McGill Law Journal — Revue de droit de McGill

NO COUNTRY FOR OLD MEN: RESTRICTIONS ON THE IMMIGRATION OF ELDERLY FAMILY MEMBERS

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Immigration policies are aimed at young-to-middle-aged people, for good reasons. The exceptions are parental and grandparental immigration programs, designed to reunite yesterday's immigrants and their young children with the (grand)parents who still live in the country of origin. (Grand)parental immigration has been an unquestioned facet of immigration law for the last century and a half. Elderly people are the least threatening immigrants: they rarely commit crimes, they are not conduits for further immigrant family members, and they are unlikely to fundamentally change the culture of the destination state. Yet the last few decades have seen an unprecedented and mostly unremarked assault on parental and grandparental immigration, with some rather shoddy economics as the only reason. Quotas have been lowered, required sponsorship amounts have been raised, health conditions have been made stricter, and family structures have been added to the list of criteria. This article looks at the tightening of immigration rules since the 1970s in three types of immigrant-receiving countries: traditional settler states, modern settler states, and liberal states which seek to discourage immigration. The article concludes that reasons, whether legal, political or economic, are lacking in both quantity and quality. The growing restrictions on elderly immigration are unjust and senseless, and should be reversed.

Les politiques d'immigration sont destinées aux jeunes et aux personnes d'âge moyen, pour de bonnes raisons. Les exceptions sont les programmes d'immigration parentale et grand-parentale, conçus pour réunir les immigrants d'hier et leurs jeunes enfants avec les (grands-)parents qui vivent encore dans le pays d'origine. L'immigration (grand-)parentale est une facette incontestée du droit de l'immigration depuis un siècle et demi. Les personnes âgées sont les immigrés les moins menaçants : elles commettent rarement des délits, elles ne sont pas des intermédiaires pour d'autres membres de la famille immigrés et il est peu probable qu'elles changent fondamentalement la culture de l'État de destination. Pourtant, au cours des dernières décennies, l'immigration parentale et grand-parentale a fait l'objet d'un assaut sans précédent et, pour l'essentiel, sans commentaire, avec pour seule raison des considérations économiques peu convaincantes. Les quotas ont été abaissés, les montants de parrainage requis ont été augmentés, les conditions de santé ont été rendues plus strictes et les structures familiales ont été ajoutées à la liste des critères. Cet article examine le durcissement des règles d'immigration depuis les années 1970 dans trois types de pays d'accueil : les États colonisateurs traditionnels, les États colonisateurs modernes et les États libéraux qui cherchent à décourager l'immigration. L'article conclut que les raisons, qu'elles soient juridiques, politiques ou économiques, manquent à la fois en quantité et en qualité. Les restrictions croissantes imposées à l'immigration des personnes âgées sont injustes et insensées, et devraient être inversées.

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Citation: (2023) 68:1 McGill LJ 1 — Référence : (2023) 68:1 RD McGill 1

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Introduction: What Space for Elderly Immigration?

The last couple of decades have seen a bifurcation of immigration laws and policies, which have been most concisely summarized as "attracting the best and excluding the rest."[1] "The best" are those with "specialized skills and human capital"[2] who "possess remarkable prowess and a proven track record of success in their fields of expertise."[3] Similarly coveted are entrepreneurs and investors, or simply high net worth individuals, who are ready to transfer large portions of their wealth to their new homelands.[4] The excluded comprehend refugees, whose passage to safe Western countries is made as difficult as possible by walls, barbed wire, and other physical obstacles;[5] by countries with little respect for human rights that straddle migration routes;[6] and by restrictive interpretations of refugee protection provisions.[7] The unwanted also include those without higher education credentials and in-demand labour skills, who are excluded by default. And similarly unwanted are those with any sort of criminal record, or those who present any sort of security risk.[8]

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1 Asha Kaushal, "Do the Means Change the Ends? Express Entry and Economic Immigration in Canada" (2019) 42:1 Dal LJ 83 at 85. See generally Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (New York: Cambridge University Press, 2016).

2 Ayelet Shachar, "Selecting by Merit: The Brave New World of Stratified Mobility" in Sarah Fine & Lea Ypi, eds, *Migration and Political Theory: The Ethics of Movement and Membership* (Oxford: Oxford University Press, 2016) 175 at 176.

3 *Ibid* at 177. See also Kaushal, *supra* note 1 at 91–96; Ayelet Shachar & Ran Hirschl, "Recruiting 'Super Talent': The New World of Selective Migration Regimes" (2013) 20:1 Ind J Global Leg Stud 71.

4 See Allison Christians, "Buying In: Residence and Citizenship by Investment" (2017) 62:1 Saint Louis ULJ 51 at 52; Kristin Surak, "Millionaire Mobility and the Sale of Citizenship" (2021) 47:1 J Ethnic & Migr Stud 166 at 166–67.

5 See Moria Paz, "Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls" (2016) 34:1 BJIL 1 at 2–5.

6 See e.g. Thomas Gammeltoft-Hansen & James C Hathaway, "Non-Refoulement in a World of Cooperative Deterrence" (2015) 53:2 Colum J Transnat'l L 235; Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge: Cambridge University Press, 2018) [Ghezelbash, *Refuge Lost*]; David Scott FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (New York: Oxford University Press, 2019).

7 See Daniel Ghezelbash, "Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees" (2020) 68:3 Am J Comp L 479.

8 See César CG Hernández, "Creating Crimmigration" (2014) 2013:6 BYUL Rev 1457 at 1462–64; Mary Bosworth, Can Immigration Detension Centres Be Legitimate? Understanding Confinement in a Global World, in: Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (New York: Oxford University Press, 2013), at 152; Katja Franco Aas, The Ordered and the Bordered Society: Migration Control, Citizenship and the Northern Penal State, in: Katja

Caught in the middle are family members, who are neither clearly wanted nor unwanted. There has certainly been a rising suspicion regarding family members wanting to immigrate, especially toward spouses and romantic partners.[9] Before the 1950s, all states accepted marriages at face value for immigration purposes as well as for other purposes; after the 1953 US Supreme Court decision, *Lutwak v United States*,[10] only "genuine" marriages concluded for purposes other than immigration were acceptable. The distinction between "true" and "sham" marriages was for a long time unique to the US, but by the early 2000s, it had globalized to Canada, the UK and most European countries.[11] Furthermore, even spouses who are accepted as "genuine" increasingly have to pass language tests and cultural integration tests, similar to economic immigrants.[12]

The attention granted to spouses (and occasionally children[13]) has eclipsed parental and grandparental immigration. There has been some attention given to the question of age in migration in general[14]—but most of that has been directed at refugees and other forced migrants, where it

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Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (New York: Oxford University Press, 2013), at 29.

9 See Helena Wray, "The 'Pure' Relationship, Sham Marriage, and Immigration Control" in Joanna Miles, Perveez Moody & Rebecca Probert, eds, *Marriage Rites and Rights* (Oxford: Hart Publishing, 2015) 141 at 142 ("[s]pousal migrants are now being assessed in similar ways to labour migrants and for the same purposes, to ensure that they will be of value to the host society").

10 See *Lutwak v United States*, 344 US 604 at 622 (1953).

11 See Kerry Abrams, "Family Reunification and the Security State" (2017) 32:2 Const Commentary 247 at 261–64; Péter D Szigeti, "Comparative Law at the Heart of Immigration Law: Criminal Inadmissibility and Conjugal Immigration in Canada and the United States" (2021) 19:5 Intl J Const L 1632 at 1656–58.

12 See generally Karin de Vries, *Integration at the Border: The Dutch Act on Integration Abroad and International Immigration Law* (Oxford: Hart Publishing, 2013) at 1–2; Liav Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (Oxford: Oxford University Press, 2015) at 85–131.

13 Minor children usually migrate with their parents, therefore children as separate family class immigrants mostly appear in transnational adoption cases. See generally Karen Dubinsky, *Babies without Borders: Adoption and Migration across the Americas* (Toronto: University of Toronto Press, 2010); Robert L Ballard et al, eds, *The Intercountry Adoption Debate: Dialogues Across Disciplines* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2015). See also Jamie R Abrams, "Why the Legal Strategy of Exploiting Immigrant Families Should Worry Us All" (2019) 14:1 Harvard L & Policy Rev 101 at 125–48 on Trump's horrible and tragic family separation policy.

14 See e.g. Christina Clark-Kazak, "Introduction: Special Focus on Age Discrimination in Forced Migration Law, Policy, and Practice" (2016) 32:3 Refuge 3 at 3-7; Christina Clark-Kazak, "Introduction: Theorizing Age and Generation in Migration Contexts: Towards Social Age Mainstreaming?" (2012) 44:3 Can Ethnic Stud 1.

is often young migrants who face discrimination, not older ones.[15] Other studies, which have investigated elderly migrants, have looked at the challenges that they have faced after they have been admitted, not at the stage of eligibility or admissibility.[16] The migration of elderly family members is a topic that has received very little attention so far.

In this article, I argue that an atmosphere of suspicion and disfavour towards elderly family members is growing in the legal systems of significant immigration destination countries. The present study will compare the rules for the immigration of parents and grandparents of citizens and permanent residents in three types of immigrant-receiving countries: traditional settler states, modern settler states, and liberal states that try to minimize immigration. Part II lays out this ideal-typical classification and identifies the United States as a traditional settler state; Old Commonwealth countries of immigration (Canada, Australia, New Zealand) as modern settler states; and other Western democratic states as non-immigrant regimes. Part III shows how modern settler states have turned toward welcoming younger immigrants and discouraging elderly immigrants, while Part IV lays out the legal "toolkit" or "playbook" for restricting immigration by elderly relatives. The tools in question include high income requirements, strict sponsorship demands, tiny quota numbers, and restrictive understandings of health requirements and health risks. Part V surveys the alternatives that the states under consideration offer to foreign (grand)parents and their sponsors. Elderly parents may enter as tourists, without rights to residence or to social services; or they can come as investors, if they are wealthy enough to invest huge sums into the destination state's budget or economy. Part VI looks at the stunted justifications for restricting elderly immigration, both in policy discourse and the courts. Courts have been passive and showed deference to legislatures and the executive—here as elsewhere in immigration law. Legislatures and the press have given minimal attention to the question, and, where justifications have been provided, they have been in term of a narrow, back-of-the-envelope type of economic rationalism. Part VII provides

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[15] It is well known that refugees skew young and male, due not least to the physical hardships inherent in making the journey to a country where they can claim asylum: see e.g. Paz, *supra* note 5 at 41. See also Stephanie J Silverman, "'Impostor-Children' in the UK Refugee Status Determination Process" (2016) 32:3 Refuge 30; Jyothi Kanics, "Challenges and Progress in Ensuring the Right to Be Heard and the Best Interests of Children Seeking International Protection" (2016) 32:3 Refuge 18.

[16] See e.g. Kimberly Seibel, "Bureaucratic Birthdates: Chronometric Old Age as Resource and Liability in U.S. Refugee Resettlement" (2016) 32:3 Refuge 8.

a conclusion: "[t]hat is no country for old men... An aged man is but a paltry thing / A tattered coat upon a stick."[17]

I. Historical Policies Regarding the Migration of Elderly Family Members: Three Ideal Types

To set the stage for an in-depth investigation of current-day restrictions on elderly family members, some historical exposition is in order. I shall demonstrate the evolution of immigration laws using three ideal-typical migration regimes, illustrated by examples from five different countries.[18] The five countries are the major English-speaking destinations for immigration today: Australia, Canada, New Zealand, the United Kingdom, and the United States. Four of these countries were settler-colonial states, the great immigration destinations of the 19th and 20th centuries. The fifth, the United Kingdom, was the point of departure for most of the immigrants to the other four countries during the 19th century; it turned into a global immigration destination during the late 20th century.

A. Traditional Settler State Regimes

The first type of migration regime I shall call the "traditional settler state regime." "Populate or perish," the post-1945 Australian immigration policy slogan,[19] encapsulates the ethos of traditional settler states. Traditional settler states sought immigrants with the general goal of populating their country; they expected immigrants to become citizens and settle for life. The traditional settler state regime promotes family-based migration in general and does not create special requirements with regard to

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17 William B Yeats, "Sailing to Byzantium" in William B Yeats, ed, *The Tower* (London: Macmillan, 1928) at 1.

18 As Max Weber defined it, an ideal type is "formed by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct." Max Weber, "'Objectivity' in Social Science and Social Policy" in Edward Shils & Henry Albert, eds, *The Methodology of the Social Sciences* (Glencoe: The Free Press, 1949) 49 at 90. That is, ideal types are analytical aids constructed from existing phenomena, which serve to accentuate typical traits and aspirations of types of phenomena which are more diverse in reality. Applied to the current article, while there may not be any pure "traditional settler", "modern settler" or "non-immigrant" states, there are many countries whose laws and policies correspond to most of the laws described herein, and whose decision-makers would agree to these descriptions despite some differences and variations.

19 John Lack & Jacqueline Templeton, *Bold Experiment: A Documentary History of Australian Immigration Since 1945* (Melbourne: Oxford University Press, 1995) at xiii.

elderly immigrants. This traditional regime existed in all immigrant-seeking states—all the countries investigated in this study, except for the United Kingdom—until the 1960s and was dismantled or transformed more or less by the 2000s.

The traditional settler state was clearly and openly a racist state-building project, which invited people to become immigrants and then citizens based on their ethnicity.[20] "Unsuitable" ethnicities (East Asians, South Asians, Pacific Islanders, Africans, Afro-Americans, and Afro-Caribbeans) were barred from entering and "suitable" ethnicities (Northern and Western Europeans, and to a lesser extent Jews and Southern and Eastern Europeans), were encouraged to immigrate and bring their extended families. It is well known how the United States excluded Chinese starting in 1882,[21] extended racial exclusions to all Asians in 1917,[22] and, in the 1920s, finally limited all non-Western European immigration through a restrictive quota system, tied to the 1890 ethnic make-up of the US[23] Canada enacted a punitive head tax on Chinese immigrants in 1885,[24] increased the head tax to tenfold its original sum in 1903,[25] and finally barred virtually all Chinese immigration in 1923.[26] South Asian immigration was barred through the "continuous journey regulation," which mandated that immigrants must come to Canada directly from their country of origin, using tickets purchased there.[27] African(-

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[20] See David S FitzGerald & David Cook-Martín, *Culling the Masses: The Democratic Origins of Racist Immigration Policy in the Americas* (Cambridge, Mass: Harvard University Press, 2014) at 1–7 on the history of racist immigration policies in North and South America. For racial exclusions in Australia, see James Jupp, *From White Australia to Woomera: The Story of Australian Immigration* (New York: Cambridge University Press, 2002) at 6–19. For the borrowing of racist exclusionary policies throughout the British Empire and the United States, see Daniel Ghezelbash, "Legal Transfers of Restrictive Immigration Laws: A Historical Perspective" (2017) 66:1 ICLQ 235. For Canada, see generally Triadafilos Triadafilopoulos, "Building Walls, Bounding Nations: Migration and Exclusion in Canada and Germany, 1870–1939" (2004) 17:4 J Historical Sociology 385, 392–403.

[21] See *Chinese Exclusion Act*, Pub L No 47-126, 22 Stat 58 at s 1 (1882). See also Lucy E Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995) at 7ff.

[22] See *Immigration Act of 1917*, Pub L No. 64-301, 39 Stat 874 at 876 (1917).

[23] See *Emergency Immigration Act of 1921*, Pub L No 67-5, 42 Stat 5 at s 2(a) (1921); *Immigration Act of 1924*, Pub L No 68-139, 43 Stat 153 at ss 4, 5, 11(a) (1924).

[24] See *The Chinese Immigration Act*, SC 1885, c 71, s 4.

[25] See *The Chinese Immigration Act*, RSC 1903, c 8, s 6.

[26] See *The Chinese Immigration Act*, RSC 1923, c 38, s 8.

[27] *An Act to Amend the Immigration Act*, SC 1908, c 33, s 1. See also Hugh JM Johnston, *The Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar* (Vancouver: UBC Press, 2014) at 16–17.

American) immigration was disallowed in 1911.[28] In Australia, the 1901 Immigration Restriction Act gave immigration officers almost limitless freedom to exclude "undesirable" immigrants, primarily meaning non-white immigrants.[29] According to FitzGerald and Cook-Martín, every country in the Americas had some form of racial or ethnic restriction on immigration (usually barring Chinese and Jews), including those that professed an official policy of racial mixing, such as Mexico or Brazil.[30]

At the same time, for the white immigrants who *were* welcomed, family reunification policies were quite generous. From the beginning, the United States created exemptions from inadmissibility rules for the family members of citizens and permanent residents. This included the parents of citizens and permanent residents who were illiterate,[31] or had tuberculosis,[32] or even those who were excludable for prostitution or criminality, with special permission from the Attorney General.[33] Parents were given preference within the quota system, from 1921 all the way up to today.[34] Maurice Brush notes that parental immigration to Canada was allowed from the moment when "family members" were more closely defined in 1910, and was only restricted between 1922–1930 and 1937–1946, when wives and minor children were the only family members who could be legally sponsored.[35] Grandparents have been sponsorable in Canada continuously from 1956 onward.[36] Mary Crock informs us that "[u]ntil December 1989, no restrictions were placed on the grant of residence to the aged parents of Australian citizens or permanent resi-

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28 See Privy Council, *Order-in-Council*, 1324 (12 August 1911).

29 *Immigration Restriction Act 1901* (Cth), 1901/17, s 3(a); Eve Lester, *Making Migration Law: The Foreigner, Sovereignty and the Case of Australia* (New York: Cambridge University Press, 2018) at 120-121, 130-133

30 See FitzGerald & Cook-Martín, *supra* note 20 at 218–21 (on Mexico) and 259–62 (on Brazil).

31 See *Immigration Act of 1917*, supra note 21 at 877.

32 See *Immigration and Nationality Act of 1957*, Pub L No 85-316, 71 Stat 639 at s 6 (1957).

33 See *ibid* at s 5.

34 See *Emergency Immigration Act of 1921*, *supra* note 23 at s 2(d) (1921); *Immigration Act of 1924*, *supra* note 23 at s 6(a)(1) (1924); *Immigration and Nationality Act of 1952*, Pub L No 82-414, 66 Stat 163 at s 203(a)(2) (1952); *8 U.S. Code, Chapter 12 (Immigration and Nationality), Subchapter II (Immigration)*, 8 USC § 1151 (*Worldwide Level of Immigration)* at (b)(2)(A)(i) (2022).

35 Maurice Brush, *Family Migration Study: The Concept of Family Reunion Immigration in the Legislation* 1-2 (CIC study, 1988, on file with author)

36 *Ibid*., 2.

dents."[37] Racial exclusions and liberal family immigration policies were two sides of the same coin.

B. Modern Settler State Regimes

By the 1960s, pressure from Third World states had pushed traditional settler states to get rid of openly racist immigration regulations.[38] The United States abrogated its national origins quota system with the 1965 Hart-Celler Act.[39] Canada introduced a completely race-neutral immigration points system in 1967.[40] Australia abolished its "White Australia" policy in 1973.[41] In lieu of racial exclusions and generous family immigration programs, the now "reformed" or "modern" settler states created skills-based immigration programs that focused on attracting highly skilled workers or high net value individuals. Instead of nation-building, the goal of modern settler states is economic gain and the offset of natural demographic decline through immigration.[42] The ideal immigrant is no longer a family member of a previously settled immigrant but a highly skilled stranger who brings valuable know-how and only their immediate nuclear family members.

The discarding of openly discriminatory immigration policies was not designed to bring in large numbers of persons of colour. Rather, especially US and Canadian legislators hoped that it would result in "more of the same": white European immigrants who would qualify based on skills *or* family connections instead of only their skin colour and place of origin. The United States in particular kept its previous system of preferring family-based immigration. The hope was that "[p]lacing family unification at the center of the new preference structure [would become] a convenient way of creating a system that did not discriminate by country of origin but that would not substantially alter the numbers of admissions."[43] As

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37 Mary Crock, *Immigration and Refugee Law in Australia* (Sydney: Federation Press, 1998) at 84.

38 See FitzGerald & Cook-Martín, *supra* note 20 at 28–30.

39 See Philip E Wolgin, "Re-Forming the Gates: Postwar Immigration Policy in the United States Through the Hart-Celler Act of 1965" in Triadafilos Triadafilopoulos, ed, *Wanted and Welcome? Policies for Highly Skilled Immigrants in Comparative Perspective* (New York: Springer, 2013) 61 at 61.

40 See Triadafilos Triadafilopoulos, "Dismantling White Canada: Race, Rights, and the Origins of the Points System" in Triadafilopoulos, *supra* note 39, 15 at 16.

41 See Gwenda Tavan, "Creating Multicultural Australia: Local, Global and Transnational Contexts for the Creation of a Universal Admissions Scheme, 1945–1983" in *supra* note 39, at 39, 48–49.

42 See Dauvergne, *supra* note 1 at 175.

43 Wolgin, *supra* note 39 at 73.

Rep. Emanuel Celler, the sponsor of the new 1965 Immigration Act testified, "Since the peoples of Africa and Asia have very few relatives here, comparatively few could emigrate from those countries."[44] By having kept family-based immigration policies at the centre of its immigration law, the US immigration system is arguably the last traditional settler state regime.

After it became clear for the modern settler states (Australia, Canada, and New Zealand) that continued immigration will take place from Third World countries, generous family sponsorship programs started to be peeled back. Modern settler states have subtly rewritten their health- and disability-based inadmissibility rules to exclude not only persons suffering from infectious diseases and intellectually disabled persons (as was the case previously, in the traditional model) but anyone who places financial or logistical stress on the healthcare system.[45] As a result, economic immigration streams became the predominant avenues of immigration, and family-based immigration started looking more and more like economic immigration itself.[46] It is hard not to see a touch of racism in these measures. Family-based immigration was supported and encouraged as long as it contributed to the white majority in settler states; but when family-based immigration began to increase minorities of colour, it started being curtailed. With regard to marriage-based immigration and the immigration of mothers based on their children's birthright citizenship ("anchor babies"), the racism involved in opinions and policy changes is well documented.[47] Parental immigration rules have not been examined in such detail, but the changes that took place alongside spousal immigration are quite similar.

There are doubtless other reasons for increasing restrictions on the immigration of elderly family members. The establishment of public wel-

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44 *Ibid* at 74.

45 See *infra* Part IV. 5.

46 See *supra* notes 9–10, 12; Szigeti, *supra* note 11 at 1661–62. See generally Abrams, *supra* note 11.

47 See e.g. Helena Wray, *Regulating Marriage Migration into the UK: A Stranger in the Home* (London: Routledge, 2016) at 41–103 (on the exclusion of South Asian husbands of British citizens in particular, due to racial and gender-based anxieties at 49); see generally Leo R Chavez, *Anchor Babies and the Challenge of Birthright Citizenship* (Stanford: Stanford University Press, 2017) (a genealogy of the concept and term "anchor baby" at 1–5); see Sarah van Walsum, *The Family and the Nation: Dutch Family Migration Policies in the Context of Changing Family Norms* (Newcastle Upon Tyne: Cambridge Scholars Publishing, 2008) at 18-20, 259-260 (on the lack of changes in the regulation of family-based immigration, despite disavowals of early 20th century, openly racist immigration policies and the switch to policies "couched in the terms of nationality rather than in those of race").

fare regimes in high-income states is the most openly stated reason.[48] Arguably, it is unfair to let newly arrived elderly people "hog" social services, welfare payments, and bedspace in publicly funded hospitals, to the detriment of native-born elderly citizens who have funded the same services through a lifetime of tax payments. One can also bring up cultural reasons: living together as multi-generational families is increasingly archaic and uncomfortable for middle- and high-income families in Western countries. Instead, fiscal and migratory policies are geared towards importing careworkers (usually as temporary foreign workers), who will care for elderly people in homes as well as specialized institutions.[49]

As noted above, the regimes described here are ideal types—they do not conform exactly to existing immigration systems in any state. The United States is not completely a traditional settler state: although it has maintained a family-focused immigration system, it has certainly abolished racial distinctions.[50] Although Canada, Australia, and New Zealand are the quintessential modern settler states, some of the rules adopted by them are nevertheless so harsh that they are reminiscent of non-immigrant regimes: the third ideal-typical category that I discuss below.[51]

C. Non-Immigrant Regimes

The third ideal type regime is the one that does not support immigration as a policy goal at all. This comprises the overwhelming majority of states today and throughout the 19th and 20th centuries. As Gerald Dirks remarks, "[i]n this final decade of the twentieth century, only half a dozen countries have comprehensive immigration policies directed at recruiting, selecting, and resettling people who seek to [immigrate to another country]."[52] These countries, if they are liberal democracies, will respect refu-

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48 See Jupp, *supra* note 20 at 152 and accompanying text.

49 See Daphna Hacker, *Legalized Families in the Era of Bordered Globalization* (Cambridge: Cambridge University Press, 2017) at 295–315; Shiri Regev-Messalem, "Stories of Dependency and Power: The Value of Live-In Elder Care in Israel" (2020) 6 Socius 1 at 1–2.

50 See Gary P Freeman, David L Leal & Jake Onyett, "Pointless: On the Failure to Adopt an Immigration Points System in the United States" in Triadafilopoulos, *supra* note 39, 123 at 123. On stalled efforts in U.S. Congress to create a comprehensive skills-based immigration program, see *ibid* at 125–140.

51 According to Catherine Dauvergne, the settler state as such is a vanishing category, because undocumented migration, massive temporary foreign worker programs, and expectations regarding further migration by highly qualified recent immigrants make both "settlement" and a cohesive "settler society" impossible (*supra* note 1 at 4–5, 124–49).

52 Gerald E Dirks, *Controversy and Complexity: Canadian Immigration Policy During the 1980s* (Montreal: McGill-Queen's University Press, 1995) at vii; "Never before has hos-

gees' rights to non-refoulement and transnational families' rights to live together to some extent, but only as much as absolutely required by international law, constitutional norms, or domestic political pressures.[53] As we shall see, that is not very much at all: elderly relatives are often admitted only if there is no other way that they could survive.[54] If they are not liberal democracies, they will often not allow family reunification at all, and their immigration programs will be exclusively short- and medium-term temporary labour programs.[55]

Because these countries are so numerous, and their regulations are so varied in other respects, I will not discuss any "typical" examples. Instead, I will look at "extreme" examples, which illustrate the tensions inherent in aiming to uphold non-discrimination, the right to the family, and other fundamental rights while trying to curtail immigration at the same time. Such examples will come from both domestic courts and international courts; and from states as varied as the United Kingdom, Finland, and even some of the typical settler states described above, whose policies are indistinguishable from those of non-immigrant regimes.[56]

II. Modern Settler States and the Selection of Younger Immigrants

Wanting to attract youthful immigrants is sound economic policy for any state. Recruiting young immigrants "improve[s] the demographic profile (dependency ratio) of the country (e.g., to maintain public pay-as-you-go pension schemes) and thereby increase[s] the country's overall fiscal surplus."[57] Young people are also more likely to successfully adapt economically and socially: they learn new languages fluently, gain socioeconomic success, pick up new, socially encouraged habits, and identify with their new homeland instead of the "old country."[58]

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tility towards immigrants been quite so widespread, and quite so nasty." Dauvergne (The New Politics of Immigration), supra note 1 at 1.

53 See generally FitzGerald, *supra* note 6; Ghezelbash, *Refuge Lost*, *supra* note 6; Ruben Andersson, *Illegality, Inc: Clandestine Migration and the Business of Bordering Europe* (Oakland: University of California Press, 2014).

54 See *infra* notes 152–56 and accompanying text.

55 Anna K Boucher & Justin Gest, *Crossroads: Comparative Immigration Regimes in a World of Demographic Change* (Cambridge: Cambridge University Press, 2018) at 98–101.

56 See *infra* notes 210–246 and accompanying text.

57 Michael J Trebilcock, "The Law and Economics of Immigration Policy" (2003) 5:2 Am L & Econ Rev 271 at 288.

58 See Joseph Schaafsma & Arthur Sweetman, "Immigrant Earnings: Age at Immigration Matters" (2001) 34:4 Can J Economics 1066; Rachel M Friedberg, "The Labour Market Assimilation of Immigrants in the United States: The Role of Age at Arrival" (Decem-

"Young" is, of course, a vague and relative term.[59] In immigration law, "young" and "old(er)" receive meaning through points systems, the primary method for selecting economic immigrant classes.[60] The Canadian Comprehensive Ranking System awards a maximum of one-hundred points for applicants aged between twenty and twenty-nine with a spouse.[61] For every increase in age above the age of twenty-nine, the number of awardable points decreases by five points. This decrease in points stops when applicants reach the age of forty-five. One can conclude, therefore, that forty-five years of age is too old for the Canadian immigration system. Australia likewise grants thirty points for those aged between eighteen and twenty-five, and does not award any points to those older than forty-five.[62] To a certain extent, the decreasing of points for age is offset by the addition of points for more work experience and higher education credentials. Even so, the percentage of immigrants above forty-five years of age is less than a sixth of all immigrants in modern settler states, despite highly skilled immigration streams making up the majority of immigrants. In family-based immigration streams, the definition of "old(er)" is implicit in family relationships: one has to be the parent or grandparent of a qualifying, sponsoring citizen or permanent resident, who is therefore at least eighteen years old (but more likely at least five to six years older, given the income requirements for sponsorship[63]). An immigrating parent is, therefore, at least in their forties, and an immigrating grandparent a generation older.

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ber 1992) at 4–5, online (pdf): Brown University <brown.edu/Departments/Economics/Faculty/Rachel_Friedberg/Links/Friedberg%20Age%20at%20Arrival.pdf>.

59 On vagueness and the ambiguities of age-based distinctions in law: see Timothy AO Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000) at 71–72; Frederick Schauer, *Profiles, Probabilities, and Stereotypes* (Cambridge: Harvard University Press, 2006) at 113–18.

60 See Dauvergne, *supra* note 1 at 174–75.

61 See Government of Canada, "Comprehensive Ranking System (CRS) Criteria – Express Entry" (last modified 11 January 2021), website: *Immigration and Citizenship* <www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/criteria-comprehensive-ranking-system/grid.html>; Cohen Immigration Law firm (canadavisa.com), "Express Entry Draw Results" (last modified 3 August 2023) website: https://www.canadavisa.com/express-entry-invitations-to-apply-issued.html (the required number of points for a successful application is usually around 490 points, and the maximum achievable by any candidate is 600 points).

62 See *Migration Regulations 1994* (Austl), 1994/268, Schedule 6D.1 [*Migration Regulations*].

63 See *infra* notes 92–108 and surrounding text.

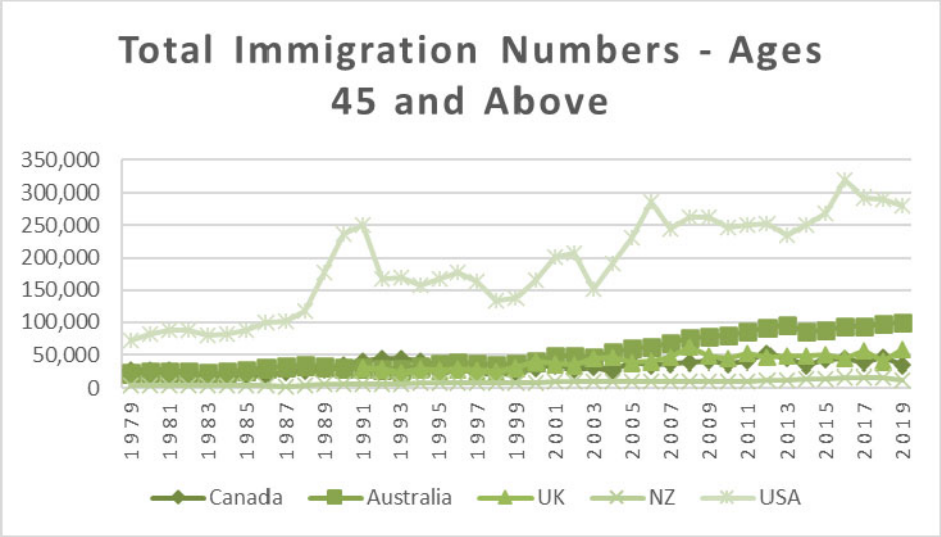

Table 1: Total number of middle-aged and elderly immigrants in Canada, Australia, New Zealand, the United States, and the United Kingdom, 1979-2019.[64]

[64] See "Australia's Permanent and Long-term Arrivals by Age Group(a)(b) - Overseas Arrivals and Departures (OAD): Customised Data Report (Migration, Australia (cat no 3412.0))" Australian Bureau of Statistics; United Kingdom, Office for National Statistics, *Long-term International Migration: Table 2.07, Age and Sex, UK and England and Wales*, (London: Office for National Statistics, 26 November 2020); Statistics Canada, *Estimates of the Components of International Migration, by Age and Sex, Annual* (Table 17-10-0014-01) (Ottawa: Statistics Canada, 28 September 2022); History Office and Library, "Advanced Search" (2022), online: *US Citizenship and Immigration Services* <eosfcweb01.eosfc-intl.net/U95007/OPAC/Search/AdvancedSearch.aspx> (Statistical yearbooks of the Immigration and Naturalization Service); "Permanent & long-term migration by age (Annual-December)" online: StatsNZ Infoshare <infoshare.stats.govt.nz/SelectVariables.aspx?pxID=799cf1b6-d1a1-41aa-b304-2aa3e10ff4e8>; "Yearbook of Immigration Statistics" (last modified 22 June 2022), online: *US Department of Homeland Security* <dhs.gov/immigration-statistics/yearbook>;

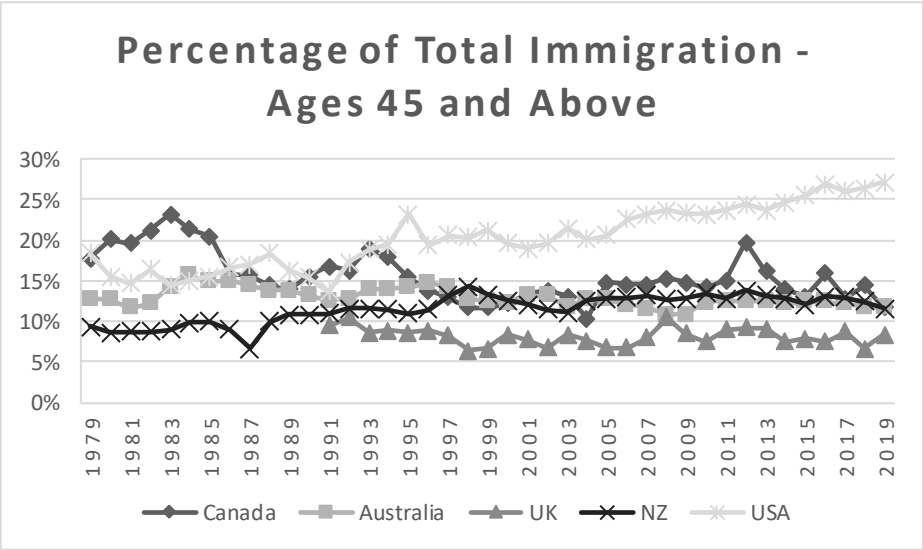

Table 2: Middle-aged and elderly immigrants as a percentage of the total number of immigrants in Canada, Australia, New Zealand, the United States, and the United Kingdom, 1979-2019.[65]

The statistical tables above show the total number of immigrants over the age of forty-five to all five countries investigated, and the ratio of such immigrants compared to all immigrants to these countries. Clearly, the United States is the one country where elderly immigrants have increased both in number and in proportion to all immigration. In Australia, the total number of middle-aged and elderly immigrants has increased, but their proportion has gone down. In Canada, New Zealand and the United Kingdom, the number of over-forty-five immigrants has held steady and the proportion of the group compared to all immigrants has gone down slightly. It is illuminating to contrast the first two tables with Table 3, which presents the proportion of middle-aged and elderly people within the total population of the five countries being investigated. While the number and ratio of elderly immigrants have gone down or stagnated, the ratio of elderly persons in general has risen markedly in all these countries, from below one-third of the population to slightly under half. The absolute decline of middle-aged and elderly immigration is evident; and the *relative* decline of the group is striking.

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[65] See History Office and Library, *supra* note 64; US Department of Homeland Security, *supra* note 64.

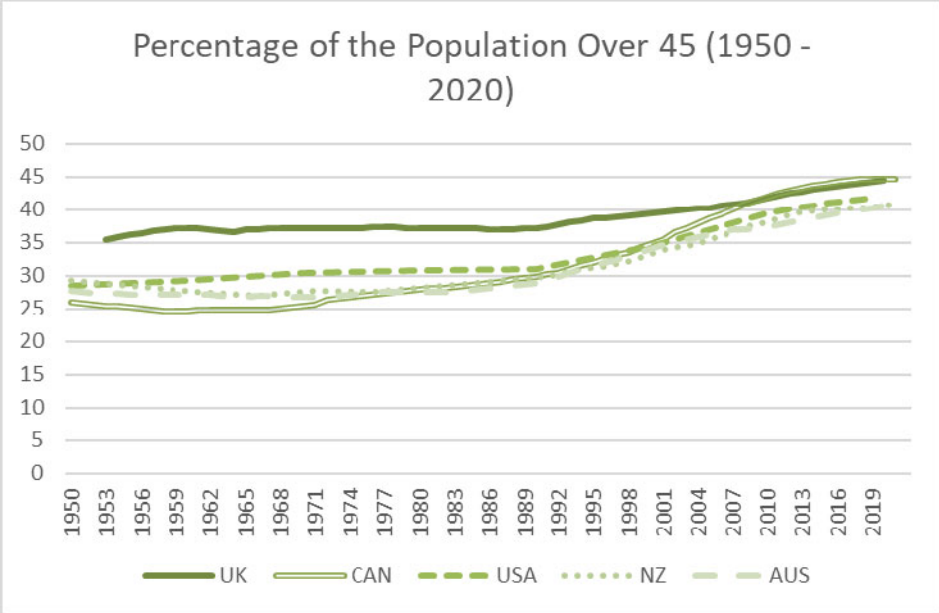

Table 3: Middle-aged and elderly people as a percentage of the total population of Canada, Australia, New Zealand, the United States, and the United Kingdom, 1950-2020.[66]

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[66] See United Kingdom, Office for National Statistics, *Analysis of Population Estimates Tool for UK*, Population Estimates Tables (London: Office for National Statistics, 25 June 2021); "Estimated Resident Population by Age and Sex (1991+) (Annual-Dec) - Table Reference: DPE058AA", online: Statistics New Zealand <infoshare.stats.govt.nz/ViewTable.aspx?pxID=7cc7f290-fdea-437e-9eaa-67eca27108ef>; Australian Bureau of Statistics, *National, State and Territory Population Tables*, Table 1: Change in estimated resident population, by age group and sex, Australia, selected periods to 30 June (Canberra: Australian Bureau of Statistics, 17 March 2022); Statistics Canada, *Population Estimates on July 1st, by Age and Sex* (Table 17-10-0005-01) (Ottawa, Statistics Canada: 28 September 2022); National Center for Health Statistics, "Health, United States – Data Finder" (12 August 2022), online: Centers for Disease Control and Prevention <cdc.gov/nchs/hus/data-finder.htm> (Resident population, by age, sex, race, and Hispanic origin: United States, selected years); Australian Bureau of Statistics, *Australian Historical Population Statistics, 2014*, Table 2.1 Population(a), age and sex, Australia(b) (Canberra: Australian Bureau of Statistics, 18 September 2014); Statistics Canada, *Archived - Estimates of Population, by Age Group and Sex, Canada, Provinces and Territories (x 1,000)* (Table 17-10-0029-01) (Ottawa, Statistics Canada: 19 February 2000); United Kingdom, Office for National Statistics, *Mid-1851 to Mid-2014 Population Estimates for United Kingdom: Total persons, Quinary age groups and Single year of age – estimated resident population*, (London: Office for National Statistics, 6 July 2015; "Yearbook Collection: 1893 – 2012", online: Stats NZ <www.stats.govt.nz/indicators-and-snapshots/digitised-collections/yearbook-collection-18932012#Yearbook-1970-79>.

What is more significant than the simple decrease in the number of elderly immigrants is the structural transformation that immigrant settler states want to welcome. What was previously a self-evident right to be reunited with one's family members in one's new home is becoming more and more an exception and a privilege. Elderly family members are acceptable only as self-supporting tourists or wealthy investor-retirees[67] or if they are lucky enough to be healthy in old age and have well-off descendants.[68] Otherwise, aged parents and grandparents are expected to wither away, perhaps receiving remittances from their children, and perhaps occasionally allowed to visit—but not to unite with—family.

III. The Toolkit of Immigration Restriction for Parental and Grandparental Classes

The regulations that contain the number and type of eligible and sponsorable family members have generally not changed during the last few decades;[69] instead, the modifications to family class immigration have been indirect. Immigration policy has changed through modifications of sponsorship and health-based inadmissibility rules. Nowadays, sponsorship of relatives requires paying high fees,[70] and the sponsored relatives need to be healthy enough not to need healthcare.[71] The unwelcomeness of (elderly) relatives is signaled through quota numbers, income requirements, and intricate definitions of health risks. Each of these tools are rational, and many even traditional, in immigration regulation. While individually reasonable, the cumulative effect is a near-strangulation of immigration by elderly family members: a threefold or fourfold over-

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67 See *infra* part V.

68 See *infra* part IV. 4-5.

69 See *8 U.S. Code Chapter 12 (Immigration and Nationality)*, *supra* note 34 at s 1151(a)(1), 1151(b)(2)(A)(i); see also *Canadian Immigration and Refugee Regulations*, SOR/2002-227, ss 117(1)(c)-(d) [*Can. IRPR*]; Immigration New Zealand, "Operational Manual" (10 October 2022), at F4.30.1, online: *Immigration New Zealand* <www.immigration.govt.nz/opsmanual/#73243.htm> [perma.cc/L3FK-ZQY8].

70 See infra part IV. 4. See also Boris Jancic, "'Just for the Rich': Government Parent Visa Rules Criticized", *New Zealand Herald* (6 October 2019), online: <www.nzherald.co.nz/nz/just-for-the-rich-government-parent-visa-rules-criticised/Y7N3RAEIB737SNG66AMH2IQTDE/> [perma.cc/8HEJ-R3PS]; Lin Evlin, "Australia's New Parent Visa 'Absolutely Unfair' Say Migrant Communities", *SBS News* (17 April 2009), online: <www.sbs.com.au> [perma.cc/ F8QJ-9SRP]; Ben Knight, "How the High Cost of Parent Visas is Leaving Migrant Families Without Support", *ABC News* (2 November 2019), online: <www.abc.net.au> [perma.cc/VZ82-8FTP].

71 See *infra* part IV. 5.

insurance against any type of "economic burden" posed by immigrants or immigrants' families.

In this section, I will describe three types of regulations: (i) sponsorship requirements, which call for the sponsoring (grand)children to assume financial responsibility for their parents' physical welfare and bar the immigrating parents from accessing social services for a period of time; (ii) health-based limitations, which disallow immigration by persons suffering from costly illnesses or disabilities; and (iii) regulations which only allow immigration by elderly relatives if the family conforms to a certain structure, or if immigration is the only option for keeping the elderly relative alive. Some further types of immigration conditions also disproportionately disfavour the elderly—one example is demanding proof of English skills, when learning languages is much harder at a later age.[72] For lack of space, I will not be treating these or any further types of indirect restrictions.

A. Sponsorship and Income Requirements

Family-based immigration relies on the mechanism of sponsorship.[73] The foreign family member has no automatic or independent right to enter the destination country; instead, the citizen or permanent resident family member must decide to sponsor them and initiate the family reunification process. In modern settler regimes, a sponsor must first demonstrate "sufficient income to support the applicant. Next, the sponsor must provide an unconditional undertaking to provide for the financial needs of the applicant ... From the outset, the objective is to ensure that the sponsored member of the family class will not become a burden on the state."[74] The requirement that immigrating family members do not rely on social assistance under any circumstances, is anything but new: as Audrey Macklin notes, it reaches back at least to the 1950s in Canada,[75] but in a

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[72] See e.g. INZ Op. Man., *supra* note 69 at para F4.25.1.

[73] See e.g. *Canadian Immigration and Refugee Protection Act*, SC 2001, c 27, ss 9 (2), 12(1), 13, 13.1, 13.2, 14(2)(e), 45–46 [*Can. IRPA*]; *Migration Act 1958* (Austl), 1958/62, ss 140AA–140ZL [*Aus MA*]; *Immigration Act 2009* (NZ), 2009/51 at ss 48, 55 [*NZ Immigration Act*].

[74] Audrey Macklin, "Public Entrance / Private Member" in Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 241–242.

[75] See *ibid* at 243: "The sponsorship undertaking can hardly be traced to the revival of the neoliberal state. Arguably, its introduction should be attributed to the rise (rather than decline) of the Keynesian welfare state in the post-war era, and a concomitant political decision to exclude immigrant families from membership in it."

more general form to colonial North American regulations against the immigration of "paupers."[76]

One of the first United States statutes to regulate immigration, in 1882, immediately excluded anyone "likely at any time to become a public charge,"[77] and "the language of the exclusion has remained the same for over a century."[78] The first Australian immigration statute, the Immigration Restriction Act of 1901, also copied the United States' formulation to prohibit "entry to 'any person likely...to become a charge upon the public or upon any public or charitable institution.'"[79] Sponsorship rules have nevertheless changed substantially in the shift from traditional to modern settler immigration regimes, despite the statutory language remaining the same.

1. The Comparative Onerousness of Sponsoring Parents

With regard to sponsorship, the United States has remained closest to a traditional settler regime because the public charge prohibition is more *ex post* than *ex ante*. That is to say, although consuls can and do consider whether or not an immigrant is "likely to become a public charge" before admission to the United States, the rules on becoming a public charge operate more as a reason for deportation once it happens. In its only statement on interpreting the phrase "likely to become a public charge", the United States Supreme Court ruled in 1915 that ignorance of the English language, lack of personal funds, or the state of the labour market in the immigrants' destination city do not make someone a likely public charge.[80] The only valid reasons for exclusion were "permanent personal objections accompanying them irrespective of local conditions,"[81] such as being physically or mentally disabled.[82]

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76 See generally Kunal M Parker, *Making Foreigners: Immigration Law and Citizenship Law in America, 1600-2000* (New York: Cambridge University Press, 2015) at 32, 42, 103–107; Aristide R Zolberg, *A Nation By Design: Immigration Policy in the Fashioning of America* (New York: Russel Sage Foundation, 2006) at 42–43, 74–75; Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* (New York: Oxford University Press, 2017) at 5.

77 See *An Act to Regulate Immigration*, Pub L No 47-376, 22 Stat 214 at s 2 (1882).

78 Joseph Daval, "The Problem with Public Charge" (2021) 130:4 Yale LJ 998 at 1000. See also Hirota, *supra* note 76 at 3, 7.

79 See Jupp, *supra* note 20 at 143.

80 See *Gegiow v Uhl*, 239 US 3 at 8–10 (1915).

81 *Ibid* at 10.

82 See *ibid*.

Later precedents from the United States were also flexible in their approach to sponsorship and the likelihood of becoming a public charge. In 1974, the case of *Harutunian*, the Board of Immigration Appeals (BIA) applied a "totality of the circumstances" test, stating that "the likelihood of a person becoming a public charge ... should take into consideration factors such as an alien's age, incapability of earning a livelihood, a lack of sufficient funds for self-support, and a lack of persons in this country willing and able to assure that the alien will not need public support."[83] *Perez*, decided the same year, added that "the fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge."[84] A third significant BIA decision is *Martinez-Lopez*, which stated that "[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency."[85] That is to say, old age and ill health are certainly factors that should push consular officers towards denying the admissibility of parents and grandparents, but they are only some factors among many, and declarations of support from friends *or* family members can be enough to preclude the determination that one is likely to become a public charge.

This "totality of the circumstances" test was codified as part of the *Immigration and Naturalization Act* in 1996, with the passage of the *Illegal Immigration Reform and Immigrant Responsibility Act*.[86] No specific sums or level of support is mentioned either in the case law or the legislation. The test has been described as offering "at most, a tautological definition of 'public charge'... [such a person] is whoever we determine them to be, by applying a wide range of factors to a specific situation."[87] During the twentieth century, the determination that an alien is likely to become a public charge has been used to exclude between 50 per cent of all would-be immigrants between 1911 and 1920,[88] to just 0.6 per cent between

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[83] *Re Matter of Harutunian*, 14 I & N Dec 583 at 583, 1974 BIA Lexis 9 (US Board of Immigration App 1974).

[84] *Re Matter of Perez*, 15 I & N Dec 136 at 137, 1974 BIA Lexis 75 (US Board of Immigration App 1974).

[85] *Re Matter of Martinez-Lopez*, 10 I & N Dec 409 at 421–22, 1962 BIA Lexis 73 (US Board of Immigration App 1962).

[86] Pub L No 104-208, 110 Stat 3009-674, codified in *8 U.S. Code Chapter 12 (Immigration and Nationality)*, *supra* note 34 at s 1182(a)(4)(B). See also Anna Shifrin Faber, "A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation" (2018) 108:5 Geo LJ 1363 at 1378.

[87] Daval, *supra* note 78 at 1018.

[88] See Faber, *supra* note 86 at 1374.

1951 and 1984.[89] The test is, therefore, capricious to say the least, but offers the opportunity to admit immigrants of modest means if immigration officers interpret the "totality of the circumstances" leniently.

The *ex post* deportation-related aspect of the public charge rule is more significant: permanent residents can be deported after admission if they have become "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of *public* cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense."[90] The public charge rule has been analysed mostly from the perspective of current permanent residents, who may or may not become eligible for deportation because of accessing food stamps or publicly funded healthcare.[91]

By contrast, in modern settler states, the obligation to support one's immigrating relatives has been codified quite precisely, and immigration officers' rights to individually balance different aspects of the immigrant's situation have been eliminated. Immigration regulations determine how much money the sponsor has to earn or hold in order to be entitled to sponsor a relative. Sponsorship also statutorily requires a declaration that the sponsor reimburse the government for any social security expenses that the sponsored relative may incur in a specified time period. On the flip side, inadmissibility for financial reasons is strictly *ex ante*.

In all counties, the obligation to support parents or grandparents –in terms of financial assistance and the duration of such help – is more onerous than the obligation to support other family members. In Canada, since 2014, sponsors have to guarantee their parents' and grandparents' financial independence from the state for twenty years, as opposed to ten years for children and three years for spouses.[92] In Australia, the assurance of support for parents lasts for ten years, as opposed to two or four years for other family members.[93] In New Zealand, the obligation to sup-

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89 See Cori Alonso-Yoder, "Publicly Charged: A Critical Examination of Immigrant Public Benefit Restrictions" (2019) 97:1 Denv L Rev 1 at 8.

90 US, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds* 64:101 Fed Reg 28689 (1999) [emphasis in original].

91 See Daval, *supra* note 78 at 1006; Alonso-Yoder, *supra* note 89 at 7–8; Lisa Sun-Hee Park, *Entitled to Nothing: The Struggle for Immigrant Health Care in the Age of Welfare Reform* (New York: New York University Press, 2011).

92 See *Can. IRPR*, *supra* note 69 ss 132(1)(b), 132(2)(a)–(d); *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 76 (the sponsors are obliged to pay back any social support accessed by their relatives, even if the relationship with the sponsored persons breaks down completely).

93 John Vrachnas et al, *Migration and Refugee Law: Principles and Practice in Australia* (Cambridge: Cambridge University Press, 2005) at 44.

port parents lasts for ten years as well.[94] The United Kingdom's requirement of five years of support and sponsorship is quite light by comparison[95]—but as we shall see, that is because sponsoring adult dependents is close to impossible in any case.[96]

Recently, income requirements have been raised to significantly more than the national average – sponsoring parents and relatives is becoming increasingly a privilege of the rich. Canada is the exception, where sponsors of spouses and children only have to prove the "minimum necessary income" for subsistence in a city of 500,000 or more, as calculated by Statistics Canada, for the last three years before sponsorship: this works out to around CA$33,000 for a household of two, plus CA$7000 to CA$8000 for each additional person.[97] For sponsoring parents or grandparents, though, the required income is 130 per cent of the minimum necessary income:[98] significantly higher, but still below the national average of around CA$55,000.[99] In New Zealand, by contrast, the minimum income necessary to sponsor one's parents was raised in 2019 to *twice* the median income (currently NZ$53,040 per annum) for sponsoring one parent, and *three times* the median income to sponsor both parents.[100]

The Australian solution sidesteps the issue of income levels by demanding that sponsors post a bond for a pre-set amount, depending on the years of required sponsorship and the number of people sponsors. To sponsor parents, the amounts vary from AU$10,000 to AU$20,000, depending on whether a person or an organization is giving the assurance of support, and whether one or two people are being sponsored.[101] Australia is also exceptional in having introduced "contributory visas" for parents: this type of visa requires the sponsor to pay a set amount up front as part

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94 See INZ Op. Man., *supra* note 69 at para F4.35 (b).

95 See UK, Home Office, *Immigration Rules Appendix FM: family members* (22 August 2022, updated 25 February 2016) (London, UK: Home Office, 2016), s E-ECDR 3.2 [*UK IR App FM*].

96 See *infra* notes 152–56 and accompanying text.

97 See *Can. IRPR*, *supra* note 69 ss 2 ("minimum basic income"), 133(1)(j)(i), 134.

98 See *ibid* at ss 133(1)(j)(i)(A)–(B).

99 See Statistics Canada reports on payroll employment, earnings and hours at <www150.statcan.gc.ca/n1/dai-quo/ind1-eng.htm> [perma.cc/SQT5-MGNT].

100 Immigration New Zealand, "Operational Manual Residence: Part 1" (2021) at para 4.40.5, online (pdf): *Immigration New Zealand* <www.immigration.govt.nz/documents/ops-manual/residence.pdf>.

101 See Services Australia, "Bank Guarantee and Term Deposit" (last modified 1 July 2022), online: *Moving to Australia* <www.servicesaustralia.gov.au/bank-guarantee-and-term-deposit-for-assurance-support?context=22051>.

of the visa costs, as a projected, averaged fee for future healthcare costs.[102] Currently, this contribution is AU$43,600 for each parent,[103] which is somewhat less than the median yearly income of AU$52,338.[104] One can sponsor one's parent in instalments, so to speak, by first sponsoring a temporary contributory visa for AU$29,130 and two years later switching to a permanent contributory visa for AU$19,420.[105] Theoretically, one need not pay for the contributory visas, and can instead apply for a "regular" parental immigration visa. However, contributory visas have a current processing period of 12 years;[106] whereas non-contributory visas have a current estimated processing period of *29 years*.[107] This means that contributory visas already take an excruciatingly long time to receive, but non-contributory visas are basically impossible to receive within the lifetime of an aged parent.

2. What Does Sponsorship Cover?

Threshold income amounts and numbers of years are only half the story, however. The meaning of sponsorship itself changes from country to country, from only having to cover social security payments to every sort of expense that may arise with regard to the sponsored relative. Here too, the Canadian regulation is the most lenient. In Canada, sponsorship only "obliges the sponsor to reimburse His Majesty in right of Canada or a province for every benefit provided as social assistance to or on behalf of the sponsored foreign national and their family members ..."[108] "Social assistance" refers to cash transfers and *in specie* benefits such as "food, shelter, clothing, fuel, utilities, household supplies [and] personal requirements," but it crucially does not include publicly funded health

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[102] Vrachnas et al, *supra* note 93 at 70–73.

[103] See Australian Government Department of Home Affairs, "Fees and Charges for Live Visas" (last modified: 13 July 2022), online: *Immigration and Citizenship* <immi.homeaffairs.gov.au/visas/getting-a-visa/fees-and-charges/current-visa-pricing/live> at 19j-viii [AU Home Affairs Fees and Charges for Visas].

[104] See Australian Bureau of Statistics, "Personal Income in Australia, 2014–15 to 2018–19" (16 December 2020), online: *Labour – Earnings and Working Conditions* <www.abs.gov.au/statistics/labour/earnings-and-working-conditions/personal-income-australia/2011-12-2017-18>.

[105] See AU Home Affairs Fees and Charges for Visas, *supra* note 103 at 19k–iii and 19j–i.

[106] See Australian Government Department of Home Affairs, "Visa Processing Times" (last modified: 6 September 2022), online: *Immigration and Citizenship* <immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates> [AU Home Affairs Visa Processing Times].

[107] See AU Home Affairs Visa Processing Times, *supra* note 106.

[108] *Can. IRPR*, *supra* note 69 at s 132(1).

care.[109] In Australia, the "assurance of support" likewise only covers social security payments that the sponsored relative accesses during the sponsorship period.[110] In the United Kingdom, the sponsor must confirm "that the applicant will have no recourse to public funds, *and* that the sponsor will be responsible for their maintenance, accommodation and care."[111] In New Zealand, sponsorship not only means the accommodation and maintenance of the sponsored relative, but also the obligation to pay the costs of repatriation or deportation.[112]

B. Health Risks and Access to Healthcare

Restrictions that limit immigration to those who are healthy date back to 1865 in Canada,[113] 1899 in New Zealand[114] and 1901 in Australia.[115] However, the substantive requirement of good health has also changed near the end of the last century, making it more restrictive for elderly people over time.

1. The Turn to an Economic Model of Immigrant Health

When discussing the state's desire to exclude sick migrants, it is worthwhile to look at two slightly different motivations: the desire to preserve public health by avoiding mass infections carried by travelers ("the medical model"); and the desire to preserve (cheaper) public healthcare by denying access to healthcare for migrants with non-infectious or non-life threatening diseases ("the economic model").[116] The medical model was predominant for traditional settler regimes, which typically only denied entry to persons with infectious or "loathsome" diseases, and permanent mental or physical disabilities. The economic model has been created by modern settler regimes and taken over by at least some non-immigrant regimes. The medical model, the economic model, and the public charge rule overlap to a large extent, but the medical model and the public charge rule together still allow the entrance of elderly people with chronic

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[109] *Ibid* at s 2 ("social assistance").

[110] *Social Security Act 1991* (Austl), 1991/46, s 1061ZZGG.

[111] *UK IR App FM*, *supra* note 95, s E-ECDR 3.2 [emphasis added]. See also *ibid*, s E-ECDR 3.1 (requiring proof of adequate maintenance, accommodation and care).

[112] See *NZ Immigration Act*, *supra* note 7 at s 48(3)(ii)–(iv).

[113] See *An Act Respecting Emigrants and Quarantine*, RSC 1859, c XL, ss 8, 10–11; see also *Immigration Act*, RSC 1906, c 93, ss 26–27.

[114] See *The Immigration Restriction Act 1899* (NZ), 1899/33, 63 Vict 115 at s 3(2)–(3).

[115] *Immigration Restriction Act 1901* (Austl), 1901/17, s 3 (b)–(d).

[116] See Judith Mosoff, "Excessive Demand on the Canadian Conscience: Disability, Family and Immigration" (1999) 26:2 Man LJ 149 at 165, 167.

illnesses or moderate disabilities, as long as they had support from family members or had the means to support themselves.[117] The economic model, however, excludes those who *could* become a burden on the public health system, without actually being "public charges."

Here again, the United States has kept regulations that are closest to the traditional settler state model. The U.S. excludes persons who have "a communicable disease of public health significance,"[118] those who have not been vaccinated against certain preventable diseases;[119] and persons with physical or mental disorders that "may pose, or has posed, a threat to the property, safety, or welfare of the alien or others."[120] No mention is made of healthcare costs or expensive disabilities—those are regulated within the framework of the public charge rule.[121]

Modern settler states and many non-immigrant states have publicly funded general health insurance systems, and preventing immigrants from accessing these systems upon arrival became a political priority from the 1970s onwards. Modern settler states have extended the economic model to cover not only disabilities and acute, contagious diseases, but any health condition that *may likely* cause *excessive* health expenditures, howsoever defined. Canada was the first to change, when in its 1976 Immigration Act, it did away with the crude and ableist language of keeping out "idiots, imbeciles or morons," "immigrants who are dumb, blind or otherwise physically defective," epileptics and those suffering from "any contagious or infectious diseases."[122] The new language, more elegant and bureaucratic, banned persons "whose admission would cause or might reasonably be expected to cause excessive demands... on health or prescribed social services."[123]

"Excessive demand" has a double definition in the Canadian immigration regulations. Firstly, above average costs: "a demand... for which the

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117 See Constance MacIntosh, "Medical Inadmissibility, and Physically and Mentally Disabled Would-be Immigrants: Canada's Story Continues" (2019) 42:1 Dal LJ 125 at 130. See also Mosoff, *supra* note 117 at 157–59; Jennifer S Kain, *Insanity and Immigration Control in New Zealand and Australia, 1860-1930* (Cham, Switzerland: Palgrave Macmillan, 2019).

118 *8 U.S. Code Chapter 12 (Immigration and Nationality)*, *supra* note 34 at s 1182(a)(1)(A)(i).

119 The list currently includes mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, but does not include Covid-19. See *ibid* at s 1182(a)(1)(A)(ii).

120 *Ibid* at s 1182(a)(1)(A)(iii)(I).

121 See *supra* notes 80–91 and accompanying text.

122 See *Immigration Act,* SC 1952, c 42, ss 5 (a)–(c).

123 See *Immigration Act, 1976-1977*, c 52, s 19(1)(a)(ii).

anticipated costs exceed triple the average Canadian per capita health services and social services costs over a period of five [or for long-term diagnoses, ten] consecutive years..."[124] Secondly, increased waiting lists: "a demand... that would add to existing waiting lists and would increase morbidity or the rate of mortality in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents."[125]

Health-based restrictions that are understood as higher than average healthcare costs clearly militate against the immigration of elderly persons in general.[126] It is well known that health expenditures are strongly correlated with age: "annual costs for the elderly are approximately four to five times those of people in their early teens."[127] Even within elderly populations, healthcare costs rise sharply with age: "The oldest group (85+) consumes three times as much health care per person as those 65–74, and twice as much as those 75–84."[128]

Australia followed the turn to the economic model in the 1994 Migration Regulations, whereby a medical officer had to attest that applicants did not need "significant care or significant treatment (or both)," or "care or treatment (or both) involving the use of community resources *in short supply*."[129] By the end of 1995, the criterion about resources in short supply was replaced by a subsection prescribing any health condition that would "prejudice the access of an Australian citizen or permanent resident to health care or community services."[130] From the middle of 2000, the further caveat was added that access and costs are to be calculated "*regardless of whether the health care or community services will actually*

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[124] Currently calculated at CA$25,689 per annum per Canadian: see "Excessive demand on health services and on social services" (last modified 4 October 2022), online: *Government of Canada* <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/medical-requirements/refusals-inadmissibility/excessive-demand-on-health-social-services.html#application>.

[125] *Can. IRPR*, *supra* note 69 at s 1 ("excessive demand")(b).

[126] Exceptions are created for refugees, so as not to violate Canada's obligations: see *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 art 24(1)(b) (entered into force 22 April 1954, accession by Canada 4 June 1969); *Can. IRPA*, *supra* note 73 s 38(1).

[127] Berhanu Alemayehu & Kenneth E Warner, "The Lifetime Distribution of Healthcare Costs" (2004) 39:3 Health Services Research 627 at 627.

[128] *Ibid* at 628.

[129] *Migration Regulations*, *supra* note 62, Schedule 4, clauses 4005(1)(c)(i)–(ii), 4007(1)(c)(i)–(ii) (version in force between July 28 and September 20, 1994; emphasis added).

[130] *Ibid* Regulation 2.15(1)(e)(ii). (version in force between November 1, 1995 and April 1, 1996)

be used in connection with the applicant."[131] The commitment to calculating costs and benefits is replaced with the mere possibility of a certain illness developing in such a way as to later impose costs.

According to the Australian courts, "[t]he 'person' referred to... is not the applicant but a hypothetical person who suffers from the disease or condition which the applicant has. ... It is not a prediction of whether the particular applicant will, in fact, require health care or community services at significant cost to the Australian community."[132] Applicants with serious conditions such as HIV-AIDS, who are themselves dealing well with the illness and are unlikely to impose significant or even any health costs on Australia, still have their applications denied regularly.[133] Since the regulation requires a decision based on probable or possible costs, "rather than on what a person will actually consume, it has become virtually impossible for individuals with serious diseases and conditions...to obtain visas permitting long-term stay in Australia."[134]

New Zealand similarly requires that all immigrants, including elderly immigrants "have an acceptable standard of health"[135] defined as being "unlikely to be a danger to public health; and unlikely to impose significant costs or demands on New Zealand's health services."[136] A medical assessor must decide whether an applicant is likely to impose significant costs on healthcare, set at NZ$81,000.[137] An additional list of severe and chronic medical conditions—some of which are quite common in old age, such as dementia, cardiac diseases, arthritis or cancer—are deemed by

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[131] *Ibid* Schedule 4.1 Clause 4005(1)(c)(ii).(version in force between July 1, 2000 and November 1, 2000, and all subsequent versions; emphasis added). See also Mary Crock & Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Annandale: Federation Press, 2011) at 155–64.

[132] See *Imad v Minister for Immigration & Multicultural Affairs*, [2001] FCA 1011 at para 13.

[133] See *Minister for Immigration and Multicultural and Indigenous Affairs v X,* [2005] FCAFC 209; *Mai v Minister for Immigration & Anor.*, [2016] FCCA 2901. See also *Han v Minister for Home Affairs*, [2019] FCA 331. A strand of Australian cases have questioned the reasonableness of the "hypothetical person's" health assessment, which does not take into account the individual applicant's general conditions. See *Inguanti v Minister for Immigration and Multicultural Affairs*, [2001] FCA 1046 [*Inguanti*]; *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] FCA 1626. Nevertheless, the reasoning of these cases does not seem to have been picked up by courts in later cases, even though the decisions themselves are cited.

[134] Crock & Berg, *supra* note 132 at 164.

[135] See INZ Op. Man., *supra* note 69 at para A4.10 (a).

[136] See *ibid* at paras A4.10(b) (i)–(ii).

[137] See *ibid* at para A4.10.2.

law to impose significant cost or demand, without the chance to prove personal exceptions.[138]

2. Individualized Assessment vs. the Possibility of Excessive Cost

An important question in taking the economic model seriously is whether it is, in effect, just another wealth/income test that is focused on healthcare costs specifically. Is a chronically ill or disabled immigrant who has private health insurance, or just sufficient wealth in general to offset all healthcare costs, still inadmissible? In Australia, as we have seen, the answer is yes. In *Inguanti v Minister for Immigration and Multicultural Affairs*, the sponsor's elderly brother, Mr. Urso "had very significant [sic] intellectual disability and required supervision with personal hygiene and other activities of daily living."[139] Although Heerey J held for the applicants, he did so by disputing the evidence about Mr. Urso's level of disability: he affirmed that "the whole thrust of cl 4005(c) is that the question of whether or not public funds will be incurred in looking after the particular applicant is irrelevant."[140] The fact that Mr. Urso had "A$420,000 held in a trust account for his benefit" and that the sponsor "had a family which comprised of five adult children who would always look after Mr Urso and would always have accommodation available for him,"[141] was irrelevant for the decision.

In New Zealand, the decision to refuse entry to those who can pay for their own care despite their ill health, is baked into the immigration regulations. "The ability of a person or organisation to pay for health services, pharmaceuticals, or residential care...; access to the private health system; ...possession of health insurance [and] [t]he capacity of family, friends, or a charitable organisation to provide care"[142] are all deemed irrelevant for deciding whether an applicant will impose significant costs or demands on health services. Here too, the possibility of sponsoring relatives is denied even for those whose healthcare is assured through private means.

Canadian case-law, by contrast, has affirmed that "without consideration of an applicant's intention and ability to pay for social services, it is

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[138] See *ibid* at para A4.10.1. Significantly, the list includes many conditions which appear almost exclusively in old age (dementia, Alzheimer's disease, Parkinson's disease, cerebral palsy), or which are more likely to develop in old age (cancers, cardiac diseases, musculoskeletal diseases including osteoarthritis, lung diseases).

[139] *Inguanti*, *supra* note 134 at para 4.

[140] *Ibid* at para 11.

[141] *Ibid* at para 7.

[142] See INZ Op. Man., *supra* note 69 at para A4.10.2 (d).

impossible to determine realistically what 'demands' will be made on Ontario's social services."[143] Therefore, "the medical officers must necessarily take into account ... the availability, scarcity or cost of publicly funded services, along with the willingness and ability of the applicant or his or her family to pay for the services."[144] Curiously enough, the "entrance for the rich only" approach taken by Canada is the most humane one by comparison.

C. Immigration as the Ultimate Necessity

Financial and health-based restrictions, as we have seen, are effective at keeping out the "wrong" kind of (elderly) immigrant. For some reason, for some countries, this was not enough, and the immigration of (grand)parents could only be justified if that was the only way for the elderly relative to receive care. This is certainly true of non-immigrant regimes (the United Kingdom, Latvia and Finland are shown as examples below),[145] but New Zealand and Australia have also created similar rules.

A relatively mild version of this type of conditionality is the Australian "balance of family" test. The "balance of family" means that the parent in question has a "greater or equal" number of children who are Australian citizens or residents, than children who are residents of other countries.[146] That is, parents are only allowed to join their Australian children, if they have fewer (or no) children elsewhere who could take care of them. A strict and simplistic numerical count of children determines the right to immigrate to Australia, "even if the Australian child is in a better position to support the parent than her or his siblings overseas, and/or if the parent has lost any rapport with the children overseas."[147]

Other rules police (grand)parents' family structures, to only allow immigration if the parents are uncared for or lonely in specific ways. In

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[143] *Hilewitz v Canada (Minister of Citizenship and Immigration); De Jong v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57 at para 54.

[144] See *ibid* at para 55. See also *Canada (Citizenship and Immigration) v Colaco*, 2007 FCA 282.

[145] See *Angela and Rodney Price v the United Kingdom* (1988), ECHR (Ser A) [*Price*]; *Slivenko v Latvia* [GC], No 48321/99, [2003] ECHR 229 [*Slivenko*]; *Senchishak v Finland* [GC], No 5049/12, [2014] [*Senchishak*]; *BRITCITS v United Kingdom (Secretary of State for the Home Department)*, [2017] EWCA Civ 368 [*BRITCITS*]; *Kugathas v United Kingdom (Secretary of State for the Home Department)*, [2003] EWCA Civ 31 [*Kugathas*]; *Singh v United Kingdom (Secretary of State for the Home Department)*, [2015] EWCA Civ 630 [*Singh*]; see *infra* notes 152–56, 220 and accompanying text.

[146] *Migration Regulations*, *supra* note 62 sec 1.05(2C).

[147] Crock, *supra* note 37 at 84, citing *Re Ramadhar* (IRT 172, 19 June 1991) and *Re Kelley* (IRT 331, 23 September 1991).

New Zealand immigration law, "[a]pplicants under the Parent Category must not have any dependent children"[148] in addition to the sponsoring children—that is, any other children who are under 20 years of age, or between 21 and 24 years of age but reliant upon the parents financially.[149] This rule betrays a fear of "chain migration," whereby the dependent children could then also enter New Zealand, then sponsor a spouse or their other parent, and so on. UK immigration law, by contrast, bans elderly relatives from remarrying or living in a relationship other than with the sponsor's other (grand)parent.[150] The not-so-subtle message is that if there any other children in the world who can take care of the elderly parents, they should be the ones to do so, not the would-be sponsoring children in Australia or New Zealand.

The harshest version of this type of dependency test has entered into force in 2012 in the UK. According to section E-ECDR 2.4 and 2.5 of the UK Immigration Rules, parents and grandparents may only immigrate to the UK if "as a result of age, illness or disability [they] require long-term personal care to perform everyday tasks"[151] *and* they are "unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living."[152] This requires immigrants to effectively prove a negative: why and how it is impossible, or no longer possible, to provide financial and healthcare wherever the (grand)parent is currently living.[153] The applicants have to account for the unavailability of not only close and more distant family members, but also the inaccessibility of a "friend or neighbour; or ... home-help, housekeeper, nurse, carer or care or nursing home."[154] As both professional commentators[155] and would-be sponsors pointed out, this is basically impossible. A

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148 See INZ Op. Man., *supra* note 69 at para F4.30.5.

149 See *ibid* at para F4.20.1 (definition of "dependent child").

150 See *UK IR App FM*, *supra* note 95, s E-ECDR 2.2 ("If the applicant is the sponsor's parent or grandparent they must not be in a subsisting relationship with a partner unless that partner is also the sponsor's parent or grandparent and is applying for entry clearance at the same time as the applicant").

151 *Ibid*, s E-ECDR 2.4.

152 *Ibid*, s E-ECDR 2.5; UK, Home Office, "Family Policy: Adult Dependent Relatives, Version 3.0" (24 January 2022) at 10, online (pdf): *Government of the United Kingdom* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825698/ Adult-Dependent-Relatives-August-2017ext.pdf>.

153 See UK, Home Office, *Immigration Rules Appendix FM-SE: family members specified evidence* (25 February 2016, updated 22 August 2022) (London, UK: Home Office, 2016), ss 34–37.

154 See Home Office, *Family Policy*, *supra* note 153 at 13.

155 See Colin Yeo, "The Immigration Rules for Adult Dependent Relatives: Out with the Old..." (8 November 2017), online: *Free Movement* <freemovement.org.uk/out-with-the-old/>.

would-be sponsor also has to prove that they would be financially able and willing to take care of their parent within the UK, while proving that it is impossible to find and finance private care for them in the place of residence.

IV. Chipping Away at the Family Class: Parents as Tourists and Investors

Having seen the myriad ways in which elderly dependent relatives are turned away, is there any alternative that modern settler states actually offer to residents who want to be reunited with their parents? The countries under consideration do not exactly forbid foreigners from seeing their adult children or minor grandchildren. Nor do they openly argue that families are "anachronistic," that "friends are the new family," or that globally dispersed Skype-families are the new normal.[156] But they do introduce new visa classes that reclassify elderly relatives as tourists or investors, far away from the expectations of solidarity and settlement that were at the heart of the family class.

"Tourist-type" temporary visas do allow parents to visit their (grand)children but without any protections against deportation or any right to receive publicly funded healthcare. These temporary parental visitor visas also require the parents to reapply for a renewed visa every few years, thereby requiring them to continuously comply with the financial, health, security, and other restrictions that every visa application entails. Canada's "Parent and Grandparent Super-Visa" is a prime example.[157] The "super visa" is "super" because of its extended validity: it may be granted for up to ten years, and it allows the holder to stay in Canada for up to five years continuously without having to leave the country.[158] At the same time, it requires the same amount of financial sponsorship from the Canadian (grand)children as an immigrant visa application would,[159] the same health examination but also the purchase of a Canadian private medical insurance policy that is valid for at least one year, for a coverage value of at least CA$100,000.[160] Furthermore, as with any visitor visa, the

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156 *Cf* Iseult Honohan, "Reconsidering the Claim to Family Reunification in Migration" (2009) 57:4 Political Studies 768 at 775.

157 See "Super Visa (for Parents and Grandparents): About the Document" (last modified 4 July 2022), online: *Government of Canada* < https://www.canada.ca/en/immigration-refugees-citizenship/services/visit-canada/parent-grandparent-super-visa/about.html> [Super Visa]. See also Sharryn Aiken et al, *Immigration and Refugee Law: Cases, Materials and Commentary*, 3rd ed (Toronto: Emond, 2020) at 838–39.

158 See Super Visa, *supra* note 158.

159 See *ibid; Can. IRPR*, *supra* note 69 at ss 2 ("minimum necessary income"), 133(1)(j)(i)(A)–(B), 134; *supra* notes 97–98 and accompanying text.

160 See "Super Visa, *supra* note 158.

issuing officers can reject any application based on "your ties to your home country; your family and finances; [and] the overall economic and political stability of your home country."[161] Because visitor visas are temporary, the conditions, the fees, and the administrative procedures have to be kept up and repeated at each new application, resulting in similar costs and fewer rights for those holding a visitor visa.

The Australian Sponsored Family Stream Visitor Visa, a twelve-month temporary family reunification visa, is similar in its design. The Australian Government touts the low application fee (AU$190) and fast processing times ("75% of applications: 20 days; 90% of applications: 30 days") on the informational website of the visa stream[162]—in contrast with the lack of advertisement about the twenty-nine-year waitlist for the Aged Parent Visa.[163] As with the permanent immigration visa, though, "we might ask your sponsor to pay a security bond"[164] and good health and private health insurance are both necessary.[165] The Australian Sponsored Parent (Temporary) Visa is the deluxe version, close to a copy of the Canadian super visa: higher costs (AU$5735 or 11,470), faster processing times (within 6 months for 90 per cent of applicants), longer validity (three or five years).[166] The New Zealand Parent and Grandparent Visitor Visa, which has a three-year validity but only allows up to eighteen months of presence in New Zealand during these three years (and no more than six months continuously), also carries its purpose in its

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161 *Ibid.*

162 "Visitor Visa (Subclass 600), Sponsored Family Stream: Overview" (last modified 1 July 2022), online: *Australian Government Department of Home Affairs* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/visitor-600/sponsored-family-stream#Overview> [Australian Visitor Visa].

163 See "Visa Processing Times: Family Visa Processing Priorities" (last modified 6 September 2022), online: *Australian Government Department of Home Affairs* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates.

164 See Australian Visitor Visa, *supra* note 162.

165 See "Sponsored Family Stream: About this Visa" (last modified 1 July 2022), online: *Australian Government Department of Home Affairs* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/visitor-600/sponsored-family-stream#Eligibility> and "Sponsored Family Stream: Eligibility" (last modified 1 July 2022), online: *Australian Government Department of Home Affairs* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/visitor-600/sponsored-family-stream#Eligibility >.

166 See "(Subclass 870) Sponsored Parent (Temporary) Visa: Overview" (last modified 29 August 2022), online: *Australian Government Department of Home Affairs* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/sponsored-parent-temporary-870#Overview> and "(Subclass 879) Sponsored Parent (Temporary) Visa: About this Visa" (last modified 29 August 2022), online: *Australian Government Department of Home Affairs* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/sponsored-parent-temporary-870#About>.

name.[167] The United Kingdom is again the exception, having only a flexible General Visitor Visa program and not advertising the visitor visa's alleged suitability for elderly family members.[168]

"Investor-type" parental visas, somewhat like the Australian contributory visas described above,[169] require applicants to prove considerable funds and invest substantial amounts in the destination country, as preconditions to immigration. While "investor immigrant" and "citizenship for sale" programs are increasingly popular worldwide,[170] New Zealand is likely the first country to combine them with family reunification. The general description for the New Zealand Parent Retirement Resident Visa mentions New Zealand family members as a minor precondition but is clearly focused on the financials:

> Your child must be a New Zealand citizen or resident... Your child must live in New Zealand.... You must have NZ $1 million or more to invest in New Zealand for 4 years... You must transfer your investment funds to New Zealand... You must have at least NZ $500,000 [for settlement funds]... You must have an annual income of NZ $60,000 or more... Your partner must meet the requirements of this visa.[171]

Unsurprisingly, the NZ Parent Retirement Resident Visa is not too successful at uniting families: since its introduction in 2012,[172] there have never been more than seventy-eight approved applications in a year, and, in most years, that number has been under a hundred.[173]

Finally, most immigration laws also allow admission into the country under the discretion of the minister, the attorney general, or another

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167 See INZ Op. Man., *supra* note 69 at para V3.110.5.

168 See generally UK, Home Office, *Immigration Rules Appendix V: Visitor* (25 February 2016, updated 22 August 2022) (London, UK: Home Office, 2016).

169 See *supra* notes 102–105 and accompanying text.

170 See Christians, *supra* note 4 at 58–62. See generally Surak, *supra* note 4.

171 See "Information About Parent Retirement Resident Visa" (last modified 2022), online: *New Zealand Immigration* <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/parent-retirement-resident-visa> and "Meeting the Criteria" (last modified 2022), online: *New Zealand Immigration* <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/criteria/parent-retirement-resident-visa?nationality=nationality-CAN&country=residence-CAN>; INZ Op. Man., s*upra* note 69 at paras F3.1–F3.35.20.

172 Richard Bedford & Liangni (Sally) Liu, "Parents in New Zealand's Family Sponsorship Policy: A Preliminary Assessment of the Impact of the 2012 Policy Changes" (2013) 39 NZ Population Rev 25 at 29–31.

173 "Statistics: Residence Decisions by Financial Year" (5 October 2022) at 4, online (pdf): *New Zealand Immigration* <www.immigration.govt.nz/documents/statistics/statistics-residents-decisions-financial-year.pdf>.

high-ranking government official.[174] In Canada, this discretionary power, known as the Minister's Humanitarian & Compassionate (hereinafter: H&C) power, has been used from time to time to grant permanent residence to grandparents who are the *de facto* primary caretakers of their grandchildren.[175] Since *Baker v Canada*, however, H&C decisions have been focused on the best interests of the child (i.e., immigrant or Canadian-born children who would be left without a caretaker, if the caretaking family member were to be deported or rendered inadmissible).[176] H&C powers are therefore not a reliable path to immigration, and I argue that it reinforces the slow loss of rights that elderly family members are facing.

V. Justifying the Restrictions on Elderly Relatives' Immigration

A. (The Lack of) Political Justifications

The political rhetoric of immigration restrictions, or lack thereof, is also curious. The restrictions of asylum-seekers and family-based immigration, in general, have been accompanied by a loud, bitter, and cynical right-wing rhetoric of denouncing "criminal refugees," "queue-jumpers," "anchor babies," "chain migration," "undeserving" welfare-seekers, and the other tropes of the anti-immigration right.[177] The discursive tropes utilized have been microscopic investigations of all emotional and monetary claims by migrants, a baseline of deep suspicion, an expectation of continuous revelations of fraud, and a payoff of disgust, anger, and fear.[178]

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[174] See e.g. *8 U.S. Code Chapter 12 (Immigration and Nationality)*, *supra* note 34 at s 1182(d)(5)(A); Can. IRPA, *supra* note 73 ss 25(1), 25.2(1); *NZ Immigration Act*, *supra* note 73 at ss 61, 378(1); *Aus MA*, *supra* note 73, ss 351, 417.

[175] See e.g. *Gill v Canada (Citizenship and Immigration)*, 2010 CA IRB TA8-01394 [*Gill*]; *Thomas v Canada (Citizenship and Immigration)*, 2019 CA IRB TB8-11311 [*Thomas*].

[176] See e.g. *Gill*, supra note 175 at para 3; *Thomas,* supra note 175 at para 17;*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69–75, 174 DLR (4th) 193 [*Baker*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 34–41.

[177] See generally Rosemary Sales, "The Deserving and the Undeserving? Refugees, Asylum Seekers and Welfare in Britain" (2002) 22:3 Critical Social Policy 456; Katherine Gelber, "A Fair Queue? Australian Public Discourse on Refugees and Immigration" (2003) 27:77 J Austl Stud 23; Matthew Cameron, "From 'Queue Jumpers' to 'Absolute Scum of the Earth': Refugee and Organised Criminal Deviance in Australian Asylum Policy" (2013) 59:2 Australia J Politics & History 241 at 243–44.

[178] See Anne-Marie D'Aoust, "A Moral Economy of Suspicion: Love and Marriage Migration Management Practices in the United Kingdom" (2018) 36:1 Environment & Planning D: Society & Space 40 at 42–43, 45–49; Irene Gedalof, *Narratives of Difference in an Age of Austerity* (London: Palgrave Macmillan, 2018) at 141–167.

None of these tropes have been directed against elderly relatives, and indeed it would be hard to make them stick. Elderly people are highly unlikely to commit crimes, compared to young persons.[179] Parents are also unlikely agents of "chain migration," even without "balance of family"-type rules, as no countries accept sponsorship of adult children. In general, the elderly bring the least amount of risk or danger with them, wherever they migrate. None of this has made the move against elderly immigration any less global, or any less comprehensive.

The rhetoric accompanying the policy changes is an almost invisible but ever so pervasive econocentrism, manifesting in slogans such as "user pays" and "cost-free immigration."[180] The argument is that the sole purpose of any national immigration policy should be financial gain. As Martin Collacott argues in the Canadian context, "it should be emphasized that there is nothing wrong in principle with wanting to bring in one's extended family so that they may benefit from the economic opportunities available... The fact is, however, that immigration policy is supposed to be based on economic benefit to Canada."[181] Economic benefit as a foundation of immigration policy is of course a highly contentious and rather narrow-minded proposition, given the multi-generational and nation-(re)constituting nature of immigration. Nevertheless, this is the policy thought that is gaining ground since the 1990s;[182] and it deems budgetary savings of as little as GB£ ten million/year worthy of implanting draconian restrictions on elderly relatives' immigration.[183]

The arguments based on pure economic rationalism are unconvincing based on several grounds. First and foremost, they fail empirically: statistical studies of elderly immigrants who arrived in Canada before the 2011 restrictions show that average family income for these immigrants' fami-

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[179] See David O Moberg, "Old Age and Crime" (1953) 43:6 J Crim L Criminology & Police Science 764 at 768–69; Herbert C Covey & Scott Menard, "Trends in Arrests Among the Elderly" (1987) 27:5 Gerontologist 666 at 667–68. Current Canadian criminal statistics show that about 20% of all guilty sentences are handed down to defendants above 45 years of age: see "Adult Criminal Courts, Guilty Cases by most Serious Sentence" (last modified 22 October 2022), online: *Statistics Canada* <https://www150.statcan.gc.ca/t1/tbl1/en/cv!recreate.action?pid=3510003101&selectedNodeIds=1D1,3D2,3D3,3D4,3D5,3D6&checkedLevels=1D1,2D1,3D1,4D1,5D1&refPeriods=20180101,20190101&dimensionLayouts=layout2,layout2,layout3,layout2,layout2,layout3,layout2&vectorDisplay= false>.

[180] See Jupp, *supra* note 20 at 141–44, 151–53.

[181] Martin Collacott, *Canada's Immigration Policy: The Need for Major Reform*, 2nd ed (Vancouver: The Fraser Institute, 2003) at 19.

[182] See Antje Ellerman, "Human-Capital Citizenship and the Changing Logic of Immigrant Admissions" (2020) 46:12 J Ethnic & Migration Studies 2515.

[183] See United Kingdom, Home Office, *Changes to Family Migration Rules*, (Impact Assessment), No HO0065, (London: Home Office, 6 December 2012) at 34.

lies is a mere CA$475 less than the average family income of younger immigrant families.[184] "Parents and/or grandparents are no more likely to be a drain on the Canadian social welfare system than other people their age, or other immigrants."[185] Elderly immigrants have also been far from inactive after arrival: over two-thirds find employment, become self-employed, or do household work and childcare for their sponsoring children.[186]

Second, the value of household work and childcare in particular (and the time, money, and energy that this liberates for their active, sponsoring adult family members) is left out of almost every econocentric analysis;[187] and where they are accounted for, they are accounted for badly. Martin Collacott argues that "it is difficult to justify such an arrangement if it costs taxpayers $160,000 in health care costs alone during the lifetime of [the immigrating grandparent] in Canada."[188] In fact, it is not that hard to justify. If an immigrating elderly parent saves its sponsoring children just the minimum wage through household work and saving extra childcare costs (currently CA$28,500 per year), such a parent will bring a net benefit to Canada after less than six years of living with her children, even accepting the CA$160,000 cost in healthcare over her remaining lifetime.

Third, there is no consideration of the remittances that adult children send abroad to ensure their parents' well-being—considerable sums that could be spent in the destination country instead. Conversely, there is no accounting of the sums that parents and grandparents bring with them when they join their descendants: their life savings, which may well be negligible in some cases but considerable in others. Finally, the econocentric analyses miss the very real emotional value of having one's loved ones

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184 See Madine VanderPlaat, Howard Ramos & Yoko Yoshida, "What Do Sponsored Parents and Grandparents Contribute?" (2012) 44:3 Can Ethnic Studies 79 at 85–86.

185 *Ibid* at 86.

186 See *ibid* at 86–90.

187 But see Myra Hamilton, Angela Kintominas & Deborah Brennan, "The Temporary Sponsored Parent Visa, Migrant Grandparents and Transnational Family Life Policy: Brief No. 2" (October 2018) at 1–2, online (pdf): *University of New South Wales Arts* <www.arts.unsw.edu.au> [perma.cc/2ZB2-KJ5Y]; Wei Wei Da, "Transnational Grandparenting: Child Care Arrangements Among Migrants From the People's Republic of China to Australia" (2003) 4:1 J Intl Migration & Integration 77 at 83–94, 96.

188 Martin Collacott, "Canadian Family Class Immigration: The Parent and Grandparent Component Under Review" (November 2013) at 14, online (pdf): *The Fraser Institute* <www.fraserinstitute.org> [perma.cc/ NSH4-4VTQ].

close by and knowing they are well cared for.[189] Econocentrism, as James Jupp summarizes looking at Australia, "is rational but inhumane... [and] incompatible with the family values espoused by the Coalition government."[190]

However, even assuming that one is convinced by the restrictionists, the policy tools erected to combat the economic dangers go beyond all rationality in their *cumulative* harshness. If states are worried about immigrants draining national healthcare systems, why not just prescribe health-based restrictions on immigration? Or, conversely, why not leave behind health-based restrictions and only prescribe private health insurance? If decision-makers are indeed driven by economic rationalism, why lower quota numbers (even for well-off immigrants), or why institute such mindless restrictions as balance of family-rules or limits to elderly immigrants' spouses or dependent children? Having a total lack of arguments, restrictionists currently can only scaremonger using sheer numbers, without giving any reasons *why* the increased number of elderly immigrants would be threatening from any perspective.[191] And yet, further restrictions are still considered from time to time—the New Zealand government deliberated in 2019 whether to deport elderly immigrant parents if their sponsoring children migrated away from New Zealand.[192]

B. (The Lack of) Judicial Justifications: Human Rights, Constitutional Law, and Administrative Law

Challenges to the extreme tightening of elderly immigration before the courts have also been scarce, and always unsuccessful. There have been three types of challenges to the measures described in Part IV above: alleged violations domestic non-discrimination law (often enshrined within the constitution); violations of international human rights law; and violations of administrative law principles, such as clarity, proportionality, and reasonability. All three of these avenues have been overwhelmingly unsuccessful.

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[189] See e.g. James Vo-Thanh-Xuan & Pranee Liamputtong, "What it Takes to be a Grandparent in a New Country: The Lived Experience and Emotional Wellbeing of Australian-Vietnamese Grandparents" (2016) 38:2 Australia J Soc Issues 209.

[190] Jupp, *supra* note 20 at 160.

[191] See e.g. Bob Birrell, "The 2019 Australian Election and the Impending Migrant Parent Deluge" (May 2019), online (pdf): *The Australian Population Research Institute* <www.apo.org.au> [perma.cc/9S52-9V9Q].

[192] See Gill Bonnett, "Cabinet Considered Deporting Parents of Departing Immigrants – Documents", *Radio New Zealand*", *Radio New Zealand* (21 November 2019), online: <https://www.rnz.co.nz/news/political/403779/cabinet-considered-deporting-parents-of-departing-immigrants-documents>.

1. Constitutional Law (and Non-Discrimination Law) on Restrictions on Elderly Immigration

"It is the core and intended function of borders to discriminate."[193] The statement may seem shocking, but in the end it is almost self-evident: immigration law exists to define criteria of selection, and the selection of "worthy" immigrants takes place solely for the benefit of the destination state.[194] Non-discrimination law, by contrast, exists to protect vulnerable and underrepresented groups—groups which often have to be protected *from* administrative measures.

The opposition between non-discrimination and immigrant selection has mostly been resolved in favour of free selection, that is, discrimination, by states. This has been achieved through two avenues: substantively, by only taking discrimination according to race, ethnicity, and religion as "serious" or "true" forms of discrimination; and procedurally, by insulating immigration decisions from constitutional and human rights challenges.

Substantively, racial, ethnicity-based, and religious discrimination have been discussed as practices to be avoided during border controls and security controls by the United States, Canada. and the European Union. However, age has been explicitly mentioned as permissible.[195] Even when discussing the permissibility of discriminatory immigration criteria, age-based discriminatory is naturalized by simply mentioning its existence and its relative benignness compared to racial discrimination, without raising the problematic nature of the age-based discrimination at all.[196] Age-based discrimination is then only discussed as suspect if it is a possible front for religious or racial discrimination.[197] Courts have argued that keeping out the sponsor's family members does not violate the right to a family, because "[the family members] remain free to live with [each oth-

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193 E Tendayi Achiume, "Digital Racial Borders" (2021) 115 AJIL Unbound 333 at 333. See also Dimitry Kochenov, *Citizenship* (Cambridge, Massachusetts: MIT Press, 2019).

194 See Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge, UK: Cambridge University Press, 2008) at 124.

195 See Liav Orgad & Theodore Ruthizer, "Race, Religion and Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case" (2010) 26:2 Const Commentary 237 at 238–39, 285–86.

196 *Ibid.* at 285–87.

197 See *ibid*. See also *Trump v Hawaii*, 585 US ___ at 13–15, 26–38 (2018).

er] anywhere in the world that both individuals are permitted to reside."[198]

Procedurally, most states have been careful to insulate their immigration regimes from constitutional challenges, making immigration decisions *de jure* unreviewable. The United States' doctrines of plenary power and consular non-reviewability are the most notorious. According to the so-called plenary power doctrine, "[t]he right to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign nation."[199] Therefore, "[t]he admission of aliens to this country is not a right, but a privilege, which is granted only upon such terms as the United States prescribes,"[200] and "[a]ny procedure authorized by Congress for the exclusion of aliens is due process, so far as an alien denied entry is concerned."[201] Furthermore, the doctrine of consular non-reviewability excludes American courts from hearing claims against consular staff acting abroad, even in violation of American law.[202] Australia has similarly made the acts of "granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa)"[203] a "final and conclusive"[204] decision. The acts "must not be challenged, appealed against, reviewed, quashed or called in question in any court ... and ... is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account."[205]

Although Canadian law does not acknowledge any sort of plenary or exceptional power over immigration, Joshua Blum has argued that the Canadian Supreme Court has nevertheless constructed an analogous doctrine.[206] The "Chiarelli doctrine" is built on *Chiarelli v Canada (Minister of Employment and Immigration)*,[207] *Medovarski v Canada (Minister of Citizenship and Immigration)*; *Esteban v Canada (Minister of Citizenship*

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198 *Kerry v Din*, 586 US 86 at 101 (2015) [*Kerry*]. See also *de Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at paras 47–48; *Senchishak*, *supra* note 146 at para 54.

199 *Fong Yue Ting v United States*, 149 US 698 at 698 (1893).

200 *United States ex rel Knauff v Shaughnessy*, 338 US 537 at 537 (1950).

201 *Ibid* at 538.

202 See Desirée C Schmitt, "The Doctrine of Consular Nonreviewability in the Travel Ban Cases: *Kerry v Din* Revisited" (2018) 33:1 Geo Immigr LJ 55 at 58–61.

203 *Aus MA*, *supra* note 73, s 474(3)(b).

204 *Ibid*, s 474(1)(a).

205 *Ibid*, s 474(1)(b)–(c).

206 See Joshua Blum, "The *Chiarelli* Doctrine: Immigration Exceptionalism and the *Canadian Charter of Rights and Freedoms*" (2021) 54:1 UBC L Rev 1.

207 [1992] 1 SCR 711, 90 DLR (4th) 289.

and Immigration),[208] and a few other judgments by the Supreme Court of Canada. Together, the cases have erased the relevance of section 7 (right to life, liberty, and security of the person), section 12 (protection from cruel and unusual treatment or punishment) *and* section 15 (equality rights) of the *Canadian Charter of Rights and Freedoms* in the immigration context.[209] "Once a connection to immigration is found, the norms of human rights are replaced by the norms of the border, and the argument for equality becomes non-justiciable."[210]

2. International Human Rights Law on Restrictions on Elderly Immigration

International human rights law has also been unsuccessful as an avenue for challenging immigration restrictions, for reasons similar to constitutional law. Some international human rights instruments explicitly exclude their applicability in an immigration or border control setting.[211] Procedurally, the usual jurisdictional problems involved in litigating breaches of international human rights arise. Domestic fora cannot apply international conventions that have not been incorporated into domestic law;[212] and international fora are usually not granted jurisdiction by the states in question.

Lack of jurisdiction is only part of the problem, as there are at least two international venues which have the power to hear human rights cases against the UK, Australia, Canada, and New Zealand. States that are members of the Council of Europe are parties to the *European Con-*

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[208] 2005 SCC 51.

[209] See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; Blum, *supra* note 205 at 13–47.

[210] Blum, *supra* note 207 at 45–46.

[211] See *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195 arts 1(2)–(3) (entered into force 4 January 1969, ratified by Canada 14 October 1970); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 2(3) (entered into force 3 January 1976, accession by Canada 19 May 1976) [*ICESCR*].

[212] See e.g. the Court of Appeal in England and Wales wrote:

> Australian law does not, however, include a right to challenge a failure to secure the enjoyment of human rights. The domestic law has not incorporated the following relevant treaties to which Australia is a party: the United Nations Convention on the Rights of the Child; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the Convention Relative to the Status of Refugees and its amending Protocol (*"B" v United Kingdom (Secretary of State for the Foreign & Commonwealth Office)*, [2004] EWCA Civ 1344 at para 90).

vention on Human Rights (*ECHR*),[213] and all the other Commonwealth states are parties to the *First Optional Protocol to the International Convention on Civil and Political Rights*, which empowers the Human Rights Committee to hear individual communications from residents of these states.[214]

Substantially, the international case law does not offer much help for elderly family members. The right to be reunited with family members across borders is not explicitly granted by the text of the human rights conventions. Although international human rights instruments protect the right to family life,[215] they also allow for derogations for a wide range of public policy reasons.[216] Finally, "the [European] Convention includes no right, as such, to establish one's family life in a particular country"[217]—and neither do other human rights conventions. The argument is, therefore, the same as in domestic constitutional judgments.[218] In practice, the only claimants who could insist on their right to a family against states' migration laws have been spouses, long-term cohabiting partners, and parents and their dependent children.[219]

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[213] See Council of Europe, CA, *European Convention on Human Rights*, Texts Adopted (1950) at 5 [*ECHR*]; See <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=ntPkDZ3f> for the list of states parties and details about their ratifications.

[214] See *Optional Protocol to the International Convention on Civil and Political Rights*, multilateral, 19 December 1966, 999 UNTS 302 arts 1–5 (entered into force 23 March 1976) UNGA Res 2200A (XXI) and "Status of Ratification Interactive Dashboard: Optional Protocol to the International Covenant on Civil and Political Rights", online: *United Nations Human Rights: Office of the High Commission*. See *Status of Ratification Interactive Dashboard* (last updated 7 October 2022), online: <https://indicators.ohchr.org/> for the list of states parties and details about their ratifications.

[215] See *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 art 16(3); *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 23(1) (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]; *ICESCR*, *supra* note 210 art 10(1).

[216] These policy reasons include "national security, public safety... the economic well-being of the country, ...the prevention of disorder or crime, for the protection of health or morals, or... the protection of the rights and freedoms of others," in the language of the *ECHR*. See *ECHR*, *supra* note 212, at art 8(2). See also *ICCPR*, *supra* note 214 art 12(3).

[217] See *Senchishak*, *supra* note 146 at para 54 (the court also cites Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, para. 68, Series A no. 94). See also *Gül v Switzerland* (1996), 1-1996 ECHR 159 (3d) at para 38, 39 YB Eur Conv HR 192; *Boultif v Switzerland*, No 54273/00, [2001] IX ECHR 119 at para 39, 33 EHRR 1179.

[218] *Cf Kerry*, *supra* note 197.

[219] See Alan Desmond, "The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?" (2018) 29:1 Eur J Intl L 261 at 265–67; Lourdes Peroni, "Challenging Culturally Dominant Conceptions in Human

By contrast, "elderly parents [are] adults who [do] not belong to the core family [if they are not] dependent members of the applicants' family."[220] The degree of dependence that the ECtHR requires echoes British law *avant la lettre*.[221] In *Senchishak v Finland*, a seventy-two-year-old Russian widow overstayed her Finnish visitor's visa and, as an undocumented migrant, moved in with her adult daughter who was a Finnish citizen.[222] Mrs. Senchishak was not only widowed and poor, but also in need of daily care, as she had suffered a stroke two years prior to her move, which left her paralyzed on her right side.[223] The Finnish authorities nevertheless ordered her deportation, and the ECtHR did not find a violation of Article 8 of the ECHR.[224] The Court reasoned:

> Even assuming that the applicant is dependent on outside help in order to cope with her daily life, this does not mean that she is necessarily dependent on her daughter who lives in Finland, or that care in Finland is the only option. As mentioned earlier, there are both private and public care institutions in Russia, and it is also possible to hire external help. ... [T]he applicant's daughter can support her financially and otherwise from Finland... *[T]he Court therefore considers that no such "additional factors of dependence other than normal ties of affection" exist between the applicant and her daughter,* and that there is thus no "family life" between them within the meaning of Article 8.[225]

It is no surprise, then, that challenging British restrictions on the immigration of elderly family members, based on their incompatibility with Article 8 of the *ECHR*, has been unsuccessful.[226] The reasoning of the UN Human Rights Committee is less detailed, but it has similarly found for the state whenever the admissibility of more distant family members, beyond the nuclear family, was brought up.[227]

Rights Law: The Cases of Property and Family" (2010) 4:2 Human Rights & Intl Leg Discourse 241 at 251–163.

220 See Slivenko, *supra* note 146 at para 97. See also *Price*, *supra* note 146.

221 *Cf supra* notes 152–56 and accompanying text.

222 See *Senchishak*, *supra* note 146 at paras 7–10, 37–41, 57.

223 See *ibid* at paras 39–40.

224 See *ibid* at paras 13–20.

225 See *ibid* at para 57 [emphasis added].

226 See *Kugathas*, *supra* note 146 at paras 19–21; *Singh*, *supra* note 146 at paras 24–27; *BRITCITS*, *supra* note 146 at paras 74–76.

227 See *AS v Canada* (1981 twelfth session), HRC Communication 068/1980 at para 5.1; *Sahid v New Zealand* (2003 seventy-seventh session), HRC Communication 893/99 at para 8.2.

3. Administrative Law Principles on the Restriction of Elderly Immigration

Where constitutional claims are unsuccessful or irrelevant, basic principles of domestic administrative law, especially in common law-countries, have sometimes come to the rescue. Landmark common law judgments have allowed courts to disregard or invalidate regulations brought by administrative bodies, including ministers and cabinets, under certain conditions. Regulations are invalid if they exceed the bounds provided by the legislation which authorized their creation;[228] if they are unintelligible or go against the meaning of the authorizing legislation;[229] if the delays in processing applications are unreasonably long;[230] if the regulations are manifestly unjust or exhibit bad faith;[231] or if the procedures they create are fundamentally unfair.[232] Lacking any other options, applicants have been forced to turn to principles of administrative law to challenge the rules that block the immigration of elderly relatives. However, these doctrines are weaker than human rights law: the principle that administrative decisions should be treated with deference is, if anything, a cornerstone of administrative law.[233] Consequently, applicants have also been unsuccessful in challenging restrictions on the immigration of elderly relatives based on administrative law principles.

The 2012 modifications to the UK Immigration Rules, which made immigration by parents and grandparents impossible except in the rarest of cases,[234] was challenged in *BRITCITS v. The Secretary of State for the Home Department*.[235] Sir Terence Etherton MR dismissed all challenges to the immigration rules by stating that the objective of the regulation, "to reduce the burden on the taxpayer for the provision of health and social

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[228] See *Padfield v Minister of Agriculture, Fisheries and Food*, [1968] AC 997 at 998, 2 WLR 924.

[229] See *Associated Provincial Picture Houses Ltd v Wednesbury Corp*, [1948] 1 KB 223 at 229–30, [1947] 2 All ER 680; *Minister for Immigration & Multicultural Affairs v Seligman*, [1999] FCA 117 at paras 54–56.

[230] See *Liang v Canada (Minister of Citizenship and Immigration),* 2012 FC 758 at paras 25, 39-44.

[231] See *Kruse v Johnson*, [1898] 2 QB 91 at 91, 99–100, [1895-9] All ER Rep 105.

[232] See *Baker* v. Canada, *supra* note 176 at paras. 18–-47; *Kioa v. West,* [1985] HCA 81 (Austl) (1985), 159 CLR 550 at 582–83, 593, 612, 632.

[233] See e.g. Michael Taggart, "From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century" (2005) 55:3 UTLJ 575 at 608–613; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012) at 17–37; *Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159 at para 35; *Baker v. Canada*, *supra* note 176, at para. 53.

[234] See *supra* notes 152–56 and accompanying text.

[235] See *supra* note 146.

care services to those [adult dependent relatives] whose needs can reasonably and adequately be met in their home country,"[236] is fair, reasonable, and has received Parliamentary approval.[237] Nor is it impossible to fulfill, because a debated number of applications (somewhere between 2 and 234) had in fact succeeded between 2012 and 2015.[238] In the judge's words, "[t]rue it is that significantly fewer dependants, including parents, will be able to satisfy the new conditions but that was always the intention."[239]

Ali Vahit Esensoy's case against the Canadian regulations that precluded him from sponsoring his 63-year-old mother went no better.[240] Mr. Esensoy's challenge followed the 2-year suspension of all processing and accepting all parental and grandparental category visas in November 2011, when the backlog faced by Immigration Canada was over 165,000 cases, and the projected waiting times exceeded six years.[241] Mr. Esensoy argued that the suspension exceeded the Minister of Immigration's delegated powers, according to which he may "give instructions ... setting the number of applications ... to be processed in any year."[242] In 2011, the Minister set the number of acceptable applications at zero and thereby suspended Canadians' statutory right to sponsor their parents and grandparents.[243] Esensoy's argument was that "in setting the number at zero, the Minister is effectively nullifying the right to sponsor, which is qualitatively different than setting the number of applications that will be processed."[244] The court disagreed, holding that the Minister "must be permitted the flexible authority to administer the system."[245] There is nothing in the regulations or the statute to preclude the Minister from accepting a minimal number of applicants each year—even one single applicant—and practically speaking, there is no real difference between zero applicants and a single one.[246] During the trial, the Parliament of Canada also accepted an amendment of the statute, affirming that "[f]or greater

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236 *Ibid* at para 58.

237 See *ibid* at paras 56, 71.

238 See *ibid* at para 62.

239 *Ibid* at para 68.

240 *Esensoy v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1343 at paras 1–3.

241 *Ibid* at para 18; Aiken et al, *supra* note 158 at 838–40.

242 *Can. IRPA*, *supra* note 73 s 87.3(3)(c).

243 *Esensoy*, *supra* note 239 at paras.13, 17. See *Can. IRPA*, *supra* note 73 s 13(1).

244 *Ibid* at para 17.

245 *Ibid* at paras 15, 17 quoting *Vaziri*, *supra* note 232.

246 *Ibid* at para 17.

certainty, an instruction given under paragraph (3)(c) may provide that the number of applications... to be processed in any year be set at zero."[247]

Courts in modern settler states are therefore united in their conclusions that the slow and gradual severing of elderly parents and grandparents from family reunification policies is acceptable and does not violate any overarching principles of law.

Conclusion

Starting in the 1970s, most immigrant-welcoming settler states reformulated their immigration laws to get rid of overt racial discrimination, while making family-based immigration more difficult. The immigration reforms have had a heretofore unnoted restrictive effect on the immigration of elderly family members. The tools being used are exceedingly familiar from immigration history: requirements on sponsorship by resident family members; restrictions on the immigration of people who are health risks for the destination country; tight quotas and long processing times. But these tools have been reconfigured in recent decades to be more restrictive, and tailored to serve a narrow-minded econocentrism that claims that immigration policy should only serve fiscal benefits. Quotas have been lowered, minimum income requirements for sponsorship have been raised, and health restrictions have been reconfigured to bar persons whose healthcare will *probably* cost more than the average national's healthcare. Additionally, a range of conditions have been created around the structure of the sponsoring family: parents who wish to migrate may not have dependent children, may not have more children in countries other than the destination state, or may not be in a partnership with anyone other than the sponsors' other parent. Strictest and bluntest of all is the UK's post-2012 policy, which bans the immigration of elderly relatives except when there is literally no other way to keep that family member alive.

What should elderly parents and grandparents in transnational families do, then, if they wish to spend time with their families? Two alternatives to the old-fashioned, long-term immigration route are the tourist route and the investor route. The tourist route allows elderly relatives to visit often, for longer periods, but does not allow them to stay, to work, or to access publicly funded healthcare or social services. It also allows for cancellation and deportation at any moment, and it must be renewed frequently. The investor route is available only to the very rich, who can literally buy entry rights to the destination country—for hundreds of thousands of dollars.

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[247] *Ibid* at paras 20–21; *Can. IRPA*, *supra* note 73 s 87.3(3.2).

Neither domestic courts nor international human rights courts have raised any qualms about these regulations. Nor have journalists, scholars or legislators raised substantial waves about them. Truly, there are much greater injustices taking place in global migration today. But the migration of elderly family members may be the canary in the coal mine: a population whose harms, risks and costs are negligible, and the arguments against them are petty and unconvincing. At the same time, there is little hope that forced migration will decrease in the coming years and decades. Indeed, the Sydney-based Institute for Economics and Peace estimated in 2020 that by 2050, as many as 1,2 billion people will be forced to escape from spiralling resource scarcity and violence erupting due to that scarcity.[248] We have seen that refugees are being denied legal protections, and are being hindered physically, already in almost every way possible.[249] If the disallowance of elderly relatives, who pose no security risks and benefit from the sponsorship of loving families in the destination country, can take place with so little opposition, what hope is there for the forced migrants of tomorrow?

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[248] Institute for Economics and Peace, *Ecological Threat Register 2020: Understanding Ecological Threats, Resilience and Peace* (Sydney, Sept. 2020), at 8-9.

[249] See *supra* notes 5-7.