demand support payments from their children.”¹⁰⁶ Thus, the law explicitly provides a cause of action to indigent parents who have been neglected by their children.¹⁰⁷ Likewise, Chinese law also stipulates that “[t]he elderly shall be provided for mainly by their families . . . [who] shall perform the duties of providing for the elderly, taking care of them and comforting them, and cater to their special needs.”¹⁰⁸ A 2012 amendment raised the bar by requiring “[f]amily members living apart from the elderly . . . frequently visit or greet the elderly.”¹⁰⁹

Enforceability of the law notwithstanding, the commanding language of these laws is seen as an urgent message to China's youth

¹⁰³ Kuang-Hui Yeh, Chin-Chun Yi, Wei-Chun Tsao & Po-San Wan, *Filial piety in contemporary Chinese societies: A comparative study of Taiwan, Hong Kong, and China*, 28 INT'L SOC. 277, 292 (2013).

¹⁰⁴ *Id.*

¹⁰⁵ Marriage Law of the People's Republic of China, art. 21 (1980), Zhonghua Renmin Gongheguo Falu Huibian (available at http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384064.htm (last visited April 18, 2020)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly, art. 10–11 (1996), Zhonghua Renmin Gongheguo Falu Huibian (available at http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/11/content_1383583.htm) (last visited April 18, 2020) (including sons, daughters, and spouses among those with a duty to care and provide for elders).

¹⁰⁹ *Id.*

to support the elderly.¹¹⁰ Although created to counter the needs of the rising elderly population, they have not been received well amongst the Chinese:

[O]ne can only wonder whether such an attempt to address a moral problem will lead to societal change or instill a greater sense of guilt in those who feel unable to meet this responsibility. While my interlocutors see filial piety as an important virtue, they regard the law as a joke. However, it is interesting to note that they do not seem to regard the provision of care to elderly people as a responsibility of the state.¹¹¹

Although China is trying to encourage a noble cause, it seems the Chinese prefer to abide by filial piety as a family-moral obligation, as opposed to a legal mandate. Such a violation of one's individual liberties is likely the cause for such resentment and is the very reason filial law contradicts the underlying values of American society.

C. American Cultural Foundations

Like China, America too has been shaped by a number of core values and beliefs, such as equal opportunity, free enterprise, and privacy.¹¹² Of particular import are individualism and liberty, the cornerstones of American values.¹¹³ In his letter to the residents of

¹¹⁰ See Yu Hua, *When Filial Piety is the Law*, THE N.Y. TIMES (July 7, 2013), <http://www.nytimes.com/2013/07/08/opinion/when-filial-piety-is-the-law.html> (discussing the impact and enforceability of the new clause in the *Protection of the Rights and Interests of Elderly People*).

¹¹¹ SUSANNE BREGNBAEK, *FRAGILE ELITE: THE DILEMMAS OF CHINA'S TOP UNIVERSITY STUDENTS*, 61 (Stanford University Press 2016).

¹¹² See generally L. Robert Kohls, *The Values Americans Live By*, WASH. INT. CTR., (available at <https://www.studocu.com/en-us/document/kettering-university/introduction-to-humanities/essays/kohls-the-values-americans-live-by/3610288/view>) (last visited April 18, 2020).

¹¹³ *Id.*

Boston in 1789, George Washington wrote, “Your love of liberty—your respect for the laws—your habits of industry—and your practice of the moral and religious obligations, are the strongest claims to national and individual happiness.”¹¹⁴ After a tumultuous period of slavery, promises of life, liberty, and the pursuit of happiness were extended to people of all races and creeds when Abraham Lincoln declared, “[A]ll persons held as slaves’ within the rebellious states ‘are, and henceforward shall be free.’”¹¹⁵ To this day, liberty is an inherent facet of American life;¹¹⁶ every American citizen is protected from government overreach¹¹⁷ and is free to pursue happiness within the bounds of the law.¹¹⁸ A citizen is free from the interference of others,¹¹⁹ as well as the imposition of duties not assented to.¹²⁰

The right to contract is one such example of how liberty and individualism are enshrined in law. Freedom of contract enables

¹¹⁴ Letter from George Washington to the Citizens of Boston (October 27, 1789), FOUNDERS ONLINE, NAT’L ARCHIVES <https://founders.archives.gov/documents/Washington/05-04-02-0165> (last visited April 20, 2020).

¹¹⁵ *The Emancipation Proclamation*, NAT’L ARCHIVES & REC. ADMIN. (Sept. 22, 1862) (available at <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation>) (last reviewed April 19, 2019).

¹¹⁶ Edward L. Hudgins, *Do Americans Still Value Freedom?*, CATO INST. (July 4, 2001), <http://www.cato.org/publications/commentary/do-americans-still-value-freedom>.

¹¹⁷ Candace H. Beckett, *Separation of Powers and Federalism: Their Impact on Individual Liberty and the Functioning of Our Government*, 29 WM. & MARY L. REV. 635, 638–39 (1988).

¹¹⁸ See Patrick J. Charles, *Restoring Life, Liberty, and the Pursuit of Happiness in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 470 (2011) (examining the relationship and history of the concept of life, liberty, and the pursuit of happiness).

¹¹⁹ Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 517 (1991).

¹²⁰ Karolina Milewicz, *Emerging Patterns of Global Constitutionalization: Toward A Conceptual Framework*, 16 IND. J. GLOBAL LEGAL STUD. 413, 436 n. 60 (2009).

individuals to enter into agreements of his or her choosing; this agreement is voluntary, enforceable in a court of law, and will not be held void, save for certain contractual defenses.¹²¹ Conversely, freedom *from* contract is the idea that one can rightly refrain from entering into an agreement with another, thereby retaining their rights in property.¹²² These two sides of the same coin illustrate how individualism and liberty are at the heart of American law.¹²³

Liberty is also routinely exemplified in tort law, which outlines the rules “between freedom and responsibility to others.”¹²⁴ According to John Stuart Mill,¹²⁵ individual freedom ends and responsibility begins “at the point where [one’s] action[s] harm[] another person.”¹²⁶ In order “[t]o protect the right [of being] free from interference [(liberty)], the law must [provide] a remedy to use when one [is harmed by] another.”¹²⁷ Thus, in the context of filial responsibility, while one has the liberty to refrain from acting as a

¹²¹ David Bear, *Establishing a Moral Duty to Obey the Law Through a Jurisprudence of Law and Economics*, 34 FLA. ST. U. L. REV. 491, 505 (2007). The right to contract is also extended to corporations and other entities. *See* DeBruin v. St. Patrick Congregation, 816 N.W.2d 878, 907 (Wis. 2012).

¹²² Bear, *supra* note 121, at 506.

¹²³ It should be noted, of course, that virtually all rights have constraints in one way or another. For example, regarding contractual freedoms, in *Lochner v. New York*, the U.S. Supreme Court held that the liberty to contract was implicit in the Due Process Clause of the Fourteenth Amendment. 198 U.S. 45 (1905). However, subsequent U.S. Supreme Court decisions limited this power. *See generally* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (affirming the constitutionality of minimum wage legislation enacted by the State of Washington); *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding New York regulations that controlled the price of milk for dairy farmers, dealers, and retailers).

¹²⁴ Robert D. Cooter, *Liberty, Efficiency, and Law*, 50 LAW & CONTEMP. PROBS. 141, 154 (1987).

¹²⁵ *See generally* JOHN STUART MILL, ON LIBERTY (2d ed., J. W. Parker and Son 1859).

¹²⁶ Cooter, *supra* note 124, at 154.

¹²⁷ *Id.* at 154–55.

caretaker for an elder under American law,¹²⁸ in the event one assumes the duty of a caretaker and a failure to uphold that duty results in harm, the caretaker may be held liable to the elder for those damages.¹²⁹

American citizens also have a right to physical liberties. In *Big Town Nursing Home, Inc. v. Newman*,¹³⁰ nursing home resident, Mr. Newman, was placed in a wing “with insane persons, alcoholics[,] and drug addicts,” knowing he did not fall into any of those categories.¹³¹ Mr. Newman was kept in a restraint chair, restricted from any telephone use, had his clothes confiscated, and was not permitted to be released “until he began to obey the rules of the [nursing] home,” which resulted in Mr. Newman being detained for fifty-one days.¹³² Mr. Newman sued and prevailed against Big Town Nursing Home for wrongful imprisonment.¹³³ On appeal, the Court of Civil Appeals of Texas affirmed the trial court’s finding that Mr. Newman was wrongfully imprisoned, explaining that “[f]alse imprisonment is the direct restraint of one person of the physical *liberty* of another without adequate legal justification.”¹³⁴

Newman shows that United States law punishes those who deprive a person of liberty without proper legal justification—
infringing on the liberty of others is permitted in only limited circumstances, such as guardianship for a mentally incapacitated

¹²⁸ See Joann Blair, “Honor They Father and Mother”-But For How Long?—*Adult Children’s Duty to Care For and Protect Elderly Parents*, 35 U. Louisville J. Fam. L 765, 768 (1996).

¹²⁹ See *Carter v. Prime Healthcare Paradise Valley LLC*, 129 Cal. Rptr. 3d 895, 901–02 (Cal. App. 4th Dist. 2011 (*mod.*, Aug. 24, 2011)); Blair, *supra* note 128.

¹³⁰ 461 S.W.2d 195 (Tex. App. 1970).

¹³¹ *Id.* at 197.

¹³² *Id.*

¹³³ *Id.* at 196.

¹³⁴ *Id.* at 197 (emphasis added).

person.¹³⁵ Similarly, tort law and the right to contract illustrate how the law protects individual liberties and the values that are fundamental to the American way of life.

IV. Arguments For and Against Filial Law

Supporters of filial law argue that it helps elderly persons who do not have an adequate means to support themselves.¹³⁶ This inability to provide may stem from a number of factors, such as a lack of savings robust enough to last into advanced age, or inadequate support from governmental programs.¹³⁷ Filial statutes fill the gap by providing a means of income sufficient to paying bills here or there or with full-fledged financial support.¹³⁸

Some argue that the duty to care for an indigent parent should fall upon children, not the government.¹³⁹ Many government programs created to provide financial aid to the elderly are projected to be depleted of resources in the coming years.¹⁴⁰ Therefore, enforcing filial responsibility statutes helps relieve the strain on government programs.¹⁴¹ Others advocate the contractual reciprocal nature of filial law—essentially, because a mother or father has supported a child for many years, there is an implicit obligation for the child to return the favor to their parent.¹⁴² From this perspective, absolving the child of the responsibility to care for their parent promotes unjust enrichment.¹⁴³

¹³⁵ See e.g. *Matter of Mark C.H.*, 906 N.Y.S.2d 419, 426 (N.Y. Surrog. Ct. 2010) (explaining that “guardianship directly infringes on liberty” and that the “seemingly benevolent” consequences of guardianship can actually be quite harsh).

¹³⁶ Clark, *supra* note 11, at 54.

¹³⁷ *Id.* at 54–55.

¹³⁸ *Id.*

¹³⁹ *Id.* at 55.

¹⁴⁰ *Id.*; Matthew Pakula, *A Federal Filial Responsibility Statute: A Uniform Tool to Help Combat the Wave of Indigent Elderly*, 39 FAM. L.Q. 859, 870 (2005).

¹⁴¹ Clark, *supra* note 11, at 55.

¹⁴² Moskowitz, *supra* note 3, at 721.

¹⁴³ *Id.*

On the other hand, opponents of filial law advocate that states with filial responsibility statutes repeal them because they “are destructive to families, distasteful, ineffective, and unconstitutional.”¹⁴⁴ Opponents point out the tension filial law places on family relationships: a parent filing an action for support against a child undoubtedly strains the parent-child relationship.¹⁴⁵ To further complicate matters, “the laws generally do not provide [guidance on] how the liability . . . should be [distributed] among multiple children,”¹⁴⁶ thus adding to the confusion and potential for familial conflict. Filial law may also impose obligations that are ill-suited for certain circumstances; a child may be reasonably reluctant to support a parent if they disagree with that parent’s spending habits.¹⁴⁷

Furthermore, states are often inconsistent in enforcing the statutes,¹⁴⁸ thus failing to give the child much guidance on how to handle the situation.¹⁴⁹ One rationale for this is that the implicit contractual obligation filial laws impose is overbroad and should not imply identical duties of support between the parent and child.¹⁵⁰ Opponents rally that a child does not contract to receive the support from their parent, therefore there is no obligation for the child to return the support.¹⁵¹

A. Filial Law Does Not Comport with American Principles

Filial law conflicts with the principals America was founded upon: liberty and individualism. John Locke once exclaimed,

¹⁴⁴ Kline, *supra* note 6, at 196

¹⁴⁵ See Clark, *supra* note 11, at 50.

¹⁴⁶ Donna Harkness, *What Are Families for? Re-Evaluating Return to Filial Responsibility Laws*, 21 ELDER L.J. 305, 324 (2014).

¹⁴⁷ Clark, *supra* note 11, at 50–51.

¹⁴⁸ Pakula, *supra* note 140, at 862–77.

¹⁴⁹ Clark, *supra* note 11, at 51.

¹⁵⁰ Pakula, *supra* note 140, at 868–69.

¹⁵¹ See *id.*

“Without an *explicit and voluntary* agreement on the part of children to be bound to parents after their majority, the former infants are at liberty to govern themselves and to unite with parents or others as they wish.”¹⁵² Locke argues that filial law violates liberty and individualism because they undermine the freedom from contract.¹⁵³ Filial responsibility statutes often compel adult children to pay for indigent parents’ needs or outstanding bills, regardless of whether the children ever agreed to take care of the parent financially.¹⁵⁴ Applying Locke’s philosophy, filial responsibility statutes compel support without an “explicit and voluntary” agreement between parent and child,¹⁵⁵ thereby placing a duty of support on an adult child that they never voluntarily consented to.¹⁵⁶ Because the freedom from assuming a duty or contractual obligation is thwarted, the child’s liberty is undermined.

Legal scholars run the risk of becoming so immersed in the law, they lose sight of how the law correlates with the bigger picture of an issue, such as morality.¹⁵⁷ In addition to undermining individual liberties, filial law conflicts with morality and culture. Morality is defined as “a doctrine or system of moral conduct” or “conformity to ideals of right human conduct.”¹⁵⁸ Applying these definitions of morality, it would appear that the law naturally addresses some underlying moral issue.¹⁵⁹ Perhaps this is why it is not uncommon

¹⁵² JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 1, 119 (Gateway 1964) (1690).

¹⁵³ *See id.*

¹⁵⁴ *See, e.g.*, OHIO REV. CODE § 2919.21 (2017) (“No person shall abandon, or fail to provide adequate support to...[t]he person's aged or infirm parent or adoptive parent, who from lack of ability and means is unable to provide adequately for the parent's own support.”).

¹⁵⁵ Locke, *supra* note 152.

¹⁵⁶ Harkness, *supra* note 146, at 327.

¹⁵⁷ *See* Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. JURIS. 1, 1 (2003).

¹⁵⁸ *Morality*, MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/morality> (last visited Feb. 23, 2020).

¹⁵⁹ Raz, *supra* note 157, at 2, 11.

to hear of one politician accusing another of “forcing morality” upon others.¹⁶⁰

In the realm of medical ethics, the term “forced altruism” has been used to describe the practice of having one’s child donate bone marrow for the benefit of another, such as a sibling:¹⁶¹ “In these instances, the child accrues no healthcare advantage from the intervention, and thus parental or proxy consent to such infringements of the child’s bodily integrity might be seen to be legally or ethically questionable.”¹⁶² These practices, in addition to similar organ donating procedures with skewed intents, have been met with the phrase “forced altruism is not altruism.”¹⁶³ In a similar way, filial statutes force adult children to be “altruistic” toward their indigent parent, thus losing the essence of altruism altogether. Though legislatures and courts may desire to strengthen family bonds, enforcing filial laws risk accomplishing the opposite.

Filial law is one such brand of “forced morality,” and a possibility as to why filial law has been met with resentment by citizens.¹⁶⁴ Consider Georgia, for instance, where “[t]he father, mother, or child of any pauper . . . if sufficiently able, shall support the pauper.”¹⁶⁵ In reality, supporting a poor relative should be done

¹⁶⁰ See Greg Koukl, *Who Are You to Force Your Morality?*, STAND TO REASON (Feb. 27, 2013), http://www.str.org/articles/who-are-you-to-force-your-morality#.VwF3m_krKUK.

¹⁶¹ Barry Lyons, *Obliging Children*, 19 MED. L. REV. 55, 57, 79–80 (2011).

¹⁶² *Id.* at 57.

¹⁶³ *Id.* at 79; see Sheldon Zink and Stacey L. Wertlieb, *Forced Altruism is Not Altruism*, 4 AM. J. BIOETHICS 29, 30 (2004) (discussing how altruism is lost when the organ donor’s intent shifts away from self-sacrifice).

¹⁶⁴ Unfortunately, there are no established surveys to determine the widespread public perception of filial laws. However, when Americans learn about filial laws, they are often met with resentment and distaste. See e.g. Julian Gray and Frank Petrich, *Elder Law: A new twist on filial responsibility in Pennsylvania*, PITTSBURGH POST-GAZETTE (Oct. 26, 2014), <https://www.post-gazette.com/business/2014/10/26/Elder-Law-A-new-twist-on-filial-responsibility-in-Pennsylvania/stories/201410260034>.

¹⁶⁵ GA. CODE § 36-12-3 (2017).

out of moral virtue or obligation, not required by law—when the law forces support of family members, the essence of virtue is lost. Indeed, the notion that filial responsibility statutes violate American liberty is exemplified, at least in part, by the public perception of the law.¹⁶⁶

But the conflict of filial law with classical liberty and individualism cannot explain why in China, the requirement that “[f]amily members living apart from the elderly should frequently visit or greet the elderly,”¹⁶⁷ has also been met with opposition.¹⁶⁸ Guo Cheng, a popular Chinese novelist, encapsulated the resentment shared by many towards the provision when he exclaimed, “Kinship is part of human nature; it is ridiculous to make it into a law. It is like requiring couples who have gotten married to have a harmonious sex life.”¹⁶⁹ Thus, the “forced morality” inherent of filial law is so unsettling that it has caused disruption in both individualistic and collectivist nations.¹⁷⁰

¹⁶⁶ Of course, it does not necessarily follow that a law that exists in opposition to the public should be stricken. However, it is the author’s opinion that the public response should at least be considered, among other factors, when enacting law and policy.

¹⁶⁷ *Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly (2012 Revision)*, LAW INFO CHINA (Dec. 28, 2012), <http://www.lawinfochina.com/display.aspx?lib=law&id=12566&CGid>.

¹⁶⁸ Bregnbæk, *supra* note 111, at 61.

¹⁶⁹ Edward Wong, *A Chinese Virtue is Now the Law*, N.Y. TIMES (July 2, 2013), <http://www.nytimes.com/2013/07/03/world/asia/filial-piety-once-a-virtue-in-china-is-now-the-law.html>.

¹⁷⁰ Of course, forced morality is not necessarily a bad thing. As mentioned previously, most laws originate from a moral approach. For instance, legislation that prohibits murder can be seen as “forcing morality” on another. However, laws that force benevolence will likely be met with resentment, because these acts of virtue come largely from human compassion and moral obligation, not necessarily the law.

B. Thinking Beyond Filial Law: Alternative Solutions for Indigent Elderly

In light of the tension between filial law and American principals of liberty and individualism, it is necessary to address alternative solutions to provide support for indigent elderly individuals. Proposed solutions have included the “expansion of the federal Family and Medical Leave Act” or adopting a universal health care system;¹⁷¹ others have proposed a more uniform approach to filial law by advocating the legislation of a federal act.¹⁷²

When analyzing problems facing the elderly population (and virtually all groups), society should strive for solutions that balance and complement American ideals of liberty while trying to maximize the care and support of the citizens.¹⁷³ Accordingly, it is the author’s opinion that society should consider solutions based on giving people and entities incentives. Incentives, such as tax incentives, would serve to encourage public compliance in helping support the elderly population, but avoids the issue of forced morality. The following are some proposed incentive-based solutions.

To help alleviate the indigent elderly population, the government should consider expanding existing dependent tax deductions and exemptions which would include individuals outside of blood or adoptive relations.¹⁷⁴ Although claiming non-related people is already permitted, one must fulfill a number of requirements.¹⁷⁵ Here, tax deductions and exemptions could be

¹⁷¹ Harkness, *supra* note 146, at 340–41.

¹⁷² See Pakula, *supra* note 140, at 859–60, 870–77 (advocating the use of a federal filial responsibility statute to encourage uniformity and fairness).

¹⁷³ See Harkness, *supra* note 146, at 339 (acknowledging that social policies should strive to care for people and strengthen social bonds).

¹⁷⁴ *Id.* at 339–40.

¹⁷⁵ See 26 U.S.C. § 152 (2017). For example, in certain circumstances, non-relatives might be claimed as dependents if they have lived with the taxpayer for a year or longer. *Id.* § 152(d)(2)(H) (2017).

provided to the taxpayer if he or she is able to show that the indigent elder is living with and being supported by the taxpayer. Also, tax credits could be given for home improvement that makes the home more accommodating to the elder.¹⁷⁶ Furthermore, low-interest loans should be considered for housing additions so that an elderly person can live with family or another caregiver.¹⁷⁷

Another innovative solution is encouraging more businesses, through tax incentives, to provide elder care benefits.¹⁷⁸ Similarly, large businesses could employ elder care centers for their employees, and overall referral services for elder care, meal planning, transportation, and housing would assist the elderly and their caregivers.¹⁷⁹

V. Conclusion

Characterized by inconsistent enforcement, negative public perception, and questionable conflicts with classical liberal values, filial law should be scrutinized by policymakers and common civilians alike. The potentially spontaneous duties these laws impose run the risk of straining family relations and stifling familial obligation. The people of the United States and China, with two distinctly different cultures, have responded to these laws with similar disdain, largely because it bastardizes family value into a legal mandate. As an alternative to filial law, positive motivations, such as tax incentives, could preserve familial bonds whilst helping the indigent elderly. Perhaps legislatures should consider the phrase in the medical community and apply it to the legal realm. Indeed, “forced altruism is not altruism.”¹⁸⁰

¹⁷⁶ Harkness, *supra* note 146, at 340.

¹⁷⁷ *Id.*

¹⁷⁸ Moskowitz, *supra* note 143, at 730.

¹⁷⁹ *Id.*

¹⁸⁰ Zink & Wertlieb, *supra* note 163.

ECONOMIC AND OTHER ISSUES OF SPOUSES SEPARATING LATER IN LIFE IN CANADA

*John-Paul Boyd Q.C.**

I. Introduction

Canada's population is, like those of much the rest of the world, growing older. This poses a number of social and economic challenges, ranging from the funding of social security programs intended to provide relief for older persons of modest income, to housing and caring for ailing and vulnerable elders. The justice system, particularly the family justice system, will also be challenged as the number of later-in-life divorces grows and the courts are increasingly called upon to address problems that until now have been rarities: the conflicting property interests of new spouses and adult children from previous marriages; the possibility that payors subsisting on fixed incomes may have concurrent support obligations to more than one spouse; and the divisibility of old age pensions and other public benefits.

Judges and family law attorneys accustomed to addressing the needs of separating middle-aged couples must adjust their approach to family justice as the population they serve is more often retired or on the brink of retirement, dealing with long term illnesses and disabilities, and leaving second or third marriages—and remarrying thereafter. The social, health, and economic circumstances of our elders are fundamentally dissimilar to those of persons in their thirties and forties and cannot be addressed with the same assumptions about wellness and future earning capacity.

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This Article will examine age and other characteristics of the Canadian population, recent trends in divorce and remarriage, and the economic consequences of separation later in life. It will briefly review the government benefits available to older Canadians, a critical source of income after retirement for both separated and intact families, and the status of these benefits as income available for the purposes of support and property available for division. It will then discuss the legal and economic issues arising when a spouse paying support wishes to retire despite the manifest need of the dependent spouse. It concludes with a number of recommendations for Canada and other countries dealing with populations that are both aging and divorcing.

II. Canada's Aging Population

The world's population is aging.¹ Life expectancy is increasing across the world at the same time as birth rates are falling.² The United Nations reports that the number of older persons is increasing at a rate of 2.6% per year, outstripping the 1.2% growth rate of the general population; the proportion of people aged 60 and older increased from 8% in 1950 to 11% in 2009, and is expected to climb to 22% by 2050.³

The growing number of older persons is partly a result of the remarkable economic, medical, and technological progress achieved in the last century, but is primarily attributable to the baby boom experienced in the west between 1946 and 1965;⁴ Canada is no exception to this global trend.⁵ Comparing the 2006 and 2011 census results, Statistics Canada reports that the number of people aged 65 and older has increased by 14.1% and reached a record high of

¹ *World Population Ageing 2009*, UNITED NATIONS 10 (Dec. 2009), <https://www.un.org/en/development/desa/publications/world-population-ageing-2009.html>.

² *Id.* at 4–9.

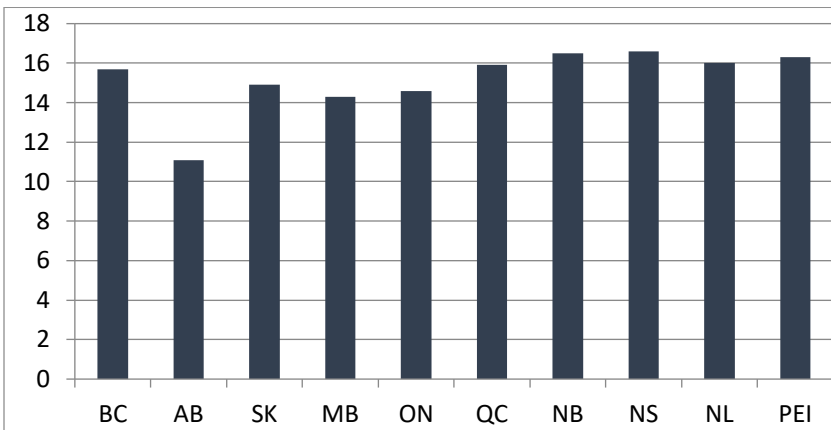
³ *Id.* at viii–ix.

⁴ *See id.* vii–xiii.

⁵ *See The Canadian Population in 2011: Age and Sex*, STATISTICS CAN. 5 (May 2012), <http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-311-x/98-311-x2011001-eng.pdf>.

14.8% of the Canadian population.⁶ Statistics Canada further reports that of all five-year birth cohorts, the 60 to 64 cohort is increasing the fastest—followed, in order, by people who are 100 and older, 85 to 89, 95 to 99 and 65 to 69—and that population aging will accelerate as the remainder of the boomers gradually turn 65.⁷

PROPORTION OF CANADIAN POPULATION AGED 65 AND
OVER
BY PERCENTAGE AND PROVINCE IN 2011⁸



The oldest of the baby boomers turned 65 in 2011 and the boomer cohort will not completely exit their early sixties until 2029.⁹ Waiting in the wings are: 2,300,081 Canadians who are aged 60 to 64; 2,635,245 who are aged 55 to 59; and 2,711,318 who are aged 50 to 54—compared to the 5,990,511 Canadians who are aged

⁶ *Id.* at 4.

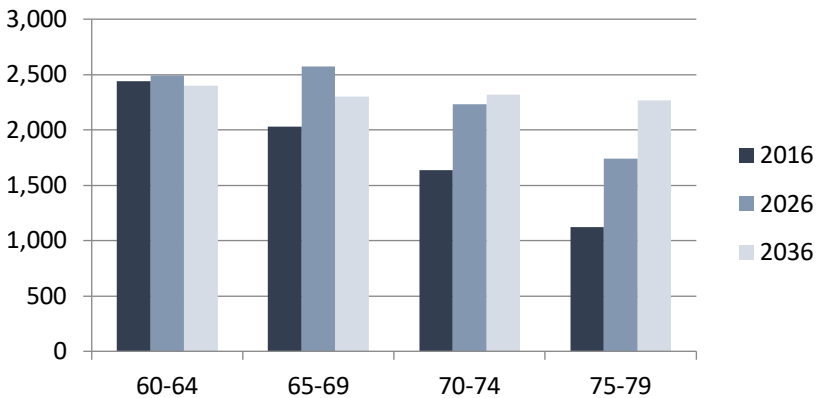
⁷ *See id.* at 5.

⁸ *Id.* at 11 fig.7.

⁹ *See id.* at 5.

65 and older.¹⁰ Projections accordingly anticipate a significant increase in the number of Canadians who are aged 65 and older through to 2036, with the number of those in the 75 to 79 age group doubling.¹¹

PROJECTED POPULATION BY AGE GROUP
(IN THOUSANDS)¹²



The aging of the Canadian population carries profound implications for the country's family justice system. Although some provinces, such as British Columbia, were fortunate enough to bring divorce legislation and divorce courts¹³ with them into

¹⁰ *Population Estimates on July 1, by Age and Sex*, STATISTICS CAN. tbl.17-10-0005-01, <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710000501> (last modified May 05, 2020) [hereinafter *Population Estimates*].

¹¹ *See id*; *Population Projections for Canada (2018 to 2068)*, STATISTICS CAN., <https://www150.statcan.gc.ca/n1/pub/91-520-x/2019001/sect02-eng.htm> (last modified Sept. 09, 2019).

¹² *Projected Population, by Projection Scenario, Age and Sex, as of July 1*, STATISTICS CAN. tbl. 17-10-0057-01, <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1710005701> (last modified May 05, 2020) (click "add/remove data," input the appropriate ages and years, and consider the "medium-growth projection").

¹³ *See Divorce and Matrimonial Causes Act*, S.B.C. 1897, c. 62 (amending *Divorce and Matrimonial Causes Act*, 1857, 20 & 21 Vict., c. 85).

Confederation,¹⁴ most provinces did not, and divorces were not generally available without passage of a private member's bill through Parliament.¹⁵ The federal Divorce Act, which established a court-based divorce process nationwide, became law in 1968, when the first of the baby boomers would have been 22 years old.¹⁶ As a result, the baby boomers are the first generation for whom the possibility of divorce was a normal part of their adult lives.

In the early years of the Divorce Act, divorce orders could not be made without proof of matrimonial misconduct ranging from adultery to abandonment,¹⁷ and the divorce rate was fairly low, at 135.17 divorces per 100,000 people in 1971.¹⁸ However, the switch to a no-fault approach in the 1985 Divorce Act,¹⁹ when the first boomers would have been 39 years old, triggered a surge in the

¹⁴ See An Act to Provide for the Government of British Columbia, 1858, 21 & 22 Vict., c. 99.

¹⁵ See Peter Ward, *History of Marriage and Divorce*, HISTORICA CAN. (Feb. 07, 2006), http://thecanadianencyclopedia.ca/en/article/history-of-marriage-and-divorce/?sessionid=-h3_jump_0 (last modified April 7, 2016).

¹⁶ Divorce Act, 16 Eliz. II, S.C. 1967–1968, c. 24.

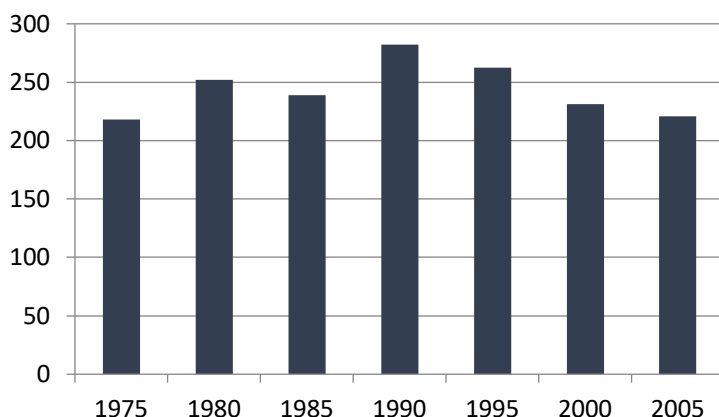
¹⁷ *Id.* Under the Divorce Act, a spouse could petition for divorce on the grounds that the other spouse: had committed adultery; had been guilty of sodomy, bestiality, rape or homosexual acts; had gone through a form of marriage with another person; or, had treated the petitioning spouse with mental or physical cruelty such that continued cohabitation was impossible. See *id.* § 3. Additionally, a spouse could petition for divorce on the ground of a “permanent breakdown of their marriage” on the basis that: the other spouse had been imprisoned or sentenced to imprisonment for certain periods; had been “grossly addicted” to alcohol or proscribed drugs; had abandoned the petitioning spouse for at least five years prior to the petition; was unable to consummate the marriage; or, the spouses lived separate and apart for at least three years. See *id.* § 4.

¹⁸ Anne Milan, Leslie-Anne Keown & Covadonga Robles Urquijo, *Families, Living Arrangements and Unpaid Work*, STATISTICS CAN. chart 6: *Crude Marriage Rate & Crude Divorce Rate, Canada, 1926–2008*, <https://www150.statcan.gc.ca/n1/pub/89-503-x/2010001/article/11546/c-g/c-g006-eng.htm> (last modified Nov. 30, 2015) (select “Description for Chart 6”).

¹⁹ Divorce Act, R.S.C., 1985, c. 3 (2d Supp.). Under the 1985 Act, the sole ground of divorce was marriage breakdown, which could be established on proof of: separation for at least one year; the adulterous conduct of the other spouse; or the other spouse's treatment of the petitioning spouse with mental or physical cruelty such that continued cohabitation was impossible. *Id.* § 8.

divorce rate to a high of 362.3 per 100,000 in 1987, following which the divorce rate crept slowly downward to a low of 217.8 per 100,000 in 2004.²⁰ In 2008, when Statistics Canada ceased collecting data from the Central Registry of Divorce Proceedings, the twenty-five-year total divorce rate—the proportion of marriages expected to have terminated by the twenty-fifth year—was projected to be approximately 38%, and the fifty-year divorce rate was projected to reach 43%.²¹

DIVORCE RATE PER 100,000 POPULATION²²



Although the overall divorce rate is generally declining, the growing population of people aged 60 and older means that more people in 2011 were divorced or separated than in 2006.²³

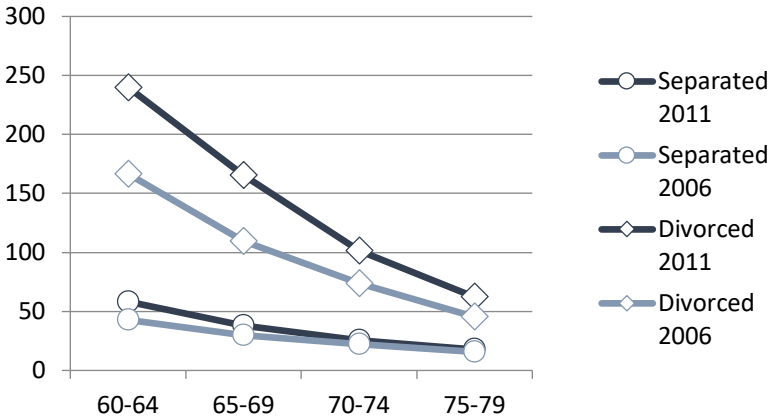
²⁰ *Vital Statistics—Divorce Database*, STATISTICS CAN. tbl. 39-10-0008-01, <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3910000801> (last modified May 05, 2020); see *Nuptiality & Divorce*, STATISTICS CAN. <https://www150.statcan.gc.ca/n1/pub/91-209-x/2004000/part1/divorce-eng.htm> (last modified Nov. 18, 2009).

²¹ Anne Milan, *Marital Status: Overview, 2011*, STATISTICS CAN. 13 (July 2013), <http://www.statcan.gc.ca/-pub/91-209-x/2013001/article/11788-eng.pdf>. The Registry is an agency of the federal Department of Justice, which keeps nationwide records of all divorce claims made in Canada after the 1968 Divorce Act came into effect. See *Vital Statistics—Divorce Database*, *supra* note 20.

²² Milan, Keown & Robles Urquijo, *supra* note 18.

²³ See *id.*

FAMILY STATUS BY AGE GROUP²⁴



However, not only are more older persons separated or divorced, more are forming new spousal relationships after separation or divorce: in 2011, 14% of those aged 65 and older had been married more than once and 19% had been involved in more than one union, either as married spouses or common-law partners.²⁵ People aged 55 to 64 were even more likely to have had two or more unions during their lifetimes.²⁶

Although most people divorce between ages 35 and 49, a significant number divorce later in life, and thus given the number

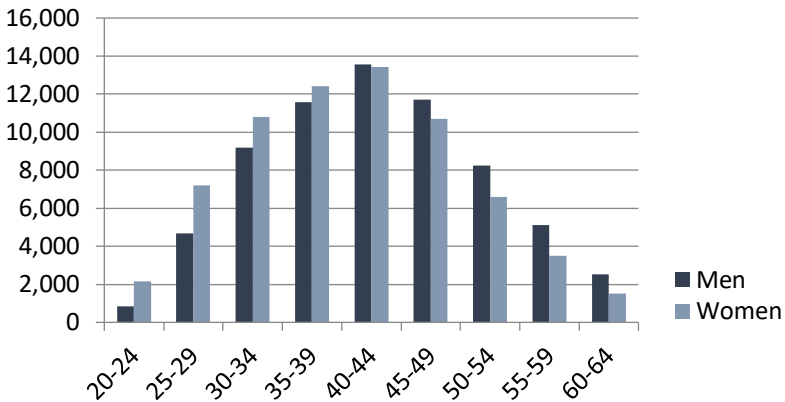
²⁴ See *2011 Census of Canada: Topic Based Tabulations*, STATISTICS CAN., <https://www12.statcan.gc.ca/census-recensement/2011/dp-pd/tbt-tt/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=1&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=1&PID=102092&PRID=0&PTYPE=101955&S=0&SHOWALL=0&SUB=0&Temporal=2011&THEME=89&VID=0&VNAMEE=&VNAMEF> (last modified Jan. 23, 2019) (input appropriate years and ages).

²⁵ Anne Milan, Irene Wong & Mireille Vézina, *Emerging Trends in Living Arrangements and Conjugal Unions for Current and Future Seniors*, STATISTICS CAN. 6 (Feb. 2014), <http://www.statcan.gc.ca/pub/75006x/2014001/article/11904-eng.pdf>.

²⁶ See *id.* at 7 fig.7.

of boomers still to turn 65, are yet to enter the family justice system for their divorce.²⁷

NUMBER OF DIVORCES BY AGE OF HUSBAND & WIFE (2004)²⁸



The economic consequences of an aging population, and the attendant pressure that will be applied to social security programs, are obvious and daunting.²⁹ This is especially true if governments are unable to shift people's expectations as to the date of their retirement from the workforce.³⁰ The social consequences may be

²⁷ See *Divorces, by Age of Husband and Wife at Divorce*, STATISTICS CAN. tbl. 39-10-0025-01, <http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=1016507> (select ages) (last modified May 04, 2020).

²⁸ *Id.*

²⁹ See Jason Clemens & Sasha Parvani, *Canada Must Prepare For Our Aging Population*, TORONTO SUN (Nov. 26, 2017), available at <https://www.fraserinstitute.org/article/canada-must-prepare-for-our-aging-population>.

³⁰ See *id.* When the Canada Pension Plan ("CPP," a public retirement benefit program roughly the equivalent of Social Security in the United States), was introduced by the Pearson government in 1965, see *infra* pt. III.A, the average life expectancy for men turning 65 that year, the age at which the full amount of benefits are payable, was around age 59, making the plan eminently affordable. See Lawson Greenberg & Claude Normandin, *Disparities in Life Expectancy at Birth*, STATISTICS CAN. 2 (Apr. 2011), <http://www.statcan.gc.ca/pub/82624x/2011001/article/11427-eng.pdf>. Men and women

less apparent: more people separating and divorcing later in life; living alone; requiring care and assistance with their day to day lives; and living with mental and physical disabilities.³¹ According to Statistics Canada, the functional health of most people declines rapidly after age 65, with severe disability occurring at about age 77 and the average person living with some level of disability for about ten and a half years.³² Making things worse, more people who are 65 and older live on diminished incomes or in poverty, particularly women and those living on their own.³³

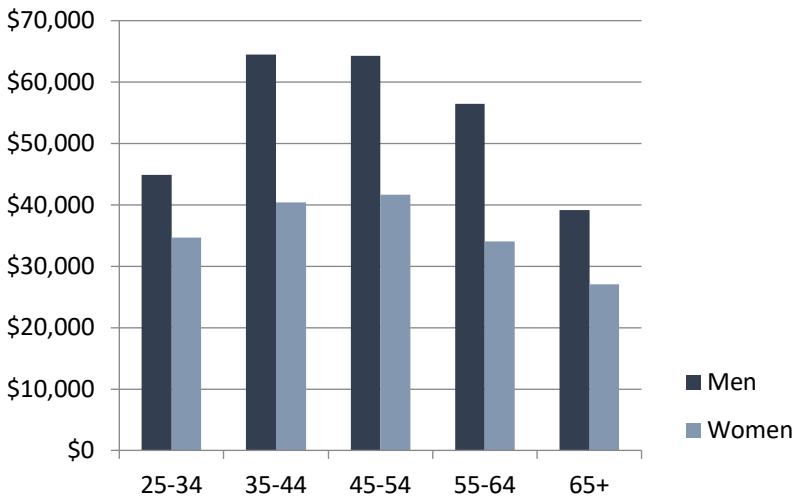
born in 2007, however, are projected to live to ages 78 and 83 respectively, and the most common age of death was as 85 in 2011. *See id.*; *Life Tables, Canada, Provinces and Territories 2005 to 2007*, STATISTICS CAN. tbl. 84-537-X, <https://www150.statcan.gc.ca/n1/en/catalogue/84-537-X> (last modified May 05, 2020); Yves Decady & Lawson Greenberg, *Ninety Years of Change in Life Expectancy*, STATISTICS CAN. 4 (July 2014), <http://www.statcan.gc.ca/pub/82-624-x/2014001/article/14009-eng.pdf>.

³¹ *See generally* Anthea Tinker, *The Social Implications of an Ageing Population*, 123 MECHANISMS OF AGEING & DEV. 729, 729–35 (2002).

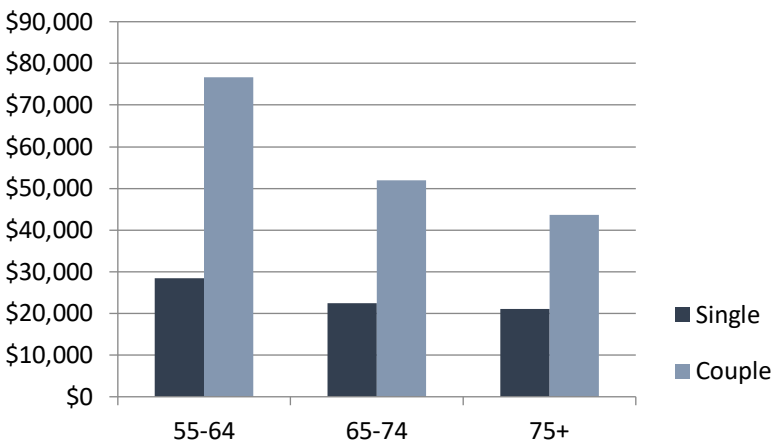
³² *See* Decady & Greenberg, *supra* note 30, at 7–8.

³³ *See Income of Individuals, by Sex, Age Group and Income Source*, STATISTICS CAN. tbl. 11-10-0159-01, <http://www5.statcan.gc.ca/cansim/pickchoisir?lang=eng&id=02020407&p2=33> (last modified May 04, 2020) [hereinafter *Income of Individuals*]; *Sources of Income of Senior Census Families by Family Type and Age of Older Partner, Parent or Individual*, STATISTICS CAN. tbl. 11-10-0053-01, <http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=1110034> (last modified May 04, 2020) [hereinafter *Sources of Income of Senior Census Families*].

AVERAGE INCOME BY AGE GROUP & SEX (2011)³⁴



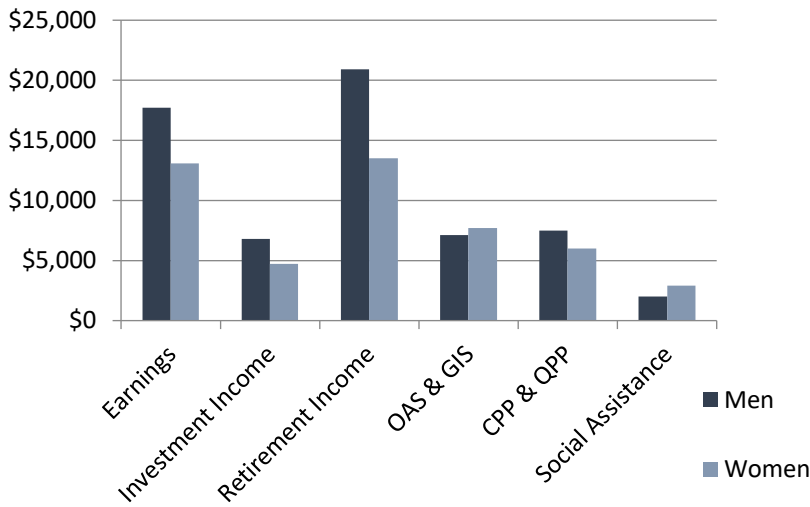
MEDIAN INCOME BY AGE GROUP & LIVING ARRANGEMENT
(2006)³⁵



³⁴ See *Income of Individuals*, *supra* note 33 (click “Add/Remove Data” and customize for age group).

³⁵ See *Sources of Income of Senior Census Families*, *supra* note 33.

INCOME OF PERSONS 65 AND OLDER BY SOURCE & GENDER
(2011)³⁶



OAS: Old Age Security
GIS: Guaranteed Income Supplement

CPP: Canada Pension Plan
QPP: Quebec Pension Plan

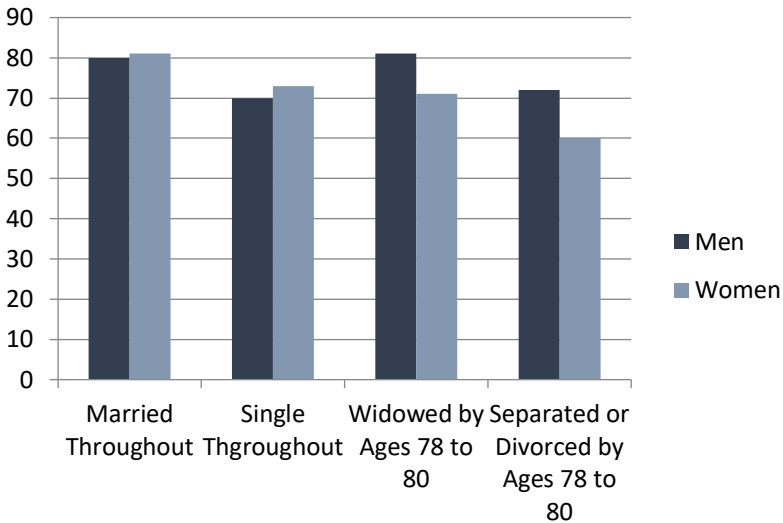
The financial impact of separation or divorce is more severe for older women than it is for older men.³⁷ A 2012 study conducted by Statistics Canada compared family income at ages 54 to 56 with income at ages 78 to 80 and found that separation or divorce has a

³⁶ See *id.* (click “Add/Remove Data” and select the 65 and older age group for the 2011 reference period).

³⁷ See Sébastien LaRoche-Côté et al., *Income Replacement Rates Among Canadian Seniors: The Effect of Widowhood and Divorce*, STATISTICS CAN. 6, (June 2012), <http://www.statcan.gc.ca/pub/11f0019m/11f0019m2012343-eng.pdf> [hereinafter *Income Replacement Rates*].

larger negative effect on income than being widowed.³⁸ Additionally, while separation or divorce had some effect on men's income, it has a far more significant impact on the income of women.³⁹

PROPORTION OF INCOME RECEIVED AT AGES 78–80 OF
INCOME RECEIVED AT AGES 54–56 (BY PERCENTAGE)⁴⁰



There are now more Canadians aged 65 and over than there have been at any previous time in Canadian history, and the proportion of older persons in the population is going to increase significantly in the coming years as 7,646,644 baby boomers leave their fifties and early sixties.⁴¹ The divorce rate in Canada rose markedly with the reforms introduced by the 1985 Divorce Act, when the first boomers

³⁸ *Id.*

³⁹ *See id.* at 13–14.

⁴⁰ *See id.* at 13, tbl. 2 *Replacement Rates by Marital Status, 1983 Cohort—Women* (see middle quintile).

⁴¹ *See Population Estimates, supra* note 10.

were entering the peak ages for divorce,⁴² and theirs is the first generation for whom divorce is a normal life event, relatively free of the stigma and opprobrium previous generations had associated with marriage breakdown.⁴³

As significant numbers of people are now divorcing later in life, the courts must expect an increasing volume of family law cases involving people aged 65 and older. Cases involving persons of retirement age raise concerns about the distribution of income and assets, some of which require a special attention to the needs of older women, who had lower incomes than men during their working lives and are disproportionately affected by separation and divorce.⁴⁴

III. Canadian Public Retirement Benefits

With the vast majority of Canadians divorcing between the ages of 30 and 49, courts and counsel are acclimated to cases involving at least one reliably employed spouse whose income is sometimes a factor in the division of property and can be relied upon as a source of support for a dependent spouse and any minor children.⁴⁵ The recipient spouse, barring any debility or unusual child care needs, is normally expected to take steps toward and eventually achieve financial independence in the many years remaining until his or her retirement.⁴⁶

Where spouses have separated later in life, however, neither is likely to have a robust stream of dependable employment earnings that can be relied upon for the indefinite future.⁴⁷ Such spouses are

⁴² See *Vital Statistics—Divorce Database*, *supra* note 20.

⁴³ See Thomas J. Abernathy, Jr. & Margaret E. Arcus, *The Law and Divorce in Canada*, 26 THE FAMILY COORDINATOR 409, 409–413 (1977).

⁴⁴ See *infra* pt. III.

⁴⁵ See *Divorces, by Age of Husband and Wife at Divorce*, *supra* note 27.

⁴⁶ See *Spousal Support Advisory Guidelines: The Revised User's Guide*, GOV'T OF CAN., https://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ug_a1-gu_a1/p18.html (last modified Sept. 06, 2016).

⁴⁷ See *Income Replacement Rates*, *supra* note 37, at 15–16.

more often living on reduced, fixed incomes in the form of private pensions and public government benefits, all types of income with which generalist benches and most family law counsel have little familiarity.⁴⁸ It is important that judges and family law attorneys have a basic familiarity with the various retirement benefits available to older persons, especially as to entitlement and quantum, first so that they may appreciate the very limited nature of the benefit income that will be available to the parties, and second so that they may make better informed decisions with respect to spousal support and the division of property.

In Canada, the two primary sources of benefits available to older persons are the CPP, a public plan that provides benefits linked to the individual recipient's contributions,⁴⁹ and Old Age Security ("OAS"), a social security program that provides a fixed schedule of benefits to persons age 65 and older.⁵⁰ Both are managed by the Ministry of Human Resources and Skills Development and run through Service Canada.⁵¹ These federal programs, like many others, are administered by the Canada Revenue Agency ("CRA").⁵²

⁴⁸ See *id.* Although unified family courts with specialist benches exist in pockets of the country, the majority of superior court judges are generalists and are expected to hear criminal and civil cases of all types.

⁴⁹ See *Canada Pension Plan—Overview*, GOV'T OF CAN., <https://www.canada.ca/en/services/benefits/publicpensions/cpp.html> (last modified Apr. 27, 2020). The CPP is the mandatory public pension plan administered throughout Canada, except in Québec, where the QPP applies. See *Canada Pension Plan/Quebec Pension Plan: A Helpful Guide to Government Income That May Be Available to You*, ROYAL BANK OF CAN. (2013), <https://contact.rbc.com/retirement/pdf/rbc-cpp-qpp-guide-e.pdf> (A worker's public pension plan contributions are made based on the place of employment, not the place of residence, as a result of which a worker may accumulate both CPP and QPP credits and potentially be entitled to pension benefits under both plans.).

⁵⁰ See *Old Age Security—Overview*, GOV'T OF CAN., <https://www.canada.ca/en/services/benefits/publicpensions/cpp/old-age-security.html> (last modified Apr. 28, 2020).

⁵¹ See *Service Canada*, GOV'T OF CAN., <https://www.canada.ca/en/employment-social-development/corporate/portfolio.html> (last updated Mar. 23, 2020).

⁵² See *Canada Revenue Agency*, GOV'T OF CAN., <http://www.cra-arc.gc.ca/menu-eng.html> (last Modified Feb. 24, 2020) (The CRA is Canada's tax agency.).

A. The Canada Pension Plan

CPP retirement benefits are authorized by the CPP and are available to anyone who has made at least one pensionable contribution from employment income.⁵³ Spouses and common-law partners who are living together may elect to pool and share their CPP benefits.⁵⁴ Spouses and partners who are separated may elect or be required to divide their accumulated CPP contributions.⁵⁵ CPP benefits include: a disability benefit; survivor's benefits available to spouses and to common-law partners who are cohabiting at the time of death; and a death benefit paid to the estate of deceased contributors.⁵⁶

CPP is funded by employee payroll deductions, based on a percentage of income up to a set income amount, with matching contributions from the employer.⁵⁷ The deduction rate and maximum insurable earnings amount varies from year to year. In 2019, the deduction rate was 4.95% to a maximum earnings limit of \$57,400.00, resulting in a maximum annual employee deduction and employer contribution of \$2,748.90 per year or \$229.08 per month.⁵⁸ Self-employed persons pay the employer's contribution, for a total deduction rate of 10.2% and a maximum contribution of \$5,497.80.⁵⁹

⁵³ Canada Pension Plan, R.S.C., 1985, c. C-8.

⁵⁴ *Id.* § 65(1). The length of time persons must cohabit to establish status as unmarried spouses or common-law partners varies according to the applicable legislation. *See id.* § 2(1). For the purpose of federal benefits, common-law partners are unmarried couples who have lived in a conjugal relationship for at least twelve continuous months. *Id.* Where benefits relate to the death of a person, the couple must have been living together at the time of the person's passing. *Id.*

⁵⁵ *Id.* § 55.1.

⁵⁶ *Id.* § 44.

⁵⁷ *Contributions to the Canada Pension Plan*, GOV'T OF CAN., <https://www.canada.ca/en/services/benefits/publicpensions/cpp/contributions.html> (last modified Dec. 28, 2018).

⁵⁸ *Id.*

⁵⁹ *Id.*

CPP benefits are taxable income reported in recipients' income tax returns.⁶⁰ Income tax is not deducted at source unless the recipient completes a *Request for Income Tax Deductions Form*,⁶¹ failing which taxes may be owing.⁶² CPP benefits are, however, not subject to deductions for further CPP contributions, or other government-levied premiums, such as for the national Employment Insurance Program or for provincial healthcare programs.⁶³

CPP benefits are income for purposes of the child support and spousal support calculations,⁶⁴ however as CPP pensionable contributions are divisible family property, attention must be paid to the potential for double recovery if a spouse is asked to pay spousal support on income derived from a pension that has already been split with the spouse seeking support.⁶⁵

1. *The Basic CPP Retirement Benefit*

The CPP retirement benefit is a monthly payment available in full at age 65.⁶⁶ Contributors may elect to begin receiving reduced

⁶⁰ *Canada Pension Plan—After You've Applied*, GOV'T OF CAN., <https://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-benefit/while-receiving.html> (last modified Apr. 29, 2020).

⁶¹ *Form Detail*, GOV'T OF CAN. (Mar. 24, 2020), <https://catalogue.servicecanada.gc.ca/content/EForms/en/Detail.html?Form=ISP3520CPP>

⁶² See *Canada Pension Plan—After You've Applied*, *supra* note 60.

⁶³ Employment Insurance Act, S.C., 1996, c. 23, § 19(4); see *Employment Insurance Benefits*, GOV'T OF CAN., <https://www.canada.ca/en/services/benefits/ei.html> (last modified March 20, 2020).

⁶⁴ Lump-sum death benefits and children's benefits available to the survivors of deceased CPP recipients are excepted. See Canadian Pension Plan, R.S.C., 1985, c. C-8, § 57–58.

⁶⁵ See *Abbott v. Abbott*, 2010 A.B.Q.B. 585, ¶ 45; *Chalmers v. Chalmers*, 2009 B.C.S.C. 517, ¶ 26; *Boston v. Boston*, [2001] S.C.C. 43, ¶ 65 (discussing briefly the circumstances in which double recovery might be permitted).

⁶⁶ See *Canada Pension Plan—How Much Could You Receive*, GOV'T OF CAN., <https://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-benefit/amount.html> (last modified March 21, 2020).

benefits as early as age 60,⁶⁷ and may receive increased benefits by delaying the commencement of benefits until as late as age 70.⁶⁸

The amount of the basic monthly benefit is roughly equivalent to 25% of the recipient's average monthly pensionable earnings,⁶⁹ subject to adjustments to accommodate contribution interruptions occasioned by parenting responsibilities, disability and so forth.⁷⁰ The benefit is adjusted every January to keep pace with increases in the cost of living, as measured by the Canadian Consumer Price Index.⁷¹ In 2020, the average monthly benefit paid was \$735.21 and the maximum potentially payable was \$1,175.83.⁷²

⁶⁷ Prior to 2012, persons wishing to take their pensions earlier than age 65 were required to meet a "work cessation test" and prove that they had stopped working or that their employment income was less than the monthly CPP maximum benefit, but as a result of changes introduced by the Economic Recovery Act, persons may begin drawing benefits when they wish, subject to a claw back of 0.6% of the recipient's maximum benefit per month before turning age 65. *See* Economic Recovery Act, S.C. (2009), c. 31, pt. II(d) (outlining amendments to the CPP). Under the new scheme, someone retiring at age 60 in 2016 will receive 36% ($7.2\% \times 5$ years) less than he or she would have received retiring at 65. *See id.*

⁶⁸ *See Old Age Security Pension*, GOV'T OF CAN., <https://www.canada.ca/en/employment-social-development/corporate/service-canada/reports/oas.html> (last modified Aug. 27, 2018). Further to the same changes, recipients who delay taking their benefits will receive up to payments of 0.7% of the recipient's maximum benefit per month after turning 65. *Id.* Someone retiring at age 70 in 2016 will receive 42% more than he or she would have received retiring at 65. *Id.*

⁶⁹ Canada Pension Plan, R.S.C., 1985, c. C-8, § 46. A recipient's total pensionable earnings are calculated using an incomprehensible formula. *See id.* § 51. Unadjusted pensionable earnings are calculated using a much simpler formula and are the lesser of the aggregate of the recipient's salary and wages for a year or the recipient's maximum contribution for that year. *See id.* § 53.

⁷⁰ In calculating the amount of a recipient's basic pension, the plan drops out: periods of no or low earnings while caring for children under the age of seven; periods of low earnings after age 65; periods when the recipient was eligible for CPP disability benefits; and, 17% of the recipient's lowest earning years. *See Canadian Retirement Income Calculator—Frequently Asked Questions About Canada Pension Plan*, GOV'T OF CAN., <https://srv111.serv-ices.gc.ca/cpp/faq> (last modified Jan. 07, 2020).

⁷¹ *Id.*

⁷² *Canada Pension Plan—How Much Could You Receive*, *supra* note 66.

2. *Survivors' Benefits*

CPP survivor's benefits consist of:

- a) a single lump-sum death benefit paid to the estate of the deceased contributor, in the maximum amount of \$2,500.00;⁷³
- b) a flat-rate monthly children's benefit paid to children until age 18, or until age 25 if in full-time attendance at school, in the amount of \$244.64 in 2018;⁷⁴ and
- c) an ongoing pension paid to the deceased contributor's surviving spouse or common-law partner, as a flat rate plus 37.5% of the deceased contributor's CPP retirement benefits where the survivor is between 45 and 65 years old,⁷⁵ or 60% of the contributor's benefits if the survivor is age 65 or older, subject to a reduction based on any CPP retirement benefits payable to the survivor.⁷⁶

Eligible surviving children must be the natural or adopted children of the deceased.⁷⁷ An eligible surviving spouse is the married spouse of a deceased contributor or the common-law partner of the contributor, providing that the partners were not separated at the time of the contributor's death.⁷⁸

⁷³ Canada Pension Plan, R.S.C., 1985, c. C-8, § 57(1.1).

⁷⁴ *Id.* § 42(1); see *Annual Report of the Canada Pension Plan for Fiscal Year 2017–2018*, GOV'T OF CAN., <https://www.canada.ca/en/employment-socialdevelopment/programs/pensions/reports/annual-2018.html> (last modified May 08, 2019) (Payments cease when the child stops attending full-time school or turns 25, whichever occurs earlier.).

⁷⁵ Canada Pension Plan, R.S.C., 1985, c. C-8, § 58(1)(a).

⁷⁶ *Id.* § 58(1)(b), (2).

⁷⁷ *Id.* § 42(1).

⁷⁸ *Id.*

In 2019, the average death benefit paid was \$2,394.67 and the maximum potentially payable was \$2,500.⁷⁹ The average survivor's pension paid to persons younger than 65 was \$439.37 per month, with a maximum payment of \$626.63; the average paid to persons 65 and older was \$311.99 per month, with a maximum payment of \$692.75.⁸⁰

3. *Sharing Retirement Benefits*

Spouses and cohabiting common-law partners who are both 60 years old or older may apply to assign their CPP retirement benefits between themselves, thereby reducing their collective tax burden.⁸¹ Where only one person was a CPP contributor, the contributor's benefits will be divided;⁸² where both were contributors, the pensions accumulating during the period of the parties' cohabitation are equalized (the gross amount payable under either circumstance is the same as if the benefits had not been assigned).⁸³

4. *Splitting Pensionable Credits*

Spouses and common-law partners may apply to have the pensionable credits accumulating during the period of their cohabitation equalized between them.⁸⁴ Spouses may apply on the making of a divorce order or a declaration of nullity, or earlier upon the first anniversary of their separation;⁸⁵ common-law partners may apply upon the first anniversary of their separation and must apply

⁷⁹ *Canada Pension Plan—How Much Could You Receive*, *supra* note 66.

⁸⁰ *Id.*

⁸¹ *Canada Pension Plan*, R.S.C., 1985, c. C-8, § 65.1(1).

⁸² *Id.* § 65.1(7).

⁸³ *Id.* § 65.1(9).

⁸⁴ *Id.* § 55.1(4).

⁸⁵ *Id.* § 55.1(1)(a)–(b).

within four years of separation, after which the former partner's consent is required.⁸⁶

The splitting of CPP credits is mandatory upon the application of a spouse or a common-law partner within the prescribed time periods.⁸⁷ The Canada Pension Plan provides that the minister is not bound by the directions of a court order or written agreement as to the division (or not) of pensionable credits, unless:

- a) provincial legislation expressly permits parties not to equalize their pensionable credits; and
- b) an agreement between the parties "contains a provision that expressly mentions this Act and indicates the intention of the persons that there be no division of unadjusted pensionable earnings under section 55 or 55.1."⁸⁸

At present, the only provinces with such legislation are Alberta,⁸⁹ British Columbia,⁹⁰ and Saskatchewan.⁹¹

B. Old Age Security

OAS benefits⁹² are authorized by the Old Age Security Act⁹³ and are presently available to Canadian citizens and residents who are 65 years of age or older.⁹⁴ OAS benefits include the Guaranteed Income Supplement ("GIS"), an allowance available to the married spouses and common-law partners of OAS recipients, and a survivor's allowance available to the spouses and partners of

⁸⁶ *Id.* § 55.1(1)(c).

⁸⁷ *Id.* § 55.1(1).

⁸⁸ *Id.* § 55.2(2)–(3).

⁸⁹ *Family Law Act*, S.A., 2003, c. F-4.5, § 82.2.

⁹⁰ *Family Law Act*, S.B.C., 2011, c. 25, § 127(2).

⁹¹ *Family Property Act*, S.S., 1997, c. F-6.3, § 38(5).

⁹² *See Old Age Security—Overview*, *supra* note 50.

⁹³ *Old Age Security Act*, R.S.C., 1985, c. O-9.

⁹⁴ *Id.* § 3(1). OAS is funded from the federal government's general revenue and does not require direct contributions from recipients. *See Old Age Security—Overview*, *supra* note 50.

deceased recipients.⁹⁵ All OAS benefits are adjusted every quarter⁹⁶ to keep pace with increases in the cost of living as measured by the Canadian Consumer Price Index.⁹⁷

The basic OAS pension is taxable income reported in recipients' income tax returns, as are GIS benefits and allowance income.⁹⁸ Income tax is not deducted at source unless the recipient completes a Request for Income Tax Deductions Form;⁹⁹ OAS pension payments are not subject to government-levied premiums, such as for CPP or the Employment Insurance Program,¹⁰⁰ or for provincial health care programs.

With a limited exception relating to the spousal allowance, OAS benefits are income for purposes of both child support and spousal support.¹⁰¹

1. *The Basic OAS Pension*

The basic OAS pension is paid monthly and indexed to income.¹⁰² It is available to persons who have lived in Canada for at least 40 years after age 18 and have an income of less than

⁹⁵ *Id.*

⁹⁶ Old Age Security Act, R.S.C., 1985, c. O-9, § 7(2).

⁹⁷ *Id.* § 27.

⁹⁸ *Id.*

⁹⁹ *Income Tax Deductions, Request For*, GOV'T OF CAN., <https://catalogue.servicecanada.gc.ca/content/EForms/en/Detail.html?Form=ISP3520CPP> (last modified June 22, 2017).

¹⁰⁰ *Old Age Security Amounts and the Consumer Price Index*, GOV'T OF CAN., <https://www.canada.ca/en/services/benefits/publicpensions/cpp/old-age-security/oas-price.html> (last updated Mar. 27, 2020).

¹⁰¹ *Id.*

¹⁰² *See Employment Insurance Benefits*, GOV'T OF CAN., <https://www.canada.ca/en/services/benefits/ei.html> (last modified May 04, 2020).

\$128,137;¹⁰³ persons who do not meet the residency requirement but have lived in Canada for at least 10 years after turning 18 will be eligible for a partial pension equal to the full pension reduced by one-fortieth (0.025%) for each year of their residence in Canada less than 40 years.¹⁰⁴ OAS is not available to persons incarcerated in a federal penitentiary or living outside of Canada who had lived in Canada for less than 20 years.¹⁰⁵

In April 2020, the maximum potentially payable was \$613.53.¹⁰⁶ Persons eligible for OAS benefits may defer receipt until age 70 in exchange for modestly higher benefits thereafter.¹⁰⁷

2. *The Guaranteed Income Supplement*

The Guaranteed Income Supplement (“GIS”)¹⁰⁸ is a monthly non-taxable benefit available to OAS recipients with combined family incomes below the following amounts in 2020:

¹⁰³ See *Old Age Security Payment Amounts*, GOV’T OF CAN., <http://www.esdc.gc.ca/en/cpp/oas/payments.page> (reflecting the maximum annual income amount as of March 27, 2020); *Old Age Security Amounts and the Consumer Price Index*, *supra* note 100. Other periods of residency may also qualify an applicant for the full pension. See *Old Age Security Pension*, *supra* note 68.

¹⁰⁴ Old Age Security Act, R.S.C, 1985, c. O-9, § 3(2). Any amount repayable is entered at T1 Line 422 in the calculation of total income tax payable. See *Line 42200—Social Benefits Repayment*, GOV’T OF CAN., <http://www.cra-arc.gc.ca/tx/ndvdl/tpcs/ncm-tx/rtrn/cmpltng/ddctns/Ins409-485/422-eng.html> (last updated Jan. 21, 2020); see also *Line 23500—Old Age Security (OAS) Benefits Repayment*, GOV’T OF CAN., <https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/deductions-credits-expenses/line-23500-social-benefits-repayment/line-23500-old-security-oas-benefits-repayment.html> (last updated Jan. 21, 2020).

¹⁰⁵ Old Age Security Act, R.S.C, 1985, c. O-9, § 5.

¹⁰⁶ *Old Age Security—How Much Could You Receive*, *supra* note 66 (select benefits).

¹⁰⁷ *Old Age Security—Eligibility*, GOV’T OF CAN., <http://www.esdc.gc.ca/en/cpp/oas/eligibility.page> (last modified Apr. 28, 2020) (Recipients who delay taking their benefits will receive a top up payment of 0.6% of the recipient’s per month after turning 65 and those who defer benefits until age 70 in 2016 will receive 36% more than he or she would have received taking benefits at 65.).

¹⁰⁸ *Guaranteed Income Supplement—Overview*, GOV’T OF CAN., <http://www.esdc.gc.ca/en/cpp/oas/gis/index.page> (last modified Apr. 28, 2020).

- a) \$18,600, for single, widowed, or divorced recipients;
- b) \$24,576.00, for couples who are both receiving OAS pensions; or
- c) \$44,592.00, for couples of whom only the recipient is receiving an OAS pension.¹⁰⁹

Family income is calculated excluding OAS benefits, and certain other benefits,¹¹⁰ but including income from CPP retirement benefits, private pension plan benefits, registered retirement savings income,¹¹¹ interest on savings, and so forth.¹¹² The GIS is reduced for non-OAS income in excess of \$3,500.00 per year.¹¹³

In 2020, the maximum monthly GIS benefits payable were as follows:

- a) single, widowed or divorced, \$916.38;
- b) couple, spouse eligible for OAS pension, \$551.63;
- c) couple, spouse not receiving OAS pension, \$916.38; and
- d) couple, spouse receiving OAS allowance, \$551.63.¹¹⁴

¹⁰⁹ See *Old Age Security Payment Amounts*, *supra* note 103.

¹¹⁰ *Old Age Security Act*, R.S.C., 1985, c. O-9, § 13.

¹¹¹ Registered Retirement Savings Plans are Canadian pension accounts similar to 401(k) plans in the United States.

¹¹² *Old Age Security Act*, R.S.C., 1985, c. O-9, § 2.

¹¹³ This amount is subject to increase to \$5,000 beginning in July 2020. *Old Age Security—How Much Could You Receive*, *supra* note 59.

¹¹⁴ *Old Age Security Payment Amounts*, *supra* note 103.

3. *The Spousal Allowance*

The spousal allowance¹¹⁵ is a monthly benefit available to persons who are Canadian citizens or reside in Canada,¹¹⁶ and whose married spouse or common-law partner is eligible for both the basic OAS pension and GIS benefits.¹¹⁷ Eligible recipients must be 60 to 64 years of age (and therefore be ineligible for OAS benefits themselves), and have lived in Canada for at least 10 years after turning 18.¹¹⁸

The amount payable, if any, is indexed to the family's combined income from all sources other than OAS to a maximum of \$34,416.16.¹¹⁹ In 2020, the maximum monthly benefit was \$1,165.90.¹²⁰

4. *The Survivor's Allowance*

The survivor's allowance¹²¹ is a monthly benefit available to persons whose married spouse or common-law partner has died and who have not entered into a new married or common-law relationship.¹²² Eligible recipients must be Canadian citizens or legal residents,¹²³ be 60 to 64 years of age, and have lived in Canada for at least 10 years after turning 18.¹²⁴ The amount payable, if any, is indexed to the recipient's income from all sources other than OAS

¹¹⁵ *Allowance for People Aged 60 to 64—Overview*, GOV'T OF CAN., <http://www.esdc.gc.ca/en/cpp/oas/allowance/index.page> (last modified Oct. 10, 2016).

¹¹⁶ *Old Age Security Act*, R.S.C., 1985, c. O-9, § 19(2).

¹¹⁷ *Id.* § 19(1).

¹¹⁸ *Id.*

¹¹⁹ *Old Age Security Payment Amounts*, *supra* note 103.

¹²⁰ *Id.*

¹²¹ *Allowance for the Survivor*, GOV'T OF CAN., <https://www.canada.ca/en/services/benefits/publicpensions/cpp/old-age-security/guaranteed-income-supplement/allowance-survivor.html> (last modified Sept. 10, 2018).

¹²² *Old Age Security Act*, R.S.C., 1985, c. O-9, § 21(1).

¹²³ *Id.* § 21(2).

¹²⁴ *Id.* § 21(1).

to a maximum of \$25,056.00. In 2020, the maximum monthly benefit was \$1,388.92.¹²⁵

IV. Spousal Support and Retirement

There is no legal requirement in Canada that one be or become gainfully employed,¹²⁶ although life will doubtless prove extremely difficult for anyone choosing not to who cannot count themselves among the indolent rich. There is similarly no legal requirement that someone who is gainfully employed remain in that condition until death, and accordingly most Canadians expect to retire at some point in their lives. However, making the choice to retire and deciding when to retire, usually depends on people's ongoing ability to maintain themselves and their dependents.

When a couple is separating later in life, questions about their independence and future support become a great deal more complicated, primarily because living together is highly cost-effective while living apart is not. The family income that may have been sufficient to cover one mortgage, one telephone bill, one gas bill, one cable bill and one grocery bill may not suffice to cover two sets of living expenses, particularly when the cost of continuing health care is taken into account. Situations like this raise two difficult possibilities:

- a) that a cohabiting couple may be unable to separate and live apart, particularly if the family is living on a fixed income, has unusually high debt obligations or unusually high health care expenses; or

¹²⁵ *Old Age Security Payment Amounts*, *supra* note 103.

¹²⁶ Subject, of course, to the obligations set out in section 215 of the Criminal Code. R.S.C. 1985, c. C-46.

- b) that, in the case of both separated and cohabiting couples, a spouse may be unable to retire, whether the spouse wishes to retire or not.

The first scenario may have a significant and undesirable impact on the parties' quality of life; it may be intolerable in the event family violence is a factor. Before deciding that a couple has no choice but to "live apart together," a choice that Statistics Canada says is made by about 1 in 13 Canadians,¹²⁷ the parties and their counsel should review the sources of income actually and potentially available to the family, especially the federal benefits available to older persons, as the rates available to single or separated persons are generally higher than those available to couples. Individuals who are eligible for CPP but have deferred drawing benefits may be unable to continue delaying payment; if CPP benefits are being paid, equalizing the parties' pensions will benefit the spouse drawing less. Matured private pensions should likely be split between the parties, and the administrators of unmatured plans should be contacted to assess the impact of early payments. The division of retirement savings accounts and other retirement planning accounts should be considered,¹²⁸ as should the possibility of converting some of the matrimonial property into to an annuity.

The second scenario, however, pits an income-earning spouse's entitlement to choose to retire against his or her obligation to provide for the needs of the other spouse, and it is this scenario that the present section of this Article addresses. It may be the case that an income-earning spouse simply cannot retire without wreaking financial havoc on both parties and must, as a consequence, remain in the workforce.

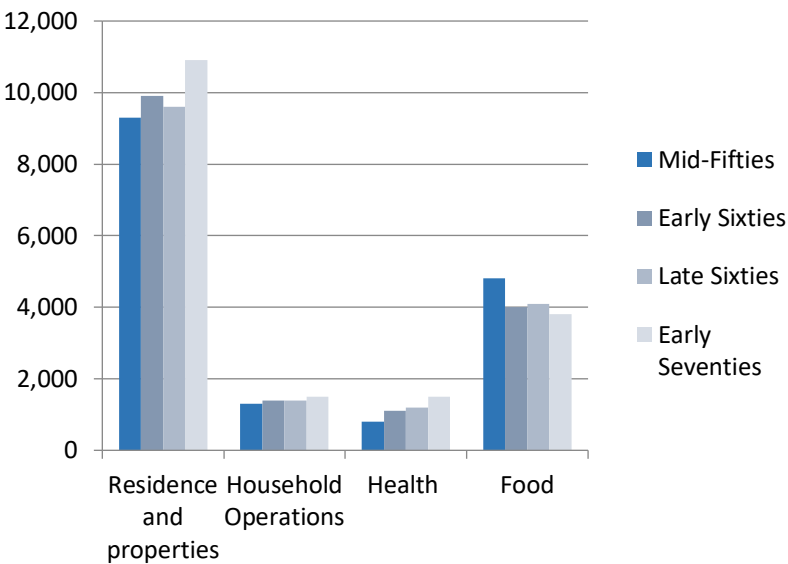
¹²⁷ Martin Turcotte, *Living Apart Together*, STATISTICS CAN. 2 (Mar. 2013), <http://www.statcan.gc.ca/pub/75-006-x/2013001/article/11771-eng.pdf>.

¹²⁸ The primary private retirement savings vehicles in Canada are Registered Retirement Savings Plans and Tax-Free Savings Accounts, both of which incentivize contributions through tax breaks, either on the income contributed (RRSPs) or on the interest earned (TFsas).

A. Income and Expenses Later in Life

Although many expenses typically diminish as people age, such as the amount spent on food, alcohol, tobacco, and recreation, other expenses increase, most notably the cost of health care and maintaining a home.¹²⁹

AVERAGE CONSUMPTION PATTERNS BY AGE GROUP (IN 2002
DOLLARS)¹³⁰

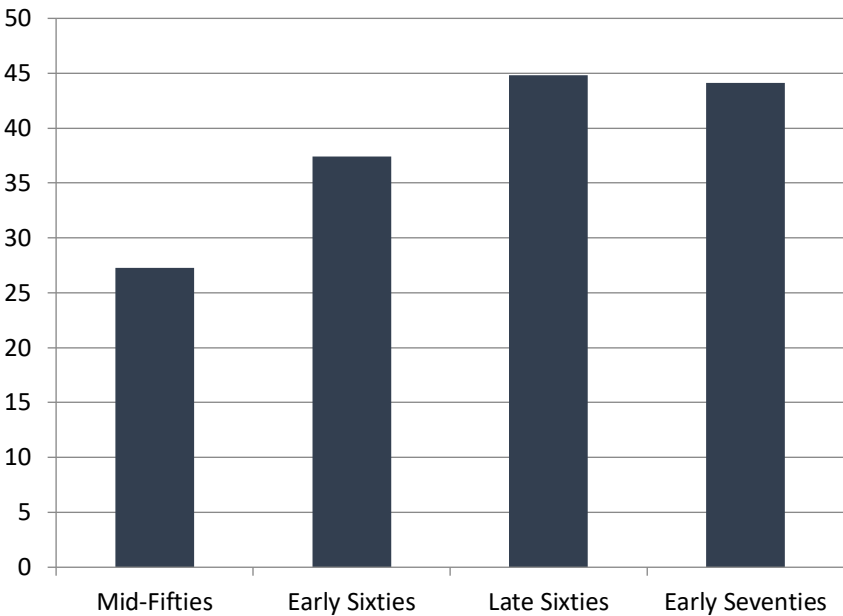


¹²⁹ See Amélie Lafrance & Sébastien LaRoche-Côté, *Consumption Patterns Among Aging Canadians*, STATISTICS CAN. 24 tbl. 5 (Mar. 2011), <http://www.statcan.gc.ca/pub/11f0027m/11f0027m2011067-eng.pdf>.

¹³⁰ *Id.*

However, when the decreasing income of older persons is taken into account, the number of households that spend more than they earn correlates with increasing age.¹³¹

HOUSEHOLDS WITH INCOME LESS THAN CONSUMPTION BY AGE
GROUP (BY PERCENTAGE)¹³²



B. The Reasonableness of Retirement

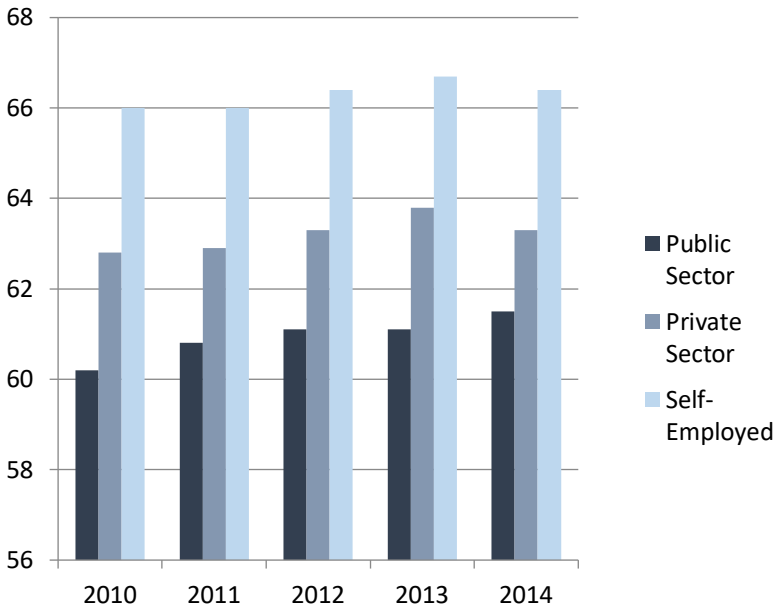
The ability of an income-earning spouse to retire usually rests on the reasonableness of that decision in light of the income and income-earning assets available to the couple and the cost of the spouses' current and foreseeable expenses. Statistically speaking, most Canadians retire at some point between age 61 and age 66,

¹³¹ *Id.* at 21 tbl. 3.

¹³² *Id.*

depending on the nature of their employment;¹³³ however, while the average age of retirement may cast light on the reasonableness of an individual's decision to retire, the behaviour of Canadians taken as a whole is rarely relevant to the circumstances of the particular family before the court following separation.

AVERAGE AGE OF RETIREMENT BY CLASS OF WORKER¹³⁴



Unfortunately, from the point of view of non-income-earning spouses, the general trend in the law is to the effect that the court will not look behind a spouse's decision to retire unless there is

¹³³ *Retirement Age by Class of Worker and Sex*, STATISTICS CAN. tbl. 14-10-0060-01, <http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2820051&pattern=282-0047..282-0051&tabMode=dataTable&srchLan=-1&p1=-1&p2=31> (last modified April 2, 2020).

¹³⁴ *Id.*

evidence that the decision is made in bad faith or, in a somewhat contrary line of authorities, was voluntary.¹³⁵ In *Ross v. Ross*, a 1994 decision of the British Columbia Court of Appeal, the court considered the circumstances of a 71-year-old payor of spousal support who sought to retire.¹³⁶ The termination of his support payments to his 70-year-old former spouse would force her to sell her condominium, while requiring the payments to continue would force him to continue working.¹³⁷ The court held that:

The fundamental question in this case is whether the fact that Mr. Ross is still capable of working at age 71 is a circumstance that should cause this Court to order that he pay maintenance to Mrs. Ross in a situation where if he does not work their incomes from pensions are equal and she has significantly more in capital assets than he does.

In my opinion, the law does not require Mr. Ross to continue to work after age 71 in order to permit Mrs. Ross to retain her condominium. Mr. Ross may well have a continuing capacity to work at age 71 but neither sub-section 61(2) nor 62(1) of the *Family Relations Act* requires this Court to make an order that would compel him to work by requiring him to pay maintenance to the point that he could not survive on his income without working.¹³⁸

¹³⁵ See generally *Ross v. Ross*, 1994 CanLII 1322 (B.C.C.A.).

¹³⁶ *Id.* ¶ 2.

¹³⁷ *Id.* ¶ 10.

¹³⁸ *Id.* ¶¶ 15–16.

Although the court perhaps cannot compel a party to continue to work,¹³⁹ it may consider the reasonableness of a person's decision to retire to determine whether the decision to retire, and the financial impact of that decision, is a change in circumstances supporting an

¹³⁹ See *Mirza v. Mirza*, 2006 CanLII 362, ¶ 48 (B.C.C.A.); *Vaughan v. Vaughan*, 2014 CanLII 6, ¶ 62 (N.B.C.A.); *Powell v. Levesque*, 2014 CanLII 33, ¶ 37 (B.C.C.A.). However, see also *Bostrom v. Bostrom* 1996 CanLII 1678, ¶¶ 12–13 (B.C.C.A.) in which, in the context of a child support obligation, the court held:

The husband has urged that he has worked for a total of 41 years, and at his age he is entitled to semi-retire. I am not persuaded to that view. This is a man who rather late in life had two daughters, both of whom are now teenagers. He cannot shun his responsibilities to the two daughters and actively take semi-retirement with those obligations outstanding.

In *Wyman v. Wyman*, 1999 CanLII 2272, ¶ 8 (N.S.C.A.), the payor's retirement income was insufficient to meet his needs, those of his current wife and those of his former wife. The court offered these comments:

The pension income which will take effect next August is substantially less. So long as Mr. Wyman and his first wife consider themselves retired from the work force, all three will be forced to exist well below the poverty line. It is unrealistic to consider that Mr. Wyman, an unemployed sixty-year-old radio executive living in a small town, could find employment at anything approaching his previous income. But both he and the first Mrs. Wyman appear personable and intelligent and should be employable in some situations, such as sales, at least until they are sixty-five. A small additional income could make a large difference. Both should be seeking work.

The court provided a similar direction in somewhat stronger terms in *Bellemare v. Bellemare*, 1990 CanLII 2605, ¶ 32 (N.S.C.A.), a case in which the payor was in good health and had retired from the military at the age of 42 after twenty-five years of service:

I am satisfied that the husband, if properly motivated, will find employment adequate to produce a total income, together with pension, at least equal to the income which he enjoyed while a member of the Canadian Armed Forces and most likely he will obtain additional income which results in a gross annual income in excess of that which he enjoyed before his unilateral termination. He would require employment at an annualized rate of only about \$22,500.00 with pension to equal his previous income. Given his skills I find this is well within his capacity.

application to vary a support obligation.¹⁴⁰ In *Lemoine v. Lemoine*, a decision of the New Brunswick Court of Appeal from 1997, the court held that the “first question” that must be addressed on the retired payor’s appeal of the dismissal of his variation application is “whether the early retirement of Mr. LeMoine constituted a material change in his circumstances sufficient to form the basis for a consideration of a Variation Order pursuant to subsection 17(4) of the Divorce Act.”¹⁴¹

1. *Bad Faith*

In *Vennels v. Vennels*, a 1993 case of the British Columbia Supreme Court, a 55-year-old payor of spousal support accepted an offer of early retirement made by his employer as part of a down-sizing effort and subsequently sought to reduce his support payments.¹⁴² Concluding that the payor’s application was not motivated by an intention to avoid the support order, the court considered his retirement to be a material change in circumstances within the meaning of section 17(4) of the Divorce Act (now section 17(4.1)), for the purposes of his variation application.¹⁴³ Likewise, in *Powell v. Levesque*, a recent decision of the Court of Appeal for British Columbia, the court in determining that the payor’s retirement constituted a change in circumstances, held:

The evidence did not support the judge’s finding that the appellant took early retirement. Nor was there any evidence that the appellant chose to retire in order to avoid her support obligation or any of her other financial commitments under the Consent Order, all of which she had met.¹⁴⁴

¹⁴⁰ R.P. v. R.C., 2011 CanLII 819, ¶ 4 (S.C.R.); Rondeau v. Rondeau, 2011 CanLII 5, ¶ 32 (N.S.C.A.).

¹⁴¹ 1997 CanLII 952, ¶ 10 (N.B.C.A.).

¹⁴² 1993 CanLII 446, ¶ 16 (B.C.S.C.).

¹⁴³ *Id.* ¶ 44.

¹⁴⁴ 2014 CanLII 33, ¶ 34.

The court in *Lemoine* cited *Ross* and *Vennels* for the conclusion that “generally, a supporting spouse cannot be required to continue working. It is only when a spouse is acting in bad faith in order to frustrate the right of a former spouse to support that the Court should look behind the decision to retire.”¹⁴⁵

It follows that a decision to reduce one’s workload or retire made in good faith should usually support a conclusion that a material change in circumstances has occurred for the purposes of a variation application,¹⁴⁶ particularly if all parties are aware of the income-earning spouse’s intention to retire early,¹⁴⁷ or if the spouse’s retirement was anticipated or foreseeable.¹⁴⁸

In *J.F. v. F.F.*, a decision of the Alberta Court of Appeal from 1989, the payor’s decision to retire at age 65 to avoid the further garnishment of his paycheck in satisfaction of his arrears of spousal support was found not to constitute a change in circumstances despite his impoverishment, a decision bolstered by the payor’s subsequent failure to return to gainful employment.¹⁴⁹ The court observed:

There is no evidence that J.F. sought any paid employment or made any attempt to return to his prior real estate work. Thus, his apparent impecunious status arises not from any adverse circumstances beyond his control but relates directly to his own decision to retire from paid employment but continue to work for his second wife on almost a full-time basis without any direct remuneration.¹⁵⁰

¹⁴⁵ 1997 CanLII 952, ¶ 10.

¹⁴⁶ See e.g., *P.M. v. S.M.*, 2011 CanLII 126, ¶ 98 (S.K.B.Q.).

¹⁴⁷ See *Beck v. Beckett*, 2011 CanLII 559, ¶ 10 (O.N.C.A.); *Cramer v. Cramer*, 2000 CanLII 272, ¶¶ 6–7 (B.C.C.A.).

¹⁴⁸ See *Matthews v. Matthews*, 1990 CanLII 1474, ¶¶ 10–12 (B.C.C.A.).

¹⁴⁹ CanLII 306, ¶¶ 4–6.

¹⁵⁰ *Id.* ¶ 6.

In *MacLanders v. MacLanders*, a 2012 decision of the British Columbia Court of Appeal, the retirement of a payor of spousal support was found not to constitute a material change where the payor had intended to retire but failed to disclose his plans at trial, on the basis that the change in circumstances was known to him at the time of the trial, after applying the test enunciated by the Supreme Court of Canada in *Willick v. Willick*.¹⁵¹

Note that a decision to retire made in bad faith, for the purpose of avoiding a spousal support obligation can also be used to support the imputation of income to a potential payor at trial.¹⁵² In *Jordan v. Jordan*, a 2011 case of the British Columbia Court of Appeal, the payor's decision to sell a profitable business and take less remunerative work and "retire, or at the very least, to semi-retire," dictated neither by economic or medical reasons but motivated by a wish to escape a spousal support obligation, resulted in the court imputing income to the payor.¹⁵³

2. *Reaching Eligibility for Full Retirement Benefits*

It is not, however, always unreasonable for a payor to retire once he or she becomes eligible for a pension, even though the payor is younger than the typical age of retirement and able to continue working. In *Powell*, the court cited *Ross* for the proposition that "the law does not require payor spouses to maintain spousal support at a level that forces them to continue to work after becoming eligible for full retirement benefits."¹⁵⁴

Accordingly, the court considered the appellant's retirement at the age of 44, after completing 25 years of service in the military and becoming eligible for full benefits, to be a material change in

¹⁵¹ 1994 CanLII 28 (S.C.C.).

¹⁵² See *Teeple v. Teeple* 1999 CanLII 3127, ¶ 5 (O.N.C.A.).

¹⁵³ CanLII 518, ¶¶ 48–52, 60.

¹⁵⁴ 2014 CanLII 33, ¶ 33.

circumstances supporting an application to vary her spousal support obligation.¹⁵⁵

3. *Voluntary Decisions to Retire*

In *Morton v. Morton*, a decision of the Saskatchewan Court of Appeal from 2005, a payor of spousal support sought to vary his support obligation following his decision to take a reduced workload at age 57 and retire fully at age 60.¹⁵⁶ Upholding the chambers judge's decision that the payor's decision to retire did not constitute a change in circumstances, the court commented that, notwithstanding the conclusion in *Lemoine*:

Retirement issues of this kind must be resolved by reference to the particular circumstances of each case. In this appeal, those circumstances include: (a) the appellant's retirement is wholly voluntary and not forced by illness, declining competency or uncertain employment prospects; (b) the appellant was 57 when he decided to semi-retire.¹⁵⁷

Likewise, in *Sangster v. Sangster*, a recent judgment of the New Brunswick Court of Appeal, the court upheld the chambers judge's conclusion that the payor's decision to take early, voluntary retirement at age 56 did not constitute a change in circumstances without evidence as to the reason for his retirement.¹⁵⁸ In *Chase v. Chase*, a 2013 judgment of the Alberta Court of Appeal, the payor's voluntary retirement at age 60 on the basis of medical reasons was

¹⁵⁵ *Id.* ¶ 37; *but see* *Cossette v. Cossette*, 2015 CanLII 2687, ¶¶ 12–13 (O.N.S.C.) (concluding to the contrary).

¹⁵⁶ CanLII 133, ¶ 7.

¹⁵⁷ *Id.* ¶ 8.

¹⁵⁸ 2014 CanLII 14, ¶¶ 1, 9 (N.B.C.A.)

found not to constitute a change in circumstances without evidence to support the claimed medical reasons.¹⁵⁹

On the other hand, in *Stroud v. Stroud*, a decision of the British Columbia Court of Appeal from 1996, the court held that an involuntary retirement which “unexpectedly and materially altered” the payor’s capacity to pay spousal support is a material change sufficient to consider the variation of a consent order.¹⁶⁰

C. Options for the Court

The stream of income of an older couple in straitened financial circumstances can rarely be increased other than by working longer and harder, which is plainly not the result sought by a person seeking to retire. If the family is living on a fixed income, the family’s net income will rarely be increased by separation, and the modest increases realized by each individual may not be sufficient to cover the costs of living independent of one another. If separation is pursued, the financial effects can be devastating, and are usually felt more keenly by women than men.

A judge at a dispute resolution conference may be able to cajole an income-earning spouse to remain in the workforce for a few more years; it is unlikely, however, that the spouse could be ordered to remain employed, even though that may be the only logical recourse that will keep a separated family afloat.¹⁶¹ Absent a result along these lines, however, older couples must examine all of the options available to them, as outlined in Part II. Upon turning 65, each will be eligible for OAS, and CPP benefits can be applied for as early as 60. Low income individuals may also qualify for the Guaranteed Income Supplement. CPP credits can be equalized to provide a dependent spouse with additional income, and the amounts of OAS and GIS benefits are generally higher for singletons than for

¹⁵⁹ CanLII 83, ¶¶ 2, 11–12; *see also* *Hanson v. Hanson*, 2005 CanLII 119 (B.C.C.A.).

¹⁶⁰ CanLII 2528 184, ¶ 38; *see also* *Strang v. Strang*, 1992 CanLII 55, ¶¶ 3–4 (S.C.C.).

¹⁶¹ The practical difference between the effect of an order requiring an individual to keep working and the effect of an order imputing income to someone without other resources is unclear to me.

couples. Personal retirement savings accounts and private pensions usually qualify as matrimonial property that can be divided between spouses. If the couple is income poor but asset rich, some assets might be carefully invested in annuities yielding monthly payments.

Where a spouse continues to have the capacity to pay spousal support, his or her retirement does not automatically cancel a support obligation; spousal support payments can and do continue past retirement.¹⁶² The court in *Vaughan v. Vaughan*, a 2014 decision of the Court of Appeal for New Brunswick, provided these recommendations for judges considering post-retirement spousal support orders:

In my view, a trial judge attempting to set spousal support once a payor spouse has retired must undertake an analysis of the situation, comparing the finances of both parties taking into consideration their means, needs and ability to pay. Trial judges should also consider whether the support ordered was compensatory in nature.¹⁶³

Where spousal support is ordered and the payor's retirement is foreseeable, the court may, depending on the circumstances of the parties and the attitude of the payor, also wish to consider making the order reviewable upon his or her retirement. A reviewable order will save the payor from the necessity of establishing a change in circumstances and allow the court to consider the couple's situation afresh, as was suggested in *Vaughan*.

¹⁶² See e.g., *Boston v. Boston*, 2001 CanLII 43, ¶ 111 (S.C.C.); *McCulloch v. McCulloch*, 2013 CanLII 298, ¶¶ 9–12 (A.B.C.A.); *MacLanders v. MacLanders*, 2012 CanLII 482, ¶¶ 18–23 (B.C.C.A.); *S.K.M. v. F.E.M.*, 2012 CanLII 3, ¶¶ 84–92 (P.E.C.A.); *Pinder v. Pinder*, 2010 CanLII 235, ¶¶ 31–34 (B.C.C.A.); *Muzzillo v. Muzzillo*, 2001 CanLII 44, ¶ 14 (B.C.C.A.); *Meiklejohn v. Meiklejohn* 2001 CanLII 21220, ¶¶ 24–26 (O.C.A.); *Schmidt v. Schmidt* 1998 CanLII 14586, ¶ 26 (B.C.C.A.).

¹⁶³ CanLII 6 ¶ 21.

V. Conclusion

The economic consequences of separation and divorce in Canada are significant, even for those who separate between the usual ages of 30 and 49. Spouses in this age range are generally able to recover from the financial shock of separation, remain or become employed, rebuild most of their former asset base, and even remarry or repartner, as divorced persons are doing in increasing numbers. Spouses separating in their fifties, however, have significantly less time to recover and prepare for retirement, and spouses 65 and older have no time at all.

The consequences of separation for older spouses are significant. Canadians who are 65 and older have, on average, less income than they did at any point in their lives after age 25, and the income of singletons aged 55 and older is less than half the family income of couples of similar ages. While spending on food and recreation decreases with age, spending on accommodations, household maintenance and health care increases—often dramatically. The impact of separation on women, who have generally earned less income than men throughout their lives, is particularly difficult.

Separation and divorce have nevertheless become normalized for baby boomers in Canada, who have had divorce legislation in place throughout their adulthood and witnessed the near doubling of the divorce rate in the thirty years following the introduction of the first federal Divorce Act in 1968. However, baby boomers are not only more likely to divorce than the generation which preceded them, they are more likely to enter into subsequent marriages which last, on average, less than half as long as first marriages.¹⁶⁴

The aging of the Canadian population, like that of the global population, and the entry of the boomer cohort, who make up the largest proportion of Canada's population, into retirement will place unprecedented stress on the country's social infrastructure,

¹⁶⁴ See Jane F. Gentleman & Evelyn Park, *Divorce in the 1990s*, 9 HEALTH REPORTS 53, 57 (1997), <http://www.statcan.gc.ca/pub/82-003-x/1997002/article/3242-eng.pdf>.

including its family justice system. Judges and attorneys will shortly be dealing with more separating, divorcing, and remarrying seniors than they ever have before, as well as the host of challenges separation later in life brings, and they cannot expect to adequately address the needs of this population with the familiar assumptions applied to younger litigants.

Although Canada appears to be well-placed to address the financial needs of its elders, the actual income available to older persons from CPP and OAS—which provided a maximum combined taxable benefit of \$1,665.87 per month in 2016¹⁶⁵—may not suffice to meet the needs of separated older persons with living costs that escalate year by year. Private pension plans and the strategic conversion of assets to income will become even more important to separated older persons than they are now.

Judges and attorneys in Canada and elsewhere must become familiar, if they are not already, with the public benefits available to older persons, especially with respect to entitlement and quantum, whether and how those benefits may be split, and whether they constitute income for the purposes of support. Judges and attorneys will need to adopt a flexible and creative approach to the division of income and assets between spouses, being mindful of the entitlements of previous spouses and interests of previous children. They will also need to consider the division of property less as a question of the redistribution of capital and more as the redistribution of important sources of potential income. Special legal questions requiring a balancing of the obligations and entitlements of adult children and separated spouses, and of dependent spouses and spouses wishing to leave the workforce, will become commonplace. The bench and bar should address themselves to these problems as soon as possible, as persons separating later in life are, in general, singularly unable to afford lengthy trials and the attendant legal fees.

¹⁶⁵ See *supra* pt. III.

AGE IS JUST A NUMBER; NOT A REASON TO FORCE RETIREMENT

Ciara C. Willis*

I. Introduction

*Age to me means nothing. I can't get old; I'm working.
I was old when I was twenty-one and out of work.
As long as you're working you stay young.
Retirement at sixty-five is ridiculous.
When I was sixty-five I still had pimples.¹*

George Burns is not the only person who feels this way—whether it is because people need to work or just enjoy what they do, many expect to work later in their lives.² A person's gainful employment in a chosen profession should not be tampered with simply in virtue of reaching a certain age. While generally mandatory retirement is banned in the United States under the Age

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¹ SUSAN BOSKEY, *THE QUALITY LIFE PLAN: 7 STEPS TO UNCOMMON FINANCIAL SECURITY*, 55 (Dog Ear Publishing 2007) (quoting George Burns, an American comedian, actor, singer, and writer who died at one-hundred years old, shortly after he stopped working).

² See Halah Touryalai, *Work Until You Die? More Middle Class Americans Say They Can Never Retire*, *FORBES*, (Oct. 25, 2013), <https://www.forbes.com/sites/halahtouryalai/2013/10/25/work-until-you-die-more-middle-class-americans-say-they-can-never-retire/#7624bdc17dfe>.

Discrimination in Employment Act of 1967 (“ADEA”),³ the practice is still allowed in a number of professions and circumstances.⁴ The purpose of proscribing mandatory retirement in the United States is “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.”⁵ However, there are exemptions to the general ban amongst certain ranks and professions,⁶ as well as defenses available to employers, such as instances where “age is a bona fide occupational qualification reasonably necessary to the normal

³ 29 U.S.C. §§ 621–34; *see* 29 C.F.R. § 1625.2 (2009) (“It is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is 40 years old or older, unless one of the statutory exceptions applies.”).

⁴ *See infra* pt. II.A.

⁵ 29 U.S.C. § 621(b) (2018). Congress implemented the ADEA based on its findings that:

- (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
- (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
- (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
- (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

Id. § 621(a)(1)–(4).

⁶ *See infra* pt. II.A.

operation of the particular business.”⁷ These exemptions and defenses, discussed further in Part II, expose a critical dilemma: on one hand, there must be a way to ensure particular occupations are performed safely and competently, such as flying commercial airplanes; but on the other hand, employees should be permitted to work in a chosen profession for as long as they desire, so long as they are capable.

To remove a person from their chosen occupation, or rid them of their access to gainful employment in general,⁸ solely based on age is discriminatory.⁹ Mandatory retirement, despite any benefits

⁷ 29 U.S.C. § 623(f)(1) (2018). Other defenses include instances where “differentiation is based on reasonable factors other than age” or adhering to the code would violate the laws of the foreign country where employee is working. *Id.*

⁸ As is the case in certain international contexts. *See infra* pt. III.

⁹ “Discrimination” is defined as:

- (1) The intellectual faculty of noting differences and similarities.
- (2) The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability. Federal law, including Title VII of the Civil Rights Act, prohibits employment discrimination based on any one of those characteristics. Other federal statutes, supplemented by court decisions, prohibit discrimination in voting rights, housing, credit extension, public education, and access to public facilities. State laws provide further protections against discrimination.
- (3) Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.

BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 9th ed. 2009). “Age Discrimination” is defined as “treating an applicant or employee less favorably because of his or her age.” U.S. Equal Emp. Opportunity Comm’n, *Age Discrimination*, EEOC, <http://www.eeoc.gov/laws/types/age.cfm> (last visited Apr. 9, 2020) [hereinafter *Age Discrimination*]. Notably, the ADEA only protects people over the age of 40, unless a statutory exception applies. 29 C.F.R. § 1625.2 (2009); *see* *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004) (holding that reverse discrimination, as in discrimination

that it might provide, needs to adopt a different process to better protect people from age discrimination. As a response to age discrimination in professions that employ mandatory retirement, this paper proposes that the United States should amend mandatory retirement laws to require individual assessments of any person who has reached the age of mandatory retirement in their profession but desires to continue working. This would afford those who meet job-specific qualifications the opportunity to continue working beyond an arbitrarily imposed age cutoff. Individual assessments can provide insight into the level of competency and capacity a person possesses to perform their duties and will help ensure an employee will not endanger themselves or others if they continue to work.

In order to establish this proposal and foster a better understanding of the current state of mandatory retirement, this paper outlines the development of mandatory retirement in the United States in Part II, including a discussion of the exemptions and defenses under the ADEA. Part III examines retirement law and policy in select countries around the world and sets out a

against the young, is not covered by the ADEA). However, some states have implemented laws to protect younger workers, including Michigan, Minnesota, New Jersey and Oregon. MICH. COMP. LAWS § 37.2102(1) (2020) (providing “[t]he opportunity to obtain employment . . . without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right”); MINN. STAT. § 181.81(1)(a) (2019) (providing that it “is unlawful for any private sector employer to refuse to hire or employ, or to discharge, dismiss, reduce in grade or position, or demote any individual on the grounds that the individual has reached an age of less than 70, except in cases where federal statutes or rules or other state statutes, not including special laws compel or specifically authorize such action”); N.J. STAT. ANN. § 10:5-2.1 (2019) (protecting all ages from age discrimination); OR. REV. STAT. § 659A.030(1)(a)–(b) (2018) (providing that “[i]t is an unlawful employment practice . . . [f]or an employer, because of an individual's . . . age[,] if the individual is 18 years of age or older[,] . . . to discriminate against the individual in compensation or in terms, conditions or privileges of employment”). If there is no state law governing reverse discrimination, an employer is not prohibited from favoring an older worker at the expense of a younger employee. *Age Discrimination*, *supra* note 9.

comparative analysis of mandatory retirement in the United States and abroad, considering the policy rationale, economic impact, and societal effects of forced retirement. Part IV argues in favor of assessing individual qualifications as a compromise between occupational safety and the freedom to hold and maintain a job in a chosen field, as opposed to mandatory retirement based on age alone. Finally, Part V explores the practical considerations of implementing assessment-based retirement policy.

II. The Development of Mandatory Retirement in The United States

*In the beginning, there was no retirement.*¹⁰

Retirement is a relatively new concept to the world that was not a widespread practice until the nineteenth century.¹¹ People worked their entire lives and employers typically accommodated elders until the employee decided to quit or physically could not work any longer.¹² Mandatory retirement became commonplace the twentieth century, developing in part due to the onset of pension programs.¹³

¹⁰ Mary-Lou Weisman, *The History of Retirement, From Early Man to A.A.R.P.*, THE N.Y. TIMES (March 21, 1999), <http://www.nytimes.com/1999/03/21/jobs/the-history-of-retirement-from-early-man-to-aarp.html>; see Carl Richards, *A Retirement Plan with Less Golf but More Satisfaction*, THE N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/your-money/a-retirement-plan-with-less-golf-but-more-satisfaction.html>.

¹¹ See Juliane Massarelli, *The Origins of Retirement*, 17 QUINNIPIAC PROB. L.J. 111, 111 (2003).

¹² *Id.*; See generally Seattle Times Staff, *A Brief History of Retirement: It's A Modern Idea*, THE SEATTLE TIMES (Dec. 31, 2013), <http://www.seattletimes.com/nation-world/a-brief-history-of-retirement-its-a-modern-idea>. While mandatory retirement was generally nonexistent until the nineteenth century, a few exceptions did exist. See *id.* For example, in 1777 the first constitution of New York required “judges of the supreme court, and the first judge of the county court in every county” to retire at the fixed age of 60. Art. XXIV.

¹³ Massarelli, *supra* note 11, at 111–12 (noting that mandatory retirement was a central component of many pension programs).

Of the earliest examples is the Railroad Retirement Pension Act of 1934,¹⁴ “which [was] the first government attempt in the United States to compel private employers and employees to contribute jointly to the support of persons who have become too old to continue profitably and safely to serve their employers.”¹⁵ For employers seeking a way to remove elderly employees who were no longer profitable or seen as a liability, mandatory retirement by way of a pension plan became a common means for employers to force elderly employees out of work.¹⁶

Fast-forward three decades to the enactment of the ADEA in 1967,¹⁷ which prevented employers from mandating retirement.¹⁸ Congress passed the ADEA because “the setting of arbitrary age limits regardless of potential for job performance [became] common practice,” and as a consequence, employment became more difficult for elderly workers to find or retain.¹⁹ Furthermore, unemployment resulting from age limits added to the “rate of deterioration of skill, morale, and employer acceptability,” and “burden[ed] commerce and the free flow of goods.”²⁰ The ADEA addressed these issues as a means “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.”²¹

¹⁴ 45 U.S.C. §§ 201–08 (Sections 201 to 208 were subsequently omitted and replaced in 1974.); see Railroad Retirement Board, *Railroad Retirement Handbook*, RRB, <https://www.rrb.gov/Resources/RailroadRetirementHandbook> (last visited Apr. 9, 2020).

¹⁵ *Railroad Retirement Pension Act of 1934*, 44 YALE L.J. 292, 293 (1934).

¹⁶ Massarelli, *supra* note 11, at 112.

¹⁷ 29 U.S.C. §§ 621–34.

¹⁸ 29 U.S.C. § 623(a) (2018).

¹⁹ 29 U.S.C. § 621(a) (2018).

²⁰ *Id.*

²¹ *Id.* § 621(b); see *Lorillard v. Pons*, 434 U.S. 575, 577 (1978) (holding that “[t]he ADEA broadly prohibits arbitrary discrimination in the workplace based on age”).

Initially, the ADEA applied to employees aged 40 to 65,²² but in 1978, Congress raised the age limit of coverage to 70 to offer more protection.²³ By 1986, the upper age limit was completely removed.²⁴ Today, the ADEA protects all employees who are over the age of 40, unless an exception applies.²⁵

Mandatory retirement challenges are often argued under the ADEA, where a plaintiff must establish a *prima facie* case for age discrimination by showing: he or she is over the age of forty; is qualified for the position; suffered damages as a result of an adverse employment decision; and was replaced by a younger person.²⁶ While the ADEA offers considerable protection, the effectiveness of the protection in practice is often debated due to the burden on the plaintiff to prove discrimination²⁷ and the number of exceptions and defenses available to employers.²⁸

²² Massarelli, *supra* note 11, at 113. “Employee” is defined as “any individual employed by an employer, subject to an exception for persons elected to public office.” 29 U.S.C. § 630(b).

²³ Massarelli, *supra* note 11, at 113–14.

²⁴ *Id.*

²⁵ *Id.*; see *infra* pt. II (discussing exemptions and defenses to the ADEA ban on mandatory retirement).

²⁶ Massarelli, *supra* note 11, at 115; see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973) (creating the standard of proof for disparate treatment cases under Title VII). Upon establishing a *prima facie* case of discrimination, the burden shifts to the employer to provide a legitimate and nondiscriminatory reason for the adverse employment action—if the employer provides such a reason, the plaintiff must then show that the employer’s defense is merely pretext for age discrimination. See 29 U.S.C. § 631 (2015); *Practice Note 0-507-0926—Age Discrimination*, Practical L. Labor & Emp. (West 2020) [hereinafter *Practice Note 0-507-0926*]; see also *Smith v. City of Allentown*, 589 F.3d 684, 689 (3d Cir. 2009).

²⁷ *Practice Note 0-507-0926*, *supra* note 26 (explaining that because “[d]irect evidence of discrimination is not common . . . [t]ypically, age discrimination plaintiffs offer only circumstantial evidence of discrimination”).

²⁸ See Luc Deshaies, *Old Age Is No Place for Sissies: The Rise of an Aging Workforce and Age Discrimination Issues in the Workplace*, 24 EMP. & INDUS. REL. L. 32, 33 (2014).

A. ADEA Exemptions

The ADEA covers most professions; however, there are a wide range of exemptions available to employers, including carveouts for executives,²⁹ high policy makers,³⁰ judges,³¹ commercial airline pilots,³² firefighters,³³ and law enforcement officers,³⁴ just to name a few.³⁵ These exemptions enable businesses to impose mandatory retirement, despite the fact that age is an arbitrary factor.³⁶ Moreover, because the ADEA only covers employees and applicants, independent contractors and small business owners are exempt from ADEA protections.³⁷

1. *Bona Fide Executive and High Policymaker Exemption*

The exemption for bona fide executives and high policymakers allows for “compulsory retirement of any employee who has attained 65 years of age and who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position.”³⁸ Under the ADEA, a “bona fide executive” is defined as:

(a) [A]ny employee:

(1) Compensated on a salary basis pursuant to § 541,600 at a rate of not less than \$684 per week (or \$455 per week, if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto

²⁹ 29 U.S.C. § 631(c).

³⁰ *Id.*

³¹ See *infra* note 48 (discussing the lack of protection for judges under the ADEA).

³² 29 U.S.C. § 623(f) (2018).

³³ *Id.* § 623(j).

³⁴ *Id.*

³⁵ See *infra* pt. III.A–B (discussing additional exceptions).

³⁶ See 29 U.S.C. §§ 623(f), 631(c) (2015).

³⁷ 29 U.S.C. § 631.

³⁸ *Id.* § 631(c).

- Rico, or U.S. Virgin Islands by employers other than the Federal government, or \$380 per week if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and
- (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.³⁹

This standard can affect not only CEOs and similar business executives, but also partners in a law firm,⁴⁰ accounting firm,⁴¹ or medical practice.⁴² Courts must look beyond the title of role and

³⁹ 29 C.F.R. § 541.100(a) (2020).

⁴⁰ See *E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002) (finding 32 people labeled as “partners” who were involuntarily demoted to “counsel” or “senior counsel,” to be employees); *Weir v. Holland & Knight, LLP*, 943 N.Y.S.2d 795 (N.Y. Sup. Ct. 2011) (finding that a partner was not an employee); see also *Beverly Earle & Marianne DelPo Kulow, The “Deeply Toxic” Damage Caused by the Abolition of Mandatory Retirement and Its Collision with Tenure in Higher Education: A Proposal for Statutory Repair*, 24 S. CAL. INTERDISC. L.J. 369, 406 (2015).

⁴¹ See *Earle & DelPo Kulow*, *supra* note 40, at 406; see also Caleb Newquist, *AICPA Asks EEOC to, Respectfully, BTFO of Big 4’s Mandatory Retirement Policies*, GOING CONCERN (July 1, 2013), <http://goingconcern.com/post/aicpa-asks-eeoc-respectfully-btfo-big-4s-mandatory-retirement-policies>.

⁴² *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440, 442 (2003) (discussing how doctors were not employees under federal antidiscrimination laws); see *Earle & DelPo Kulow*, *supra* note 40, at 406. It is

evaluate whether a person is an executive or an employee based on several factors.⁴³

The term “high policymaker,” for purposes of this exemption, applies to certain top level employees who play a significant role in developing and recommending corporate policy, but are not bona fide executives.⁴⁴ The exemption includes “individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof.”⁴⁵ For example, this would be the chief economist or chief research scientist of a company, due to the impact such work has on the company.⁴⁶ To determine whether an employee is a high

important to note that this does not include doctors as a whole, but rather those in a managerial role within a partnership or other similar business venture. *See id.*

⁴³ The following six factors are relevant to whether a shareholder-director is an employee:

1. Whether the organization can hire or fire the individual or set rules and regulations of the individual's work;
2. Whether and, if so, to what extent the organization supervises the individual's work;
3. Whether the individual reports to someone higher in the organization;
4. Whether and, if so, to what extent the individual is able to influence the organization;
5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
6. Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas Gastroenterology Associates, P.C., 538 U.S. at 449–50 (citing to EEOC Compliance Manual § 605:0009).

⁴⁴ 29 C.F.R. § 1625.12(e) (2019).

⁴⁵ *Id.*

⁴⁶ *Id.*; *see Morrissey v. The Boston Five Cents Sav. Bank*, 54 F.3d 27, 33 (1st Cir. 1995) (finding that an Executive Vice President for Corporate Affairs who was forced to resign after his 65th birthday was a high policymaker); *Practice Note #0-507-0926*, *supra* note 27.

policymaker, courts will examine whether the employee had direct access to top decision makers, was responsible for evaluating significant legislative and regulatory trends and working with legislators on such matters, and whether the employee recommended policy regarding matters such as acquisitions, mergers, and capitalization.⁴⁷ Ironically, state appointed judges are considered high-ranking government policymakers, and are also exempt from ADEA protections.⁴⁸

In addition to meeting the definitions of a bona fide executive or high policy maker, the employee must also be entitled to an immediate and annual non-forfeitable retirement benefit from the employer at a minimum of \$44,000 in order to fall within the

⁴⁷ Morrissey, 54 F.3d at 33; *Practice Note 2-506-0530—Wage and Hour Law: Overview*, Practical L. Labor & Emp. (West 2020).

⁴⁸ Gregory v. Ashcroft, 501 U.S. 452 (1991) (holding that appointed state judges are not protected under the ADEA's definition of "employees"); see Christopher R. McFadden, *Judicial Independence, Age-Based BFOQs, and the Perils of Mandatory Retirement Policies for Appointed State Judges*, 52 S.C. L. REV. 81, 82–83 (2000). Mandatory judicial retirement has been upheld in approximately thirty states. See ALA. CONST. art. VI, § 155 (age 70); ALASKA CONST. art. 4, § 11 (age 70); ARIZ. CONST. art. 6, §§ 20, 39 (age 70); COLO. CONST. art. 6, § 23(1) (age 72); CONN. CONST. art. 5, § 6 (age 70); FLA. CONST. art. 5, § 8 (in 2018, the mandatory retirement for judges changed from the age 70 to the age 75); HAW. CONST. art. 6, § 3 (age 70); LA. CONST. art. 5, § 23(B) (age 70); MD. CONST. art. 4, § 3 (age 70); MASS. CONST. pt. 2, c. 3, art. 1 (age 70); MICH. CONST. art. 6, § 19 (age 70); MO. CONST. art. 5, § 26(1) (age 70); N.H. CONST. pt. 2, art. 78 (age 70); N.J. CONST. art. 6, § 6, ¶ 3 (age 70); N.Y. CONST. art. 6, § 25(b) (age 70); OHIO CONST. art. IV, § 6(C) (no election or appointment if age 70 on or before day assumes office); OR. CONST. art. VII, § 1a (age 75, but state may fix age to not less than 70); TEX. CONST. art. 5, § 1-a(1) (age 75, but state may fix age to not less than 70); VT. CONST. ch. II, § 35 (age 70); WASH. CONST. art. 4, § 3(a) (age 75, but legislature may fix age to not less than 70); WYO. CONST. art. 5, § 5 (age 70); IND. CODE ANN. § 33–3813-8 (age 75); IOWA CODE ANN. § 602.1610 (2020) (age 75 for justices holding office before July 1, 1965; age 72 for justices holding office after July 1, 1965; and age 72 for all others except associate juvenile or probate judges 72 or older as of July 1, 1996); MINN. STAT. ANN. § 490.121(21)(d) (age 70); N.C. GEN. STAT. ANN. § 7A-4.20 (1992) (age 72); S.C. CODE ANN. § 9-8-60(1) (2014) (age 72); S.D. CODIFIED LAWS §§ 16-1-4.1, 16-6-31 (2020) (age 70); UTAH CODE ANN. § 49-17-701 (2020) (age 75); VA. CODE ANN. § 51.1-305(B1) (2017) (age 73).

exemption.⁴⁹ In a claim against an employer violating the ADEA, the employer has the burden of proving that the bona fide executive exemption applies to an employee.⁵⁰ Likewise, the employer has the burden of proving that the employee is a high policymaker within the exemption.⁵¹

2. *Firefighters and Law Enforcement Officers*

Another exemption specifically outlined in the ADEA applies to firefighters and law enforcement officers.⁵² Under this exemption,

⁴⁹ 29 U.S.C. § 631(c)(1) (2015). Such plan must be “an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least \$44,000.” *Id.*

⁵⁰ See *Raymond v. Boehringer Ingelheim Pharm., Inc.*, 653 F.Supp.2d 151, 155 (D. Conn. 2009).

⁵¹ See *Id.*

⁵² 29 U.S.C. § 623(j) (2018). The requirements for non-discriminatory mandatory retirement of a firefighter or law enforcement officer are:

- (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained--
 - (A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or
 - (B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or
 - (ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of--
 - (I) the age of retirement in effect on the date of such discharge under such law; and
 - (II) age 55; and
- (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

Id. § 623(j)(II).

firefighters and law enforcement officers can be forced to retire as early as 55 years old.⁵³ The exemption received a good deal of attention in litigation, which ultimately resulted in a broader definition of “officer” under the ADEA.⁵⁴ The exemption allowing mandatory retirement for firefighters and law enforcement officers has been repeatedly challenged as to whether employers are using the exemption as part of a trick or scheme to evade the purpose of the ADEA—to protect employees from age discrimination.⁵⁵

The origin of the exemption dates back to the 1986 amendments to the ADEA that ensured retirement decisions would be made on the basis of individual capabilities rather than assumptions based on age.⁵⁶ The amendments provided that mandatory retirement would be allowed for law enforcement officers and firefighters until the provision terminated on December 31, 1993.⁵⁷ However, it also

⁵³ *Id.* § 623(j)(1)(B)(ii)(II).

⁵⁴ *See, e.g.,* *E.E.O.C. v. Com. of Mass.*, 864 F.2d 933 (1st Cir. 1988) (finding certain employees of a motor vehicle bureau to be enforcement officers).

⁵⁵ *See e.g.* *Sadie v. City of Cleveland*, 718 F.3d 596 (6th Cir. 2013) (holding that the city’s retirement plan, requiring police officers to retire at 65, was not a subterfuge for evading the protections of the ADEA).

⁵⁶ 29 U.S.C. §§ 621–34 (amended by Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99–592, 100 STAT. 3342).

⁵⁷ *Id.* The exemption stated:

(a) GENERAL RULE. — Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by adding at the end thereof the following new subsection:

(i) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual’s age if such action is taken

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or

required that within four years after enactment the Secretary of Labor would collaborate with the Equal Employment Opportunity Commission to:

(1) conduct a study—

(A) to determine whether physical and mental fitness tests are valid measurements of the ability and competency of police officers and firefighters to perform the requirements of their jobs,

(B) if such tests are found to be valid measurements of such ability and competency, to determine which particular types of tests most effectively measure such ability and competency, and

(C) to develop recommendations with respect to specific standards that such tests, and the administration of such tests should satisfy, and

(2) submit a report to the Speaker of the House of Representatives and the President pro tempore of the Senate that includes—

(A) a description of the results of such study, and

(B) a statement of the recommendations developed under paragraph (1)(C).⁵⁸

retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

Id.

⁵⁸ *Id.* § 5(a). Additionally, there was a consultation requirement for the study:

The Secretary of Labor and the Equal Employment Opportunity Commission shall, during the conduct of the study required under subsection (a) and prior to the development of recommendations under paragraph (1)(C), consult with the United States Fire Administration, the Federal

Furthermore, within five years after the enactment of the amended act, the Equal Employment Opportunity Commission was required to propose “guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of police officers and firefighters to perform the requirements of their jobs.”⁵⁹

While the time requirement was not met, a study was conducted by Penn State University's Center for Applied Behavioral Sciences that was completed in January, 1992.⁶⁰ The study “concluded that age is not an accurate predictor of either job performance or ability to perform; deficits in either of these that present a grave danger to public safety were only marginally associated with chronological age and much better predicted by available tests not based on age.”⁶¹ Nonetheless, due to a failure to provide a definitive test, which would no better withstand legal attack than an age standard, the provision allowing mandatory retirement for firefighters and police officers was reinstated in 1996 and it was made a permanent and retrospective exemption.⁶²

The ADEA states that the Secretary of Labor shall conduct a more general study “concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy.”⁶³ The research is to focus on “reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills.”⁶⁴ This research is

Emergency Management Agency,
organizations representing law enforcement
officers, firefighters, and their employers,
and organizations representing older
Americans. *Id.* § 5(b).

⁵⁹ *Id.* § 5(c).

⁶⁰ Martin Schiff, *The Age Discrimination in Employment Act: Whither the Bona Fide Occupational Qualification and Law Enforcement Exemptions?*, 67 ST. JOHN'S L. REV. 13, 16.

⁶¹ *Id.*

⁶² *Id.*

⁶³ 29 U.S.C. § 622(a) (2018).

⁶⁴ *Id.* § 622(a)(1).

aimed to eliminate the stereotypical views which led to the enactment of the ADEA.⁶⁵ However, this is a more general research study, and it is not directly focused on the effectiveness or appropriateness of physical and mental fitness tests, let alone specific to one profession such as firefighters or police officers.⁶⁶ Thus, the Secretary of Labor should continue to conduct such studies and incorporate specific assessments where applicable as means for eliminating mandatory retirement in various professions.

It is important to note that, as a result of the 1986 amendments, mandatory retirement was also permitted for tenured professors until the provision terminated on December 31, 1993.⁶⁷ At the same time, the amendments required that a study be conducted by the Equal Employment Opportunity Commission during the five years after the amendment was enacted, in order to “analyze the potential consequences of the elimination of mandatory retirement on institutions of higher education.”⁶⁸ However, the 1986 provision terminated in 1993 and was not reinstated, unlike the exemption for firefighters and law enforcement officers.⁶⁹

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See* 29 C.F.R. § 1625.11 (2019), which states:

(a)(1) Section 12(d) of the Act, added by 1986 amendments provides: Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965).

(2) This exemption from the Act’s protection of covered individuals took effect on January 1, 1987 and is repealed on December 31, 1993 . . . The Equal Employment Opportunity Commission is required to enter into an agreement with the National Academy of Sciences for the conduct of a study to analyze the potential consequences of the elimination of mandatory retirement on institutions of higher education.

⁶⁸ *Id.*

⁶⁹ *See* Earle & DelPo Kulow, *supra* note 40, at 382.

B. ADEA Defenses

Just because a profession does not fall into one of the above exemptions does not mean that mandatory retirement is out of the question. There are several defenses available to employers if faced with an ADEA claim for age discrimination: the bona fide occupational qualification (“BFOQ”); reasonable factors other than age; good cause; bona fide seniority systems; bona fide benefit plans; and employment in a foreign country where ADEA compliance would violate that country’s laws.⁷⁰ This paper is primarily concerned with the BFOQ defense.

The ADEA allows an employer to base a decision on a person’s age “where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.”⁷¹ For an employer to successfully assert the BFOQ defense, the employer must prove that:

- (1) the age limit is reasonably necessary to the essence of the business, and either
- (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or
- (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.⁷²

⁷⁰ 29 U.S.C. § 622 (f)(1) (2018).

⁷¹ *Id.*

⁷² 29 C.F.R. § 1625.6(b)(1) (2019).

Professions that have been included under the BFOQ include those where safety is imperative, such as commercial airline pilots⁷³ and bus drivers.⁷⁴

III. Mandatory Retirement in Other Countries

A number of countries have started to recognize age as a class that should be protected from discrimination, such as the United States, the United Kingdom and Canada, and have taken steps to ban mandatory retirement. While countries take different approaches to retirement, they either mandate retirement at a certain age across the board, like Israel, or fall somewhere in between, like in Japan.

A. The United Kingdom

Like the United States, other countries have enacted amendments to their respective legislations to help protect aging workers.⁷⁵ The United Kingdom took similar steps as the United States in protecting employees from age discrimination, although only recently enforcing legislation in 2006.⁷⁶ Similarly, in 2007 the E.U. enacted the requirement that member states prohibit age

⁷³ Under the BFOQ defense, mandatory retirement for pilots at age sixty has been upheld. *See* Prof. Pilots Fed., *Age 60 Rule Chronology*, P.P.F., http://lobby.la.psu.edu/_107th/091_Airline_Age_60/Organizational_Statements/PPF/PPF_Chronology.htm (last visited Apr. 4, 2020). The “Age 60 Rule” originated in 1959 after a decade long debate. *Id.* Upon the enactment of the ADEA nearly ten years later, the Secretary of Labor declared the Age 60 Rule was covered by the BFOQ defense. *Id.* However, the Fair Treatment for Experienced Pilots Act passed in 2007 and upped the age to 65. 42 U.S.C. § 44729 (2012); *see* Julie Johnsson, *U.S. Pilots Can Fly Until 65*, LEFT SEAT (Dec. 14, 2007), <https://www.leftseat.com/age60.htm>.

⁷⁴ *See* *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 226 (5th Cir. 1976) (affirming that “bus company’s policy of refusing to consider applications of individuals between the ages of 40 and 65 for initial employment as intercity bus drivers is a bona fide occupational qualification reasonably necessary to the normal operation of its business”).

⁷⁵ *See* Deshaies, *supra* note 28, at 33.

⁷⁶ *Id.*

discrimination in employment matters.⁷⁷ However, the E.U. still allows for a number of exceptions to the protections offered to its citizens.⁷⁸ Likewise, in the United Kingdom, an employee can be forced into retirement if the employer abides by certain requirements.⁷⁹

⁷⁷ *E.U. Council Directive 2000/78/EC* (Nov. 27, 2000) [hereinafter *E.U. Directive*]; see Donald C. Dowling, Jr., *International HR Best Practice Tips: Toward a Functional Cross-Border Age-Discrimination Policy*, 18 INT'L H.R. J. ART. 1. The E.U. Directive provides:

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

E.U. Directive at art. 2.

⁷⁸ Deshaies, *supra* note 28, at 33.

⁷⁹ See Oliver Brettle & Donald C. Dowling Jr, *The EEAR: Not Your Uncle Sam's ADEA*, SHRM LEGAL REPORT (Oct.-Nov. 2007) <https://www.lexology.com/library/detail.aspx?g=416be4f9-fa15-4e89-bce9-25d93c623be9>.

Requirements include declaring and justifying retirement at 65 or older; providing notice to employees as they approach the established retirement age;

B. Canada

Canada, likewise, has human rights legislation establishing that discrimination in employment is illegal.⁸⁰ Several provinces of Canada first outlawed mandatory retirement in the early 1980s, and additional provinces have followed suit over the last decade.⁸¹ However, Canada also allows for exceptions and defenses, including where a BFOQ exists.⁸² *McCormick v. Fasken Martineau DuMoulin LLP*,⁸³ exemplifies the effect that these exceptions play. In *McCormick*, a law firm adopted a rule that required an equity partner to retire and divest their ownership stake in the firm at age 65, irrespective of whether the partner was still capable of performing in their role.⁸⁴ On appeal from a holding for the partner, the court held that the relationship between a firm and its equity partners was not one in which the firm maintained a degree of control over partners such that they were subordinate to and dependent upon the partnership.⁸⁵ Thus, because partners typically wield a higher degree of decision-making authority and independence, they are generally not considered an “employee” protected by Canadian age discrimination laws unless “the powers, rights and protections normally associated with a partnership were greatly diminished.”⁸⁶

implementing a procedure which allows employees to request a waiver; and consistently and fairly applying its policy. *Id.*

⁸⁰ See Deshaies, *supra* note 28, at 32.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 2014 S.C.C. 39, [2014] 2 S.C.R. 108 (finding that McCormick, an equity partner at a law firm, was not an employee under the Human Rights Code of the province of British Columbia, thus, allowing his mandatory retirement at the age of 65).

⁸⁴ See *id.* ¶ 1.

⁸⁵ See *id.* ¶ 38–39.

⁸⁶ *Id.* ¶ 45–46. The holding of McCormick is aligned with American courts which have also “found that partnerships are not employment relationships under anti-discrimination legislation since . . . partners are typically able to influence the running of a partnership to a significant extent,” save for “exceptional circumstances based on an assessment of the substance of the relationship.” *Id.* ¶ 34.

McCormick is illustrative of the fact that in a time of advanced protections, age discrimination is still an issue that needs to be reconciled, and on a more personal level, highlights an important issue lawyers and other professionals may face later in their careers.⁸⁷

C. Israel

Other countries are at the other end of the spectrum, allowing mandatory retirement policies to be imposed on any profession, if the employer so desires. While it is a hot topic amongst Israeli legislative bodies,⁸⁸ Israel allows mandatory retirement under the Retirement Age Law of 2004.⁸⁹ The Retirement Age Law permits compulsory retirement for men at the age of 67 and women at the age of 62.⁹⁰ However, with the consent of an employer, employees may maintain their employment status after the standard retirement age.⁹¹ Many oppose the Israeli law and attempts have been made to remove it; however, on April 21, 2016, the Supreme Court of Israel

⁸⁷ See *id.* ¶ 47–48 (providing that partners may be subject to forced retirement or other forms of discrimination that nevertheless comport with the duties of fairness and good faith owed to partners); Deshaies, *supra* note 28, at 33.

⁸⁸ Orly Gerbi, *Compulsory Retirement in Israel-Is the End in Sight?*, 24 EMP. & INDUS. REL. L. 35, 35 (noting the controversial nature of this discussion in Israel due to “the ruling of the National Labour Court in *Weinberger v Bar Ilan University*, LA (National) 209–10 (6 Dec. 2012), regarding the treatment of an employee wishing to continue working past the mandatory retirement age,” and the “petition to the High Court in *Gavish v Knesset of Israel*, HCJ 9134/12 (21 April 2016), challenging the constitutionality of having a mandatory retirement age at all”); see also Yonah Jeremy Bob, *A-G: Give New Government a Chance to Address Mandatory Retirement Controversy*, J POST, (Feb. 9, 2015), <http://www.jpost.com/Israel-News/A-G-Give-new-government-a-chance-to-address-mandatory-retirement-controversy-390505>.

⁸⁹ Gerbi, *supra* note 88, at 36.

⁹⁰ *Id.*

⁹¹ Hila Weissberg, *Israel Defends Age-Based Retirement Law as Protecting Weaker Workers*, HAARETZ (April 17, 2013), <http://www.haaretz.com/israel-news/business/israel-defends-age-based-retirement-law-as-protecting-weaker-workers.premium-1.515862>.

entered an opinion upholding the constitutionality of the Retirement Age Law.⁹²

D. Japan

Japan is another country that still permits mandatory retirement. Japan, unmatched in its growing population of people aged 65 and older, has the largest elderly population in the world.⁹³ In Japan this demographic has doubled from seven to fourteen percent in twenty-four years, whereas European countries took fifty to one hundred years to obtain the same increase.⁹⁴ The proportion of those over the age of 75 is quickly growing in Japan and will likely make up one-fifth of the population by the year 2035.⁹⁵ The rapid increase in population has significant implications for the economy and social security in Japan.⁹⁶ As a consequence of the growth, fewer people will be in the workforce and the population will see a lower standard of productivity, and thus, a diminished standard of living.⁹⁷ Due to a lower fertility rate currently limiting growth of younger

⁹² See generally *Gavish*, HCJ 9134/12.

⁹³ Atsushi Seike, *Japan's Race Against the Ageing Clock*, EAST ASIA FORUM (May 3, 2015), <http://www.eastasiaforum.org/2015/05/03/japans-race-against-the-ageing-clock/>.

⁹⁴ *Id.*; see also John Creighton Campbell & Ruth Campbell, *Retirement in Japan*, ASIA SOCIETY at 1, 7–13 (1991), <http://www.exeas.org/resources/pdf/retirement-japan-campbell.pdf> (last visited Mar. 9, 2020) (supplementing *Video Letter from Japan II: Choices for Men Approaching Age Sixty*). The main reason for such rapid increase in aging population is the short but intense baby boom Japan experienced after World War II and the subsequent decline to the country with the lowest birth rate in the 1980s. *Id.* at 1. To further complicate matters, people in Japan are now living longer, with life expectancy rising from 76 in 1980 to 84 in 2018. See *Life Expectancy at Birth, Total (Years)—Japan*, The World Bank (2019), <https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=JP>.

⁹⁵ Seike, *supra* note 93.

⁹⁶ *Id.*

⁹⁷ *Id.*

demographics,⁹⁸ the country will need to consider encouraging the aging population to continue working.⁹⁹

Japan has long permitted mandatory retirement, but also has laws that promote elderly employment, such as the Act of Stabilization of Employment of Elderly Persons ("SEEP Act").¹⁰⁰ Japan's approach is partly due to the fact that "retirement" has a different meaning to the Japanese than it does to most Americans; the Japanese can continue to work after retirement in a unique system referred to as "teinen."¹⁰¹ Under the teinen system, an elderly employee can elect to stay with an employer that participates in the system or take up a job with a new employer for another 5 to 10 years or more.¹⁰² The SEEP Act was amended in 2012 requiring the statutory minimum retirement age in Japan to rise to 65 years old.¹⁰³

⁹⁸ Peter McDonald, *Very Low Fertility: An East Asian Dilemma*, EAST ASIA FORUM (Apr. 23, 2013), <http://www.eastasiaforum.org/2013/04/23/very-low-fertility-an-east-asian-dilemma/>.

⁹⁹ *Id.*; Seike, *supra* note 93.

¹⁰⁰ See Act on Stabilization of Employment of Elderly Persons, Law No. 68 of 1971 (available at www.japaneselawtranslation.go.jp) [hereinafter SEEP Act]. The SEEP Act permits mandatory retirement so long as the age for retirement is not set below 60. *Id.* art. 8.

¹⁰¹ Campbell & Campbell, *supra* note 94, at 1 ("Americans tend to see retirement as stopping work altogether, while the most common word for retirement in Japanese, *teinen* (literally, "prescribed year") refers to the age limit set by an organization for remaining in one's main job or career line.").

¹⁰² *Id.* ("Although, employees of smaller firms, as well as farmers and other self-employed people, often have no fixed retirement age and may continue doing the same work to an advanced age"). Studies have shown that on average men in Japan stop working at age 70 while women stop at age 67. Kanoko Matsuyama, *In Japan, Retirees Go On Working: A Retirement-age Hike May Ease the Country's Pension Load*, BLOOMBERG (Aug. 30, 2012), <http://www.bloomberg.com/news/articles/2012-08-30/in-japan-retirees-go-on-working>.

¹⁰³ SEEP Act, art. 9(1); Katsuya Natori et al., *Employment Law Update: Change's to Japan's Employment Laws Effective From 1 April 2013*, HERBERT SMITH FREEHILLS (Mar. 21, 2018), <https://hsfnotes.com/employment/2013/04/01/changes-to-japans-employment-law-effective-from-1-april-2013/>.

The amendment reflects the policy to help improve employment options for older workers and ease pension pressures in Japan..¹⁰⁴

E. Mandatory Retirement Law and Policy in the United States and Abroad

Countries around the world each have their own unique approach to retirement. There have been movements in the United States, Canada, and Europe toward a less discriminatory retirement system.¹⁰⁵ Likewise, while Israel currently has a blanket mandatory retirement law, lawmakers in the country have started to feel pressure to take action.¹⁰⁶ As a response to burgeoning demographic and economic factors, Japan has taken a different approach by permitting mandatory retirement but also protecting an employee's freedom to continue working.¹⁰⁷

Changing demographics are one of the primary reasons for revisiting retirement laws around the globe. The growing number of people over the age of 65 should encourage countries to change the way they regulate retirement to stand behind those who must now work later in life, sometimes well beyond the age of 65.¹⁰⁸

¹⁰⁴ See Natori, *supra* note 103.

¹⁰⁵ See *supra* pt. III.A–D.

¹⁰⁶ *Id.* pt. III.C.

¹⁰⁷ *Id.* pt. III.D.

¹⁰⁸ *The World Factbook: Life Expectancy At Birth*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/355.html> (last visited Mar. 29, 2020) (The Average life expectancy in the United States is 80.3, the United Kingdom is 81.1, Japan 86, and Israel 83.); see *Benefits Planner: Life Expectancy*, SOCIAL SECURITY ADMIN., <https://www.ssa.gov/planners/lifeexpectancy.html> (last visited Mar. 29, 2020).

IV. Shifting from Mandatory Retirement Based on Age Alone, to Retirement Law Premised Upon Qualifications and Ability

The history and background of mandatory retirement policies is diverse throughout the world. The United States and a number of other countries have made many advancements in aims of discarding discrimination.¹⁰⁹ However, there is still more to be done. In the United States, at least, one of the purposes of allowing mandatory retirement is to maintain public safety.¹¹⁰ While this is an important goal, there is a better way to accomplish this, specifically by implementing individual assessments. With advancements in science, medicine, and technology, creating viable assessments to eliminate employment discrimination on the basis of age alone is now more attainable than ever. Individualized assessments would better fulfill the purpose of the ADEA, to protect people from discrimination based on arbitrary factors, such as age.¹¹¹

One might compare mandatory retirement policies to other age-specific events, such as applying for a driver's license,¹¹² voting in government elections,¹¹³ or purchasing alcohol.¹¹⁴ However, each of these age-triggered events can be distinguished from mandatory retirement in that they grant a person the freedom to partake in a privilege upon reaching a certain age, whereas forced retirement obstructs a person's freedom from interference with holding and

¹⁰⁹ See *supra* pt. III.

¹¹⁰ *Id.* pt. II.

¹¹¹ 29 U.S.C. § 621(b) (2018).

¹¹² *Apply for a License (Under 18)*, DEP'T OF MOTOR VEHICLES, <https://www.dmv.org/teen-drivers.php> (last visited Mar. 29, 2020); *Driving Age by State*, VIRTUAL DRIVE, <https://www.vdriveusa.com/resources/driving-age-by-state.php> (last visited Mar. 29, 2020) (The age for obtaining a driver's license varies by state.).

¹¹³ U.S. CONST. amend. XXVI (Citizens who are eighteen years of age or older may vote in United States general elections.).

¹¹⁴ 23 U.S.C. § 158 (2018) (requiring states to enforce a legal drinking age of 21 years or older, or else sacrifice a portion of federal funding).

maintaining gainful employment in a given profession. For instance, when a person reaches the age of driving eligibility, he or she must first take a test to prove they are qualified to drive.¹¹⁵ There is no mandate that requires all citizens of driving age to participate in the process, but for one who wishes to drive, they must dedicate time, money, and effort into taking and passing the test in order to obtain the privilege of driving—age is only one part of the process.¹¹⁶

The same should be said for mandatory retirement: reaching a certain age should instead trigger the option to undergo an assessment, which if passed, allows the employee to continue working in their chosen profession. To further analogize to driving tests, many states have implemented additional driving assessments for persons over a certain age, in order to balance safety and freedom from interference with the privilege to drive.¹¹⁷ Individualized assessments could significantly improve the fallout from mandatory retirement laws currently in force by examining the qualifications, skills, and capabilities required of any given employee in a certain profession. As with driving exams for older adults, the assessments would reduce discrimination and satisfy safety priorities.

This paper is not the first to propose such an idea; when the United States sought to do so in 1987 with the firefighter and law enforcement officer exemption, results from the Penn State study conducted in light of the exemption showed that individual assessments were preferable.¹¹⁸ Despite the advantages of implementing individualized assessments, no standard was developed that would sufficiently survive “a legal attack any better than the age standard.”¹¹⁹ However, even if individualized assessments are no better or worse than a set retirement age at surviving a legal attack, the proposed individualized assessments

¹¹⁵ See *Apply for a License (Under 18)*, *supra* note 112.

¹¹⁶ *Id.*

¹¹⁷ See *Older Drivers*, INS. INST. FOR HIGHWAY SAFETY, <https://www.iihs.org/topics/older-drivers> (last updated Mar. 2020).

¹¹⁸ Schiff, *supra* note 60, at 16.

¹¹⁹ *Id.*

would still be less discriminatory, as a more flexible and less arbitrary approach to forced retirement.

In 1993, the issue with establishing an assessment that would hold up in court was that there was no “legal consensus as to what constitute[d] the precise tasks that . . . must [be] perform[ed] and whether, once determined, such tasks must be measured by frequency, criticality, or some other measure.”¹²⁰ Thus, identifying job-specific tasks and the requisite competency and proficiency one needs to perform those tasks is imperative to the development of individualized assessments. Determining criteria for employment assessments is crucial because as the 1993 study showed, “age is not an accurate predictor of either job performance or ability to perform,” and “deficits . . . that present a grave danger to public safety [a]re only marginally associated with chronological age and much better predicted by available tests not based on age.”¹²¹ However, assessments should not only be readily available for fire fighters, law enforcement officers, they should also be available to those who can be characterized as a bona fide executive or high policymaker and any occupation subject to a BFOQ defense.

The ADEA was created to discourage discrimination, but exceptions, available through various exemptions and defenses, are permitted for public policy reasons.¹²² However, these exceptions could substantially affect a company’s trajectory or even put citizen lives at risk when older, more experienced, workers are replaced with their less experienced cohorts—despite the fact research has shown age is only a marginal indicator of potential safety concerns.¹²³ The public safety needs could still be met, and more

¹²⁰ *Id.* (analyzing the context of a police officer’s employment beyond a fixed retirement age).

¹²¹ *Id.*

¹²² *See supra* pt. III.B.

¹²³ Schiff, *supra* note 60, at 50. The Penn State study focused on “sudden physical incapacitation [and] accumulated deficits in abilities” and concluded they only had “a marginal correlation with chronological age.” *Id.* The study took note “that the risk of an officer experiencing a catastrophic medical event that would compromise public safety was so small—about one such event every

effectively so, with an individualized assessment of each employee who wishes to continue working past the age of retirement. Not everyone ages at the same rate and people should not be grouped into default categories based on age-related assumptions.¹²⁴ Requiring assessments in select professions will ensure that a person will not be forced out of a job based on a discriminatory factor such as age, but rather would allow the person to maintain employment so long as their abilities were sufficient to meet the demand of the their role. This provides for a fair and efficient way of addressing aging workers.¹²⁵

Congress found that discriminatory practices, such as mandatory retirement, disadvantage older people; enhance the rate of

twenty-five years—as to eliminate this factor in the debate regarding age-based retirement.” *Id.* The study concluded that the responsibilities of “public safety officers only occasionally involved a direct threat to the well-being of citizens or fellow officers.” *Id.*

¹²⁴ See *id.* The Penn State study found that many “changes associated with aging were more accurately the results of illness, injury, and lifestyle variables rather than aging per se.” *Id.* The study found that:

Chronological age limits do not, by themselves ensure functional competency of police officers. Aging effects and corresponding implications on job performance are complex. As age increases, it is possible that there is a decline in some abilities, however, “[a]n older person may be able to maintain high levels of performance even though aging has a detrimental influence on some abilities that contribute to performance.” Successful physical performance is dependent upon the relationships among the sensory, motor, and central nervous system. “Factors such as task complexity, experience, practice, and physical fitness . . . affect . . . performance decline.” Age limitations do not address individual variability, and they do not accurately predict individual performance declines associated with advancing age.

Id. at n.208 (citing to Frank J. Landy, et al., Alternatives to Chronological Age in Determining Standards of Suitability for Public Safety Jobs Volume I: Technical Report (Jan. 31, 1992) (unpublished manuscript) (internal citations omitted)).

¹²⁵ Requiring assessments at various career milestones is a means of taking equal treatment under the law step further, and would be a sound practice, as mental and physical problems can occur at any age.

deterioration of skill, morale, and suitability in obtaining other employment; and may burden commerce and the free flow of goods.¹²⁶ As discussed above, the increasing longevity of human life will need to be factored into employment policies due to the impact aging populations can have on the economy.¹²⁷ Many elderly individuals are continuing to work past the age of retirement, which is typically 65.¹²⁸ To force these willing laborers out of their jobs would result in less production in the country's economy, as valuable resources are being discarded.¹²⁹ Thus, age discrimination not only negatively affects employees, it also impacts the economy by hindering the free flow of goods in commerce.¹³⁰ The current policies are cutting out a viable work force that would otherwise contribute to the United States' economy and productivity.

Furthermore, individualized assessments would foster a more efficient labor force, as they would provide the government and companies with a formal means of ensuring the mental and physical acuity to perform assigned tasks.¹³¹ One of the central purposes of creating retirement laws originally was to help businesses save money by releasing employees who are no longer productive.¹³² However, assessments could highlight how older workers create value through their accumulation of knowledge and experience in their profession and keeping them in their job saves the costs associated with training a new employee.¹³³ Furthermore, assessments at various mile markers of a career could help expose a

¹²⁶ 29 U.S.C. § 621 (2018).

¹²⁷ See *The World Factbook: Life Expectancy At Birth*, *supra* note 108.

¹²⁸ Ros Altmann, *Older Workers are Essential for Economic Success*, PENSIONANDSAVINGS.COM (Feb. 22, 2015), <http://pensionsandsavings.com/rethinking-retirement/older-workers-are-essential-for-economic-success/>.

¹²⁹ See *id.*

¹³⁰ See 29 U.S.C. § 621.

¹³¹ See Schiff, *supra* note 60, at 50.

¹³² See Massarelli, *supra* note 11, at 111–12.

¹³³ *Study: Older Workers Bring Valuable Knowledge to the Job*, AM. PSYCHOL. ASS'N (Apr. 2, 2015), <https://www.apa.org/news/press/releases/2015/04/older-workers>.

lack of productivity that would be good cause to terminate an employee regardless of their age.¹³⁴

Critics of individual assessments may say that these mandatory retirement policies do not affect many employees and it is not worth the investment in such research because most Americans look forward to retirement,¹³⁵ or even retire early.¹³⁶ While this may be true in some respects, those who do not have the luxury to retire, or do not want to retire, should not be forced out due to age, but only if the skills and capabilities to perform such job are diminished. Therefore, even if mandatory retirement does not affect the overwhelming majority of people (discrimination affects underrepresented or minority groups), those that are affected deserve protection.¹³⁷ Additionally, although the ADEA provides a cause of action for those forced into retirement, these claims can be difficult to prove and would be even less attractive if an alternative measure was available to prevent discriminatory claims.¹³⁸

¹³⁴ In an at-will relationship, employers will always maintain the right to cut high-cost employees when it becomes financially prudent to do so. *See At-Will Employment—Overview*, NAT'L CONF. OF STATE LEGISLATURE (Apr. 15, 2008), <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx>.

¹³⁵ Judith A. McMorrow, *Retirement and Worker Choice: Incentives to Retire and the Age Discrimination in Employment Act*, 29 B.C. L. REV. 347, 361 n. 91 (1988).

¹³⁶ *Id.* at 358 n.98 (quoting JAMES W. WALKER & HARRIET L. LAZER, *THE END OF MANDATORY RETIREMENT: IMPLICATIONS FOR MANAGEMENT* 8 (1978) (“[E]xperience suggests that relatively few employees will wish to prolong their work careers”).

¹³⁷ McFadden, *supra* note 48, at 84 (stating that “lack of success is not surprising given that the elderly often have difficulty mobilizing significant cross-generational support for measures protecting them as a class”).

¹³⁸ For example, even though a pattern of releasing older employees and hiring only younger employees may evidence age discrimination, the courts are cautious in finding such a pattern. *See Sarullo v. United States Postal Serv.*, 352 F.3d 789, 799 (3d Cir. 2003) (evidence that employer hired nine younger persons since dismissing plaintiff, was too speculative); *see also Yeschick v. Mineta*, 675 F.3d 622, 632 (6th Cir. 2012) (stating that “all ADEA plaintiffs must carry the burden of persuasion and demonstrate that age was the ‘but-for’

Assessments are a better way to ensure that a considerable portion of the workforce is not forced sooner than need be. While opponents of this idea would likely say that a hard line is better than having an assessment that is susceptible to human mistake and error, it is important to keep in mind that many things can happen to affect public safety through the employment of anyone at any age. People are not perfect; poor health, error in judgment, and mistakes can happen to anyone, regardless of age. Using age as the sole standard to judge someone on the likelihood of one of those things occurring is inaccurate and unfair in the sense that it takes no other factors into consideration. Especially today, when life expectancy continues to increase¹³⁹ and doctors and other experts are continually finding ways to improve the effects of aging and prolong life.¹⁴⁰ Finding a balance is key to ensuring no discriminatory practices are taking place.

Furthermore, utilizing individualized assessments to determine whether a person must retire after a certain age would allow other occupations to supervise professionals that currently do not have any retirement policy, and without one could cause harm to public safety through their unmonitored practice. A medical doctor, not within the bona fide executive exception, will be able to continue practicing without any mandatory retirement.¹⁴¹ Although Doctors

cause of the adverse employment action.”); *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 177 (2009).

¹³⁹ See *Life Expectancy Around the World Has Increased Steadily for Nearly 200 Years*, SCITABLE BY NATURE EDUCATION, <http://www.nature.com/scitable/content/life-expectancy-around-the-world-has-increased-19786> (last visited Mar. 30, 2020).

¹⁴⁰ Interestingly, primary care doctors have a greater influence on increasing life expectancy than do specialty doctors. Robert Pearl, M.D., *Study: Primary Care Doctors Increase Life Expectancy, But Does Anyone Care?* (Apr. 8, 2019, 8:16AM), <https://www.forbes.com/sites/robertpearl/2019/04/08/primary-care-does-anyone-care/#6332ed71695f>.

¹⁴¹ See *supra* pt. II.A.1.

must take an exam every 10 years,¹⁴² the difference between a 65-year-old and a 75-year-old can be great, thus, it would be more beneficial to have a higher frequency of assessment after a certain age. If individualized assessments were successfully implemented, it would create greater equality in employment decisions and protect public safety by incorporating more professions, such as medical doctors, that otherwise do not fall within an exemption or defense outlined in the ADEA.

The most logical way to guard against discrimination and facilitate public safety is to assess people on the heart of the matter: the employee's ability to perform the job safely. If there is no concern that a person is unable to continue making reasonable decisions, or that the physical demands of a job cannot be met, then there is no reason to force a person out of their profession. While there is no perfect formula for determining whether a person poses a danger to themselves or others in the context of their professional duties, occupational assessments move one step closer to a balance between safety and continued employment.

V. Developing and Implementing Occupational Assessments

In order to correct the inefficiencies that have developed as a consequence of mandatory retirement, several things will need to occur. First, assessments will need to be developed specifically for each occupation and more research will need to be completed to determine what age such assessments should be taken. Assessments will need to take into account not only age but also the frequency and measure needed of particular skills in each profession. Additionally, costs of implementation will need to be considered. While there may be some hurdles, overall it will be worth the effort to help eliminate age discrimination to the highest extent possible

¹⁴² Joshua A. Krisch, *Board Certification and Fees Anger Doctors*, (Apr. 13, 2015, 5:36 PM), <https://well.blogs.nytimes.com/2015/04/13/board-certification-and-fees-anger-doctors/>. Of course, there are many arguments as to the benefits of such written exams.

and keep older adults who wish to keep working contributing to economic productivity.

A. Unique Construction Tailored to Each Profession

Given that the skills and abilities required for each profession vary, each profession would need to have an assessment uniquely tailored to suit each profession's needs. Likewise, the age for administering the assessment and the frequency of testing would need to be occupation specific. Accordingly, professions would need to develop an appropriate assessment program in order to effectively adopt and administer individualized assessments.¹⁴³ Committees may be necessary conduct studies or collect information on what minimum standards must be met in order for a person to meet the qualifications required for a certain profession and to outline the essential competencies in need of evaluation. Research on the trends pertaining to aging employees should also be compiled to assist in establishing robust retirement policies.

This paper proposes that initial studies are undertaken by the Equal Employment Opportunity Commission and the Secretary of Labor, with the assistance of other organizations to oversee professions of interest or provide insight as to the skills and capabilities required. Costs of such assessments could be offset by a reasonable fee collected from those who wish to undergo an evaluation. For example, using state or national bar associations as a means to identify the requisite criteria for judges and lawyers.¹⁴⁴ Likewise, allowing for a comment period from employers could prove to be substantially informative.

Committees should take note of any research conducted to this point and assessments currently in use. It will be important to look at both physical and mental abilities together and separately,

¹⁴³ See *supra* pt. II.

¹⁴⁴ The American Bar Association is a voluntary bar association, which is not specific to any jurisdiction. See *About The American Bar Association*, AM. B. ASS'N., https://www.americanbar.org/about_the_aba/ (last visited Mar. 30, 2020).

especially as each concern different professions and skill sets. For example, the criteria for a judge would be different from a firefighter, due to the difference in physical demands versus cognitive capacity for critical thinking; firefighters are required to make quick life-saving decisions under pressure, while judges, who likewise make life altering decisions, typically have more time to fully vet their opinions, albeit in the face of complex legal issues that require use of a different type of intelligence.¹⁴⁵

Determining the capabilities required of a bona fide executive or high policymaker, could prove to be more difficult as each would be uniquely situated depending on the occupation. However, general guidelines could be composed for these positions, as the main concern for people in these positions regards their decision-making abilities.¹⁴⁶ By establishing such guidelines, each unique position

¹⁴⁵ Fabrizio Mazzonna & Franco Peracchi, *Aging, Cognitive Abilities and Retirement*, 56 EUR. ECON. REV. 691 (Apr. 3, 2012) (available at http://www.eief.it/files/2012/05/peracchi_mazzonna_eer_2012.pdf).

The process of cognitive ageing is complex not yet well understood. One conceptual framework, due to Horn and Cattell (1967) and Salthouse (1985), distinguishes between two types of abilities. The first type, “fluid intelligence,” consists of the basic mechanisms of processing information which are closely related to biological and physical factors. One important aspect of these abilities is the speed with which many operations can be executed. The second type, “crystallized intelligence,” consists of the knowledge acquired during the life with education and other life experiences. Unlike fluid intelligence, which is subject to a clear decline as people get older, crystallized intelligence tends to be maintained at older ages and is subject to a lower rate of age-related decline. As argued by Salthouse (1985), dimensions of cognitive functioning such as orientation, memory, fluency and numeracy, are generally based on different combinations of fluid and crystallized intelligence. This suggests that accounting for the different dimensions of cognitive functioning may be important for the analysis of the process of cognitive ageing.

Id. at 691.

¹⁴⁶ See *supra* pt. II.A.1.

could select from pre-identified tests that are needed to meet the specific tasks required by each position.¹⁴⁷

While the process may not result in a completely discriminatory-free work force, it would be more reliable than arbitrary assumptions based on age, which have been proven to be an inefficient means of assessing individual capabilities. Much thought will be required of each profession's assessment, but it is worth the aims it stands to achieve: a less discriminatory practice and more efficient oversight of public safety concerns.

B. Determining the Proper Age to Require Assessment and Frequency of the Test Thereafter

Another crucial issue in implementing assessments is to consider the studies behind the age requirements already in place.¹⁴⁸ In general, the age of forced retirement is 65 in many professions.¹⁴⁹ However, the age of 65 was originally imposed arbitrarily; some believe its origin traces back to the introduction of the social security system by German "Iron Chancellor," Otto von Bismark.¹⁵⁰ At the

¹⁴⁷ For example, there could be several standard cognitive assessments for each executive or high policymaker, but also profession specific assessments. For example, critical thinking and reasoning criteria for partners of law firms or testing of accounting proficiencies exclusive to accountants.

¹⁴⁸ *See supra* pt. II.

¹⁴⁹ *Id.*

¹⁵⁰ Hampton Roy & Charles Russel, *Retirement Age, History of*, MEDROUNDS (Jan. 15, 2006), <http://www.medrounds.org/encyclopedia-of-aging/2006/01/retirement-age-history-of.html>.

The age of 65 was originally selected as the time for retirement by the "Iron Chancellor," Otto von Bismark of Germany, when he introduced a social security system to appeal to the German working class and combat the power of the Socialist Party in Germany during the late 1800s. Somewhat cynically, Bismark knew that the program would cost little because the average German worker never reached 65, and many of those who did lived only a few years beyond

time, Otto von Bismark wanted to appease the working class, but wanted to spend little on a social security program.¹⁵¹ To this end, the age to qualify for the social security system was placed at 65 because few German workers ever reached that age.¹⁵² The number seemed to stick throughout the ages, despite changes in life expectancy.¹⁵³ While subsequent studies have shown the average age of retirement to be 65, it is likely only because pension programs incentivize people to retire at that age.¹⁵⁴

Further studies are needed to evaluate the age that is most logical to require retirement or testing. This is likely to be slightly different for each profession depending on what factors, mental or physical, are required for each job. As previously discussed, a judge will not need the same physical skills as a firefighter, and while both would need significant decision-making abilities, the speed and type of decision would likely be factors that differ and need to be measured differently in each respective profession.

The frequency of any assessment would likewise be dependent on the specific profession an assessment pertains to, as each is uniquely constructed. The frequency and measure will vary due to differences in skills and abilities required, which may be prioritized differently and have distinctive indicators of decline. For example, a commercial airline pilot would be evaluated more frequently due

that age. When the United States finally passed a social security law in 1935 (more than 55 years after the conservative German chancellor introduced it in Germany), the average life expectancy in America was only 61.7 years.

Id.; see McMorrow, *supra* note 135, at 362 n.94 (“According to common belief, age 65 was selected because Otto von Bismark, the first chancellor of the German empire, used age 65 in the Old Age and Survivors Pension Act. Sixty-five was selected ‘because of the use of this age in pre-war Germany’s social security system.’”).

¹⁵¹ Roy & Russel, *supra* note 150.

¹⁵² *Id.*

¹⁵³ See *supra* pt. II.

¹⁵⁴ See McMorrow, *supra* note 135, at 365 (stating that “the possibility remains that by merely providing a retirement incentive, targeted to a particular group of employees, the employer skews the employee’s choice by creating the impression that the employee is no longer wanted”).

to the physical safety demands required of pilots, where a bona fide executive would perhaps need to be evaluated less frequently.

C. Costs of Implementing Individual Assessments

The cost of individual assessments would be greater at the beginning of the process, while gathering funds to develop research and implement the initial programs and procedures. After that, reasonable fees could be required of the employee taking the evaluation. Similar to other licensing fees and costs, this would be an anticipated cost that could cover expenses of administering the assessment and contribute to future studies to improve the assessment process over time. This author would propose that professions within the government be exempt from any fees, or provided with a subsidy, as professions like firefighters and law enforcement officers are public service workers who do not typically encounter the types of licensing and continued education fees common to other professionals.

The initial research should be provided for by the government, particularly through the Equal Employment Opportunity Commission and the Secretary of Labor, just as the initial study in 1992.¹⁵⁵ Any fees acquired through individual assessments should go towards future studies and costs. These fees would be charged to the professionals, or government, and would vary from each profession as it would have to be based on the support and time needed to assess any person taking an assessment. Similar to other industry specific fees, such as attorney bar exams, CPA exams, and others, occupational assessments would be no different and would just be a cost to the person wishing to continue working in a field in which one of the exceptions applies.

Some concerns regard the cost to the state, particularly due to anticipated litigation costs over a performed individual assessment.¹⁵⁶ However, this would not be an issue because

¹⁵⁵ See Schiff, *supra* note 60, at 50.

¹⁵⁶ *Id.* at 54.

assessments would likely reduce the many of the litigation costs already at issue regarding age-based discrimination claims. Overall, the benefit of providing a less discriminatory retirement practice, as well as a more effective way to protect public safety,¹⁵⁷ outweighs any price that may or may not be seen as a result of a change in policy to individual assessments.

VI. Conclusion

Individual assessments are needed in order to reduce discrimination in mandatory retirement policies that are still in place. Previous studies have shown that individual assessments are a more effective predictor than age as a way to measure the ability of a person to perform a job.¹⁵⁸ Policies regarding exceptions to the ban on mandatory retirement need to be amended in order to limit discriminatory practices and protect the elderly. Retirement policy also needs to be addressed in consideration of the needs of changing demographics. Occupational assessments for employees of certain professions must be implemented to reduce discrimination in a world where people are living and working longer in order to effectively accomplish the aims of the ADEA.

¹⁵⁷ *Id.* at 50 (finding “that chronological age was not a good predictor of abilities or performance for police, firefighters, or correction officers” and concluding that because “there was no scientific basis to support mandatory retirement for such public safety personnel . . . Congress [should] eliminate the exemption that these occupations had under the ADEA”).

¹⁵⁸ *See Schiff, supra* note 60.

IS THERE A PANACEA FOR AGEISM? AN INTERNATIONAL LAW PERSPECTIVE

*Jiawen Liu, Alex Ross & Loïc Garçon**

Abstract

Ageism is a common and widely-tolerated social phenomenon that is gaining recognition in the field of global health. It acts as a barrier to health and social services, to healthy aging, and has proven to have debilitating effects on the health and well-being of older adults. This article explores the construct of ageism and attempts to make sense of why it is so deeply entrenched in societies around the world, then analyses whether it can be tackled by the available international legal and political instruments or whether a new legally-binding international convention specifically for the protection of older people may be needed.

I. Introduction

Individuals aged sixty years and older are currently the most rapidly-expanding population strata worldwide; as of 2011, they constitute almost 12% of the global population.¹ The World Health

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Organization (“WHO”) estimates that in 2020, older people will outnumber children under the age of 5.² Major challenges in the face of this significant demographic shift will have to be confronted by countries across the world to ensure that older adults are able to attain the highest level of health and well-being. A review of the global progress made since the introduction of the Madrid International Plan of Action on Ageing (“MIPAA”)³ in 2002 showed that “the challenge of the demographic transition” is a low priority.⁴ This is a pressing concern as population ageing is inextricably linked with many other global public health agendas reflected in the Sustainable Development Goals (“SDGs”) of the 2030 Agenda for Sustainable Development, including targets on universal health coverage (“UHC”), noncommunicable diseases (“NCDs”), and disability.⁵

One of the challenges which needs to be urgently addressed by policymakers is that of ageism, a form of social prejudice that has been shown to severely undermine both the physical and mental

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¹ D.E.S.A., *World Population Prospects: The 2010 Revision, Vol. I: Comprehensive Tables 3*, U.N. Doc. ST/ESA/SER.A/313 (2011) [hereinafter *World Population Prospects*] (predicting that the global population of people aged 60 and older will rise to 22% by 2050).

² *Decade of Healthy Ageing 2020-2030*, WORLD HEALTH ORG. 2, https://www.who.int/docs/default-source/decade-of-healthy-ageing/full-decade-proposal/decade-proposal-fulldraft-en.pdf?sfvrsn=8ad3385d_6 (last visited May 8, 2020).

³ U.N. Assembly on Ageing, 2nd Sess., Political Declaration and Madrid International Plan of Action on Ageing (Apr. 12, 2002), available at https://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf [hereinafter MIPAA].

⁴ Report of the U.N.P.F.A. & HelpAge International for State of the World’s Older Persons 2012, Overview of Available Policies and Legislation, Data and Research, and Institutional Arrangements Relating to Older Persons—Progress Since Madrid vi (2011), https://www.unfpa.org/sites/default/files/pub-pdf/Older_Persons_Report.pdf [hereinafter *Overview of Progress Since Madrid*].

⁵ See U.N.G.A. Res. 70/1, U.N. SCOR, Transforming Our World: the 2030 Agenda for Sustainable Development, U.N. Doc. A/Res/70/1 (Oct. 21, 2015) (sustaining that ageing is an issue relevant to the Sustainable Development Goals, particularly in Goals 1–5, 10 and 11).

health of older adults.⁶ Ageism serves as a challenging barrier for the WHO Global Strategy and Plan of Action on Ageing and Health,⁷ which has a vision of building a world in which everyone can live long and healthy lives, where “older people experience equal rights and opportunities and can live lives free from age-based discrimination.”⁸ A strategic objective of the plan is to “combat ageism and transform the understanding of ageing and health,”⁹ which, crucially, “lie[s] at the core of any public health response to population ageing.”¹⁰

Although the term has been in existence since 1968,¹¹ the legal discourse surrounding ageism is a rather contemporary one. This could be attributed to the recent shift in focus in the past decade: from tackling specific discriminatory practices against older people in areas such as employment law and elder abuse to combating stereotypes around old age. Regional case studies on the developments following the MIPAA have shown that changes to policies and practices alone are insufficient to achieve the successful implementation of commitments made and attitudes, too, must be changed.¹² The MIPAA also recognizes and supports “changes in attitudes, policies and practices.”¹³ It has been suggested that ageism

⁶ See *World Report on Ageing and Health*, WORLD HEALTH ORG. 4, 11 (2015), https://apps.who.int/iris/bitstream/handle/10665/186463/9789240694811_eng.pdf;jsessionid=28081EC63D47CF28C250C8EF962DB6E6?sequence=1 (Reporting that “low levels of training in geriatrics and gerontology within the health professions, despite increasing numbers of older persons,” and that “care and support for caregivers . . . is not a priority focus of government action on ageing.”).

⁷ World Health Assembly, 69th Sess., Agenda Item 13.4, The Global Strategy and Action Plan on Ageing and Health 2016–2020: Towards a World in Which Everyone Can Live a Long and Healthy Life, WHA69.3 (May 28, 2016) (addressing these challenges by stating, “populations around the world, at all income levels, are rapidly ageing; yet, that the extent of the opportunities that arise from older populations, their increasing longevity and active ageing will be heavily dependent on good health”). *Id.*

⁸ Report of the World Health Organization, 69th Sess., Prov. Agenda Item 13.4, Multisectoral Action for a Life Course Approach to Healthy Ageing: Draft Global Strategy and Plan of Action on Ageing and Health 9, A69/17 (Apr. 22, 2016).

⁹ *Id.* at 12.

¹⁰ *Id.*

¹¹ ROBERT N. BUTLER, WHY SURVIVE? BEING OLD IN AMERICA 11 (2002).

¹² *Overview of Progress Since Madrid*, *supra* note 4, at vii.

¹³ MIPAA, *supra* note 3.

is even more pervasive than sexism and racism today,¹⁴ yet research has shown that the amount of effective research to eliminate this detrimental social prejudice is meagre in comparison.¹⁵ This is extensively cited to justify the introduction of a new legally binding international convention on the rights of older persons.

This article will first dissect the architecture of ageism by delving into the complexities of its unique construct, the variety of ways in which it manifests, and its consequences on the health and wellbeing of older adults. The existing international legal and political interventions that relate to older persons will be studied, taking their effectiveness in tackling ageism and various shortfalls into account. Next, this article will seek to explore alternative solutions and discuss the possibility and implications of a legally binding international convention on the rights of older persons. The potential benefits, disadvantages, and whether implementation of a new convention could potentially aid the fight against ageism, and efficiently reduce its presence, will be discussed. The final section will offer concluding thoughts and suggestions for tackling this pressing social problem in a cohesive, sustainable, and effective way.

II. Ageism and Old Age

Ageism is defined as the stigmatisation of and “discrimination against individuals or groups based on their age.”¹⁶ The term was originally coined by Robert N. Butler in 1969,¹⁷ who described it as “a process of systematic stereotyping of, and discrimination against, people because they are old, just as racism and sexism accomplish

¹⁴ See Becca R. Levy & Mahzarin R. Banaji, *Implicit ageism*, in AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 49, 64 (Todd D. Nelson ed., 2002).

¹⁵ Todd D. Nelson, *Ageism: Prejudice Against Our Feared Future Self*, 61 J. SOC. ISSUES 207, 207–08 (2005).

¹⁶ *World Report on Ageing and Health*, *supra* note 6, at 11.

¹⁷ Robert N. Butler, *A Disease Called Ageism*, 38 J. AM. GERIATRICS SOC’Y 178, 178 (1990); W. Andrew Achenbaum, *A History of Ageism Since 1969*, AM. SOC’Y ON AGING, <https://www.asaging.org/blog/history-ageism-1969> (last visited May 9, 2020).

for skin colour and gender.”¹⁸ He identified three facets of ageism which are interrelated and mutually reinforce each other: prejudicial attitudes held by others (or the older persons themselves) towards the ageing process; discriminatory practices against older persons; and institutional practices and policies which perpetuate stereotypical beliefs of older persons.¹⁹ To tackle ageism, all three components will have to be addressed.

An important first step is to arrive at a consensus on a precise definition of the term, as it could serve to raise awareness of what ageism is and what exactly policymakers and advocates should be focusing their attention on. WHO defines ageism as the stigmatization and discrimination against individuals or groups on the basis of their age.²⁰ However, it is not uncommon for the term to be used to solely depict the stigma element of the equation, just as is often done when referring to racism or sexism. For example, a widely cited definition by Alex Comfort offers the view that ageism is where “people cease to be people, cease to be the same people, or become people of a distinct and inferior kind, by virtue of having lived a specified number of years,”²¹ which alludes more to ageist beliefs rather than actionable responses. Similarly, the UN adopted a resolution in 2014 that recognises ageism as the “source of, the justification for[,] and the driving force behind age discrimination.”²² This definition also connotes that ageism is equivalent to age-based stigma. It is worth consistently adopting definitions which account for all three components identified by Butler; this would provide a more comprehensive overview of the problem and acknowledge that because they are inextricably linked, they should not be viewed as mutually exclusive in policymaking processes. Understanding that there exists a vicious cycle which

¹⁸ Julia Johnson & Bill Bytheway, *Ageism: Concept and Definition*, in AGEING AND LATER LIFE 200, 200 (Julia Johnson & Robert Slater eds., 1993) (citing Robert N. Butler, *Ageism*, in THE ENCYCLOPEDIA OF AGING 22 (George L. Maddox ed., 1st ed., 1987)).

¹⁹ See Butler, *supra* note 11, at 12.

²⁰ *World Report on Ageing and Health*, *supra* note 6, at 11.

²¹ ALEX COMFORT, A GOOD AGE 35 (1976).

²² E.C.O.S.O.C. Res. 2014/7, U.N. SCOR, Further Implementation of the Madrid International Plan of Action on Ageing 3, U.N. Doc E/Res/2014/7 (June 12, 2014).

involves stigma catalyzing discrimination and institutional practices reinforcing that stigma (thereby indirectly justifying discriminatory acts) is foundational to creating change.

Prejudice around old age is a unique phenomenon in that it is unlike prejudice around race, sex, or disability status. Age is progressive, and that we have been able to achieve longer life expectancies globally is a welcome advancement in medical science and global health development. Thus, most people will likely fall under their classification of old age at some point, and so the question is why so many hold these damaging, prejudicial views against their future selves.

There have been several explanations put forth to explain this. Branco and Williamson attribute the shift in attitudes towards older people to the advent of the printing press, which eliminated the functional role of older people to being the custodians of tradition, history, and knowledge as it enabled the recreation and distribution of information in great detail and efficiency.²³ Stearns believes that the shift is owed to the industrial revolution, which demanded individuals to be mobile in the pursuit of new jobs and livelihoods.²⁴ The revolution created a distortion of family structures, eventually leading to a cultural perception that the elderly are useless.²⁵ In Asia-Pacific countries specifically, fewer children at home to share the responsibilities for their ageing parents and grandparents eventually led to the social exclusion of older people and a more

²³ Todd D. Nelson, *Ageism: The Strange Case of Prejudice Against the Older You*, in *DISABILITY AND AGING DISCRIMINATION: PERSPECTIVES IN LAW AND PSYCHOLOGY* 37, 38 (Richard Wiener & Steven Willborn eds. 2011) (referencing K.J. Branco and J.B. Williamson, *Stereotyping and the Life Cycle : Views of Aging and the Aged*, in *IN THE EYE OF THE BEHOLDER : CONTEMPORARY ISSUES IN STEREOTYPING* 364, 364–410 (A.G. Miller ed. 1982)).

²⁴ Peter J. Stearns, *Old Age Family Conflict: The Perspective of the Past*, in *ELDER ABUSE: CONFLICT IN THE FAMILY* 3, 8–11 (Karl A. Pillemer & Rosalie S. Wolf eds., 1986).

²⁵ *See Id.* at 11 (describing the shift in public perception of older people during the industrial revolution, from capable to useless and dependent); *see also* Nelson, *supra* note 15.

distinct gap between intergenerational expectations,²⁶ which have possibly evolved to become associations of old age with burden.

While the advent of the printing press and the industrial revolution have long become parts of our history, negative perceptions around old age have not followed suit. Some perspectives provided by researchers offer insight into why ageism has persisted. Snyder and Meine contend that ageist views hold an ego-safeguarding function, and that ageism is a manifestation of self-denial: individuals reject the idea of belonging to the category of “older people” in the future, having to possibly confront mental and physical disabilities, and eventually, having to acknowledge death.²⁷ Research has shown that when such a threat (old age) is present, perceptions of and behaviours towards the threatening (older people) tend to be negative.²⁸ The second theoretical approach is the Terror Management Theory (“TMT”) by Greenberg, Pyszczynski, & Solomon, which is similar in nature.²⁹ It holds the perspective that because older people are often associated with the nearing of the end of life, it is deeply frightening and disruptive to the order and autonomy that cultures, religions, and similar social creations alike have created to assuage that innate fear.³⁰ The same issue of denial comes to play in this theory—those who are affected

²⁶ David R. Phillips & Kevin H. C. Cheng, *The Impact of Changing Value Systems on Social Inclusion: an Asia-Pacific Perspective*, in FROM EXCLUSION TO INCLUSION IN OLD AGE 109, 111 (Thomas Scharf & Norah C. Keating eds., 2012).

²⁷ Mark Snyder & Peter K. Meine, *Stereotyping of the Elderly: A Functional Approach*, 33 BRIT. J. SOC. PSYCHOL. 63, 66–67 (1994). This creates a threat to their personal identities. *See id.*

²⁸ FARAH A. IBRAHIM & JIANN R. HEUER, CULTURAL AND SOCIAL JUSTICE COUNSELING: CLIENT-SPECIFIC INTERVENTIONS 19 (2015) (citing K. Edwards & J. Wetzler, *Too Young to be Old: The Roles of Self-Threat and Psychological Distancing in Social Categorization of the Elderly* (unpublished manuscript)).

²⁹ Jeff Greenberg, Tom Pyszczynski & Sheldon Solomon, *The Causes and Consequences of a Need for Self-Esteem: A Terror Management Theory*, in PUBLIC SELF AND PRIVATE SELF 189, 189–212 (Roy F. Baumeister ed., 1986).

³⁰ *See id.*

by it and take it out on older people do so as an “anxiety buffer” to deny their impending mortality.³¹

What both perspectives have in common is that they acknowledge the prominence of the stereotype that old age entails biological declines. For many, awareness of disorders such as dementia which are more likely to occur with age may be inaccurately perceived as a reflection of the regular ageing process.³² The WHO World Report on Ageing and Health notes that:

[A]geism is assumed to be based on these presumed physiological and psychological facts, little or no account is taken of the less obvious adaptations made by older people to minimize the effects of age-related loss, nor the positive aspects of ageing, the personal growth that can occur during this period of life and the contributions made by older people.³³

The root of stigma then can clearly be distinguished as an unfortunate combination of fear and ignorance, both of which fuel the other. The element of fear has been explained by the aforementioned theories and perspectives, and it can be reduced and eventually extinguished through addressing the ignorance about the reality of ageing through the means of effective and accurate education and advocacy.

Ageism is so deeply embedded into social norms that it is widely tolerated and often seen as acceptable.³⁴ It goes unsaid that the media is extremely powerful by way of influencing social norms and beliefs, but often, instead of portraying ageing in a positive light, it asserts the idea that it is an unsavoury part of life and should be avoided where possible, reinforcing gerontophobia.³⁵ Worldwide,

³¹ Nelson, *supra* note 15, at 214 (citing K. Edwards & J. Wetzler, *Too Young to be Old: The Roles of Self-Threat and Psychological Distancing in Social Categorization of the Elderly* (unpublished manuscript)).

³² *World Report on Ageing and Health*, *supra* note 6, at 11.

³³ *Id.*

³⁴ Nelson, *supra* note 15, at 208

³⁵ *See id.* at 216 (addressing the influence of ageism in television).

anti-ageing products dot the markets and flourish in sales, and it is acceptable to poke fun at older people in a way that is clearly offensive and socially unacceptable if replicated in relation to race or sex.³⁶ For example, commiserating notes on birthday cards for adults where getting older is often portrayed almost as an inevitable tragedy is commonplace and seen as harmless humour, albeit a dark one.³⁷ It is considered complimentary when someone says “you look good for your age!,” and there are social norms that dictate how an older person should dress and carry themselves in public. Ageism can also manifest even when the perpetrators believe they are supporting or contributing to the wellbeing of older persons; seemingly considerate interactions such as speaking louder or slower to older people can be classed as ageist, as doing so assumes that all older people are likely to have hearing difficulties.³⁸

These negative portrayals of old age undermine older persons’ value and dignity, which in turn leads to consequences for their health and wellbeing: they have been shown to cause lowered levels of self-efficacy, decreased productivity,³⁹ and even effect the will to live.⁴⁰ Older persons describe feeling ostracised, humiliated, condescended to, and patronised, with many feeling insecure and frightened of physical or verbal abuse, of losing their job, or of going out.⁴¹

³⁶ *Id.* at 207–08.

³⁷ *Id.*

³⁸ *Id.* at 209–10.

³⁹ Becca Levy, Ori Ashman & Itiel Dror, *To Be or Not to Be: The Effects of Aging Stereotypes on the Will to Live*, 40 OMEGA: J. DEATH & DYING 409, 410 (2000).

⁴⁰ *Id.* at 415; see also Tom Redman & Ed Snape, *The Consequences of Perceived Age Discrimination Amongst Older Police Officers: Is Social Support a Buffer?*, 17 BRIT. J. MGMT. 167, 167–75 (2006) (finding age discrimination has a negative impact on life satisfaction); Anastasia S. Vogt Yuan, *Perceived Age Discrimination and Mental Health*, 86 SOC. FORCES 291, 291 (2007) (“This study finds that perceived age discrimination is associated with higher psychological distress and lower positive well-being.”); Susanne Wurm & Yael Benyamini, *Optimism Buffers the Detrimental Effect of Negative Self-Perceptions of Ageing on Physical and Mental Health*, 29 PSYCHOL. & HEALTH 832, 832–33 (2014) (reporting that negative self-perceptions of ageing impact future health).

⁴¹ Report of the Global Alliance for the Rights of Older People, In Our Own Words: What Older People Say About Discrimination and Human Rights in Older Age: A Consultation by the Global Alliance for the Rights of Older People 3 (2015).

The negative stereotype that old age is synonymous with biological decline is one that is so repetitive and embedded into the social fabric that it is easily and commonly internalised by older adults themselves. This phenomenon of stereotype embodiment causes older persons unconsciously internalise the ageist beliefs present in their environment and embody them, believing and behaving as though they are no longer independent, healthy, and valuable adults.⁴² In laboratory studies where older adults are exposed to negative age-based stereotypes, they demonstrated worse memory.⁴³ It becomes a self-fulfilling prophecy and creates a vicious cycle, adding another dimension to the problem of ageism which needs to be addressed.⁴⁴ Aronson and Steele introduce the related concept of “stereotype threat,” which occurs when people are bothered by the negative stereotypes they face, leading to adverse effects on their attitudes, cognitions, and behaviour.⁴⁵

Older persons will also face challenges on an institutional level as a result. The United Nations Special Rapporteur on the Right to Health noted that as old age is reached, an individual is more likely to be ignored, patronized, denied access to social security or healthcare, abused, forcefully medicated without their consent, or denied medical treatment at all due to their age.⁴⁶ They might also

⁴² Becca Levy, *Stereotype Embodiment: A Psychosocial Approach to Aging*, 18 CURRENT DIRECTIONS IN PSYCHOL. SCI. 332, 334–35 (2009).

⁴³ Brad A. Meisner, *A Meta-Analysis of Positive and Negative Age Stereotype Priming Effects on Behavior Among Older Adults*, 67 J. GERONTOLOGY SER. B: PSYCHOL. SCI. & SOC. SCI. 13, 13 (2011).

⁴⁴ *Id.*; Jocelyn Angus & Patricia Reeve, *Ageism: A Threat to “Aging Well” in the 21st Century*, 25 J. APPLIED GERONTOLOGY 137, 139 (2006).

⁴⁵ Joshua Aronson & Claude M. Steele, *Stereotypes and the Fragility of Academic Competence, Motivation, and Self-Concept*, in HANDBOOK OF COMPETENCE AND MOTIVATION 436, 440 (Andrew J. Elliot & Carol S. Dweck eds., 2005). After a lifetime of exposure, ageist stereotypes become part of our internal working model. *See id.* This presents grave consequences to the prevention of diseases. For example, while people of any age may decide that their symptoms of ill health do not warrant a visit to the doctor, it could be argued that older people are more likely to accept the symptoms as a normal part of aging or may assume that there is little that doctors can do for them, and as a result delay or avoid medical consultations.

⁴⁶ *See* Anand Grover, Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health,

face difficulties in access to affordable healthcare services, where there are insufficient health policies and supporting infrastructure to enable easy access to checks and treatment.⁴⁷ Furthermore, ageism also leads to obstacles in the development of policies as it steers policy options in limited directions.⁴⁸

At this point, the components of ageism: stigma, discrimination, and institutional practices have been identified, and the factors that make up stigma—namely, fear and ignorance—have been presented. The manifestations of ageism have shown how problematic it is that the prejudice around older adults and ageing is so deeply embedded and widely accepted, and the consequences on the health and wellbeing of older people have illustrated the pressing importance of combatting ageism.

The role of the law in the fight against ageism has to acknowledge all of the above. It has been established earlier that stigma is the cause of discrimination and institutional practices which disfavour older adults reinforce that stigma. Legal remedies can be given in cases of age discrimination, as exemplified by employment acts around the world which expressly prohibit discrimination on the grounds of age in hiring processes and at the workplace. The law can also enact changes in unacceptable institutional practices by setting standards and establishing new norms. In short, the law can police discriminatory actions and practices. However, the same legal interventions cannot be applied to combat the stigma element of ageism, as it is both impossible and disturbingly dystopian to police ageist thoughts. That is not to say that the law is unable to tackle stigma, though—through prosecuting discriminatory acts and practices, the law is able to clarify what is acceptable and what is not, and sheds light on the injustice older people face, thereby raising awareness of the problem that is ageism.

Thematic Study on the Realization of the Right to Health of Older Persons, U.N. Doc. A/HRC/18/37 (July 4, 2011).

⁴⁷ U.N.G.A., 66th Sess., Follow-Up to the Second World Assembly on Ageing ¶ 9–11, U.N. Doc. A/66/173 (July 22, 2011) [hereinafter *Follow-Up to the Second World Assembly on Ageing*].

⁴⁸ *World Report on Ageing and Health*, *supra* note 6, at 10.

This indirectly affects stigma around older people as the awareness raised reduces ignorance. In the following section, the existing legal and political interventions relating to older persons will be discussed, and their effectiveness in addressing the three facets of ageism will be analysed.

III. International Human Rights Instruments

A. International Bill of Rights

Human rights are spelled out in various international instruments produced under the aegis of the United Nations, with the Universal Declaration of Human Rights 1948 (“UDHR”)⁴⁹ being the most influential and significant.⁵⁰ It should be noted that “[a]s a declaration, the UDHR is an example of ‘soft’ international law. Soft law encodes norms in various declarations and statements of principles that states agree to act in accordance with—that is, it is aspirational rather than strictly binding.”⁵¹ However, the UDHR has grown to be recognized as “customary law and has influenced the creation of numerous ‘hard [international] law’ treaties and conventions.”⁵² These hard laws become legally binding for states who sign and ratify them and are only considered operative after a critical mass of states have done so.⁵³ The signatory states are then subject to international scrutiny and regular reporting to the monitoring committees of the relevant treaties.⁵⁴

The rights in the UDHR are universal and apply to all individuals: “Everyone is entitled to all the rights and freedoms set

⁴⁹ G.A. Res. 217 (III) A, U.N. SCOR, Universal Declaration of Human Rights, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

⁵⁰ Marthe Fredvang & Simon Biggs, *The Rights of Older Persons: Protection and Gaps Under Human Rights Law* 8 (Bhd. St Laurence & Ctr. Pub. Pol’y, U. Melbourne, Social Policy Working Paper No. 16, 2012), <https://social.un.org/ageing-working-group/documents/fourth/Rightsolderpersons.pdf>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

forth in this Declaration, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth[,] or other status.”⁵⁵ The rights of older persons are not specified but are technically covered under the category of “other status.”⁵⁶ In theory, this principle of universality is ideal as it does not leave any individuals out from its framework of protection; in practice, however, that a vulnerable group is identified and explicitly included in such instruments holds powerful symbolic value—one that the UDHR fails to offer older people. The passive reinforcement of ageism caused by the lack of explicit mention of age in international instruments will be discussed in greater detail when considering the need for a new international instrument for the rights of older persons.

The UDHR, along with the International Covenant on Civil and Political Rights (“ICCPR”)⁵⁷ and International Covenant on Economic, Social and Cultural Rights (“ICESCR”)⁵⁸ form the International Bill of Rights.⁵⁹ The rights contained in these instruments are very wide in scope and application, encompassing a plethora of rights signatory states should protect. Similar to the UDHR, the covenants do not make explicit reference to the rights of older persons.

The ICCPR elaborates on the rights outlined in the UDHR and includes some additional rights, such as those of minorities and detainees, as well as a variety of civil and political rights like the freedom of conscience and religion, the right to a timely trial, freedom from torture, and the right to remedy for any violations of rights listed in the covenant.⁶⁰ Article 26 of the ICCPR provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law,” and lists “race,

⁵⁵ UDHR, *supra* note 49, at art. II.

⁵⁶ Fredvang & Biggs, *supra* note 50, at 10.

⁵⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁵⁸ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁵⁹ Fredvang & Biggs, *supra* note 50, at 11.

⁶⁰ ICCPR, *supra* note 57, at art. 2, 3, 9, 18.

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” as prohibited grounds for discrimination.⁶¹ “Age” is not mentioned explicitly, but like the UDHR, it is regarded as falling under the blanket classification of “other status.”⁶² While the ICESCR also does not make specific mention to older persons, it contains rights relevant to the group, which are detailed in Articles 6 and 7 (work-related rights, such as the right to work in just and favourable conditions), Article 9 (right to social security), Article 11 (right to favourable standard of living), Article 13 (right to education), and Article 12 (right to the highest attainable standard of physical and mental health).⁶³

Crucial to the discussion on old age-related rights is General Comment 6 released by the Committee on Economic, Social and Cultural Rights (“CESCR”) in 1995 on the economic, social and cultural rights of older persons, which clarifies that the omission of age as an illegal ground for discrimination was unintentional, and transpired because “the problem of demographic ageing was not as evident or as pressing as it is now.”⁶⁴ This is reiterated in the Committee’s 2009 General Comment 20, which holds that “[a]ge is a prohibited ground of discrimination in several contexts.”⁶⁵ The Committee stressed the importance of addressing discrimination against older persons in seeking employment and “professional training” and protecting those “living in poverty with unequal access to universal old-age pensions.”⁶⁶ The need for these clarifications by the CESCR makes it evident that the rights of older people is a pressing issue not to be overlooked by States when evaluating their

⁶¹ *Id.* art. 26.

⁶² *Id.*

⁶³ ICESCR, *supra* note 58, at art. 6, 7, 9, 11, 13, 12.

⁶⁴ C.E.S.C.R., 13th Sess., General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons ¶ 11, U.N. Doc E/1996/22 (Dec. 8, 1995).

⁶⁵ C.E.S.C.R., 42nd Sess., General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) ¶ 29, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

⁶⁶ *Id.*

citizens' human rights protections and violations. The shortfall of these General Comments is that they are not legally binding.⁶⁷

The International Labour Organisation ("ILO") took a similar approach in incorporating older people's rights into their agenda. They awaited the adoption of the Older Workers Recommendation No. 162 in 1980, which called for measures to prevent discrimination in employment and occupation within the framework of a national policy, to promote equality of opportunity and treatment of workers regardless of their age.⁶⁸ Also, the ILO Termination of Employment Recommendation No. 166 of 1982 stated that age should not constitute a valid reason for termination, subject to national law and practice regarding retirement.⁶⁹

B. United Nations Human Rights Treaties

The UN monitors nine core human rights instruments, including the International Bill of Rights,⁷⁰ three of which are relevant to older persons—the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),⁷¹ the Convention on the Protection of the Rights of Migrant Workers and the Members of their Families ("ICMW"),⁷² and the Convention on the Rights of Persons with Disabilities ("CRPD").⁷³ The CRPD is, notably, the convention that cites the rights of older persons most frequently, and

⁶⁷ Fredvang & Biggs, *supra* note 50, at 8–10.

⁶⁸ Int'l Labour Org., *R162 - Older Workers Recommendation, 1980 (No. 162)*, I.L.O. ¶ 3–9 (June 23, 1980), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R162.

⁶⁹ Int'l Labour Org., *R166 - Termination of Employment Recommendation, 1982 (No. 166)*, I.L.O. ¶ 3–9 (June 22, 1982), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R166.

⁷⁰ *The Core International Human Rights Instruments and Their Monitoring Bodies*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited May 11, 2020).

⁷¹ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

⁷² International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 93 [hereinafter ICMW].

⁷³ Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].

will thus be explored in greater detail. The conventions are legally binding human rights instruments to states which have signed and ratified them, however, while none are directly enforceable by national courts, they have the potential to heavily influence decision and policy-making processes affecting older people.⁷⁴

While these treaties are not focused on older persons and can be inadequate in providing them with legal protection from human rights violations, they do include a few mentions of “age” worthy of noting. For example, “age” is included in Article 11 of the CEDAW on the equal rights of women and men to social security and paid leave.⁷⁵ In Article 7 of the ICRMW, “age” is listed explicitly as one of the prohibited grounds of discrimination.⁷⁶ In comparison to the International Bill of Rights, the explicit mention of age in these conventions provides undeniable symbolic and authoritative value when discussing the rights of older people.

The CRPD offers the most protection to older persons. For example, there is Article 25(b), which obliges states to take all appropriate measures to ensure access for older people with disabilities to health services; Article 13(1) on the access to justice, which makes clear reference to “age-appropriate accommodations;” Article 16(2), the right to “age-sensitive assistance” by states to ensure freedom from exploitation, violence, and abuse; and Article 8.1(b), the elimination of stereotypes, prejudices, and harmful practices “relating to persons with disabilities, including those based on sex and age.”⁷⁷ The CRPD’s clear reference to age is undoubtedly a welcome change from the constant classification of age under “other status.”⁷⁸ However, while this is beneficial to the protection of older persons, it cannot be heavily relied on as not all older persons will fall under the category of persons with disabilities: it would be ageist to assume so or to view the CRPD as equivalent to a specific convention for older persons.

⁷⁴ Fredvang & Biggs, *supra* note 50, at 9–10.

⁷⁵ CEDAW, *supra* note 71.

⁷⁶ *Id.*

⁷⁷ CRPD, *supra* note 73.

⁷⁸ *Id.*

The approach of the CRPD relating to its definition of disability is worth exploring in greater detail. A key characteristic unique to the convention which could be adopted by legislation for older persons is that it offers a flexible, evolving definition of which individuals fall under the category of “persons with disabilities.” In the convention, persons with disabilities include those who have “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁷⁹ The convention, understandably, does not provide an exhaustive list of disabilities or impairments to guide signatory states and their policymakers—it would have been impossible to make any progress with the protection of the rights of disabled persons if the definition was set to be a strict one which dictates every last detail of who qualifies for its legal protection. Similarly, as Van Bueren notes on the UN Convention on the Rights of the Child: “[h]ad we insisted on a watertight definition of the child . . . agreement on a treaty would never have been achieved.”⁸⁰

As with any international legal discourse relating to age, it is critical for definitions to be precise, yet panoptic, and globally and locally applicable. Defining the threshold of old age has been a prolonged debate, and rightly so: “old age” is a culturally saturated, subjective concept that is extremely difficult to categorise.⁸¹ It proves much more complex when compared to defining the category of “child” for the purposes of the CRC, as with younger age groups there exist clear stratifying social indicators such as the development of one from infant to toddler, toddler to child, child to adolescent, and so on. There is also the clear legal indicator of the age of consent, which is useful in providing clarity on which stage a young person is more vulnerable to abuse and therefore requires protection.

⁷⁹ *Definition of Disability*, GSDRC, <https://gsdrc.org/topic-guides/disability-inclusion/background/definition-of-disability/> (last visited May 11, 2020).

⁸⁰ Report of Geraldine Van Bueren to the International Symposium on the Rights of Older People 2009, *The Protection of the Human Rights of Older Persons in Europe: A Legal Perspective* (2009), available at <http://globalag.igc.org/elderrights/world/2009/humanrightseurope.pdf>.

⁸¹ Pat Thane, *History and the Sociology of Ageing*, 2 SOC. HIS. MED. 93, 93–94 (1989).

With older people, likely because demographic ageing on the current scale was initially unprecedented, that stratification is less clear. Upon reaching retirement age, older people are clustered together as a homogenous group, which severely undermines their diversity.

Although the United Nations has not set a standard number to represent the minimum threshold for old age, those aged sixty or older have been widely considered the “older population.”⁸² In developed countries, chronological numerical designations play a more significant role in defining old age; commonly, individuals aged sixty-five and above are considered as belonging to the category as they would be eligible for retirement, pension and social benefits, but this matters less in many developing countries where “chronological time [holds] little or no importance” and their definition is characterised heavily by respective social constructs.⁸³ In some of these countries, old age is the point at which active contribution to society is no longer possible; it can be marked by the loss of roles or positions once held, or the physical decline of persons which renders them incapable of performing tasks once fundamental to their identity and status in society.⁸⁴ A review of the multitude of public perception surveys available will also reveal that the definition of old age not only differs across regions, but across different age groups.⁸⁵ There is a common trend of younger respondents perceiving the stage of old age to be sooner than is expected (e.g. fifty instead of sixty-five), and this “old age floor”

⁸² *Proposed Working Definition of an Older Person in Africa for the MDS Project*, WORLD HEALTH ORG. (2002), <http://www.who.int/healthinfo/survey/ageingdefnolder/en/>; D.E.S.A., *World Population Ageing 2015* 3, U.N. Doc. ST/ESA/SER.A/390 (2015) [hereinafter *World Population Ageing*].

⁸³ Mark Gorman, *Development and the Rights of Older People*, in *THE AGEING AND DEVELOPMENTS REPORT: POVERTY, INDEPENDENCE AND THE WORLD'S OLDER PEOPLE* 3, 7 (1999).

⁸⁴ *See generally id.*

⁸⁵ *See, e.g.*, WILLIAM LITTLE, *INTRODUCTION TO SOCIOLOGY: 2ND CANADIAN EDITION* ch. 13.1 (2016) (explaining that some define elderly “as an issue of physical health, while others simply define it by chronological age,” however, “as people grow older they define ‘old age’ in terms of greater years than their current age.”).

tends to be raised as the respondents' ages increase.⁸⁶ Though this adds to the complexity of the international legal discourse at hand, in doing so it impeccably illustrates how old age is a social construct that differs widely on a global scale, supporting how offering a flexible, open definition as with the CRPD would be very useful.

The WHO World Report on ageing and health, published in 2015, presents a new WHO paradigm that defines healthy ageing as "developing and maintaining the functional ability that enables well-being in older age."⁸⁷ This definition stresses the need to understand and act upon a person's intrinsic capacities, and ways to maximize their functional abilities.⁸⁸ Both are mediated by older people's environments, whereby ageism is one key influencing factor.

The focal point of these arguments that strive to define old age is largely based on the decline of physical and mental capacities that are commonly associated with ageing. This decline would then cause individuals to lose their positions in society, benefit from pensions, or accept themselves as being old. However, this offers a rather simplistic view of the ageing process. While older people do often have to confront the gradual biological changes, basing definitions on the presumption that old age equates to incapacity and vulnerability is laced with stereotypes, however well-meaning in intent. A person who falls under the numerical definition of old age could be physically and mentally healthier than a twenty-year-old. Adopting this presumption can also be damaging as it could potentially exclude groups of people who do not meet the numerical designation but are indeed vulnerable and require protection, for example, a fifty-year-old with significant disabilities.

It then follows that one of the prominent features in combatting ageism is the breaking down of these arbitrary, presumptuous age-based categorisations, as they are restrictive and tend to overlook the vast diversity of ability and health across the ages. These

⁸⁶ See William Chopik et al., *Age Differences in Age Perceptions and Developmental Transitions*, 9 FRONTIERS IN PSYCHOL. at 2, 4–7 (2018). For example, respondents who are sixty and above might perceive "old age" to be seventy and above. *Id.*

⁸⁷ *World Report on Ageing and Health*, *supra* note 6, at 228.

⁸⁸ See *id.*

categorisations can lead to simplistic responses based on stereotypes of what old age implies. An open definition is thus the best option to reflect this diversity, and it would support the WHO's definition of ageing as "the process of progressive change in the biological, psychological and social structure of individuals."⁸⁹

C. International Political Instruments

The first UN human rights instrument on ageing was the Vienna International Plan of Action on Ageing ("VIPAA").⁹⁰ The VIPAA recommendations included making home-based care for older persons available, rejecting stereotypical concepts related to old age in government policies and recognising the value of old age.⁹¹ The 1991 United Nations Principles for Older Persons,⁹² 1992 Global Targets on Ageing⁹³ for the Year 2001, and the 1992 Proclamation on Ageing⁹⁴ further advanced international understanding of the fundamental requirements for the well-being of older persons and have all served as valuable guides.

Later, at the Second World Assembly on Ageing in 2002, the Madrid International Plan of Action on Ageing ("MIPAA")⁹⁵ was adopted as an updated and expanded version of the VIPAA with the two main goals of achieving: (i) "the full realization of all human rights and fundamental freedoms of all older persons" and (ii) "ensuring the full enjoyment of economic, social and cultural rights,

⁸⁹ Karen M. Sowers & William S. Rowe, *Global Aging*, in HANDBOOK OF GERONTOLOGY: EVIDENCE-BASED APPROACHES TO THEORY, PRACTICE, AND POLICY 3, 3 (James A. Blackburn & Catherine N. Dulmus eds. 2007).

⁹⁰ G.A. Res. 47/86, U.N. GAOR, 47th Sess., Implementation of the International Plan of Action on Ageing: Integration of Older Persons in Development, U.N. Doc. A/47/49 (Dec. 16, 1992).

⁹¹ *Id.*

⁹² G.A. Res. 46/91, U.N. GAOR, 46th Sess., Implementation of the International Plan of Action on Ageing and Related Activities (Dec. 16, 1991).

⁹³ Report of the Secretary General, Global Targets on Ageing for the Year 2001: A Practical Strategy, U.N. Doc. A/47/339 (Sept. 10, 1992).

⁹⁴ G.A. Res. 47/5, U.N. GAOR, 47th Sess., Proclamation on Ageing, U.N. Doc. A/Res/47/5 (Oct. 16, 1992).

⁹⁵ MIPAA, *supra* note 3.

and civil and political rights of persons and the elimination of all forms of violence and discrimination against older persons.”⁹⁶ The MIPAA also identified three key policy directions for states to guide the formulation and implementation of policies. They are: (i) “older persons and development”, (ii) “advancing health and well-being into old age”, and (iii) “ensuring enabling and supportive environments.”⁹⁷

As an expansion of the VIPAA, the MIPAA covers a wider range of issues, such as equal employment opportunities for all older persons; “programmes [that] enable all workers to acquire . . . social protection/social security, including where applicable, pensions, disability insurance[,] and health benefits”; and “sufficient minimum income for[]all older[]persons [with] particular attention to socially and economically disadvantaged groups.”⁹⁸ Also highlighted is the importance of continuous education, vocational guidance, and placement services, including for the purpose of maintaining a maximum functional capacity and enhancing public recognition of the productivity and the contributions of older persons.⁹⁹ A key feature of the MIPAA is the goal of advancing health into old age,¹⁰⁰ where it contains provisions for equal access to health care, active participation in medical decisions, “the impact of HIV/AIDS [in respect to] older persons,” and the full functionality of supportive and care-giving environments.¹⁰¹

Since its adoption, the MIPAA has been successful in guiding policymakers, “inspir[ing] the development of national and regional plans and provid[ing] an international framework for dialogue” on the various issues older persons could face.¹⁰² It is perhaps the soft law instrument that holds the most weight, being cited by a large number of states who are not in favour of a new international

⁹⁶ *Id.* ¶ 12.

⁹⁷ *Id.* ¶ 14.

⁹⁸ *Id.* ¶¶ 52–53.

⁹⁹ *Id.* ¶¶ 40, 90, 113.

¹⁰⁰ *Id.* ¶¶ 57–90.

¹⁰¹ *Id.* ¶¶ 75–80.

¹⁰² *Follow-Up to the Second World Assembly on Ageing, supra* note 47 (setting forth national and international standards and responses regarding the rights of older persons).

convention for older persons, but who contend that increasing efforts to implement the MIPAA is the better option.¹⁰³

It is not uncommon to hear scholars claim that the rights of older persons are currently not protected under international law, but as this section has shown, there exist a number of instruments which pertain to the rights of the older people.¹⁰⁴ The international soft law protections offered is wide-ranging and includes sets of principles, declarations, plans of action, and comments on how to interpret the ICESCR with regards to older persons. These documents are useful guides for state action in setting standards and influencing domestic policies. In fact, there are more soft international legal instruments available for the protection of older people than women and children had prior to the implementation of the CEDAW and CRC. Because there are already a variety of instruments available that affect older people, critics of a potential international convention on the rights of older persons believe that the adoption of it would merely be a repackaging of the existing legal rights offered.¹⁰⁵

However, an obvious disadvantage of the existing instruments is that they do not contain legally binding obligations pertaining to older people specifically. As a result, implementation can be weak, and states often fail to incorporate these international standards into their policies and institutional practices. Furthermore, the instruments that are legally binding, such as the ICCPR and ICESCR, make no explicit mention of age as being unfair grounds for discrimination, which is also problematic as it opens doors for selective interpretation.¹⁰⁶

¹⁰³ Fredvang & Biggs, *supra* note 50, at 13–14.

¹⁰⁴ *Id.*; see John Williams, *When I'm Sixty Four: Lawyers, Law and 'Old Age'*, 34 CAMBRIAN L. REV. 103, 111–13 (2003) (wherein United Kingdom legislation needed implementation to enforce the European Convention on Human Rights).

¹⁰⁵ Frédéric Mégret, *The Human Rights of the Elderly: An Emerging Challenge* 19 (Apr. 2010) (draft paper), <http://ssm.com/abstract=1584303>.

¹⁰⁶ Fredvang & Biggs, *supra* note 50, at 10, 14–17.

IV. United Nations Convention on The Rights of Older Persons

The following section will proceed to examine whether the gaps in the existing international legal and political instruments can be resolved with a new instrument—namely, a United Nations Convention on the Rights of Older Persons (“CROP”), which has been under discussion by the United Nations Open-Ended Working Group on Ageing (“OEWG”) since 2011.¹⁰⁷ The potential convention’s benefits and shortfalls in tackling age-based stigma and discrimination will be explored, as will recommendations for what it could contain for it to be successful.

The UN carried out an analysis of the standards in international human rights law for older people in 2011, and the resulting report identified the presence of inadequate protection for older people arising from normative gaps in the instruments, as well as fragmentation and a general lack of coherence and specificity of standards that relate to the experiences of older people.¹⁰⁸ The UN Secretary-General has remarked that the lack of special measures to ensure equality for older people is a major area of concern with regards to ageing.¹⁰⁹ As identified in the previous section, while key international human rights instruments acknowledge the importance of individual freedoms enlisted through the shared principle of universality, it is problematic that they do not expressly address the elderly. While there are international political instruments that have paved the way for dialogue on concerns older people may face and how these concerns should be addressed, there is currently no specific legal instrument that caters to the rights of older people.¹¹⁰

“Strengthening older people’s human rights is [claimed to be] the best single response” to the recognised difficulties they face, and

¹⁰⁷ U.N.G.A., Open-ended Working Group on Ageing, 2nd Sess., Report of the Open-ended Working Group on Ageing 6–10, U.N. Doc. A/AC.278/2011/5 (Aug. 23, 2011) [hereinafter *Report of the OEWG*].

¹⁰⁸ Fredvang & Biggs, *supra* note 50, at 12–13.

¹⁰⁹ UDHR, *supra* note 49, at 6.

¹¹⁰ Fredvang & Biggs, *supra* note 50, at 11.

a fundamental first step to achieving a world free of ageism.¹¹¹ In the follow-up to the Second World Assembly on Ageing, the Secretary-General also highlighted the importance of “the promotion and protection of human rights” as they pertain to older persons.¹¹² The African Commissioner on Human and Peoples’ Rights even expressed his surprise that older people do not have their own legally-binding instrument yet, finding it “remarkable that no specific UN Convention exists to proclaim and regulate [their rights].”¹¹³ Older persons are indeed one of the vulnerable groups that have not yet had their rights consolidated into a convention. While a notable number of groups and non-government organizations (“NGO”) support the call for the CROP,¹¹⁴ many of the world’s most developed countries and non-state stakeholders’ groups oppose it for a range of reasons.¹¹⁵ It is primarily owed to the belief that there are already sufficient existing instruments which should be more strongly implemented and monitored to effect change, yet this expressed skepticism is reasonable, since there have already been a “number of [new] international human rights instruments adopted in the last decade.”¹¹⁶ It would be counterproductive to have a new convention as there is a “tendency to haphazardly proclaim new rights at the risk of weakening the

¹¹¹ D.E.S.A, *Strengthening Older People’s Rights: Towards a UN Convention*, UNITED NATIONS, https://social.un.org/ageing-working_group/documents/Coalition%20to%20Strengthen%20the%20Rights%20of%20Older%20People.pdf (last visited May 13, 2020) [hereinafter *Strengthening Older People’s Rights*].

¹¹² *Follow-Up to the Second World Assembly on Ageing*, *supra* note 47, at 6.

¹¹³ Y.K.J. Yeung Sik Yuen, *African Commission on Human and Peoples’ Rights Report of the Focal Point on the Rights of Older Persons in Africa*, AFR. COMM’N ON HUM. AND PEOPLES’ RTS., https://www.achpr.org/public/Document/file/English/achpr43_specmec_older_actrep_2008_eng.pdf (last visited May 13, 2020).

¹¹⁴ Bridget Sleep, *Why it’s Time for a Convention on the Rights of Older People*, HELPAGE (2009), <http://globalag.igc.org/elderrights/world/2009/Humanrightsconvention.pdf>.

¹¹⁵ *Report of the OEWG*, *supra* note 107, at 18 (noting that while the existing standards were sufficient, they were underutilized).

¹¹⁶ Frédéric Mégret, *The Human Rights of Older Persons: A Growing Challenge*, 11 HUM. RTS. L. REV. 37, 40 (2011). This phenomenon is known colloquially as “convention fatigue.”

human rights project,” stressing the importance of “quality control” to manage the problem.¹¹⁷

A. Advantages of a Convention on the Rights of Older Persons

The need for specificity and direct acknowledgement of older persons as a vulnerable group needing protection, which existing instruments do not offer, is a primary advantage of a new convention. Identifying this social problem through specific mention first and foremost serves as an advocacy tool that raises awareness on the issues older persons could face. Following this recognition, there would be little reason to deny older people a specific instrument that protects their rights, as has been granted to other groups who are prone to rights violations. Identifying older people as a group within a framework of rights allows for a more systemic view of issues of discrimination. For example, discriminatory acts in the workplace or in employment can be viewed and addressed within a broader context of institutional ageism. A legally binding convention to protect them from these cases would thus become useful to consider. Besides the CROP’s advocacy function, the symbolic force of a convention specific to the rights of older people will be powerful in effecting change not just on a legislative level, but on a social one. Advocacy leads to awareness and action, creating a positive cycle of reinforcement.¹¹⁸

Besides its purpose as an important advocacy tool, a new convention would narrow the identifiable normative gap in the existing international human rights framework. As age is not listed explicitly as a ground for discrimination, such a gap exists and deprives older persons of their rights and dignity.¹¹⁹ It would serve as a comprehensive instrument that can frame the rights of the affected group more lucidly, complementing the existing instruments which already provide some degree of protection against ageism. Like older people’s rights, there was once a

¹¹⁷ *Id.* at 38.

¹¹⁸ See Fredvang & Biggs, *supra* note 50, at 14–15.

¹¹⁹ *Id.* at 16.

normative gap in the protection of women's rights, which was identified and remedied in the form of a new instrument: the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").¹²⁰ Although the UDHR guaranteed all its rights and freedoms to women and reaffirmed that both genders should enjoy equal rights, women were negatively and disproportionately affected by inequalities in the workplace, access to education, and healthcare.¹²¹ The history of CEDAW is similar to the current plight of older persons, whose rights are made somewhat hidden under the category of "other status."¹²²

Another example of a normative gap remedy is the Convention on the Rights of the Child ("CRC").¹²³ Like the rights of women, the rights of children were also technically covered in the UDHR under the blanket of "other status," as well as the 1959 United Nations Declaration on the Rights of the Child.¹²⁴ Similar to the rights of older persons, children's rights were scattered amongst a range of legal instruments and it was evident that they were fragmented and applied inconsistently.¹²⁵ The reality of children's vulnerability led to the recognition of children as a distinct group whose human rights required special attention: "Arguments were made that a convention was needed to lay down precise, binding obligations for signatory states, to enable children to protect their rights more effectively" and raise awareness of their issues.¹²⁶ Just as women and children have been recognised as distinct groups which require specific acknowledgement in international legislation, the case can be made that older persons, too, should be recognised as a distinct group in need of protection against ageism and rights violations, and afforded the same resolution.

¹²⁰ *Id.*

¹²¹ *Id.* Under the UDHR, there was also prominent sexism, specifically, the inequality of power distribution in politics and employment, as well as stereotypical beliefs, gender-based violence, and a general lack of respect for women's their human rights. *See id.*

¹²² *Id.*

¹²³ Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3

¹²⁴ Fredvang & Biggs, *supra* note 50, at 4, 16.

¹²⁵ *Id.*

¹²⁶ *Id.* at 16.

In a practical policy sense, the “invisibility” of older people’s rights has very distinct consequences in terms of getting the issues of older people onto the policy agendas of international human rights organisations and local governments. A number of leading age-focused NGO’s consider that the absence of an express reference to age in human rights conventions means that age is often overlooked by the human rights field itself.¹²⁷ It is problematic that rights of older people are fragmented and “scattered throughout various international and regional instruments.”¹²⁸ This poses the risk of these rights remaining invisible, significantly slowing the progress of promotion and protection. A study by the United Nations Population Fund (“UNFPA”) and HelpAge International discovered that monitoring bodies rarely prompted signatory states to include older persons in their regular reporting to governing committees, and even “the work of special rapporteurs and independent experts who examine rights in geographic areas failed to consider the rights of older persons as a specific category” in need of distinct protection.¹²⁹ If states are not prompted to report about older people, they will be less likely to ensure that older people’s rights are included within national legislation, outreach initiatives, or quality-control measures that other more visible groups are afforded. This problem was confirmed by the United Nations Secretary General in the follow-up on the Second World Assembly on Ageing, who analysed the treatment of older people by governing bodies and concluded that despite the existence of various documents on ageing, they are “age-blind” in their human rights reporting.¹³⁰ Similarly, the ICESCR received 124 state reports of which only

¹²⁷ Sleap, *supra* note 114, at 4. As states tend to track their progress against their express international obligations, rights of older people are largely left unaddressed. *See id.*

¹²⁸ *Id.*

¹²⁹ Fredvang & Biggs, *supra* note 50, at 17.

¹³⁰ *Id.*; Lindsay Judge, Report to International Symposium on the Rights of Older Persons 2009, *The Rights of Older People: International Law, Human Rights Mechanisms and the Case for New Normative Standards* 12 (Dec. 2008), available at <http://globalag.igc.org/elderrights/world/2008/internationallaw.pdf> (citing the example that between 2000 and 2008 only a meagre four in 124 State Reports sent to the Human Rights Committee had made reference to older people).

twenty-four referenced older people and their rights, and the CEDAW Committee received 190 state reports, of which thirty-two made references to older women and their rights.¹³¹

The selective interpretation and lack of legal certainty is a real problem for example, during the 19th Session of the Human Rights Council, Member State's representatives objected to the holding of the first UN panel on sexual orientation and gender identity.¹³² Rights of people with varying sexual orientations also fell under the umbrella of "other status" and was not codified in UDHR. Leveraging on this legal "invisibility" of their access to equal rights, it could be argued that they had no place in any international human rights instrument, and that to create new standards would be a misinterpretation of existing international human rights law. The same line of argument could be brought up when concerned with the rights of older people. By clarifying older people's rights with an international convention, such opposition based on selective interpretation could be avoided. At the same time, an international convention could also help in the cohesive and consistent development of regional human rights instruments, strengthening the global commitment and efforts towards tackling ageism. A binding international convention would also make local governments potentially more accountable to governing committees, as individuals could lodge complaints of any breaches of the convention to them and seek legal recourse. Having such a clear procedure asserts a minimum standard of responsibility states have to maintain.

Besides solving the normative gap, a new convention could also potentially eliminate the implementation gap due to its legally binding nature. Implementation gaps occur when states do not pass domestic legislation that is compatible with international standards to which they have committed to when they sign and ratify such treaties.¹³³ ICESCR Article 2(1) contains the principle of

¹³¹ Fredvang & Biggs, *supra* note 50, at 17.

¹³² U.N.H.R.C., 19th Sess., Report of the Human Rights Council, U.N. Doc. A/HRC/19/2 (June 19, 2013).

¹³³ *Id.* at 16.

“progressive realization,”¹³⁴ in which a signatory state must take steps “‘to the maximum of its resources’ to progressively achieve full realisation of the rights in the Convention,” taking into account the States’ differing and unique resources and positions, thereby ensuring a fair evaluation of their accountability and responsibilities.¹³⁵ This approach offers a promising future to the state of older people’s rights should the convention materialise.

The convention could also assist in the much bigger challenge of combatting systemic and conditioned ageism. Its social advocacy role and powerful international symbolism not only provides recognition and acknowledgement to the rights of older people, but also serves as an enabler and catalyst in promoting groups, communities and states to effect social change. The rights-based approach the convention adopts could aid in shifting views and changing public perspectives of older people as burdensome, frail, and in need of charity and social aid. It enables them to be viewed as valuable individuals whose rights have been made more visible and are empowered by the convention in realising these rights to their fullest potential. The dialogue it would create around ageism and age-based stereotypes would also lead to sustainable social change, which would overshadow any short-term solution a narrow needs-based solution could offer. A rights-based approach is also a basis for the SDGs and the “leave no one behind” agenda.¹³⁶

B. Disadvantages of a Convention on the Rights of Older Persons

As earlier discussed, statements from some Member States and NGOs reveal that both normative gaps and implementation gaps exist in the international protection system for older persons with the

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ C.D.P., *Leaving No One Behind* 1 UNITED NATIONS (2018), https://sustainabledevelopment.un.org/content/documents/2754713_July_PM_2_Leaving_no_one_behind_Summary_from_UN_Committee_for_Development_Policy.pdf

existing range of instruments that attempt to address their rights.¹³⁷ However, not all parties agree on the drafting of a new specific, legally-binding convention on the rights of older persons. While South American nations as a group as well as a number of NGOs are in favour of this, other “[M]ember [S]tates such as the United States, New Zealand, Canada, China, Switzerland, Norway and Russia, together with the European Union, believe” in and advocate for the wider use and development of existing instruments instead, citing convention fatigue and hold that a new instrument would only serve the purpose of framing the content which already exist—and quite thoroughly—across the various legal and political instruments.¹³⁸

Opponents of the convention also hold that the rights of older persons are already protected under the UDHR’s principle of universality, and there already exist strong and comprehensive soft law protections which exist to cover their rights.¹³⁹ Soft international law’s influence is often underrated, as it can be highly effective—if not more effective—than legally binding instruments. Besides providing detailed guides for policy makers on a wide range of issues, its non-binding nature ironically makes it more likely to be accepted and adopted in local policies by signatory states as it offers a flexibility to adapt to the states’ contexts without the threat of legal action should they not meet the instrument’s guidelines precisely. With the problem of convention fatigue, opponents believe that a new convention will merely serve the purpose of tidying up or consolidating all the existing instruments, which is not a good enough reason to implement it.¹⁴⁰ Advocates on the rights of older persons should instead focus their attention on better implementation and respect for present conventions, treaties, principles and declarations.¹⁴¹

¹³⁷ See *supra* pt. III.A.

¹³⁸ Fredvang & Biggs, *supra* note 50, at 13–14.

¹³⁹ *Id.*

¹⁴⁰ See *id.*

¹⁴¹ *Id.*

Another argument against the convention is that while the goals of such human rights treaties are ambitious, the results are often counterproductive.¹⁴² Proponents of this argument postulate that conventions have historically shown to create superficial equality rather than remedying past wrongs and are as such not sustainable or practical solutions.¹⁴³ For example, CEDAW is constantly subject to criticism because it has not eradicated global discrimination against women, a problem that is still prominent today although women's rights have been said to be advanced through the international convention.¹⁴⁴ Similarly, an overly optimistic view on the convention on the rights of older persons could be severely undermined when its implementation results in mediocre responses and minimal global change.

However, CEDAW's limitations can be largely attributed to the drafting and consultation process instead of the actual power an international instrument possesses in effecting change. Critics note that the committee is not always consistent in accounting for the intersectionality of women's identities, global diversity, and the ways in which the treaty affects the discrimination of women.¹⁴⁵ For a convention on the rights of older persons to be successful, older people will have to be involved as much as possible in the discussions and drafting processes, rightly acting as their own enablers in the protection of their rights. However, questions remain as to whom would be able to effectively represent their diversity. It has been argued that international conventions ignore multiculturalism and the plethora of considerations that need to be included, including how it could possibly conflict with local laws,

¹⁴² Rumana Islam, *CEDAW—The Promise and the Pain of the Promise*, ELCOP YEARBOOK OF HUM. RTS. 21, 28 (2017).

¹⁴³ *See id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See* Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 53 EMORY L. J. 71, 93 (2003) ("The structure of the treaty-based system within the United Nations has thus itself contributed to a fractured understanding of the nature of discrimination, failing to recognize it as an often inextricable mixture of factors, including race, ethnicity, religion, gender, class, and sexual orientation.").

religions, cultures and belief systems.¹⁴⁶ When conventions are in conflict with local or religious laws, for example, it is likely to lead to a backlash by the societies that are affected, whereas a non-binding soft law instrument would cause less friction. Furthermore, the failure of enforcing a convention of the rights of older persons is also dangerous as it legitimises illegal behaviour and indirectly makes it permissible. The CRC, for example, set out to create standards for children's rights, but the failure to effectively monitor and enforce violations of their rights in illegal activities such as child soldier recruitment, paired with the lack of punitive measures taken in response, sends a message of the convention being void of possessing any real meaning or effect, containing only superficial equality and empowerment.¹⁴⁷

It could also be argued that a Convention for the Rights of Older Persons would be counterproductive as it would serve to, ironically, perpetuate ageism. Drawing attention to older people would distinguish them from the rest of society as a specific vulnerable group needing protection and only marginalise them further. While the rights-based approach the convention would take is helpful in assuaging this by promoting the *advancement* of their rights, it only does so to a limited extent; the fact that the convention needs to exist and advocate also for the *protection* of their rights would likely lead others to wrongly assume that all individuals who fall under the category of older persons as set out by the convention are collectively vulnerable and in need of aid. Not all older people are vulnerable or identify as such, and to categorise them together in this way could lead to the reinforcement of ageing's links to poor health and quality of living. Defining old age for the purposes of the convention would also achieve the same negative effect, but as

¹⁴⁶ See Frances Raday, *Gender and Democratic Citizenship: The Impact of CEDAW*, 10 INT'L J. OF CON. L. 512, 517–23 (2012).

¹⁴⁷ Ursula Kilkelly, *The Convention on the Rights of the Child after Twenty-five Years*, in HANDBOOK OF CHILDREN'S RIGHTS: GLOBAL AND MULTIDISCIPLINARY PERSPECTIVES 80, 85 (2017).

discussed earlier, this could potentially be avoided by allowing for an open definition like that of the CRPD.¹⁴⁸

V. Conclusion

Older people around the world are often at a disadvantage because of the ageism they may be facing on a regular basis. The stereotypes which unjustly portray them in a pessimistic light directly affects their health and wellbeing. Often, stigma reinforcement and embodiment within the older people themselves exist because they, too, start to falsely believe in these stereotypes, leading to a vicious, self-fulfilling prophecy type cycle of ageism. This deep-set prejudice entrenched in prevailing social and cultural norms and its persistence through the ages is primarily owed to the two debilitating elements of fear (of the inevitable closeness to death that comes with older age) and ignorance when confronted with myths around old age and older people, which have generally not been effectively acknowledged and addressed. These two elements reinforce the stigmatisation of older people in all areas of their lives.

Moreover, rapidly changing demographics, such as increasing life expectancy, greater population growth in older ages (e.g. 75 and older), and emerging issues such as the onset of dementia and cognitive decline (accompanied by stigma often), present unprecedented challenges and needs to confront issues of ageism.

At present, significant progress has been made around the world in advocating for the protection of older people in specific areas like the workplace, where they are commonly unfairly viewed as a burden. However, the conversation around ageism has yet to reach that same level. This is crucial to address, as the underlying stigma and stereotypes which drive ageism form the root of discrimination and discriminatory practices on individual, community and institutional levels. There are a number of existing international legal instruments which attempt to combat discrimination faced by older people either through their principle of universality or with

¹⁴⁸ See *supra* pt. III.B.

specific mention in a few of their clauses, but fractioned efforts and the lack of focus on this particular group undermines their effectiveness, resulting in critics to proclaim that international instruments hold little weight in the fight against ageism as they are neither comprehensive nor successful in their implementation. The complacency and reliance of the rights of older people falling under “other status” in various international legal instruments as being sufficient in the protection of their rights will likely leave older people just as that—“others.”

The introduction of a new binding international legal convention that focuses explicitly on the rights of older people in all areas of their lives which might need protection, paired with effective implementation, monitoring and consistent follow-up, has been proposed widely to fill the gaps the existing international legal and political instruments have demonstrated. This article has outlined the advantages and disadvantages of a potential legally binding convention, with its recognisable symbolic force and legally binding nature being key to the support it has received. The recognition of older people deserving equal access to rights and the dialogue this creates will also, importantly, serve as an advocacy tool to raise awareness of their rights, catalysing a chain of positive social change. On the other hand, opponents of the introduction of such a convention argue that the instrument would simply serve as a consolidation tool that “repackages” what the existing international legal and political instruments offer, which is not a good enough reason to implement it; instead, the focus should be on overseeing and ensuring the success of the instruments and guidelines that are currently available for the protection of older adults. They also argue that a convention could highlight the false assumption that all older people are vulnerable and need protection in a multitude of areas, thereby perpetuating ageist stereotypes.

Ultimately, the success or failure of a potential international convention on the rights of older persons will depend on the unknown variables such as the drafting and formulation process, content, as well as the implementation, monitoring and enforcement tools that follow. Doron and Apter believe that shaping and forming

each element with the lessons from other conventions (of which specific points of the CEDAW, CRC and CRPD in particular have been discussed earlier in the article) in mind will positively affect the instrument's actual impact on the lives of older people. This emphasizes the roles of NGOs and older people as active participants and contributors to the drafting process. For example, NGO participation in the drafting of the CRPD as part of the working group heavily influenced the content of the convention, as it served as a voice for the persons with disabilities in discussions, and in one case, also prevented the breakup of negotiations.¹⁴⁹ Having age-focused NGOs and representatives from older communities across regions at such meetings would likely have a similar effect and help greatly in aiding the development of the convention's contents to provide for a more diverse population.

Whether or not the convention eventually comes into existence, the discussion around its feasibility for the past years has encouraged dialogue and sparked off debates across governments, NGOs, academia, advocacy groups and the general public, which is a welcome first step in the challenge of tackling ageism globally. It has and continues to raise awareness on the issues older people may face, encourages the identification and elimination of ageism, examines the role of international law in effecting social change, and poses questions previously unthought of, such as who falls under the category of an older person, whether an older person can be defined in the first place for the purposes of international legal instruments, what it means to protect older people, and whether interventions can, ironically, be inherently ageist in nature. This awareness plays an important role in helping to dispel any unfounded fears of ageing, aid in distinguishing myths from facts, and eventually—hopefully—combat ageism. No new convention nor any of the existing instruments will succeed against curbing ageism, without this fervent advocacy and awareness by its side.

¹⁴⁹ Janet E. Lord, *NGO Participation in Human Rights Law and Process: Latest Developments in the Effort to Develop an International Treaty on the Rights of People with Disabilities*, 10 ILSA J. INT'L & COMP. L. 311, 314–18 (2004).

ELDER RIGHTS ARE NOT NESTING DOLLS: AN ARGUMENT FOR AN INTERNATIONAL ELDER RIGHTS CONVENTION

*Julie Childs**

Abstract

By 2050, older adults will account for one in three people in the world's developed regions, according to United Nation ("UN") reports on world population ageing. In developing countries, the older population is projected to reach ten and nearly twenty percent respectively by 2050. Older persons, like all human beings, have basic human rights, but older persons rights often seem to be nested under other human rights such as those governing treatment of gender or disability rather than uncovered, valued and considered independently.

Human beings should not see their rights diminish as they age. An international treaty would establish a benchmark for acceptable behavior toward people as we age and empower older persons by promoting "elder rights" as human rights. The issue of whether elder rights are unique enough to warrant protection through an international treaty, has been debated by UN Member States for years, but has not yielded a treaty despite the significant rise in the older population expected in only thirty years.

This article will examine the ways in which we might move past the debate about *whether* elder rights are human rights that need to be protected through an international treaty and toward the broader discussion of *how* we can best protect elder rights. Elder rights should no longer be nested under other international human rights

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conventions. By examining the unique experiences of older adults that can impact elder rights, we may be able to gain traction on progress toward the ratification of an elder rights treaty.

I. Introduction

Several scholars have written in support of the creation of an international charter of rights for the elderly.¹ An international treaty would establish a benchmark for acceptable behavior and empower older persons by promoting “elder rights” as human rights. The issue may be *how* elder rights are classified, not *whether* elder rights are human rights that need to be protected through an international treaty.

According to UN reports on world population aging, by 2050, older persons will account for one in three people in the developed regions.² The share of older persons in the developing and least developed countries is projected to reach twenty and nearly ten percent respectively in 2050.³ Roughly sixty-five percent of UN states are developing countries.⁴ How a UN Treaty addresses elder rights will disproportionately impact its developing Member States, yet developing nations are the ones that seem to be taking the lead on its creation.⁵ The arguments for enforcing aspects of existing treaties that mention older persons rather than creating a dedicated international treaty on elder rights do not take fully into account the unique aspects of elder rights that weigh in favor of an independent instrument. In order to not miss the mark of advancing elder rights, it will be important to ensure that the nuances of elder rights are fully

¹ See, e.g. Diego Rodríguez-Pinzón & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18 AM. U. INT'L L. REV. 915, 915–1008 (2003).

² D.E.S.A., World Population Ageing 2015 1, U.N. Doc. ST/ESA/SER.A/390 (2015) [hereinafter *World Population Ageing*].

³ *Id.* at 27.

⁴ *World Economic Situation & Prospects*, UNITED NATIONS 166 tbl. C (2020), https://www.un.org/development/desa/dpad/wpcontent/uploads/sites/45/WESP2020_Annex.pdf (grouping countries into the following categories: developed; developing; least developed; and those with economies in transition).

⁵ Pinzón, *supra* note 1, at 996.

understood and captured within it. The demographics of the global population make this an urgent task.

II. The Momentum that Brought Elder Rights to the Forefront of International Law

There are many international agreements designed to safeguard basic human rights for all people. The Universal Declaration of Human Rights (UDHR),⁶ is one of the most recognized and influential of these agreements.⁷ The UDHR was adopted by the UN General Assembly in 1948, and provides, *inter alia*, that human rights impose duties on the State to ensure fair and appropriate treatment of its citizens.⁸ The UDHR consists of thirty articles affirming an individual's rights, which, although not legally binding in themselves, have been expounded in subsequent international treaties, regional human rights instruments, national constitutions, and laws.⁹ The UDHR proclaims that

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other

⁶ G.A. Res. 217 (III) A, U.N. SCOR, Universal Declaration of Human Rights, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR] (establishing a common achievement standard for all nations to protect the universal rights of all people, as drafted by agents from across the globe representing a multitude of different legal and cultural backgrounds).

⁷ See *Universal Declaration of Human Rights*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/> (last visited May 05, 2020).

⁸ See *id.* Every Member State vowed to cooperate with the UN in the promotion and campaign of universal respect and observation of all human rights and freedoms. See *id.*

⁹ See *id.*

lack of livelihood in circumstances beyond his control.¹⁰

In addition to the UDHR, there are several other cross cutting UN human rights treaties that moved human rights issues forward generally,¹¹ but few that focus on protecting elder rights. Some bright spots include the Madrid International Plan of Action on Ageing (“MIPAA”), adopted at the Second World Assembly on Ageing in April 2002.¹² The MIPAA began a new era for elder rights protections. MIPAA was said to “mark a turning point in how the world addresses the key challenge of ‘building a society for all ages.’”¹³ The MIPAA plan of action focused on three priority areas: “older persons and development; advancing health and well-being into old age; and ensuring enabling and supportive environments.”¹⁴ Significantly, it was the first time governments agreed to connect ageing to human rights as a central issue at the UN conferences and summits.¹⁵

In 2009, the Committee on Economic, Social and Cultural Rights (“CESCR”) provided that age is a prohibited ground of

¹⁰ UDHR, *supra* note 6, at art. 25; see *Universal Declaration of Human Rights—In Six Cross-Cutting Themes*, UNITED NATIONS HUM. RIGHTS OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/EN/UDHR/Pages/CrossCuttingThemes.aspx> (last visited Mar. 10, 2020).

¹¹ See *The Core International Human Rights Instruments and Their Monitoring Bodies*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Mar. 10, 2020).

¹² U.N. Assembly on Ageing, 2nd Sess., Political Declaration and Madrid International Plan of Action on Ageing (Apr. 12, 2002), available at https://www.un.org/en/events/pastevents/pdfs/Madrid_plan.pdf [hereinafter MIPAA]. The MIPAA offered a bold new agenda for handling matters of ageing in the twenty-first century. See *id.* at 1. The plan served as a resource for government and non-government organizations to “link questions of ageing to other frameworks for social and economic development and human rights.” See *id.*

¹³ *Id.* at 1.

¹⁴ *Id.* at pt. II. The objective of the MIPAA was to ensure that all nations play their part in “combating discrimination against older people, and in building a future of security, opportunity and dignity for people of ages.” *Id.* at 1.

¹⁵ *Id.*

discrimination.¹⁶ CESCR is a UN “body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties.”¹⁷ The CESCR has long emphasized the need to address discrimination against older persons in finding work, in professional training, and against those living in poverty with unequal access to pensions.¹⁸ The International Covenant on Economic, Social and Cultural Rights provides that States are obliged to progressively ensure the right to social security to all individuals within their territories.¹⁹

In 2010, the General Assembly of the UN established the Open-Ended Working Group on Ageing (“OEWG”) to examine the treatment of older persons.²⁰ The OEWG created a forum to consider the protection of elder rights and led to the appointment of the Independent Expert on the enjoyment of all human rights by

¹⁶ C.E.S.C.R., 42nd Sess., General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) ¶ 29, U.N. Doc. E/C.12/GC/20 (July 2, 2009) [hereinafter General Comment 20].

¹⁷ *Committee on Economic, Social and Cultural Rights*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R, <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (last visited Mar. 11, 2020). (“The Committee was established under [United Nations Economic and Social Council (“ECOSOC”)] Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the [ECOSOC] in Part IV of the Covenant.”). The main function of the CESCR is to oversee the covenant implementation by states parties. See *UN Committee on Economic, Social and Cultural Rights (CESCR)*, ECOI.NET, <https://www.ecoi.net/en/source/11512.html> (last updated Aug. 30, 2018). The committee strives to hold constructive discussions with state representatives regarding application of the terms of the covenant. *Id.* The committee also assists governments in fulfilling their responsibilities under the covenant through policy and legislation aiming to secure and protect social, economic, and cultural privileges. *Id.*

¹⁸ See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.A. 3.

¹⁹ See *id.*; Araromi Marcus Ayodeji, *Protecting the Rights of Old People in Nigeria: Towards a Legal Reform*, 40 J.L. POL’Y & GLOBALIZATION 131, 134–135 (2015).

²⁰ The Open-Ended Working Group on Ageing was established by the UN General Assembly under Resolution 65/182 on December 21, 2010. The working group will consider the existing international framework of the human rights of older persons and identify possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures. *Open-Ended Working Group (OEWG) on Ageing*, UNITED NATIONS (July 29, 2011), <https://www.un.org/development/desa/ageing/open-ended-working-group-oewg-on-ageing.html>.

older persons (“HROP”) in May 2014.²¹ The OEWG continues to examine the existing international human rights framework in relation to the elder rights, and the possibility of a new convention on the rights of older persons.²²

Latin America has been a consistent supporter of elder rights and on June 15, 2015, the Americas became the first region in the world to have an instrument for the promotion and protection of the rights of older persons.²³ The Organization of American States (“OAS”) with the support of the Pan American Health Organization (“PAHO”), adopted the Inter-American Convention on Protecting the Human Rights of Older Persons (“CPHROP”), which recognizes that all existing human rights and fundamental freedoms apply to older people.²⁴ The Convention, signed by the governments of Argentina, Brazil, Chile, Costa Rica, and Uruguay, is an important influence on other countries in establishing a framework for elder rights.²⁵

The African Charter on Human and Peoples' Rights (“African Charter”) is a human rights proclamation that is intended to promote and protect human rights and essential liberties throughout the African continent.²⁶ In January 2016, the Organization of African Unity (“OAU”) took a bold step forward for elder rights and adopted the Protocol to the African Charter (“Protocol”), to promote and

²¹ See *The Independent Expert on the Enjoyment of All Human Rights by Older Persons*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R, <http://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/IEOlderPersons.aspx> (last visited Mar. 11, 2020) (“In May 2014, the Human Rights Council appointed Ms. Rosa Kornfeld-Matte as the first Independent Expert on the enjoyment of all human rights by older persons.”).

²² *Open-Ended Working Group (OEWG) on Ageing*, *supra* note 20.

²³ See *The Americas Becomes First Region in the World to Have an Instrument for the Promotion and Protection of the Rights of Older Persons*, ORG. OF AM. STATES (June 15, 2015), https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-198/15.

²⁴ Inter-American Convention on Protecting the Human Rights of Older Persons, June 15, 2015, O.A.S.T.S. A-70.

²⁵ See, e.g., African Charter on Human and Peoples' Rights, Oct. 21, 1986, Afr. Comm’n on Hum. & Peoples’ Rts., available at <http://www.humanrights.se/wpcontent/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>.

²⁶ See *African Commission on Human and Peoples' Rights—History*, AFR. COMM’N ON HUM. & PEOPLES’ RTS., <https://www.achpr.org/history> (last visited May 05, 2020) (Also known as the “Banjul Charter.”).

protect the rights of older persons.²⁷ The Protocol directs African Union Member States to “[e]nact legislation and take other measures that protect the rights of Older Persons to express opinions and participate in social and political life.”²⁸ The Protocol further calls for “the elimination of discrimination against Older Persons, access to justice and equal protection before the law, access to employment without discrimination, social protection, access to health care services, access to education and information and communication technology, as well as accessibility to infrastructure for Older Persons.”²⁹ This is the momentum needed to advocate convincingly for a separate convention on elder rights: because elder rights, like human rights generally, are indivisible, interrelated, and interdependent, “the improvement of one right facilitates advancement of the others,” yet the deprivation of one right adversely affects all others.³⁰

²⁷ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa, Jan. 31, 2016, Org. of African Unity, available at https://au.int/sites/default/files/pages/32900-file-protocol_on_the_rights_of_older_persons_e.pdf. The OAU is dedicated to transitioning Africa out the era of human rights violations under apartheid toward standards for human rights established by the African Charter. *Id.* For a very long time in Africa, many countries lacked the necessary mechanisms for the protection of human rights. *See id.* The African Charter, and later the Protocol, became a means of enforcing human rights and preventing discrimination, including against older persons. *See id.* The OAU now requires all African countries to uphold the guidelines of the Charter. *See id.*

²⁸ *Id.* art. 5.

²⁹ *Statement of the Working Group on the Rights of Older Persons and Persons with Disabilities in Africa of the African Commission on Human and Peoples’ Rights on the Occasion of the 27th International Day of Older Persons*, AFR. COMM’N ON HUM. & PEOPLES’ RTS. (October 1, 2017), <https://www.achpr.org/news/viewdetail?id=25>.

³⁰ *See What Are Human Rights?*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> (last visited Mar. 11, 2020). Human rights are essential rights to all people in the world; no matter their unique personal background or features, all persons are created equal and entitled to rights without discrimination. *See id.* These rights are always interdependent, indivisible and interrelated, “whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; [or] economic, social and cultural rights, such as the rights to work, social security and education; or collective rights, such as the rights to development and self-determination.” *Id.* Human rights must be expressed and assured

A. Why a Treaty is Important Now—The Case for Urgency

The world's older population continues to grow at an unprecedented rate.³¹ Approximately 8.5% of people worldwide (617 million) are 65 or older.³² According to a 2015 report this percentage is projected to jump to nearly 17% of the world's population by 2050 to 1.6 billion.³³ The ageing population is growing at a rapid rate, stressing resources and spurring resentments that could lead to elder abuse.³⁴ A convention on elder rights could mitigate the impact by providing a framework to manage the confluence of global modernization, ageing, and demographic changes.

Nowhere should the urgency for a convention on elder rights be more apparent than in developing regions where the population of persons over the age of 60 has quickly accelerated “from 376 million in 2000 to 602 million in 2015—an increase of 60%—and . . . is projected to grow by 71% between 2015 and 2030, when a projected one billion people aged 60 years or over will reside in the less developed regions.”³⁵ It is necessary to turn and face the reality that 1.7 billion people aged 60 years or over—nearly 80% of the world's older population—will live in the less developed regions in 2050.³⁶ Even more staggering, by this same time, developing nations will be

by law; they are protected only to the extent they are embedded in general principles of law, treaties, international covenants, or the customary laws and constitutions of international nations. *See id.*

³¹ *World's Older Population Grows Dramatically*, NAT'L INST. OF HEALTH (March 28, 2016), <https://www.nih.gov/news-events/news-releases/worlds-older-population-grows-dramatically>.

³² *Id.* According to the National Institute on Aging (“NIA”) and National Institutes of Health (“NIH”), the older demographic is rapidly growing in proportion the rest of the global population. *See id.* The growing population of older people around the world must be the impetus for ensuring the health, livelihood, and rights of our elders; the NIH and the US Census Bureau are collaborating to ensure that data collected is used to “better understand the course and implications of population aging.” *Id.*

³³ *Id.*

³⁴ *See Elder Abuse*, WORLD HEALTH ORG. (June 8, 2018), <https://www.who.int/news-room/fact-sheets/detail/elder-abuse>.

³⁵ *World Population Ageing*, *supra* note 2, at 9.

³⁶ *Id.*

home to two out of every three persons aged 80 years or older.³⁷ Existing human rights conventions, even if broadly interpreted to convey rights to older citizens, were not drafted with this demographic phenomenon in mind.

Older adults may not be able to rely upon filial piety to protect their rights and assist in caregiving, as resources in the rural areas become scarcer due to greater demand, and potential caregivers move to cities and industrial nations for work.³⁸ The need for laws to protect the older population cannot be ignored and is too important to rely solely upon moral standards and cultural codes of conduct. Moreover, older persons need to have a say in these decisions; “[t]o ensure well-being, the powerless need to be empowered.”³⁹

B. What Are Elder Rights and Why We Make Special Efforts to Protect Them?

As human rights go, elder rights do not, in and of themselves, appear so extraordinary. For example:

- The right to work and to pursue other income-generating opportunities with no barriers based on age.
- To retire and participate in determining when and at what pace withdrawal from the labor force

³⁷ *Id.* at 11–12.

³⁸ Michael North & Susan Fiske, *Modern Attitudes Toward Older Adults in the Aging World: A Cross-Cultural Meta-Analysis*, 141 PSYCHOL. BULL. 993, 993–1021 (2015).

³⁹ Sanjeev Bakshi & Prasanta Pathak, *Aging and the Socioeconomic Life of Older Adults in India: An Empirical Exposition*, MUNICH PERSONAL REPEC ARCHIVE 2 (2013), https://mpira.ub.uni-muenchen.de/68651/1/MPRA_paper_68651.pdf. Protecting the rights of elders is imperative because it places power back in the hands of older adults to dictate the outcomes of their lives. *See id.* (“[T]he process of empowerment is about making choices. The concept incorporates three interrelated dimensions namely, agency, resources, and achievements that lead to manifestation of power in the presence of choices. Therefore, in the context of older adults, autonomy in decision making reflects the power.”).

takes place. To permit informed planning and decision-making.

- To live in environments that are safe and adaptable to personal preferences and changing capacities. To reside at home for as long as possible.
- To remain integrated and participate actively in society, including the process of development and the formulation and implementation of policies which directly affect their well-being.
- To obtain health care to help them maintain or regain the optimum level of physical, mental, and emotional well-being and to prevent or delay the onset of illness. To access social and legal services.
- To make decisions about their care and quality of life.
- To be valued independently of their economic contributions. To live in dignity and security and to be free of exploitation and physical or mental abuse.⁴⁰

Despite their common denominators, the reason we must address elder rights separately, and protect them uniquely, is because of the systematic discrimination at the individual, institutional, and societal levels that impedes, erodes, and, in some cases, destroys basic human rights.⁴¹ This is the necrotic force of ageism, “the stereotyping and discrimination against individuals or

⁴⁰ G.A. Res. 46/91, U.N. GAOR, 46th Sess., Implementation of the International Plan of Action on Ageing and Related Activities (Dec. 16, 1991).

⁴¹ Tova Band-Winterstein, *Health Care Provision for Older Persons: The Interplay Between Ageism and Elder Neglect*, 34:3 J. OF APPLIED GERONTOLOGY 113, 114 (2015); available at <http://journals.sagepub.com/doi/pdf/10.1177/0733464812475308>.

groups on the basis of their age.”⁴² Emphasizing the toll of ageism on elder rights, the World Health Organization (“WHO”) proposed working together with Member States and national and international partners on a global campaign to implement a framework to combat ageism.⁴³ Negative perceptions of older people, such as viewing them as senile, burdensome, useless, or invisible, can result in social exclusion, isolation, and, ultimately, even abuse.⁴⁴ These “[a]geist stereotypes, that depict older people as frail, vulnerable, or confused . . . promote the idea that older people are a strain on society’s human and fiscal resources.”⁴⁵ While ample anti-age discrimination legislation has been introduced by countries across the world, it has not successfully “expose[d] the age perceptions that are the foundation of discriminatory practices.”⁴⁶ Thus, elder rights continue to be viewed through an occluded lens.

People should not see their rights diminish as they age. The Convention on the Rights of the Child (“CRC”) protects rights at the beginning of the continuum analogous to those that elders seek protection for at the other end of the human life cycle.⁴⁷ The CRC

⁴² *Ageing and Life-Course*, WORLD HEALTH ORG.,

<http://www.who.int/ageing/features/faq-ageism/en/> (last visited Mar. 19, 2020). The insidious nature of ageism is that it can “take many forms, including prejudicial attitudes, discriminatory practices, or institutional policies and practices that perpetuate stereotypical beliefs.” *Id.*

⁴³ Werner Obermeyer, Director, World Health Org., Statement at the United Nations Open-Ended Working Group on Ageing, 7th Sess. (Dec. 14, 2016) (transcript available at <https://social.un.org/ageingworkinggroup/documents/seventh/WernerObermeyer.pdf>).

⁴⁴ This treatment of elders contravenes the Universal Declaration of Human Rights, that “the foundation of freedom, justice and peace in the world” is “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.” UDHR, *supra* note 6, at 1.

⁴⁵ See Imogen Lyons, *Public Perceptions of Older People and Ageing*, NAT’L CENTRE FOR THE PROTECTION OF OLDER PEOPLE 42 (2009), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.469.276&rep=rep1&type=pdf>.

⁴⁶ *Id.* at 36.

⁴⁷ Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3 (“Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance” and “[r]ecognizing that the child, for the full and harmonious development of his or her personality, should grow up in a

“consider[s] that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.”⁴⁸ Advanced age is a milestone we all hope to one day reach—denying elders the basic protections we afford our youth (arguably in virtue of the fact they have outlived the only chapter of their lives that warrant special protections) is at best irresponsible and at worst ageist.⁴⁹

Another underlying false assumption characteristic of ageism is that older people are a monolithic group.⁵⁰ Old age may be a common denominator, but the numerators are as infinite as the variations of cultures and experiences humanity can imagine.⁵¹ The assumption that all members of a group, such as older adults, are the same, is a pernicious threat to the rights each person individually should otherwise enjoy because “[l]ike racism and sexism, ageism serves a social and economic purpose: to legitimize and sustain

family environment, in an atmosphere of happiness, love and understanding” and “entitled with assistance and special care.”).

⁴⁸ *Id.*

⁴⁹ Addressing the Sixth Session of the OEWG, a Representative of Morocco explained the distinction between elder rights and human rights generally:

Mister President, we are all born equal and that does not change with aging. However, existing national, regional, and international mechanisms do not adequately protect elderly people who are suffering of inequality and invisibility. Although human rights should not change with age or dependence, older people face very specific and real threats to their rights, particularly in terms of access to health care and education, protection from abuse, and protection from age discrimination in employment.

The Permanent Mission of the Kingdom of Morocco to the United Nations, Statement at the United Nations Open-Ended Working Group on Ageing, 6th Sess. (July 16, 2015) (transcript available at <http://statements.unmeetings.org/media2/7650781/morocco.pdf>). Notably people aged 60 and over are projected to represent nearly 25% of the total Moroccan population by 2050. *Id.*; see *supra* pt. I.

⁵⁰ See Diane E. Rykken, *Sex in the Later Years*, in *THE ELDERLY AS MODERN PIONEERS* 162 (Philip Silverman ed., 1987).

⁵¹ See *id.*

inequalities between groups.”⁵² Thus, societal misinterpretations of what it means to be an older person perpetuate inequality.⁵³

Healthcare is a particular concern for older persons and a critical area where elder rights can be jeopardized by ageist perceptions and practices.⁵⁴ Age limits that govern access to screening and treatment currently exist throughout healthcare systems in many countries; the rights and entitlements of patients are constrained by legislation and regulations, as well as professional codes and guidelines.⁵⁵ These discriminatory healthcare related laws and regulations are a low hanging fruit to pick in support of framing an elder rights treaty.

At a time of increasing global need, there is an opposing trend in healthcare.⁵⁶ Studies have shown that professional healthcare workers prefer to work with younger populations.⁵⁷ Geriatrics as a career choice among students in health and social care has remained unappealing in recent years.⁵⁸ For example a study at the turn of the millennium found that while attitudes toward working in long term care are generally positive, nearly 97% of US nursing students responded that they had no desire of working in such a setting.⁵⁹ A

⁵² *Ageing and Life-Course*, *supra* note 42.

⁵³ *See id.* (“In 2014, governments around the world recognized ageism as ‘the common source of, the justification for, and the driving force behind age discrimination.’”).

⁵⁴ See Karin M. Ouchida & Mark S. Lachs, *Not for Doctors Only: Ageism in Healthcare*, AM. SOC’Y ON AGING, <https://www.asaging.org/blog/not-doctors-only-ageism-healthcare> (last visited May 10, 2020).

⁵⁵ See Mary F. Wyman, Sharon Shiovitz-Ezra & Jürgen Bengel, *Ageism in the Health Care System: Providers, Patients, and Systems*, in INTERNATIONAL PERSPECTIVES ON AGING VOL. 19: CONTEMPORARY PERSPECTIVES ON AGEISM 201–04 (L. Ayalon & C. Tesch-Römer eds., 2018).

⁵⁶ See generally Barbara J. King, Tonya J. Roberts & Barbara J. Bowers, *Nursing Student Attitudes Toward and Preferences for Working with Older Adults*, 34 GERONTOLOGY & GERIATRIC EDUC. 272 (2013).

⁵⁷ *See id.*; Band-Winterstein, *supra* note 41, at 114.

⁵⁸ See Maria Castellucci, *Geriatrics Still Failing to Attract New Doctors*, MODERN HEALTHCARE (Feb. 27, 2018), <https://www.modernhealthcare.com/article/20180227/NEWS/180229926/geriatrics-still-failing-to-attract-new-doctors>; Marius Ungureanu, et al., *The Future of Work in the Health Sector*, INT’L LABOR ORG. (2019), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/sector/documents/publication/wcms_669363.pdf.

⁵⁹ King, Roberts & Bowers, *supra* note 56.

more recent study determined that less than 1% of registered nurses in the US are certified in geriatrics, as well as fewer than 3% of advanced practice registered nurses.⁶⁰ While no global treaty will mandate geriatrics as a field of study, or force medical professionals to fill the shortage of geriatric practitioners, a treaty on elder rights can combat the ageism that undermines the pipeline to care for older persons. By untangling the stereotypes and focusing on the threads that older persons contribute to the fabric of society, they become more valuable in the eyes of others.

Elder rights are also diminished when society conflates old with sick, frail, or disabled.⁶¹ A survey in Ireland showed that the most common form of ageism reported was the attribution of ailments as a consequence of age by healthcare workers.⁶² It has also been discovered that older people are sometimes denied services afforded to young people, even when presenting with similar symptoms.⁶³ This brand of discrimination is a direct threat to access to medical care that should cause at least as much alarm as if a child were denied treatment. Under these circumstances, in order to maintain one's autonomy, protect dignity, and fend off potential abuse, older persons only hope is to avoid frailty and dependence upon caregivers. Access to healthcare then can be seen as another essential part of protecting elder rights.

Ageist prejudices can also lead to a failure to refer those with diminished capacity for expert opinions, such as psychological evaluation, or a denial of social, legal, or medical services in

⁶⁰ John W. Rowe et al., *Preparing for Better Health and Health Care for an Aging Population: A Vital Direction for Health and Health Care*, NAT'L ACADEMY OF MED. (Sept. 19, 2016), <https://nam.edu/preparing-for-better-health-and-health-care-for-an-aging-population-a-vital-direction-for-health-and-health-care/>.

⁶¹ See generally Eileen McGlone & Fiona Fitzgerald, *Rep. No. 85: Perceptions of Ageism in Health and Social Services in Ireland*, NAT'L COUNCIL ON AGEING AND OLDER PEOPLE (2005).

⁶² See *id.* at 53–54.

⁶³ *Id.* at 23 (“Ageism in health and social services may occur because health problems in the older population are characterised as ‘normal aspects of aging.’”). For example, older patients admitted to Emergency Departments in Scotland were “less likely than younger people with similar injuries to receive appropriate treatment.” *Id.* at 30.

general.⁶⁴ On the other end of the spectrum, presuming that an older person needs assistance when they are actually capable of helping themselves is another, seemingly more subtle, act of ageism, however, this sort of paternalism can be more invasive because the older person may have no idea that decisions were made on their behalf without their participation.⁶⁵ For example, where an older client seeks advice of legal counsel and receives advice that has been colored by assumptions of a lack of capacity.⁶⁶

Perhaps the most insidious manifestation of ageism on elder rights is the misperception that older adults are a cohort of frail, burdensome, demented people.⁶⁷ For example, in 2016, “60% of respondents in the ‘World Values Survey’ analysed by WHO reported that older people are not respected.”⁶⁸ Other studies have shown that even health care providers’ attitudes have been “shaped by the persistent misconception that older patients are demented, frail, and somehow unsalvageable.”⁶⁹ This sort of stereotyping can significantly impact health and quality of life.⁷⁰

⁶⁴ See generally Patricia Brownell, *Social Issues and Social Policy Response to Abuse and Neglect of Older Adults*, in AGING, AGEISM AND ABUSE: MOVING FROM AWARENESS TO ACTION 1–16 (Gloria Gutman & Charmaine Spencer eds., 2010) (discussing “social forces that shape attitudes about ageism” and “personal and institutional ageism [that] has a tendency to dismiss signs of pathological and treatable signs of aging”).

⁶⁵ See *id.* at 2. Guardianship is perhaps the most extreme example of a situation where paternalistic ageism can be perpetrated, even under the best of intentions. *Id.*

⁶⁶ Under the American Bar Association’s Model Rules of Professional Conduct, a client with diminished capacity must be held in the same regard as a client with full capacity, to the best of the attorney’s ability. Model R. Prof’l Conduct 1.14 (Am. Bar Ass’n 1999).

⁶⁷ See Karin M. Ouchida & Mark S. Lachs, *American Society on Aging Not for Doctors Only: Ageism in Healthcare*, in GENERATIONS, AM. SOC’Y ON AGING (2015), <https://www.asaging.org/blog/not-doctors-only-ageism-healthcare>.

⁶⁸ *Discrimination and negative attitudes about ageing are bad for your health*, WORLD HEALTH ORG. (Sep. 29, 2016), <https://www.who.int/news-room/detail/29-09-2016-discrimination-and-negative-attitudes-about-ageing-are-bad-for-your-health>. Over 83,000 people from fifty-seven different countries participated in the study to assess attitudes toward older persons. *Id.* Countries with the highest income reported the lowest levels of respect. *Id.*

⁶⁹ Ouchida & Lachs, *supra* note 67.

⁷⁰ See Rylee A. Dionigi, *Stereotypes of Aging: Their Effects on the Health of Older Adults*, HINDAWI J. OF GERIATRICS 6 (2015), <http://downloads.hindawi.com/archive/2015/954027.pdf>.

Isolation and marginalization can also leave older persons vulnerable to elder abuse.⁷¹ The English Longitudinal Study of Aging (ELSA) Final Report examined the social exclusion of older people and identified seven different dimensions of social exclusion: social relationships, cultural activities, civic activities, access to basic services, neighbourhood exclusion, financial products, and material goods.⁷² According to the report, “[o]verall quality of life falls as the number of dimensions older people are excluded on increases.”⁷³

A recent story about ageing in Japan illustrates the ultimate toll isolation can take.⁷⁴ In describing the scene of multiple deaths in a building designated for older persons without family, the report was ominous:

None of the dead man’s neighbors knew him, though he had lived there for years. He was 67. The second man’s body was found two days later. Again, the smell had become so intense that it had kept his next-door neighbor awake for three nights. The man was elderly, had lived there for years, and chatted about

⁷¹ See Margarida Pedroso de Lima et al., *Relations Between Elder Abuse, Ageism and Perceptions of Age*, 5 INT’L J. OF HUMANITIES, SOC. SCI. & EDU. 91, 92 (2018).

⁷² *The Social Exclusion of Older People: Evidence from the First Wave of the English Longitudinal Study of Ageing Final Report*, OFF. OF THE DEP. PRIME MINISTER 15–17 (Matt Barnes ed., 2006), https://www.researchgate.net/publication/37183878_The_social_exclusion_of_older_people_evidence_from_the_first_wave_of_the_English_Longitudinal_Study_of_Ageing_ELSA_final_Report [hereinafter *ELSA Final Report*]. Various consequences of social exclusion have been identified by numerous other studies, such as the Index of Multiple Deprivation of 2004 (Namely, income deprivation; employment deprivation; health deprivation and disability; education, skills and training deprivation; barriers to housing and services; living environment deprivation; and crime.). See *Living in the 21st Century: Older People in England—English Longitudinal Study of Ageing (Wave 3)*, INST. FOR FISCAL STUDIES 63 (James Banks ed., 2008), https://www.ifs.org.uk/elsa/report08/elsa_w3.pdf.

⁷³ *ELSA Final Report*, *supra* note 72, at 9.

⁷⁴ Norimitsu Onishi, *A Generation in Japan Faces a Lonely Death*, THE N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/world/asia/japan-lonely-deaths-the-end.html>.

the cherry blossoms with his neighbors, but they didn't know his name.⁷⁵

Isolation is not unique to Japan: every country will have to address this issue.⁷⁶ If there is a silver lining, the recognition of this isolation it may be a first step toward elder rights.

III. Elder Rights as Nesting Dolls Within Existing Human Rights Conventions

There are nine core international human rights instruments.⁷⁷ The Convention on the Rights of Persons with Disabilities (“CRPD”) includes a reference to “Older Persons” in the right to health services, but it was by no means a treaty designed to protect elder rights.⁷⁸ Instead, it shortchanges elder rights to treat them like

⁷⁵ *Id.*

⁷⁶ See Raphael Rashid, *Lonely, Aging, Dying: South Korea's Kodokushi*, KOREA EXPOSÉ (Nov. 29, 2017), <https://koreaexpose.com/south-korea-lonely-death-aging-dying/>; Ben Steverman, *Americans Face a Rising Risk of Dying Alone*, BLOOMBERG (Oct. 9, 2017), <https://www.bloomberg.com/news/articles/2017-10-09/americans-face-a-rising-risk-of-dying-alone>; Steven Swinford, *Thousands Are Dying Alone and Unloved, Jeremy Hunt Warns*, THE TELEGRAPH (July 1, 2015), <http://www.telegraph.co.uk/news/health/elder/11709356/Thousands-are-dying-alone-and-unloved-Jeremy-Hunt-warns.html>; Shaju Philip, *In 'Ageing' Kerala, Living and Dying Alone is a Trend*, THE INDIAN EXPRESS (Aug. 27, 2013), <http://archive.indianexpress.com/news/in-ageing-kerala-living-and-dying-alone-is-a-trend/1160437/>.

⁷⁷ *The Core International Human Rights Instruments and Their Monitoring Bodies*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstru-ments.aspx> (last visited May 11, 2020) (The core instruments are as follows: International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; International Convention for the Protection of All Persons From Enforced Disappearance; Convention on the Rights of Persons with Disabilities.).

⁷⁸ Convention on the Rights of Persons with Disabilities art. 25, Dec. 13, 2006, 2515 U.N.T.S. 3. The CRPD was “the first comprehensive human rights treaty of the twenty-

small nesting dolls, tucked away within an instrument focused on persons with disabilities. Scholars have called out the inappropriateness of relying upon other treaties to protect older persons rights.⁷⁹ Specifically, it has been noted that the CRPD inadequately addresses “institutions and attitudes in society that lead to ageism”⁸⁰ and “provides very limited protection for older persons who confront ageist attitudes that are based upon age rather than actual or perceived impairments.”⁸¹

Human rights instruments should instead reflect the fact that definitions of old age and disability are no longer conflated.⁸² Other existing human rights instruments such as those addressing racism, sexism, and ableism are unique and distinct enough to stand on their own, yet ageism propels elder rights into this same category.⁸³ Elder rights belong in the echelon of specifically protected rights because “the significant denial of rights that flows from ageism, and the failure of the existing human rights regime to adequately combat this form of discrimination, is itself a justification for developing a specialised human rights convention which can generate age specific jurisprudence.”⁸⁴

Irrespective of the fact that old age and disability should not be conflated, some may believe that conventions like the CRPD could at least be superficially construed to protect the rights of older persons, however, this stance fails to understand how truly limited elder rights are under the CRPD. For example,

first century and was the first human rights convention to be open for signature by regional integration organizations.” *Convention on the Rights of Persons with Disabilities (CRPD)*, U.N. DEP’T OF ECON. AND SOC. AFFAIRS, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#Fulltext> (last visited Mar. 20, 2020).

⁷⁹ Paul Harpur, *Old Age Is Not Just Impairment: The CRPD and the Need for A Convention on Older Persons*, 37 U. PA. J. INT’L L. 1027, 1056 (2016).

⁸⁰ *Id.*

⁸¹ *Id.* at 1033.

⁸² *Id.* at 1044.

⁸³ Tad Friend, *Why Ageism Never Gets Old*, THE NEW YORKER (Nov. 13, 2017), <https://www.newyorker.com/magazine/2017/11/20/why-ageism-never-gets-old> (“Like the racist and the sexist, the ageist rejects an Other based on a perceived difference.”).

⁸⁴ Harpur, *supra* note 79, at 1033.

[p]olicies that discriminate based upon age alone are not sufficiently connected with a disability to obtain protection from the CRPD. Using the CRPD to influence policy debates around the ageing population will create the situation where some debates are influenced by a robust international human rights law discourse, where other debates lack the benefit of an international statement on older person's rights.⁸⁵

Likewise, the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), a comprehensive treaty promoting gender equality,⁸⁶ is by no means sufficient to protect elder rights, nor was it designed to do so. However, the CEDAW positively influenced customary international law and created a foundation for global legality; a convention for elder rights would do the same.⁸⁷

Possibly the most practical portrayal of why elder rights should not be extracted and cobbled together from other treaties came from Mr. Rio Hada, speaking to the Eighth Session of the Open-Ended Working Group on Ageing (“OEWG”).⁸⁸ Demonstrating the bureaucratic impracticality of facilitating elder rights in such a

⁸⁵ *Id.* at 1058.

⁸⁶ See CEDAW: *Convention on the Elimination of All Forms of Discrimination Against Women*, EQUAL RTS. TRUST (Apr. 6, 2017), <https://www.equalrightstrust.org/sites/default/files/ertdocs/CEDAW-Quick-Reference-Guide%20%281%29%20%281%29.pdf>.

⁸⁷ See Michelle Lewis Liebeskind, *Preventing Gender-Based Violence: From Marginalization to Mainstream in International Human Rights*, 63 REV. JUR. U.P.R. 645, 667; Israel Doron & Itai Apter, *International Rights of Older Persons: What Difference Would a New Convention Make to Lives of Older People?*, 11 MARQ. ELDER’S ADVISOR 367, 385 (2010).

⁸⁸ Rio Hada, Team Leader of Eco., Soc. and Cultural Rts., O.H.C.H.R., Statement at Panel Discussion on Violence, Neglect and Abuse, United Nations Open-Ended Working Group on Ageing, 8th Sess. 1 (July 5, 2017) (transcript available at <https://papersmart.unmeetings.org/ga/open-ended-wg-on-ageing/eighth-session/statements/>).

manner, Mr. Hada asked the body to imagine being told as an older person that:

- You are older prisoners, go and report to the Committee Against Torture.
- If you experienced violence from health care workers, write to the Special Rapporteur on the right to health.
- If you have disabilities, you can go to the CRPD.
- And if your bank mistreat[s] you, you must address [the mistreatment] to the Working Group on Business and Human Rights.⁸⁹

During the Eighth Session, Mr. Mokhiber, Director of the New York Office of the UN re-emphasized ageism as a causal connection for a unique treaty for elder rights.⁹⁰ He asserted that “[w]e must combat ageism and prejudice against older persons in society, in law, in policy, and in practice.”⁹¹ The next OEWG discussion should continue to focus on the benefits to the global society of recognizing and protecting elder rights. Supporting self-determination, strength and independence will be far more beneficial than perpetuating a system of laws and mores that weakens older adults and makes them more dependent upon others. Imposing cultural and societal moral codes to care for older persons, however well intentioned, is paternalistic and patronizing. Older persons have the right to shape their own lives and while they may need assistance, they may not desire to have their rights supplanted with directives that reflect them as a burden on society. The lack of a convention framing these unique issues may be unwittingly encouraging more paternalism

⁸⁹ *Id.* at 2–3.

⁹⁰ Craig Mokhiber, Dir. of the New York Office of the United Nations High Commissioner for Human Rights, Statement at Panel Discussion on Equality and Nondiscrimination, United Nations Open-ended Working Group on Ageing, 8th Sess. (July 6, 2017) (transcript available at <http://statements.unmeetings.org/media2/14685792/panelist-craig-mokhiber.pdf>).

⁹¹ *Id.* at 2.

internationally. As international elder rights scholars Israel Doron and Itai Apter noted,

[d]eciding not to support an elderly rights treaty can be interpreted as yet another discriminatory behavior ignoring the unique situation of older persons. Establishing such a treaty would be a strong anti-ageism, anti-discriminatory, and mainstreaming tool.⁹²

IV. The Hope for an Elder Rights Convention Today

Contrasting opinions should ideally facilitate compromise, but there is always the risk of opposite ends of an argument impeding progress by degrading into gridlock. Members of the OEWG continue to debate the value of a separate convention on elder rights.⁹³ Notably, the US has spoken out against a separate treaty for elder rights.⁹⁴ Kathy Greenlee, Assistant Secretary for Ageing, and the Administrator for the Administration for Community Living in the Department of Health and Human Services, addressed the OEWG in 2014 and questioned the utility in having a separate convention when protections already exist in other human rights treaties.⁹⁵ The UN has put forth several separate conventions for special group rights, notwithstanding all the other treaties and conventions generally protecting human rights—under these

⁹² Doron and Apter, *supra* note 87 at 382.

⁹³ See Kathy Greenlee, Assoc. Sec. for Ageing and Administrator for the Admin. for Community Living in the Dept. of Health and Hum. Services, Statement to United Nations Open-ended Working Group on Ageing, 5th Sess. (July 30, 2014) (transcript at <https://social.un.org/ageing-working-group/documents/fifth/United%20States.pdf>); Hada, *supra* note 88; Mokhiber *supra* note 90.

⁹⁴ See generally Greenlee, *supra* note 93. The US has also chosen not to ratify many existing treaties, such as the CRPD and the CRC. *Human Rights & the U.S.*, THE ADVOCATES FOR HUM. RTS., https://www.theadvocatesforhumanrights.org/human_rights_and_the_united_states (last visited May 12, 2020).

⁹⁵ Greenlee, *supra* note 93, at 2.

established UN treaties there is clear precedent for a separate elder rights convention, irrespective of perceived or actual overlap.⁹⁶

Secretary Greenlee also pointed to the passage of the US Elder Justice Act in 2010, “dedicated to the prevention . . . of elder abuse, neglect, and exploitation,” as a “practical measure” the international community could follow to address elder rights.⁹⁷ Raising the issue of elder abuse at the international level was timely, as elder abuse is a known consequence of increasing elder invisibility on the global stage.⁹⁸ Elder abuse is just beginning to be addressed in human rights discussions even though “[e]ach year, an estimated 5 million older adults are abused, neglected, or exploited.”⁹⁹ Because elder abuse is the ultimate destruction of elder rights, it is only logical to create a specialized instrument that simultaneously champions elder rights and protects against elder abuse. Thus, Secretary Greenlee’s statement serves as a strong argument for developing a separate convention on elder rights and provides an answer to her own question as to “what a new convention would add to the protections already present in existing human rights treaties” to address “[t]he situations older persons find themselves in.”¹⁰⁰ Furthermore, denying elders a separate convention fails to acknowledge the social and institutional mechanisms that created those “situations” and perpetuated ageist perceptions of older persons as powerless.¹⁰¹

Other Member States support the idea that elder rights are sufficiently protected under existing human rights instruments. For

⁹⁶ See *The Core International Human Rights Instruments and Their Monitoring Bodies*, *supra* note 77.

⁹⁷ Greenlee, *supra* note 93, at 3.

⁹⁸ See *ELSA Final Report*, *supra* note 72.

⁹⁹ *World Elder Abuse Awareness Day*, ADMIN. FOR COMMUNITY LIVING (June 15, 2017), <https://www.acl.gov/news-and-events/events-and-observances/world-elder-abuse-awareness-day>.

¹⁰⁰ Greenlee, *supra* note 93, at 3.

¹⁰¹ Although delegates like Mrs. Greenlee have argued against a separate convention, the US has ironically spent ample time championing various elder rights initiatives, such as “national, government-led campaigns to educate employers about ageism and to treat ageism with the same urgency as race discrimination.” See Ralph M. Silberman, *White House Conference on Aging to Urge Workplace Changes on President and Congress*, EMP. ALERT 2 (Mar. 2, 2006).

example, some argue that the frameworks in place are sufficient, they simply are not being properly “implemented to address the situation of older persons in any region of the world.”¹⁰² In other words, if only we would properly manage the resources we already have in place under existing doctrine, we would see we have everything we need to protect older individuals. However, the problem is not lack of enforcement; the problem is a fundamental lack of understanding of the protections that need to be enforced: the argument to protect older persons under existing human rights instruments cannot account for the role ageism plays as an impediment to elder rights.

If the OEWG examined every human rights doctrine in existence it still would not be able to cobble together sufficient protections for older adult’s rights:

[E]ven if legal rights of older persons can be currently indirectly addressed through existing human rights instruments—this is not enough: it will not resolve the existing socio-legal injustice older persons are experiencing. Only a new and exclusive human rights convention will symbolize and dignify our recognition of older persons as a fully equal group worthy of society’s respect.¹⁰³

¹⁰² Johanten Geuzendam, Dir. of Equality, European Comm’n, Closing Statement at United Nations Open-Ended Working Group on Ageing, 7th Sess., The Way Forward (Dec. 15, 2016) (transcript at <http://statements.unmeetings.org/media2/7664363/eu-15dec2016.pdf>). A similar argument can be made in regard to universal healthcare in the US. See *UN Open-Ended Working Group on Ageing—OEWG*, AGE PLATFORM EUROPE, <https://www.age-platform.eu/un-open-ended-working-group-ageing-oewg> (last visited Mar. 20, 2020) (“The OEWG examines current instruments in force to determine their weaknesses and comes up with solutions for the future. The argument for the U.S. healthcare system is that we could accomplish universal healthcare if we looked at the current instruments in place and utilized their resources properly, as the OEWG attempts to do.”).

¹⁰³ Israel Doron, *International Rights of Older Persons: Ageism, Justice, and Social Policy*, 35 BIFOCAL 52, 55 (2013).

Reaching the current resistance to a separate convention on elder rights is akin to raising your voice to be understood by someone who speaks another language. The Director of Equality, DG Justice, and Consumers at the EU stated that there is no need to accelerate efforts to raise awareness of elder rights.¹⁰⁴ It appears there is a critical misunderstanding between members of the OEWG.

Canada has advocated for a gradual approach by requesting an independent expert on the rights of older people to advise and support UN Member States on better implementing the MIPAA and eventually a new convention.¹⁰⁵ At the July 16, 2015, meeting of the OEWG on Aging, a Canadian representative stated:

The MIPAA is but one of the many existing mechanisms in place that we can all use to improve the situation of older persons worldwide. We also have a unique opportunity before us to intensify and increase attention to the human rights of older persons through the implementation of the Post-2015 Development Agenda which will set out common global development goals for the next 15 years. The Post-2015 Agenda also provides us with an opportunity to reaffirm our commitment to . . . the aging and demographic pressures that many countries will face.”¹⁰⁶

Unfortunately, the MIPAA, as groundbreaking as it was at the time it was drafted, does not have the breadth to tackle the current problem.

Additionally, developing and developed nations may classify elder rights differently based on a number of factors, such as the strength of the state, cultural norms, economics, or access to justice.

¹⁰⁴ Geuzendam, *supra* note 102.

¹⁰⁵ Member State of Canada, Closing Statement to United Nations Open-Ended Working Group on Ageing, 6th Sess. (July 16, 2015) (transcript available at <http://statements.unmeetings.org/media2/7650792/canada-eng-.pdf>).

¹⁰⁶ *Id.*

As a response, some have recommended that the UN human rights indicators be standardized at the country level.¹⁰⁷ The current lack of standardization further stresses the importance for elder rights to be codified in a convention that is sufficiently flexible to acknowledge the differences between state governments, societies, and cultures. The 2030 Millennium Development Goals (“MDG”) achievements are laudable, but they have long been a moving target.¹⁰⁸ The MDG could incorporate the elder rights convention as part of its huge vision to end all forms of poverty, fight inequalities and tackle climate change, but this is another very large nesting doll overshadowing elder rights.¹⁰⁹

The Inter-American Convention on Protecting the Human Rights of Older Persons (“CPHROP”) ¹¹⁰ reflects developing nations’ clear desire to protect their elderly through separate law. The goal of the CPHROP “is to promote, protect[,] and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons, in order to contribute to their full inclusion, integration and participation in society.”¹¹¹ The CPHROP stipulates that:

State Parties undertake to safeguard the human rights and fundamental freedoms of older persons enunciated in this Convention without discrimination of any kind and, to that end, shall:

¹⁰⁷ Grace Sanico Steffan, U.N. Hum. Rts. Off. of the High Comm’r, Statement to United Nations Open-Ended Working Group on Ageing, 6th Sess., Older Persons and Human Rights in the Post-2015 Agenda (July 16, 2015) (transcript available at https://social.un.org/ageingworkinggroup/documents/sixth/Global%20Ageing_OHCHRSteffan.pdf).

¹⁰⁸ See D.E.S.A., *The Millennium Development Goals Report 2015*, UNITED NATIONS 4–7 (July 6, 2015), <https://www.un.org/en/development/desa/publications/mdg-report-2015.html>.

¹⁰⁹ See *id.*

¹¹⁰ Inter-American Convention on Protecting the Human Rights of Older Persons, June 15, 2015, O.A.S.T.S. A-70.

¹¹¹ *Id.* art. 1.

- a) Adopt measures to prevent, punish, and eradicate practices that contravene this Convention, such as isolation, abandonment, prolonged physical restraint, overcrowding, expulsion from the community, deprivation of food, infantilization, medical treatments that are, inter alia, inadequate or disproportional or that constitute mistreatment or cruel, inhuman, or degrading treatment or punishment that jeopardizes the safety and integrity of older persons;
- b) Adopt affirmative measures and make sure reasonable adjustments as may be necessary for the exercise of the rights established in this Convention and shall refrain from adopting any legislative measure that is incompatible with it; by virtue of this Convention, affirmative measures and reasonable adjustments that are necessary to expedite or attain de facto equality for older persons, or to ensure their full social, economic, educational, political, and cultural engagement, shall not be considered discriminatory; such measures shall not lead to the maintenance of separate rights for different groups, nor be continued beyond a reasonable time once their objectives have been attained;
- c) Adopt and strengthen such legislative, administrative, judicial, budgetary, and other measures as may be necessary to give effect to and raise awareness of the rights recognized in the present Convention, including adequate access to justice, in order to ensure

differentiated and preferential treatment for older persons in all areas;

- d) Adopt, to the full extent of their available resources and commensurate with their level of development, such measures as they consider necessary in the framework of international cooperation to progressively achieve in accordance with domestic law the full realization of economic, social, and cultural rights, without prejudice to such obligations as may be immediately applicable under international law;
- e) Promote public institutions specializing in the protection and promotion of the rights of older persons and their integral development;
- f) Encourage the broadest participation by civil society and other social actors, especially older persons, in the drafting, implementation, and oversight of public policies and laws to implement this Convention;
- g) Promote the gathering of adequate information, including statistical and research data, with which to design and enforce policies to implement this Convention.¹¹²

The CPHROP is a bell weather for other countries to follow. The fact that it was ratified shows the desire and need for a unique treaty on elder rights in areas significant to where the older population will be significant soon.

¹¹² *Id.* art. 4.

Under current international instruments, most provisions affecting older persons are recognized in treaties that protect economic, social, and cultural rights. These types of treaties identify standards for progressive implementation. Such categorization tends to imply that these rights are programmatic aspirations, in contrast to civil and political rights, which require immediate application. In other words, they are “soft law”—they lack sanctions for noncompliance or infringements.¹¹³

These so-called “soft laws” are often flexible enough to allow protections for various groups as a norm, rule, or law. For example, although the European Social Charter does not expressly include elder rights, the European Court of Human Rights implicitly protects elder rights in addition to those other rights specifically enumerated in the Social Charter.¹¹⁴ The Social Charter is another instrument that could be cited as the harbinger for inclusion of elder rights in an independent convention—it is clear the European Court of Human Rights has realized that the time for a significant rethinking of elder rights in the context of ageism and an aging population has come.

We aspire to take care of our vulnerable citizens, but our approaches vary widely. In adopting an elder rights convention “[w]e should, however, be less tolerant of politicization in the drafting and adoption of the Declaration than we are in domestic law. The Declaration claims to be universal, yet less than a quarter of the current states in the world participated in its drafting and adoption.”¹¹⁵ Perhaps instead of the “government or other benevolent agencies supplying the elderly with their rights, we [should] tell the elderly that they have rights, so that it can become

¹¹³ Charles Sabatino, *International Human Rights of Older Persons: The Gray Wave*, AM. BAR ASS’N 11–22 (2012), <https://www.cardi.ie/publications/internationalhumanrightsofolderpersonsthegraywaveapril2012>.

¹¹⁴ European Social Charter (Revised), May 3, 1996, E.T.S. 163.

¹¹⁵ Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States*, 41 CORNELL INT’L L.J. 250, 293 (2008).

a demand situation where they start to assert their demands against the government in much stronger fashion.”¹¹⁶

V. Conclusion

Societal and cultural norms about how to care for and integrate older members of a population differ widely amongst the UN Member States. Filial piety in developing and rural nations, whose societal structures promote collectivity and interdependence, may hamper some Member States from seeing the need for a convention on elder rights. Elder rights may also be viewed as a moral issue, rather than a matter of human rights law. But as China demonstrated with its 2013 Elderly Rights Law, dealing with the growing problem of isolated elderly people by ordering adult children to visit their ageing parents isn’t going to be a sufficient solution either.¹¹⁷

Perception is reality; often perceptions are often normalized into culture and sometimes even codified into law. In addressing the UN on elder rights, the Holy See asserted that

[I]n order to guarantee that the human rights system is effective and commitments are fulfilled, we must recognize that an approach based only on respect for human rights will not be sufficient unless it is complimented by policies and programs that address the underlying causes of the violations it wishes to prevent.¹¹⁸

¹¹⁶ Deborah Bagge, *Aging: A New Human Rights Concern*, 81 AM. SOC’Y INT’L L. PROC. 164, 178 (1987).

¹¹⁷ Celia Hatton, *New China Law Says Children ‘Must Visit Parents’*, BBC NEWS (July 1, 2013), <http://www.bbc.com/news/world-asia-china-23124345>.

¹¹⁸ Archbishop Bernadito Auza, Intervention of the Holy See to the UN, Statement to United Nations Open-Ended Working Group on Ageing, 6th Sess., General Discussion, Agenda Item 4: Existing International Framework on the Human Rights of Older Persons and Identification of Existing Gaps at the International Level (July 15, 2015) (transcript available at <https://holyseemission.org/contents//statements/55e34d38335cc3.39357836.php>).

Ageist perceptions at their worst espouse that older adults lack value and are a drain on resources. Under this negative perception, older people suffer because they are not able to fully participate in the world, shape their own destiny, remain healthy as long as possible, or even protect themselves from abuse. The rest of the population suffers the loss of the elderly population's contributions, experience, and fellowship. There is no longer time for scholars, gerontologists, and the like to wait. Discussions around ageing and elder rights have to move forward to create policy and laws. The sheer numbers of the older population will soon make these issues urgent for all. If ageism is addressed and countered through an international convention on elder rights, we will create a world better for today's elders and our future selves.