

What If Granny Wants to Gamble? Balancing Autonomy and Vulnerability in the Golden Years

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I. INTRODUCTION

*When I am an old woman I shall wear purple
With a red hat which doesn't go, and doesn't suit me.
And I shall spend my pension on brandy and summer gloves
And satin sandals, and say we've no money for butter.*¹

In the late 1990s, the words of this poem inspired a global social organization known as the “Red Hat Society.” Women in the Red Hat Society “victoriously celebrate turning 50 and entering into the next phase of their lives.”² Their signature outfit consists of a purple ensemble and a red hat (that doesn’t match). The women in this Society “embrace[e] a renewed outlook on life filled with fun and friendship, fulfilling lifelong dreams.”³

The poet, Jenny Joseph, in dressing her “old woman” in the rich but mismatched palette of red and purple, highlights accurately the conflicting perceptions that our society holds today about older women in America.

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¹ These are the first four lines of a poem entitled “Warning,” written in 1961 by Jenny Joseph. For the entire poem see Jenny Joseph, *Warning*, SCOTTISH POETRY LIBRARY, <https://www.scottishpoetrylibrary.org.uk/poem/warning/> (last visited May 5, 2020).

² *The Red Hat Revolution*, RED HAT SOC’Y, https://www.redhatsociety.com/page/red_hat_revolution (last visited May 5, 2020).

³ *Id.* We all know, of course, that grown men would never join a society in which they parade around in funny red hats — with the exception of the red fez worn by Shriners at their parades and functions. See *The Fez*, SHRINERS INT’L (June 9, 2014), <https://www.shrinersinternational.org/Shriners/History/Fez>.

A. Women in Purple

First, Ms. Joseph's "old woman" chooses to wear purple. The color purple has historically been associated with royalty, wealth, and power. In ancient Rome, only the emperors and other members of the elite classes were allowed to wear togas that had purple borders.⁴ Julius Caesar was said to be the first ruler of Rome to be allowed to wear a toga that was entirely purple.⁵

But the royal color of purple was not consigned exclusively to men. History is replete with many women – older women – who have donned this royal color and whose lives have been imbued with all of the power that the color signifies.

Queen Elizabeth I of England wore a mantle of purple velvet when she was crowned Queen in 1559.⁶ She ruled England for almost 45 years until her death at age 69 and an entire era bears her name.⁷ Elizabeth I followed the lead of her father, King Henry VIII, by enacting a series of "sumptuary laws"⁸ that stated, among other things, that only "the King,

⁴ Mark Cartwright, *Tyrian Purple*, ANCIENT HIST. ENCYCLOPEDIA (July 21, 2016), https://www.ancient.eu/Tyrian_Purple/.

⁵ *Id.* Part of the reason that the color purple was reserved for the wealthy is that it was so expensive to produce purple dye. Purple dye in ancient times was extracted from a small mollusk-type shellfish that lived in the Mediterranean Sea and it took about 10,000 of these small creatures to produce just one gram of the dye (which in turn was only enough to color the hem of a garment).

⁶ A.L. Rowse, *The Coronation of Queen Elizabeth*, HIST. TODAY (May 5, 1953), <https://www.historytoday.com/archive/coronation-queen-elizabeth>.

⁷ *Queen Elizabeth I (1533-1603)*, ELIZABETH I, <https://www.elizabethi.org/> (last visited May 5, 2020). Elizabeth I, the daughter of King Henry VIII and his second wife, Anne Boleyn, was born on September 7, 1533. *Id.* She was crowned in January 1559. Rowse, *supra* note 6. She died on March 24, 1603. *Little-Known or Unknown Facts Regarding Queen Elizabeth I's Death*, ROYAL MUSEUMS GREENWICH, <https://www.rmg.co.uk/discover/explore/little-known-or-unknown-facts-regarding-queen-elizabeth-is-death> (last visited May 5, 2020). The Elizabethan Era is sometimes referred to as a "golden age." *Daily Life in the Elizabethan Era*, ENCYCLOPEDIA.COM (Jan. 22, 2020), <https://www.encyclopedia.com/humanities/news-wires-white-papers-and-books/daily-life-elizabethan-era>.

⁸ "Sumptuary legislation can be defined as a set of regulations, passed down by legislators through statutory law and parliamentary proclamations, that sought to regulate society by dictating what contemporaries could own or wear based on their position within society." Leah Kirtio, *The inordinate excess in apparel: Sumptuary Legislation in Tudor England*, 3 CONSTELLATIONS 17, 17 (2011), <https://journals.library.ualberta.ca/constellations/index.php/constellations/article/view/16283/13071>. "[F]or centuries, sumptuary laws prescribing detailed regulations about who could wear certain attire and when they could wear it were a fact of life in societies around the globe." Lucille M. Ponte, *Echoes of the Sumptuary Impulse: Considering the Threads of Social Identity, Economic Protectionism, and Public Morality in the Proposed Design Piracy Prohibition Act*, 12 VAND. J. ENT. & TECH. L. 45, 48 (2009).

Queen, King's mother, children, brethren, and sisters, uncles, aunts" were allowed to wear "[a]ny silk of the color purple."⁹

The royal color purple was also worn by Victoria I, Queen of the United Kingdom of England and Ireland and Empress of India.¹⁰ Queen Victoria reigned for 63 years and 216 days until her death at age 81.¹¹ She also lent her name to an era.¹²

And, of course, Queen Elizabeth II, the longest-reigning English monarch, who at age 92 is celebrating the 67th year of her reign, also enjoys wearing the color purple.¹³

So, aging for women (as well as men) can bring the power born of experience, maturity, creativity, and wisdom. In our own lifetimes we have witnessed older women who have figuratively donned the purple robe of power:

1) Golda Meir came out of retirement in 1969 to be elected as the first woman Prime Minister of Israel. She was age 71 at the time.¹⁴

2) Ellen Johnson Sirleaf became President of Liberia at age 68. She is the first elected female head of state in Africa as well as a winner of the Nobel Peace Prize.¹⁵

⁹ Maggie Secara, *Who Wears What I*, ELIZABETHAN SUMPTUARY STATUTES (July 14, 2001), <http://elizabethan.org/sumptuary/who-wears-what.html>.

¹⁰ In 1862, the purple dress that Queen Victoria wore to the Royal Exhibition was colored with one of the world's first synthetically-created dyes. Anni Turnbull, *Mauve, an unexpected discovery*, MUSEUM OF APPLIED ARTS & SCI. (Oct. 2, 2013), <https://maas.museum/inside-the-collection/2013/10/02/mauve-an-unexpected-discovery/>.

¹¹ Queen Victoria was born on May 24, 1819. She ruled England from 1837 until her death in 1901. *Victoria (r. 1837-1901)*, THE ROYAL HOUSEHOLD, <https://www.royal.uk/queen-victoria> (last visited May 5, 2020).

¹² "Queen Victoria (1819-1901) was the first English monarch to see her name given to the period of her reign whilst still living." Anne Shepherd, *Overview of the Victorian Era*, HIST. IN FOCUS (Apr. 2001), <https://www.history.ac.uk/ihr/Focus/Victorians/article.html>.

¹³ Elizabeth II was born on April 21, 1926. She became queen when her father died in February 1952 and she was crowned on June 2, 1953. *Queen Elizabeth II Biography*, BIOGRAPHY.COM (Jan. 13, 2020), <https://www.biography.com/royalty/queen-elizabeth-ii>. For pictures of Queen Elizabeth II wearing the color purple, see *The Queen's best fashion moments in pink and purple*, HELLO!, Apr. 21, 2019, <https://ca.hellomagazine.com/fashion/02018042044521/queen-elizabeth-best-fashion-moments-pink-purple/1/>.

¹⁴ *Golda Meir Biography*, BIOGRAPHY.COM (Aug. 7, 2019), <https://www.biography.com/political-figure/golda-meir>.

¹⁵ *Biographical: Ellen Johnson Sirleaf*, THE NOBEL PRIZE (Feb. 17, 2020), https://www.nobelprize.org/prizes/peace/2011/johnson_sirleaf/biographical/; *Ellen Johnson Sirleaf*, ENCYCLOPEDIA BRITANNICA (Oct. 25, 2019), <https://www.britannica.com/biography/Ellen-Johnson-Sirleaf>.

3) Angela Merkel, now age 65, was the first female Chancellor of Germany¹⁶ and Time Magazine's "Person of the Year" for 2015.¹⁷

And, of course, four very strong and powerful American women have all donned the robe of power, albeit a black one rather than a purple one: Justices Sonya Sotomayor,¹⁸ Elena Kagan,¹⁹ Ruth Bader Ginsburg,²⁰ and Sandra Day O'Connor.²¹ All four of these women were age 50 or older when they were appointed to the Supreme Court of the United States.

B. Women in Red

There is another side to the story of aging, however. Unfortunately, the canvas for many older women in America is not painted purple – that is, they do not lead lives of power and wisdom.

You will recall that the poet Jenny Joseph also dresses her old woman in a red hat that doesn't match. Red is a color with many symbolic meanings but included among them are danger, passion, rage, and madness.²² And in fact, Jenny Joseph's old woman intends to do things that could perhaps be characterized as "crazy" or "mad." Recall that she is planning to spend her pension on brandy and pretty clothes rather than on butter.

She has additional plans. Imagine if you came across this woman on the street:

*I shall sit down on the pavement when I am tired,
And gobble up samples in shops and press alarm bells,
And run my stick along the public railings,
And make up for the sobriety of my youth.*²³

¹⁶ Nicki Peter Petrikowski, *Angela Merkel: Chancellor of Germany*, ENCYCLOPEDIA BRITANNICA (Nov. 27, 2019), <https://www.britannica.com/biography/Angela-Merkel>.

¹⁷ Karl Vick & Simon Shuster, *Person of the Year: Angela Merkel*, TIME, <https://time.com/time-person-of-the-year-2015-angela-merkel/> (last visited May 5, 2020).

¹⁸ Justice Sotomayor was born on June 25, 1954 and confirmed as Associate Justice in August 2009. *Biographies of the Justices*, SCOTUS BLOG, <https://www.scotusblog.com/reference/educational-resources/biographies-of-the-justices/> (last visited May 5, 2020).

¹⁹ Justice Kagan was born on April 28, 1960 and confirmed as Associate Justice and sworn in on August 7, 2010. *Id.*

²⁰ Justice Ginsburg was born on March 15, 1933 and confirmed as Associate Justice in August 1993. *Id.*

²¹ Justice O'Connor was born on March 26, 1930 and confirmed as Associate Justice on September 21, 1981. She retired from the Supreme Court on January 31, 2006. *Id.*

²² *Color Meanings & Symbolism*, ART THERAPY, <http://www.arttherapyblog.com/online/color-meanings-symbolism/> (last visited May 5, 2020).

²³ Joseph, *supra* note 1.

When older people – particularly older women – engage in these types of behaviors, those around them begin to worry. And rightfully they should, because for far too many older women, their lives and freedom are over-shadowed by vulnerability, isolation, and our 20th century version of “madness” known popularly as “neurocognitive disorder”²⁴ or “dementia.”

C. Elder Financial Abuse as a Women’s Issue

You may wonder why I am highlighting the issues about which I am speaking today as “women’s issues.” Statistics show us that there is a rather large gender gap in the population and lifestyles of older Americans. In the general U.S. population the genders are almost equally divided with 97 males per every 100 females. But as we age, the number of women begins to outstrip the number of men so that by age 85, women outnumber men almost 2 to 1.²⁵

Additionally, many more women than men are “alone” in their old age in that they are widowed, unmarried, divorced, or single. U.S. Census Bureau statistics show us that, for those people age 65 and over who are not institutionalized (that is, those who do not live in a setting such as a nursing home), only 20% of the men live alone, while 35% of the women live alone.²⁶ And the gap increases with age such that 46% (almost half) of women age 75 and older live alone, compared to only 27% of men.²⁷

²⁴ The fifth version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), published by the American Psychiatric Association in 2013, replaced the term “dementia” with “neurocognitive disorder.” The theory was that the term “dementia” was stigmatizing for older adults. Neurocognitive disorders are classified as “minor” or “major.” “Major and mild neurocognitive disorders exist on a spectrum of cognitive and functional impairment. Major neurocognitive disorders corresponds to the condition referred to in DSM-IV as dementia.” George T. Grossberg, *The DSM-5 and Neurocognitive Disorders: Diagnosis and Treatment Options*, PSYCHIATRY & BEHAVIORAL HEALTH LEARNING NETWORK (July 8, 2015), <https://www.psychcongress.com/article/dsm-5-and-neurocognitive-disorder-diagnosis-and-treatment-options>.

²⁵ Andrew W. Roberts et al., *The Population Age 65 and Older in the United States: 2016*, AM. COMMUNITY SURV. REP., 1, 3 fig. 1 (Oct. 2018), <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-38.pdf>.

²⁶ Loraine A West et al., *65+ in the United States: 2010*, U.S. CENSUS BUREAU (June 2014), <https://www.census.gov/content/dam/Census/library/publications/2014/demo/p23-212.pdf>.

²⁷ Paula Span, *The Gray Gender Gap: Older Women Are Likelier to Go It Alone*, N.Y. TIMES, Oct. 7, 2016, <https://www.nytimes.com/2016/10/11/health/marital-status-elderly-health.html>. See also Renee Stepler, *Smaller Share of Women Ages 65 and Older are Living Alone*, PEW RES. CTR., § 1 (Feb. 18, 2016), <http://www.pewsocialtrends.org/2016/02/18/1-gender-gap-in-share-of-older-adults-living-alone-narrows/> (showing the gap between the percentage of men living alone and the percentage of women living alone has declined overall since 1990).

Sometimes, to fill the void, people who live alone engage in unusual behaviors.

Our poet, Jenny Joseph, speaks (with glee) of the things that older women can do:

*You can wear terrible shirts and grow more fat,
And eat three pounds of sausages at a go,
Or only bread and pickle for a week,
And hoard pens and pencils and beer mats and things in
boxes.*²⁸

So what happens today when an older woman wants, for example, to “hoard pens and pencils and beer mats and [other] things in boxes”? Will she have the freedom to do these things . . . or will she be considered “mad”?

1. *Huguette Clark*

Let’s look, for example, at the life of this woman in purple, whose name is Huguette Clark.²⁹ Huguette Clark could arguably have been labelled a “hoarder,” although I doubt that word had the same notoriety in the 1960s (when Huguette Clark was in middle age or when Jenny Joseph wrote her poem) as it does now.³⁰

When Huguette Clark died in 2011 at age 104, she owned a collection of dolls: over 1100 dolls, worth about \$1.7 million.³¹ These dolls

²⁸ Joseph, *supra* note 1.

²⁹ *Self Portrait*, EMPTY MANSIONS, <http://www.emptymansionsbook.com/self-portraits> (last visited May 5, 2020). The information in this lecture pertaining to Huguette Clark is derived primarily from Bill Dedman and Paul Clark Newell, Jr.’s book, *Empty Mansions: The Mysterious Life of Huguette Clark and the Spending of a Great American Fortune*. The slide shown at this point in the lecture was a self-portrait of Ms. Clark wearing a purple dress that was taken with Ms. Clark’s own Polaroid camera.

³⁰ See Cristie Glasheen et al., *Impact of the DSM-IV to DSM-5 Changes on the National Survey on Drug Use and Health*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. 1, 137 (June 2016). The 2013 update of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) now actually lists “hoarding disorder” as a psychiatric condition characterized by “[p]ersistent difficulty discarding or parting with possessions, regardless of their actual value.” *Id.*; David Mataix-Cols et al., *Hoarding Disorder: A New Diagnosis for DSM-V?*, DEPRESSION & ANXIETY 1, 7 (2010) (stating that the DSM-IV did not list this behavior as a separate disorder but rather as one of the eight criteria for Obsessive-Compulsive Personality Disorder).

³¹ Susan Downing, *Huguette Clark and the ‘FBI’ Dollhouse*, DOLLHOUSE DECORATING (Feb. 22, 2019), <http://dollhousedecoratingblog.com/2019/02/huguette-clark-and-the-fbi-dollhouse.html>. Huguette Clark’s personal assistant reported at one point that there were 1157 dolls in her apartment. BILL DEDMAN & PAUL CLARK NEWELL, JR., *EMPTY MANSIONS: THE MYSTERIOUS LIFE OF HUGUETTE CLARK AND THE SPENDING OF A GREAT AMERICAN FORTUNE* 244 (2014).

were well-cared-for as Mrs. Clark³² commissioned outfits for them from designers like Christian Dior³³ and she had numerous dollhouses designed for them by famous architects.³⁴

Mrs. Clark owned three high-end Fifth Avenue apartments in New York City.³⁵ She also owned mansions in California³⁶ and Connecticut.³⁷ She could afford such opulent surroundings because she had inherited millions of dollars from her father, who was a copper baron.³⁸ But Huguette was not living in any of these luxurious homes when she died. Many years prior to her death, she was admitted to New York's Doctor's Hospital.³⁹ At that time she was painfully thin and had numerous cancerous lesions on her face.⁴⁰ She underwent surgeries⁴¹ and was then urged by her doctors to go home, but she chose to remain in her hospital room.⁴² She only left that room when Doctor's Hospital merged

³² DEDMAN & NEWELL, *supra* note 31, at 140. Huguette Clark was briefly married but secured a divorce two years into her marriage after a one-year separation from her husband. "After her divorce, Huguette reclaimed her maiden name, but she kept the 'Mrs.,' indicating perhaps that she was no longer in the market for a husband." *Id.* at 159.

³³ One portion of *Empty Mansions* describes how the then-reclusive 50-year-old Huguette Clark attended a House of Christian Dior showing in order to see dresses for her dolls. *Id.* at 177. She ordered expensive clothes made of expensive fabrics from Paris. *Id.* at 180. Huguette Clark's close friend, Suzanne Pierre, once stated, "[h]er dolls are her closest companions." *Id.* at 227.

³⁴ *Id.* at 177-80, 182-83.

³⁵ After her death, these apartments sold for a total of \$54.8 million. *Id.* at 348.

³⁶ This home in Santa Barbara, California, called Bellosguardo, was built by Huguette's mother in 1933-37. *Id.* at 193-94.

³⁷ Her Connecticut mansion, called Le Beau Chateau, sold after her death for \$14 million. *Id.* at 349.

³⁸ Huguette Clark was the daughter of multimillionaire W.A. Clark. *Id.* at 3.

³⁹ As described in *Empty Mansions*, Huguette Clark chose Doctor's Hospital "which wasn't Manhattan's finest but was close to a friend's apartment." *Id.* at xxvi. Reporter Dedman describes Doctor's Hospital as follows: it "was better known as a fashionable treatment centre for the well-to-do, a society hospital, a great place for a facelift or for drying out. Michael Jackson had been a patient, as had Marilyn Monroe, James Thurber, Clare Boothe Luce and Eugene O'Neill." Bill Dedman & Paul Clark Newell, Jr., *The Extraordinary story of Huguette Clark and the \$30m she left to her nurse*, THE GUARDIAN (Jun. 27, 2014, 2:08 PM), <https://www.theguardian.com/lifeandstyle/2014/jun/27/huguette-clark-and-the-fortune-she-left-to-her-nurse>.

⁴⁰ DEDMAN & NEWELL, *supra* note 31, at xxv.

⁴¹ *Id.* at 230.

⁴² Her physician, internist Dr. Henry Singman, assured her that she could have round-the-clock nurses at home and that he would visit daily. "I had strongly urged that she go home," he said. She was, however, "perfectly happy, content, to remain in the situation she was in". When one of the first night nurses kept urging her to move back home, Huguette fired her. In the end Dr. Singman accepted her decision, writing in her chart in 1996: "I fervently believe that this woman would not have survived if she had been discharged from the hospital." Dedman & Newell, *supra* note 39.

with Beth Israel Hospital and the building eventually closed down. She then transferred to a room in the main Beth Israel Hospital.⁴³ All in all, she spent the last 20 years of her life living not in the luxury she could afford but in spartan hospital surroundings.⁴⁴

Like so many older women today, Huguette Clark was basically alone. She had no spouse or children, only distant relatives.⁴⁵ She was reclusive and refused to allow visits from those family members. She expressed the fear that everyone was out to get her money.⁴⁶ It is said that her dolls were her closest companions.⁴⁷ While Mrs. Clark was in the hospital she hired an assistant to take care of the dolls and bring back photographs of them. Occasionally a few special dolls would be brought to the hospital for short visits.⁴⁸ But despite these eccentricities, throughout the final years of her life, Mrs. Clark continued to manage her properties from afar, showing a meticulous and ordered mind and a sound grasp of her many assets.⁴⁹

Mrs. Clark also was a very generous woman. She gave numerous gifts to the nurses and others who cared for her while she was in the hospital and to the family of her best friend.⁵⁰ She also made sizeable contributions to the hospitals themselves.⁵¹

One nurse, Hadassah Peri, was a particular object of Mrs. Clark's affection and generosity.⁵² During the course of their relationship, Mrs.

⁴³ DEDMAN & NEWELL, *supra* note 31, at 287.

⁴⁴ *Id.* at xxvi, 232. Huguette Clark never told her relatives or acquaintances that she was in the hospital. *Id.* at 239.

⁴⁵ Her father, sister, and mother had all predeceased her. Her mother (the last of her close family members to die) died in 1963. *Id.* at 170. Her closest blood relatives were the great-grandchildren and great-great grandchildren of her father, who were descendants of his children from his first marriage. *Id.* at 325. Most of them had never met Mrs. Clark. *Id.* at 326. Huguette Clark did have one close friend, Suzanne Pierre, who also acted as a personal secretary for her. Suzanne Pierre eventually developed Alzheimer's disease. Bill Dedman, *At 104, the mysterious heiress Huguette Clark is alone now*, NBC NEWS (May 23, 2012, 6:06 AM), https://via.hypothes.is/http://www.nbcnews.com/id/38719231/ns/business-local_business/t/mysterious-heiress-huguette-clark-alone-now/#fullstory.

⁴⁶ DEDMAN & NEWELL, *supra* note 31, at 228.

⁴⁷ Huguette Clark's close friend, Suzanne Pierre, once stated, "Her dolls are her closest companions." *Id.* at 227.

⁴⁸ The services of her personal assistant, Chris Sattler, are described in *Empty Mansions*. *Id.* at 240-45.

⁴⁹ *Id.*

⁵⁰ For example, a chart reproduced in *Empty Mansions* lists a total of over \$600,000 in gifts made in 1991 alone. *Id.* at 261.

⁵¹ During her first decade in the hospital, she gave a total of \$940,000 to the hospital, often giving gifts in honor of her doctors. *Id.* at 281.

⁵² Hadassah Peri served as the day nurse for Huguette Clark from the first day Ms. Clark entered the hospital. *Id.* at 229. She worked for Mrs. Clark for the twenty years she was in the hospital. *Id.*

Clark gave Hadassah Peri and the Peri family numerous gifts, including cash (including a check for \$5,000,000), a total of seven residences, and many cars, including a Bentley.⁵³

Huguette Clark died with a will that left an additional \$15 million and her doll collection to Hadassah Peri⁵⁴ and the bulk of her \$300 million dollar estate to a foundation of which her attorney and her accountant would be trustees (with a sizeable trustee fee attached).⁵⁵ Mrs. Clark's distant relatives challenged the will, alleging that she was mentally vulnerable and had been manipulated by her doctors and caregivers and her attorney and accountant.⁵⁶ They cited her obsession with dolls and her reclusive lifestyle as illustrative of her vulnerability and her lack of decision-making capacity.⁵⁷

The challenge to Huguette Clark's will was settled only moments before jury selection was set to begin⁵⁸ so we'll never know whether a jury would have found that Huguette Clark was of sound mind when she signed her will or whether she was unduly influenced by Hadassah Peri and others. Hadassah agreed in the settlement to forego the bequests of the dolls and the millions, but she was allowed to keep the homes and the cars and most of the millions of dollars that Mrs. Clark had already given her in gifts.⁵⁹ The attorney and the accountant agreed to relinquish their appointments as trustees and disclaim the bequests given them in Mrs. Clark's will.⁶⁰ The estate paid millions of dollars in taxes; \$34.5 million was split among those distant relatives; and the remainder went to fund her arts foundation.⁶¹

Mrs. Clark's story is an example of how older women may wish to indulge their eccentricities but, in doing so, also may run the risk of losing their freedom to dispose of their property as they wish. This happens because our society, usually for all the right reasons, wishes to protect them from making bad decisions about their own property and welfare.

⁵³ *Id.* at 260-65.

⁵⁴ *Id.* at 335.

⁵⁵ *Id.* at 299.

⁵⁶ *See id.* at 325.

⁵⁷ *See id.* at 339.

⁵⁸ *See Huguette Clark's faithful nurse gets NOTHING in settlement of her \$300 million estate – while relatives she never met get \$34 million*, DAILYMAIL.COM (Sept. 24, 2013, 16:11), <https://www.dailymail.co.uk/news/article-2430852/Huguette-Clarks-faithful-nurse-Hadassah-Peri-gets-NOTHING-settlement-300m-estate.html>.

⁵⁹ Hadassah Peri agreed to return \$5 million dollars in gifts she had received from Huguette Clark. *See* DEDMAN & NEWELL, *supra* note 31, at 349.

⁶⁰ *Id.*

⁶¹ *Id.*

2. *Brooke Astor*

I do not want any of us to underestimate the extent or severity of the fact that some older vulnerable women are manipulated by people who take advantage of their mental frailty.

Take, for example, Brooke Astor. She was a socialite and a philanthropist who died at age 105.⁶² Brooke was somewhat of an unusual woman, even when she was younger. After the death of her beloved second husband,⁶³ she chose to marry the very wealthy but notoriously angry alcoholic, Vincent Astor.⁶⁴ Mr. Astor, who was in the process of getting a divorce from his first wife when he met Brooke, had already proposed to another woman. To convince that woman to marry him, Mr. Astor told her that his doctors had said that he only had three years to live. Reportedly the woman responded, “But Vincent, what if the doctors are wrong?”⁶⁵ Well, that woman didn’t marry Vincent Astor but Brooke did. Vincent lived another 5 1/2 years and died leaving over \$100 million to Brooke and the Vincent Astor Foundation.⁶⁶

Unfortunately all of that wealth was not enough to protect Brooke Astor from a predator. This predator came in the form of her own son, Anthony Marshall. After she died, he was convicted (in his 80s) of grand larceny, having looted millions of dollars from her estate.⁶⁷

3. *Sara Cochran*

So even the wealthiest and most powerful women are vulnerable to being preyed upon by thieves and scam artists, whether these predators be relatives or strangers.

But let’s look at someone less wealthy and less powerful, a woman who lived in Cobb County, Georgia. Her name is Ms. Sara Cochran.⁶⁸ Ms. Cochran was a woman in her 70s who loved to gamble. And she often won . . . or at least she thought she had won. Between the ages of 75 and 79, Sara Cochran spent somewhere between \$100,000 and

⁶² See Marilyn Berger, *Brooke Astor, 105, First Lady of Philanthropy, Dies*, N.Y. TIMES, Aug. 13, 2007, <https://www.nytimes.com/2007/08/13/obituaries/13cnd-astor.html>.

⁶³ She was married to her first husband, Dryden Kuser, for 11 years until their divorce. The marriage produced a son, Anthony. Her second marriage, which lasted 20 years, was to Charles Marshall, the “love of her life” (whose surname Anthony adopted). *Id.* See John Richardson, *The Battle for Mrs. Astor*, VANITY FAIR HIVE (Sept. 4, 2008), <https://www.vanityfair.com/news/2008/10/astor200810>.

⁶⁴ See Richardson, *supra* note 63.

⁶⁵ *Id.*

⁶⁶ See Berger, *supra* note 62; see also Richardson, *supra* note 63.

⁶⁷ See Jessica Dye, *New York appeals court upholds fraud conviction for Brooke Astor’s son*, REUTERS (Mar. 26, 2013, 4:15 PM), <https://www.reuters.com/article/us-new-york-astor-sentence-idUSBRE92P15620130326>.

⁶⁸ *In re Cochran*, 723 S.E.2d 490, 490 (Ga. Ct. App. 2012).

\$700,000⁶⁹ on foreign lotteries, including the “Sweet Steaks Company of Australia.”⁷⁰ (That is the exact spelling that was used in her notification.) You have probably seen examples of this scam. The email notification arrives: “Congratulations, you have won \$75 million and all you need to do to collect is to prepay \$7000 in taxes. Click here.”⁷¹ Unfortunately, this was not money that Sara Cochran could afford to lose. An emergency conservator appointed for her by the probate court reported to the court that Mr. and Ms. Cochran’s estate would be completely exhausted within a couple of years if they continued their pattern of spending money on lotteries and sweepstakes.⁷² At the court hearing on whether to impose a permanent conservatorship, Ms. Cochran herself took the stand and testified and exhibited a fairly sound grasp of her own finances⁷³ (perhaps much like what Huguette Clark had exhibited). But then Ms. Cochran told the judge that she needed to hurry up and leave the courthouse because a man from Jamaica was waiting for her to call him so he could bring her a check for \$57 million and two cars.⁷⁴ The court decided that Sara Cochran needed a permanent conservator.⁷⁵

The appointment of a conservator in most situations has draconian consequences for someone like Ms. Cochran. This means that Ms. Cochran is no longer allowed to make her own decisions about how to spend her money or manage her property because someone else has been appointed to do that for her.

Ms. Cochran appealed the order appointing a conservator for her but the Georgia Court of Appeals affirmed the probate court’s finding.⁷⁶ The Court of Appeals pointed out that a conservator was needed in this case because Ms. Cochran’s judgment was impaired by “cognitive loss.”⁷⁷ However, that court also made a very important and enlightened observation. The Court of Appeals stated that the fact that Ms. Cochran chose to play those foreign lotteries in and of itself was not clear and convincing evidence that she needed to have a conservator appointed for her. The court opined that “a person of perfectly sound mind, capable of understanding that the lotteries might be a fraud, nev-

⁶⁹ The Department of Human Services investigation revealed that she had spent \$100,000. Ms. Cochran herself testified that the amount was \$600,000 to \$700,000. *Id.* at 491, 491 n.1.

⁷⁰ *Id.* at 492.

⁷¹ *See Id.*

⁷² *Id.* at 491-92.

⁷³ *Id.* at 493.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 495.

⁷⁷ *Id.* at 493-94.

ertheless might choose to play the lotteries as escapist fantasy and fun.”⁷⁸

This observation by the court illustrates the conundrum that we as a society must face:

How do we ensure the *autonomy, the freedom of choice* of older women who want to hoard personal items and give their fortunes to someone other than their families and gamble,⁷⁹ while *protecting* older women like Ms. Cochran, who apparently had lost the ability to make a rational decision about her actions and thus was vulnerable to all of those out there who target women like her?

We as a society are finally paying attention to elder abuse—in particular, elder financial abuse — and that is a great thing. However, I, like Jenny Joseph, would like to issue a warning: we must guard against a tendency to “over-protect.”

I plan today to take a few moments to reflect on the various aspects of the multi-faceted problem of elder financial abuse and then address three questions: 1) What can the law itself do to protect the vulnerable without unnecessarily jeopardizing the autonomy of those who are merely eccentric? 2) What role do lawyers play in this societal balancing act? and 3) What can all of us in this room do to foster an appropriate balance between vulnerability and autonomy?

II. THE ELDER POPULATION

A. In General

I’ll start by fleshing out the topic I introduced earlier – that is, the composition of today’s society from the point of view of age and gender. Our population is definitely “graying.” By 2030, 20% of the US population will be age 65 and older⁸⁰ and the group of Americans who are age 85 and over is the fastest growing demographic group in the US popula-

⁷⁸ *Id.* at 493, 493 n.4 (citing Mary F. Radford, *Guardianships and Conservatorships in Georgia*, § 5–1, p. 239 (1st ed. 2005)).

⁷⁹ The author is aware that for some individuals, gambling is not entertainment but rather an addiction. The reasons why many elderly individuals, particularly women, seem prone to this addiction are discussed in Michael Mayerck’s article, *Gambling Granny: The Elderly’s Propensity for Gambling Addiction and the Need for Effective Legal and Legislative Remedies to Prevent It*, 27 *ELDER L. J.* 187, 197-99 (2019).

⁸⁰ *Older People Projected to Outnumber Children for the First Time in History*, U.S. Census Bureau (Oct. 8, 2019), <https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html>.

tion.⁸¹ The average life span for an adult in 1950 was 68.2 years.⁸² By 2018, the average life span in the United States had increased to 78.7⁸³ years, with men having an average life span of about 77 years and women's average life span being 81 years.⁸⁴

Today's individuals age 65 and older in fact span three different generations:

G.I. Generation (whom Tom Brokaw immortalized as "The Greatest Generation") (age 94+)
Silent Generation (age 75-93)
Baby Boomers (age 55-74)⁸⁵

The individuals who are part of this older population are wealthier by far than the each of the generations that preceded them.⁸⁶ The median household income of households headed by someone age 65 or older has increased dramatically since 1967 — a whopping 130% — and that growth has far outstripped that of younger households.⁸⁷ And for the first time in American history, the individuals who have the highest median net worth in our country are those age 75 and older.⁸⁸

These individuals will also bear more responsibility in managing their own wealth in their later lives than did those who preceded them. In prior generations, a typical retiree's financial life was regulated by regular, defined distributions paid out each month from Social Security and employer-sponsored pension plans. These retirement vehicles left

⁸¹ Paola Scommegna, *U.S. Growing Bigger, Older, and More Diverse*, POPULATION REFERENCE BUREAU (Apr. 26, 2004), <https://www.prb.org/usgrowingbiggerolder-andmorediverse/>.

⁸² Table 22. *Life Expectancy at Birth, at 65 Years of Age, and at 75 Years of Age, by Race and Sex: United States, Selected Years 1900–2007*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/data/hus/2010/022.pdf> (detailing the life expectancy statistic for those born in 1950).

⁸³ Grace Donnelly, *Here's Why Life Expectancy in the U.S. Dropped Again This Year*, FORTUNE (Feb. 9, 2018 12:43 PM), <https://fortune.com/2018/02/09/us-life-expectancy-dropped-again/>.

⁸⁴ Erin Duffin, *Life Expectancy in North America 2019*, STATISTA (Sept. 20, 2019), <https://www.statista.com/statistics/274513/life-expectancy-in-north-america/>.

⁸⁵ Jeff Anderson, *From the Greatest Generation to the Boomers: Senior Living Evolves*, A PLACE FOR MOM (Aug. 21, 2013), <https://www.aplaceformom.com/blog/2013-8-20-senior-living-generations/>.

⁸⁶ Olivia DaDalt, *Why Older Adults Are So Susceptible To Financial Fraud*, FORBES (Dec. 18, 2016, 8:00AM), <https://www.forbes.com/sites/nextavenue/2016/12/18/why-older-adults-are-so-susceptible-to-financial-fraud/>.

⁸⁷ Jill Mislinski, *Median Household Incomes by Age Bracket: 1967-2018*, ADVISOR PERSP. (Dec. 10, 2019), <https://www.advisorperspectives.com/dshort/updates/2018/10/19/median-household-incomes-by-age-bracket-1967-2018>.

⁸⁸ Neil Howe, *The Graying of Wealth*, FORBES (Mar. 16, 2018, 9:19 AM), <https://www.forbes.com/sites/neilhowe/2018/03/16/the-graying-of-wealth/>.

little room for flexibility. In other words, the retiree and his or her spouse basically knew that they would be living on a specified, guaranteed monthly distribution, no more and no less. They did not have to make decisions about how to invest their retirement savings nor about how to withdraw those savings over time. The retirees of today and those of the future will be relying increasingly not on defined benefit pension-type plans but on their own accumulations in defined contribution plans, 401(k) plans and Individual Retirement Accounts.⁸⁹ They will be the ones (rather than the government or their employers) who will be making the decisions not only as to how to invest these assets (among an increasingly complex and confusing array of financial products)⁹⁰ but as to when and how much of their retirement assets to withdraw. Unfortunately their nest eggs are viewed by today's scammers and fraudsters as a virtual pot of gold.

B. Threats to Elders' Financial Security

Thus the stability and financial security of today's retirees is inextricably linked with their financial capacity — that is, their “capacity to manage money and financial assets in ways that meet [their] needs and which are consistent with [their] values and self-interest.”⁹¹ Their financial stability is also linked to their astuteness in protecting themselves from the fraudsters who have them in their cross-hairs. Only in the past decade have researchers focused their attention on the degree to which older adults display this requisite financial capacity.⁹² Their findings are not exactly optimistic. For example, one study showed that financial literacy (that is, knowledge of the basic concepts essential to making effective financial choices) on average declines at a rate of about 2% per year

⁸⁹ James Poterba et al., *The Changing Landscape of Pensions in the United States 2* (Nat'l Bureau of Econ. Research, Working Paper No. 13381, 2007), <https://www.nber.org/papers/w13381.pdf>. See Annamaria Lusardi, *Financial Literacy and Financial Decision-Making in Older Adults*, AM. SOC'Y ON AGING, <https://www.asaging.org/blog/financial-literacy-and-financial-decision-making-older-adults> (last visited May 5, 2020) (describing the contrast over time between private sector retirement contributions made to defined contribution plans as opposed to defined benefit plans).

⁹⁰ Lusardi, *supra* note 89. See generally Melinda Wenner Moyer, *Why Older Adults are Too Trusting*, SCI. AM. MIND (May 1, 2013), <https://www.scientificamerican.com/article/why-older-adults-are-too-trusting/> (discussing how elders are susceptible to exploitation).

⁹¹ Daniel C Marson & Charles P. Sabatino, *Financial Capacity in an Aging Society*, AM. SOC'Y ON AGING, <https://www.asaging.org/blog/financial-capacity-aging-society-0> (last visited May 5, 2020) (citation omitted).

⁹² “Despite its critical importance in everyday life, financial capacity has been surprisingly neglected in research concerning older adults.” *Id.*

after individuals reach age 60.⁹³ The same study showed, however, that individuals' confidence in their ability to make sound financial decisions does not decline with age.⁹⁴ Talk about a recipe for disaster – one's financial ability is reduced but one's confidence in his or her ability remains intact or even increases. Add to this the finding of a recent Wells Fargo study that shows that while 98% of the respondents believed that seniors are susceptible to scams, only one in ten of the older Americans surveyed believed that this could actually happen to them.⁹⁵

But there is more bad news: In addition to the decrease in financial capacity, increased confidence, and the refusal to face the potential for financial abuse, the vulnerability of some older adults may be further enhanced by an arguably admirable personality trait that appears to increase as we age. The trait is that of being trusting of other people. The older we get, on average the more trusting we become.⁹⁶ This correlation between age and trust seems to bear little relationship to the era or culture in which we grew up. In a study that examined almost 200,000 people from over 83 countries, "a positive association [was found] between age and trust . . . that has existed for at least the past 30 years with little change over time."⁹⁷ A 2013 study published in the *Scientific American* found that there actually is a physical reason behind this correlation between aging and a heightened sense of trust. The study isolated an "age-related drop in activity in the anterior insula, a brain region that may play a role in assessing trust and risk."⁹⁸

So here is the picture that is shaping up: we wealthy, older Americans are living longer than ever before and are handling our own retirement benefits; our financial capacity is lessening over time but we remain fairly confident in our abilities and that we won't be scammed; and we tend over time to become less and less suspicious of the people around us. So how do you spell "vulnerable"?

And we have not yet even talked about cognitive loss, in the form of dementia, that is now plaguing many older adults in our society, much as the Georgia probate court found that it plagued Sara Cochran. The symptoms of Alzheimer's Disease,⁹⁹ which is the most common cause of

⁹³ Michael Finke et al., *Old Age and the Decline in Financial Literacy*, 63 *MGMT. SCI.* 213, 217 (Jan. 21, 2016), <https://doi.org/10.1287/mnsc.2015.2293>.

⁹⁴ *Id.* at 214.

⁹⁵ 2018 *Wells Fargo Elder Needs Study*, WELLS FARGO, at 1, 8 (2018), https://www.wellsfargoadvisors.com/pdf/elder-protection/elder-needs_survey.pdf.

⁹⁶ Julie Deardorff-Northwestern, *People 'Grow to Trust' As They Get Older*, *FUTURITY* (Mar. 23, 2015), <https://www.futurity.org/aging-trust-older-880822/>.

⁹⁷ *Id.*

⁹⁸ Moyer, *supra* note 90.

⁹⁹ Alzheimer's disease ("AD") is defined by the National Institute on Aging as "an irreversible, progressive brain disorder that slowly destroys memory and thinking skills

dementia,¹⁰⁰ showed up in some 5.8 million Americans in 2019.¹⁰¹ Of those individuals, it is estimated that 5.6 million were over age 65.¹⁰² The numbers of Americans living with Alzheimer's Disease is expected to rise to 14 million by 2050.¹⁰³ In addition, other emotional and mental conditions can affect one's decision-making ability and increase one's susceptibility and vulnerability. Scientists are now exploring the theory that even the decision-making ability of some otherwise "healthy" elders may be impaired due not to hidden dementia but rather to changes in the frontal lobes of their brains. "[S]tudies using brain imaging suggest that a subset of older adults who have no diagnosable neurological or psychiatric disease may experience disproportionate, age-related decline in specific neural systems crucial for complex decision-making."¹⁰⁴

C. Older Women

So again the question is: why are these issues of particular importance to older women? As I mentioned before, older women in our society vastly outnumber older men. The "good news" is that women tend to live, on average, five to six years longer than men.¹⁰⁵ The "bad news" is that the consequences of a longer life may be both unexpected and dire. For example, a Merrill Lynch study on "Women and Financial Wellness" estimates that "the average woman will have 39% higher health costs than the average man in retirement, paying an additional

and, eventually, the ability to carry out the simplest tasks." *What is Alzheimer's disease?*, NAT'L INST. ON AGING (May 16, 2017), <https://www.nia.nih.gov/health/what-alzheimers-disease>. Currently, diagnosis of AD depends on medical clinical assessment and neuropsychological testing, which can result in a diagnosis with a 90% accuracy. See Alissa Sauer, *How Alzheimer's Is Diagnosed*, ALZHEIMERS (Aug. 13, 2019), <https://www.alzheimers.net/how-is-alzheimers-diagnosed/>. See also *Medical Tests*, ALZHEIMER'S ASS'N, https://www.alz.org/alzheimers-dementia/diagnosis/medical_tests (last visited May 5, 2020) (explaining that there is no single test that can determine whether a patient has Alzheimer's disease).

¹⁰⁰ *What is Alzheimer's Disease?*, Alzheimer's Ass'n, <https://www.alz.org/alzheimers-dementia/what-is-alzheimers> (last visited May 5, 2020).

¹⁰¹ *2019 Alzheimer's Disease Facts and Figures*, ALZHEIMER'S ASS'N, at 17 (2019), <https://www.alz.org/media/Documents/alzheimers-facts-and-figures-2019-r.pdf>.

¹⁰² *Id.*

¹⁰³ *Alzheimer's Cases to Triple by 2050*, FISHER CTR. FOR ALZHEIMER'S RES. FOUND. (Sept. 4, 2013), <https://www.alzinfo.org/articles/alzheimers-cases-triple-2050/>. See *Facts and Figures*, ALZHEIMER'S ASS'N, <https://www.alz.org/alzheimers-dementia/facts-figures> (last visited May 5, 2020).

¹⁰⁴ Natalie L. Denburg & Lyndsay Harshman, *Why So Many Seniors Get Swindled: Brain Anomalies and Poor Decision-making in Older Adults*, CEREBRUM DANA FOUND. (Aug. 10, 2009), <http://www.dana.org/article/why-so-many-seniors-get-swindled/>.

¹⁰⁵ Thomas Kirkwood, *Why Women Live Longer*, SCI. AM. (Nov. 1, 2010), <https://www.scientificamerican.com/article/why-women-live-longer/>.

\$194,000 over her lifetime.”¹⁰⁶ Almost two-thirds of the sufferers of Alzheimer’s Disease in our country are women.¹⁰⁷

Older women, as we’ve seen, also are more likely to be “alone” than older men. This is due to a number of sociological factors that have created a group of people whom some refer to as “elder orphans.”¹⁰⁸ What has created this new population group? The life expectancy statistics I quoted obviously play a part. In addition, of the approximately 800,000 people who lose a spouse to death each year, about 700,000 of them were women.¹⁰⁹ The divorce rate for people age 50 and older doubled between 1990 and 2010 and the divorce rate for people age 65 and older tripled during that time even though the divorce rate levelled off and went down in the younger population.¹¹⁰ Although many of these divorced individuals remarry, research has revealed a gender gap in that women are less likely to remarry than men.¹¹¹ Another factor that affects women’s solo status later in life is that fewer women in the Baby Boom generation chose to be mothers than in the generations that preceded them. The number of women who were childless at the end of their child-bearing years doubled between the 1970s and 2010.¹¹² Adding to these phenomena the fact that there are significant numbers of

¹⁰⁶ Merrill Lynch, *Women and Financial Wellness: Beyond the Bottom Line*, BANK OF AM., at 17 (2019), https://www.bofam.com/content/dam/boamlimages/documents/articles/ID18_0244/ml_womens_study.pdf.

¹⁰⁷ *Women & Alzheimer’s*, ALZHEIMER’S ASS’N, <https://www.alz.org/alzheimers-dementia/what-is-alzheimers/women-and-alzheimer-s> (last visited May 5, 2020). Research is exploring whether there is a link between the loss of estrogen that occurs during menopause and the acceleration of Alzheimer’s Disease in those women who are already predisposed to the disease. See Alex Keown, *Menopause and Estrogen Decline Could Show a Link to Alzheimer’s Disease*, BIOSPACE (Feb. 20, 2019), <https://www.biospace.com/article/menopause-and-estrogen-decline-could-show-a-link-to-alzheimer-s-disease/>.

¹⁰⁸ “[E]lder orphans [are defined as] aged, community-dwelling individuals who are socially and/or physically isolated and have no known family member or designated surrogate available to them.” Maria T. Carney et al., *Elder Orphans Hiding in Plain Sight: A Growing Vulnerable Population*, CURRENT GERONTOLOGY & GERIATRIC RES. § 1 (July 12, 2016), <https://www.hindawi.com/journals/cggr/2016/4723250/>.

¹⁰⁹ *Peace, Love and Grief . . . For our friends and family*, PEACE, LOVE AND GRIEF (Apr. 10, 2016), <http://peaceloveandgrief.com/?tag=widow-statistics>.

¹¹⁰ Renee Stepler, *Led By Baby Boomers, divorce rates climb for America’s 50+ population*, PEW RES. CTR. (Mar. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/03/09/led-by-baby-boomers-divorce-rates-climb-for-americas-50-population/>. See Ashley Spangler et al., *Divorce Before vs. After Age 50*, NAT’L CTR. FOR FAM. & MARRIAGE RES. (2015), <https://www.bgsu.edu/ncfmr/resources/data/family-profiles/spangler-brown-linhammersmith-wright-divorce-fp-15-09.html>.

¹¹¹ Gretchen Livingston, *Chapter 2: The Demographics of Remarriage*, PEW RES. CTR. (Nov. 14, 2014), <http://www.pewsocialtrends.org/2014/11/14/chapter-2-the-demographics-of-remarriage/>.

¹¹² Gretchen Livingston & D’Vera Cohn, *Childlessness Up Among All Women; Down Among Women with Advanced Degrees*, PEW RES. CTR. (June 25, 2010), <http://>

individuals who have outlived¹¹³ or are estranged from their children, one researcher concluded that about 22.6% of the population is at risk of becoming an “elder orphan.”¹¹⁴ Those who are living alone without social or family support face increased threats to their independence as well as to their health. They are also often the targets of those in our society who prey on vulnerable adults: the perpetrators of elder abuse. And again, women figure prominently in this group. The typical victim of elder abuse is often described as “between the ages of 70 and 89, white, female, frail and cognitively impaired. She is trusting of others and may be lonely or isolated.”¹¹⁵

III. ELDER FINANCIAL ABUSE

So this brings us to zero in on the depressing topic of elder abuse — in particular elder financial abuse or, as it is sometimes called, elder financial exploitation. A 2009 report pointed out that “[i]n two-thirds of reports [of elder abuse] to Adult Protective Services, the victim is an older or disabled woman.”¹¹⁶ This same report stated that “people with dementia are at greater risk of elder abuse than those without.”¹¹⁷ (Remember the statistic that 2/3 of those with Alzheimer’s disease are women?) Social isolation is also often cited as a risk factor for elder abuse.¹¹⁸ (Remember our “elder orphans” statistic?) So we have a perfect storm — women who are alone and isolated, vulnerable due to cognitive loss, and trusting by nature versus the vast array of perpetrators in our society.

www.pewsocialtrends.org/2010/06/25/childlessness-up-among-all-women-down-among-women-with-advanced-degrees/.

¹¹³ Carney et al., *supra* note 108, § 3.2.3.

Another trend that may further impact adults outliving their children is described in the American Medical Association 2012 study that found that the current generation may be the first to encounter parents outliving their children.

This is attributed to childhood obesity which in turn increases rates on hypertension, diabetes, stroke, and osteoarthritis upon reaching middle age.

¹¹⁴ *Id.* The same study found, however, that a much smaller percent of the population actually are currently “elder orphans.”

¹¹⁵ 115 MetLife Mature Mkt. Inst. et al., *Broken Trust: Elders, Family & Finances*, at 8 (Mar. 2009), <https://www.giaging.org/documents/mmi-study-broken-trust-elders-family-finances.pdf>.

¹¹⁶ *Elder Abuse: A Woman’s Issue: Mother’s Day Report*, OWL, at 3 (May 2009), http://www.ncdsv.org/images/OWL_Mother%27s-Day-Report_2009.pdf.

¹¹⁷ *Id.* at 4.

¹¹⁸ *Elder Abuse Facts*, NAT’L COUNCIL ON AGING, <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/> (last visited May 5, 2020).

A. What is Elder Financial Abuse?

What is elder financial abuse? There is no one legal or societal definition but it generally means the use or misuse of an elder person's property without his or her consent.¹¹⁹ Elder financial abuse can take a variety of forms. It can be as simple as the pilfering of small amounts of cash by an in-home caregiver, who maybe keeps the change after she makes a grocery purchase. It can take the form of forgery or unduly influencing the elder individual to sign a trust or will or a power of attorney. It can, as in Ms. Cochran's case, take the form of fraud and scams perpetrated by outsiders, such as:¹²⁰

- the lottery winnings I mentioned that can be collected only upon the prepayments of certain sums for taxes;¹²¹
- the phony call from the IRS or the Medicare authorities asking for Social Security numbers and other identifying information;¹²²
- the website that advertises cheap prescription drugs or supplements that are in fact contaminated or contain the wrong

¹¹⁹ For example, the Older Americans Act of 2006 defines "exploitation" as "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 elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets." Older Americans Act, Pub. L. 109-365, 120 Stat. 2522, 2524 (2006) (amending 42 U.S.C. § 3002(24)(A) to include this definition). The National Adult Protective Services Association describes elder financial exploitation as follows:

Financial exploitation occurs when a person misuses or takes the assets of a vulnerable adult for his/her own personal benefit. This frequently occurs without the explicit knowledge or consent of a senior or disabled adult, depriving him/her of vital financial resources for his/her personal needs.

What is Financial Exploitation?, NAT'L ADULT PROT. SERVS. ASS'N, <https://www.napsanow.org/get-informed/what-is-financial-exploitation/> (last visited May 5, 2020).

¹²⁰ Lists of common scams and frauds can be found at *Elderly Fraud Scams: How They Are Being Targeted and How to Prevent It*, ASS'N OF CERTIFIED FRAUD EXAM'RS, <https://www.acfe.com/fraud-examiner.aspx?id=4294997223> (last visited May 5, 2020) and *Elder Financial Exploitation*, NAT'L ADULT PROT. SERVS. ASS'N, <https://www.napsanow.org/policy-advocacy/exploitation/> (last visited May 5, 2020).

¹²¹ *Sweepstakes and Lottery Scams*, AARP, <https://www.aarp.org/money/scams-fraud/info-2019/sweepstakes.html> (last updated Dec. 5, 2019).

¹²² Lisa Weintraub Schifferle, *Protect yourself against Medicare scams*, FED. TRADE COMM'N (Mar. 15 2019), <https://www.consumer.ftc.gov/blog/2019/03/protect-yourself-against-medicare-scams>; Lisa Weintraub Schifferle, *Those (not really) IRS calls*, FED. TRADE COMM'N (Mar. 22 2019), <https://www.consumer.ftc.gov/blog/2019/03/those-not-really-irs-calls>.

ingredients or simply have not been proven to do what they are said to do;¹²³

- the fake charity solicitation done by phone¹²⁴ (how many elders still have land lines, compared to their younger counterparts?);
- the purported creditor who calls the grieving widow (after reading the obituary) to claim that her deceased husband owed him money;¹²⁵
- the warning that pops up on the computer screen offering “tech support” to cure a non-existent virus.¹²⁶

The Federal Bureau of Investigation reports that, in 2017 alone, “almost 50,000 people over the age of 60 lost \$342.5 million” just “to internet fraud and scams.”¹²⁷ National reports indicate that older individuals lose somewhere between \$2.9 billion¹²⁸ and \$36.48 billion¹²⁹ each year due to elder financial abuse. Even more staggering is the realization that these reports are reflecting only the tip of the iceberg. Recent estimates indicate that only one in fourteen cases of financial abuse are ever reported.¹³⁰

Two scams to which the elderly individuals seem especially susceptible are the grandparent scam and the sweetheart scam. The perpetrator of the grandparent scams often mines enough information from a grandchild’s social media to weave a credible story before he makes a phone call to the targeted grandparent. The scammer then poses either

¹²³ See Sheila Kaplan, *Supplement Makers Touting Cures for Alzheimer’s and Other Diseases Get F.D.A. Warning*, N.Y. TIMES, Feb. 11, 2019, <https://www.nytimes.com/2019/02/11/health/Alzheimers-drug-fda.html>.

¹²⁴ See *Before Giving to Charity*, FED. TRADE COMM’N (Mar. 2019), <https://www.consumer.ftc.gov/articles/0074-giving-charity> (acknowledging that sham charities exist and providing steps individuals can employ to protect themselves).

¹²⁵ See, e.g., Katie Pelton, *Call for Action Alert: Scammers target grieving widow*, KKTV 11 (Jul. 1, 2019 1:33 PM), <https://www.kktv.com/content/news/Call-for-Action-Alert-Scammers-target-grieving-widow-512070141.html> (describing an incident of a grieving widow who was called repeatedly).

¹²⁶ *How to Spot, Avoid and Report Tech Support Scams*, FED. TRADE COMM’N (Feb. 2019), <https://www.consumer.ftc.gov/articles/0346-tech-support-scams>.

¹²⁷ Bob Blancato, *Curbing Elder Abuse: What’s Been Helping, What’s Needed*, FORBES (Jun. 12, 2018, 1:14 PM), <https://www.forbes.com/sites/nextavenue/2018/06/12/curbing-elder-abuse-whats-been-helping-whats-needed/>.

¹²⁸ MetLife Mature Market Inst., *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation against America’s Elders*, at 2, 7 (2011), <https://tcombudsman.org/uploads/files/issues/mmi-elder-financial-abuse.pdf> [hereinafter *The MetLife Study*].

¹²⁹ *The True Link Study on Elder Financial Abuse 2015*, True Link Fin., at 1, 11 (2015), <http://documents.truelinkfinancial.com/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf>.

¹³⁰ Blancato, *supra* note 127.

as the grandchild himself or a lawyer or law enforcement official who needs money in order to bail out the grandchild from some unfortunate situation.¹³¹ (Because many banks have become suspicious of cash withdrawals, these scammers are now demanding their payments in the form of gift cards!)¹³²

The sweetheart scam involves the slow grooming of the target, perhaps beginning with an online dating site.¹³³ These scammers often send online pictures of themselves that bear little or no resemblance to their actual physical appearance.¹³⁴ (In this respect perhaps the sweetheart scam is not that different than online dating in general?) The “grooming” leads to increased expressions of romantic love and sometimes (as discussed in an ACTEC Elder Law Committee meeting) even marriage.¹³⁵ But then a “catastrophe” in the new lover’s life occurs that requires a loan or perhaps even a gift of money from the target.¹³⁶ The end result is not only financial loss (in some reported cases as high as \$500,000¹³⁷ or even \$2 million¹³⁸) but also shame, humiliation, and heartbreak.¹³⁹

¹³¹ Stacey Colino, *Beware of Grandparent Scam*, AARP (Apr. 18, 2018), <https://www.aarp.org/money/scams-fraud/info-2018/grandparent-scam-scenarios.html>.

¹³² Emma Fletcher, *New Twist to Grandparent Scam: Mail Cash*, FED. TRADE COMM’N (Dec. 3, 2018), <https://www.ftc.gov/news-events/blogs/data-spotlight/2018/12/new-twist-grandparent-scam-mail-cash>; Emma Fletcher, *Scammers Increasingly Demand Payment By Gift Card*, FED. TRADE COMM’N (Oct. 16, 2018), <https://www.ftc.gov/news-events/blogs/data-spotlight/2018/10/scammers-increasingly-demand-payment-gift-card>.

¹³³ ROMANCESCAMS, <https://www.romancescams.org/> (last visited May 5, 2020).

¹³⁴ Patricia Joyce, *The Sweetheart Scam: Beware the Wolf in Sheep’s Clothing*, AGING CARE, <https://www.agingcare.com/articles/the-sweetheart-scam-169804.htm> (last visited May 5, 2020).

¹³⁵ Ellen McKissock & Christopher Long, *Marrying Into Elder Abuse*, presented at the Elder Law Committee meeting at the ACTEC Annual Meeting, March 22, 2019.

¹³⁶ *Online Dating and Romance Scams*, OFFICE OF MINN. ATT’Y GEN. KEITH ELLISON, <https://www.ag.state.mn.us/consumer/Publications/OnlineDatingRomanceScams.asp> (last visited May 5, 2020).

¹³⁷ *Man duped \$500k in online romance scam*, CBC NEWS (Sept. 26, 2013, 5:15 PM), <https://www.cbc.ca/news/canada/british-columbia/man-duped-500k-in-online-romance-scam-1.1870043>.

¹³⁸ Diana Hembree, *Online Romance Scams Are Fleecing More Americans*, FORBES (June 20, 2017, 9:47 AM), <https://www.forbes.com/sites/dianahembree/2017/06/20/romance-scam-crimes-on-the-rise/#660391ef5ec1>.

¹³⁹ Monica T. Whitty & Tom Buchanan, *The Online Dating Romance Scam: The Psychological Impact on Victims – Both Financial and Non-Financial*, 16 CRIMINOLOGY & CRIM. JUST. 176, 180 (2016), <https://journals.sagepub.com/doi/pdf/10.1177/1748895815603773>.

B. Victims of Elder Financial Abuse

Who are the victims of elder financial abuse? As I mentioned before, there are certain factors that appear repeatedly in elder financial abuse situations. Prominent among these are the fact that the elder suffers from some cognitive impairment, is too trusting of or not suspicious enough of others, is dependent upon others for care, is socially isolated, and is lonely. This description might lull many or all of us in this room into thinking that we are immune. But wait: there is another group of victims who should not be ignored. These are sometimes referred to as the “high achievers”¹⁴⁰ who are suffering from some cognitive or decision-making impairment. High achievers are very attractive targets of scammers and fraudsters for the obvious reason that their achievements have been rewarded by the accumulation of a significant amount of wealth.¹⁴¹ It may be less apparent to the outside world when a high achiever has become vulnerable or susceptible to exploitation because high achievers often exhibit something called “reserved capacity.”¹⁴² In other words, they “can still operate at a reasonable level when they become cognitively impaired—often at a level that masks the true severity of their impairment.”¹⁴³ Consequently their vulnerability may not be as readily seen as it is with some other older individuals. Finally, high achievers “are characteristically proud people who do not take their declining mental abilities sitting down.”¹⁴⁴ They reject the notion that they may be helpless and thus often refuse to let family members or professionals intervene in potentially abusive situations.¹⁴⁵

C. Perpetrators of Elder Financial Abuse

Who are the perpetrators of elder financial abuse? Obviously there are the strangers, often located in different countries, who are difficult to apprehend because they exist primarily in the amorphous world of the internet and the cloud.¹⁴⁶ But, sadly, many of these perpetrators are closer to home. They are the trusted advisors of the elders — their lawyers, accountants, financial advisors — their caregivers, and, all too often (as with Brooke Astor), even members of their own families. The

¹⁴⁰ Douglas G. Chalgian, *Patterns in Cases Involving Financial Exploitation of Vulnerable Adults*, 94 MICH. B. J. 30, 33 (2015), <http://www.michbar.org/file/barjournal/article/documents/pdf4article2580.pdf>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See Mehroz Baig, *Elder Abuse and Technology*, HUFFINGTON POST (Jul. 18, 2013, 3:06 PM), https://www.huffpost.com/entry/elder-abuse-and-technolog_b_3605646.

seminal 2011 MetLife Study of Elder Financial Abuse reported that 34 percent of noted incidents were perpetrated “by family and friends.”¹⁴⁷ “The National Center on Elder Abuse reports a much higher estimate, with 57.9 percent of perpetrators of financial exploitation of older adults being family members, 16.9 percent being friends and neighbors and 14.9 percent being home care aides.”¹⁴⁸

Studies have isolated certain characteristics that are exhibited by those family members and caretakers who engage in financial abuse. Included among these risk factors are drug or alcohol addiction, mental health issues, gambling or related behavioral problems, financial problems, unemployment, and a heightened sense of entitlement on the part of a child.¹⁴⁹

Perhaps not surprisingly, the closer the relationship is between the elder victim and the perpetrator, the less likely it is that the abuse will be reported and that the perpetrator will be prosecuted. Why? Sometimes this is because the victims are simply too embarrassed to report or prosecute. Other times the victims themselves are not absolutely certain that the abuse took place at all (due to their own cognitive impairment) or that what took place was in fact “abuse.”¹⁵⁰ For example, was it abusive for a struggling son with a wife and new baby to convince his mother to buy his family a home and a nice new car? Some victims fear further abuse¹⁵¹ or that the individual on whom they are dependent will abandon them.¹⁵² Some victims feel that at some level their children may be entitled to the money or property that they appropriated, perhaps due to some lingering guilt about not giving the child the appropriate amount of love and affection in that child’s youth. Other victims may simply not want to air their family’s dirty laundry or, God forbid, be responsible for sending a family member to jail.¹⁵³ Finally, and perhaps saddest of all, many victims realistically comprehend that the “remedy” for the abuse may be worse than the harm. In other words, they fear

¹⁴⁷ *The MetLife Study*, *supra* note 128, at 10.

¹⁴⁸ Stacy Rapacon, *Beware Elder Financial Abuse in the Family*, U.S. NEWS & WORLD REP. (Mar. 5, 2018, 10:00 AM), <https://money.usnews.com/money/personal-finance/family-finance/articles/2018-03-05/beware-elder-financial-abuse-in-the-family>.

¹⁴⁹ Dale Bagshaw et al., *Elder Mediation and the Financial Abuse of Older People by a Family Member*, 32 CONFLICT RESOL. Q. 443, 445, 452 (2015), <https://online-library.wiley.com/doi/pdf/10.1002/crq.21117>.

¹⁵⁰ See Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 212 (2000); Roy Niedermayer, *Who Commits Elder Financial Abuse and Why Isn't It Reported?*, PALEY ROTHMAN (June 16, 2016), <https://www.paleyrothman.com/legal-blog/who-commits-elder-financial-abuse-and-why-isnt-it-reported>.

¹⁵¹ Joanne Cohen, *Understanding Elder Financial Abuse*, COUNSELING TODAY (Apr. 27, 2017), <https://ct.counseling.org/2017/04/understanding-elder-financial-abuse/>.

¹⁵² Dessin, *supra* note 150, at 209-10.

¹⁵³ Niedermayer, *supra* note 146.

(and it is a realistic fear) that revealing their own victimization will cause other family members or protective services workers to move them – the victims — to an institution or to proceed to deprive them of virtually all their civil rights by having a guardian appointed for them.¹⁵⁴ With what other crime in our country does reporting and prosecution carry such a tremendous risk to the victim of losing her own autonomy?

D. State and Federal Initiatives

As I mentioned earlier, our society is waking up to the reality of elder financial abuse and has rallied around protecting vulnerable and elder adults.

Consider, for example, the following statutes and initiatives that have taken place on a national level:

1) The Senior Safe Act of 2018¹⁵⁵ encourages financial institution employees and advisors to report suspected elder financial abuse by immunizing them from liability for reporting so long as they provide appropriate training to their employees.

2) The Elder Abuse Prevention & Prosecution Act of 2017¹⁵⁶ calls for a coordinated effort by several federal government departments to help curb elder abuse, including the appointment of one U.S. Assistant Attorney in every federal judicial circuit to serve as that district's Elder Justice Coordinator.

3) In February 2018, and again in March 2019, the Department of Justice's Elder Fraud Sweeps resulted in the charging of some 450 defendants who had allegedly defrauded over three million elders of over \$1.5 billion dollars in losses using phony computer security alerts.¹⁵⁷

¹⁵⁴ *Id.*; Kelley Holland, *Why Elders Don't Fear Elder Financial Abuse*, CNBC (Nov. 10, 2015, 9:43 AM), <https://www.cnbc.com/2015/11/10/why-seniors-dont-fear-elder-financial-abuse.html>.

¹⁵⁵ Economic Growth, Regulatory Relief and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 1296, 1337-38 § 303 (2018).

¹⁵⁶ Elder Abuse Prevention and Prosecution Act, Pub. L. No. 115-70, 131 Stat. 1208, 1214 (2017).

¹⁵⁷ See *Justice Department Coordinates Nationwide Elder Fraud Abuse Sweep of More Than 250 Defendants*, DEP'T OF JUST.: JUST. NEWS (Feb. 22, 2018), <https://www.justice.gov/opa/pr/justice-department-coordinates-nationwide-elder-fraud-sweep-more-250-defendants>; Kevin Johnson, *\$365,000 to protect your computer? Feds promise 'all-out attack' on scams targeting the elderly*, USA TODAY (Mar. 7, 2019, 12:05 PM), <https://www.usatoday.com/story/news/politics/2019/03/07/justice-department-pledge-attack-tech-support-other-scams-hitting-elderly/3091696002/>

4) The U.S. Senate Special Commission on Aging (chaired by Senator Susan Collins of Maine, age 66) held hearings in January 2019 on Fighting Elder Fraud.¹⁵⁸

5) In February 2019, the Seniors Fraud Prevention Act, which is designed to crack down on frauds perpetrated on elder Americans, was re-introduced as a bipartisan effort by Senators Collins and Amy Klobuchar (age 58).¹⁵⁹

In addition to the national initiatives, state legislatures are responding resoundingly to the problem of the abuse of elder and vulnerable adults. Virtually every state has enacted statutes that require certain individuals who suspect that abuse of an elderly or vulnerable adult is occurring to report their suspicions to the local adult protective services agency.¹⁶⁰ In addition to the reporting statutes, some states have criminal statutes that directly or indirectly address abuse of elderly and vulnerable citizens.¹⁶¹ Some of these statutes provide for explicit enhanced penalties for crimes that are committed against elder or vulnerable persons.¹⁶² Others criminalize behavior that is otherwise not deemed criminal (such as “undue influence”) if the behavior is inflicted on an elder or vulnerable adult.¹⁶³

These initiatives are laudable in that they rightfully prioritize the safety and security of elder persons. However, they also bring with them some more subtle concerns. They run the risk of stereotyping all elders as weak, fragile, confused, and vulnerable. They may not always be effective. And they may even have the unintended consequence of jeopardizing the autonomy of an individual who does not need their protection.

¹⁵⁸ *Fighting Elder Fraud: Progress Made, Work to be Done*, U.S. SENATE SPECIAL COMMITTEE ON AGING (Jan. 16, 2019, 9:30 AM), <https://www.aging.senate.gov/hearings/fighting-elder-fraud-progress-made-work-to-be-done>.

¹⁵⁹ *Seniors Fraud Prevention Act of 2019*, S. 512, 116th Cong. (2019); see *Collins, Klobuchar Introduce Legislation to Crack Down on Fraud Targeted at Seniors*, SUSAN COLLINS: UNITED STATES SENATOR FOR MAINE (Feb. 19, 2019), <https://www.collins.senate.gov/newsroom/collins-klobuchar-introduce-bipartisan-legislation-crack-down-fraud-targeted-seniors>.

¹⁶⁰ A. KIMBERLEY DAYTON ET AL., *ADVISING THE ELDERLY CLIENT* § 4A:20, § 23:48 (2019).

¹⁶¹ See, e.g., ALA. CODE §§ 13A-6-192 to -94 (2020); COLO. REV. STAT. § 18-6.5-103 (2020); D.C. CODE §§ 22-933, 22-933.01 (2020); GA. CODE ANN. § 16-5-100 (2020); VA. CODE ANN. § 18.2-369 (2020).

¹⁶² See, e.g., CAL. PENAL CODE § 368 (2020); IND. CODE § 35-46-1-12 (2020).

¹⁶³ See, e.g., GA. CODE ANN. § 16-5-100(6); KAN. STAT. ANN. § 21-5417(a)(2)(A) (2020); MD. CODE ANN., CRIM. LAW § 8-801 (LexisNexis 2020).

IV. THE QUESTION OF BALANCE

So this brings us back to the challenging question of balance: how do we protect our grandmothers (and grandfathers) from predation while at the same time respecting and guarding their autonomy? In other words, what if Granny's cognitive abilities are not reduced and she can afford it and she really and truly just wants to gamble?

A. Protecting Autonomy

Before discussing how to reach this balance, it is worth addressing a preliminary question: Why *should* we protect Granny's autonomy? For purposes of this presentation I will define autonomy as the freedom to pursue one's own life choices without forced intervention by others, whether private parties or governmental officials, even if those choices are ones that the rest of us find inadvisable or ill-considered or just downright stupid. It is perhaps easier to define autonomy by describing what happens when one is deprived of her autonomy. For older adults, this can occur either by private action (e.g., the family decides to move Granny to a nursing home) or by government action – that is, when Granny is placed under guardianship or conservatorship. What happens when Granny is moved to a nursing home? Up until very recently she lost such basic rights as the right to decide when she wanted to eat, what she wanted to eat and even whether she could lock the door to her room. (I am happy to report that recent regulations issued by the Center for Medicare and Medicaid Services now guarantee some of these rights to many nursing home residents.)¹⁶⁴ What happens if a guardian or conservator is appointed for Granny? A quick look at any state's Guardianship Code produces a list of the rights that she will lose: among other things, she will lose the right and power to (1) get married; (2) consent to medical treatment; and (3) decide where she wants to live.¹⁶⁵ Furthermore, if a conservator (guardian of the property) is appointed for Granny, she also will lose the right to make contracts, to buy and sell her own property and to conduct business transactions – basically, to handle any of her tangible or intangible property.¹⁶⁶ In other words, she cannot buy the clothes she wants to buy, take the trips she wants to take, or play the games she wants to play (except maybe Bingo).

¹⁶⁴ Effective since 2016, 42 C.F.R. § 483.60 requires that nursing home residents be furnished with “palatable, attractive” food and drink and with “suitable, nourishing alternative meals and snacks” if they choose to eat outside of scheduled mealtimes. Enacted in 2014, 42 C.F.R. § 401.301(c) guarantees that each nursing home resident will have a “person-centered service plan” and is entitled to units that can be locked by the residents.

¹⁶⁵ See, e.g., GA. CODE ANN. § 29-4-21(a).

¹⁶⁶ See, e.g., GA. CODE ANN. § 29-5-21(a).

The loss of autonomy equates to the loss of control. Loss of control in the form of loss of personal independence is philosophically the antithesis of one of the most valuable and deeply-imbedded rights in our culture. In addition, loss of control has been proven to have a tangible negative effect on an individual's psychological and even physical well-being.¹⁶⁷ Studies of institutionalized patients have shown that patients who are given a sense of responsibility and choice in their daily lives exhibit greater activity, more happiness, increased interpersonal action, and significant improvements in their health as opposed to their counterparts who are restricted to doing only what they are "allowed" to do.¹⁶⁸ Just as we know that individuals who are victims of elder abuse suffer both physically and psychologically, so too do individuals who have lost their personal autonomy. As one researcher reports, "When people think they have little or no control in their lives, they may stop doing some of the everyday things that are important for self-care — because they believe those things don't matter."¹⁶⁹

I have a few modest suggestions (and I stress the word "modest") for achieving the balance between maximizing the protection of vulnerable older adults without needlessly sacrificing the precious autonomy of those who do not need our protection. My suggestions fall into the three categories of questions that I mentioned earlier: What the law itself can do to achieve this balance, what lawyers can do, and what each of us as individuals can do.

B. What Can the Law Do?

Question #1: What can the law do? Let's begin by taking a closer look at the ramifications and potential unexpected consequences of today's push to use government intervention and law enforcement to stave off the epidemic of elder financial abuse.

¹⁶⁷ See Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 27-29 (2006).

¹⁶⁸ *Id.* at 27-28. Jessica Flanigan, *Respect Patients' Choices to Self-Medicate*, CATO UNBOUND (July 10, 2017), <https://www.cato-unbound.org/2017/07/10/jessica-flanigan/respect-patients-choices-self-medicate>.

¹⁶⁹ Robert Preidt, *What Makes Seniors Feel In Control?*, DAHL'S PHARMACY (Feb. 8, 2019), https://dahlspharmacy.com/patient-resources/article_modal/742137/what-makes-seniors-feel-in-control (statement of Dr. Shevaun Neupert). Dr. Neupert is a co-author of the study entitled "Predicting Control Beliefs in Older Adults: A Micro longitudinal Study," published in *The Journals of Gerontology: Series B* on January 12, 2019, available at <https://academic.oup.com/psychsocgerontology/advance-article/doi/10.1093/geronb/gbz001/5288507>.

1. *Mandatory Reporting Laws*

First there are the reporting laws.¹⁷⁰ As I mentioned, these laws *require* certain individuals (called “mandatory reporters”) to report suspected elder abuse to the state’s Adult Protective Services¹⁷¹ unit or other appropriate government authority. Mandatory reporters vary from state to state but may include physicians,¹⁷² mental health professionals,¹⁷³ pharmacists,¹⁷⁴ clergy members,¹⁷⁵ and, in some states, even lawyers.¹⁷⁶ Upon receiving a report, the state’s Adult Protective Services conducts an investigation and recommends a plan of action, which may include bringing in law enforcement.¹⁷⁷

These laws are modeled after state child abuse reporting laws.¹⁷⁸ There is certainly merit in promoting the reporting of abuses and crimes

¹⁷⁰ Every state has some form of elder abuse reporting law. STETSON L. CTR. FOR EXCELLENCE IN ELDER L., <https://www.stetson.edu/law/academics/elder/home/media/Mandatory-reporting-Statutes-for-elder-abuse-2016.pdf> (providing a compilation of states’ elder abuse reporting statutes).

¹⁷¹ “Adult Protective Services” has been described as “a social services program provided by state and/or local governments nationwide serving older adults and adults with disabilities who are in need of assistance.” NAT’L ADULT PROTECTIVE SERV. ASS’N, <https://www.napsa-now.org/get-help/how-aps-helps/> (last visited May 5, 2020). Forms of abuse may include physical, emotional, verbal, and sexual abuse. Exploitation can be either financial or material in nature. Neglect can be caused by either a caregiver or can be an individual’s inability to care for themselves due to physical or cognitive impairments. *See id.* “Interventions provided by Adult Protective Services include, but are not limited to, receiving reports of adult abuse, exploitation or neglect, investigating these reports, case planning, monitoring and evaluation. In addition to casework services, Adult Protection may provide or arrange for the provision of medical, social, economic, legal, housing, law enforcement or other protective, emergency or supportive services.” *Adult Protective Services*, NAT’L CTR. ON ELDER ABUSE, [https://ncea.acl.gov/What-We-Do/Practice/Intervention-Partners/APS-\(1\).aspx](https://ncea.acl.gov/What-We-Do/Practice/Intervention-Partners/APS-(1).aspx) (last visited May 5, 2020) (hereinafter NCEA, *Adult Protective Services*). For an overview of the development of adult protective services in the United States, see Nina A. Kohn, *Second Childhood: What Child Protection Systems Can Teach Elder Protection Systems*, 14 STAN. L. & POL’Y REV. 175, 182-84 (2003).

¹⁷² *See, e.g.*, ALA. CODE § 38-9-8 (2020).

¹⁷³ *See, e.g.*, ARK. CODE ANN. § 12-12-1708 (2020).

¹⁷⁴ *See, e.g.*, COLO. REV. STAT. § 18-6.5-108 (2020).

¹⁷⁵ *See, e.g.*, CONN. GEN. STAT. § 17a-412 (2020).

¹⁷⁶ *See, e.g.*, ARIZ. REV. STAT. ANN. § 46-454 (2020).

¹⁷⁷ NCEA, *Adult Protective Services*, *supra* note 171. A 2013 study of 71 cases of elder abuse found that law enforcement was involved in 54% of the cases. Shelly L. Jackson & Thomas L. Hafemeister, *How do abused elderly persons and their adult protective services caseworkers view law enforcement involvement and criminal prosecution, and what impact do these views have on case processing?* 25 J. ELDER ABUSE & NEGLECT 254 (2013).

¹⁷⁸ Joseph W. Barber, *The Kids Aren’t All Right: The Failure of Child Abuse Statutes as a Model for Elder Abuse Statutes*, 16 ELDER L. J. 107, 115-16 (2008); Nina A. Kohn, *Outliving Civil Rights*, 86 WASH. U. L. REV. 1053, 1057 (2009).

that still remain largely “hidden” from our society. The underlying presumption¹⁷⁹ of this type of law is that the victim will not report because she is incapacitated or too vulnerable or essentially unable to take action to protect herself. As already noted, older individuals are often perceived as vulnerable, feeble, and in need of protection. For older women, this perception is exacerbated by the widespread stereotyping of women as “the weaker sex.” The government justifies its intervention into the lives of these individuals under the theory of *parens patriae*, which is the notion that the state is the “parent” of all its citizens and thus should act when necessary to protect those who are unable to protect themselves.¹⁸⁰ The key concept underlying the *parens patriae* doctrine is the protection of *vulnerable* individuals. However, many of the state mandatory reporting laws focus not on vulnerability but on status. In other words, in many states, the mere fact that an individual has reached a certain age (often age 60 or 65) results in that individual’s activities being subject to the reporting laws.¹⁸¹ These laws assume that age and vulnerability are inextricably entwined.

These laws infantilize and objectify older individuals.¹⁸² They assume that all elders are in need of this well-meaning governmental protection. And the price that the elders pay for falling into this undifferentiated class of older individuals could well be unwarranted in-

¹⁷⁹ See Benjamin Pomerance, *Finding the Middle Ground on a Slippery Slope*, 16 MARO. BENEFITS & SOC. WELFARE L. REV. 439, 447 (2015); Barber, *supra* note 178, at 122-23; Jennifer Beth Glick, *Protecting and Respecting Our Elders: Revising Mandatory Elder Abuse Reporting Statutes to Increase Efficacy and Preserve Autonomy*, 12 VA. J. SOC. POL’Y & L., 714, 726 (2005).

¹⁸⁰ “The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.” *Parens Patriae*, BLACK’S LAW DICTIONARY (10th ed. 2014) (second definition).

¹⁸¹ For example, COLO. REV. STAT. § 18-6.5-102(2) (2020) includes in the definition of “at-risk adult” (for whom reporting is required) “any person who is seventy years of age or older;” CONN. GEN. STAT. § 17b-450(1) (2020) defines an “elderly person” (for whom reporting is required) as “any resident of Connecticut who is sixty years of age or older;” GA. CODE ANN. § 30-5-3(6) (2020) defines “elder person” (for whom reporting is required) as “a person 65 years of age or older.” It should be noted that some state statutes do not blatantly pronounce that individuals of a certain age are in need of protection, but rather reach that result in a bit more round-about way. For example, South Carolina defines 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.” S.C. CODE ANN. § 43-35-10(11) (2020) (emphasis added). See Pomerance, *supra* note 179, at 475 (listing of these statutes).

¹⁸² See Kohn, *supra* note 178, at 1065-67 (describing the varying criticisms of mandatory reporting laws and adding Professor Kohn’s own rights-based critique).

tervention by the state into their private sphere of existence.¹⁸³ Simply put, under the laws of some states, I, Mary, at age 64, can “make up for the sobriety of my youth”¹⁸⁴ by perhaps lending inappropriate amounts of money to my adult son who is down on his luck, or, better still, buying extravagant presents for my new boyfriend. However, if I wait a few more months until my 65th birthday, my doctor, my psychologist, my pastor, and in some states even my attorney are required to report me to APS if my actions give any of these individuals “cause to believe” that I am being exploited.¹⁸⁵ What might be the unintended consequences of such a statute? I, at age 65, knowing that my judgement will be questioned (and perhaps even ridiculed) and that a well-meaning but overly protective APS agent may soon be knocking at my door, may choose to stop going to my doctor, stop talking with my therapist, stop seeking counseling at my church, and even stop confiding in my lawyer. With this in mind, my first suggestion is that the reporting statutes should stop using age *per se* as a proxy for vulnerability.¹⁸⁶ There are statutes in some states that do not have an age component in their reporting and criminal statutes.¹⁸⁷ They use terms such as “vulnerable adult” and indeed the modern trend is to include not only those who are “elderly” but also all vulnerable individuals who are over the age of 18.¹⁸⁸

2. *Criminal Statutes*

The other type of state elder abuse statutes – the criminal statutes — are not as effective as they could be because some of them allow “stranger perpetrators” (such as those scammers and fraudsters who victimized Sara Cochran) to use their very anonymity to absolve them from guilt under the statute. For example, a District of Columbia statute en-

¹⁸³ In a section of his article entitled “Preventing Legalized Ageism,” author Benjamin Pomerance offers a detailed criticism of the statutes that define the protected person on the basis of age alone. Pomerance, *supra* note 179, at 474-82.

¹⁸⁴ See Joseph, *supra* note 1.

¹⁸⁵ For example, TEX. HUM. RES. CODE ANN. § 48.051 (West 2019) provides in part that “a person having cause to believe that an elderly person, a person with a disability, or an individual receiving services from a provider as described by Subchapter F is in the state of abuse, neglect, or exploitation shall report the information required by Subsection (d) immediately to the department.”

¹⁸⁶ This solution is suggested and explored in Pomerance, *supra* note 179, at 478-80.

¹⁸⁷ 187 See, e.g., Arizona’s mandatory reporting statute, ARIZ. REV. STAT. ANN. § 46-454 (2020), which applies only to a “vulnerable adult” who is defined in ARIZ. REV. STAT. ANN. § 46-451(A)(10) as “an individual who is eighteen years of age or older and who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment.”

¹⁸⁸ David Godfrey, *Elder Abuse: Mandatory and Permissive Reporting for Lawyers*, NAT’L CTR. ON LAW & ELDER RIGHTS, at 2 (Apr. 2019), <https://ncler.acl.gov/getattachment/Legal-Training/Mandatory-Reporting-Ch-Summary.pdf.aspx>.

hances the criminal penalties for many crimes (such as fraud, theft, identity theft, and financial exploitation) if they are committed against an individual who is age 65 or over. However, this same statute states that, “It is an affirmative defense that the accused . . . could not have known or determined the age of the victim because of the manner in which the offense was committed.”¹⁸⁹ So, the end result of these statutes is that fraudsters and scammers like the purveyors of the “Sweet Steaks of Australia,” who contact their victims via the internet, are immunized from these enhanced penalties by virtue of their “excuse” that there is no way they could have known that one or more of the victims they caught in their net of deceit was an older, vulnerable person. My second proposal is that these statutes should not immunize the criminal simply because he did not know or have reason to know that his victim was of that age.¹⁹⁰ In other words, if a scammer sends out messages informing countless individuals that they have won the “Sweet Steaks of Australia” and the individual who responds to this message and sends him a check to cover “taxes” happens to be over age 65, the scammer should not be subjected to a lesser penalty under the defense that he had no way of knowing her age. He ran that risk when he engaged in the scam in the first place.

3. *Suggested Alternative to Prosecution*

A third refinement that I would like to see added to the law is the introduction of a “kindler, gentler” way of dealing with financial abuse that is perpetrated by individuals who are known to and close to the victim. As I mentioned before, one of the biggest problems in curtailing this type of abuse is that the victim chooses not to report, either out of embarrassment or family pride or a perhaps ill-advised but very real desire to protect the perpetrator. If the only options under our law are having Adult Protective Services intervene or, worse still, having the perpetrator arrested, many of these home-grown varieties of elder financial abuse will remain undisclosed. So what are the alternatives here? One possibility is a form of mediation or “intermediation,” in which a neutral facilitator would work together with the entire family or with the victim’s support group to bring the problem out into the open and explore solutions that are less draconian than institutionalizing the

¹⁸⁹ D.C. CODE § 22-3601(c) (2020).

¹⁹⁰ In this respect, these laws would be similar to those criminalizing statutory rape in which the perpetrator is not required to know that the victim is underage. For a discussion of the evolution of Florida’s elder abuse criminal statute (such that it no longer requires the prosecution to show that the perpetrator knew the victim was over age 65), see Tracy L. Kramer, *Section 784.08 of the Florida Statutes: A Necessary Tool to Combat Elder Abuse and Victimization*, 19 NOVA L. REV. 735 (1995).

victim or having a guardianship imposed or incarcerating the perpetrator. This type of “elder mediation” is already happening in some parts of the globe. The Association for Conflict Resolution has developed a protocol for “Eldercaring Coordination,” which is mediation that is designed to promote the autonomy of an elder person while at the same time monitoring situations in which there is a high risk of abuse or neglect.¹⁹¹ A 2015 set of surveys in Australia revealed that 59% of those who had used mediation to address potential financial abuse of an older person by a family member felt that “mediation had assisted in preventing or stopping financial abuse.”¹⁹² Like so many other family situations we encounter in estate planning, elder financial abuse that is perpetrated by family members or trusted caretakers is a complex and many-faceted matter that reflects long-term family tensions as well as current states of need and states of mind. Mediation allows for nuanced approaches to dealing with the tensions involved with these family dynamics. Mediation offers an arena in which these tensions can be explored and perhaps diffused or at least mitigated. Mediation could also offer a “safe space” in which the elder victim could protect herself while still preserving the family relationships that are so important to her. Finally, mediation is founded upon the principle of “self-determination.” In a mediation, the parties (and, in these cases, the victim would be one of the “parties”) are encouraged to reach their own resolutions on their own terms rather than resorting to a court or other outside authority to tell them what to do.¹⁹³ So in its own unique way, mediation could transcend the autonomy/vulnerability dichotomy by enhancing the ability of the adult (with appropriate representation, if necessary) to participate in her own protection.

4. *Revision of Guardianship Laws*

State guardianship laws can also offer a more refined way to offer protection to a vulnerable adult without depriving her completely of all of her civil and personal rights. In 2017, the Uniform Law Commission,

¹⁹¹ *Guidelines for Eldercaring Coordination*, ASS’N FOR CONFLICT RESOLUTION (Oct. 2014), <http://www.eldersandcourts.org/~media/Microsites/Files/cec/ACR%20Guidelines%20for%20Elder%20Caring%20Coordination%202014.ashx>.

¹⁹² Bagshaw et al., *supra* note 149, at 473. This type of mediation could be facilitated by mediators who are specially trained in such pertinent areas as the psychological dynamics of aging, the risk factors for intra-family financial abuse, the assessment of capacity, and the ability to balance family dynamics. *Id.* at 461-62.

¹⁹³ The concept of mediation being grounded in self-determination is discussed in Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases*, 31 STET. L. REV. 611, 646-48 (2002).

under the leadership of ACTEC Academic Fellow David English¹⁹⁴ and with the participation of other ACTEC Fellows such as Molly Ackerly, Debbie Tedford, and Linda Whitton, promulgated the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.¹⁹⁵ This revised and modernized Guardianship Act stresses the importance of involving vulnerable individuals in making decisions about their own welfare.¹⁹⁶ Article 5 of the Act permits a court to eschew a full-blown guardianship (with its accompanying loss of rights to the individual) in favor of a less intrusive alternative “that is precisely tailored to the individual’s circumstances and needs, and that is limited in scope and, potentially, duration.”¹⁹⁷ Under this Act, if (for example) a house-bound grandmother is being victimized by a caretaking grandchild on whom she also is dependent for meeting her daily needs, a court may explore other possibilities for having those needs met that may override the requirement to have that grandchild so intricately involved in the grandmother’s life and her finances.¹⁹⁸ Even if the grandchild had been appointed as her grandmother’s guardian, this Act would provide for increased monitoring of the guardianship by the court,¹⁹⁹ prevent the grandchild from isolating Granny from other family members and friends,²⁰⁰ and promote Granny’s ability to retain her independent decision-making ability whenever possible.²⁰¹

¹⁹⁴ Professor David M. English, University of Missouri School of Law, served as the Chair of the Drafting Committee on the *Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act* (UGCOPAA).

¹⁹⁵ UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS ACT (UNIF. LAW COMM’N, 2017).

¹⁹⁶ *See id.*, Prefatory note at p. 2 (explaining that the new provisions require individuals subject to guardianship be given meaningful notice of their rights and are required to be involved in decisions about their lives and life planning).

¹⁹⁷ *Id.* § 501 cmt.

¹⁹⁸ Under section 502(b)(2) of the UGCOPAA, instead of imposing a guardianship, a court may “restrict access to the respondent by a specified person whose access places the respondent at serious risk of physical, psychological, or financial harm” and, under section 503(c)(1), instead of ordering a conservatorship, a court may “authorize or direct a transaction necessary to protect the financial interest or property of the respondent . . .”).

¹⁹⁹ *Id.* § 317.

²⁰⁰ UGCOPAA section 315(c) provides, “A guardian for an adult may not restrict the ability of the adult to communicate, visit, or interact with others, including receiving visitors and making or receiving telephone calls, personal mail, or electronic communications, including through social media, or participating in social activities”

²⁰¹ Section 313(b) of the Act requires a guardian to “promote the self-determination of the adult and, to the extent reasonably feasible, encourage the adult to participate in decisions, act on the adult’s own behalf, and develop or regain the capacity to manage the adult’s personal affairs.”

C. What Can Lawyers and Other Professionals Do?

Question #2: What can we lawyers and other allied professionals do to help guard this delicate balance between autonomy and protection? In our roles as estate planners and elder law attorneys, we often will find ourselves on the front line of the battle against elder financial abuse. In addition we may find ourselves as arbiters of the tension between autonomy and vulnerability. We need to educate ourselves about the risk factors for elder financial abuse and not be shy about discussing these factors with our clients. We should perhaps consider putting together our own set of screening questions to be used with both new and existing clients.

1. *Care in Document Drafting*

In addition, much of the elder financial abuse that is committed by those close to the victim is accomplished through the use of legal vehicles that lawyers prepare, such as wills and trusts and powers of attorney and deeds for joint ownership of property. We are sometimes asked to draft one of those documents by someone other than the actual testator or transferor. We should resist the urge ever to draft documents for anyone other than the principal. So, even if a longtime trusted client asks us to whip up a “simple will” for her mother, we should never do so without meeting and consulting with the mother first.²⁰² (I realize that I am preaching to the choir on this topic.)

2. *Increased Self-Education about Capacity*

Next, we professionals must ramp up our understanding of legal and mental capacity and of the tests performed to assess it.²⁰³ If a client has received a diagnosis of progressive dementia, we must be quick to help her put into place mechanisms that will allow for the management of her person and property when she is unable to do so. And these mechanisms should not be simple, garden-variety powers of attorney or trusts but rather mechanisms with back-up protections (such as a trust

²⁰² The second edition of the NAELA Aspirational Standards introduces the notion of the “protected individual” who exists in many attorney-client relationships. This is the individual “whose personal and property interests are the subject of the representation.” This individual may or may not be the actual client as she may lack the capacity to enter into the relationship or may be represented by a fiduciary, such as a guardian or agent under a power of attorney. Nat’l Acad. of Elder L. Att’ys, *Aspirational Standards for the Practice of Elder and Special Needs Law With Commentaries*, NAELA J. (SPECIAL EDITION) 1, 7-8 (2018).

²⁰³ A helpful resource in this regard is *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, published jointly by the American Bar Association Commission on Aging and American Psychological Association, available at <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>.

protector or a family oversight committee) that will help guard against abuse by the major power-holder as well as by outsiders.

3. *Refinement of Professional Responsibility Rules*

As lawyers we also should demand more clarity from the American Bar Association, our state bars, and our state legislatures as to how we should deal with our clients whose capacity is diminishing. Model Rule of Professional Conduct 1.14, which is entitled “Client with Diminished Capacity,” is unsatisfactory in its current form. It basically says that we should maintain a “normal” client-attorney relationship with a client whose capacity is diminished unless we can’t, in which case we may take protective action. This simplistic, dualistic command ignores the many calibrations that exist between the time a client has full capacity and the time that capacity is completely gone. Importantly, this Rule does not address the issue of “vulnerability” or “susceptibility” to elder abuse. Even clients who are operating at a high level of capacity may be vulnerable to the wiles of an abuser. The widow who is grieving the loss of her long-time spouse may be easily targeted by the scammer who reads the obituaries and shows up to demand money that was putatively owed to him by her husband. The accident victim who needs expensive pain medication may not comprehend that mail-order companies that promise cheap drug prices are sometimes selling medications that are either ineffective or, even worse, dangerous. The Model Rules give us no guidance for dealing with our clients who still have capacity but whose susceptibility is heightened and whose decision-making ability and judgment are marred by external forces.

We must also demand of our state bars and state legislatures more clarity as to how we as lawyers should deal with reporting suspected elder abuse. Remember the mandatory reporting statutes that I mentioned earlier? Some states include lawyers on the list of those who are *required* to report suspected elder abuse.²⁰⁴ This is a direct assault on one of the hallmarks of the client-attorney relationship: that of client confidentiality, and such a requirement could discourage vulnerable individuals from confiding in their lawyers. We should lobby to have lawyers removed from those statutes that name us as mandatory reporters.

At the same time, we lawyers should have the discretion to take action if we suspect that our clients are endangered without fear of being subjected to professional disciplinary action. The state of Illinois, for example, provides by statute that any person *may* report suspected elder abuse and that a person who reports in the good faith belief that the

²⁰⁴ See, e.g., ARIZ. REV. STAT. ANN. § 46-454(B) (2020); see also TEX. HUM. RES. CODE ANN. § 48.051 (West 2019).

report is in the alleged victim's best interest is immunized from professional disciplinary action notwithstanding whether the information is otherwise considered confidential.²⁰⁵ The professional conduct rules of the state of Georgia allow a lawyer to reveal what would otherwise be confidential information if the lawyer reasonably believes that the revelation is necessary to avoid or prevent substantial financial loss that would result from third-party criminal conduct.²⁰⁶

On the other end of the spectrum, the Model Rules of Professional Conduct are vague as to what approach should we lawyers take if our client is not the vulnerable beneficiary but is the fiduciary — the trustee or guardian or agent under a power of attorney — who is entrusted with the care of an individual's welfare or property. Some of those states that have addressed the issue of an attorney's duties in these circumstances have taken the position that the *only* client of a lawyer who represents a fiduciary is the fiduciary.²⁰⁷ Under this theory, the fiduciary's lawyer owes few duties, if any, to the "beneficiaries" of the relationship — that is, to the principal in a power of attorney relationship if an agent is the client or to the protected individual if the client is the guardian. While this theory offers some comfort for the lawyer in that it is clear to whom his or her loyalty is owed, it offers scant protection for individuals who are not in a position to protect themselves. I propose that instead of supporting this simplistic view of the client-lawyer relationship, we lawyers should promote a theory that gives us the leeway and discretion to take action to protect those who cannot protect themselves when we see that the actions of the fiduciary-client are endangering the welfare of another individual.²⁰⁸

²⁰⁵ 320 ILL. COMP. STAT. 20/4(a-7) (2014).

²⁰⁶ GA. CODE ANN. § 4-102-1.6(b)(1)(i) (2020).

²⁰⁷ See, e.g., N.H. REV. STAT. ANN. §§ 564-B:2-205(c), 556:31(I)-(II) (2020) (attorney-client privilege in a trust or wills context applies to communications between the fiduciary and the lawyer for the fiduciary); see also OHIO REV. CODE ANN. § 5815.16 (LexisNexis 2020); see also S.C. CODE ANN. § 62-1-109 (2020).

²⁰⁸ Section 51 of the *Restatement (Third) of the Law Governing Lawyers* makes a start in this direction. Section 51(4) provides that a lawyer owes a duty of care to a nonclient "to the extent: (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient; (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach; (c) the nonclient is not reasonably able to protect its rights; and (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4) (AM. LAW INST. 2000).

4. *Asking for Trusted Contact for Client*

We as lawyers should follow the lead of other allied professionals about steps to take in advance of abuse occurring. For example, in 2017, regulations issued by the SEC encourage brokers to procure from all clients the name of a “trusted contact” who can be contacted in the event that the broker suspects that financial exploitation is occurring.²⁰⁹ The ACTEC Commentary to Model Rule 1.14 suggests a similar approach by lawyers, stating that “A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate with designated parties . . . concerns that the lawyer might have regarding the client’s capacity.”²¹⁰

D. What Can All Individuals Do?

Question #3: What can we (everyone in this room) do on an individual basis to help curb elder financial abuse while at the same time guarding against over-protection of our elderly citizens?

1. *Education about Elder Financial Abuse*

First, we must all recognize elder financial abuse for the national epidemic that it is. Mickey Rooney’s testimony before Congress in 2011 (facilitated by ACTEC Fellows Bruce Ross and Vivian Thoreen)²¹¹ helped bring this issue to the forefront but it still travels largely under the radar screen. In addition, the abusers are becoming more and more sophisticated so that those of us who are still in a position to warn others must make efforts to educate ourselves daily about the latest scams. For example, scammers have learned how to manipulate Caller ID so that the name of a bank or charity will pop up when the scammer makes a call.²¹² “Free-trial offers” of anti-aging products have locked many unsuspecting individuals into long-term, costly, fine-print “subscriptions”

²⁰⁹ FIN. INDUS. REGULATORY AUTH., INC. (FINRA), *Customer Account Information*, R. 4512(a)(1)(F) (amended 2017), <https://www.finra.org/rules-guidance/rulebooks/finra-rules/4512>. These regulations also allow the broker to place a temporary hold on distributions from accounts if financial exploitation is suspected. FINRA, *Financial Exploitation of Specified Adults*, R. 2165, <https://www.finra.org/rules-guidance/rulebooks/finra-rules/2165>.

²¹⁰ Am. Coll. Tr. & Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct*, at 160 (5th ed. 2016), http://www.actec.org/assets/1/6/ACTEC_Commentaries_5th.pdf.

²¹¹ Mickey Rooney’s emotional testimony on elder abuse, YOUTUBE (Mar. 3, 2011), <https://www.youtube.com/watch?v=W9ikKP5-s5A>.

²¹² Clark Howard, *What is caller ID spoofing and how do I protect myself from it?*, CLARK HOWARD INC. (Dec. 4, 2018), <https://clark.com/scams-rip-offs/safeguard-yourself-against-caller-id-spoofing/>.

that are very difficult to cancel.²¹³ As I mentioned before, internet fraudsters have learned to offer free “security scans” of computers that often result in money being stolen or private information being compromised.²¹⁴ Scammers are bombarding us by email also. In fact, even as I was in the process of writing up this lecture, I received a not-so-official-looking email from Western Union informing me that I was one of seven lucky email beneficiaries who had been chosen to receive \$1,500,000 in the United Nations Humanitarian Aid/Poverty Alleviation. I was cautioned, however, that the Western Union “transfer policy” only allowed them to pay me in daily increments of \$7,600. (Suffice it to say, I did not respond.)

We all know vulnerable adults with whom we could have a conversation about warning signs of potential abuse. Once we recognize the myriad of scams that are out there, we can make simple but effective suggestions to our older loved ones – suggestions like “Never give out personal information over the phone no matter what name shows up on the Caller ID;” “Never allow anyone access to your computer;” “Install malware or spyware filters for computer protection;” or something so simple as “Just hang up!”

We also can familiarize ourselves with the range of services available to an older individual who is experiencing difficulties in managing her own affairs. It is possible today, for a relatively modest fee, to have a professional service (rather than your drug-addicted son) handle your bill paying²¹⁵ or to use a ride-sharing service to get you to your medical appointments (rather than depending upon that same son). Companies now offer prepaid credit/debit cards that can be set up to disable certain types of transfers and limit ATM withdrawals yet still offer financial independence to the card holder.²¹⁶ Modern technology, for all its faults, provides wonderful opportunities for many to remain in their homes for much longer periods than were formerly possible.²¹⁷ But remaining in one’s home also may contribute to social isolation, so another way in

²¹³ Alex Thomas Sadler, *Beware of ‘free’ anti-wrinkle cream offers that can leave you with an empty bank account*, CLARK HOWARD INC. (May 25, 2017), <http://clark.com/technology/beware-of-free-anti-wrinkle-cream-offers-that-can-leave-you-with-an-empty-bank-account/>.

²¹⁴ Clark.com Staff, *10 scary scams targeting seniors and how to avoid them*, CLARK HOWARD INC. (May 26, 2017), <https://clark.com/scams-rip-offs/top-10-financial-scams-targeting-senior-citizens/>.

²¹⁵ See, e.g., SILVERBILLS, www.silverbills.com (last visited May 5, 2020).

²¹⁶ Latoya Irby, *How Does a Prepaid Card Work? Using Prepaid Cards as an Alternative to Traditional Credit Cards*, THE BALANCE (Nov. 13, 2019), <https://www.thebalance.com/how-does-a-prepaid-card-work-960201>.

²¹⁷ There are services today that will shop for and deliver groceries or even deliver already-cooked meals thus reducing an older individual’s dependence upon caregivers. See Christine Yu, *13 Healthy Meal Delivery Services Across the Country That Are a Must*

which we here today can help our vulnerable loved ones is simply to keep in touch.

2. *Avoid Over-Protection*

But what about the other lurking danger that we must combat at the same time that we are fighting the skyrocketing onslaught of elder abuse? That danger, as I have mentioned numerous times, is the danger of over-protection — of suffocating an older person's autonomy by our well-meaning attempts to protect her. One way to begin to address this danger is to confront the inclination we all have to stereotype older individuals and treat them as if they were a homogenous group. Although the statistics about the increased vulnerability that sometimes accompanies advancing age are depressing (for example, as mentioned earlier, one in ten people age 65 and over has Alzheimer's Disease), it is vital to remember that every statistic has two sides. In other words, nine in ten people of that age are not suffering from the disease. While 48% of women age 75 and older are living alone (that is, without anyone to help them with their daily life activities),²¹⁸ the other half of older women live within support networks of some sort. Trends from the 1990s to the present show that the percentage of older women age 85 or older who are living in nursing homes has actually dropped, from 27% in 1990 to 13% in 2014.²¹⁹ And yes, because our children are more and more likely to be "boomerang children," (children who as adults have returned to live with their parents), this has led to an increasingly larger percentage of older individuals living not alone but in multi-generational households.²²⁰ This is all by way of saying that we cannot deal effectively with elder financial abuse problems unless we recognize and honor the diverse nature of the population with whom we are dealing. Many of the individuals sitting in this room today personify the theory that older Americans are vibrant, in-touch, engaged, and actively participating in life rather than sadly mourning its passing.

3. *Combat Stereotypes and Generalizations*

We are the ones who must work to eliminate the profound negative effect of ageist stereotyping. How do we do this? We can begin with the simple process of vowing to excise certain words from our vocabulary, like "shriveled up," "dotty," "old maid," "old hag," "blue haired," "little

Try, WELL+GOOD LLC, <https://www.wellandgood.com/good-food/national-healthy-meal-delivery-services/slide/4/> (last visited May 5, 2020).

²¹⁸ Ari Houser, *Women & Long-Term Care*, AARP PUB. POLICY INST. (2007), https://assets.aarp.org/rgcenter/il/fs77r_ltc.pdf.

²¹⁹ Stepler, *supra* note 27, § 2.

²²⁰ *Id.*

old lady,” “old codger,” and “over the hill.”²²¹ I was tempted to put the term “old coot” on this list but then I read this definition on the AARP website: “A coot is a tough, adaptable water bird. [It] can fly *and* swim. Can you?”²²²

Why should we attempt to eliminate these stereotyping terms and images? Many psychological studies illustrate that stereotyping has lasting negative effects on those who are the victims of it. For example, a Canadian study in 2018 intentionally placed individuals in situations in which they faced prejudice based on a variety of factors such as age, race, religion, or gender. The study found that these subjects not only experienced an immediate negative reaction but they also later were more likely to be more aggressive, exhibit a lack of self-control, “have trouble making good rational decisions, and over-indulge in unhealthy foods.”²²³ And the same pattern emerged, regardless of whether the prejudice was based on their gender or race or any other factor.²²⁴

On the other end of the spectrum, in a 2014 study, participants age 60 and older were exposed to subliminal *positive* age stereotypes for four weekly sessions.²²⁵ Compared to the control group, these individuals showed decreased levels of internalized negative age stereotyping and strengthened positive self-perceptions of aging.²²⁶ Even more impressive is that those exposed to the positive age stereotypes showed improvement in their physical function that surpassed the improvement of others of similar age who had engaged in a six-month exercise program.²²⁷ Recent studies are showing that positive self-perceptions about growing older are correlated with quicker recovery from severe disability, shorter hospital stays, and even increased longevity.²²⁸

²²¹ Amanda Duarte & Mike Albo, *Who You Calling ‘Young Lady’? And other ageist language that needs to change— now*, AARP (Feb. 2, 2018), <https://www.aarp.org/disrupt-aging/stories/ideas/info-2018/ageist-language-glossary.html>.

²²² *Id.*

²²³ Rick Nauert, *Long-term Effects of Stereotyping*, PSYCH CENTRAL (June 15, 2019), <https://psychcentral.com/news/2010/08/11/long-term-effects-of-stereotyping/16675.html> (discussing a research study headed by Michael Inzlicht at the University of Toronto). For a draft of the research study, see <https://static1.squarespace.com/static/550b09eae4b0147d03eda40d/t/5527270fe4b0b34285d1dd28/1428629263020/stereotype-threat-spillover-the-short-and-long-term-effects-of-coping.pdf> (Dec. 7, 2011). See also Becca R. Levy, *Mind Matters: Cognitive and Physical Effects of Aging Self-Stereotypes*, 58 *J. GERONTOLOGY* 203 (2003), <https://academic.oup.com/psychsocgerontology/article/58/4/P203/523293>.

²²⁴ Nauert, *supra* note 223.

²²⁵ Becca R. Levy et al., *Subliminal Strengthening: Improving Elders’ Physical Function over Time through an Implicit-Age-Stereotype Intervention*, 25 *PSYCHOL. SCI.* 2127, 2127 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4372155/>.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 2134. Researchers have found that having positive self-perceptions about the benefits of getting older can create a self-fulfilling prophecy by helping someone stay

Hand-in-hand with the negative stereotypes about old age come the negative generalizations about old age that people in our society – including both the scammers and those who are trying to defeat them — use as a basis for their decision-making. While many generalizations are based soundly in fact, they also tend to be the refuge of those who do not want to take the time to examine where the whole truth lies. Before wrapping up, let's look quickly at three common generalizations about aging and then at some of the studies that should give us pause before accepting these generalizations as truth.

Generalization #1: Older people, particularly old women, are depressed and unhappy.

This generalization may explain why so many scammers target older women with products that purport to reverse aging or with relationships that promise to bring back the joyfulness of their youth. Researchers are only beginning to delve into whether this generalization is an accurate one. It has been discovered that overall happiness does indeed drop as one enters middle age, but it rises again beginning about age 60.²²⁹ A 2017 British study proclaimed that women are generally unhappier than men until the women reach about age 85.²³⁰ At that point, women's happiness levels begin to outstrip those of men.²³¹ Why is this? Psychiatrists were asked to ponder a reason for this finding and several posited that this is because so many women are widowed at that point in their lives and are beginning to enjoy retirement.²³²

Generalization #2: Older people, especially older women, lack the ability to make sound decisions.

Studies conducted as recently as 2009 led us to believe that this generalization was true. In fact, I mentioned one of these studies earlier when I spoke about financial capacity.²³³ But in 2013, a MetLife study

mentally, physically, and psychologically younger. See Christopher Bergland, *Positive Attitudes About Aging May Be a "Fountain of Youth"*, PSYCHOL. TODAY (Jan. 30, 2016), <https://www.psychologytoday.com/us/blog/the-athletes-way/201601/positive-attitudes-about-aging-may-be-fountain-youth>.

²²⁹ Jennifer Welsh, *Happiness Is U-Shaped: It Drops in Middle Age, Rises Later*, LIVE SCIENCE (Apr. 19, 2011), <https://www.livescience.com/13788-happiness-lifetime.html>.

²³⁰ Harry Pettit, *Women Are More Miserable Than Men Until Their Mid-80s When They Are Widowed And Begin Enjoying Retirement*, DAILY MAIL (Dec. 14, 2017, 6:49 PM), <https://www.dailymail.co.uk/sciencetech/article-5178261/Women-unhappy-men-entire-lives.html>.

²³¹ *Id.*

²³² *Id.*

²³³ See Marson & Sabatino, *supra* note 91.

called “Healthy Brain, Healthy Decisions”²³⁴ added a bit more nuance to this generalization. The MetLife study revealed that earlier studies had focused on the older population as a whole, including among the test group individuals who were suffering from dementia. The MetLife study found that *healthy* older individuals did not show an age-related decline in decision-making ability. Rather, the study found that both strategic learning capacity and the conscientiousness of one’s decisions in fact increased with age.²³⁵ A Harvard Medical School Report provides this description of the effect of physical age-related changes in the brain:

These [physical] changes enable the aging brain to become better at detecting relationships between diverse sources of information, capturing the big picture, and understanding the global implications of specific issues. Perhaps this is the foundation of wisdom. It is as if, with age, your brain becomes better at seeing the entire forest and worse at seeing the leaves.²³⁶

The poet Robert Frost expressed the same concept, perhaps more eloquently when he said:

I think young people have insight. They have a flash here and a flash there. It is like stars coming out in the sky in the early evening. . . . [However,] it is later in the dark of life that you see forms, constellations.²³⁷

As to the brains of women in particular, a study published in February 2019 in the Proceedings of the National Academy of Science showed that, while many people’s brains tend to “shrink” with age, on average, the physical make-up of female brains is about three years younger than that of male brains²³⁸ and that “[o]lder women tend to score better than men of the same age on tests of reason, memory and problem solving.”²³⁹

²³⁴ *Aging Does Not Impair Decision-Making, Study Shows*, ADVISOR MAG., Dec. 20, 2012, <https://www.lifehealth.com/aging-does-not-impair-decision-making-study-shows/>.

²³⁵ *Id.*

²³⁶ *How memory and thinking ability change with age*, HARV. HEALTHBEAT, <https://www.health.harvard.edu/mind-and-mood/how-memory-and-thinking-ability-change-with-age> (last visited May 5, 2020).

²³⁷ Lesley Lee Francis, *Robert Frost and the Child: “Mother Goose” and “The Imagination Thing”*, 45 MASS. REV. 256, 259 (2004).

²³⁸ Tamara Bhandari, *Women’s Brains Appear Three Years Younger Than Men’s*, WASH. U. SCH. MED. ST. LOUIS (Feb. 9, 2019), <https://medicine.wustl.edu/news/womens-brains-appear-three-years-younger-than-mens/>.

²³⁹ *Id.*

Generalization #3: Older people are less creative and less able to learn than younger people. (AKA: You can't teach an old dog new tricks.)

A persistent generalization in our society is that youth and creativity and mental flexibility are reciprocally related.²⁴⁰ The corollary to this generalization is that older individuals are “stuck in ruts” and unable to generate new ideas and thus lack the creativity and vision that is the lifeblood of our commercial culture. Why is this generalization dangerous and why is it relevant to today’s discussion? It is dangerous because, like so many stereotypes and generalizations, it has both internal and external consequences. Older people who internalize this concept may refrain from engaging in the types of novel post-retirement activities that have been found to contribute to enhanced physical and mental health and improved social interaction and independence. Their excuse will be that they are just “too old” to try or learn anything new. When they are isolated and in poor health, their dependence on others (including potential abusers) as well as their susceptibility to scammers is heightened.

In terms of external consequences, the connection is a bit more complex. Among other things, this generalization encourages influential industries, such as the advertising industry, to pass over older job applicants and opt instead to hire “dynamic” or “new-wave” or “progressive”²⁴¹ (aka “younger”) workers. In ad agencies, for example, more than 60% of the employees are age 25-44 and only 5% are over age 50.²⁴² In fact, the advertising industry has been referred to as a “Peter Pan industry” where age discrimination is “on steroids.”²⁴³ These younger “hip” workers then proceed to saturate the media with images that perpetuate the “youth = beauty” myth and its corollary (“old age is

²⁴⁰ “One of the most widespread and persistent myths about creativity is that it is the domain of the young. So for example in surveying popular attitudes toward aging, the psychologist Dean Simonton observed that ‘Most conspicuous is the notion that creativity is the prerogative of youth, that aging is synonymous with a decrement in the capacity for generating and accepting innovations.’” David Galenson, *Old Age and Creativity in Art and Science*, HUFFINGTON POST (Dec. 6, 2017, 3:34 PM), https://www.huffingtonpost.com/david-galenson/old-age-and-creativity-in_b_2272877.html.

²⁴¹ The AARP lists the following words as being used by employers to mask ageism in their job advertisements: “recent college graduate,” “digital native,” “cultural fit,” “energetic person sought for young company,” “five to seven years experience.” Ann Brenoff, *5 Ageist Phrases to Be Aware Of*, AARP (June 12, 2019), <https://www.aarp.org/disrupt-aging/stories/info-2019/ageist-phrases.html>.

²⁴² Avi Dan, *Is Ageism The Ugliest “Ism” on Madison Avenue?*, FORBES (Sept. 13, 2016, 3:29 PM), <https://www.forbes.com/sites/avidan/2016/09/13/is-ageism-the-ugliest-ism-on-madison-avenue/#7e39c9d0557c>.

²⁴³ Adrienne Pasquarelli, *Advertising Has an Ageism Problem*, ADAGE (Nov. 19, 2018, 2:00 AM), <https://adage.com/article/agencies/advertising-ageism-problem/315645/>.

not pretty”). This saturation gives fraudsters a powerful psychological tool for hocking their most notorious scam products – the so-called “anti-aging” products. These include counterfeit cosmetics, soaps, lotions, pills and other “nutritional supplements,” and a myriad of “scientific breakthroughs” that can make you “look 10 years younger in just 30 days.” The FBI reports that these fraudulent products “may contain arsenic, beryllium, and cadmium—all known carcinogens—along with high levels of aluminum and dangerous levels of bacteria from sources such as urine.”²⁴⁴ To comprehend the danger here, we need only look at the outbreak of fake Botox injections in the last decade that left the victims with burns and swelling²⁴⁵ and, in some cases, even poisoned with botulism.²⁴⁶

In short, these youth-culture industries feed widespread stereotypes about the elderly, including that they are ugly, frail, feeble, and even laughable.

Everyone remembers some version of this ad: “I’ve fallen and I can’t get up.”²⁴⁷ Why not replace that image with ads that celebrate the vitality and beauty of age, such as the ad from the British department stores Harvey Nichols? The Harvey Nichols ad commemorates the 100th year anniversary of the fashion magazine *Vogue* and the model in the magenta-colored cape, Bo Gilbert, is 100 years old.²⁴⁸

So, does science support the theory that creativity and elasticity in the brain degenerate with age? Not necessarily. First of all, there are notable exceptions to the theory that age hampers creativity:

- Benjamin Franklin invented the bifocal lens at the age of 78.²⁴⁹

²⁴⁴ *Fraudulent Cosmetics and “Anti-Aging” Products*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/scams-and-safety/common-fraud-schemes/fraudulent-anti-aging-products> (last visited May 5, 2020).

²⁴⁵ *‘Fake Botox’ injections doctor Ozan Melin jailed*, BBC, June 8, 2018, <https://www.bbc.com/news/uk-england-dorset-44419062>.

²⁴⁶ Betsy Bates, *Botulism Disaster Uncovers Fake Botox Market*, INTERNAL MED. NEWS (May 1, 2005), <https://www.mdedge.com/internalmedicine/article/12832/health-policy/botulism-disaster-uncovers-fake-botox-market>.

²⁴⁷ The Life Alert ad shows a frail older woman on the floor in her home. LIFE ALERT, lifealert.com (last visited May 5, 2020).

²⁴⁸ Mallory Schlossberg, *This 100-Year-Old Model Just Appeared in Vogue*, BUS. INSIDER (May 2, 2016, 9:10 AM), <https://www.businessinsider.com/100-year-old-bo-gilbert-in-vogue-2016-5>.

²⁴⁹ Michael Benton, *Benjamin Franklin Bifocals*, BENJAMIN FRANKLIN (Nov 6, 2013), <http://benjaminfranklinbio.com/bifocals-benjamin-franklin/122/>.

- Frank Lloyd Wright, who died at age 91, spent the last 15 years of his life involved in the design and construction of the Guggenheim Museum in New York.²⁵⁰
- Giuseppe Verdi wrote the opera *Falstaff* when he was nearly 80 years old.²⁵¹
- Anna Mary Robertson Moses (better known as “Grandma Moses”) took up painting when in her late 70s and, by the time of her death at age 101, completed over 1500 paintings.²⁵²

Perhaps more interesting is the fact that recent studies are showing that the aging brain bears many similarities to the so-called “creative brain.”²⁵³ In her poem “Warning,” Jenny Joseph bemoans the constraints and strictures of her current life of sober *middle age*.²⁵⁴

She longs for the day when she can:

*. . . go out in my slippers in the rain
And pick flowers in other people’s gardens
And learn to spit.*

It is exactly this type of fearlessness and lack of inhibition that is now revealed to be an essential component of creativity. Aging brains exhibit a “thinning” of that portion of the prefrontal cortex that governs self-conscious awareness.²⁵⁵ Some scientists believe that this results in less of a need to please other people. And this trait is one that is also prevalent among highly-creative individuals.²⁵⁶

In addition, older individuals tend to be more distractible than younger individuals.²⁵⁷ That makes us sound as if we are in fact “dotty,” but this inability to ignore extraneous or irrelevant information, which is

²⁵⁰ Edgar Kaufmann, *Frank Lloyd Wright: American Architect*, ENCYCLOPEDIA BRITANNICA (Jan. 16, 2020), <https://www.britannica.com/biography/Frank-Lloyd-Wright>.

²⁵¹ Houston Grand Opera, *Giuseppe Verdi’s ‘Falstaff’*, NPR (Mar. 16, 2007, 10:00 AM), <https://www.npr.org/templates/story/story.php?storyId=8901076>.

²⁵² *Grandma Moses*, SMITHSONIAN AM. ART MUSEUM, <https://americanart.si.edu/artist/grandma-moses-5826>.

²⁵³ Shelley H. Carson, *Creativity and the Aging Brain: Use the powers of the aging brain to enhance creativity*, PSYCHOL. TODAY (Mar. 30, 2009), <https://www.psychologytoday.com/us/blog/life-art/200903/creativity-and-the-aging-brain>.

²⁵⁴ In “Warning,” Jenny Joseph says,

But now we must have clothes that keep us dry
And pay our rent and not swear in the street
And set a good example for the children.
We must have friends to dinner and read the papers.

Joseph, *supra* note 1.

²⁵⁵ Carson, *supra* note 253.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

called “cognitive disinhibition,”²⁵⁸ aids the creative spirit. The opposite of “cognitive disinhibition” — what is sometimes referred to as “cognitive control” — is “the ability to limit attention to goal-related information.”²⁵⁹ While cognitive control certainly aids all of us in performing a wide range of daily tasks, neuroscientists are now positing that reduced cognitive control can enhance one’s ability to detect patterns and “to approach tasks or problems in a novel manner and reach solutions by relying on broad associations formed between diverse bits of information from a wide variety of sources.”²⁶⁰ Thus, as one researcher has concluded, “the evidence suggests that reduced cognitive control in older adults may boost creativity and their ability to solve insight problems.”²⁶¹

V. CONCLUSION

I realize that my remarks today have bounced between two parallel and perhaps colliding universes: that of the sad older woman in a “red” world who is in cognitive decline, is vulnerable, and is in need of protection from both strangers and loved ones who may take advantage of her weakness and susceptibility and that of the vibrant, happy older woman in a “purple” world who lives powerfully and steadfastly pursues her dreams and her potential. And sometimes just likes to gamble. I hope that, among other things, my remarks today will help all of us to envision life in parameters other than chronological age. Remember, young people have fantasies too. Would we institutionalize or impose a guardianship upon a 25-year-old man who spent all of his time indulging his fantasy, to the point that he missed school and didn’t show up for work? Would we take away from him the legal authority to spend his money as he pleased and decide that he needed to have someone else appointed to make decisions for him about the management of his property? Probably not.

In conclusion, we definitely need to face head-on the reality of elder financial abuse but we need to frame the threat as one to those who are vulnerable and susceptible and of diminished capacity rather than to those who have merely reached a certain chronological age. We

²⁵⁸ Margarita Tartakovsky, *The Link Between Creativity and Eccentricity*, PSYCHCENTRAL (July 8, 2018), <https://psychcentral.com/blog/the-link-between-creativity-and-eccentricity/>.

²⁵⁹ Tarek Amer et al., *Cognitive Control as a Double-Edged Sword*, 20 TRENDS COGNITIVE SCI. 905, 905 (2016), [http://www.psych.utoronto.ca/users/haserlab/PDF/2016%20\(Amer%20et.%20al\)%20Cognitive%20Control%20As%20a%20Double-Edged%20Sword.pdf](http://www.psych.utoronto.ca/users/haserlab/PDF/2016%20(Amer%20et.%20al)%20Cognitive%20Control%20As%20a%20Double-Edged%20Sword.pdf).

²⁶⁰ *Id.* at 909.

²⁶¹ *Id.*

need to protect the many older “alone” vulnerable women in our society but part of that protection must include a vigilant awareness that aging provides for many women not a descent into “madness” but rather a loosening of the restraints and filters that permeated their lives when young. The fact that these filters have worn down does not automatically mean that these women have “lost it” and are in need of someone to make more rational, “appropriate” decisions for them.

In short, sometimes older women simply want to spend their pensions on brandy (lots of it) and eat sausages by the pound rather than seven servings of fruits and vegetables a day; they want to wear terrible shirts and grow fat rather than dressing in an age-appropriate manner and counting their calories; and sometimes we older women simply want to wear purple with a red hat that doesn’t match.

