It’s What She Would Want:  
The Need to Criminalize Personal Financial Elder Abuse  

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Sixth Place
In the last century, the number of Americans living past sixty has quadrupled. Currently, there are 39.6 million persons over the age of sixty-five and by 2030 there will be about 72.1 million. By then, persons over the age of sixty-five will represent almost 20% of the population. With this graying of America, the prevalence and seriousness of elder abuse also continues to rise. Older Americans are targeted for fraud, theft, and deception because they often have significant assets and are the most likely to lack the tools needed to defend themselves. In 2004, a national survey of state Adult Protective Services programs placed the incidences of elder abuse from a low of 100,000 cases a year to over a million cases a year.

Elder abuse is currently defined as “any knowing, intentional, or negligent act by a caregiver or any vulnerable person that causes harm or serious risk of harm to a vulnerable adult.” Elder abuse can currently be broken down into six categories: physical, emotional, financial, sexual, psychological, and neglect.

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3. Id.
6. Frequently Asked Questions: What is Elder Abuse, NAT’L CENTER ON ELDER ABUSE http://www.ncea.aoa.gov/NCEARoot/Main_Site/FAQ/Questions.aspx (last visited December 2,
sexual, exploitation, neglect, and abandonment. Approximately 90% of all kinds of Elder abuse occur in domestic settings.

While all types of elder abuse are on the rise, the fastest growing form of elder abuse is the financial exploitation of the elderly. Elder financial exploitation is generally defined as the illegal taking, misuse, or concealment of funds, property, or assets of a vulnerable elder at risk for harm due to decreased physical or mental capacity. Financial abuse is often divided into two categories: personal financial abuse and commercial financial abuse. Personal financial elder abuse generally refers to abuse committed by someone with a personal relation to the victim, such as durable power of attorney abuse. Commercial financial elder abuse is abuse practiced by organized businesses, usually in the form of telemarketing schemes or predatory lending.

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7 See id. (“Physical Abuse – Inflicting, or threatening to inflict, physical pain or injury on a vulnerable elder, or depriving them of a basic need; Emotional Abuse – Inflicting mental pain, anguish, or distress on an elder person through verbal or nonverbal acts; Sexual Abuse – Non-consensual sexual conduct of any kind; Exploitation – Illegal taking, misuse, or concealment of funds, property, or assets of a vulnerable elder; Neglect – refusal or failure by those responsible to provide food, shelter, health care or protection for a vulnerable elder; Abandonment – the desertion of a vulnerable elder by anyone who has assumed the responsibility for care or custody of that person.”).

8 BROKEN TRUST, supra note 5, at 5.


11 Eggert, supra note 4, at 697-98. See also Carolyn L. Dressin, Financial Abuse of the Elderly, 36 IDAHO L. REV. 203, 207 (2000) (defining personal elder abuse as the intentional mistreatment of assets).

12 See Eggert, supra note 4, at 698 (defining personal financial elder abuse as abuse from someone with a personal relationship with the victim such as a family member, friend, caretaker, or a “befriender”).

13 Id. at 698. See also Shelby A.D. Moore & Jeanette Schaefer, Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse, 41 SAN DIEGO L. REV. 505, 508 (2004)
The typical victim of elder abuse is between seventy and eighty-nine, white, female, and cognitively impaired.¹⁴ The most common perpetrators of abuse are the victim’s own family members.¹⁵ Financial abuse can be manifested as robbery and burglary, homeowner fraud, telemarketing scams, the intentional misuse of assets by a fiduciary, or the negligent misuse of assets by a fiduciary.¹⁶ This paper will focus on the last two categories of financial elder abuse and what can be done by state legislatures and criminal prosecutors to penalize such action.

Part I of this paper will focus on the durable power of attorney and its potential for abuse. Part II will focus on the difficulties of prosecuting financial elder abuse and durable power of attorney abuse in particular, as well as the current system of prosecuting such cases. Part III will examine three state codes: California, Florida, and Virginia to assess their strengths and weaknesses in criminalizing financial elder abuse. Part IV will suggest that there should be uniform state and criminal laws for Durable Power of Attorney Abuse and stricter sentencing guidelines for financial abuse crimes against the elderly.

I. Durable Power of Attorney Abuse

Durable power of attorney abuse is the most familiar form of personal financial elder abuse and the most difficult to prosecute.¹⁷ The power of attorney is a document allowing someone else

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¹⁴ Broken Trust, supra note 5, at 8.
¹⁵ Id. See also Black, supra note 9, at 290 (reporting that 89.3% of elder abuse reports occur in domestic dettings and that the most common relationship between the victim and perpetrator is between a parent and child or other family members); Seymour H. Moskowitz, Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education 47 Loy. L. Rev. 191 (2001) (acknowledging that most mistreatment occurs within the family and causes both embarrassment of the victim and a willingness to protect the abuser).
¹⁶ Black, supra note 9, at 290. See also Dressin, supra note 11, at 207 (2000) (dividing financial elder abuse into the categories of theft, fraud, breach of fiduciary duty, and negligence).
¹⁷ See generally Lori A. Steigel & Ellen VanCleave Klem, Power of Attorney Abuse:
to act on behalf of an individual. A durable power of attorney refers to a document that may or may not terminated if the principal becomes incapacitated.\textsuperscript{18} It is a common estate planning device, often used in planning for the possibility of an individual’s incapacity.\textsuperscript{19} Many durable power of attorney documents are “springing” power of attorney documents that do not go into effect until the principal has been determined incapacitated.\textsuperscript{20} Because these documents give over a substantial amount of power to another individual, usually upon the incapacitation of another, there is considerable room for abuse.

Durable power of attorney abuse generally results from the breach of the fiduciary duty the agent owes the principal. Black’s Law Dictionary defines the fiduciary relationship as one “in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship.”\textsuperscript{21} With respect to older adults, fiduciary duties generally arise between the trustee and the trust’s beneficiary; between the guardian of an estate and his ward; or between an agent acting under power of attorney and the principal.\textsuperscript{22}

In an AARP study on durable power of attorney abuse, Linda Whitton lays out three general categories of abuse:

(1)Transactions that exceed the intended scope of authority – such as making gifts
of the principal’s property when not granted gift-making authority;

(2) Transactions conducted for self-dealing purposes - such as when an agent spends the principal’s money to buy him or herself a car rather than pay for the principal’s nursing home care; and

(3) Transactions conducted in contravention of the principal’s expectations - such as when an agent has gift-making authority, but makes gifts that undermine the principal’s estate plan.23

Based on an analysis of news stories in 2008, the largest percentage of financial elder abuse came at the hands of trusted professionals (18%), followed closely by family(16.9%), and caregivers (10.9%).24 Trusted professionals, family members, and caregivers are all in unique positions to commit the abuses listed above. While every case is different, family members can often feel a sense of entitlement when it comes to the money or goods of the elderly principal.25 They may feel they are entitled to a reimbursement for taking care of the principal or that the principal would want them to have such things.26

There are also unique elements about the power of attorney that make it easy to abuse. First, the power of attorney document grants broad decision-making authority to the agent.27 Because a power of attorney must be broad in order to be an effective decision making tool, the agent is granted a wide range of powers over the principal’s finances and assets, including the

24 BROKEN TRUST, supra note 5, at 8.
25 Id. at 14 (explaining that family members often feel it is acceptable to take control over the assets they think are almost or rightfully theirs).
26 Id. (detailing that many family members also feel it is their job to take pre-emptive steps to prevent their inheritance from being spent on medical bills).
27 See STEIGAL, supra note 20, at 5 (Noting that such broad authority is often necessary in order to make the document effective).
right to sell or mortgage property, the right to withdraw or deposit money in a bank, or make
gifts.\textsuperscript{28} Second, the power of attorney lacks monitoring. If the principal has become
incapacitated, which is generally the case with durable power of attorney documents, there is no
one else to monitor the agent’s actions.\textsuperscript{29} While some power of attorney documents allow for the
monitoring by a third party, many do not in order to maintain the privacy of the principal.\textsuperscript{30}
Finally, the standards for agent conduct are vague and unclear.\textsuperscript{31} Most state laws do not lay out
standards for agents and do not specify the duty that the agent owes the principal.\textsuperscript{32} While many
states have begun to adopt the Uniform Power of Attorney Act, which seeks to correct this last
problem, many agents are still unaware of the strict fiduciary duty they owe to the principal.\textsuperscript{33}
Although the Uniform Power of Attorney Act attempts to correct many of the problems with
durable power of attorney statutes, the durable power of attorney still provides myriad
difficulties for prosecuting financial elder abuse.

II. Difficulties of Prosecution

a. Difficulties for Elder Abuse in General

Along with the susceptibility of durable power of attorney to abuse, there are many
factors ranging from the unique problems of elderly victims to weaknesses in state criminal laws

\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} See id. ("Some of the reasons for the popularity of the POA as a tool for planning for
incapacity are the ability to maintain privacy and avoid court oversight or the burden of
accounting that comes when a guardian or conservator is appointed").
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} See id. at 8 (listing the enhanced provisions of the Uniform Power of Attorney Act); Uniform
Power of Attorney Act, \textit{Uniform Law Commission, National Conference of
Commissioners on Uniform State Laws, available at
www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-upoaa.asp} (listing Colorado,
Idaho, Maine, Nevada, New Mexico, U.S. Virgin Islands, Virginia, Wisconsin, Minnesota, Ohio,
and West Virginia as having ratified the UPOAA).
that make prosecuting durable power of attorney abuse very difficult. One of the biggest
difficulties, which pertains to all forms of elder abuse, is the reluctance to report abuse.\footnote{See Dressin, supra note 11, at 210 (reporting that most scholars feel that cases of physical, psychological, and financial abuse are grossly underreported).} Older adults are unlikely to report abuse for many reasons including: distaste for government interference in their lives, fear a loved one will go to jail, the belief that no one can help them or the belief that any resolution will come too late, or fear that they will be placed in a nursing home.\footnote{See BROKEN TRUST, supra note 5, at 21. (Other reasons listed for the underreporting of elder abuse include: that the elder feels responsible for what happened, lack of realization that they have been financially abused, belief that financial abuse is a consequence of doing business, fear that the perpetrator might harm them further, and a belief that they will lose more money to court costs). See also Moskowitz, supra note 15, at 203 (arguing that elders refuse to report abuse because they feel abuse is ordinary or that there are no legal resources available to them).} Many older adults feel ashamed that they have allowed themselves to be taken advantage of and are reluctant to report abuse for fear of embarrassment. As Carolyn Dressin writes in her article \textit{Financial Abuse of the Elderly}, “It is not difficult to imagine the loss of personal dignity that comes with undergoing such abuse, and similarly easy to empathize with the pain of relating that experience to others.”\footnote{Dressin, supra note 11, at 211.} When the abuser is a family member, older adults may also feel some responsibility for the abuse. Because abusers are often the adult children of the older adult, the older adult may feel as though they suffering because they did not properly raise their child.\footnote{Id. (Accordingly, the victim may be reluctant to “air the family’s dirty laundry”).}

Unique problems with prosecuting financial elder abuse claims stem from the lack of detection from other family members or professionals who interact with older adults. Financial abuse often occurs in secret and many victims have no idea they are being abused until it is too late.\footnote{Id. at 214. See also Judith B. Skylar, \textit{Elder and Dependant Adult Fraud: A Sampler of Actual}}
reporting laws, the difficulty of determining the capacity of an older adult, a fear of incriminating a fellow professional or a fear of being involved in a potential lawsuit.\textsuperscript{39} Similarly, abuse may often not be detected until the principal has died and his or her successors discover that the agent has redistributed the assets.\textsuperscript{40} Some victims are so completely isolated or under a caretaker’s control that they cannot possibly seek help.\textsuperscript{41}

Law enforcement often does not understand financial elder abuse or durable power of attorney abuse and may tell concerned family members that it is a civil problem and not for law enforcement.\textsuperscript{42} Financial elder abuse is exceptionally difficult to prove, and many law enforcement officials are not trained in evaluating complex financial records.\textsuperscript{43}

\textit{b. Difficulties Specific to Personal Financial Elder Abuse}

In some cases, particularly those involving durable power of attorney, the victim may be too incapacitated to report the abuse. The unfortunate gray area exists in cases where the victim may remember that abuse occurred but may not be able to recall the details of the abuse or tell a

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\textit{Cases to Profile the Offenders and the Crimes they Perpetrate, 12 J. Elder Abuse \& Neglect 19, 20 (2000) (noting that many elders believe their family are simply assisting them with their finances).}
\textsuperscript{39} \textit{Id. (Examining the reasons professionals often fail to get involved in suspected elder abuse cases).}
\textsuperscript{40} \textit{See Steigal, supra note 28, at 6 (explaining that this delayed detection is a common external problem related to the durable power of attorney document).}
\textsuperscript{41} \textit{See Moskowitz, supra note 15, at 203 (analyzing the many reasons elder abuse in under-reported).}
\textsuperscript{42} \textit{See Carolyn L. Dressin, Financial Abuse of the Elderly: Is the Solution a Problem? 34 McGeorge L. Rev. 267, 291 (2003) [hereinafter Solution to a Problem] (“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”).}
\textsuperscript{43} \textit{See Dressin, supra note 11, at 217 (noting that a lack of witnesses willing and able to testify places and extra burden on law enforcement officers). See also Skler, supra note 39, at 31 (listing the involvement of notarized documents, powers of attorney, quit claims deeds and wills as some of the tools used in financial abuse which often lead law enforcement officials to believe the problem is civil instead of criminal).}
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consistent story. The victim may also not be financially sophisticated enough to recognize abuse, especially if it is at the hands of a trusted family member. Courts have acknowledged the fact that elderly individuals often make unreliable witnesses – a stereotype that unfortunately prevents the prosecution of many elder abuse cases.

Specific to a durable power of attorney, many people draft the document without understanding the full amount of risk involved. Due to the availability of power of attorney documents on the internet, anyone can fill out a legally binding document without the benefit of solid legal advice. Even if people are informed of the risks, many ignore the warnings, believing that their agent would never commit such a heinous offense.

Durable power of attorney abuse is also difficult to prosecute because of the lack of state statutes criminalizing such abuse. However, an individual that abuses a durable power of attorney may have violated many other state criminal laws, including exploitation, embezzlement, forgery, fraud, larceny, money laundering, or theft. The current methods of prosecuting financial elder abuse claims generally rely on these statutes and the enhanced punishments that some states provide for victims over the age of sixty-five. Part III will analyze

44 Id. at 212 (continuing to explain why so much abuse, which usually takes place in private, often goes completely undetected).
45 See id. at 216 (“it takes a much higher level of capacity to recognize financial abuse than to realize that harmful physical acts are improper”).
46 Black, supra note 9, at 289 (“accusations by demented persons must always be viewed with a certain skepticism, especially since paranoid suspicions are a common incident of dementia” quoting Boyce v. Fernandes, 77 F.3d 946, 948 (7th Cir. 1996)).
47 See STEIGAL, supra note 41, at 5 (Warning of the dangers of using form documents and how-to books without the benefit of counsel).
48 Id. See also Solution to a Problem, supra note 42, at 287 (“Although these principles of fiduciary duty sound clear and unbending, they are frequently difficult to apply in the family context”).
49 LORI A. STEIGEL, DURABLE POWER OF ATTORNEY ABUSE: IT’S A CRIME TOO, 2 (American Bar Association 2008) [hereinafter IT’S A CRIME].
50 See Moore, supra note 13, at 561 (proving a comparison of the laws of all fifty states for
some examples of these statutes and their effectiveness in prosecuting durable power of attorney abuse offenders.

In general, the crimes listed above are often difficult to use when prosecuting elder abuse. The close family ties between victim and abuser and the capacity issues discussed above create substantial issues of proof. In a situation where one person is likely to want to give and the other is likely to feel entitled, the law has an extremely difficult time indentifying fraudulent transactions.\textsuperscript{51} Russ ex. rel Schwartz v. Russ, a Wisconsin case concerning durable power of attorney abuse demonstrates these difficult issues of proof and why financial elder abuse cases are so difficult to prosecute.\textsuperscript{52}

In 1985, at the age of fifty-nine, Johnnie Russ had a stroke that left her in poor health.\textsuperscript{53} Seven years later, she moved in with her adult son Elliot and his wife Doris.\textsuperscript{54} Johnnie and Elliot opened a joint bank account in which they deposited Johnnie’s income, consisting of social security benefits, a small pension, and a few royalties from an oil company.\textsuperscript{55} Seven years later, when Johnnie was seventy-three, Elliot created a Wisconsin Durable Power of Attorney document, without the assistance of a lawyer.\textsuperscript{56} Johnnie signed the first page, allowing Elliot to pay her bills and manage her bank accounts but left the second page blank.\textsuperscript{57} The second page

\textsuperscript{51} See Dressin, supra note 11, at 213 (“In a relationship in which one person is likely to want to give and the other is likely to feel an entitlement to receive, how can the law identify improper transactions?”).
\textsuperscript{52} See Russ ex. rel. Schwarz v. Russ, 302 Wis.2d 264 (2007) (A case in which the Wisconsin Supreme Court assessed the validity of a breach of fiduciary duty claim when the victim and the defendant had a joint checking account).
\textsuperscript{53} Id. at 270.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 271.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
would have authorized Elliot to be compensated for his authority and to have general authority to make gifts. In 2001, Johnnie was admitted to a nursing home. Between 1999 and 2002, Elliot withdrew from the joint checking account for personal expenses, business expenses, and expenses for his wife. In 2002, Johnnie was declared incapacitated and the court dissolved the power of attorney and replaced Elliot with Schwartz, a court appointed guardian. Schwartz brought suit against Elliot on behalf of Johnnie, claiming that Elliot had breached his fiduciary duty to Johnnie by using the joint checking account for personal expenses. Between 1999 and 2002, Johnnie deposited $45,172.44 into the joint checking account. During that same time period, Elliot wrote $34,379.91 in checks.

Elliot claims that he and Johnnie intended for Elliot to have unrestricted access to the account and that the family interchanged their incomes without keeping detailed accounts. He also argues that Johnnie received the benefits of nursing care, a health care provider, medicine, room, board, clothing, and vacations all from the checking account. Finally, Elliot claims that Johnnie stated she wanted to be “a part of the Russ family” and that they could spend her money on the family business.

The Russ family represents a very typical durable power of attorney abuse case. The issues that arise in this case are present in a vast majority of financial elder abuse cases. While the court eventually found that Elliot Russ did not breach his fiduciary duty, the facts

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58 Id.
59 Id.
60 Id.
61 Id. at 272.
62 Id.
63 Id.
64 Id.
65 Id. at 279.
66 See id. at 287. ("The circuit court’s findings provide a sufficient basis for its conclusion that
demonstrate the many difficulties in prosecuting elder abuse cases. First, by the time Johnnie’s
guardian filed suit against Elliot Russ, she had been ruled incapacitated by the court. She could
not, herself, inform the court of the validity of Elliot’s statements about the intent of the joint
checking account. Her incapacity during the time of the abuse also demonstrates that she was
unaware of the abuse or perhaps only had partial awareness of what was happening.67 Johnnie
was also willing to hand over her finances to Elliot, possibly because of her discomfort with
managing money or a belief that her son was better suited to handle such things.68 Second, by
creating a standard durable power of attorney document, Johnnie granted Elliot control over her
bank accounts and financial affairs but did not give him the power to make gifts or provide
compensation. This ambiguity made Elliot’s powers and responsibilities unclear.69 Similarly,
because the document was created without an attorney, Elliot was not informed of his
responsibilities under the power of attorney document, the risks of the joint checking account, or
the risks of such ambiguous powers.

Johnnie never reported abuse herself. If she was aware the Elliot was using the funds in
the joint checking account for personal use, she did not report as such to the authorities. As
discussed above, this is extremely common among elder abuse victims.70 Fourth, Elliot’s defense
that his mother wanted him to have the money to use for the family business is a common

Elliot did not breach his fiduciary duty”).

67 Id. Accord Dressin, supra note 11, at 212 (explaining that many victims are too impaired to
report abuse).
68 See also BROKEN TRUST, supra note 5, at 10 (explaining that women who have no typically
made financial decision may be more trusting of others when seeking financial advice).
69 See also STEIGAL, supra note 48, at 5 (listing unclear standards for agent conduct as one of the
many dangers of a power of attorney document).
70 Skler, supra note 44, at 21 (noting that many victims are afraid of having their loved ones
penalized).
defense to durable power of attorney abuse. Finally, the case demonstrates the problems of proof that make durable power of attorney abuse difficult to prosecute.

While the trial court did reach a factual determination in the case, many of the facts in the case were Elliot’s word versus Schwartz’s (Johnnie’s guardian). Johnnie’s willingness to create a joint checking account and sign the durable power of attorney agreement, while not incapacitated, lends truth to Elliot’s statement. We will never really know if Johnnie intended for Elliot to use those funds in the manner he did or if Elliot took advantage of his mother’s incapacity – a situation far too common in financial elder abuse cases.

Part III – Existing State Statutes

To handle situations similar to the Russell case, many states use a combination of civil remedies and general criminal punishments. Along with statutes against general embezzlement and theft, many states have unique ways to punish financial elder abuse. Some have statutes specifically directed to financial abuse of the elderly and some use enhanced sentences when the victim of financial abuse is elderly. Currently, ten states address the misuse of power of attorney in statutes outside of the criminal realm. However, this confusing mixture of laws does little to solve the many problems of prosecution discussed in Part II. By closely examining different statutes from California, Florida, and Virginia it is obvious how state criminal statutes differ and how they do not account for all the problems in the way of prosecuting financial elder abuse.

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71 Id. ("Since consent is a defense to theft, when the victim is unavailable to testify, prosecution is difficult unless there is evidence to rebut this defense").
72 See Russ ex. rel. Schwarz v. Russ, 302 Wis.2d 264 (2007) (holding that the doctrines of mutual mistake and equitable estoppel banned Johnnie’s claim).
73 See Black, supra note 9, at 303 (providing examples of several state statutes that have enhanced punishments for elderly victims).
74 Solution to a Problem, supra note 42, at 288.
75 See Black, supra note 9, at 289 (explaining that most of these statutes only punish for fraud or theft and do not take into account the victim’s age).
76 See discussion infra p. II.
abuse. For each state listed below, the definitions, if they exist, of embezzlement, exploitation, and theft are discussed along with the varying language of enhanced sentencing guidelines and criminal charges for elder abuse.

A. California

California law contains several criminal provisions for prosecuting elder abuse. California has also passed the Elder Abuse and Dependant Adult Civil Protection Act, which addresses many problems of elder abuse in the civil arena.\(^77\) The definitions below show that while California law goes further than many states in providing a criminal remedy for financial elder abuse, there is still work to be done.

California defines embezzlement as “the fraudulent appropriation of property by a person to whom it has been intrusted[sic].”\(^78\) While California is a unique state that has many additional statutes for the prosecution of financial elder abuse, it is easy to see why the generic theft\(^79\) crimes are inefficient for elder abuse.\(^80\) The definition of theft would not begin to cover the Russ

\(^77\) See generally CAL. WELFARE & INSTITUTIONS CODE §15600 (“It is the intent of the Legislature in enacting this chapter to provide that adult protective services agencies, local long-term care ombudsman programs, and local law enforcement agencies shall receive referrals or complaints from public or private agencies, from any mandated reporter submitting reports pursuant to Section 15630, or from any other source having reasonable cause to know that the welfare of an elder or dependent adult is endangered, and shall take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety.(j) It is the further intent of the Legislature in adding Article 8.5 (commencing with Section 15657) to this chapter to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults”).

\(^78\) CAL. PENAL CODE §503 (West 2009).

\(^79\) See CAL. PENAL CODE §487 (Grand theft is theft committed in any of the following cases: (a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars except as provided in subdivision (b) (b) Notwithstanding subdivision (a), grand theft is committed in any of the following cases: . . . (c) when the property is taken from the person of another (d) When the property taken is any of the following: (1) An automobile. . . . (2) A firearm).

\(^80\) See Solution to a Problem, supra note 42, at 277 (explaining that it would be difficult for a criminal theft statute to be applicable to all forms of exploitation).
case nor would it apply to most situations of durable power of attorney abuse.\textsuperscript{81} Similarly, the overly broad definition of embezzlement offers no guidance for what constitutes “fraudulent appropriation” of funds and provides no method for determining whether or not the fraud has taken place.

The enhanced sentencing guidelines provide additional punishments for crimes where the victim was over the age of sixty-five.\textsuperscript{82} While the enhanced guidelines provide greater tools for punishment, and perhaps greater deterrence, once a criminal defendant has been found guilty, it does nothing for further defining financial elder abuse as a unique crime. The provision of California Penal Code Ch. 12 §368 concerning financial abuse creates a unique crime for financial elder abuse, but does not address many of the issues of durable power of attorney abuse such as breach of fiduciary duty or capacity issues.\textsuperscript{83} It states:

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(d) Any person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates §530.5 proscribing identity theft, with respect to the property or personal identifying information of an elder or a dependant adult, and who knows or reasonably should know that the victim is an elder or a dependant adult, is punishable by imprisonment in a county jail not exceeding one year or in the state prison for two, three, or four years when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value exceeding nine hundred fifty dollars ($950); and by a fine not exceeding one thousand dollars ($1,000), by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, when the moneys, labor, good, services, or real or personal property taken or obtained is of a value not exceeding nine hundred fifty dollars ($950).\textsuperscript{84}
\end{quote}

\textsuperscript{81} See Solution to a Problem, \textit{supra} note 42, at 287 (noting that what constitutes abuse can often be unclear).
\textsuperscript{82} See \textsc{Cal. Penal Code} §502.9 (“Upon conviction of a felony violation under this chapter, the fact that the victim was an elder or dependent person, as defined in Section 288, shall be considered a circumstance in aggravation when imposing a term under subdivision (b) of Section 1170”).
\textsuperscript{83} See \textsc{Cal. Penal Code} §368 (demonstrating that California has a much broader Criminal Elder Abuse statute; these are the provisions that apply to financial elder abuse).
\textsuperscript{84} See \textit{id.} (including section (e) which provides nearly identical language for caregivers who
While California has taken many strides in attempting to criminalize financial elder abuse, even its progressive statutes do not address many of the unique elements of these crimes. The California statute does not take into account many of the subtleties of durable power of attorney abuse. It provides little guidance for the problems of capacity and does not address the negligent misuse of funds. Similarly, it provides no distinction between commercial abuse and personal abuse and the nuances needed for each crime. While many of these provisions are addressed by California’s Elder Abuse and Dependant Adult Civil Protection Act, these provisions need to also be incorporated into the California Penal Code.

B. Florida

Florida, given its large percentage of elderly population, has some of the strictest laws against elder abuse in the country. These examples of Florida’s statutory definitions and laws demonstrate a successful way to fill many of the holes in state criminal laws for durable power of attorney abuse. Although there is no embezzlement definition in the state of Florida, the theft statute goes far beyond the general provisions laid out in other states. Even Florida’s definition of theft applies to durable power of attorney abuse, where an agent has misappropriated funds to commit financial elder abuse).

85 Key Indicators of Well-being, AMERICAN ASSOCIATION OF AGING http://www.aoa.gov/agingstatsdotnet/Main_Site/Data/2008_Documents/Population.aspx (17% of Florida’s population is over the age of 65).
86 See FLA STAT. ANN. 812.014 (West 2009) ((1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently: (a) Deprive the other person of a right to the property or a benefit from the property (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property. (2)(a)1. If the property stolen is value at $100,000 or more or is a semitrailer that was deployed by a law enforcement officer; or. . . .3. If the offender commits any grant theft and: . . . (b) In the course of committing the offense the offender causes damage to the real or personal property of another in excess of $1,000, the offender commits grant theft in the first degree punishable as a felony of the first degree…(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s.775.082, s. 775.083, or s.775.084, if the property stolen is: . . . . 1. a will, codicil, or other testamentary instrument).
his or herself and not for the benefit of the principal. Similarly, Florida’s detailed definition of exploitation fills in many of the loopholes evidenced in California’s definition.87

(8)(a) “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.
(b) “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
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.88

Florida’s extensive definition provides exactly the kind of specificity needed to combat financial elder abuse. Florida’s laws criminalizing elder abuse and its enhanced sentencing guidelines also show how Florida laws address many of the problems presented by other states’ definitions. Florida laws providing enhanced punishments for victims of theft over the age of sixty-five include community service and restitution as well as a reclassification of crimes. The strong punishments not only provide a deterrent against elder abuse but set out a substantial

87 See Cuda v. State, 639 So. 2d 22, 25 (Fla. 1994) (inferring that the level of detail in the Florida statute is because of the Florida Supreme Court decision that “improper or illegal” is too vague of a definition of exploitation). See also Solution to the Problem, supra note 43, at 272 (analyzing Cuda v. State, 639 So.2d 22 (Fla. 1994).
amount of rehabilitative community service as well.\textsuperscript{89}

Florida is one of the few states to criminalize financial elder abuse. The statute below incorporates the above definition of exploitation and provides criminal punishment for several different types of financial elder abuse.

(1) “Exploitation of an elderly person or disabled adult” means:
(a) Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who:
1. Stands in a position of trust and confidence with the elderly person or disabled adult; or
2. Has a business relationship with the elderly person or disabled adult;
(b) Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent; or
(c) Breach of a fiduciary duty to an elderly person or disabled adult by the person's guardian or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of property.
(2)(a) If the funds, assets, or property involved in the exploitation of the elderly

\textsuperscript{89} See FLA. STAT. ANN. 812.0145 (West 2009) ((1) A person who is convicted of theft of more than $1,000 from a person 65 years of age or older shall be ordered by the sentencing judge to make restitution to the victim of such offense and to perform up to 500 hours of community service work. Restitution and community service work shall be in addition to any fine or sentence which may be imposed and shall not be in lieu thereof). (2) Whenever a person is charged with committing theft from a person 65 years of age or older, when he or she knows or has reason to believe that the victim was 65 years of age or older, the offense for which the person is charged shall be reclassified as follows:
(a) If the funds, assets, or property involved in the theft from a person 65 years of age or older is valued at $50,000 or more, the offender commits a felony of the first degree. . .
(b) If the funds, assets, or property involved in the theft from a person 65 years of age or older is valued at $10,000 or more, but less than $50,000, the offender commits a felony of the second degree. . .
(c) If the funds, assets, or property involved in the theft from a person 65 years of age or older is valued at $3000 or more, but less than $10,000, the offender commits a felony of the third degree. . .).
person or disabled adult is valued at $100,000 or more, the offender commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at $20,000 or more, but less than $100,000, the offender commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) If the funds, assets, or property involved in the exploitation of an elderly person or disabled adult is valued at less than $20,000, the offender commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.\(^9\)

While Florida’s comprehensive exploitation definition coupled with specific criminal laws against financial elder abuse allows for the punishment of most types of durable power of attorney abuse, the Florida statute defines “elderly adults” as persons who are physically and mentally disabled so that they cannot provide for their own care.\(^1\) Such a definition leaves out those victims that may be able to provide for their own care but are still vulnerable to some form of financial elder abuse. Florida’s statute, while ideal in many respects, could be re-drafted based on age alone, which would prevent certain older adults from being left out of its criminal protections.\(^2\)

C. Virginia

Virginia offers the least protection to financial elder abuse victims of the three states discussed in this article. The Virginia definition of theft provides for simply larceny for items not taken directly from a person.\(^3\) This definition offers no guidance for theft under a durable

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\(^1\) Id. at 825.101(5).
\(^2\) See Moore, supra note 13, at 527 (arguing for elder abuse statutes based on age as a way of extending protection to all elderly regardless of their ability to complete daily tasks).
\(^3\) Va. Code Ann. §18.2-95 (West 2009) (Any person who (i) commits larceny from the person of another of money or other thing of value of $5 or more, (ii) commits simple larceny not from the person of another of goods and chattels of the value of $200 or more, or (iii) commits simple larceny not from the person of another of any firearm, regardless of the firearm's value, shall be guilty of grand larceny, punishable by imprisonment in a state correctional facility for not less
power of attorney or any of the other more complex versions of theft. The Virginia definition of
embezzlement provides the most protection for durable power of attorney victims.

If any person wrongfully and fraudulently use, dispose of, conceal or embezzle
any money, bill, note, check, order, draft, bond, receipt, bill of lading or any other
personal property, tangible or intangible, which he shall have received for another
or for his employer, principal or bailor, or by virtue of his office, trust, or
employment, or which shall have been entrusted or delivered to him by another or
by any court, corporation or company, he shall be guilty of embezzlement. Proof
of embezzlement shall be sufficient to sustain the charge of larceny. 94

However, similar to most state laws, a generic embezzlement definition provides for none
of the special issues concerning durable power of attorney abuse. Had the Russell case 95 been tried
under the Virginia embezzlement statute, the court would have had no guidance as to whether the
durable power of attorney document that allowed Elliot to manage the joint account but not to
give gifts constituted either “wrongful” or “fraudulent” use of his mother’s funds. The Virginia
theft and embezzlement statute clearly emphasizes the point that there is a subtle but important
distinction between indirect forms of exploitation and traditional theft. 96

Virginia provides no enhanced sentencing for elderly victims, even though the United
States Sentencing Guidelines enhance the sentence for vulnerable victims. 97 A vulnerable victim
is one “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise
particularly susceptible to the criminal conduct.” 98 By not providing enhanced sentencing,
Virginia sends the signal that elder victims are not vulnerable and do not deserve special

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94 V.A. STAT. ANN. §18.2-111 (West 2009)
95 See discussion infra p. II.
96 See Solution to a Problem, supra note 42, at 291 (“In the average theft prosecution, the
prosecution does not need to even consider the possibility that the victim consented to the asset
transfer”).
98 Id. at cmt. n.2.
protection. While Virginia does have a criminal elder abuse statute, the statute does not mention financial abuse:

A. It shall be unlawful for any responsible person to abuse or neglect any incapacitated adult as defined in this section. . . .

B. Any responsible person who abuses or neglects an incapacitated adult in violation of this section and the abuse or neglect results in serious bodily injury or disease to the incapacitated adult is guilty of a Class 4 felony. Any responsible person who abuses or neglects an incapacitated adult in violation of this section and the abuse or neglect results in the death of the incapacitated adult is guilty of a Class 3 felony . . .

D. No responsible person shall be in violation of this section whose conduct was (i) in accordance with the informed consent of the incapacitated person or a person authorized to consent on his behalf; (ii) in accordance with a declaration by the incapacitated person under the Natural Death Act of Virginia (§ 54.1-2981 et seq.) or with the provisions of a valid medical power of attorney; (iii) in accordance with the wishes of the incapacitated person or a person authorized to consent on behalf of the incapacitated person and in accord with the tenets and practices of a church or religious denomination; (iv) incident to necessary movement of, placement of or protection from harm to the incapacitated person; or (v) a bona fide, recognized or approved practice to provide medical care.

Criminalizing physical elder abuse is a necessary and important goal, but under Virginia law there are no penalties for financially abusing the elderly. When compared to the Florida statute,

99 Va. Code Ann. §18.2-369 (West 2009) (“C. For purposes of this section: “Abuse” means (i) knowing and willful conduct that causes physical injury or pain or (ii) knowing and willful use of physical restraint, including confinement, as punishment, for convenience or as a substitute for treatment, except where such conduct or physical restraint, including confinement, is a part of care or treatment and is in furtherance of the health and safety of the incapacitated person. “Incapacitated adult” means any person 18 years or older who is impaired by reason of mental illness, mental retardation, physical illness or disability, advanced age or other causes to the extent the adult lacks sufficient understanding or capacity to make, communicate or carry out reasonable decisions concerning his well-being. “Neglect” means the knowing and willful failure by a responsible person to provide treatment, care, goods or services which results in injury to the health or endangers the safety of an incapacitated adult. “Responsible person” means a person who has responsibility for the care, custody or control of an incapacitated person by operation of law or who has assumed such responsibility voluntarily, by contract or in fact. “Serious bodily injury or disease” shall include but not be limited to (i) disfigurement, (ii) a fracture, (iii) a severe burn or laceration, (iv) mutilation, (v) maiming, or (vi) life - threatening internal injuries or conditions, whether or not caused by trauma”).

100 Va. Code Ann. §18.2-369 (West 2009)
the differences in specificity are obvious. In Virginia, the perpetrator can only be found guilty under general theft and embezzlement statutes, with no additional punishments to take into account the vulnerable nature of their victim. During the 2011 legislative session, Del. Watts introduced a bill expressly criminalizing financial abuse against any vulnerable adult or adult over the age of sixty.\textsuperscript{101} The bill never made it out of committee in the Virginia House of Delegates.\textsuperscript{102}

Current laws and the problems accompanying financial elder abuse make it unlikely that prosecutors will take on many financial elder abuse cases.\textsuperscript{103} Without reform, state laws continue to allow the various forms of durable power of attorney abuse and other financial elder abuse crimes to slip through the cracks.\textsuperscript{104} Until states criminalize financial elder abuse, there is little protection for a population that is the least likely to defend themselves against these appalling crimes.

While most states do not have ideal criminal statutes for penalizing financial elder abuse, many have made strides in criminalizing physical abuse and creating multi-disciplinary teams to help prevent abuse.\textsuperscript{105} Similarly, attempts to pass national elder abuse legislation culminated with the passing of the Elder Justice Act, which was signed into law alongside the Patient Protection and Affordable Care Act.\textsuperscript{106} The Elder Justice Act, which was first introduced into Congress in 2003, authorizes $777 million dollars over four years to address the various problems states are

\begin{flushleft}
\textsuperscript{102} Id.
\textsuperscript{103} Black, supra note 9, at 307.
\textsuperscript{104} See id. at 308 (arguing that a state’s criminal code does not offer enough deterrence for crimes against older persons).
\textsuperscript{105} BROKEN TRUST, supra note 5, at 9.
\textsuperscript{106} Elder Justice Coalition, Elder Justice Act/Patient Safety Abuse and Prevention Act Signed into Law, ELDER JUSTICE COALITION \url{www.elderjusticecoalition.com} (last visited December 2, 2010).
\end{flushleft}
facing in preventing elder abuse. The Act, among many other things, provides twenty-six million dollars for establishing forensic centers to help develop forensic training specific to the various areas of elder abuse. The Act also mandates that long term care facilities report suspected abuse and creates criminal penalties if such an institution fires an employee for reporting abuse. While the version of the Act that became law earlier this year does not contain any specific provisions for criminalizing financial elder abuse, alternate versions of the bill contained provisions giving six million dollars to local prosecutors and eight million to state prosecutors and courts to provide additional training for prosecutors and law enforcement in the area of elder abuse. These provisions are not currently part of the recently passed Elder Justice Act, but they have enormous potential to provide the funding and the training needed to enforce the enhanced criminal statutes for financial elder abuse.

Part IV – The Need for Uniform Criminal Financial Abuse Laws

Criminal law is widely thought of as a manifestation of society’s disapproval of an act. When an act is criminalized, it sends a message that society condones this predatory behavior and lets victims know they are not powerless. While many other intelligent and important remedies have been suggested for decreasing the amount of financial elder abuse and durable power of attorney abuse outside of the criminal court system, criminal law provides a strong

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108 Id.
109 Id.
112 See Moore, supra note 13, at 525 (explaining that by criminalizing elder abuse, society makes it clear that such abuse is unacceptable).
113 See Solution to a Problem, supra note 42, at 315-16 (suggesting that agents have to register
deterrent and the threat of imprisonment for abusers of the elderly. Given the vast discrepancies in state laws concerning theft, elder abuse, and sentencing guidelines, it is clear that we need uniform state laws criminalizing financial elder abuse that especially help to deter durable power of attorney abuse. However, concerns over personal autonomy, ageist stereotypes, and over-criminalization have deterred many from pushing for more stringent laws.\(^\text{114}\)

Despite these concerns, there is still a need for uniform laws in every state criminalizing the financial abuse of the elderly. Forcing prosecutors to pick and choose from among various statutes, located in different penal code sections and ranging from vague to irrelevant allows abusers to escape charges or avoid them altogether. An ideal statute criminalizing financial elder abuse would contain the following:

\textit{a) A definition of financial elder abuse}

A workable definition of financial elder abuse should include that financial elder abuse is the illegal taking, misuse, or concealment of funds, property of assets. It should include an expansive definition of exploitation, such as that included in the Florida statute.\(^\text{115}\) Another concise but precise definition can be found in the 2006 Older Americans Act, which defines exploitation as:

\begin{quote}
The fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an older individual for monetary or personal benefit, profit, or gain or that results in depriving an older individual of rightful access to, or use of, benefits, resources,
\end{quote}

\begin{footnotesize}\begin{enumerate}
\item See generally \textit{Solution to a Problem}, supra note 42, at 290-307 (identifying three reasons why current elder abuse are ineffective: the difficulty of criminalization, ageist stereotyping, lack of personal autonomy).
\item \textsc{Fla. Stat. Ann.} \textsection{} 415.102 (8)(a) (West 2009).
\end{enumerate}\end{footnotesize}
belonging, or assets.\textsuperscript{116}

\textit{b) A definition of elder that distinguishes between age and vulnerability}

Legendary older Americans advocate Robert Butler describes in his novel \textit{Why Survive?: Being Old in America} that “physiological indicators show a greater range from the mean in old age than in any other age group. . . . Old people actually become more diverse rather than more similar with advancing years.”\textsuperscript{117} States vary in whether or not to use elder, meaning a person of 65 years, or to use a more general term such as vulnerable; in fact, all three statutes above use a different term.\textsuperscript{118} A statute that defines “elder” by vulnerability casts the widest net and allows the most protections for elderly victims without giving in to aging stereotypes.\textsuperscript{119}

\textit{c) Clear distinctions between the types of conduct found in financial elder abuse cases:}

(1) Breach of Fiduciary Duty

While some states, such as Florida, contain provisions addressing these crimes under theft or exploitation statutes, it belongs in a financial elder abuse criminal statute. Breach of fiduciary duty by an accountant against his thirty-five year old client is not the same as breach of a fiduciary duty by a son using his mother’s durable power of attorney. The breach of fiduciary duty crime can be divided into three distinct subsections:

(a) Unauthorized transfer of assets/Self-Dealing – When an agent transfers funds from the principal’s account, makes changes to the last will and testament, and generally uses the power of attorney to use the principal’s funds for the agent’s well being.

\begin{itemize}
    \item \textsuperscript{116} \textit{Broken Trust}, supra note 5, at 7.
    \item \textsuperscript{117} Robert N. Butler, \textit{Why Survive?: Growing Old in America} 7 (1975).
    \item \textsuperscript{119} \textit{See} \textit{A Solution to a Problem}, supra note 42, at 303 (arguing against all enhanced sentencing for the elderly because it is based on many ageist stereotypes. Instead argues for enhanced sentencing for the vulnerable only, regardless of age).
\end{itemize}
(b) Intentional breach of fiduciary duty/Against the Principal’s wishes –
When the agent purposefully and knowingly commits an action against the principal’s expressed wishes according to the power of attorney document or trust.

(c) Negligent misuse of funds/Actions beyond the scope\textsuperscript{120} - Any time an agent goes beyond the scope of the powers allowed in a durable power of attorney document or within a trust, or when an agent does not use funds to care for the principal as stipulated.

(2) Commercial Financial Elder Abuse provisions\textsuperscript{121}

d) Penalties that reflect enhanced sentencing guidelines for vulnerable victims
The U.S. Sentencing guide recommends increasing sentencing by two levels if the defendant knew the victim of an offense was a vulnerable victim.\textsuperscript{122} Many states provide enhanced penalties for crimes where the victim meets the statutory definition of vulnerable or is over the age of sixty-five.\textsuperscript{123} Penalties attached to financial elder abuse criminal statutes should take the general crime, such as theft, embezzlement, or fraud and apply the enhanced sentencing as stipulated by the guidelines. Shelby Moore, in Remembering the Forgotten Ones, argues for a two-tiered sentencing structure.\textsuperscript{124} She recommends one tier of enhanced penalties if the

\textsuperscript{120} See Whitton, supra note 23, at 10-13 (division of types of abuse based on the types laid out by Linda Whitton); Solution to a Problem, supra note 42, at 311-313 (arguing that each type of financial elder abuse needs to be treated separately by the legislature and suggests the following divisions: Transfer of Assets away from the victim and use of assets; intentional breach of fiduciary duty; consumer fraud and scams; and negligent mishandling of funds).

\textsuperscript{121} Not discussed because this falls outside the scope of this paper. An ideal statute would protect against both predatory lending and consumer fraud.

\textsuperscript{122} U.S. SENTENCING GUIDELINES MANUAL §3 A1.1(b)(1) (2000).

\textsuperscript{123} See e.g. FLA. STATE. ANN. 812.0145 (providing enhanced penalties when the victim is over the age of 65); CAL. PENAL CODE §502.9 (listing an elderly victim as an aggravating circumstance for the purposes of sentencing). See also Solution to a Problem, supra note 42, at 294 (listing 14 states as having enhanced sentencing for older adults based solely on age and not the vulnerability of the person).

\textsuperscript{124} Moore, supra note 13, at 529.
defendant abused a public of private trust and another if the victim was simply elderly.125

a. What this solves

The suggestions offered above attempt to address many of the issues not addressed by
current state statutes. The issues of incapacitation, law enforcement’s aversion to financial elder
abuse, the close family ties generally involved, and the failure to report abuse all have the
potential to be improved with state laws criminalizing financial elder abuse. A criminal financial
elder abuse statute can lay out provisions for incapacitated victims as well as provide different
definitions of elderly, from an age-based determination to level of disability. With a clearer
statute and procedures, law enforcement officials can better understand the different aspects of
financial abuse and will be less likely to refer complainants to the civil system. While elderly
victims of abuse may still be reluctant to report family members, by defining financial elder
abuse as a crime, fewer elders will consider financial elder abuse just a usual cost of doing
business. Similarly, other family members of the victim will be better able to recognize financial
abuse as a crime and more likely to report the offense.

b. What this does not solve

Criminalizing financial elder abuse does not solve every problem related to financial
ever abuse. Creating new laws surrounding financial elder abuse does little to address the issues
of personal autonomy, ageist stereotypes, and the substantial issues of proof involved in so many
cases. The stricter the laws governing financial abuse, the less personal autonomy many elders
will have with handling their finances.126 By placing so many restrictions on what elders can and

125 See id. (using an instance where the court applied increased sentencing both because the
victims were elderly and because the defendant abused a position of trust).
126 See Eggert, supra note 4, at 719 (“it is difficult to balance protecting their financial assets and
income with protecting their autonomy and freedom to make their own decisions unencumbered
by well-intentioned, but excessive restrictions on their ability to borrow, buy, sell, or give away
cannot do, the legislature reinforces ageist stereotypes and paints all elder individuals with one sweeping brush. Along with these significant problems, no set of laws can ever completely solve the difficult problems of proof that exist in many personal financial elder abuse cases. The relationships between family members is extremely complicated and nuanced, and the prevalence of incapacitated or mentally deficient victims will continue to exist. However, despite these drawbacks, uniform state laws criminalizing financial elder abuse would provide a greater deterrent against abuse and make it much more likely that prosecutors everywhere will take on financial elder abuse and its vulnerable victims.

Many of the other proposed solutions, from widespread acceptance of the Uniform Durable Power of Attorney Act to an emphasis on the risks of the power of attorney document, need to take place to help stop many of these crimes before they even begin. Legislation like the Elder Justice Act, once funded by Congress, could go a long way in helping to create multidisciplinary teams of lawyers, gerontologists, scholars, and administrators that can create policies to help stop all kinds of elder abuse.

V – Conclusion

Financial elder abuse is the fastest growing form of elder abuse in the county. As the population of senior citizens continues to rise, the need to protect the elderly from such exploitation grows every day. Specifically, durable power of attorney abuse exemplifies unique problems such as capacity issues, the close family ties between victim and abuser, and difficult issues of proof that make prosecuting such cases extremely difficult.

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127 See id. (emphasizing the challenges of drafting legislation that encompasses the differences in the elderly population). See also Solution to a Problem, supra note 42, at 292-303 (discussing the ageist stereotyping in current legislation and sentencing guidelines).

Current state laws do not provide an effective model for prosecuting financial elder abuse. Most financial elder abuse is prosecuted under civil statutes, general theft statutes, and only some states provide enhanced penalties for elder or vulnerable victims. The weaknesses of these laws create too many loopholes for abusers to slip through and demonstrate a need to criminalize financial elder abuse in every state.

A model criminal financial elder abuse statute would contain a working definition of financial elder abuse and a definition of elder, vulnerable adult, and disabled adult. A model statute would also contain clear distinctions between the types of conduct found in financial elder abuse cases, such as the types of breach of fiduciary duty, and commercial elder abuse such as consumer fraud. Finally, such a statute would contain enhanced sentencing guidelines for vulnerable victims.

While criminalizing financial elder abuse does not solve everything, it solves many of the problems currently facing prosecutors when it comes to financial elder abuse.129 Currently, victims of elder abuse are more likely to worsen or experience mental and physical illness.130 Victims are more likely to have trouble affording medications or other daily necessities.131 The rise of financial elder abuse is a serious concern with the potential to affect all generations, not just older adults. It is time for legislatures to pass laws criminalizing financial elder abuse and stop the spread of this disturbing trend.

129 See Moore, supra note 13, at 532 (“To effectively fight physical, emotional, and financial abuse, all states need a uniform system of strict, comprehensive laws”).
130 BROKEN TRUST, supra note 5, at 30.
131 Id.