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Financial Abuse of the Elderly: Is the Solution a Problem?

Carolyn L. Dessin, *University of Akron School of Law*

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* Associate Professor of Law, The University of Akron School of Law. J.D., Villanova University School of Law; M.M., Westminster Choir College; B.M. Ed., Temple University. The author would like to thank The University of Akron School of Law for its generous funding of the research for this article. She also thanks Professors Elizabeth Brandt, Alan Newman, and J. Willard O'Brien for their thoughtful comments. Further, she acknowledges the research assistance of Wade Wilcox and Matt Hudson.

I. INTRODUCTION

As a population, we are aging rapidly. With this phenomenon has come an increasing interest in the problems of older Americans. Early studies of elder abuse in the 1970s began a dialogue that continues with increasing vitality. This dialogue has prompted states to attempt to prevent, remedy, and punish elder abuse in a variety of ways.

Although all of the early studies and most of the current studies focus on physical and psychological abuse of the elderly, there is a growing appreciation that financial abuse is a serious problem. Accordingly, many states have attempted to remedy financial abuse, often called "exploitation," as part of a statutory framework designed to improve the living conditions of older citizens.

This article will discuss the often vague definition of financial abuse with a goal of suggesting a more workable definition of the problem. It will then examine the various statutes directed at financial abuse of the elderly and the case law interpreting those statutes. Finally, it will examine the weaknesses of many states' approaches and suggest a model for addressing abuse that is both effective and free of ageist stereotyping.

II. DEFINING FINANCIAL ABUSE

A. A Basic Definition Defines Financial Abuse as Misuse or Misappropriation of a Person's Assets

Before one can meaningfully consider the approaches of the various states in dealing with financial abuse, one must develop some reasonably certain definition of what financial abuse is. The most basic definition of financial abuse focuses on the misuse of another person's assets. The difficulty, of course, lies in giving meaning to the vague concept of "misuse."

The heart of virtually all claims of exploitation involves a transfer of assets from one person to another. Thus, it is necessary to examine various forms of activity that might be characterized as "transfers" to determine whether any particular type of transfer activity can be characterized as inherently abusive.

A transfer may involve the outright transfer of ownership of an asset from one person to another. If property is simply taken from a person without his consent, it would seem abusive. It would also most likely be treated as a form of theft under any jurisdiction's criminal code. The traditional theft offenses focus on this type of direct transfer of assets away from a victim.

A transfer should, however, be understood to include transactions that are accomplished in more subtle and indirect ways. For example, transferring title to an asset from one person's name into some form of joint ownership accomplishes a type of transfer. Determining exactly what interest was transferred would depend on the type of joint ownership that resulted.[1] Similarly, convincing a person to name an individual as a beneficiary under a trust or will sets the stage for a transfer. Thus, the range of activity that could qualify as financial abuse is significantly broader than the activity we typically think of as "theft."

To further complicate the issue, there are at least four different types of conduct that might be considered abusive.[2] First, and most obviously, the outright misappropriation or use of funds without consent could be exploitation. Second, the intentional misuse of funds by one in a fiduciary relationship with the victim could be viewed as exploitation. Third, "hard sell" or fraudulent tactics could be

1. *See generally* RALPH E. BOYER ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY § 6.5 (4th ed. 1991).

2. *See* Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 206 (2000).

treated as exploitation.[3] Fourth, negligent mishandling of funds could be viewed as financial abuse.

Thus, states were faced with a difficult problem when attempting to formulate a workable definition of exploitation. On the one hand, the definition had to be precise enough to pass constitutional muster.[4] On the other hand, the definition had to be broad enough to reach the entire range of exploitative conduct in which the unscrupulous person might engage.

B. Existing Legislation Defines "Financial Abuse" or "Exploitation" in a Number of Ways

It is virtually impossible to generalize a definition of "exploitation" from the various states' definitions of the term, although there are some common themes in many of the definitions. Thus, in defining abuse, states have considered the act itself, the benefit to another, the lack of consent, the object of the exploitive act, and the relationship of the abuser to the victim.

1. Conduct Constituting the Abusive Act

The first definitional issue is to determine what conduct will constitute the abusive act. States have struggled to define the act upon a person's assets or the person himself that will constitute exploitation.

In attempting to define exploitation, states have used a number of terms to describe the conduct that is abusive. Legislatures have taken two basic approaches. First, some have used neutral words like "use" or "expenditure" in describing the forbidden conduct, and then added another concept like "for another's profit" or "without consent" to complete the definition of abuse. Second, some legislatures have used negative words like "misuse" or "illegal use" to define the covered conduct, leaving courts to flesh out what "misuse" means. Either method of definition is workable, as long as the formulation is not unconstitutionally vague.[5]

In the states that use neutral words to specify the act modified by a negative word or other concept that makes the neutral conduct improper, the words used delineate a wide range of conduct. The neutral words have included

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3. This article will focus on the type of exploitation that is based on transfer and use of assets rather than on consumer fraud. Nevertheless, the arguments offered with respect to avoiding ageist stereotyping would apply with equal force to consumer protection statutes.

4. *See* Cuda v. State, 639 So. 2d 22, 25 (Fla. 1994) (holding that section 415.111(5) of Florida Statutes (1991) is unconstitutionally vague); *see also* FLA. STAT. ANN. § 415.111(5) (West 1991) (providing: "A person who knowingly or willfully exploits an aged person or disabled adult by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person or disabled adult for profit, commits a felony of the third degree. . . .").

5. Cuda v. State, 639 So. 2d 22, 25 (Fla. 1994).

"expenditure,"[6] "diminution,"[7] "use,"[8] "appropriation,"[9] and "management."[10] The negative words to modify the acts include "unjust,"[11] "improper,"[12] "illegal,"[13] and "unlawful."[14] The other concepts used include lack of consent[15] or benefit to another.[16]

The negative words used by legislatures have shown a similar variety in attempting to delineate abusive acts. These negative words have included "misuse,"[17] "misappropriation,"[18] "taking advantage of,"[19] and "abuse."[20]

Most of these approaches to definition are similar in that the statutes using the terms do not define them. This vagueness may be calculated. Perhaps it is sensible to leave the definition of the abusive act flexible so that courts can use it to remedy the wide variety of abusive conduct practiced by the unscrupulous. On the other hand, it is possible that such vagueness may lead to less effective use of the statutes. If a law enforcement officer does not understand the meaning of a statute, he cannot enforce it. If a prosecutor is concerned that the conduct

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6. *E.g.*, ALA. CODE § 39-9-2(7) (2000); LA. REV. STAT. ANN. § 14:93.4 (West 2000); W. VA. CODE § 9-6-1(3) (2000).

7. *E.g.*, ALA. CODE § 39-9-2(7); LA. REV. STAT. ANN. § 14:93.4.

8. ALA. CODE § 39-9-2(7); ARIZ. REV. STAT. ANN. § 46-451(A)(4) (West 1997); DEL. CODE ANN. tit. 31, § 3902(5) (1999); D.C. CODE ANN. § 6-2501(8) (1999); GA. CODE ANN. § 30-5-3(9) (2000); IND. CODE ANN. § 35-46-1-12 (West 2000); MISS. CODE ANN. § 3-47-5(i) (2000); N.H. REV. STAT. ANN. § 161-F:43(V) (1999); VA. CODE ANN. § 63.1-55.2 (Michie 2000).

9. *See, e.g.*, D.C. CODE ANN. § 6-2501(8) (1999); FLA. STAT. ANN. § 415.102(7)(a) (West 2000).

10. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1802 (West 2000); ARK. CODE ANN. § 5-28-101(5) (Michie 1999); LA. REV. STAT. ANN. § 14:403.2(B)(6) (West 2000).

11. *See, e.g.*, ALASKA STAT. § 47.24.900(7) (Michie 1999); N.M. STAT. ANN. § 27-7-16(i) (Michie 2000); OKLA. STAT. ANN. tit. 43A, § 10-103(A)(9) (West 2000).

12. *See, e.g.*, ALASKA STAT. § 47.24.900(7); ARIZ. REV. STAT. ANN. § 46-451(A)(4) (West 2000); COLO. REV. STAT. ANN. § 26-3.1-101(4)(c) (West 2000); DEL. CODE ANN. tit. 31, § 3902(5) (1999); GA. CODE ANN. § 30-5-3(9) (2000).

13. *See, e.g.*, ARIZ. REV. STAT. ANN. § 46-451(A)(4) (West 2000); ARK. CODE ANN. § 5-28-101(5); COLO. REV. STAT. ANN. § 26-3.1-101(4)(c); DEL CODE ANN. tit. 31, § 3902(5); GA. CODE ANN. § 30-5-3(9).

14. *See, e.g.*, D.C. CODE ANN. § 6-2501(8); NEB. REV. STAT. § 28-358 (1999); N.D. CENT. CODE § 50-25.2-01(7) (1999).

15. *See, e.g.*, ALA. CODE § 39-9-2(7) (2000); IOWA CODE ANN. § 235B.2.5.a.(1)(c) (West 2000). *See infra* note 29 and accompanying text.

16. *See, e.g.*, ALASKA STAT. § 47.24.900(7); ARK. CODE ANN. § 5-28-101(5); COLO. REV. STAT. ANN. § 26-3.1-101(4)(c); DEL. CODE ANN. tit. 31, § 3902(5); D.C. CODE ANN. § 6-2501(8); GA. CODE ANN. § 30-5-3(9); IDAHO CODE § 39-5301A (Michie 2000); IND. CODE ANN. § 35-46-1-12 (West 2000); IOWA CODE ANN. § 235B.2.5.a.(1)(c); KAN. STAT. ANN. § 39-1430(d) (1999); KY. REV. STAT. ANN. § 209.020(8) (Michie 2000). *See infra* notes 27-28 and accompanying text.

17. *See, e.g.*, IDAHO CODE § 39-5302(7) (Michie 2000); MD. CODE ANN., FAM. LAW § 14-101(f) (2000); MICH. COMP. LAWS ANN. § 400.11(c) (West 2000); N.D. CENT. CODE § 50-25.2-01(7); WIS. STAT. ANN. § 46.90(1)(e) (West 2000).

18. *See, e.g.*, KAN. STAT. ANN. § 39-1430(d); WIS. STAT. ANN. § 55.01(4p) (West 2000).

19. *See, e.g.*, CONN. GEN. STAT. ANN. § 17b-450(4) (West 2000); IOWA CODE ANN. § 235B.2.5.a.(1)(c); KAN. STAT. ANN. § 39-1430(d); R.I. GEN. LAWS § 42-66-4.1(3) (1999).

20. *See, e.g.*, DEL CODE ANN. tit. 31, § 3902(5).

complained of might not fit the statutory definition, he might choose not to pursue the case.

Not all states have chosen to paint their definitions of exploitation with a broad brush. For example, Florida's definition of exploitation is much more detailed.[21] It states:

> "Exploitation" means a person who:
>
> 1. Stands in a position of trust and confidence with a vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or
>
> 2. Knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult. [22]
>
> "Exploitation" may include, but is not limited to:
>
> 1. Breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property;
>
> 2. Unauthorized taking of personal assets;
>
> 3. Misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or
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> 4. Intentional or negligent failure to effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance.[23]

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21. This level of detail was probably adopted because the Florida Supreme Court had declared an earlier definition of exploitation as "improper or illegal" conduct unconstitutionally vague. *See* Cuda v. State, 639 So. 2d 22, 25 (Fla. 1994).

22. FLA. STAT. ANN. § 415.102(7)(a) (West 2000).

23. *Id.* § 415.102(7)(b).

Florida's definition thus attempts to be both detailed and flexible. It is one of only a few states that clearly includes the idea of negligent failure to use assets for the victim's maintenance as exploitation.[24]

California also has an interesting definition of financial abuse. Under section 15610.30 of the California Welfare & Institutions Code,

> (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
>
> (1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.
>
> (2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.
>
> (b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.
>
> (1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative.
>
> (2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity's authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1).

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24. *Id*. Hawaii's definition of exploitation is almost identical to subsection (b) of the Florida statute. HAW. REV. STAT. § 346-222(7) (1999). The statute reads in pertinent part that abuse occurs when

> [t]here is financial and economic exploitation. For the purpose of this part, 'financial and economic exploitation' means the wrongful or negligent taking, withholding, misappropriation, or use of a dependent adult's money, real property, or personal property. 'Financial and economic exploitation' can include but is not limited to:
>
> (A) Breaches of fiduciary relationships such as the misuse of a power of attorney or the abuse of guardianship privileges, resulting in the unauthorized appropriation, sale, or transfer of property;
>
> (B) The unauthorized taking of personal assets;
>
> (C) The misappropriation, misuse, or transfer of moneys belonging to the dependent adult from a personal or joint account; or
>
> (D) The intentional or negligent failure to effectively use a dependent adult's income and assets for the necessities required for the person's support and maintenance.
>
> The exploitations may involve coercion, manipulation, threats, intimidation, misrepresentation, or exertion of undue influence.

(c) For purposes of this section, "representative" means a person or entity that is either of the following:

(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.

(2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.[25]

Subsection (a)(1) of the California statute is a fairly typical definition of exploitation. Subsection (b) is, however, unique. It focuses on property that belongs to the victim but may be in the hands of a third party as defined in the statute.[26]

In sum, then, the states have developed a myriad of definitions of the act that is to be viewed as abusive. This most likely represents an attempt to address the wide range of conduct that may constitute exploitation.

2. Benefit to Another

Many states include an idea of benefit to a person other than the owner of the asset in their definitions of exploitation.[27] One common formulation speaks in terms of benefit either to the abuser or to a third party.[28]

3. Lack of Consent

A few states have included the lack of consent in their definitions of exploitation. Thus, in addition to focusing on whether an act is itself abusive, some states focus on the lack of consent of the transferor. These states tend to define exploitation as any transfer of assets away from the transferor or use of assets without the transferor's consent.[29]

4. Object of Exploitation

In defining exploitation, a state must consider the exploiter's object. The most obvious object of exploitation is to obtain the assets of the victim.

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25. CAL. WELF. & INST. CODE § 15610.30 (West 2001).

26. *Id*.

27. *See, e.g.*, ALASKA STAT. § 47.24.900(7) (Michie 1999); ARIZ. REV. STAT. ANN. § 46-451(A)(4) (West 2000); COLO. REV. STAT. ANN. § 26-3.1-101(4)(c) (West 2000); DEL. CODE ANN. tit. 31, § 3902(5) (1999); GA. CODE ANN. § 30-5-3(9) (2000).

28. *See, e.g.*, ARK. CODE ANN. § 5-28-101(5) (Michie 1999); D.C. CODE ANN. § 6-2501(8) (1999); IND. CODE ANN. § 35-46-1-12 (West 2000).

29. *See, e.g.*, ALA. CODE § 39-9-2(7) (2000); IOWA CODE ANN. § 235B.2.5.a.(1)(c) (West 2000); LA. REV. STAT. ANN. § 14:93.4 (West 2000); TEX. HUM. RES. CODE ANN. § 48.002(a)(3) (Vernon 2000).

Accordingly, many states' definitions treat this as the only object of exploitation.[30] Some states, however, add the idea of improper use of the victim himself in the definition of exploitation.[31]

5. Relationship of Abuser to Victim

A few states narrow the definition of exploitation by specifying that only those who stand in certain relationships with the victim will be guilty of exploitation. For example, some states focus on abuse by a caretaker.[32] Others focus on a person who stands in a position of trust with the victim.[33]

C. Difficulties in Defining Abuse

1. The Focus on the Victim's Asset Retention

Perhaps the greatest difficulty in defining financial abuse is the tendency to focus only on the idea that a person should keep all of his own assets for his own benefit. Put another way, many state legislatures seem to begin with the premise that almost any use of a person's assets for another person's benefit is exploitation.[34]

There are, of course, many reasons why an individual might use his funds to benefit another. The most basic reasons are real or perceived obligation and donative intent.

With respect to obligation, a person may have a duty to support another, as is the case in the relationship of a parent and minor child. On the other hand, even in the absence of a legal obligation, one may feel a moral obligation to support another, as in the instance of a parent and an adult child or of one sibling and another.

With respect to donative intent, it is clear that all gifts involve a use of assets for the benefit of one other than the donor. People give gifts for a variety of reasons ranging from pure donative intent to a desire for a quid pro quo in similar gifts or other return. Many people decide to give away "excess" assets as they

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30. *See, e.g.*, ALA. CODE § 39-9-2(7); NEB. REV. STAT. § 28-358 (1999); D.C. CODE ANN. § 6-2501(8); IDAHO CODE § 39-5302(7) (2000); 720 ILL. COMP. STAT. 5/16-1.3 (2000); LA. REV. STAT. ANN. § 14:403.2(B)(6) (West 2000).

31. *See, e.g.*, ARIZ. REV. STAT. ANN. § 46-451(A)(4); COLO. REV. STAT. ANN. § 26-3.1-101(4)(c); DEL. CODE ANN. tit. 31, § 3902(5); GA. CODE ANN. § 30-5-3(9); IND. CODE ANN. § 35-46-1-12 (West 2000); IOWA CODE ANN. § 235B.2.5.a.(1)(c) (West 2000); KAN. STAT. ANN. § 39-1430(d) (1999); KY. REV. STAT. ANN. § 209.020(8) (Michie 2000).

32. *See, e.g.*, CONN. GEN. STAT. ANN. § 17b-450(4) (West 2000); KY. REV. STAT. ANN. § 209.020(8).

33. *See, e.g.*, 720 ILL. COMP. STAT. 5/16-1.3; MONT. CODE ANN. § 52-3-803(3) (2000).

34. *See, e.g.*, D.C. CODE ANN. § 7-1901 (2001) ("'Exploitation' means the unlawful appropriation or use of another's 'property,'" defined in [section] 22-3801, for one's own benefit or that of a 3rd person."); IDAHO CODE § 39-5302(7) (Michie 2000) ("Exploitation" is defined as "an action which may include, but is not limited to, the misuse of a vulnerable adult's funds, property, or resources by another person for profit or advantage.").

age. There is often a donative pattern of making a rough calculation of how much wealth one will need for support through old age and a disposal of other assets to the natural objects of one's bounty. Indeed, for the wealthy, the current structure of the federal transfer taxes makes this arrangement desirable.[35] Under the federal transfer tax system that existed before the repeal of the Estate Tax in 2001, there was often less tax imposed on an estate whose owner had made lifetime gifts than on an estate whose owner waited to transfer all assets at death.[36]

The focus on maintaining the assets of a person for the owner's benefit alone perhaps reflects a judgment that obligation and donative intent are to be valued less than asset maintenance. It may be an acknowledgment that many decisions are made out of self-interest and that preservation of one's own assets for one's own support is a common instinct.

Also, the focus on asset maintenance may reflect a legislative decision that a vulnerable person, however that term is defined, *should* value asset maintenance more than obligation and donative intent. In other words, the focus of so many legislatures on use of assets "for the benefit of another" may be an expression of a protective desire for the vulnerable citizen.

The idea that any use of assets for the benefit of another is abusive certainly has the attraction of simplicity. This sort of inquiry will almost always result in a clear answer to the question of whether a particular act is exploitative. If the transfer of funds can be tied to the needs of the owner of the funds, then there is no exploitation. But, if the transfer's purpose cannot be justified as benefiting the owner of the funds, then there is exploitation.

This simplicity, while enticing, does not adequately respect an individual property owner's autonomy of decisionmaking nor, I suggest, the average person's wishes with respect to asset management. We do not always act out of pure self-interest with respect to our assets. Indeed, especially in the family setting, many people put the needs of others before their own needs.

Interestingly, courts have allowed guardians to make gifts on behalf of incompetent wards when the gift would result in a tax savings to the ward's estate.[37] Courts have also allowed guardians to make such gifts to allow the ward to qualify for certain benefits that are need-based.[38] This shows at least some willingness to focus on concerns other than pure asset preservation.

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35. HOWARD M. ZARITSKY, TAX PLANNING FOR FAMILY WEALTH TRANSFERS ¶ 2.02[2][c] (3d ed. 1997).

36. *Id*. Once the repeal of the Estate Tax is complete, however, this result will change. *See* Byrle M. Abbin, *Planning Techniques for Large Estates, American Law Institute—American Bar Association Continuing Legal Education*, ALI-ABA Course of Study (Apr. 22-26, 2002). As the repeal stands now, the repeal will be complete only in 2010. Whether the Estate Tax will be reborn in 2011 remains to be seen.

37. *In re* duPont, 194 A.2d 309 (Del. Ch. 1963) (allowing gifts from ward's estate for tax reduction); *In re* Florence, 530 N.Y.S.2d 981 (1988) (allowing tax planned gifts from conservatee's estate).

38. *See, e.g.*, *In re* Shah, 95 N.Y.2d 148, 711 N.Y.S.2d 824 (2000) (allowing spouse who was guardian to transfer husband's assets to her to qualify husband for Medicaid).

This same sort of inquiry should be applied in determining whether transfers are abusive. The fact that a transfer benefits someone other than the asset owner should not solely be the deciding factor in determining whether a transfer constitutes exploitation.

2. The Difficulty in Identifying Abusive Acts

As the preceding examination of the states' various ways of defining "exploitation" illustrates, the character of an abusive transfer appears to elude precise definition. When faced with definitions that are based on words like "misuse," one might conclude that exploitation is like obscenity—legislatures count on courts to "know it when [they] see it."[39]

A further difficulty arises in attempting to determine how broad the definition of "exploitation" is under existing statutes. Perhaps in attempting to define exploitation as broadly as possible, legislatures have not defined the word with enough specificity to satisfy the mandates of the Constitution. A recent case in Florida gives one clear example of this difficulty.

Ten years ago, the Florida statutes criminalized financial exploitation of an aged person. The relevant statute stated: "A person who knowingly or willfully exploits an aged person or disabled adult by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person or disabled adult for profit, commits a felony of the third degree."[40] In *Cuda v. State*,[41] a defendant had been charged with exploitation, and moved to dismiss the case on the ground that the statute under which he was charged was unconstitutionally vague. The trial court dismissed, finding that the phrase "improper or illegal" was unconstitutionally vague.[42] The State appealed the dismissal, and the intermediate appellate court reversed and remanded the case for trial.[43] Although the intermediate appellate court held that "[t]he use of ["improper"] in the statute does not provide a sufficiently definite warning of the proscribed conduct," it concluded that the word "illegal" in the statute was sufficient to put the defendants on notice as to the proscribed conduct.[44] It further held that the word "improper" was severable from the statute, leaving a description of the offense that was not unconstitutionally vague.[45] The defendant appealed to the Florida Supreme Court, again contending that the statute was

39. Justice Stewart suggested that obscenity could only be described in terms of: "I know it when I see it." *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

40. FLA. STAT. ANN. § 415.111(5) (West 1991) (repealed 1995).

41. 639 So. 2d 22 (Fla. 1994).

42. *Id*.

43. State v. Cuda, 622 So. 2d 502 (Fla. Ct. App. 1993), *rev'd*, 639 So. 2d 22 (Fla. 1994).

44. *Id*. at 504.

45. *Id*. at 505 (citing Cramp v. Board of Public Instruction, 137 So. 2d 828, 830 (Fla.1962)).

unconstitutionally vague.[46] The Florida Supreme Court agreed and held that the phrase "improper or illegal use" was unconstitutionally vague.[47] Because the court did not find "illegal" any less vague than "improper," it did not address the severability issue. Florida has since amended its statute so that the definition is one of the most explicit and detailed in the nation.[48]

States attempting to address exploitation are clearly faced with difficulties. The analysis may begin with the general notion that we know exploitation when we see it, but that alone is not sufficient. States must develop definitions that are broad enough to encompass a wide range of behavior, yet narrow enough to give constitutionally acceptable notice of the proscribed conduct.

D. A Suggested Definition

A workable definition of exploitation is a misuse of a person's assets or the person himself without consent. The concept of "misuse" is broad enough to encompass the various types of bad conduct that are abusive and flexible enough to be given shape in each individual circumstance. If there is a concern that the word "misuse" is too vague,[49] then it could certainly be amplified by examples of various types of inappropriate behavior.

I have purposely left the idea of "benefit to another" out of this suggested definition, because it adds little to attempts to define financial abuse. Although many states have adopted some form of the idea in their definitions of exploitation, it is problematic.[50] If the focus of the statutes is to deter financial abuse of the victim, then the focus should be on the victim, not on whether the potentially abusive conduct benefited another. This would also likely result in the intentional wasting of a victim's assets falling within the definition of exploitation, and that result is appropriate.

Including "lack of consent" in the definition gives appropriate deference to personal decisionmaking autonomy by recognizing that a transfer to which the transferor consents is not abusive.[51] This implies, of course, that the transferor is

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46. *Cuda*, 639 So. 2d at 23.

47. *Id*. at 25. *But see* State v. Sailer, 684 A.2d 1247, 1249-50 (Del. Super. Ct. 1995) (holding "illegal or improper use or abuse" in the definition of exploitation as not unconstitutionally vague).

48. FLA. STAT. ANN. § 415.102(7)(a) (West 2000); *see also* Laws 1995, c. 95-140, § 4 (deleting subsection (5) and redesignating subsequent subsections).

49. *See Cuda*, 639 So. 2d at 22 (holding "improper or illegal use or abuse" in definition of exploitation unconstitutionally vague). *But see Sailor*, 684 A.2d at 1249-50 (holding "illegal or improper use or abuse" in definition of exploitation not unconstitutionally vague).

50. *See* discussion *infra* Part II.B.2.

51. North Dakota has recognized the importance of personal autonomy in its definition of criminal exploitation. That definition states in pertinent part:

> This section does not impose criminal liability on a person who has:
>
> a. Managed the disabled adult's or vulnerable elderly adult's funds, assets, or property in a manner that clearly gives primacy to the needs and welfare of that person or is consistent with any explicit written authorization; or

capable of giving consent to the transfer. In the case of a competent transferor, this should be a fairly straightforward inquiry.

The law of donative transfers has developed the rule of undue influence to undo a transfer that was not the product of the transferor's free will. The burden is typically on the person who wishes to challenge a transfer to prove that it was the result of undue influence. This doctrine could be imported to the area of exploitation as well.

The task of applying the definition of financial abuse becomes significantly more complicated when the owner of the transferred assets is not competent to consent to the transfer. At that point, some states' protective structures reflect an attitude that the incompetent's assets must be held for the benefit of the incompetent alone. Such an attitude takes no cognizance of the fact that the incompetent person might have wanted to transfer assets to others, but was prevented from doing so by incompetence. Therefore, there should be some flexibility in the concept of consent to allow for the fact that even a transfer away from an incompetent person might not be exploitation.

I recognize that this might seem like the summit of a very slippery slope. It seems, however, that to create a definition of exploitation so constrictive that it would prevent a person from supporting his children is not an appropriate balance of the desire to protect the vulnerable while respecting their autonomy to the greatest extent possible.

Finally, the word "misuse" is not the only one that could be used to adequately define exploitation. Many of the other words chosen by various states possess the dual attributes of flexibility and definiteness.

There is, however, an inherent difficulty in using the word "illegal" in a statute that defines an offense of exploitation.[52] It is circular to define illegal conduct as involving an illegal act. Put another way, an act cannot be illegal unless it is prohibited by statute, so the term "illegal" should not be part of the prohibited conduct's definition. It is possible that the legislatures that used this term in defining exploitation were trying to tie the definition of exploitation to their state's criminal statutes, but if that is the case, then the connection should be made explicit.[53]

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b. Made a good faith effort to assist in the management of the disabled adult's or vulnerable elderly adult's funds, assets, or property.

N.D. CENT. CODE § 12.1-31-07.1(4) (1999).

52. *See, e.g.*, ARK. CODE ANN. § 5-28-101(5) (Michie 1999).

53. *See Cuda*, 639 So. 2d at 22 (holding "improper or illegal use or abuse" in definition of exploitation unconstitutionally vague).

III. LEGISLATION RELATED TO FINANCIAL ABUSE OF THE ELDERLY

A. The Background for Legislative Action

An awareness that elder abuse might be a problem in the United States developed fairly recently, well after child abuse had been identified as a significant problem.[54] In the late 1970s, a number of studies considering the abuse of the elderly appeared.[55] In 1981 and 1990, several important Congressional reports were published that identified elder abuse as a pervasive and insidious problem.[56] In 1998, the National Center on Elder Abuse was established, with a mission of doing what it could to alleviate the problem.[57] In 1996, the National Elder Abuse Incidence Study was conducted pursuant to a Congressional Mandate.[58] The study found a significant number of instances of abuse, including exploitation.[59]

Coupled with the studies and reports of abuse, researchers began to develop demographic predictions of the "graying" of America. There are now approximately thirty-five million Americans who are age sixty-five or older, and statisticians predict that that number will rise to forty million by 2010.[60] Similarly, it is predicted that those over age sixty-five will outnumber teenagers by two-to-one by 2025.[61] As the awareness of the aging of American society increased, calls for addressing the potential problems of older citizens increased as well.

Although there have been few comprehensive attempts to study the incidence of elder abuse, the few studies that do exist show an alarming number of instances of abuse. For example, a federal study estimated that 1.5 million adults

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54. *See* Audrey S. Garfield, Note, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 861, 863-64 (1990).

55. *See, e.g.*, THE BATTERED ELDER SYNDROME: AN EXPLORATORY STUDY (M. Block & J. Sinnott eds., 1979); LEGAL RESEARCH AND SERVICES FOR THE ELDERLY, ELDER ABUSE IN MASSACHUSETTS: A SURVEY OF PROFESSIONALS AND PARAPROFESSIONALS (1979) (prepared by H. O'Malley, H. Segars, R. Perez, V. Mitchell & G. Kneupfel).

56. *See* HOUSE SUBCOMM. ON HEALTH & LONG-TERM CARE, 101ST CONG., ELDER ABUSE: A DECADE OF SHAME AND INACTION, (Comm. Print 1990) [hereinafter 1990 HOUSE REPORT]. The 1990 House Report was the follow-up to a 1981 report: HOUSE SELECT COMM. ON AGING, 97TH CONG., ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM (Comm. Print 1981) [hereinafter 1981 HOUSE REPORT].

57. *See HHS: HHS Announces New National Center on Elder Abuse*, M2 Presswire, Oct. 9, 1998, *available at* 1998 WL 16527054.

58. U.S. Dep't of Health and Human Servs., Administration on Aging, *Introduction*, *at* http://www.aoa.dhhs.gov/abuse/report/D-intro.html (last visited Mar. 21, 2003).

59. *Id*.

60. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 16, 37 tbl. 18 (110th ed. 1990) (containing projections of the total population by age, sex, and race: 1989 to 2010).

61. KEN DYCHTWALD & JOE FLOWER, AGE WAVE: THE CHALLENGES AND OPPORTUNITIES OF AN AGING AMERICA (1989).

are abused each year.[62] Studies also suggest that elder abuse is on the rise.[63] Abuse is often classified as physical, psychological or financial.[64] Although the studies showed that the number of instances of financial abuse was small in comparison to the physical and emotional abuse,[65] the actual number of financial abuse cases was large enough to cause concern.[66] Therefore, there was a common sentiment among state legislators and others that increased efforts were needed to address the problem.[67]

Once the states decided that financial abuse of the elderly might be a significant problem, they began to develop frameworks to prevent, address, remedy, and punish it. Although the causes of elder abuse are widely varied and difficult to identify,[68] states developed relatively similar general plans for addressing the issue. There is also, however, significant variation in such legislation.

B. Various Statutes Addressing Financial Abuse

Against the backdrop of an increasing concern with elder abuse, states began to give increased protection to their older and/or vulnerable citizens against financial abuse. This protection took a number of forms.[69] While some states

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62. *See* 1990 HOUSE REPORT, *supra* note 56.

63. CALIFORNIA ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 2199, at 7 (June 23, 1998) (noting a 116-percent rise in reports of incidents of abuse and neglect from 1984-1993); *Examining Legislation Authorizing Funds for Programs of the Older Americans Act, Focusing on Elder Abuse Prevention Provisions, the Preventing Elder Financial Exploitation Project, Medicaid Fraud Control Units, and the Long Term Care Ombudsman Program: Hearing Before the Senate Subcomm. on Aging*, 106th Cong. 25 (1999) (statement of Stephen J. Schneider, Oregon Department of Justice Liaison, Senior and Disabled Services Division, Oregon Department of Human Resources, Salem, Oregon) (reporting that elder exploitation reports tripled from 1993 to 1997).

64. *See, e.g.*, Elizabeth E. Lau & Jordan I. Kosberg, *Abuse of the Elderly by Informal Care Providers*, *in* AGING 299-301 (1979); *see also* Suzanne K. Steinmetz, *Elder Abuse: Myth or Reality*?, *in* FAMILY RELATIONSHIPS IN LATER LIFE (Timothy H. Brubaker ed., 1990).

65. TOSHIO TATARA & LISA BLUMERMAN, NAT'L CENTER ON ELDER ABUSE, SUMMARIES OF THE STATISTICAL DATA ON ELDER ABUSE IN DOMESTIC SETTINGS: AN EXPLORATORY STUDY OF STATE STATISTICS FOR FY 93 AND FY 94 (1996) (noting that twelve percent of substantiated abuse reports for 1993 and 1994 were reports of financial abuse).

66. *See, e.g.*, Hannie C. Comijs et al., *Elder Abuse in the Community: Prevalence and Consequences*, 46 J. AM. GERIATRICS SOC'Y 885 (1998) (noting that 1.4 percent of the study sample had experienced financial abuse).

67. *See, e.g.*, *Panel Details Ideas for Safety Reforms: Report Outlines Ways to Protect Older Residents*, HARRISBURG PATRIOT, July 27, 2000, at B6 (discussing Pennsylvania's task force). *But see* Opinion, *To Long-Term Care List, Add Issue of Elder Abuse*, PALM BEACH POST, Sept. 14, 2000, at 12A (discussing Florida's task force on the elderly and noting that abuse should be added to the list of issues to be considered by the task force).

68. *See generally* Seymour Moskowitz & Michael J. DeBoer, *When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect*, 49 DEPAUL L. REV. 1, 29-32 (1999).

69. For a state-by-state compilation of statutes addressing financial abuse, see Carolyn L. Dessin, *Financial Exploitation Statutes' Impact on Domestic Relations Practice*, 16 J. AM. ACAD. MATRIMONIAL LAW. 379 (2000).

appear to have concentrated on one form of protection, others enacted several overlapping forms of protection. It is useful to consider each form separately in evaluating its efficacy.

1. Guardianships and Protective Services

Every state has enacted statutes that provide protective services to its citizens. These statutes are based on the idea that each person has a right to a life in which his basic needs will be met and to freedom from the overreaching of those with bad motivations. Of course, even the least searching examination of this ideal reveals it as an unattainable goal. States have neither the resources nor the ability to protect every citizen who needs protection. Adult protective services are viewed, therefore, as a last-ditch protection for the "really bad" cases of seriously impaired adults having no family or friends willing to care for them.

Adult protective services statutes are remarkably similar in structure from state to state. Although the formulations describing protected persons vary semantically, the basic idea is the same: protect those who are unable to protect themselves. With respect to protecting the financial interests of incompetent persons, each state allows for the creation of guardianships. The enabling power for the creation of guardianships lies in the parens patriae power of the state.[70]

A guardianship is a court-imposed mechanism for protecting the interests of an incompetent person.[71] When the court decides that a person meets the state's definition of "incompetent," the court appoints a guardian, also sometimes called a conservator or committee,[72] to ensure the well-being of the incompetent person, the ward.[73] The guardian owes a fiduciary duty to the ward.[74] Under guardianship statutes, the guardian is given the power to manage the ward's assets, but the guardian does not actually take title to those assets as a trustee does.[75] At least in theory, the court directly oversees the acts of the guardian.[76]

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70. *See* MARSHALL B. KAPP, KEY WORDS IN ETHICS, LAW, AND AGING: A GUIDE TO CONTEMPORARY USAGE 51-52 (1995). "The *Parens Patriae* power is the inherent authority of a state to take action to protect persons who cannot or will not protect themselves from harm." *Id*. at 51.

71. *See* BLACK'S LAW DICTIONARY 712 (7th ed. 1999) (defining "guardian" as "[o]ne who has the legal authority and duty to care for another's person or property, esp. because of the other's infancy, incapacity, or disability.").

72. *See* RESTATEMENT (SECOND) OF TRUSTS § 7 cmt. c (1959).

73. *See* Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867 (2002); *see also* AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 7 (4th ed. 1987).

74. *See, e.g.*, Glanville v. McDonnell Douglas Corp., No. 87-1980, 1988 WL 40547, at *6 (9th Cir. 1988) (stating that fiduciary duties extend to guardian and ward relationships); Taylor v. Calvert, 37 N.E. 531 (Ind. 1894); Flynn v. Colbert, 146 N.E. 784 (Mass. 1925).

75. *See, e.g.*, Owen v. Hines, 41 S.E.2d 739 (N.C. 1947); State v. Whitaker, 638 S.W.2d 189 (Tex. App. 1982).

76. *See, e.g.*, CAL. PROB. CODE § 2102 (West 1991) (setting forth court control of conservator); OHIO REV. CODE ANN. § 2111.50 (Anderson 1994) (setting forth the role of a probate court in guardianships).

The need for a mechanism like guardianship is apparent and has two aspects. First, a person who is incompetent in the eyes of the law cannot enter into legally binding transactions. Therefore, a person who lacks competency could not enter into a contract.[77] This could prevent an incompetent person from having adequate shelter, medical care, and all the other necessities of life. Knowing that contracts with incompetent persons may be voidable, other parties may be reluctant to contract with persons of even doubtful capacity.

Second, a person who is incompetent is more susceptible to the overreaching of unscrupulous individuals.[78] Thus, a primary purpose of guardianship law is to prevent financial abuse from occurring. This is apparent from the states' approaches to guardianship.

With respect to abuse prevention as a motive for establishing the guardianship system, legislatures could hardly have spoken more forcefully. There is much language in the guardianship statutes and in the legislative history underlying those statutes that suggests that prevention of exploitation is an important goal.[79] Further, all states require that guardianships receive, at least in theory, significant court oversight. In so doing, the states again attempt to prevent abuse.[80]

If a guardian misappropriates a ward's assets, each state allows the ward to sue the guardian for breach of fiduciary duty.[81] One component of the guardian's fiduciary duty is a duty of loyalty to the ward. If the guardian breaches this duty of loyalty, such as by misappropriating the ward's assets, he must return the amount of damages to the ward that his breach caused.[82] The difficulty in this

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77. *See generally* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 8-2 (3d ed. 1987) (discussing minors' incapacity to contract).

78. *See, e.g.*, Guardianship of Walters, 231 P.2d 473, 477 (Cal. 1951) (quoting the Probate Code's formulation of incompetence, which includes the phrase "likely to be deceived or imposed upon by artful or designing persons").

79. *See, e.g.*, ARIZ. REV. STAT. ANN. § 46-451(10) (West 2000) (defining "vulnerable adult" as "an individual who is eighteen years of age or older who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment"); CAL. PROB. CODE § 1801 (West 1991) (providing: "A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence"); IND. CODE ANN. § 12-10-3-2 (West 2000) (defining "endangered adult" as, inter alia,

> (2) incapable by reason of mental illness, mental retardation, dementia, habitual drunkenness, excessive use of drugs, or other physical or mental incapacity of managing or directing the management of the individual's property or providing or directing the management of the individual's property or providing or directing the provision of self-care; and (3) harmed or threatened with harm as a result of: (A) neglect; (B) battery; or (C) exploitation of the individual's personal services or property.).

80. *See, e.g.*, CAL. PROB. CODE § 2102 (setting forth court control of conservator); OHIO REV. CODE ANN. § 2111.50 (setting forth the role of a probate court in guardianships).

81. *See* SCOTT & FRATCHER, *supra* note 73, § 2.5.

82. *See, e.g.*, *In re* Guardianship of Eisenberg, 719 P.2d 187 (Wash. App. 1986). In *Eisenberg*, a guardian had leased the ward's airplane to a corporation controlled by the guardian. When the corporation became insolvent, it did not pay the rent for the airplane. The Washington court held that the guardian was

remedy is, of course, that a ward is by definition incompetent and thus unlikely to recognize the abuse. Also, since the ward lacks competence, the court would probably have to appoint a person to sue on the ward's behalf. As a practical matter, this is unlikely to occur, and therefore it is suspected that much guardianship abuse goes undiscovered.

Additionally, the guardianship is a cumbersome mechanism for preventing and remedying financial abuse.[83] As a device, it is widely criticized.[84] One speaker stated that we must

> [r]ecognize guardianship for what it really is: the most intrusive, non-interest serving, impersonal legal device known and available to us and as such, one which minimizes personal autonomy and respect for the individual, has a high potential for doing harm and raises at best a questionable benefit/burden ratio. As such, it is a device to be studiously avoided.[85]

In a related vein, some states have directly targeted protective laws at residents of care-providing institutions even though those persons may not have been adjudged incompetent.[86] Thus, a resident of a skilled nursing facility may be given a different protective scheme than a person living independently.[87] This differentiation appears to be based on the premise that one in such an institution is per se vulnerable, which is a reasonable notion. A resident of a long-term care facility is typically afflicted with one or more serious chronic conditions and in need of a great deal of care. Additionally, the resident has typically turned management of his assets over to another person. Because the person has relinquished much of his decision-making autonomy, it is reasonable for a

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liable to the ward for the fair rental value of the airplane. *Id*. (citing RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. f, § 206).

83. *See* FRANCIS J. COLLIN, JR. ET AL., DURABLE POWERS OF ATTORNEY AND HEALTH CARE DIRECTIVES § 1.2 (3d ed. 2002); John J. Lombard, Jr., *Asset Management Under a Durable Power of Attorney—The Ideal Solution to Guardianships or Conservatorships*, 9 PROB. NOTES 189, 190-91 (1983); A.L. Moses & Adele J. Pope, *Estate Planning, Disability, and the Durable Power of Attorney*, 30 S.C. L. REV. 511, 515 (1979).

84. *See, e.g.*, A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?,* 27 STETSON L. REV. 1 (1997).

85. Winsor C. Schmidt, *Guardianship of the Elderly in Florida: Social Bankruptcy and the Need for Reform*, 55 FLA. B.J. 189, 189 (Mar. 1981) (quoting E.S. Cohen, Protective Services and Public Guardianship: A Dissenting View, Address at the 31st Annual Meeting of the Gerontological Society, Dallas, Tex., Nov. 20, 1978).

86. *See, e.g.*, ARK. CODE ANN. § 5-28-101(7)(A)-(B) (Michie 1999) (defining "impaired adult" as "including adult residents of a long-term care facility"); CAL. WELF. & INST. CODE § 15610.23(b) (West Supp. 2003) (defining "dependent adult" as "any person between the ages of [eighteen] and [sixty-four] years who is admitted as an inpatient to a [twenty-four]-hour health facility"). *Cf.* GA. CODE ANN. § 30-5-3(7.1) (2001) (defining protected elderly as persons who are not residents of long-term care facilities).

87. *See, e.g.*, ARK. CODE ANN. § 5-28-101(7)(A)-(B); CAL.WELF. & INST. CODE § 15610.23(b); *cf*. GA. CODE ANN. § 30-5-3(7.1).

legislature to conclude that residents need enhanced protection. Although this enhanced protection is not expressly a guardianship, it is similar to a guardianship in that it arises from a legislature's desire to protect vulnerable citizens.

2. Voluntary Financial Arrangements

While not specifically created to prevent financial abuse, a number of voluntary financial arrangements like trusts and durable powers of attorney allow individuals to seek assistance with financial transactions and, thus, may prevent financial abuse from occurring. Each state allows an individual to create a trust or execute a financial durable power of attorney to assist with asset management.[88]

A trust is simply an arrangement for managing property for the benefit of one or more beneficiaries.[89] To create a trust, the creator, called the "settlor," transfers assets to a trustee under an instrument creating the trust. The instrument sets forth how the assets are to be managed and distributed.[90] The legal title to the assets passes from the settlor to the trustee, but the equitable title is held by the beneficiaries.[91] This split of legal from equitable title creates a fiduciary duty flowing from the trustee to the beneficiaries.[92]

A durable power of attorney is a device by which a principal authorizes another to act on the principal's behalf with respect to managing the principal's assets.[93] The word "durable" refers to the fact that, unlike the older non-durable power of attorney which ceased to be effective at the incompetence of the principal, the durable power remains effective even if the principal becomes incompetent.[94] The durable power was enacted largely in response to calls by the estate planning bar, which felt that there should be an effective and flexible alternative to the cumbersome guardianship and that most people had someone they could trust with such financial power.[95] If a durable power of attorney is in

88. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 396 (6th ed. 2000).

89. The Restatement of Trusts defines a trust as "a fiduciary relationship with respect to property, subjecting the person by whom the title to property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." *See* RESTATEMENT (SECOND) OF TRUSTS §§ 169-185 (1959) (describing the trustee's duties to the beneficiary).

90. *See* SCOTT & FRATCHER, *supra* note 73, § 164.

91. *See* RESTATEMENT (SECOND) OF TRUSTS § 7 cmt. a (1959).

92. *See* SCOTT & FRATCHER, *supra* note 73, § 2.5.

93. *See generally* Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574 (1996).

94. *See generally* DUKEMINIER & JOHANSON, *supra* note 88 at 396; *see* UNIF. PROBATE CODE § 5-501 (amended 1998); COLLIN, *supra* note 83, § 5:1; Michael S. Insel, *Durable Power Can Alleviate Effects of Client's Incapacity*, 22 EST. PLAN. 37, 37 (1995).

95. *See, e.g.*, *In re* Estate of Schriver, 441 So. 2d 1105, 1106 (Fla. Dist. Ct. App. 1983) (stating that durable powers of attorney have "the beneficial effect of avoiding the time, expense and embarrassment involved in having to establish guardianships for incompetent persons."); Bank IV, Olathe v. Capitol Fed. Sav. & Loan Assoc., 828 P.2d 355, 358 (Kan. 1992) (quoting the lower court's statement that the durable power of

place, guardianship can often be avoided.[96] The grant of power to the agent to handle the principal's assets creates a fiduciary duty in the agent if he exercises his power.[97]

Both the trust and durable power of attorney function similarly with respect to preventing abuse by third parties, i.e., someone other than the person who owns the assets and the fiduciary. Thus, a person who believes that he may be becoming incapable of handling his own financial affairs could transfer his assets in trust to a trustee and allow the trustee thereafter to make all management and distribution decisions. Because the person having difficulty managing his affairs would no longer "own" the assets, except in a beneficial capacity, it would be difficult for a third party to convince the owner to transfer assets to him. Similarly, it is common for the agent under a financial durable power of attorney to take control of the principal's bank accounts, including the checkbook. This would make it difficult for an unscrupulous person to convince the principal to transfer assets to him.

There is, however, one important difference in function between the trust and the durable power of attorney in connection with abuse prevention.[98] Once a trust has been created and the owner of the assets has turned them over to the trustee, the owner cannot regain control of the assets unless the trust is revocable.[99] The trustee must follow the dispositive provisions of the trust instrument, so the trustee cannot return the assets to the settlor unless the instrument allows such a disposition. Thus, once assets have been placed in trust, it is unlikely that the settlor would be able to regain title to the assets and transfer them to an unscrupulous party.

In contrast, the agent under a durable power of attorney has the power to act on the principal's behalf with respect to the principal's assets, but the principal

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attorney is an inexpensive way to allow management of an impaired person's property and to avoid a conservatorship, which costs approximately ten thousand dollars plus annual accounting fees).

96. *See, e.g., In re* Conover, 2 Fid. Rep. 2d 200 (Pa. Ct. Com. Pl. 1984) (declining to appoint a guardian for an incompetent principal whose agent under a durable power of attorney was efficiently managing her affairs); *In re* Guardianship of Pearson, No. CA91-466, 1992 WL 121766 (Ark. Ct. App. 1992) (affirming the probate judge's refusal to appoint guardian when agent acting under durable power of attorney was adequately caring for principal's person and estate); *In re* Estate of Ewing v. Bryan, 883 S.W.2d 545 (Mo. Ct. App. 1994) (terminating guardianship for person who had executed durable power of attorney); OHIO REV. CODE ANN. § 2111.02(c)(5), (6) (Anderson 1999) (providing that a court can consider evidence of a less restrictive alternative to guardianship in guardianship proceeding and a court can deny guardianship based on a finding that a less restrictive alternative exists). *Cf.* Rice v. Floyd, 768 S.W.2d 57, 58 (Ky. 1989) (noting that the purpose of a durable power of attorney statute is to "validate the acts of the attorney-in-fact during a period of actual disability prior to a finding of legal disability"); *In re* Guardianship of Friend, No. 64018, 1993 WL 526643 (Ohio Ct. App. 1993) (affirming a lower court's refusal to appoint an agent under a durable power of attorney as the guardian of an incompetent's estate).

97. *See* RESTATEMENT (SECOND) OF AGENCY § 376-98 (1958); SCOTT & FRATCHER, *supra* note 73, § 2.5 (noting that the relationship of agent and principal creates a fiduciary duty flowing from agent to principal).

98. For a comparison of trust and agency, see SCOTT & FRATCHER, *supra* note 73, § 8.

99. *See id*. § 37.

does not lose his power to act with respect to the assets unless the principal becomes incompetent. Because there is no transfer of title in the assets,[100] but rather only a grant of authority to act with respect to the assets, the principal who has given a durable power of attorney does not enjoy the protection of not being able to transfer his assets. Thus, unless the principal becomes so incapacitated that he loses the legal capacity to transfer assets, he retains full concurrent transfer power with the agent.

Whether this distinction makes a trust or a durable power of attorney more beneficial to the asset owner depends on the circumstances. Many owners dislike the idea of having their assets "trusted up" in a setting in which alteration is difficult if not impossible. Conversely, the idea of having an agent available to assist with asset management is an attractive idea to many people. The decision often is reduced to deciding whether protection or flexibility and control is more important to the individual asset owner.

One insidious problem that can occur in the context of a voluntary financial arrangement like a trust or durable power of attorney is that the fiduciary in these relationships is sometimes the financial abuser. In some ways, the closeness of the fiduciary setting coupled with the control that the fiduciary has over the assets makes the fiduciary setting the perfect environment for financial abuse.

It is also important to consider that what constitutes abuse by the fiduciary is not always clear. The nature of the fiduciary role has been described as requiring the utmost honesty. The fiduciary may not profit at the expense of the person to whom he owes his fiduciary duty with respect to transactions within the scope of the fiduciary duty.[101] He must make full disclosure to the person to whom he owes his duty of all details of transactions between himself and the person to whom the duty is owed.[102]

Although these principles of fiduciary duty sound clear and unbending, they are frequently difficult to apply in the family context. Consider the example of a mother who puts most of her assets into a trust with her eldest son as trustee and herself and her three children, including the eldest son, as beneficiaries. The trust instrument provides that the trustee has complete discretion to distribute the trust assets for the benefit of the mother and her three children. If the trustee/son decides to make a distribution to himself, is he breaching the fiduciary duty he owes to his mother?

Here again the concept of consent becomes important. To say that the trustee can never transfer assets from a family trust to himself is probably not in keeping with the wishes of most settlors.

As in the guardianship context, if abuse does occur in the fiduciary setting of a trust or a durable power of attorney and the abuser is the fiduciary, the victim

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100. *See, e.g.*, DUKEMINIER & JOHANSON, *supra* note 88, at 397.

101. SCOTT & FRATCHER, *supra* note 73, § 2.5.

102. *Id.*

can sue the abuser for breach of fiduciary duty. There are three basic remedies for breach of the trustee's duty of loyalty.[103] First, the trustee can be required to restore to the trust the value of any loss that was caused by the trustee's breach of duty.[104] Second, the trustee can be required to disgorge any profit that he made through a breach of duty and to return the amount of that profit to the trust.[105] Third, the trustee can be required to reimburse the trust for any profit that would have been made in the trust assets if the trustee had not committed a breach of duty.[106]

Again, however, there is difficulty in believing that this possibility of liability for breach of fiduciary duty will deter abuse by the fiduciary because detection of the abuse is so difficult. If the trust beneficiary or principal under the durable power is vulnerable, this difficulty is compounded. Thus, an unscrupulous fiduciary is unlikely to get caught abusing his fiduciary position.

In some particularly heinous cases, the abuser is a person who forces or tricks his way into a fiduciary position and then abuses the fiduciary role. For example, one California case involved the caregivers of a woman who forced her to give them her power of attorney by holding her at knifepoint.[107] They then mortgaged her home and withdrew large amounts of cash from her bank account.[108] Such a case would presumably give rise both to remedies under breach of fiduciary duty and criminal theories.

3. Criminal Statutes

Every state has a means of punishing financial abuse under its criminal statutes. There is, however, significant variance in the way states have chosen to address the problem. A state may use criminal statutes of general application, may use a statute directed specifically to financial abuse of the elderly, or may use a sentencing enhancement when the victim of the financial abuse is elderly.

a. Statutes of General Application

Since financial abuse involves a wrongful deprivation of the assets of another, much financial abuse could be classified as a form of theft. Thus, a state's criminal statutes of general application would prohibit financial abuse and could be used to punish abuse if it occurs. Sixteen states and the District of

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103. *See id.* § 206.

104. *Id*.

105. *Id*.

106. *Id*.

107. Karen Kucher, *Seniors Tell Tales of Thieves, Swindlers: Supervisors Hear of Abuse, Exploitation,* SAN DIEGO UNION-TRIB., May 21, 1998, at B1.

108. *Id*.

Columbia have taken this approach in that they do not have any criminal statute specifically addressing financial abuse of the elderly or vulnerable.[109]

Similarly, some types of abusive behavior violate other statutes, such as consumer protection statutes. Thus, for example, an unscrupulous telemarketer who targets vulnerable victims could be prosecuted under a state's deceptive practices act.

b. Statutes Specifically Criminalizing Financial Abuse of the Elderly and Vulnerable

Some states specifically criminalize exploitation of the elderly and vulnerable.[110] Some states criminalize financial abuse of both the elderly and the vulnerable.[111] Others criminalize exploitation of only the elderly[112] or only the vulnerable.[113]

c. Statutes Enhancing Penalties for Crimes Against Elderly and Vulnerable Victims

Some states enhance penalties for those convicted under criminal statutes of general application if the victim is elderly.[114] Similarly, in some states crimes against an elderly victim are classified higher than similar crimes against other individuals, resulting in penalty enhancement.[115]

The United States Sentencing Guidelines enhance the penalty for a crime committed against a vulnerable victim.[116] The Guidelines define a "vulnerable victim" in part as one "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct."[117]

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109. These states are: Alaska, Connecticut, the District of Columbia, Iowa, Kansas, Maine, Michigan, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, and Washington. *See* Dessin, *supra* note 69.

110. *E.g.*, COLO. REV. STAT. ANN. § 18-6.5-103(5) (West 2000) (setting forth the crime of theft against an at-risk adult); *Id.* § 18-6.5-102(1) (defining an "at-risk" adult as including both persons over sixty years of age and persons with a disability).

111. GA. CODE ANN. § 30-5-3(8) (2000) (making exploitation of an elderly or a disabled person a misdemeanor).

112. *E.g.*, MASS. GEN. LAWS ANN. ch. 266, § 30(5) (West 2000); NEV. REV. STAT. § 200.5099 (1999).

113. *E.g.*, ARK. CODE ANN. § 5-28-101(5) (Michie 1999); DEL. CODE ANN. tit. 31, § 3913 (1999).

114. *E.g.*, ARIZ. REV. STAT. ANN. § 13-702(c)(12) (1993) (specifying that if the victim is over age sixty-five or disabled it counts as an aggravating circumstance); ILL. COMP. STAT. 5/5-5-3.2 (1992) (listing an "offense against a person [sixty] years of age or older or such person's property" as an aggravating factor); NEV. REV. STAT. § 193.167 (1993) (adding an extra penalty for crimes committed against individuals sixty-five and older).

115. *E.g.*, CAL. PENAL CODE § 368 (West 2000); D.C. CODE ANN. § 22-3601 (2000); OKLA. STAT. tit. 22, § 991a-17 (2000).

116. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (2000) ("If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by [two] levels.").

117. *Id.* at cmt. n.2.

4. Mandatory Reporting Statutes

Many states have chosen to address the existence of financial abuse of the elderly or vulnerable by enacting a statute that requires mandatory reporting of suspected abuse.[118] Most states impose some reporting requirement.[119]

Although a few states impose the reporting requirement on everyone,[120] most impose it only on those in certain positions. For example, most of the states that have reporting requirements for specified groups of reporters require reporting by health professionals.[121] In contrast, only nine of the states that have reporting requirements for specified groups require reporting by attorneys.[122] In the states that have mandatory reporting statutes, there is usually some sanction for failing to report.[123]

IV. ANALYSIS OF EXISTING LEGISLATION TARGETED AT FINANCIAL ABUSE OF THE ELDERLY

As the above discussion reflects, states have enacted a large body of varied legislation as a reaction to what is perceived as a growing societal problem. States offer up a smorgasbord of protective statutes and statutes criminalizing abuse. But is that legislation an effective solution to the problem of exploitation?

The efforts of many state legislatures, though well-intentioned, are overprotective and not as effective as they could be. This is so for a number of reasons.

A. Criminalizing Financial Abuse Can Be Difficult

One threshold question in considering how states should treat exploitation is to determine whether it should be expressly criminalized or simply treated as a form of theft. Not surprisingly, there are pros and cons to each approach. Many

118. *See generally* Moskowitz & DeBoer, *supra* note 68, at 33-34 (discussing reporting standards).

119. *See generally id*.

120. *E.g*., DEL. CODE ANN. tit. 31, § 3910 (1999); IND. CODE ANN. § 12-10-3-9 (2000); MISS. CODE ANN. § 43-47-7 (2000); WYO. STAT. ANN. § 35-20-103(a) (Michie 2000).

121. *E.g*., ALA. CODE § 38-9-8(a) (2000); ARIZ. REV. STAT. ANN. § 46-454 (West 1998); ARK. CODE ANN. § 5-28-203(a)(1) (Michie 1999).

122. These states are Arizona, ARIZ. REV. STAT. ANN. § 46-454(B), (J) (West 2000) (attorneys in some roles have duty to report); Florida, FLA. STAT. ANN. § 415.1034(1) (West 2000); Montana, MONT. CODE ANN. § 52-3-811(3)(f) (2000); Nevada, NEV. REV. STAT. § 200.5093 (1999); New Hampshire, N.H. REV. STAT. ANN. § 161-F:46 (1999); New Mexico, N.M. STAT. ANN. § 27-7-30 (Michie 2000); Ohio, OHIO REV. CODE ANN. § 5101.61A (Anderson 2000); Oklahoma, OKLA. STAT. ANN. tit. 43A, § 10-104 (West 2000); and Texas, TEX. HUM. RES. CODE ANN. § 48.051 (Vernon 2000).

123. *See, e.g*., KY. REV. STAT. ANN. § 209.990 (Michie 2000). *But see* DEL. CODE ANN. tit. 31, § 3910 (1999) (imposing a duty to report but imposing no penalty for failure to report).

states rely on general criminal theft statutes to prosecute financial abuse.[124] One strength of this approach lies in the comfort level of law enforcement personnel and prosecutors charged with enforcing the law.

A difficulty in this approach is, however, the previously discussed distinction between the more subtle and indirect forms of exploitation and the conduct that we traditionally consider "theft." In the average theft prosecution, the prosecution does not need to even consider the possibility that the victim consented to the asset transfer. In the exploitation context, however, the question of whether the alleged victim consented should always be considered if the victim's autonomy rights with respect to the disposition of his property are to be adequately taken into account.

Further, because of the many forms that exploitation can take, it is difficult to imagine a criminal theft statute of general application that would be comfortably applicable to all forms of exploitation. For example, if an abuser wrongly convinces a victim to name the abuser as a beneficiary under the victim's will, it would be a difficult crime to prosecute under a general theft statute because there is no immediate deprivation of property.

On the other hand, if financial abuse is expressly criminalized, there is more opportunity for the legislature to focus on the lack of consent issue, which is so central in an exploitation case.[125] The consent defense is frequently strong because the alleged abuser is most often a child, some other close relative, or a friend.

There is, however, at least some possibility that the offense of exploitation will become marginalized if it is criminalized apart from the criminal statutes of general application. Many law enforcement personnel and prosecutors are already reluctant to become involved in such cases either because of a feeling that the cases are better handled in the civil system or because the cases present too many hindrances to effective prosecution.[126]

On the whole, express criminalization seems the better route in terms of matching the statutory prohibition to the problem. "Misuse" of assets without the

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124. These states are Alaska, the District of Columbia, Iowa, Kansas, Maine, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, and Washington. *See generally* Dessin, *supra* note 69.

125. Consider, for example, the Massachusetts protective statute's definition of financial exploitation. It includes the following language with respect to consent:

> such an act or omission shall not be construed as financial exploitation if the elderly person has knowingly consented to such act or omission unless such consent is a consequence of misrepresentation, undue influence, coercion or threat of force by such other person; and, provided further, that financial exploitation shall not be construed to interfere with or prohibit a bona fide gift by an elderly person. . . .

MASS. GEN. LAWS ANN. ch. 19A, § 14 (West 2002).

126. *See* Suzanne J. Levitt & Rebecca J. O'Neill, Essay: *A Call for a Functional Multidisciplinary Approach to Intervention in Cases of Elder Abuse, Neglect, and Exploitation: One Legal Clinic's Experience*, 5 ELDER L.J. 195, 196 (1997) (discussing the difficulties in proving financial abuse).

consent of the owner would be broad enough to include conduct like wrongful beneficiary designations.

Despite the difficulties of criminalizing financial abuse, states should continue to impose criminal sanctions for abuse. Criminalization probably serves as a deterrent to some amount of abuse. A state's criminal code gives some indication of "the moral sense of the community."[127] Thus, at the very least, criminalization is a manifestation of society's disapproval of the abusive conduct.[128] Each state has decided whether it believes that general or specific criminalization of the problem is the best solution for that state, and states should continue to monitor the effectiveness of those criminal statutes and be willing to change their approaches if necessary.

As previously noted, some states' criminal statutes address financial abuse by using the criminal statutes of general application while enhancing the penalties for crimes committed against the elderly. This approach raises a question as to why a crime committed against an older person should be punished more harshly, which will be discussed in the next section.

B. Much Existing Legislation is Based on Ageist Stereotyping

Perhaps the most insidious weakness in existing legislation addressing financial abuse is that many states focus on abuse of the elderly. Such a focus perpetuates ageist stereotyping that furthers neither the interests of the elderly nor of society as a whole.[129] "Ageism," like "racism" and "sexism," refers to a pattern of holding views about a person merely because he exhibits a certain immutable trait, namely attainment of a certain age.[130] The term was originated in 1968 by Dr. Robert N. Butler.[131] Butler, who was the founding director of the National Institute on Aging, defined "ageism" as

> a systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills [and this stereotyping]

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127. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 125 (1993).

128. *See* Candace J. Heisler, *The Role of the Criminal Justice System in Elder Abuse Cases*, 3 J. ELDER ABUSE & NEGLECT 5, 7 (1991).

129. Professor Linda S. Whitton has authored two insightful articles examining ageism in America and how it permeates the legal system. Linda S. Whitton, *Re-examining Elder Law Practices: Reflections on Ageism*, 12 J. PROB. & PROP. 8 (1998) [hereinafter *Re-examining Elder Law*]; Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453 (1997) [hereinafter *Ageism*].

130. *See generally* Jon Hendricks, *The Social Construction of Ageism*, *in* PROMOTING SUCCESSFUL AND PRODUCTIVE AGING (Lynne A. Bond et al. eds., 1995); Marge Lueders, *As Time Goes By: Deep-Seated Ageism Occurs All Around Us in Many Subtle Ways*, SEATTLE TIMES, Feb. 7, 1993, at L4, *available at* 1993 WL 5978742.

131. Robert N. Butler, *Dispelling Ageism: The Cross-Cutting Intervention*, ANNALS AM. ACAD. POL. & SOC. SCI., at 138, 139 (1989) [hereinafter *Dispelling Ageism*].

> allows the younger generation to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.[132]

During the last thirty years, there has been a good deal of commentary on ageism in medical and sociological literature.[133] In contrast, there has been relatively little commentary on ageism in legal literature.[134] With respect to the prevalence and contours of ageism, several scientists have attempted to design studies that would offer some idea of how prevalent ageism is in the general population.[135] While these attempts at gathering data about ageism have been criticized,[136] all who have commented on the subject seem to agree that ageism exists in American society and is fairly widespread.

Ageism is more than discrimination against people who have attained a certain age. It should be seen as encompassing any negative stereotyping of the elderly as a group. The phenomenon of advocates for the elderly applying negative stereotyping to the very group they were attempting to help was termed "the new ageism" in 1979 by Richard Kalish.[137] Dr. Kalish described the message of New Ageism:

> "[W]e" understand how badly you are being treated . . . [and] "we" have the tools to improve your treatment, and . . . if you adhere to our program, "we" will make your life considerably better. You are poor, lonely, weak, incompetent, ineffectual, and no longer terribly bright. You are sick, in need of better housing and transportation and nutrition, and

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132. *Id*. (footnote omitted).

133. *See, e.g*., BILL BYTHEWAY, AGEISM (Brian Gearing ed. 1995); JACK LEVIN & WILLIAM C. LEVIN, AGEISM: PREJUDICE AND DISCRIMINATION AGAINST THE ELDERLY (Curt Peoples et al. eds., 1980); ERDMAN B. PALMORE, AGEISM: NEGATIVE AND POSITIVE (Bernard D. Starr ed., 1990) [hereinafter PALMORE I]; Robert H. Binstock, *The Oldest Old: A Fresh Perspective or Compassionate Ageism Revisited?*, 63 MILBANK MEMORIAL FUND Q. HEALTH & SOC'Y 420 (1985); Margaret Gatz & Cynthia G. Pearson, *Ageism Revised and the Provision of Psychological Services*, 43 AM. PSYCHOLOGIST 184 (1988); Richard A. Kalish, *The New Ageism and the Failure Models: A Polemic*, 19 GERONTOLOGIST 398 (1979) [hereinafter *The New Ageism*]; Douglas C. Kimmel, *Ageism, Psychology, and Public Policy*, 43 AM. PSYCHOLOGIST 175 (1988); Glenda Laws, *Understanding Ageism: Lessons from Feminism and Postmodernism*, 35 GERONTOLOGIST 112 (1995); Alvin J. Levenson, *Aging Gracefully with Ageism: Difficult at Best*, PERSPECTIVES ON MEDICAID & MEDICARE MGMT., Feb. 1981, at 55; Jack Levin et al., *The Challenge of Ageism*, AM. HEALTH CARE ASS'N J., Mar. 1983, at 47; K. Warner Schaie, *Ageism in Psychological Research*, 43 AM. PSYCHOLOGIST 179 (1988).

134. *But see Re-examining Elder Law*, *supra* note 129; *Ageism*, *supra* note 129.

135. *See* generally ERDMAN B. PALMORE, THE FACTS ON AGING QUIZ (2d ed. 1998) [hereinafter PALMORE II]; Maryann Fraboni et al, *The Fraboni Scale of Ageism (FSA): An Attempt at a More Precise Measure of Ageism*, 9 CAN. J. AGING 56 (1990).

136. *See* PALMORE I, *supra* note 133, at 64-65; Valerie Braithwaite et al., *An Empirical Study of Ageism: From Polemics to Scientific Utility*, AUSTL. PSYCHOLOGIST, Mar. 1993, at 9.

137. *The New Ageism*, *supra* note 133.

> we . . . are finally going to turn our attention to you, the deserving elderly, and relieve your suffering from ageism.[138]

An analysis of the roots of ageist thought is beyond the scope of this article.[139] Several perceived origins of ageism are, however, relevant to the question of whether to offer enhanced protection from exploitation to the elderly. The underlying issue in deciding whether protection of the elderly as a group is warranted is whether that group exhibits some characteristic or set of characteristics that warrants protection.

First, it has been suggested that we tend to classify and group ourselves in terms of age.[140] With this grouping sometimes comes difficulty in inter-group empathy and communication.[141] Thus, it is not terribly surprising that legislatures might choose to categorize a particular age group as needing enhanced protection. That does not necessarily make the classification appropriate, but it does, perhaps, make it more understandable.[142]

Second, it is often said that we are obsessed with youth in America.[143] Again, this might serve as a basis for believing that the elderly require enhanced protection from abuse. If youth is good, perhaps old age is bad.[144] If youth is strong, perhaps old age is weak.[145]

Turning then to the issue of the states' choices to protect the elderly as a group, one finds that many states use age grouping as a precursor to enhanced protection. Fourteen states focus on exploitation of a person over a certain age

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138. *Id.*

139. For an excellent discussion of the possible causes of ageism, see *Ageism*, *supra* note 129, at 456-71. Professor Whitton identifies "patterns which mark ageism's evolution. These patterns include the rise of age consciousness and age segregation, an obsession with youth, and the increasingly observed fear and resentment of the aged, sometimes labeled 'gerontophobia.'" *Id*. at 458 (footnotes omitted).

140. *Id*. at 458-62 (discussing the importance of chronological age and the stages of life through history).

141. *See* Steven Keith Berenson, *Can We Talk?: Impediments to Intergenerational Communication and Practice in Law School Elder Law Clinics,* 6 ELDER L.J. 185 (1998) (discussing the idea that sometimes younger students have difficulty relating to older clients).

142. For an interesting discussion of how separating out "elder law" into a separate course may actually perpetuate ageism by reinforcing that the legal problems of the elderly are separate and distinct from the legal problems of other segments of society, see Rebecca C. Morgan, *Elder Law Across the Curriculum: Introduction*, 30 STETSON L. REV. 1265 (2001).

143. *See Ageism*, *supra* note 129, at 462-69.

144. *See* MITCH ALBOM, TUESDAYS WITH MORRIE: AN OLD MAN, A YOUNG MAN, AND LIFE'S GREATEST LESSON 117 (1997). Albom describes a scene of looking at billboards and realizing that no one on them is over the age of thirty-five.

145. *See* Andrew Achenbaum, *Images of Old Age in America, 1790-1970: A Vision and a Re-Vision*, *in* IMAGES OF AGING: CULTURAL REPRESENTATIONS OF LATER LIFE 20-21 (1995) (pointing to a shift that occurred in the middle of the nineteenth century from viewing old age as positive to viewing old age as negative); *see also* W. Andrew Achenbaum, *The Obsolescence of Old Age in America, 1865-1914*, 1974 J. SOC. HIST. 48, *reprinted in* MILDRED M. SELTZER ET AL., SOCIAL PROBLEMS OF THE AGING: READINGS 26 (Stephen D. Rutter ed., 1978); PALMORE I, *supra* note 133, at 59-63.

with no consideration of the vulnerability of the victim.[146] Five other states include attainment of a certain age in their definitions of vulnerability.[147]

When legislatures talk about protecting the elderly, they often do so without any evidence to support the idea that the elderly need protection. Thus, one frequently sees statements indicating that the older population needs protection without any real examination of whether this is true. For example, in deciding to treat a crime against an older person as a more serious offense, the California Legislature stated:

> The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.[148]

> Before enacting legislation specifically addressing financial abuse of the elderly, as opposed to financial abuse of other individuals, a legislative body should be able to articulate a reason for such enhanced protection of the elderly. The basic question that must be addressed in dealing with financial abuse is whether we should focus on the problem as financial abuse of the elderly, implying that older citizens need increased protection against this problem. To answer this question, it is important to address the possible justifications for focusing on abuse of the elderly rather than on abuse of other individuals. In other words, is there some reason why society should ameliorate financial abuse of the elderly as opposed to financial abuse of others?

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146. These states are California, CAL. WELF. & INST. CODE § 15610.27 (2000) (age 65); Connecticut, CONN. GEN. STAT. ANN. § 17b-450(1) (West 2000) (age 60); Georgia, GA. CODE ANN. § 30-5-3(7.1) (2000) (age 65); Illinois, 320 ILL. COMP. STAT. 20/2(e) (2000) (age 60); Louisiana, LA. REV. STAT. ANN. § 14:403.2 (B)(2) (West 2000) (age 60); Massachusetts, MASS. GEN. LAWS ANN. ch. 19A § 14 (West 2000) (age 60); Missouri, MO. ANN. STAT. § 660.250(5) (West 2000) (age 60); Nevada, NEV. REV. STAT. § 200.5092(5) (1999) (age 60); Oregon, OR. REV. STAT. § 124.050(3) (1999) (age 65); Rhode Island, R.I. GEN. LAWS § 42-66-4.1(3) (1999) (age 60); Texas, TEX. HUM. RES. CODE ANN. § 48.002(a)(1) (Vernon 2000) (age 65); Utah, UTAH CODE ANN. § 62A-3-301(8) (2000) (age 65); Vermont, VT. STAT. ANN. tit. 33, § 6902(6) (2000) (age 60); and Virginia, VA. CODE ANN. § 63.1-55.2 (Michie 2000) (age 60).

147. These states are Colorado, COLO. REV. STAT. ANN. § 18-6.5-102(1) (West 2000) (defining an at-risk adult as including anyone over the age of sixty); Montana, MONT. CODE ANN. § 52-3-803(8) (2000) (focusing on those over sixty but also requiring vulnerability for prosecution of exploitation of a vulnerable elder); Ohio, OHIO REV. CODE ANN. § 5101.60(B) (Michie 2000) (using age sixty in defining "vulnerable elderly"); Pennsylvania, 35 PA. CONS. STAT. ANN. § 10225.103 (2000) (focusing on those over age sixty-five in defining "vulnerable older adults"); and Washington, WASH. REV. CODE ANN. § 74.34.020(13) (West 2000) (focusing on those over age sixty in defining "vulnerable adult").

148. CAL. PENAL CODE § 368(a) (West 2000).

Several possible justifications for heightened protection of the elderly have been offered, either in legislative history or in commentary on protective legislation. These will be addressed seriatim.

One root that seems to underlie protective legislation is a model of decretion: the idea that with age comes infirmity. From this starting point, it is easy for legislatures to go on to reason that the infirm must be protected. The tying of age to infirmity is certainly not a new phenomenon. During the last half of the nineteenth century, medical literature began to contain suggestions that infirmity was tied to age.[149] Some have explained that this may have been because better treatment for illness and injury led more people to die of what was seen as "old age."[150] Early biomedical studies frequently compared aging with disease. This led two noted gerontological psychologists to conclude:

> [P]sychological study of the aged is heavily infested with biomedical conceptions of aging as a disease or a result of some deteriorative process. For instance, cognitive processes at older age are often described in terms of failure, loss, insufficiency, inadequacy, impoverishment, decrement, inefficiency, or impaired performance. These biomedical conceptions reflect the dominant metaphor that aging is a biological or medical problem, and that the elderly make up a problem group in society.[151]

These early studies have been criticized.[152] The major early studies were cross-sectional studies, which compare the intelligence of different people of different ages.[153] The cross-sectional study design has been criticized as having inherent difficulties that call the resulting data into question.[154] For example, how is the researcher to determine that the subjects of different ages are comparable?[155] One researcher has gone so far as to suggest that the elderly subjects of these studies were the weakest of the elderly population.[156]

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149. HOWARD P. CHUDACOFF, HOW OLD ARE YOU?: AGE CONSCIOUSNESS IN AMERICAN CULTURE 56 (1989).

150. *Id*. at 13-14.

151. James E. Birren & Johannes J.F. Schroots, History, Concepts, and Theory in the Psychology of Aging, *in* HANDBOOK OF THE PSYCHOLOGY OF AGING 3, 7 (1996).

152. *See, e.g*., Paul B. Baltes & K. Warner Schaie, *Aging and IQ: The Myth of the Twilight Years*, PSYCHOL. TODAY, Mar. 1974.

153. *See* Meredith Minkler, *Aging and Disability: Behind and Beyond the Stereotypes*, 4 J. AGING STUD. 245 (1990).

154. For a discussion of the weaknesses in the cross-sectional model, see *Ageism*, *supra* note 129 at 465-66.

155. *See* KATHRYN A. BAYLES & ALFRED W. KASZNIAK, COMMUNICATION AND COGNITION IN NORMAL AGING AND DEMENTIA 222 (1987)

156. *See* Clark Tibbits, *Can We Invalidate Negative Stereotypes of Aging?*, 19 GERONTOLOGIST 10, 11 (1979) (quoting B.M. Steffl who stated that early studies examined elderly subjects who were "congregated in poor farms, nursing homes, and state mental hospitals").

More recent longitudinal studies, which examine the intelligence of the subjects at various times in their lives to determine development, have not borne out this model of aging as decretion.[157] Indeed, current research suggests that if there is any mental impairment resulting from aging, that impairment is usually slight and has little effect on a person's ability to function.[158]

Studies that have attempted to discover the amount of significant cognitive impairment in the aging population have been encouraging. They all reach the same conclusion: aging does not bring inevitable mental decrement.[159] Scholars addressing gerontological issues have reached the same conclusion.[160] In fact, one large study conducted fifteen years ago estimated that only seven percent of persons aged seventy-five to eighty-four and twenty-five percent of persons aged eighty-five or older suffered from dementia.[161]

Despite current medical research, however, the idea that old age inevitably leads to decline persists today.[162] One author has stated that the belief that an older person is "a study in decline, the picture of mental and physical failure" is a common myth about aging.[163] Many published writings addressing abuse perpetuate this stereotype.[164] In an Associated Press Investigation of over two

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157. *See* Minkler, *supra* note 153, at 246-47. Dr. Minkler noted that longitudinal studies "have demonstrated that, contrary to myth, no significant decline in intellectual functioning occurs with aging for the majority of older people." *Id*. at 246. Similarly critical was psychologist K. Warner Schaie, who said "cross-sectional data are not directly relevant to the question of how intelligence changes with age within individuals, nor will such data help discover the antecedents of individual differences in the course of adult development." K. Warner Schaie, *Intellectual Development in Adulthood*, *in* HANDBOOK OF THE PSYCHOLOGY OF AGING 266, 268 (1996).

158. *See* Minkler, *supra* note 153, at 246; Schaie, *supra* note 133, at 270-71; H.B. GIBSON, THE EMOTIONAL AND SEXUAL LIVES OF OLDER PEOPLE: A MANUAL FOR PROFESSIONALS 56 (1992).

159. *See* Minkler, *supra* note 153, at 246-47.

160. *See* GIBSON, *supra* note 158, at 55; Marie R. Haug & Marcia G. Ory, *Issues in Elderly Patient-Provider Interactions*, 9 RES. ON AGING 3, 6 (1987)

161. *See* OFFICE OF TECH. ASSESSMENT, LOSING A MILLION MINDS: CONFRONTING THE TRAGEDY OF ALZHEIMER'S DISEASE AND OTHER DEMENTIAS 12-16 (Apr. 1987) [hereinafter LOSING A MILLION MINDS].

162. *See, e.g*., Gatz & Pearson, *supra* note 133, at 186 (stating that almost half of respondents to the Alzheimer's Disease Knowledge test overestimated the percentage of the elderly suffering from Alzheimer's Disease).

163. ROBERT N. BUTLER, WHY SURVIVE?: BEING OLD IN AMERICA 7 (1975) [hereinafter WHY SURVIVE?].

164. *See, e.g*., MARY J. QUINN & SUSAN K. TOMITA, ELDER ABUSE AND NEGLECT 4 (1986) ("For the most part, [elderly victims] are frail and cannot speak for themselves or act on their own behalf."); Amanda A. Thilges, Comment, *Abuse of a Power Of Attorney: Who Is More Likely to Be Punished, The Elder or The Abuser?*, 16 J. AM. ACAD. MATRIMONIAL LAW. 579 (2000). This article opens with the sentence: "It happens to all of us—we begin to age and with that comes forgetfulness and difficulties such as being unable to handle our finances." *Id*.; *see also* Tracy L. Kramer, *Section 784.08 of the Florida Statutes: A Necessary Tool to Combat Elder Abuse and Victimization*, 19 NOVA L. REV. 735, 745 (1995) ("The elderly, like children, are in need of special protection from crime.").

thousand guardianships,[165] reporters discovered that the reason for establishing a guardianship in eight percent of the cases was simply "advanced age."

Another possible justification for treating the elderly as a group needing protection from exploitation is the idea that the elderly are weaker than other segments of the population. Although not often expressly employed as a justification for enhanced protection against abuse for the elderly, there seems to be a pervasive idea in America that older citizens are somehow weaker than younger ones. Further, there is the notion that the elderly are less able to make informed financial decisions and less able to fend off the attempted overreaching of the unscrupulous than other groups. This underpinning manifests itself in a number of ways.

First, one hears numerous statements suggesting that older citizens are more likely to be victims of abuse. For example, one California conservator being interviewed by the Los Angeles Times remarked, "It just seems like when times get tough, old people are easy money."[166]

Second, there appears to be a commonly held belief that we weaken as we age. In applying a Texas criminal statute that addressed the assault on an "aged or decrepit" person, the Texas Court of Criminal Appeals defined "aged" as meaning "that the party has reached that degree of weakness which characterizes declining years."[167] A recent law review article, rather offensively titled "Blue Hairs in the Bighouse," began with a sentence that epitomizes the age as weakness stereotype: "When one thinks of the elderly, one envisions images of a fragile old man or woman needing help to carry groceries, getting help on the subway stairs, or the times when their own grandparents needed help cutting the lawn."[168]

If the elderly as a group are truly weaker than other members of society, then society has a legitimate right to protect them under the doctrine of parens patriae. Parens patriae is "the inherent authority of a state to take action to protect persons who cannot or will not protect themselves from harm."[169]

Commentators have offered two other possible explanations for the view of the elderly as weak. First, some have suggested that the "commodification" of old age allows the creation of more service opportunities. That is, if we paint the elderly as weak, we create a whole new group of employment opportunities to

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165. Guardians of the Elderly: An Ailing System, AP Special Report (Sept. 1987), *in* ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE 13 (Comm. Print 1987) [hereinafter Guardians of the Elderly Report].

166. Tracy Wilson, *Elder Abuse is a Tragedy on the Rise*, L.A. TIMES, Aug. 9, 1998, at B1 (quoting Barbara Knight). "Despite tough new laws aimed at protecting the elderly . . . seniors are being beaten and bilked, starved and neglected with startling regularity in crimes that law enforcement officials say are vastly underreported." *Id*.

167. *See* Black v. State, 67 S.W. 113, 113 (Tex. Crim. App. 1902).

168. Nadine Curran, Note, *Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225, 225 (2000).

169. KAPP, *supra* note 70, at 51.

serve their needs.[170] Second, it is possible that the perception of the elderly as weak could stem from a resentment of their affluence.[171] It has been suggested that feelings of financial dependence can lead to feelings of resentment and perhaps to abuse.[172] Taking this idea one step further, perhaps the feeling that the elderly should be supervised in their financial affairs and receive enhanced protection is an outgrowth of a feeling of jealousy that as a group the older Americans are wealthier than the younger Americans.

In an interesting juxtaposition, legislatures and others seem willing to use both minority and advanced age as a proxy for the inability to make knowing and informed decisions.[173] This legislative posture has seldom been challenged with respect to minors. Thus, states seem quite comfortable in deciding that minors cannot take title in their own right to certain assets or that contracts involving minors are generally voidable at the minor's behest.[174]

The correlation of minority with a need for legal protection is fairly easy to justify. Most children complete their secondary education at the age of eighteen. Most children have completed the journey through puberty at age eighteen. Developmentally, most researchers agree that eighteen-year-olds can be regarded more as adults than as children. Experientially, we can at least conclude that all persons eighteen years old have had the same chronological period to gain real-life experiences. This is not to suggest, of course, that there are not developmental differences in the population of eighteen-year-olds. Rather, it is to suggest that the differences are small enough that legislatures feel justified in treating the group of under-eighteen-year-olds as a homogenous group when enacting legislation to protect vulnerable minors.[175]

With respect to the elderly, however, it is much more difficult to justify age as a proxy for vulnerability. At what age could we suggest that the population becomes vulnerable? Should society offer increased protection to its citizens at

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170. JOHN MCKNIGHT, THE CARELESS SOCIETY: COMMUNITY AND ITS COUNTERFEITS 32 (1995). Knight describes the commodification of the elderly as follows:

> The economic use of classifying "oldhood" as a problem serves two purposes. The first is that it produces more service jobs by classifying old people as problems. Second, by the very act of classification it also defines old people as less productive or nonproductive and diminishes their capacity to compete for jobs. Thus, we create more jobs for one class by diminishing the job capacity of another. Indeed, one might say that what has happened in the United States since World War II is that those people of middle years have needed "problems" called old and young in order to create more "needs" while diminishing the number of people eligible to meet the needs.

Id. at 31.

171. *See Dispelling Ageism*, *supra* note 131, at 140-41 (suggesting envy of the affluent elderly as one of the manifestations of ageism).

172. *See* Moskowitz & DeBoer, *supra* note 68, at 30.

173. *See, e.g*., Kramer, *supra* note 164, at 745.

174. *See, e.g*., Rivera v. Reading Hous. Auth., 819 F. Supp 1323 (E.D. Pa. 1993), *aff'd.,* 8 F.3d 961 (3d Cir. 1993); Prudential Bldg. & Loan Ass'n v. Shaw, 26 S.W.2d 168 (1930).

175. There are, of course, minor exceptions to this generalized treatment. One example is the idea that a minor child with the ability to form an intelligent preference may be given a say in a custody determination while a child without that ability will not be heard. *See, e.g.*, CAL. FAM. CODE § 3042 (West 2000).

age sixty?[176] In the states that begin enhanced protection at a specified age, age sixty is the most common age at which protection begins.[177] Would age sixty-five[178] be more appropriate? Many states begin enhanced protection at that age.[179] Would age seventy be better?

The difficulty in agreeing on a particular age is, of course, that if older people become vulnerable at all, they become vulnerable at dramatically varying points in their lives.[180] Thus, one is not justified in assuming that all people become vulnerable at a particular age.[181] Studies of aging and function bear this out.[182] As one noted gerontologist said:

> [T]here are great differences in the rates of physiological, chronological, psychological and social aging within the person and from person to person. In fact, physiological indicators show a greater range from the mean in old age than in any other age group, and this is true of personality as well. Older people actually become more diverse rather than more similar with advancing years.[183]

Perhaps more important, the fact that studies show that most elderly individuals never become vulnerable to exploitation seriously calls into question

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176. *See, e.g.*, COLO. REV. STAT. ANN. § 18-6.5-102(1) (West 2000); CONN. GEN. STAT. ANN. § 17b-450(1) (West 2000); 320 ILL. COMP. STAT. 20/2(e) (2000).

177. Fourteen states offer enhanced protection beginning at age sixty. These states are Colorado, Connecticut, Illinois, Louisiana, Massachusetts, Missouri, Montana, Nevada, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington. COLO. REV. STAT. ANN. § 18-6.5-102(1); CONN. GEN. STAT. ANN. § 17b-450(1); 320 ILL. COMP. STAT. 20/2(e); LA. REV. STAT. ANN. § 14:403.2(B)(2) (West 2000); MASS. GEN. LAWS ANN. ch. 19A § 14 (West 2000); MO. ANN. STAT. § 660.250(5) (West 2000); MONT. CODE ANN. § 52-3-803(5) (2000); NEV. REV. STAT. § 200.5092(5) (1999); OHIO REV. CODE ANN. § 5101.60(B) (Anderson 2000); 35 PA. CONS. STAT. ANN. § 10225.103 (2000); R.I. GEN. LAWS § 42-66-8 (1999); VT. STAT. ANN. tit. 33, § 6902(6) (2000); VA. CODE ANN. § 63.1-55.2 (Michie 2000); WASH. REV. CODE ANN. § 74.34.020(13) (West 2000).

178. *See, e.g.*, CAL. WELF. & INST. CODE § 15610.27 (West 2001); GA. CODE ANN. § 30-5-3(7.1) (2000); OR. REV. STAT. § 124.050(3) (1999).

179. Five states offer enhanced protection beginning at age sixty-five. These states are California, Georgia, Oregon, Texas, and Utah. CAL. WELF. & INST. CODE § 15610.27; GA. CODE ANN. § 30-5-3(7.1); OR. REV. STAT. § 124.050(3); TEX. HUM. RES. CODE ANN. § 48.002(a)(1) (Vernon 2000); UTAH CODE ANN. § 62A-3-301(8) (2000).

180. *See* William E. Adams & Rebecca C. Morgan, *Representing the Client Who Is Older in the Law Office and in the Courtroom*, 2 ELDER L.J. 1, 6 (1994) (noting the absence of uniformity of functional level at any particular age). Further, external factors can affect a person's ability to function. *See* William E. Adams, Jr., *The Incarceration of Older Criminals: Balancing Safety, Cost, and Humanitarian Concerns,* 19 NOVA L. REV. 465, 467 n.10 (1994).

181. *See* Minkler, *supra* note 153, at 246 (stating "[W]hile 'downwardly sloping' lines may accurately be drawn for aggregate population groups on such dimensions as vital capacity, there is in fact considerably *less* clustering around the mean for older people than there is for their younger counterparts.").

182. *See* Birren & Schroots, *supra* note 151, at 10 ("aging is at least in part an individualized process that differs among individuals and among functions"); *see also* Fred L. Bookstein & W. Andrew Achenbaum, *Aging as Explanation: How Scientific Measurement Can Advance Critical Gerontology*, *in* VOICES AND VISIONS OF AGING: TOWARD A CRITICAL GERONTOLOGY 20, 28-38 (1993).

183. WHY SURVIVE?, *supra* note 163, at 7.

any type of protection based purely on age.[184] The medical evidence simply does not warrant classifying an entire age group as weak and in need of protection.

Accordingly, it is impossible to make the generalization that all people over a certain age need protecting. From our own experience, we know that it is quite possible to find a vulnerable fifty-nine-year-old and an invulnerable hundred-year-old. Therefore, even if we raised the age of vulnerability to a high age, like ninety or one hundred, the classification would still be overprotective.

The difficulty in the current formulations of many states' statutes addressing exploitation is that they stereotype all people above a certain age as warranting extra protection. Such a legislative scheme is not only offensive to the vast majority of people over that age who are perfectly able to defend their own financial interests, it may also have the effect of chilling dealings with older people. For example, if a corporate fiduciary is concerned that it may be sued under an exploitation statute for carrying out a transaction authorized by a competent yet elderly client, the corporation may be reluctant to accept such fiduciary appointments, may require an intrusive inquiry into the person's competence, or may charge greater fees to hedge against potential liability.

As another justification for enhanced protection of the elderly, it has been suggested that older persons are less able to recover from financial abuse than younger persons.[185] This argument appears to be based on the premise that younger persons can earn wages while older persons cannot. Thus, as the argument goes, an older person tends to live on a fixed income, and any unplanned depletion of assets has a more damaging effect than it would on a younger, working-age person who is more likely to overcome the negative effect of the depletion.[186]

There are two serious problems with this possible justification for treating financial abuse of the elderly as a worse offense than financial abuse of any person. Each of these problems is serious enough to call into question the appropriateness of this justification; together they undercut it entirely.

The first problem is that the justification is based on an overgeneralization about and an oversimplification of the relative wealth and income of various age groups in the United States. Although it is true that the percentage of persons

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184. *See* LOSING A MILLION MINDS, *supra* note 161, at 12-16 (1987).

185. *See, e.g.*, Lois Haight Herrington, *Crime Has a Devastating, Tragic Impact on the Nation's Elderly*, JUST. ASSISTANCE NEWS, Aug. 1983, at 2 (including excerpts of a hearing before the Senate Subcommittee on Aging); Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 101 (1998) ("Older persons may have less ability to recover from financial exploitation because of fixed incomes or short remaining life spans.").

186. *See* Lori A. Stiegel, *What Can Courts Do About Elder Abuse?*, 35 JUDGES J. 38, 42 (1996).

> Elder abuse may have a particularly devastating impact on older persons. They may have fewer options for resolving or avoiding the abusive situation due to their age, health, or limited resources. . . . Older persons may have less ability to recover from financial exploitation if they are already retired or because of their short remaining life span.

Id.

over age sixty-five who are wage earners is far lower than the percentage of other adults who are wage earners, it is also true that the combination of pension and Social Security payments to an older person combined with the person's investment income may meet or even exceed prior earnings. Further, an older person is statistically more likely to have more investment income that a younger person.[187] According to census data, nearly seventy-five percent of older Americans own their own house. [188] Additionally, according to the same source, most older persons have paid off the encumbrance on their residences.[189] Moreover, while an older person may have more medical or long-term care expenses than a younger person, he is typically free of the enormous expenses associated with child-rearing.

The second problem with this possible justification for enhanced protection of the elderly is that it is based on the type of stereotyping that is at the heart of ageism. There seems to be a strong correlation between the notion that older people cannot recover from financial abuse as easily as younger people and the false view of older persons as unproductive members of society.[190]

There is no question that financial abuse hurts any victim. The ability to recover from that harm is dependent on a number of interrelated factors. One important factor is the victim's wage-earning potential, but another equally important factor is the availability of other assets to the victim. Another factor relates to the victim's needs after the abuse. Focusing only on wage-earning overemphasizes the fact that most older people do not earn wages and thus overemphasizes and reinforces the perception of nonproductivity.[191]

Looking once again to census data, older people hold most of the wealth in America.[192] In 1990, the Bureau of the Census estimated that approximately seventy percent of American wealth was held by those over the age of sixty-five.[193] In 1999, the Bureau estimated the average wealth per capita of older Americans as over $250,000.[194] Although some might argue that this concentration of wealth in older Americans makes the elderly a more attractive target for abuse, and therefore a group that warrants increased protection, the fallacy of that reasoning is apparent. It is as flawed as the idea that the rich

187. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 518 tbl. 801 (119th ed. 1999).

188. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 489 tbl. 772 (119th ed. 1999); *see also* U.S. CENSUS BUREAU, Series P-70, No. 7, *Household Wealth and Asset Ownership: 1984* (1986).

189. U.S. CENSUS BUREAU, Series P-70, No. 7, *Household Wealth and Asset Ownership*: *1984* (1986).

190. *See, e.g.*, *Dispelling Ageism*, *supra* note 131, at 140-41.

191. *See* Achenbaum, *supra* note 145, at 48 (discussing how workers came to view age sixty-five as the end of productive life).

192. U.S. CENSUS BUREAU, Series P23-178*, Sixty-Five Plus in America*, 4-18, 4-21 (1992).

193. *Id*.

194. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 488 tbl. 771 (119th ed. 1999).

deserve more protection from theft than the less rich because the rich are more attractive as victims. In the past, society has not protected a victim from crime because of his attractiveness to the perpetrator but rather because the victim needs protection. Additionally, it seems obvious that an abusive deprivation is less devastating to one who does not need the money. Thus, rather than focusing on a shorter life expectancy as indicating less time to recover from financial abuse, one could also argue that the shorter life expectancy of an older person suggests that there is less need to recover from financial abuse than the need of a younger person.[195]

In sum, there seems no justifiable reason for protecting the older citizen simply because he is old. The medical evidence simply does not justify classifying those over a certain age as more vulnerable than other members of society. A better answer is to protect the vulnerable, who truly are weaker than other members of society.[196]

C. Existing Legislation Often Fails to Give Appropriate Respect to Personal Autonomy Concerns

One criticism of existing legislation is that it does not adequately respect an individual's right to dispose of property as he chooses. Society should not question any person's financial decisions lightly. Legislatures defining exploitation in statutes and courts interpreting those statutes must be careful to respect each individual's rights with respect to his property.

Ownership of property in America implies a right to use and dispose of that property as the owner sees fit. Society interferes with that right only when more important societal concerns are present.

One example of this principle is the doctrine that a person does not have a right to use property for illegal purposes. An adult cannot, for example, claim that he has a right to give alcohol that the adult lawfully possesses to a minor. This example also suggests another limitation on the rights incident to property ownership. Under the doctrine of parens patriae, society has an interest in protecting its vulnerable members.[197]

The question then becomes: what is the appropriate balance between society's legitimate concern in protecting its vulnerable members and respecting personal autonomy? Defining exploitation to include the idea of lack of consent will aid in this balancing. The inclusion of lack of consent in the definition will cause those interpreting the statutes to focus on the state of mind of the alleged victim of the abuse. Those interpreting the statutes must be careful, however, not to inject their own dispositive prejudices into the determination of whether there

195. Stiegel, *supra* note 186, at 42.

196. For a discussion of a definition of "vulnerable" that incorporates the concepts of weakness and inability to recover from abuse, see *infra* notes 229-32 and accompanying text.

197. For a discussion of the doctrine of parens patriae, see *supra* note 70 and accompanying text.

was consent. Like a court attempting to decide whether a transfer should be undone because it was the product of undue influence, a court deciding whether there was consent should take care not to equate what the court views as an ill-advised transfer with a non-consensual transfer. Thus, the inquiry should be subjective: did this particular transferor consent to the transfer? A similar subjective inquiry should be made in the case of an incompetent transferor: did the transfer in question comport with what this transferor would have wanted if competent? Any concern about the possibility that an incompetent transferor is more easily abused could be allayed by placing a higher burden on the person attempting to justify a transfer from an incompetent person.

In addition to recognizing that any interference with the transfer of property has personal autonomy concerns and should only occur when there is a legitimate societal interest in interference,[198] we must also be cautious not to base our interventions on ageist stereotyping that suggests that older people need help in deciding whether to transfer property or not.[199] The idea of "protecting" the elderly simply because they are old seems particularly offensive when considered in this context. There are a number of instances in which a protective services investigation can occur over the objection of the person whose protection is sought.[200] Before such an intrusive event, there should at least be some reason to suspect vulnerability. Put another way, an unwanted investigation of a competent older person's financial affairs is an unwarranted intrusion on that person's autonomy.

D. Mandatory Reporting Statutes Appear to Have Limited Efficacy

There is no research available on the effectiveness of mandatory reporting statutes. When a report of exploitation is made, the agencies who receive the report do not seem to note whether the report is made pursuant to a mandatory reporting requirement. Accordingly, one can do no more than speculate whether the mandatory reporting statutes lead to any significant reporting of exploitation.

Interestingly, although the idea of mandated reporting of exploitation is widespread, there are no reported prosecutions for failure to report suspected

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198. There is an interesting parallel to this idea in the area of medical decisionmaking. Several commentators have suggested that medical professionals sometimes make decisions for their older patients inappropriately. *See, e.g.*, Levenson, *supra* note 133, at 56-57.

> [I]t is not uncommon to witness the physician and other health care professionals omnisciently and omnipotently determining the quality of life someone [sixty-five] years or older deserves, the decision being based mostly on the patient's age. Frequently, such decisions are rendered regardless of the patient's desires, or without the patient's participation.

199. *See* Kalish, *supra* note 133, at 398 (commenting that the New Ageism "encourages the development of services without adequate concern as to whether the outcome of these services contributes to reduction of freedom for the participants to make decisions controlling their own lives").

200. Ruthann M. Macolini, *Elder Abuse Policy: Considerations in Research and Legislation*, 13 BEHAV. SCI. & L. 349, 353 (1995).

elder abuse.[201] Similarly, this researcher did not discover any anecdotal reports of such prosecutions. This leads to the conclusion that law enforcement authorities are not seeking out instances of failure to report abuse. Indeed, one must wonder how law enforcement authorities could prove that a person knew of exploitation and failed to report it, except in the most obvious and egregious cases.

Further, serious ethical questions are raised by requiring reporting by those who may have a professional duty not to reveal information learned in the course of a professional relationship.[202] Sometimes, the existence of financial abuse becomes apparent to one who has a professional relationship with either the victim or the abuser. In that context, the professional may be faced with a statutory duty to report the abuse to the appropriate authorities.[203] Sometimes this statutory duty directly contravenes a professional duty to keep the secrets of a client or patient or a similar duty not to reveal information gained in the course of representation or treatment.

Consider the ways that this dilemma could face an attorney. Although a majority of states do not require an attorney to report suspected abuse,[204] many states do require an attorney to report,[205] and there have been calls for attorneys

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201. There have, however, been prosecutions for failure to report child abuse in instances where there is a duty to report. *E.g.*, *In re* Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990); State v. Motherwell, 788 P.2d 1066 (Wash. 1990) (en banc); Mellish v. State, No. 84-1930 (Fla. Dist. Ct. App. 1985).

202. *See generally* Moskowitz & DeBoer, *supra* note 68 (discussing the impact of a mandatory reporting requirement on the clergy).

203. *See generally* Dessin, *supra* note 69.

204. These states are Alabama, Alaska, Arkansas, California, Colorado, Connecticut, the District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Vermont, Virginia, Washington, West Virginia and Wisconsin. ALA. CODE § 38-9-8 (2000); ALASKA STAT. § 47.24.010 (Michie 2002), ARK. CODE ANN. § 5-28-203 (Michie Supp. 2001); CAL. WELF. & INST. CODE § 15630 (West 2000); COLO. REV. STAT. ANN. § 26-3.1-102 (West 2002); CONN. GEN. STAT. ANN. § 17b-451 (West Supp. 2002); D.C. CODE ANN. § 6-2503 (1999); GA. CODE ANN. § 30-5-4 (2000); HAW. REV. STAT. § 346-224 (1999); IDAHO CODE § 39-5303 (Michie 2000); 320 ILL. COMP. STAT. 20/2(f-5) (2000); IOWA CODE ANN. § 235B.3 (West 2000); KAN. STAT. ANN. § 39-1431 (1999); KY. REV. STAT. ANN. § 209.030 (Michie 2000); ME. REV. STAT. ANN. tit. 22, § 3477 (West 2000); MD. CODE ANN. FAM. LAW § 14-302 (2000); MASS. GEN. LAWS ANN. ch. 19A, § 15 (West 2000); MICH. COMP. LAWS ANN. § 400.11a (West 2000); MINN. STAT. ANN. § 626.5572(16) (West 2000); MO. ANN. STAT. § 660.255(1) (West 2000) (requiring reporting in cases of potential physical harm); MO. ANN. STAT. § 565.188 (West 2000) (requiring certain persons to report); NEB. REV. STAT. § 28-372 (1999); N.J. STAT. ANN. § 52:27D-409 (West 1999); N.D. CENT. CODE § 50-25.2-03 (1999); OR. REV. STAT. § 121.060 (1999); 35 PA. CONS. STAT. ANN. § 10225.302 (West 2000); VT. STAT. ANN. tit. 33, § 6903 (2000); VA. CODE ANN. § 63.1-55.3 (Michie 2000); WASH. REV. CODE ANN. § 74.34.035 (West 2000); W. VA. CODE § 9-6-9 (2000); WIS. STAT. ANN. § 46.90 (West 2000). Additionally, attorneys may be required to report in Arizona if they serve the client in a certain manner. ARIZ. REV. STAT. ANN. § 46-454(B) (West 2000). New York and South Dakota have no mandatory reporting statute.

205. These states are Delaware, Florida, Indiana, Louisiana, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah and Wyoming. DEL. CODE ANN. tit. 31, § 3910 (1999); FLA. STAT. ANN. § 415.1034(1) (West 2000); IND. CODE ANN. § 12-10-3-9 (West 2000); LA. REV. STAT. ANN. § 14:403.2(C) (West 2000); MISS. CODE ANN. § 43-47-7 (2000); MONT. CODE ANN. § 52-3-811(3)(f) (2000); NEV. REV. STAT. § 200.5093 (1999); N.H. REV. STAT. ANN. § 161-F:46 (1999); N.M. STAT. ANN. § 27-7-30 (Michie 2000); N.C. GEN. STAT. § 108A-102(a) (2000); OHIO REV. CODE ANN. § 5101.61A (Anderson 2000); OKLA. STAT. ANN. tit. 43A, § 10-104 (West

to be added to the list of mandated reporters in other states.[206] First, imagine that the client is the victim of abuse. Can the attorney follow the mandate of a reporting statute?[207] In the states where a duty to report abuse exists, it is unclear whether the duty to report overrides the privilege.[208] In Texas, the attorney-client privilege is specifically abrogated in this circumstance, but the question remains whether it should be so abrogated.[209] In the remaining states, there is no direct struggle between mandatory reporting and the attorney-client privilege. This may be because there is no duty to report abuse in that state or because an attorney is not a mandated reporter in that state.[210] In a few states, there is authority suggesting that the mandatory reporting requirement does not override the attorney-client privilege.[211]

Another difficulty with mandatory reporting as a method of combating exploitation is that by the time a third party has a reasonable suspicion that there is a problem, the abuse may have already occurred. Sadly, case law bears out the fact that even when abusers are prosecuted, victims often regain only a small portion of the funds that they lost.[212]

A final issue undercutting the efficacy of mandatory reporting statutes is that financial abuse is often difficult to detect. In our society, people tend to treat financial matters as extremely private. We are not likely to talk about our financial affairs in good times, let alone when there is a problem. Also, identifying abusive transactions often requires a thorough review of a victim's finances. Unless one has a high level of knowledge of a victim's financial affairs, one is not likely to have enough background knowledge to support a belief that financial abuse is occurring.

Despite all of these difficulties with mandatory reporting statutes, they may yet prove to be a useful weapon in the fight against exploitation. The purpose of enacting a mandatory reporting statute is to require those most likely to see the

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2000); R.I. GEN. LAWS § 42-66-8 (1999); S.C. CODE ANN. § 43-35-25 (Law-Co-op. 1999); TENN. CODE ANN. § 71-6-103(b) (1999); TEX. HUM. RES. CODE ANN. § 48.051 (Vernon 2000); UTAH CODE ANN. § 62A-3-302 (2000); WYO. STAT. ANN. § 35-20-103(a) (Michie 2000).

206. *See* Marshall B. Kapp, *Reforming Guardianship Reform: Reflections on Disagreements, Deficits, and Responsibilities*, 31 STETSON L. REV. 1047, 1054 (2002) (noting sentiment at Second National Guardianship Conference that more states should include attorneys as mandated reporters).

207. *See* Edward D. Spurgeon & Mary Jane Ciccarello, *Lawyers Acting As Guardians: Policy and Ethical Considerations*, 31 STETSON L. REV. 791, 828 (2002) ("Treating a client with dignity and respect does mean respecting confidences, but not when life itself is at stake.").

208. *E.g.*, ARIZ. REV. STAT. ANN. § 46-454(B); N.M STAT. ANN. § 27-7-30; R.I. GEN. LAWS § 42-66-8.

209. *See* TEX. HUM. RES. CODE ANN. § 48.051.

210. *See, e.g.*, ALA. CODE § 38-9-8; ALASKA STAT. § 47.24.010; ARK. CODE ANN. § 5-28-203; NEV. REV. STAT. § 200.5093.

211. *See* 83 Ky. Op. Att'y Gen. 367 (2000) (stating that an attorney does not have to and cannot report domestic abuse if the client directs otherwise); MONT. CODE ANN. § 52-3-811(3)(f) (2000).

212. *See, e.g.*, Hoppe v. Kandiyohi County, 543 N.W.2d 635, 637 (Minn. 1996). In *Hoppe*, a bank employee became a woman's agent under a durable power of attorney and then used the power to misappropriate her assets. When prosecuted, the woman regained some of her assets from the bank, not the abuser. *Id*.

early signs of abuse to report the suspected abuse to an agency that can investigate it.[213] If the existence of a mandatory reporting statute convinces even one person who would otherwise keep silent that he has a duty to report suspected abuse, then perhaps the statutes are worthy of existence. Even without any hope of significant reporting, the statutes cost society nothing and should therefore be kept in place.

V. SUGGESTED REFORMS

A. Change of Focus From Age to Vulnerability

Legislation addressing financial abuse should be changed from its current focus in many states of protecting the elderly to a model that protects the vulnerable.

1. Society Has a Legitimate Interest in Protecting Its Vulnerable Members

It is beyond argument that society has a legitimate interest in protecting the welfare of its vulnerable members. This interest, and the power that allows a state to protect the vulnerable, comes from the state's parens patriae power.[214] Additionally, the parens patriae power is sometimes viewed as recognition of the fact that the state should further the interests of its citizens and that the citizens' interests are furthered by minimal state intrusion into private affairs.[215]

In contrast, society does not have any more interest in protecting its older citizens than it does in protecting its other members. Therefore, classifications based on age should be eliminated from legislation and replaced with classifications based on vulnerability.[216]

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213. *See* Moskowitz & DeBoer, *supra* note 68, at 35.

214. KAPP, *supra* note 70, at 51-52.

215. *See* United States v. Charters, 829 F.2d 479, 494-95 (4th Cir. 1987). *Charters* arose in the context of deciding whether to administer involuntary medical treatment. With respect to the parens patriae power, the *Charters* court opined:

> [T]he government's *parens patriae* goal of protecting the well being of its citizens is realized . . . by allowing the greatest latitude to the decisions of the individual patient. . . . If an individual is competent . . . [his] informed decision presumptively is the best decision for that individual—for the individual is in the best position thoroughly to assess and evaluate the circumstances of his own life.

Id.

216. *But see* Terrie Lewis, *Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota*, 28 WM. MITCHELL L. REV. 911 (2001). This student commentator suggested that there are four negative consequences of a focus on vulnerability rather than age and concluded that protective legislation should classify the protected individuals by age. I find none of these arguments compelling. First, Lewis suggests that a vulnerability classification makes it difficult to ascertain the prevalence of elder abuse. I suggest that it should be a relatively simple matter to determine the age of the victim of any reported instance of abuse. Second, Lewis contends that if protection only follows a determination of vulnerability, victims of abuse may be unwilling to seek that determination because of the stigma attached to being declared "vulnerable."

2. Defining Vulnerability

At the heart of a definition of vulnerability is the idea that one is incapable of protecting himself or herself from the overreaching acts of unscrupulous people. This implies several possibilities. First, it implies a weakness of resistance to the influence of others. Second, it implies a lack of the ability to understand when another might be trying to take advantage.

In defining vulnerability, states must be careful to respect personal autonomy concerns. Not everyone who is easily persuaded to give away money is "vulnerable." Like so many other aspects of human behavior, the range of an individual's reaction to persuasion from others lies along a continuum.

States must also be careful not to make stereotypical assumptions when defining "vulnerable." Consider, for example, the Michigan definition of "vulnerable."[217] The Michigan protective services statute protects those with "a condition in which an adult is unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment or because of advanced age."[218] What does including the consideration of advanced age add to this formulation? It suggests that advanced age is akin to a mental or physical impairment. One could delete "or because of advanced age" and be left with an equally effective statute. One is not vulnerable because of advanced age; one is vulnerable because of a physical or mental impairment.

The Florida statute contains a similar defect. It defines a vulnerable adult as "a person [eighteen] years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging."[219] This formulation is slightly less offensive than the Michigan example, because it makes reference to the "infirmities of aging" as opposed to the mere fact that one is of advanced age, but the formulation is still flawed. Because any possible "infirmity of aging" would also be a "mental, emotional, physical, or developmental disability or dysfunctioning," the addition of "the infirmities of aging" is surplusage. The addition of those words is invidious because it reinforces ageist stereotyping by

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Again, I do not think that the unproven possibility that some victims will choose not to report abuse outweighs the stigmatization that current age-based legislation imposes. Third, Lewis argues that some crimes cannot be prosecuted if the victim is not vulnerable. While it is true that prosecution could not proceed under a statute criminalizing exploitation of the vulnerable if the victim is not, in fact, vulnerable, a crime against a non-vulnerable victim could still be prosecuted using the criminal statutes of general application. Fourth, Lewis suggests that some instances of exploitation go unremedied because the persons charged with remediation are unwilling or unable to apply the vulnerability standard. This concern is remedied by careful definition of "vulnerability" in legislation.

217. MICH. COMP. LAWS ANN. § 400.11(f) (West 2000).

218. *Id*.

219. FLA. STAT. ANN. § 415.102(26) (West 2000).

suggesting that aging brings infirmities—a thesis that is unproven in the majority of cases.

In a slightly different formulation, the South Carolina Legislature defined a "vulnerable adult" as

> a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.[220]

The flaw in this formulation is apparent: one of the infirmities of aging is "advanced age."[221]

As a final example, California protects both "elders" and "dependent adults" from financial abuse. It defines "elders" as anyone over the age of sixty-five.[222] It then defines "dependent adults" as

> any person residing in this state, between the ages of [eighteen] and [sixty-four] years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.[223]

The problems with protecting those over age sixty-five have been previously discussed. The difficulty in California's definition of "dependent adults" is that again the definition focuses inappropriately on aging rather than on disability.[224] Nothing is added to the definition by pointing to aging as a cause of the diminishment of physical or mental abilities. Rather, the focus on aging perpetuates the unfounded stereotype that we should question the abilities of those who are aging. It is interesting to note that this definition of "dependent adults" applies only to adults under the age of sixty-five.[225]

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220. S.C. CODE ANN. § 43-35-10(11) (Law. Co-op. 1999).

221. *Id*. South Dakota has adopted similarly flawed language. S.D. CODIFIED LAWS § 22-46-1(2) (Michie 2000). The South Dakota statute section defines "disabled adult" as "a person eighteen years of age or older who suffers from a condition of mental retardation, infirmities of aging as manifested by organic brain damage, advanced age or other physical dysfunctioning to the extent that the person is unable to protect himself or provide for his own care." *Id.* Thus, in the South Dakota statute there appears to be an equation relating "advanced age" and "physical dysfunctioning."

222. CAL. WELF. & INST. CODE § 15610.27 (West 2000).

223. *Id*. § 15610.23.

224. *Id*.

225. *Id*.

Even the United States Sentencing Guidelines (Sentencing Guidelines) suffer from the same difficulty.[226] The Sentencing Guidelines enhance the penalty for a crime committed against a vulnerable victim.[227] The Sentencing Guidelines define a "vulnerable victim" in part as one "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct."[228]

Many states have adopted a preferable definition of vulnerability that focuses only on inability to protect oneself without reference to advanced age.[229] Further, the definition of "vulnerability" would not necessarily have to match a state's definition of "incompetent" for purposes of declaring a guardianship.[230] Many states have adopted some form of the Uniform Probate Code's definition of "incompetent:" "lacking sufficient understanding or capacity to make or communicate responsible decisions."[231] This requires a fairly high degree of disability before a finding of incompetence could be made. It is possible that a legislature could decide that there is a group of individuals who are less impaired, who would not be found incompetent, but whose mental abilities are impaired enough that they warrant enhanced protection.

Additionally, the definition of "vulnerable" could be made broad enough to include more than simply the idea that one is incapable of managing one's own affairs. It could also include some of the ideas that may underlie states' protection of people over a certain age. It is far more appropriate to work these concepts into a definition of vulnerability than to assume that all people over a certain age suffer from them. For example, if a state finds the concept of weakness important, it could include the susceptibility to acts of unscrupulous people in the definition of vulnerability. Similarly, if a state decides that those who would find it difficult to recover from financial abuse deserve enhanced protection from such abuse, the state could choose to define vulnerability as including difficulty of recovery from abuse. This could be accomplished by thinking of vulnerability as including the idea of particular susceptibility to serious harm, i.e., a harm from which it is difficult to recover.

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226. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (West 2000).

227. *Id.* § 3A1.1(b)(1) ("If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by [two] levels.").

228. *Id.* at cmt. n.2.

229. *E.g.*, ARIZ. REV. STAT. ANN. § 46-451(10) (West 2000) (defining "vulnerable adult" as "an individual who is eighteen years of age or older who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment."); IDAHO CODE § 39-5302(10) (Michie 2000) (defining "vulnerable adult" as "a person eighteen . . . years of age or older who is unable to protect himself from abuse, neglect or exploitation due to physical or mental impairment which affects the person's judgment or behavior to the extent that he lacks sufficient understanding or capacity to make or communicate or implement decisions regarding his person.").

230. *See* Bobbe Shapiro Nolan, *Functional Evaluation of the Elderly in Guardianship Proceedings, in* LEGAL AND ETHICAL ASPECTS OF HEALTH CARE FOR THE ELDERLY 212, 217-21 (1986) (reviewing various formulations of the concept of incompetence).

231. UNIF. PROBATE CODE § 5-103(7) (amended 1989); 8 U.L.A. 327-28 (1988).

With respect to defining vulnerability, there is not one perfect formulation of the definition. Many states have developed definitions that are adequately protective of the needs of vulnerable individuals while respecting concerns of personal autonomy.[232]

B. Each Type of Abusive Conduct Should be Treated Separately

Each of the four types of potentially abusive conduct should be addressed separately. Aggregating the types of conduct under a general heading of "exploitation" dilutes the meaning of the abuse in a way that does not make for efficient prevention and punishment.

1. Transfer of Assets Away from the Victim and Use of the Victim's Assets

Perhaps the easiest type of conduct to address is the transfer of assets away from the victim. Any definition of exploitation that includes the idea of "misuse" would cover outright asset transfer. Also, the definition should be broad enough to include a situation in which the abuser convinces the victim to set the stage for a future transfer, as is the case when the abuser convinces the victim to name the abuser as a future beneficiary under a will or trust.

It is not sufficient, however, to define the problem in terms of transfer of assets away from the victim. Rather, the focus should be on a transfer of assets that does not comport with the wishes of the victim. For example, if an abuser convinces a person to put property into a joint tenancy or pay-on-death account, and that causes the property to devolve in a way that was not the free choice of the victim, then that conduct should be considered abusive.

Thus, the focus should be on consent rather than on the nature of the transfer involved. A simple example illustrates this: an outright transfer of assets away from a person is not abusive if the person consents to the transfer, but the most subtle retitling of assets into survivorship form that does not deprive the person of any incidents of ownership while alive but causes the assets to pass in a way that the person does not desire is abusive.

Further, it is unwise to simply say that a transfer of a person's assets to another should be prohibited. It is similarly unwise to provide that the use of a person's assets for the benefit of another should be prohibited. Presumably the

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232. For example, Minnesota provides that a vulnerable individual is one who

> possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction: (i) that impairs the individual's ability to provide adequately for the individual's own care without assistance, including the provision of food, shelter, clothing, health care, or supervision; and (ii) because of the dysfunction or infirmity and the need for assistance, the individual has an impaired ability to protect the individual from maltreatment.

MINN. STAT. ANN. § 609.232.11(4) (West 2000).

inclusion of lack of consent in defining the offense will address both these concerns.

2. Intentional Breach of Fiduciary Duty

This class of abusive conduct is best dealt with under the well developed body of law regarding breach of fiduciary duty. The remedies for breach of fiduciary duty focus primarily on restoration of the loss caused by the breach to the person to whom the duty was owed, and that makes them particularly well suited to remedying financial abuse.

In the particularly egregious cases, of course, criminal prosecution might also be appropriate. Just as corporate directors who misappropriate corporate funds can be liable under both breach of fiduciary duty and criminal theories, the trustee, guardian or agent who misuses the funds of the person to whom a fiduciary duty is owed could be both civilly and criminally liable.

3. Consumer Fraud and Scams

The class of offensive conduct that can be grouped generally under this heading is not always easily treated as financial abuse. An outright scam with the purpose of stealing money is fairly easy to classify as exploitation. On the other hand, is selling a person a product at a greatly inflated price "exploitation?"

The difficulty lies in the fact that most of the conduct complained of in this area falls into the category of overpricing and high-pressure sales tactics rather than outright theft with nothing passing in return to the victim.

This type of offensive conduct seems better prosecuted under consumer protection statutes than under exploitation statutes. The attempts to stretch the definitions in exploitation statutes to address inappropriate selling practices only weakens the exploitation statutes, especially when courts refuse to find that the selling practices are exploitation.[233]

4. Negligent Mishandling of Funds

To date, only Florida has chosen to expressly include negligence in its definition of exploitation.[234] In defining exploitation in its protective services statute, the Florida statute provides that "[i]ntentional or negligent failure to

233. *See* State v. Dyer, 607 So. 2d 482, 482 (Fla. Dist. Ct. App. 1992). In *Dyer*, the defendants allegedly used inappropriately hard sales tactics to sell overpriced emergency response systems to elderly victims. *Id*. The defendants were charged with grand theft and financial exploitation of an aged person pursuant to now-repealed section 415.111(5) of the Florida Statutes. The Second District Court of Appeal affirmed the dismissal of the exploitation charges, stating that while "the alleged sales conduct may be 'exploitation' in a general sense . . . it does not involve use or management of the aged person's funds for profit." *Id*.

234. FLA. STAT. ANN. § 415.102(7)(a) (West 2000).

effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance" can be exploitation.[235] Florida does not, however, criminalize negligent conduct as exploitation.[236]

It is possible that other states could interpret their less detailed definitions of exploitation to include negligent conduct as exploitation. It would, however, be quite a stretch to do so. For example, in states that use words like "use" to describe the exploitative act, the word "use" seems to imply intentional conduct rather than mere negligence.

To date, there have been no criminal prosecutions under any statute for conduct that was purely negligent. This is perhaps true because there are some inherent difficulties in attempting to criminalize negligent conduct. Normally, we require an intentional act, or at least a reckless act, in the commission of a crime. This is not to suggest that those who negligently deprive a vulnerable person of assets should not suffer consequences. A fiduciary who makes negligent investment decisions should probably not be prosecuted for exploitation, but he should be removed from office and required to reimburse the person to whom he owed a fiduciary duty for the loss caused by his negligence.

Additionally, negligence could be treated as a ground for implementing protective services. If a victim is vulnerable and his assets are being negligently mishandled, then intervention by the protective services agency may be appropriate. The negligent conduct would not, however, be prosecuted in most states.

C. Guardianships Should be Carefully Monitored by the Appropriate Court or Other Entity

The state of guardianship law in the United States has often been examined and there are many recent calls for various reforms.[237] Although guardianship has traditionally been a matter for the states, the federal government has also recognized the need for reforms.[238] Perhaps the most important catalyst in this reform movement was the convening in 1988 of a National Guardianship Symposium by the American Bar Association Commission on Legal Problems of the Elderly and Commission on the Mentally Disabled (which is now called the

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235. *Id*. § 415.102(7)(b)(4).

236. FLA. STAT. ANN. § 825.103(1) (West 2000).

237. *See* Guardians of the Elderly Report, *supra* note 165, at 13, 31-32. In this investigative report, the Associated Press investigated over two thousand guardianship cases and found many troubling incidents of abuse and exploitation of the wards. *Id*.; s*ee also* UNIF. GUARDIANSHIP AND PROTECTIVE PROC. ACT 8A U.L.A. 102 (Supp. 2001); ABA COMM'N ON MENTAL & PHYSICAL DISABILITY LAW & COMM'N ON LEG. PROBLEMS OF THE ELDERLY, STEPS TO ENHANCE GUARDIANSHIP MONITORING (1991) (available for order from the ABA Commission on Legal Problems of the Elderly); Dorothy Siemon et al., *Public Guardianship: Where Is It and What Does It Need?* 27 CLEARINGHOUSE REV. 588 (1993).

238. *See, e.g*., Carol Ann Mooney, *Guardianship Reform: A Federal Mandate,* 4 PROB. & PROP. 48 (1990) (discussing the National Guardianship Rights Act).

Commission on Mental and Physical Disability Law). This symposium, known as "Wingspread," produced many influential recommendations for reforming the guardianship system.[239] In 2001, a follow-up National Guardianship Conference was convened which was also known as "Wingspan."[240] The goal of this second conference was to examine the progress made since the first conference and to consider additional reforms.[241] Perhaps because there were more participants at the Wingspan conference, there was much disagreement about some basic aspects of guardianship law, including its basic focus.[242] Despite this disagreement, however, the Wingspan conference also issued a comprehensive set of guardianship reform proposals.[243]

In response to such calls for change, states have implemented a number of recent reforms in the area of guardianship law, and these reforms should continue to be implemented. For example, many states have recently enacted legislation either requiring or permitting periodic hearings regarding the need for continuing guardianships.[244]

Perhaps most importantly, states should continue to focus on improved monitoring of guardians.[245] Requiring the accountability of guardians seems the most effective way to curtail abuse.[246] The few studies of guardianships that have been made show a surprising lack of comprehensive monitoring.[247] There have also been suggestions that courts are too ill-equipped and under funded to

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239. ABA COMM'N ON MENTALLY DISABLED & COMM'N ON LEG. PROBLEMS OF THE ELDERLY, GUARDIANSHIP: AN AGENDA FOR REFORM—RECOMMENDATIONS OF THE NATIONAL GUARDIANSHIP SYMPOSIUM AND POLICY OF THE AMERICAN BAR ASSOCIATION (1989).

240. A. Frank Johns & Charles P. Sabatino, *Wingspan—The Second National Guardianship Conference*, 31 STETSON L. REV. 573, 573 (2002). The Spring 2002 issue of the Stetson Law Review contains many papers from this symposium.

241. *Id*. at 573-74.

242. *See* Kapp, *supra* note 206, at 1047 (noting differences between adversarial and therapeutic models of guardianship).

243. *Wingspan—The Second National Guardianship Conference: Recommendations*, 31 STETSON L. REV. 595, 595-609 (2002) [hereinafter *Recommendations*]. Any recommendations that received support from more than fifty percent of the conferees at the Wingspan conference became official conference recommendations. *See* Johns & Sabatino, *supra* note 240, at 580.

244. *See, e.g*., CAL. PROB. CODE § 1850 (West 2001); CONN. GEN. STAT. ANN. § 45a-660(c)-(d) (West 2001); KAN. STAT. ANN. § 59-3035(a)-(b) (2000) (repealed 2002); TEX. PROB. CODE ANN. § 672(a) (Vernon Supp. 2000).

245. *See* Johns & Sabatino, *supra* note 240, at 575 (reporting keynote remarks of Richard Van Duizend, Executive Director of the National Center of State Courts, at the Wingspan conference as he noted that there is "inadequate monitoring of guardianships and conservatorships by courts").

246. *See generally* Hurme & Wood, *supra* note 73.

247. *See, e.g*., AP Turned to Legal Counsel to Gain Access to Guardianship Files, AP Special Report, *in* ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE, (Comm. Print 1987), at 19 (noting that almost half of the over two thousand guardianship files investigated by the Associated Press were missing at least one annual accounting); Fred Bayles & Scott McCartney, Part III: Lack of Safeguards Leaves Elderly at Risk, *in* Guardians of the Elderly Report, *supra* note 165, at 31-32.

monitor guardianships or that they simply fail to do so.[248] It is possible that monitoring could be performed by an agency outside the court, either a public guardianship agency or a private agency hired for monitoring.[249] However the monitoring is accomplished, it seems clear that monitoring concerns are foremost in the fight against exploitation.[250]

The requirement of accountability to a court does not necessarily create an adversarial relationship between the guardian and the court. Rather, the court should be viewed simply as an expert that can offer assistance to the guardian.[251] Many courts provide training programs for guardians in their jurisdictions.[252] Under this model, which is often referred to as the "therapeutic" model of guardianships, courts and guardians assume roles that more closely resemble members of a caregiving team than adversaries.[253]

D. The Durable Power of Attorney Should be Used with More Care

Estate planning attorneys should be more careful in drafting financial durable powers of attorney for clients. The general consensus in the estate planning community seems to be that the durable power is a flexible and useful estate planning tool and that every client should have one.[254] Although the flexibility of the financial durable power cannot be denied, nor can its usefulness in avoiding guardianship proceedings be ignored, it is also an extremely powerful device that should be used only with knowledge and caution.

A threshold question is whether an attorney should ever represent the agent in drafting a durable power of attorney. The current Model Rules of Professional Conduct do not answer this question, and some have called for a change in the rules to require that the attorney only draft a durable power when the principal is the client.[255] Such a change would not, however, completely address the concern that the principal and agent may not completely understand the import and workings of the durable power of attorney. Although the change in the ethical

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248. *See, e.g.*, Lawrence A. Frolik, *Abusive Guardians and the Need for Judicial Supervision*, 130 TR. & EST. 41, 44 (July 1991).

249. *See* Johns & Sabatino, *supra* note 240, at 590-91. In its recommendations, the second National Guardianship Conference called for an investigation of whether monitoring by an entity other than the court might be desirable.

250. For a comprehensive look at the path of guardianship monitoring reform since the first National Guardianship Conference and through the second National Guardianship Conference, see Hurme & Wood, *supra* note 73, at 869-71.

251. *See, e.g.*, Kapp, *supra* note 206, at 1051.

252. *E.g.*, FLA. STAT. § 744.1085(3)(2001); N.Y. MENTAL HYGIENE LAW § 81.39 (1996); *see generally* Hurme & Wood, *supra* note 73, at 872-75.

253. *See, e.g.*, Kapp, *supra* note 206, at 1050-51.

254. *See, e.g.*, COLLIN, *supra* note 83, § 1.2 ("[T]he Durable Power of Attorney is an essential component of every estate plan."); Lombard, *supra* note 83, at 190-91; *Gifts Made Under a Durable Power of Attorney*, ARMY LAW., Nov. 2000, at 38 [hereinafter *Gifts*].

255. *See Recommendations*, *supra* note 243, at 599.

rules would be salutary, it must be coupled with an education of both the principal and the agent about the rights and responsibilities of each under the power.

One of the issues that a principal should consider when executing a financial durable power is whether to include a power to make gifts.[256] This type of power is frequently granted in financial durable powers of attorney.[257] The power can be either complete or limited. The grant of such a power should be made with great caution. Additionally, a client's earlier gifts should be documented. [258]

Clients should be warned about the power and possibility of misuse inherent in a power to make gifts. One state has gone so far as to raise a presumption that a transfer of more than ten percent of an elder's assets to a fiduciary is the product of undue influence.[259] While I do not think that that level of presumptive invalidity is appropriate, a fiduciary who receives a large transfer from the person to whom he owes his fiduciary duty should be prepared to justify the transaction as non-abusive. In an ideal situation, I would not advise a fiduciary to make a gift to himself without some concrete proof that such a transfer comports with the owner's past or present dispositive intentions.

Moreover, forms for drafting durable powers of attorney are sold in many stationery stores and available on the Internet. This practice should be regulated to help curtail potential abuse. The form is so powerful that it should simply not be sold in stationery stores without appropriate warnings about the document's potential misuse.

E. Agents Acting Under Durable Powers of Attorney Should be Monitored More Closely

The durable power of attorney is an extremely flexible and useful estate management tool. It is also, however, a powerful document that can allow the agent complete control of the principal's assets.[260] The combination of those attributes brings a danger for abuse that many suspect occurs on a regular

256. *See, e.g.*, *Gifts*, *supra* note 254, at 41-42.

257. If, however, the power to make gifts is not specifically granted to the agent under a power of attorney, most states hold that a general power of attorney does not grant the agent the authority to make gifts of the principal's property. *See* Russell E. Haddleton, *The Durable Power of Attorney: An Evolving Tool*, 14 PROB. & PROP. 58 (2000). *But see* ALA. CODE § 26-1-2.1 (2000) (implying gifting authority in general grant of power); VA. CODE ANN. § 11-9.5 (Michie 2000) (same).

258. *See generally* Hans A. Lapping, Note, *License to Steal: Implied Gift-Giving Authority and Powers of Attorney*, 4 ELDER L.J. 143 (1996).

259. ME. REV. STAT. ANN. tit. 33, §§ 1021-1024 (West Supp. 1997). Maine presumes undue influence where real estate or at least ten percent of the elderly individual's assets are transferred to a fiduciary. *See id*. Upon a finding of undue influence, the elderly victims can force the return of the property. *See id*.

260. *See generally* Dessin, *supra* note 69.

basis.[261] Several concrete requirements should be implemented to address possible misuse of powers of attorney.[262]

First, agents acting under durable powers of attorney should be required to register with the same court that oversees guardianships in the jurisdiction. Under current law in most states, an agent under a durable power of attorney can simply act with respect to the principal's assets without any oversight. A requirement that an agent register as such with the appropriate court would serve two purposes in this respect. First, it would give the court notice as to who is exercising the authority granted under a durable power in its jurisdiction. Second, it would give the impression to the agent that there is some oversight of the agent's actions and that the agent might be called to account for his actions to the court.[263] This alone might deter some abusive conduct.

Second, once a principal becomes incompetent, the agent should have to file periodic accountings with the court. Unlike a guardianship, an agent acting under a durable power of attorney is typically not required to file an accounting of any sort either during or at the close of his agency. It is interesting to note that calls have been made for more strict accounting standards for guardians, but calls for accountings by agents have gone largely unheeded.[264] The accounting requirement can be a fairly simple one, such as requiring the agent to show all transactions entered into with respect to the principal's property. For the honest agent who carries out his duties in a responsible manner, this will not be a problem. Additionally, it will again impress on the agent that there is some oversight of his actions.

Third, at the death of the principal, the agent should have to file an accounting with that same court. Again, the agent should be required to account for any transaction that he engaged in with respect to the principal's property. Like lifetime accountings during incompetency, this will not be overly onerous to the agent who behaves appropriately. Once again, the mere fact that the agent will be called on to account to a court may deter some abuse from occurring.[265]

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261. *See, e.g.*, Patricia E. Salkin, *The Durable Power of Attorney: Guarding Against Abuse*, 4 SHEPARD'S ELDER CARE L. NEWSL. 17, 17 (1994); Gerald S. Susman, *Power of Attorney Abuse Called Invisible Epidemic*, LEGAL INTELLIGENCER, Aug. 20, 1993, at 1.

262. The difficulties in applying traditional fiduciary standards to durable power of attorney was noted by the Diversion Committee at the Second National Guardianship Conference. Although the Conference recommended applying fiduciary standards to agents under durable powers, there was much disagreement about the contours of the fiduciary duty in the durable power context. *See* Johns & Sabatino, *supra* note 240, at 582; *Recommendations*, *supra* note 243, at 598, 600.

263. *See* Hurme & Wood, *supra* note 73, at 901 (noting that even self-completed reports may enhance a feeling of oversight by the court in the guardianship context).

264. *See* Johns & Sabatino, *supra* note 240, at 591 (noting the suggestion at the second National Guardianship Conference that guardian's accounts should be audited by certified public accountants; this suggestion was not adopted as a conference recommendation).

265. *See* Hurme & Wood, *supra* note 73, at 901 (noting that even self-completed reports may enhance a feeling of oversight by the court in the guardianship context).

This is not to suggest that a requirement of accountability to a court should be viewed as creating an adversarial relationship between the agent and the court. Rather, the court should be viewed as a knowledgeable entity that can offer assistance to an agent. This assistance could come by way of training programs for agents or through a mechanism by which an agent can ask for advice on particular transactions. Like the therapeutic model of guardianship, courts could assume a nonadversarial role in this context.

F. State Agencies and Other Entities Should Work Together More Closely

Any solution to the problem of exploitation of vulnerable citizens should involve at a minimum law enforcement personnel and state protective services personnel. Without such cooperation, the issue cannot be adequately addressed.

Consider the difficulties inherent in an investigation of and potential prosecution for exploitation. As previously discussed, the determination that exploitation has occurred is a complex one. Such a determination can usually only be made after a thorough examination of the alleged victim's financial affairs, which are often considered private matters.[266] After the examination there should also be a consideration of whether the alleged victim made the transfers in question voluntarily and knowingly. Only if this careful inquiry leads to the conclusion that financial abuse has occurred should action be taken. The complexity of such an investigation and determination of voluntariness often leads law enforcement personnel to avoid these cases.

If, however, an agency outside law enforcement, like a state protective services agency, was available to conduct the preliminary investigation and talk with the alleged victim to attempt to determine whether abuse occurred, law enforcement resources would be less burdened. In turn, the protective services agency could refer the case to the appropriate law enforcement agency if there is reason to believe that exploitation has occurred.

Delaware provides an excellent model for this type of coordination of resources. In 1996, Delaware organized the Elder Abuse and Exploitation Project (Project).[267] The Project involved the appointment of an elder abuse advocate to lead it. Before the Project was initiated, Delaware's protective services program had investigated more than two hundred cases of exploitation, but few of the cases were prosecuted.[268] After the Project became active, more than one hundred cases were referred to it; the Project initiated the prosecution of twenty-five cases, and the conviction rate in those cases was one hundred percent.[269] This led

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266. *See* Moskowitz, *supra* note 185, at 79 (suggesting that elder abuse usually "occurs in private residences against persons who have limited contact with outsiders").

267. Timothy H. Barron, *Financial Exploitation of the Elderly–A Delaware Perspective*, THE PROSECUTOR, Nov.-Dec. 1998, at 34.

268. *Id*. at 35.

269. *Id*.

one Delaware Deputy Attorney General to reach the unusual conclusion that "financial exploitation cases can be (and should be) fairly easy to prosecute."[270]

In addition, however, the problem of exploitation would be best addressed by the addition of many other individuals. For example, an accountant or bank officer is often best situated to discover financial abuse.[271] Accountants or others preparing tax returns might notice a sudden decline in income or assets. Family members, friends and neighbors are probably in the best position to notice a change in quality of life that may indicate that exploitation is occurring.[272] One beneficial effect of the existence of state mandatory reporting statutes is that they sometimes contain a provision stating that a reporter cannot be held civilly liable for making an unintentionally false report of suspected abuse.[273] The existence of such provisions should encourage willingness to report suspected abuse, and such provisions may alone be sufficient justification for keeping mandatory reporting statutes in place.

Similarly, attempts at preventing and remedying abuse could be aided by the efforts of non-governmental groups. For example, in California, the Los Angeles police department teamed with the local Senior Citizens Network to address exploitation.[274] One result of this cooperation was the creation in 1993 of the Fiduciary Abuse Specialist Team (FAST).[275] FAST consists of law enforcement, senior care, probate court, government, health, legal, financial services, and real estate personnel.[276] The success of FAST has prompted several dozen other California counties to form their own teams, and the Los Angeles team has been widely praised.[277]

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270. *Id*. at 36.

271. *See, e.g*., *A New Training Cycle, New Materials As the Bank Reporting Project Enters Its Fourth Year*, MASS. BANKER, Spring 1999, *at* http://www.thewarrengroup.com/home/wp/mab/mabspring1999/mabspring1999. asp (last visited Mar. 21, 2003) (copy on file with the *McGeorge Law Review*) (describing the Massachusetts Bank Training Project Mission as follows:

> "[T]o help protect elders from financial exploitation by scam artists and unscrupulous caretakers without sacrificing the confidentiality and control that we all value in our personal financial affairs. The Bank Reporting Project seeks to establish an industry-wide standard that will help prevent victimization by both educating employees and by providing simple reporting procedures for banks that will enable more effective cooperation between bank officials, elder protective-services agencies and local law enforcement.")

272. One of the important recommendations of the second National Guardianship Conference was a call for increased interaction among agencies to help avoid unnecessary guardianship proceedings. *See Recommendations*, *supra* note 243, at 599-600 (noting that diversion from the guardianship system is desirable, with focus on "collaboration among financial institutions, law enforcement, and adult protective services.").

273. *See* DEL. CODE ANN. tit. 31, § 3910(c) (1999) (granting immunity to anyone who makes a report of abuse in good faith).

274. *See* Juliet Bruce, *Bunco Unit Teams Up with Aging Network to Protect Elderly*, AGING, Mar 22, 1996, at 74.

275. *Id*.

276. Council on Aging of Orange County, *FAST Program*, *at* http://www.coaoc.org/Fast.html (last visited Mar. 21, 2003) (copy on file with the *McGeorge Law Review*).

277. *See, e.g*., LISA NERENBERG, NAT'L CENTER ON ELDER ABUSE, FORGOTTEN VICTIMS OF ELDER FINANCIAL CRIME AND ABUSE, A REPORT AND RECOMMENDATIONS 52 (1999).

Finally, the adversarial legal system that we rely on so heavily for ordering our affairs does not appear to be the optimal system in addressing the problem of exploitation of the vulnerable. The current protective services system is typically triggered by a petition for guardianship. The petition and resulting hearing raise full due process protection for the alleged incompetent, who is often represented by an attorney.[278] This adversarial model seems more focused on the purely legal issue of whether the person is incompetent than on developing the best assistance plan. Many voices are now suggesting a more therapeutic style of legal intervention in this context.[279] If a truly inter-entity system of preventing and addressing exploitation is to function, it is important that attorneys take a less adversarial approach than usual and act more like caregivers.[280]

VI. CONCLUSION

The challenges inherent in attempting to prevent, remedy, and punish exploitation are daunting (to say the least). State legislatures and other agencies have taken many productive steps toward combating financial abuse and these efforts should continue.

Continued cognizance of the problem and attempts to study the incidence of exploitation should likewise continue. Additionally, careful consideration of all of a state's protective mechanisms is warranted to seek maximum effectiveness. As abusers develop increasingly subtle ways to exploit their victims, society must be increasingly vigilant and creative to thwart those attempts.

Other than some vague notion that a society should respect its elders, however, it is difficult to justify protecting the elderly from exploitation merely because they are old. The root of such age-based protection is a well-intentioned but inaccurate stereotyping of all older citizens as less able to safeguard their own needs than younger members of society. This is precisely the negative

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278. *See* Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. LEGAL ISSUES 143 (1996).

279. *See* Kapp, *supra* note 206, at 1048-49 (describing the therapeutic model of guardianship as "facilitating the benevolent provision of helpful services to the incapacitated individual and doing so with a minimum of unnecessary hassle and expense."). Kapp stated that

> [i]n this model, courts are therapeutic agencies rather than neutral referees of disputed facts and technical points of law. Attorneys for the parties are more like the caregiving team for the ward than combatants in search of decisive legal victory. Diversion of individuals to alternative arrangements short of formal guardianship proceedings, including advocating on the basis of trust and goodwill among the parties, is part of the therapeutic theme.

Id. at 1049.

280. For thoughtful considerations of therapeutic jurisprudence in general and as applied to mentally disabled individuals, see DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990), and Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL., PUB. POL'Y & L. 80 (1995).

stereotyping that Richard Kalish termed "new ageism" in the late 1970s.[281] The fact that the negative stereotyping is occurring in the context of efforts to "help" a group does not make the stereotyping any more appropriate.

In contrast, society has a legitimate interest in protecting its vulnerable members from abuse. Thus, the focus of legislation addressing financial abuse should be on the vulnerable, not the elderly. Many states have already adopted this model, and it is the appropriate one. Society simply does not have a legitimate interest in stereotyping the elderly as vulnerable. Further, the existing scientific literature does not support using age as a proxy for vulnerability. Although it may be true that a larger portion of the older population is more vulnerable than the younger population, the prevalence of vulnerability is not enough even in the very old population to warrant protecting everyone in that age group.

In sum, the point of this discussion is not to suggest that as a society we should not have the utmost respect for our oldest members. We should not, however, allow unproven ageist notions to force additional protection on those who are not in need of protection. To put the focus of protection against exploitation on vulnerability accomplishes society's goal of protecting its weakest members without stigmatizing others. The task of addressing exploitation is difficult enough, and we should not perpetuate ageism as a by-product of our protective efforts.

281. Kalish, *supra* note 133, at 398.