

## It's Not OK, Boomer: Preventing Financial Power-of-Attorney Abuse of Elders

Genevieve Mann

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## IT'S NOT OK, BOOMER: PREVENTING FINANCIAL POWER-OF-ATTORNEY ABUSE OF ELDERS

GENEVIEVE MANN\*

*Most people hope they will never need another person to step in and make financial decisions for them if they become “incapacitated.” Just ask Britney Spears. Yet many execute a power of attorney to protect their assets in case it happens to them. The power of attorney has become the universal financial management tool to prepare for future incapacity, preferred because it allows loved ones to effortlessly assist an elder with diminishing capacity. Unfortunately, along with ease of use, comes ease of abuse. Too often this ubiquitous instrument is used to misappropriate an elder’s property or usurp their autonomy due to a lack of oversight.*

*The rate of elder financial exploitation continues to rise as the U.S. population ages. The COVID-19 pandemic also exacerbated isolation and vulnerability for our elders. Nevertheless, the legal profession steadfastly holds its grip on the power of attorney as a utility instrument—despite the high risk. The academic conversation too narrowly focuses on a polarized choice: Either keeping powers of attorney unregulated and unsupervised or opting for an overly restrictive regulatory process. Rather than adhering to this false dichotomy, a better approach is creating a legal framework to address the increasing number of elders exploited at the hands of unscrupulous individuals.*

*This Article posits that the rise in elder financial exploitation due to power-of-attorney abuse demands a more robust and creative framework. The federal legislative response has been anemic; despite passage of the Elder Justice Act, which established a collaborative approach to protective services, the mandate has remained woefully underfunded. To prevent elder financial exploitation, a multi-disciplinary infrastructure should be bolstered*

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*with necessary oversight and protection measures. In particular, the model should be enhanced with agent supervision and a centralized power-of-attorney registry to increase detection and prevention, while not overburdening agents or elders. It is no longer adequate to allow unregulated power-of-attorney use while a growing number of elders remain at risk.*

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## INTRODUCTION

When 84-year-old Violet<sup>1</sup> contacted a legal aid attorney to revoke her power of attorney, she reported she was “imprisoned” in a memory care unit of a long-term care facility. Her agent, an individual authorized to act on her behalf under a power of attorney, had moved her there against her will, sold her home, and placed all of her personal property in storage. The facility would not intervene and deferred to her agent. Despite living in a dementia unit, Violet could recite specific financial information from what seemed to be memory and did not exhibit any apparent dementia symptoms. Violet wanted access to her finances, personal property, and to make her own decisions—especially where to live. Violet had executed a power of attorney ten years earlier that named her accountant, at the time, as her agent. Over the course of the decade, Violet had no further contact with the accountant. When she had a medical emergency that left her exhibiting signs of dementia, the hospital contacted the accountant under the power of attorney. As Violet displayed signs of incapacity, the accountant used the power of attorney to place her in the facility, and proceeded to sell her home and all of her personal belongings (they were not in storage as she had thought). All of these actions were taken without contacting Violet because the accountant thought “it was best for her.”

Unfortunately, Violet’s story is not unique. Thousands of vulnerable adults are victims of financial exploitation, often at the hands of loved ones. Consider Juan,<sup>2</sup> a 75-year-old man who lost his life savings over the course of several years when his son, Carlos, slowly siphoned money out of his father’s savings account. Juan, who executed a power of attorney that gave

1. A fictional person based on a real client.

2. A fictional person based on a real client. *See also* Easley v. Commonwealth, No. 2013-CA-001407, 2016 WL 99124, at 3–4 (Ky. Ct. App. Jan. 8, 2016) (son and nephew over period of two years wrote checks to himself, and the abuse was not discovered until the nursing home bill went unpaid).

Carlos the power to manage his financial affairs, had no idea his son was stealing from him until his mortgage payment bounced. Or consider Liu,<sup>3</sup> an 82-year-old woman who lived alone with no family nearby and was befriended by a neighbor, Johnny. He convinced Liu to name him as her agent so he could “help her with bills.” Without Liu’s knowledge or consent, Johnny used the power of attorney to transfer her house to himself. No one discovered the abuse until Liu had passed away.

In addition to harrowing client stories, similar reports are rampant in the news media.<sup>4</sup> Recently, a federal grand jury charged a lawyer with multiple crimes after he allegedly used a power of attorney to steal half a million dollars from an elderly victim with dementia.<sup>5</sup> While that victim may see justice through the legal process, others are not so lucky. Another lawyer was convicted of stealing from his client using a power of attorney, but the client died days before the lawyer was sentenced to prison.<sup>6</sup> Even the wealthy are not immune. In 2009, the son of philanthropist and socialite, Brooke Astor, was convicted of defrauding his mother out of millions of dollars as she suffered from Alzheimer’s disease.<sup>7</sup> Misusing her power of attorney, her son gifted himself over one million dollars to care for her. This epidemic has also struck celebrities including Stan Lee, co-creator of multiple Marvel Comics movies, who was allegedly victimized by multiple advisers as well as his daughter. There are several civil suits pending in this matter, which claim financial exploitation, fraud, and abuse.<sup>8</sup>

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3. A fictional person based on a real client. *See also* *People v. Fenderson*, 188 Cal. App. 4th 625, 630 (2010) (financial exploitation not discovered until after the victim’s death).

4. *See* Susan Tompor, *Elderly Getting Scammed by Their Own Family Members—And One Group Wants to Stop it*, DETROIT FREE PRESS (Oct. 17, 2019, 8:39 AM), <https://www.freep.com/story/money/personal-finance/susan-tompor/2019/10/16/aarp-banksafe-scam-financial-exploitation-elderly/3901379002/>; Michael O. Schroeder, *Financial Exploitation: When Taking Money Amounts to Elder Abuse*, U.S. NEWS & WORLD REP. (Mar. 7, 2017, 10:44 AM), <https://health.usnews.com/wellness/aging-well/articles/2017-03-07/financial-exploitation-when-taking-money-amounts-to-elder-abuse>.

5. *Former Belmont County Attorney Charged with Stealing More Than Half a Million Dollars from Elderly Victim with Dementia*, U.S. ATT’YS OFF. FOR THE S. DIST. OF OHIO (Oct. 1, 2021), <https://www.justice.gov/usao-sdoh/pr/former-belmont-county-attorney-charged-stealing-more-half-million-dollars-elderly>.

6. Erin Arvedlund, *Philly Lawyer Who Stole \$100,000 From Elderly Client to Gamble Gets 4 Years in Prison*, PHILA. INQUIRER (May 23, 2019), <https://www.inquirer.com/business/law/john-conner-cozen-oconnor-atf-fbi-mark-dubnoff-william-mcswain-us-attorney-20190523.html>.

7. John Eligon, *Brooke Astor’s Son Guilty in Scheme to Defraud Her*, N.Y. TIMES (Oct. 8, 2009), <https://www.nytimes.com/2009/10/09/nyregion/09astor.html>. On March 26, 2013, the Appellate Division of the New York State Supreme Court affirmed the verdict. *People v. Marshall*, 106 A.D.3d 1, 12, 961 N.Y.S.2d 447, 454 (2013), *leave to appeal denied*, 993 N.E.2d 1280 (N.Y. 2013).

8. David Hochman, *The Last Days of Stan Lee*, AARP MAG., <https://www.aarp.org/entertainment/celebrities/info-2020/stan-lee-elder-abuse.html> (last visited Jan. 26, 2023).

Despite a national awakening to financial abuse, in part due to social media stories such as #FreeBritney<sup>9</sup> and the well-known Netflix film *I Care a Lot*,<sup>10</sup> elder financial abuse remains difficult to detect and prevent. These cases are challenging because “you have potential suspects who appear to have shown the victim affection, allegiance, loyalty and protection.”<sup>11</sup> The risk of elder financial exploitation is amplified by a surging population of older adults, increased isolation due to COVID, and improved technology use.<sup>12</sup>

The power of attorney is touted as an informal, efficient tool to empower older clients to choose a substitute decision-maker before any cognitive decline. In doing so, they avoid the more drastic impact of a court guardianship proceeding. Unfortunately, all too often this “simple yet powerful”<sup>13</sup> instrument is instead used to misappropriate the elder’s property or usurp their autonomy due to a lack of oversight or regulation.<sup>14</sup> The primary benefits of a power of attorney—the ease of use and lack of regulation—are precisely what leaves elders at risk. As baby boomer elders reach retirement and can expect to live into a tenth decade, the risk of exploitation is only increasing.

In an attempt to prevent exploitation, decades of prior reform efforts tweaked statutory language to clarify, educated parties on their roles and authority, and emphasize elder empowerment. Most scholarly contributions agree that the instrument is ripe for reform in light of financial abuse, but the majority favor improvements that do not impede the ease of creation or use.<sup>15</sup> Proposals have been careful not to add any hint of regulation or restriction to the free-wheeling instrument.<sup>16</sup> While elder protection has remained at the forefront of the dialogue, the increasing threat of financial exploitation has not led to significant alteration in the tool or process. It was created to be a practical tool to assist those with diminishing capacity and has evolved to

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9. The #FreeBritney movement is an online social movement to release American pop singer Britney Spears from her court conservatorship. Bianca Betancourt, *Why Longtime Britney Spears Fans are Demanding to #FreeBritney*, HARPER’S BAZAAR (Nov. 12, 2021), <https://www.harpersbazaar.com/celebrity/latest/a34113034/why-longtime-britney-spears-fans-are-demanding-to-freebritney/>.

10. *I CARE A LOT* (Black Bear Pictures 2021).

11. Hochman, *supra* note 8.

12. Shana Siegel, *How Isolation and COVID Make Seniors More Vulnerable to Fraud and Exploitation*, NAT’L L. REV. (Feb. 18, 2021), <https://www.natlawreview.com/article/how-isolation-and-COVID-make-seniors-more-vulnerable-to-fraud-and-exploitation>.

13. Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 ELDER L.J. 165, 170 (2009) (quoting *Russ ex rel. Schwartz v. Russ*, 734 N.W.2d 874, 888 (Wis. 2007) (Abrahamson, J. concurring)).

14. *Id.* at 177–82.

15. *See, e.g., id.*

16. *See, e.g., id.* at 194–98.

strongly favor practicality and utility over protection. In an effort to avoid excessive restrictions or regulations, a gaping hole remains between the unfettered access by agents and the watchful eye of the court system.

However, with increasing abuse and growing numbers of elders, the time has come to create a robust infrastructure to manage power of attorney use and prevent abuse. The Elder Justice Act,<sup>17</sup> passed in 2010, has the necessary multi-disciplinary framework to structure power of attorney oversight, which will also empower elders. Enhancing and expanding the forensic center model to include regulatory measures and a broader network of professionals would better identify, prevent, and remedy financial exploitation. Instead of leaving vulnerable elders alone to navigate abuse and inadequate prevention methods, a multi-disciplinary approach would improve prevention while also preserving self-determination. This Article argues for the expansion of innovative justice centers to serve as the collaborative hub of social service agencies, legal assistance, and financial institutions. It proposes adding regulatory measures—such as recording powers of attorney and mandatory annual accountings—to prevent power of attorney abuse. Part I traces the evolution of the power of attorney and the benefits of the tool. Part II outlines the pitfalls associated with a power of attorney and the increasing financial exploitation of elders. Part III examines prior reform efforts and where they have fallen short. Part IV discusses how current remedies for financial exploitation are inadequate. Part V proposes enhancing the multi-disciplinary forensic center model to provide an expansive infrastructure with oversight and support to effectively treat power of attorney abuse.

## I. THE RISE OF THE POWER OF ATTORNEY

Now viewed as an essential estate planning tool, the power of attorney has become ubiquitous as aging citizens plan for the future and contemplate possible disability. Since its inception, the enduring goal when an elder loses decision-making capability has been to avoid expensive and time-consuming court processes.<sup>18</sup> Durable powers of attorney evolved into attractive devices for seniors who want to maintain independence while easily appointing a surrogate when necessary.<sup>19</sup> As such, the focus has been to promote the beneficial qualities of utility, ease of use, and lack of oversight.<sup>20</sup> This Part begins with a history of the power of attorney and how it developed into a

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17. Pub. L. No. 111-148, §§ 6701–03, 124 Stat. 119, 782–85 (2010).

18. Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 11 (2007) [hereinafter Whitton, *Durable Powers*].

19. John C. Craft, *Preventing Exploitation and Preserving Autonomy: Making Springing Powers of Attorney the Standard*, 44 U. BALT. L. REV. 407, 412 (2015).

20. *Id.* at 416–17.

widespread financial planning tool. This is followed by a discussion of how its advantages create risk of financial exploitation and deprivation of autonomy.

*A. Becoming the Universal Planning Tool*

From the beginning, the financial planning tool was conflicted between ease of use and protecting the principal. At its core, a power of attorney is a written instrument that authorizes one or more individuals, known as an agent, to act on behalf of another person, known as the principal, regarding property and financial matters.<sup>21</sup> This relationship is derived from common law principles of agency, in which an agent was contracted to carry out an act for the principal.<sup>22</sup> Historically, the incapacity of the principal also meant the termination of the agent's authority since the principal no longer had the ability to guide the agency relationship.<sup>23</sup> The only remaining option for an incapacitated individual was court intervention through appointment of a guardian.<sup>24</sup> Since this defeated the usefulness of the estate planning tool just when the principal needed it, the requirement of "durability" was added so incapacity would no longer end an agent's authority.<sup>25</sup> The tool was used for both convenience as well as a necessary substitute for decision making due to incapacity.

In the 1950s and 1960s, the use of durable powers of attorney began to catch the attention of national groups, including the American Bar Foundation and the National Council on Aging. More importantly, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") began crafting model legislation, as existing state laws were lacking in guidance for financial management of incapacitated adults.<sup>26</sup> From 1964 to 2006, the NCCUSL promulgated four uniform acts: the Model Special Power of Attorney for Small Property Interests Act ("Model Act") of 1964; the Uniform Probate Code ("UPC") in 1969; the Uniform Durable

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21. LAWRENCE A. FROLIK & ALISON BARNES, ELDER LAW: CASES AND MATERIALS 407–08 (6th ed. 2015); 1 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 35, at 19 (2d ed. 1914).

22. RESTATEMENT (THIRD) OF AGENCY § 1.01, at 17 (AM. L. INST. 2006).

23. RESTATEMENT (SECOND) OF AGENCY § 122, at 308–09 (AM. L. INST. 1958).

24. Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 5 (2001).

25. "Durability" is a relatively recent legal construct. In 1954, Virginia was the first state to allow a power of attorney to continue beyond the principal's incapacity, but the concept did not become universal until a decade later. *Id.* at 4–6.

26. *Id.* at 4.



Power of Attorney Act (“UDPAA”) in 1979; and the Uniform Power of Attorney Act (“UPOAA”) in 2006.<sup>27</sup>

The Model Act was intended to “provide a simple and inexpensive legal procedure for the assistance of persons with relatively small property interests” when those individuals become “unable . . . to take care of their own affairs.”<sup>28</sup> It was designed to be a less expensive alternative to guardianship, allowing a principal to authorize an agent to act without subsequent incapacity causing revocation.<sup>29</sup> When the Model Act was first promulgated, there was significant concern that such a delegation of power could lead to financial exploitation. As such, the Model Act included significant restrictions, such as requiring a judge’s signature on the document, and filing and recording of the power of attorney.<sup>30</sup> Additionally, the power of attorney had to state the principal’s annual income as well as the nature and extent of the property impacted. There was also a maximum dollar amount that could be managed, and the power of attorney was terminated if the income or assets exceeded the limit. As a result, few states adopted it.<sup>31</sup>

Several years later, in 1969, the UPC was enacted.<sup>32</sup> It removed the protective restrictions, including court authorization and registration, which also streamlined the process.<sup>33</sup> The goal shifted to creating a less cumbersome tool and an intentional alternative to guardianship.<sup>34</sup> The UDPAA, created in 1979 and amended in 1987, removed the limitation for small estates, allowing anyone to execute a durable power of attorney without liability.<sup>35</sup> It further ensured a power of attorney would be valid even if it was executed years

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27. Craft, *supra* note 19, at 427; NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE L., HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 275 (1964); UNIF. PROB. CODE §§ 5-501 to -505 (1969); UNIF. DURABLE POWER OF ATT’Y ACT §§ 1-10 (amended 1987), 8A U.L.A. 246 (2003); UNIF. POWER OF ATT’Y ACT, (NAT’L. CONF. OF COMM’RS ON UNIF. STATE L. 2006).

28. Boxx, *supra* note 24, at 7 (quoting from NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE L., HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR, 274 (1964)).

29. Catherine Seal, *Power of Attorney: Convenient Contract or Dangerous Document?*, 11 MARQ. ELDER’S ADVISOR 307, 310 (2010).

30. *Id.* at 310–11.

31. *Id.* at 311.

32. *Id.*

33. *Id.*

34. Craft, *supra* note 19, at 416–17.

35. LORI A. STIEGEL & ELLEN VANCLEAVE KLEM, AM. BAR ASS’N COMM’N ON L. & AGING, POWER OF ATTORNEY ABUSE: WHAT STATES CAN DO ABOUT IT 9 (2008), [https://assets.aarp.org/rgcenter/consume/2008\\_17\\_poa.pdf](https://assets.aarp.org/rgcenter/consume/2008_17_poa.pdf).

prior.<sup>36</sup> While several reiterations occurred over the years, durability became the norm. This essential estate planning tool became ubiquitous by 1984 as soon as all states and Washington, D.C. had enacted power of attorney statutes.<sup>37</sup>

Following the trend of increasing accessibility and availability, in 1991, the Uniform Statutory Form Power of Attorney Act was adopted, which endorsed a simple, shortened form.<sup>38</sup> The last national reform in 2006 was the Uniform Power of Attorney Act (“UPOAA”), fashioned to provide ease of use and greater guidance to all parties involved.<sup>39</sup> The hope was that its approach would strike the right balance between flexibility and abuse prevention. While the drafters of the UPOAA were mindful to provide protection of incapacitated adults, it was crafted to be “a set of default rules that preserve a principal’s freedom to choose both the extent of an agent’s authority and the principles to govern the agent’s conduct.”<sup>40</sup> Ultimately, the goal was to standardize provisions that all states could adopt and promote the utility of durable powers of attorney as an inexpensive and flexible option for surrogate decision-making.<sup>41</sup> Every state now has legislation relating to powers of attorney and twenty-seven states have passed the UPOAA.<sup>42</sup>

*B. The Power of Attorney Conundrum: How the Advantages Also Create Risk*

The power of attorney can be a double-edged sword, as the “greatest advantage, its ease of use and informality, is also its greatest flaw since it becomes easy to abuse in the hands of a dishonest person.”<sup>43</sup> Over the last generation, as the tool became universal, “financial abuse of elders and others through the durable power of attorney has burgeoned.”<sup>44</sup> A beneficial power of attorney “depends on how effectively the scope of authority is delineated,

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36. JONATHAN FEDERMAN & MEG REED, ALB. L. SCH. GOV’T LAW CTR., ABUSE AND THE DURABLE POWER OF ATTORNEY: OPTIONS FOR REFORM 1 (1994).

37. Seal, *supra* note 29, at 311–12; STIEGEL & VANCLEAVE KLEM, *supra* note 35, at 9.

38. FEDERMAN & REED, *supra* note 36, at 16.

39. Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHX. L. REV. 343, 355–60 (2008) [hereinafter Whitton, *Striking a Balance*].

40. UNIF. POWER OF ATT’Y ACT, prefatory note (NAT’L. CONF. OF COMM’RS ON UNIF. STATE L. 2006).

41. Craft, *supra* note 19, at 432.

42. *50-State Power of Attorney Laws Chart*, THOMSON REUTERS: PRACTICAL L. TRS. & ESTS., [https://content.next.westlaw.com/Document/I8aa869dd436d11eaadfea82903531a62/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=\(sc.DocLink\)&firstPage=true](https://content.next.westlaw.com/Document/I8aa869dd436d11eaadfea82903531a62/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&firstPage=true) (last visited Dec. 5, 2022).

43. Boxx, *supra* note 24, at 12.

44. Craft, *supra* note 19, at 417 (quoting Marie A. Failing, *The Paradox in Madness: Vulnerability Confronts the Law*, 1 MENTAL HEALTH L. & POL’Y J. 127, 134 (2012)).

how faithfully the agent acts to manifest the principal's expectations, and how willing third persons and would-be surrogates are to honor the principal's choice of agent."<sup>45</sup> Success requires several pieces to fall into place.

A 2000 AARP survey found that 45% of Americans aged 50 or older had executed a power of attorney.<sup>46</sup> This statistic increased with age, with nearly 73% of those eighty or older having one.<sup>47</sup> There are several characteristics that make a power of attorney an easy vehicle for exploitation that, paradoxically, include many of the same reasons it is valuable. To be useful to the principal—in particular, after incapacity—the agent must have broad decision-making authority to effectuate financial management. These powers—such as selling property, mortgaging a home, transferring assets, depositing and withdrawing money or assets—are often the exact situations that can lead to exploitation.<sup>48</sup> Similarly, the lack of oversight allows an unscrupulous agent to engage in abuse without worrying about detection by a court or agency.<sup>49</sup> Just as it allows an agent to seamlessly step into the principal's shoes to pay bills and manage accounts, it just as easily allows the agent to step in and siphon off the elder's savings.

### 1. Avoiding Guardianship

Guardianship is a court-imposed procedure that requires a judicial determination of mental incapacity.<sup>50</sup> If a guardian is appointed, the individual loses basic civil rights to make personal life decisions including where to live, how to manage property and finances, whom to marry, and how to make medical decisions.<sup>51</sup> Most attorneys and commentators agree that guardianship, while necessary at times, is a “highly intrusive way[] to protect a vulnerable person.”<sup>52</sup>

Durable powers of attorney were specifically designed to “avoid the costly, time-consuming, often complicated, and burdensome” nature of the

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45. Whitton, *Striking a Balance*, *supra* note 39, at 346.

46. AARP RSCH. GRP., WHERE THERE IS A WILL . . . LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY 5 (Apr. 2000), [https://www.aarp.org/content/dam/aarp/research/surveys\\_statistics/econ/2000/will-legal-documents-survey.pdf](https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2000/will-legal-documents-survey.pdf).

47. *Id.*

48. STIEGEL & VANCLEAVE KLEM, *supra* note 35, at 5–6; Whitton, *Striking a Balance*, *supra* note 39, at 355–60.

49. *Id.*

50. FROLIK & BARNES, *supra* note 21, at 349.

51. Norman Fell, *Guardianship and the Elderly Oversight Not Overlooked*, 25 U. TOL. L. REV. 189, 190 (1994).

52. See, e.g., Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 593 (1996) [hereinafter Dessin, *Acting as Agent*].

guardianship court process.<sup>53</sup> The stated objective of adding “durability” was to “allow for the management of an incapacitated person’s affairs by non-court regimes.”<sup>54</sup> Instead of paying attorneys, court costs and ultimately guardian fees, an agent can avoid these expenses and assist an incapacitated principal outside court proceedings. In the event an individual becomes “incapacitated” and there is no power of attorney or trust in place, the court guardianship process is the only option to manage a person’s financial affairs.

In addition to cost-savings, avoiding guardianship means preventing unnecessary intrusion into the principal’s capacity, functioning, and finances. While in many states guardianship law includes a mandate for the “least restrictive alternative,” it remains a burdensome and lengthy process that reveals much of the principal’s private affairs.<sup>55</sup> In elder law circles, a lingering question is how to protect individuals with diminished capacity without truncating the legal rights they maintain. Many see a power of attorney as the answer—its “informality . . . avoids this dilemma because there is no adjudication of the principal’s incapacity and the agent need only assume the degree of surrogate management that the principal’s condition requires.”<sup>56</sup>

## 2. *Ease of Use and Availability*

Greater ease and availability of powers of attorney increase the number of vulnerable elders at risk of exploitation. The power of attorney’s ubiquity is due primarily to how conveniently and quickly it can be drafted, executed, and utilized. Beginning with the addition of “durability” in 1969, the drafters first recognized that the road to widespread national usage was paved by making the power of attorney easier to use.<sup>57</sup> This trend continued over the decades, as the prefatory note to the 1991 Uniform Statutory Form Power of Attorney Act demonstrates: “Special effort is made throughout the Act to make the language as informal as possible.”<sup>58</sup>

The mandatory requirements to create a power of attorney are quite minimal and simple: It must be in writing and signed by a competent principal at the time the document is executed; and most states require witnesses, notarization, or both.<sup>59</sup> The power of attorney is either effective immediately

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53. Craft, *supra* note 19, at 412.

54. *Id.* at 430–31.

55. FROLIK & BARNES, *supra* note 21, at 380.

56. Whitton, *Durable Powers*, *supra* note 18, at 11.

57. FEDERMAN & REED, *supra* note 36, at 14; Boxx, *supra* note 24, at 11.

58. UNIF. STAT. FORM POWER OF ATT’Y ACT, prefatory note, 8 U.L.A. 334–35 (Supp. 1993); *see also* FEDERMAN & REED, *supra* note 36, at 16.

59. Dessin, *Acting as Agent*, *supra* note 52, at 581–82; UNIF. POWER OF ATT’Y ACT § 105 (NAT’L. CONF. OF COMM’RS ON UNIF. STATE L. 2006). Section 105 outlines the execution

at signing or is “springing” and takes effect when some triggering future event, often incapacity, occurs.<sup>60</sup>

Unlike its alternative, a costly and burdensome court process, the power of attorney is designed to be simple, easy to use, and widely available to those with or without significant financial resources.<sup>61</sup> The evolution of the statutory mechanism included a simple short form with the intent of making powers of attorney “more practical and easy to execute.”<sup>62</sup> The trend to include a statutory template became increasingly popular. Many states adopted it and there are two form options provided by the UPOAA.<sup>63</sup> Most attorneys prefer a power of attorney that is effective immediately upon signing to give the principal the most flexibility, and to allow the agent to act as soon as necessary.<sup>64</sup> While the UPOAA statutory forms are optional, it uses “layperson-friendly language” so that it can be more readily used by unrepresented principals.<sup>65</sup>

In addition to durability and informal language forms, the power of attorney became omnipresent due to accessibility. Even before the internet, fill-in-the-blank forms could be obtained from a stationery store with minimal cost.<sup>66</sup> The blitz of online websites offering low-cost, DIY estate planning forms such as LegalZoom.com and Nolo.com have already provided millions of consumers with legal documents.<sup>67</sup> LegalZoom.com launched in 2001 to provide assistance to individuals preparing various online legal documents with a goal “to mak[e] legal help accessible to all.”<sup>68</sup> Since 2001, its website claims to have assisted 3.5 million individuals with estate planning documents. LegalZoom boasts that creation of a power of attorney can be completed for just \$35, or users can spend \$45 for legal

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requirements for states that have adopted the UPOAA. For execution requirements in all 50 states, see W. BIRCH DOUGLASS III, AM. COLL. OF TR. & EST. COUNS., 50 STATE (PLUS D.C.) SURVEY OF POWERS OF ATTORNEY (Aug. 2019), [https://www.actec.org/assets/1/6/Dougllass\\_Powers\\_of\\_Attorney\\_Survey.pdf?hssc=1](https://www.actec.org/assets/1/6/Dougllass_Powers_of_Attorney_Survey.pdf?hssc=1).

60. Craft, *supra* note 19, at 433.

61. Dessin, *Acting as Agent*, *supra* note 52, at 584.

62. Craft, *supra* note 19, at 438–39.

63. *Id.* at 439.

64. Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 4–5 (2006) [hereinafter Kohn, *Elder Empowerment*].

65. Craft, *supra* note 19, at 439 (quoting Linda S. Whitton, *Navigating the Uniform Power of Attorney Act*, 3 NAT’L ACAD. ELDER L. ATT’YS J. 1, 11 (2007)).

66. FEDERMAN & REED, *supra* note 36, at 20.

67. Wendy S. Goffe & Rachelle L. Holler, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 EST. PLAN. 27, 27 (2011).

68. See *Hello, We’re LegalZoom*, LEGALZOOM, <https://www.legalzoom.com/about-us> (last visited Dec. 5, 2022); *Protect Your Finances with a Durable Power of Attorney*, LEGALZOOM, <https://www.legalzoom.com/personal/estate-planning/power-of-attorney-overview.html> (last visited Dec. 5, 2022).

assistance.<sup>69</sup> There are numerous other websites that allow an individual to complete an easy form, which can be printed, signed by the principal, and used the same day without need for a lawyer, judge or court process.<sup>70</sup>

Since the principal must have capacity when executing a power of attorney, lawyers advise clients to execute one far in advance of need. Rather than wade into the murky waters of evaluating a principal's capacity, lawyers often draft powers of attorney years, if not decades, before one is either needed or a client demonstrates signs of diminished capacity. As the document does not expire, a client is prepared for the unknown and has chosen an agent should the need arise. This purposeful action—executing documents when a client has clear capacity—is aimed to provide protection for clients if and when they become incapacitated.<sup>71</sup> Until that time, a principal continues to manage their own financial affairs alone without agent intervention. Barring any exploitation or abuse, the process works as it should by allowing an agent to easily step into the shoes of the principal and manage their financial affairs when necessary.

### 3. Broad Decision-Making Power

Despite their ease of use and flexibility, the extensive breadth of power delegated by most powers of attorney provides opportunities for abuse. Historically, most powers of attorney did not provide specific provisions detailing the scope of authority, as the early renditions of model promulgations were silent on such matters. Over time, the subsequent evolution centered on including statutory definitions of certain powers.<sup>72</sup> While the UPOAA ultimately incorporated the requirement of express authorization for certain activities, a prominent feature of a modern power of attorney is to give an agent broad authority to conduct the principal's financial affairs.<sup>73</sup> Once executed, the agent is vested with significant power and generally authorized “to perform virtually any act with respect to the principal's property that the principal could perform.”<sup>74</sup> This immense power usually includes the ability to sell property and assets, make investments, transfer and withdraw bank accounts, and cancel or modify life insurance policies.<sup>75</sup>

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69. See *Hello, We're LegalZoom*, *supra* note 68; *Protect Your Finances with a Durable Power of Attorney*, *supra* note 68.

70. See *infra* Section I.B.4 for more discussion.

71. Craft, *supra* note 19, at 412.

72. Whitton, *Durable Powers*, *supra* note 18, at 34–35.

73. *Id.* at 35–36.

74. Dessin, *Acting as Agent*, *supra* note 52, at 582.

75. Rhein, *supra* note 13, at 179.

There are significant benefits of a comprehensive and nimble power of attorney. These include allowing an agent to take the necessary steps to qualify a principal for public benefits such as Medicaid or Social Security, taking advantage of tax savings, or avoiding estate recovery.<sup>76</sup> For example, if a principal owns two properties and needs long-term care, it will often be necessary for an agent to have the authority to sell a property to either pay for care or qualify the principal for Medicaid. A flexible power of attorney ensures that a principal is well protected regardless of what arises, and it gives the agent the ability to make sound financial decisions.<sup>77</sup>

There is a unique tension that exists regarding the level of authority to give an agent. If the scope of authority is too restricted, a guardianship may still be needed in the future, negating the purpose of a power of attorney. For example, if the power of attorney does not authorize selling property and the principal later needs to sell assets to qualify for Medicaid then an overly restrictive document is counterproductive. However, the broader the authority, the greater the potential for abuse.<sup>78</sup> While authority can be restricted when drafting a power of attorney, attorneys generally advise for broad authority so as not to defeat the purpose in the future.

#### *4. Extensive Power and Lack of Oversight*

It is not by chance that powers of attorney are largely unsupervised and unregulated. The guiding principle in the last few decades has been “that a safe [power of attorney] is not necessarily the most useful” power of attorney.<sup>79</sup> The broad, unregulated power means agents “have vast, largely unsupervised discretion which allows them to act as largely autonomous agents.”<sup>80</sup> Financial abuse is particularly hard to detect or prevent as the exploitative transaction is often within the agent’s authority, at least as far as

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76. Dana Perry & Ryan Barry, *Look Both Ways Where Estate Planning and Elder Law Intersect*, 39 EST. PLAN. 29, 29 (2012).

77. Just as a power of attorney can give an agent extensive authority, a principal also maintains autonomy to restrict some powers and to determine which powers to delegate to an agent. Whitton, *Striking a Balance*, *supra* note 39, at 346. It is not an all-or-nothing proposition but rather, the instrument can be tailored to the needs of the principal. The UPOAA provided clarity as to which powers were default provisions and which needed a specific grant of authority. Referred to as “hot powers,” a principal must specifically grant authority to the agent to do, among other things—create, amend, or revoke a trust, make a gift, and create or change a beneficiary designation. *Id.* at 347–48; UNIF. POWER OF ATT’Y ACT § 201 (NAT’L. CONF. OF COMM’RS ON UNIF. STATE L. 2006). These were given special status due to the likelihood of dissipating the principal’s assets. Whitton, *supra* note 39, *Striking a Balance*, at 347–48.

78. Whitton, *Durable Powers*, *supra* note 18, at 19.

79. Kim Vu-Dinh, *Reforming Power of Attorney Law to Protect Alaskan Elders from Financial Exploitation*, 27 ALASKA L. REV. 1, 21 (2010).

80. Kohn, *Elder Empowerment*, *supra* note 64, at 22.

the written document is concerned.<sup>81</sup> The risk is heightened if the principal has diminished capacity since the agent has unfettered access even without the principal's oversight.

Unlike the more restrictive nature of guardianship, most state power of attorney statutes do not include a monitoring process or a reporting requirement to ensure the agent is acting within the scope of authority.<sup>82</sup> Many principals who execute a power of attorney may not fully understand the provisions, and more importantly, the risks that can come with broad power. This only increases the opportunity and likelihood of financial exploitation.<sup>83</sup> While lawyers can often mitigate this issue by explaining the legal aspects and potential for risk, even counsel may not fully recognize if a particular client is in peril.<sup>84</sup> Unfortunately, with the increase in online forms, many principals never see an attorney before signing one.

If the one-size-fits-all self-help form is legally valid (which is a big "if"),<sup>85</sup> it can be quickly completed and signed, giving the agent vast authority to access the principal's assets. With a quick signature, elders can open themselves, and their bank account, up to financial exploitation. Many civil legal aid providers have also created new ways for low-income clients to access simple online forms without a lawyer. For example, in Washington State, a website named [washingtonlawhelp.org](http://washingtonlawhelp.org) provides free self-help materials including a power of attorney.<sup>86</sup> There is no judicial, court, or agency oversight required.<sup>87</sup>

### 5. *Balancing Autonomy and Protection*

The basis for the unregulated nature of a power of attorney is to allow individuals with capacity to autonomously decide who they trust enough to serve as a substitute decision-maker.<sup>88</sup> Autonomy has been defined as "the right of self-governance"<sup>89</sup> and a person's "right to live life consistent with his or her personal values."<sup>90</sup> The unsupervised aspect is justified by the

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81. Whitton, *Durable Powers*, *supra* note 18, at 37.

82. *Id.* at 10.

83. STIEGEL & VANCLEAVE KLEM, *supra* note 35, at 4–5.

84. Craft, *supra* note 19, at 449.

85. Paul Sullivan, *A Will Without Ink and Paper*, N.Y. TIMES (Oct. 18, 2019), <https://www.nytimes.com/2019/10/18/your-money/electronic-wills-online.html>.

86. *Power of Attorney*, WASH. L. HELP, <https://www.washingtonlawhelp.org/issues/aging-elder-law/powers-of-attorney-health-care-directives> (last visited Dec. 5, 2022).

87. *See id.*

88. Whitton, *Durable Powers*, *supra* note 18, at 11.

89. Melissa Brooks & Richard Goralewicz, *Balancing Autonomy and Protection: In Search of the Least Restrictive Manner*, in AM. BAR ASS'N, 2019 NATIONAL AGING AND LAW CONFERENCE 2 (2019).

90. *In re Conservatorship of Groves*, 109 S.W.3d 317, 327 (Tenn. Ct. App. 2003).



belief that the principal can independently select a trustworthy agent.<sup>91</sup> Some maintain that the structure and process are intended to provide an internal monitoring system for the incapacitated individual.<sup>92</sup> The informal agency relationship is premised on a principal maintaining ownership of assets and the authorized agent acting only when needed.<sup>93</sup> In theory, while a principal has capacity, they can observe and supervise the actions of the agent. If the principal disagrees with the agent's decision-making and retains capacity, they can ultimately choose to revoke the power of attorney.<sup>94</sup>

A power of attorney is designed to facilitate the principal's autonomy by preserving choice and decision-making capability as compared to other alternatives. In a guardianship, the private nature of the relationship is removed, and the court is inserted as the primary decision-maker and monitor. Some may argue that a trust is a good alternative as it provides some level of monitoring since the trustee must account to beneficiaries.<sup>95</sup> However, a trust is a less viable option for many, since the elder loses legal title and, possibly, control of the asset once it is placed in a trust.<sup>96</sup> Additionally, since the trustee only has control over the corpus of the trust, this often excludes some of the trustor's property, thereby limiting the trustee's ability to assist the elder.<sup>97</sup> Both of these surrogate property management arrangements remove the principal as the guiding force.

Several aspects of the UPOAA are designed to emphasize principal autonomy, including flexibility in customizing agent authority, clear agent guidelines, and protection of the principal's specific substitute decision goals.<sup>98</sup> It is argued that the drafting flexibility, which allows for expansion or restriction of duties, empowers a principal during the process.<sup>99</sup> Additionally, the UPOAA recognizes and underscores that the principal's expectations remain paramount guideposts for agent activities.<sup>100</sup> The UPOAA mandates that the agent "act in accordance with the principal's

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91. Whitton, *Durable Powers*, *supra* note 18, at 11.

92. *Id.* at 9.

93. Whitton, *Striking a Balance*, *supra* note 39, at 345–46.

94. Brooks & Goralewicz, *supra* note 89, at 9.

95. Boxx, *supra* note 24, at 44. Trustees' duties arise primarily from the trust instrument, but also from federal and state law. In the absence of express duties, a trustee is subject to the duties "which have evolved by courts of equity for the governing of the conduct of trustees." AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 164 (4th ed. 1987). A trustee must administer the trust in good faith, in accordance with its terms, and to pay income to a beneficiary according to trust requirements. RESTATEMENT (SECOND) OF TRUSTS § 169 (AM. L. INST. 1959).

96. Dessin, *Acting as Agent*, *supra* note 52, at 599–600.

97. *Id.* at 600.

98. Whitton, *Striking a Balance*, *supra* note 39, at 345.

99. *Id.* at 346–49.

100. *Id.* at 349.

reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest."<sup>101</sup> Key provisions were included in the UPOAA to support principals' self-determination, such as preventing a later-appointed guardian from terminating an agent's authority.<sup>102</sup> Finally, the principal's wishes are further protected by provisions outlining liability and damages when a third-party improperly rejects a valid power of attorney.<sup>103</sup> Increasing third-party acceptance of a power of attorney enhances and respects a principal's choice of agent.<sup>104</sup>

The academic conversation in the last decade has focused on how to balance autonomy with protection while not losing the usefulness that a power of attorney affords. Since an agent likely has vast discretion, they are "also granted the right to exercise that discretion in a virtually unsupervised—and largely unsupervisable—manner."<sup>105</sup> It has been described as a spectrum where one side has "unfettered freedom to create surrogate authority for any delegable action" and the other has "protection that comes at the sacrifice of delegating autonomy."<sup>106</sup> Lack of clarity regarding the agent role and duty further contributes to the potential for abuse. Without specificity as to what an agent is authorized to do, it is easier for an unprincipled agent to get away with abuse. Determining whether an agent actually disregarded a principal's directive or violated a fiduciary duty becomes less obvious.<sup>107</sup> Unfortunately, too often a power of attorney is a means to act *over* or *instead of* a principal, rather than *with* or *for* the principal. It is not uncommon for a lawyer to hear a client say their adult-child agent told them, "*I have a power of attorney over you so I now make the decisions.*"<sup>108</sup>

Autonomy can be a particularly tricky subject with the elderly since, as a group, they are at a greater risk of losing the opportunity to make their own decisions, not only because of actual mental or physical decline, but also due to ageist notions or protectionist beliefs.<sup>109</sup> Overprotection results when the

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101. UNIF. POWER OF ATT'Y ACT § 114(a)(1) (NAT'L. CONF. OF COMM'RS ON UNIF. STATE L. 2006).

102. Whitton, *Striking a Balance*, *supra* note 39, at 350–52.

103. UNIF. POWER OF ATT'Y ACT § 120 (NAT'L. CONF. OF COMM'RS ON UNIF. STATE L. 2006); Linda S. Whitton, *The New Uniform Power of Attorney Act: Balancing Protection of the Principal, the Agent, and Third Persons* 1, 7 (Val. U. Legal Stud. Rsch. Paper Series, No. 07-09, 2007), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1031250](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031250).

104. Craft, *supra* note 19, at 438.

105. Kohn, *Elder Empowerment*, *supra* note 64, at 17.

106. Whitton, *Striking a Balance*, *supra* note 39, at 361.

107. Kohn, *Elder Empowerment*, *supra* note 64, at 24.

108. *Accord id.* at 24–25.

109. Kurt Eggert, *Lashed to the Mast and Crying for Help: How Self-Limitation of Autonomy Can Protect Elders from Predatory Lending*, 36 LOY. L.A. L. REV. 693, 723–24 (2003).

balance towards protection tips too far due to ageism or paternalism.<sup>110</sup> If the power of attorney authorizes broad power to the agent, and the agent leans towards protectionism, there is a higher risk of the agent stepping over the principal's interests and possibly leading to abuse. Ageism is a persistent stereotype that negatively views elders as less capable based on the perceived loss of physical and mental capacity as we age.<sup>111</sup> Age used to be considered the sole basis for a lack of capacity finding or the need for a guardianship.<sup>112</sup> While that baseless legal theory no longer exists, ageism continues to permeate the actions of many family members, caregivers, and fiduciaries.

The power of attorney became ubiquitous because of its attractive qualities of accessibility, informality, and lack of oversight. Nonetheless, as the population ages, and COVID brings into focus the increased risk of isolation, the power of attorney is increasingly used to abuse vulnerable elders.

## II. ELDERS AT INCREASING RISK OF POWER OF ATTORNEY ABUSE

The trusting relationship, which serves as the foundation of a power of attorney, may “constitute the most likely breeding ground for financial abuse.”<sup>113</sup> Since many elders choose loved ones as an agent, “[t]he intimacy, proximity, and dependency that the caregiving relationship engenders place unscrupulous caregivers in disturbingly opportune positions to exercise coercion, subtle influence, and outright control.”<sup>114</sup> As power of attorney usage rises, and the baby boomers continue to age, the risk of power of attorney misuse and abuse grows. This Part examines the rise of financial exploitation in the last decade and highlights the need for power of attorney reform in light of the growth of our elder population.

### A. *The Growth of Financial Exploitation*

In the last few decades there has been a concerted effort to capture and research the causes, impact, and possible solutions to elder abuse. However, compared to child abuse and intimate partner violence, elder abuse is

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110. Brooks & Goralewicz, *supra* note 89, at 3.

111. The World Health Organization defines “ageism” as “the stereotypes (how we think), prejudice (how we feel) and discrimination (how we act) towards others or oneself based on age.” *Ageing: Ageism*, WORLD HEALTH ORG. (Mar. 18, 2021), <https://www.who.int/news-room/questions-and-answers/item/ageing-ageism>.

112. Brooks & Goralewicz, *supra* note 89, at 5.

113. Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 208 (2000) [hereinafter Dessin, *Financial Abuse of the Elderly*].

114. Matthew N. Andres, *Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips from the Experiences of the University of Illinois College of Law's Elder Financial Justice Clinic*, 23 ELDER L.J. 297, 304 (2016) (quoting LISA NERENBERG, NAT'L CTR. ON ELDER ABUSE, FORGOTTEN VICTIMS OF ELDER FINANCIAL CRIME AND ABUSE 4 (1999)).

underfunded and under studied.<sup>115</sup> Research data is often gathered from reports made to adult protective services (“APS”), rather than self-reported, and likely woefully underestimates the amount of abuse.<sup>116</sup> A 2010 national survey of adults over sixty found that more than one in ten older adults identified at least one category of mistreatment in the past year.<sup>117</sup> Recently, one study found that number had increased to one in six elders, or 15.7%, experiencing abuse in the past year.<sup>118</sup>

One type of elder abuse, financial exploitation,<sup>119</sup> is often one of the most common forms of reported abuse and has been called “a burgeoning public health crisis”<sup>120</sup> and “a virtual epidemic.”<sup>121</sup> One of the largest studies to date singling out financial exploitation found that 4.7% of elders were financially exploited during their lifetime.<sup>122</sup> Despite its prevalence, the root

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115. *Research, Statistics, and Data*, NAT’L CTR. ON ELDER ABUSE, <https://ncea.acl.gov/What-We-Do/Research/Statistics-and-Data.aspx> (last visited Dec. 6, 2022). In the first significant study of elder maltreatment in 1997, the National Elder Abuse Incidence Study found 449,924 individuals sixty or over had been mistreated in the prior year. NAT’L CTR. ON ELDER ABUSE, *THE NATIONAL ELDER ABUSE INCIDENCE STUDY 4* (1998), [https://acl.gov/sites/default/files/programs/2016-09/ABuseReport\\_Full.pdf](https://acl.gov/sites/default/files/programs/2016-09/ABuseReport_Full.pdf).

116. Ron Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100 AM. J. PUB. HEALTH 292, 292 (2010).

117. Maltreatment categories included physical abuse, psychological or verbal abuse, sexual abuse, financial exploitation, and neglect—these impact approximately one in ten elders. *Id.* at 293.

118. A recent study, relying on self-reports of abuse, assigned the following percentages by type of abuse: psychological (11.6%), physical (2.6%), financial (6.8%), neglect (4.2%), and sexual (0.9%) abuse. Yongjie Yon et al., *Elder Abuse Prevalence in Community Settings: A Systematic Review and Meta-Analysis*, 5 LANCET GLOB. HEALTH 147, 147 (2017). Another study found the following: emotional (4.6%), physical (1.6%), financial (family: 5.2%), financial (stranger: 6.5%), potential neglect (5.1%), and sexual (.6%). RON ACIERNO ET AL., U.S. DEP’T OF JUST., *THE NATIONAL ELDER MISTREATMENT STUDY 4* (2009), <https://www.ojp.gov/pdffiles1/nij/grants/226456.pdf>.

119. While the definition of “exploitation” varies, the Elder Justice Act defines it as:

[T]he 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.

42 U.S.C. § 1397j(8). The Centers for Disease Control and Prevention defines “financial abuse” as “the illegal, unauthorized, or improper use of an elder’s money, benefits, belongings, property, or assets for the benefit of someone other than the older adult.” *Fast Facts: Preventing Elder Abuse*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 2, 2021), <https://www.cdc.gov/violenceprevention/elderabuse/fastfact.html>.

120. Janey C. Peterson et al., *Financial Exploitation of Older Adults: A Population-Based Prevalence Study*, 29 J. GEN. INTERNAL MED. 1615, 1620 (2014).

121. Mark S. Lachs & Karl A. Pillemer, *Elder Abuse*, 373 NEW ENG. J. MED. 1947, 1947 (2015).

122. Peterson et al., *supra* note 120, at 1620. Prevalence rates vary, with one study finding financial abuse occurring 6.8% of the time. Yongjie Yon et al., *supra* note 118, at 154. A 2008 study found that 3.5% of community-residing elders aged 57 to 85 reported financial mistreatment. Edward O. Laumann et al., *Elder Mistreatment in the United States: Prevalence Estimates from a Nationally Representative Study*, 63B J. GERONTOLOGY 248, 252 (2008).

cause and impact of financial abuse has been largely ignored in research that instead examines physical abuse and neglect.<sup>123</sup> These studies are believed to underestimate the complete picture of abuse as elders may underreport financial abuse due to hesitancy to report a caregiver or loved one.<sup>124</sup>

As the risk of elder abuse increases, the financial impact surges as well. It is estimated that victims of elder exploitation lose at least \$2.9 billion per year.<sup>125</sup> A recent report from the Consumer Financial Protection Bureau revealed that the average annual financial loss to an older victim of financial exploitation is \$34,200.<sup>126</sup> To make matters worse, the amount of loss increases as people age with those 70–79 years old losing an average of \$45,300.<sup>127</sup> Financial institutions are required to report and file Suspicious Activity Reports (“SAR”) if the transaction involves \$5,000 or more and is deemed suspicious.<sup>128</sup> The number of SARs filed on elder financial exploitation increased more than fourfold from 2013 to 2017.<sup>129</sup> In 7% of the SARs, the loss to the older adult was over \$100,000.<sup>130</sup> Importantly, the SARs can identify the suspects specifically as either strangers or someone known to the victim. The financial loss was greater—and the amount lost was higher—if the older adult knew the perpetrator.<sup>131</sup>

The cost of exploitation on elders is significant and impacts not just their financial health but their social and emotional wellbeing. Along with substantial economic harm, financial exploitation can destroy credit scores and force elders into poverty and homelessness as many live on a fixed

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123. Peterson et al., *supra* note 120, at 1615–23.

124. *Understanding Elder Abuse*, CTNS FOR DISEASE CONTROL & PREVENTION (2016), <https://www.cdc.gov/violenceprevention/pdf/em-factsheet-a.pdf>. It is suggested that only 1 in 25 cases of elder abuse are reported. JILENNE GUNTHER, UTAH DIV. OF AGING & ADULT SERVS., *THE UTAH COST OF FINANCIAL EXPLOITATION* 4 (2011), [http://vcoy.virginia.gov/UTAH%20FINANCIAL%20EXPLOITATION%20EXPLORATORY%20STUDY%20\(3\).pdf](http://vcoy.virginia.gov/UTAH%20FINANCIAL%20EXPLOITATION%20EXPLORATORY%20STUDY%20(3).pdf). A large comprehensive study in New York State found incidents of elder abuse were 24 times greater than the number of reports made to legal authorities. LIFESPAN OF GREATER ROCHESTER, INC. ET AL., *UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY* 8 (2011), <https://ocfs.ny.gov/reports/aps/Under-the-Radar-2011May12.pdf>.

125. METLIFE MATURE MKT. INST. ET AL., *THE METLIFE STUDY OF ELDER FINANCIAL ABUSE* 7 (2011), <https://ltombudsman.org/uploads/files/issues/mmi-elder-financial-abuse.pdf>.

126. CONSUMER FIN. PROT. BUREAU, *SUSPICIOUS ACTIVITY REPORTS ON ELDER FINANCIAL EXPLOITATION: ISSUES AND TRENDS* 14–16 (2019), [https://files.consumerfinance.gov/f/documents/cfpb\\_suspicious-activity-reports-elder-financial-exploitation\\_report.pdf](https://files.consumerfinance.gov/f/documents/cfpb_suspicious-activity-reports-elder-financial-exploitation_report.pdf). Actual loss and attempts to steal from older individuals totaled over \$1.7 billion. *Id.*

127. Individuals 80 years and above lost approximately \$39,200. *Id.* at 17.

128. SARs are a detection mechanism used by financial institutions to report suspected fraudulent activity to the U.S. Department of Treasury and law enforcement. *Id.* at 9–10.

129. *Id.* at 11.

130. *Id.* at 4.

131. *Id.*

income.<sup>132</sup> Elders report skipping meals, losing independence, and experiencing an increase in depression and anxiety.<sup>133</sup> Financial devastation can cause elders to forego medications that they can no longer afford, and has been directly linked to an increased risk of hospitalization.<sup>134</sup>

In addition to undermining the health and self-care ability of elders, there is a larger community cost, as the burden of caring for exploited elders falls to states. One jurisdiction that reviewed elder financial exploitation cases found that the loss amounted to \$7,704,729 in overall elder assets.<sup>135</sup> The average loss involved when the perpetrator was a family member was \$125,193, and \$157,326 if it was a victim's adult child.<sup>136</sup> States lost an additional nearly \$900,000 in state Medicaid program costs when forced to cover care for elders who suffered substantial financial loss.<sup>137</sup>

### *B. Power of Attorney Abuse*

According to one long-time elder abuse prosecutor, “the power of attorney is the most common tool used . . . to commit financial exploitation.”<sup>138</sup> Case law also indicates an uptick in power of attorney abuse, as reported cases went from a few in 2002 to eleven in 2012.<sup>139</sup> These cases involve family members intentionally misusing agent powers to self-deal.<sup>140</sup>

#### *1. The Rising Threat of Harm*

Ideally, there should be some empirical evidence that demonstrates abuse specific to powers of attorney; unfortunately, there is a dearth of recent statistical evidence specifically examining this form of financial exploitation. The earliest study was a 1993 national survey that surveyed elder law

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132. Andres, *supra* note 114, at 304–05.

133. TRUE LINK FIN., THE TRUE LINK REPORT ON ELDER FINANCIAL ABUSE 2015, at 18–19 (2015), <http://documents.truelinkfinancial.com/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf>.

134. Andres, *supra* note 114, at 305.

135. GUNTHER, *supra* note 124, at 5.

136. *Id.*

137. *Id.*

138. Rebecca C. Morgan & Randolph Thomas, *Financial Exploitation by Agents Under Powers of Attorney*, 34 CRIM. JUST. 31, 34 (2020) (quoting Page Ulrey, *The Case for Specialized Elder Abuse Prosecutors*, 24 AM. BAR ASS'N EXPERIENCE MAG. (Mar. 1, 2014), [https://www.americanbar.org/groups/senior\\_lawyers/publications/experience/2014/spring/case-specialized-elder-abuse-prosecutors/](https://www.americanbar.org/groups/senior_lawyers/publications/experience/2014/spring/case-specialized-elder-abuse-prosecutors/)).

139. Craft, *supra* note 19, at 421; Jane A. Black, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws are Failing a Vulnerable Population*, 82 ST. JOHN'S L. REV. 289, 296–300 (2008).

140. Black, *supra* note 139, at 300–02 (citing *Levy v. Thompson*, No. 20641, 2006 WL 2875429 (Ohio Ct. App. 2006)) (finding that the sister's agent depleted her sister's certificates of deposit and then used money to buy herself annuities).

attorneys, service providers, judges, and prosecutors.<sup>141</sup> Overwhelmingly, the respondents recognized that power of attorney abuse happens regularly, and believed it warranted a response.<sup>142</sup> It was further noted that the majority of the principal's assets were dissipated. The early findings demonstrate that while misuse was not widespread, when it did occur it was quite serious.<sup>143</sup>

Despite the financial loss, the majority of respondents believed the benefits derived from a power of attorney outweighed the possible risk.<sup>144</sup> A subsequent survey revealed that most attorneys believed that the current criminal statutes and civil laws were sufficient to combat abuse and did not support legislative action.<sup>145</sup> The written comments indicated that most were opposed to any steps that limited or detracted from the tool's effectiveness.<sup>146</sup> Nearly ten years later, a study of lawyers, APS staff, law enforcement, and prosecutors found an increase in awareness of power of attorney abuse.<sup>147</sup> Results indicated that most respondents supported statutory safeguards and judicial review, but less than half were in favor of oversight.<sup>148</sup>

There is a dearth of data examining financial exploitation specifically committed under a power of attorney.<sup>149</sup> However, there are several recent studies that examined financial abuse committed only by a family member perpetrator, which certainly would be inclusive of agent abuse.<sup>150</sup> One survey

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141. FEDERMAN & REED, *supra* note 36, at 29.

142. Ninety-four percent expressed a belief that power of attorney abuse happens occasionally or frequently, and 82% believed it warranted a legislative/administrative response. Of those who responded, 66% had actually encountered power of attorney abuse, with 22% having encountered it more than ten times. *Id.* at 37. A survey conducted in 1994 by the ABA Section of Real Property, Probate and Trust Law of 2,242 lawyers found that 40% of the 854 respondents reported being aware of power of attorney misuse. David M. English & Kimberly K. Wolff, *Survey Results: Use of Durable Powers*, 10 PROB. & PROP. 33, 33–34 (1996).

143. In 48% of the 270 situations described by respondents, approximately 75% or more of the principal's assets were exploited. FEDERMAN & REED, *supra* note 36, at 39.

144. English & Wolff, *supra* note 142, at 33 (“The survey results indicate that incidents of misuse are relatively infrequent but that when they occur, they can produce unfortunate and harmful consequences.”).

145. The survey by the American College of Trust and Estate Counsel was sent to 2,711 members. Only 32% of the 776 respondents indicated they personally knew of power of attorney abuse. E. Thomas Shilling, *Report on ACTEC Elder Law Committee Questionnaire on Possible Abuse of Financial Durable Power of Attorney*, 21 ACTEC NOTES 247, 248–49 (1995).

146. *Id.* at 250.

147. The study showed that 78% of the 371 respondents from 44 jurisdictions were aware of power of attorney abuse and 64% had personally encountered it in their work. LINDA S. WHITTON, NATIONAL DURABLE POWER OF ATTORNEY SURVEY RESULTS AND ANALYSIS 12 (2002).

148. Only 41% of respondents were in favor of mandatory recording of powers of attorney as a solution. *Id.* at 13.

149. Kevin Hansen et al., *Empowering the Wicked: How Some Agents Use a Power of Attorney to Commit the Crime of Financial Exploitation*, 30 ELDER L.J. 1, 13 (2022).

150. See Ananda B. Amstadter et al., *Prevalence and Correlates of Elder Mistreatment in South Carolina: The South Carolina Elder Mistreatment Study*, 26 J. INTERPERSONAL VIOLENCE 2947, 2948 (2011); Laumann et al., *supra* note 122, at 248; Acierio et al., *supra* note 116, at 292.

revealed that family members commit over half of the reported financial abuse.<sup>151</sup> Recently, a study gathered data from cases substantiated by APS and examined abuse committed by surrogate decision makers, including agents authorized under a power of attorney.<sup>152</sup> An overwhelming 85% of perpetrators were agents under a power of attorney, and financial exploitation was the most common form of abuse occurring in 34.2% of cases.<sup>153</sup>

## 2. *Exploiting a Trusting Relationship*

Financial exploitation has been categorized as a crime of occasion, desperation, or predation.<sup>154</sup> Each of these situations relies on the creation or exploitation of a trusting relationship to access the elder's finances. Unlike stranger scams, the relationship of trust and ease of access afforded by a power of attorney increases the opportunity for exploitation. Additionally, in examining the financial loss to the victim, it was almost three times as high—an average of \$34,200 compared to \$83,600—if the perpetrator was a fiduciary.<sup>155</sup> Financial exploitation can be particularly devastating to low-income communities when it means the loss of the elder's fixed income of Social Security or other public benefits.

As perpetrators are often those with a trusting relationship, family members were the most common culprits of financial exploitation of older adults.<sup>156</sup> The profile of the common perpetrator is an adult child or spouse, more likely to be male, with a history of substance abuse, mental or physical health problems, unemployment issues, or financial problems.<sup>157</sup> According to one study looking at APS cases, 60% of elder financial abuse was committed by an adult child.<sup>158</sup> Adult children can feel entitled to the principal's assets or wealth due to perceived inheritance or as "payment" for caring for an ailing parent. The water is further muddied by the notion of "consent," when an elder may appear to choose to make a gift to a child

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151. A 2008 national study demonstrated that of 5,777 adults 60 years and over found that 5.2% of elders reported current financial abuse by a family member. Aciermo et al., *supra* note 116, at 292. A 2011 self-reported study of 4,156 respondents revealed that family members committed more than half of the financial exploitation. LIFESPAN OF GREATER ROCHESTER, INC. ET AL., *supra* note 124, at 34–35.

152. Cory Bolkan et al., *Abuse of Vulnerable Older Adults by Designated Surrogate Decision Makers*, 4 INNOVATION IN AGING 702, 702 (2020).

153. *Id.*; Hansen et al., *supra* note 149, at 14.

154. METLIFE MATURE MKT. INST., *supra* note 125, at 21.

155. "Fiduciary" encompasses more than an agent, but also includes guardians, trustees, and government benefit fiduciaries. CONSUMER FIN. PROT. BUREAU, *supra* note 126, at 18.

156. The breakdown of perpetrators was: family members (57.9%), friends and neighbors (16.9%) and then home care aides (14.9%). Peterson et al., *supra* note 120, at 1615–23.

157. Lachs & Pillemer, *supra* note 121, at 1950.

158. Leslie Callaway & Jerry Becker, *Stopping the Financial Abuse of Seniors*, ABA BANK COMPLIANCE, July–Aug. 2011, at 10, 11.



serving as an agent. A perpetrator may start out providing support to a parent and using the elder's financial resources to benefit both the elder and the agent before ultimately taking advantage of the principal.<sup>159</sup> An added risk for baby boomers is that they have experienced higher rates of divorce, remarriage, nonmarital liaisons, and cohabitation than other generations that creates ties to not just adult children, but step-children and former relatives as well.<sup>160</sup>

As individuals age, there is an increased risk of financial exploitation due to impaired capacity, declining physical health and functioning, and dependency on others. For some, a lifetime of accumulated wealth and assets in preparation for retirement can also increase the likelihood of becoming a target.<sup>161</sup> Other elders may be experiencing grief, depression, anxiety, or isolation, factors that increase the opportunity or likelihood of financial exploitation.<sup>162</sup> As noted earlier, with the rise of DIY forms, online options, and the lack of a lawyer, many principals are uneducated about the associated risks.<sup>163</sup> Add in an elder with diminishing capacity who may not be aware of the actions or abuse, and the damage may not be discovered until the principal has died or after the assets are gone.<sup>164</sup> Additionally, before these types of abuse can occur, a principal may be tricked or persuaded into signing a power of attorney. In particular, an older adult with capacity issues may sign one due to undue influence, fear, fraud, abuse, or misrepresentation.<sup>165</sup>

While there are a host of possible bad actions an agent can take, one scholar has created three categories of power of attorney financial abuse: (1) transactions that exceed the intended scope of authority; (2) transactions conducted for self-dealing purposes; and (3) actions that are in contravention of the principal's expectations.<sup>166</sup> Transactions that exceed the agent's scope can be both intentional and unintentional. A well-meaning but unsophisticated agent may simply not understand the legal language in the document. Dishonest agents certainly know that the document does not give

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159. See Black, *supra* note 139, at 294–300.

160. Karen L. Fingerman et al., *The Baby Boomers' Intergenerational Relationships*, 52 GERONTOLOGIST 199, 200 (2012).

161. Stephen Deane, *Elder Financial Exploitation: Why It Is a Concern, What Regulators are Doing About It, and Looking Ahead*, U.S. SEC. & EXCH. COMM'N (Jun. 2018), <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

162. METLIFE MATURE MKT. INST. ET AL., *supra* note 125, at 22.

163. Goffe & Holler, *supra* note 67, at 27.

164. STIEGEL & VANCLEAVE KLEM, *supra* note 35, at 5–6; see also Whitton, *Striking a Balance*, *supra* note 39, at 359–60.

165. STIEGEL & VANCLEAVE KLEM, *supra* note 35, at 4–5; Whitton, *Striking a Balance*, *supra* note 39, at 343.

166. Whitton, *Striking a Balance*, *supra* note 39, at 355–60.

them the authority to engage in certain activities but act intentionally to defraud the principal.<sup>167</sup>

A more common and deceptive practice is a transaction that is technically authorized by the power of attorney but is undertaken to benefit the agent to the disadvantage of the principal.<sup>168</sup> This often involves family member agents who use the document to enrich themselves from the principal's assets. This type of abuse can be complicated, as the agent may be acting within the bounds of authority and is unlikely to get caught or have the abuse detected.<sup>169</sup> Recalling the three client stories of Violet, Juan, and Liu, all the agents were likely authorized by the power of attorney to complete the financial transactions. However, it is difficult to detect in advance whether a property transfer or cash withdrawal is for self-dealing purposes. Without agent oversight, or notice to the principal, it becomes nearly impossible to prevent the harm until it is too late.

The last category of abuse involves transactions that disregard the principal's wishes, interests, or self-determination.<sup>170</sup> Violet's case demonstrates the harmful nature of this type of action because the agent took actions that ignored the basic human dignity and value of the principal. Not only were all of Violet's personal possessions acquired over a long life sold without her knowledge or consent, but her rights to liberty and bodily integrity were violated when she was placed in a facility she did not choose. She was, in essence, wrongfully imprisoned. There may be no recourse, as the power of attorney authorizes the actions and there is an absence of self-dealing.<sup>171</sup> The only option may be civil litigation and a breach of fiduciary duty claim. But even then, if the agent does not have money or resources, there is no adequate way to compensate the principal.

### *C. Baby Boomer Boom*

The baby boomer generation has impacted the size of the United States population as well as nearly every cultural institution for the last 70 years.<sup>172</sup> The post-World War II baby boom, those born between 1946 and 1964, has long been referred to as the "pig-in-the-python" generation, as it conjures up the image of a massive demographic bubble easing its way through

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167. *See id.* at 355.

168. *Id.* at 357.

169. *Id.* at 357–58.

170. *Id.* at 359.

171. *See, e.g., id.* at 360.

172. *2020 Census Will Help Policymakers Prepare for Incoming Wave of Aging Boomers*, U.S. CENSUS BUREAU (Feb. 25, 2022), <https://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html>.

time.<sup>173</sup> The oldest boomers turned 75 in 2021, and approximately 10,000 turn 65 every day.<sup>174</sup> By 2030, all boomers will hit the retirement mark.<sup>175</sup>

From 2008 to 2018, the population of individuals 65 and older increased 35%, and the population over 85 years old is forecast to more than double by 2040.<sup>176</sup> Life expectancy for this generation is also swelling and expected to reach 85.6 years by 2060.<sup>177</sup> By 2034, adults aged 65 and older are projected to outnumber those under 18 for the first time.<sup>178</sup> With such a large number of people over 85 years old, it is expected that those individuals with Alzheimer's disease and related dementias will increase too.<sup>179</sup>

For boomers, “demography equals destiny”<sup>180</sup> as they continue to transform virtually every development stage and social institution.<sup>181</sup> As the largest generation group in history, representing 23.5% of the population of the United States currently, they have significantly affected the economy and are often the focus of national marketing campaigns.<sup>182</sup> The total wealth

173. Baby Boomers were named for the increase in the birth rate after World War II. According to the census, the generation starts with those born in 1946 through 1964. *American Generation Fast Facts*, CNN (Aug. 21, 2022, 2:55 PM), <https://www.cnn.com/2013/11/06/us/baby-boomer-generation-fast-facts/>.

174. *2020 Census Will Help Policymakers Prepare for Incoming Wave of Aging Boomers*, *supra* note 172.

175. *Id.*

176. Those 65 and older increased from 38.8 million to 52.4 million and is projected to reach 94.7 million in 2060. Individuals over 85 will grow by 123% from 6.5 million in 2018 to 14.4 million in 2040. ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUM. SERVS., 2019 PROFILE OF OLDER AMERICANS 3–4 (2020), <https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2019ProfileOlderAmericans508.pdf>.

177. In 2017, life expectancy for Americans was 79.7 years. LAUREN MEDINA, SHANNON SABO & JONATHAN VESPA, U.S. CENSUS BUREAU, P25-1145, LIVING LONGER: HISTORICAL AND PROJECTED LIFE EXPECTANCY IN THE UNITED STATES, 1960 TO 2060, at 5 (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1145.pdf>.

178. *Id.*

179. U.S. DEP'T OF HEALTH & HUM. SERVS., NATIONAL PLAN TO ADDRESS ALZHEIMER'S DISEASE: 2020 UPDATE 4 (2020), [https://aspe.hhs.gov/sites/default/files/migrated\\_legacy\\_files//197726/NatPlan2020.pdf](https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//197726/NatPlan2020.pdf).

180. *The Baby Boom Generation—Five Time Losers?*, GLOBALIST (Jan. 1, 2003), <https://www.theglobalist.com/the-baby-boom-generation-five-time-losers/>.

181. “Baby boomers have changed the face of the U.S. population for more than 70 years and continue to do so as more enter their senior years, a demographic shift often referred to as a ‘gray tsunami.’” *2020 Census Will Help Policymakers Prepare for Incoming Wave of Aging Boomers*, *supra* note 172. In the employment context, as massive numbers of boomer employees entered the labor market at the same time, they changed the face of what it meant to be a professional. The days of working 9–5 were gone, as competition for jobs led to a longer workday and stringent demands on worker time. As boomers were ready to settle down and buy their dream homes, so was everyone else, which led to a tighter housing market and increased prices. *See The Baby Boom Generation—Five Time Losers?*, *supra* note 180.

182. *Baby Boomer: Definition, Years, Date Range, Retirement & Preparation*, INVESTOPEDIA (July 31, 2022), [https://www.investopedia.com/terms/b/baby\\_boomer.asp](https://www.investopedia.com/terms/b/baby_boomer.asp).

accumulation of boomers is massive, as they hold 54% of personal net worth.<sup>183</sup> While the previous generation was reliant on union or corporate pensions, today's boomers have a plethora of investment options available as they anticipate living longer.<sup>184</sup>

Although many in the prior generation often worked physically demanding jobs which required an earlier retirement, as the boomers began entering retirement age in 2012, many are showing no interest in working until their bodies give out. Instead, anticipating living longer and healthier, those who can afford it plan to travel more, start new endeavors, and fulfill other life dreams.<sup>185</sup> Due to their sheer size, as baby boomers retire in large numbers, they will leave a gaping hole in the employment sector.<sup>186</sup> As they enter the final phase of life, an increasing number of elders will begin to consider estate planning. According to a 2010 survey, only 48% of those 65 and older had basic documents such as a power of attorney in place,<sup>187</sup> but usage is on the rise.<sup>188</sup>

As the number of baby boomers rises and access to technology by both elders and bad actors increases, financial abuse, especially in the power of attorney context, will continue to increase. The power of attorney affords ease of access coupled with lack of supervision that demands a multifaceted solution.

### III. PRIOR POWER OF ATTORNEY REFORMS HAVE NOT PREVENTED ABUSE

As the power of attorney became universal and led to accompanying misuse and abuse, the idea to reform the power of attorney began to take hold as well.<sup>189</sup> While some scholars have suggested regulatory ideas, most favor less restrictive options so as not to impact the tool's utility. Proposals have included defining and specifying the agent role or tightening drafting provisions over regulation.<sup>190</sup> Overall there has been a strong and continuous

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183. *Id.*

184. This generation can expect an increase in life expectancy of approximately 25 years. *Id.*

185. One-third of baby boomers are now 65 years or older. *Id.*

186. Sarah Chandler, *As Boomers Slow Down, Will the Economy Follow?*, INVESTOPEDIA (Sept. 14, 2021), <https://www.investopedia.com/articles/investing/080614/boomers-slow-down-will-economy-follow.asp>.

187. Ashlea Ebeling, *Americans Lack Basic Estate Plans*, FORBES (Mar. 1, 2010, 6:22 PM), <https://www.forbes.com/2010/03/01/estate-tax-living-will-schiavo-personal-finance-no-estate-plans.html?sh=2053e1216677>.

188. Greg Reese, *Estate Planning for Baby Boomers*, AMERIESTATE LEGAL PLAN, INC. (May 15, 2017), <https://ameriestate.com/estate-planning/estate-planning-boomers/>.

189. See FEDERMAN & REED, *supra* note 36, at 39.

190. See, e.g., Kohn, *Elder Empowerment*, *supra* note 64, at 4; Craft, *supra* note 19, at 464–65; Whitton, *Durable Powers*, *supra* note 18, at 17.

resistance to enacting mandatory supervision or oversight measures.<sup>191</sup> Such caution has come at a cost to elders and has not decreased financial exploitation.

#### *A. Early Reform Efforts*

The first substantial conversation on power of attorney reform was initiated after a 1994 national study by Government Law Center at Albany Law School revealed that 82% of respondents believed that power of attorney abuse warranted a legislative or administrative response.<sup>192</sup> The report highlighted that the “seemingly endless debate” raged on between proponents of regulation and advocates for maintaining informality.<sup>193</sup> The report concluded by cautioning both sides that, “there is a need for a more balanced perspective that recognizes both the need for reform and the negative effects that the reform may cause if not done wisely.”<sup>194</sup>

Ultimately, the report outlined a number of legislative safeguards to deter abuse, enhance detection, and increase prosecution of power of attorney abuse.<sup>195</sup> Several of the suggestions were aimed at the power of attorney form itself, including adding formal execution requirements, mandating cautionary language, or requiring the principal to affirmatively signify certain powers.<sup>196</sup> Other safeguards targeted more intrusive options such as recording powers of attorney and requiring principal notification when a transaction is completed.<sup>197</sup> Additional ideas were designed to detect and punish abusers, such as allowing interested parties to petition the court to terminate a power of attorney, creating a public registry of convicted abusers, and encouraging states to revise and enhance criminal statutes.<sup>198</sup>

#### *B. Role Clarification and Education*

Since the 1994 report, other scholars have suggested non-regulatory means to curb both intentional abuse as well as the more nuanced issues of principal disempowerment and undue influence.<sup>199</sup> In an effort to walk the fine line of maintaining flexibility while ensuring protection, advocates have

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191. See, e.g., Boxx, *supra* note 24, at 46 (“To include a thorough monitoring process would essentially gut the usefulness of the power of attorney . . .”).

192. FEDERMAN & REED, *supra* note 36, at 1.

193. *Id.* at 7.

194. *Id.*

195. *Id.* at 43.

196. *Id.* at 47, 51–52, 57.

197. *Id.* at 59, 72.

198. *Id.* at 66, 74, 77.

199. See, e.g., Kohn, *Elder Empowerment*, *supra* note 64, at 42; Craft, *supra* note 19, at 455; Dessin, *Acting as Agent*, *supra* note 52, at 620.

focused on agent selection and education. This has included instructing principals to select only the most trustworthy to serve, naming co-agents to make consensus decisions, and selecting a third-party to monitor the agent.<sup>200</sup>

Other scholars suggest solutions focused on increasing principal empowerment to curb agent “over-reach.”<sup>201</sup> Paternalistic notions of elder ability, capacity, and functioning negatively impact an elder’s sense of self-determination.<sup>202</sup> This, in turn, increases mental and physical health concerns, as well as overall functioning.<sup>203</sup> For example, one commentator argues that requiring an agent to ascertain a principal’s wishes in advance would be a beneficial reform mechanism that also maintains the tool’s utility.<sup>204</sup> She posits that empowering elders to play an active role in the agency relationship would result in better agent monitoring, less exploitation, and better principal well-being.<sup>205</sup> Certainly, improved principal-agent communication and consultation is preferred; however, this is only realistic before a principal’s capacity degenerates. Increased interaction would have no impact on a bad actor’s intent on over-reaching.

An additional suggestion for improvement is to better define the core of the power of attorney: the fiduciary duty of the agent.<sup>206</sup> While there is no doubt that an agent’s role was as a fiduciary, the lack of definition of what the role entails was problematic. The legal relationship between principal and agent is defined primarily as a duty of loyalty. This ambiguous definition directed agents only to avoid putting their own interests above that of the principal, but provided little other guidance.<sup>207</sup> While the fiduciary duty encompasses specific directives, such as protecting property and acting with honesty and impartiality, the role was undefined and amorphous, which was purposeful to bolster efficiency and utility.<sup>208</sup> These reform suggestions focused on providing clarification to agents about what the role entailed rather than creating regulation or oversight. It was argued that specifying the agent’s duties would guide the agent appropriately, protect the principal, and serve as a deterrence for bad actors.<sup>209</sup>

Prior to the UPOAA, state statutes varied greatly in the degree to which the agent’s duties were specifically delineated.<sup>210</sup> As such, reform advocates

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200. Whitton, *Durable Powers*, *supra* note 18, at 17–18.

201. Kohn, *Elder Empowerment*, *supra* note 64, at 30.

202. *Id.* at 29.

203. *Id.* at 34.

204. *Id.* at 36.

205. *Id.* at 42–43.

206. Boxx, *supra* note 24, at 56; Dessin, *Acting as Agent*, *supra* note 52, at 602.

207. Boxx, *supra* note 24, at 17.

208. *Id.* at 18, 43.

209. *Id.* at 56.

210. Whitton, *Durable Powers*, *supra* note 18, at 25.

suggested that establishing clear, written fiduciary guidelines would alleviate confusion and guard against the “uniquely directionless” agent.<sup>211</sup> Many family member-agents simply have no idea what their role is and how to meet the obligations. This can lead to errors or mistakes that may harm the principal without intentional exploitation.<sup>212</sup>

### C. Stricter Execution and Drafting Requirements

Since few states had formalities other than the principal’s signature, another safeguard suggestion was to tighten the execution requirements.<sup>213</sup> States began to enact measures aimed at formalizing execution, including mandatory notarization, increasing the number of witnesses, and including witness attestations designed to ensure principal capacity.<sup>214</sup>

Further considerations included limitations on the scope of authority or reducing agent power.<sup>215</sup> The evolution of powers of attorney have seen generalized duties give way to clearly delineated duties, as well as the inclusion of specific provisions outlining scope of authority.<sup>216</sup> Beginning in the 1980s, with the advent of statutory forms, came the inclusion of defined statutory powers. States began to require explicit specification of certain powers, like gifting.<sup>217</sup> It was mixed on whether to give broad gifting authority to agents or to insist on express language in the power of attorney to authorize gifts.<sup>218</sup> The obvious problem with limiting agent authority is that the individual chosen may not be able to accomplish necessary tasks, thus eliminating the document’s objective. For example, if the power of attorney does not authorize transferring real property, such a restriction could defeat the purpose of the document. One suggestion is to limit gifting powers to curb abuse, but at times gifting is essential for the principal’s asset management to qualify for public benefits.<sup>219</sup>

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211. Boxx, *supra* note 24, at 44.

212. Dessin, *Acting as Agent*, *supra* note 52, at 602, 619.

213. FEDERMAN & REED, *supra* note 36, at 47.

214. *Id.* at 47–50.

215. Whitton, *Durable Powers*, *supra* note 18, at 18.

216. *Id.* at 34.

217. *Id.* at 35–36.

218. UNIF. POWER OF ATT’Y ACT § 201(a) (NAT’L. CONF. OF COMM’RS ON UNIF. STATE L. 2006). Compare WASH. REV. CODE ANN. § 11.94.050 (West 2016) (“Although a designated attorney-in-fact or agent has all powers of absolute ownership of the principal, or the document has language to indicate that the attorney-in-fact or agent has all the powers the principal would have if alive and competent, the attorney-in-fact or agent *does not* have the power . . . to make any gifts of property owned by the principal . . .” (emphasis added)), *repealed* by 2016 Wash. Legis. Serv. ch. 209 (S.S.B. 5635) (West), with TENN. CODE ANN. § 34-6-110 (West 2022) (granting an attorney-in-fact or agent “the power and authority to make gifts, in any amount, of any of the principal’s property, to any individuals, or to organizations”).

219. Whitton, *Durable Powers*, *supra* note 18, at 18–19.

One scholar argued to tip the balance away from efficiency in favor of protecting elders by making “springing” powers of attorney the default.<sup>220</sup> He asserts that not only would it decrease the opportunity for abuse, but it would also promote the dual goals of self-determination and privacy protection. Simply, if a client does not lose capacity, then there is no need for the power of attorney, and no opportunity for abuse.<sup>221</sup> It is argued that much of the abuse occurs after the agent is appointed and begins to act. A springing power of attorney may prevent, or at least mitigate, abuse by delaying when an agent’s authority begins.<sup>222</sup> Clients may also prefer to keep their capacity situation private and not announce to the world that they need a substitute decision-maker. Additionally, many choose not to relinquish decision-making until it becomes absolutely necessary.<sup>223</sup>

On the downside, springing powers of attorney remove principal oversight or thoughtful communication between the agent and principal regarding the latter’s wishes.<sup>224</sup> The fundamental flaw with springing powers is that if you do not trust the agent now, why would you trust them later when you are incapacitated? Violet’s case seems to prove this point as she executed a springing power of attorney. It did not become effective for a decade, during which she had no contact, communication, or interaction with the agent. She had no notice when the agent began to act and was unaware of the resulting damage until it was too late.

Lastly, eliminating immediately effective powers of attorney eradicates the tool’s basic usefulness. Such a drastic solution would punish the millions of agents and their principals who rely on the document for regular financial management. There would be no way to assist an elderly parent who is physically ailing but not deemed “incapacitated” for purpose of the effectiveness clause. The benevolent desire to curb abuse by restricting assistance until a later date would ultimately destroy the effectiveness of a power of attorney for many elders.

#### *D. The UPOAA and Provisions to Prevent Abuse*

Despite the passionate and lengthy national debate on how to reform powers of attorney, the primary focus has remained on ensuring that any

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220. Craft, *supra* note 19, at 433, 456–57. A “springing” power of attorney becomes effective “at a future date or upon the occurrence of a future event or contingency” compared to immediately upon execution. UNIF. POWER OF ATT’Y ACT § 109(a) (NAT’L. CONF. OF COMM’RS ON UNIF. STATE L. 2006).

221. Craft, *supra* note 19, at 442.

222. *Id.* at 460–61.

223. *Id.* at 442, 463.

224. Whitton, *Durable Powers*, *supra* note 18, at 21–22.



changes do not become too burdensome.<sup>225</sup> The promulgation of the UPOAA in 2006 was the culmination of a national effort to balance safeguarding against abuse while maintaining the utility and ease of use. Advocates encouraged all states to adopt the UPOAA because it “[p]reserve[d] the effectiveness of durable powers as a low-cost, flexible, and private form of surrogate decision-making.”<sup>226</sup> In fact, one of the aims was to deter abuse by adding provisions to minimize risk, safeguard against financial exploitation, and provide redress.<sup>227</sup>

In an effort to prevent against abuse, the UPOAA aimed to provide clear guidelines dictating that an agent must act: (1) according to a principal’s reasonable expectations, (2) in good faith, and (3) within the scope of authority given.<sup>228</sup> While this guidance may seem useful, the first two are not new requirements but merely list duties that existed at common law. This provides no protection against an unscrupulous agent intent on acting in conflict with a principal’s interest or “reasonable expectations.”<sup>229</sup>

To ensure that an agent acts within the authorized scope, the UPOAA delineates between actions that require express language and those under the general grant of authority.<sup>230</sup> Commissioners added several provisions in an attempt to prevent exploitation, in particular the requirement of express authority for acts that may dissipate the principal’s property.<sup>231</sup> Section 201(a) lists specific actions—this includes making a gift, creating or amending a trust, and changing beneficiary designations—that are only authorized if the document gives express authority.<sup>232</sup> Additionally, a non-relative agent with gifting authority is prohibited from making a gift to herself unless the document provides.<sup>233</sup> This is designed as an extra layer of principal protection if an agent attempts to act outside the scope of authority. Rather than blanket authority, a principal is empowered to make thoughtful selections as to what authority to grant and may choose to limit power.<sup>234</sup>

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225. Boxx, *supra* note 24, at 55–56.

226. Rhein, *supra* note 13, at 176 (citing UNIF. L. COMM’N, WHY YOUR STATE SHOULD ADOPT THE UNIFORM POWER OF ATTORNEY ACT (2006), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=c6e96515-49af-c01a-3fdb-86fdd614855a&forceDialog=0>).

227. STIEGEL & VANCLEAVE KLEM, *supra* note 35, at 5; Whitton, *Striking a Balance*, *supra* note 39, at 356, 364.

228. UNIF. POWER OF ATT’Y ACT § 114(a)(1)–(3) (NAT’L. CONF. OF COMM’RS ON UNIF. STATE L. 2006).

229. Rhein, *supra* note 13, at 180.

230. Whitton, *Striking a Balance*, *supra* note 39, at 355–56.

231. UNIF. POWER OF ATT’Y ACT, prefatory note; Whitton, *Striking a Balance*, *supra* note 39, at 348.

232. UNIF. POWER OF ATT’Y ACT § 201(a).

233. *Id.* § 201(b).

234. *Id.* at prefatory note.

The UPOAA also includes provisions designed to detect financial exploitation. The Act gives standing to APS or another government agency to request an accounting from the agent.<sup>235</sup> There is also a “good faith” provision that allows a third party to refuse a valid power of attorney based on a belief the principal is being abused.<sup>236</sup> However, a third party is not required to investigate the legitimacy or authority of an agent. Instead, the UPOAA allows an entity to rely on the validity of the document on its face.<sup>237</sup> There is, in essence, no way to prevent an agent who has authority to act with a valid power of attorney from committing financial fraud.

If prevention is unsuccessful, the UPOAA also added provisions to increase detection. A principal may be unaware of unauthorized acts or exploitation, or worse—incapacitated and unable to discover the abuse.<sup>238</sup> A broad, catch-all category of individuals, including those “that demonstrate[] sufficient interest in the principal’s welfare,” may petition the court to review the actions of the agent.<sup>239</sup> Government agencies, in particular APS, may force an agent to produce evidence of transactions conducted on behalf of the principal.<sup>240</sup>

Lastly, the UPOAA provides remedies when a bad actor agent is caught in the act. This includes restoring the principal’s property to make her whole as if the exploitation did not occur, as well as paying attorney fees and costs.<sup>241</sup> In some circumstances, a co-agent is required to disclose bad acts of another co-agent.<sup>242</sup> These provisions are only a starting point and do not limit the agent’s liability.<sup>243</sup> The UPOAA makes clear these remedies are not the exclusive means to redress financial abuse.<sup>244</sup>

While these efforts have begun to swing the pendulum away from unfettered access towards some protection, there is no indication that these mechanisms have decreased exploitation or provided enhanced protection for elders. Moreover, only twenty-nine states have adopted legislation based on the UPOAA, and not all of them have implemented protective provisions.<sup>245</sup>

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235. *Id.* § 114(h).

236. *Id.* § 120(b)(5); Whitton, *Striking a Balance*, *supra* note 39, at 357.

237. UNIF. POWER OF ATT’Y ACT § 119 cmt.

238. Whitton, *Striking a Balance*, *supra* note 39, at 355.

239. UNIF. POWER OF ATT’Y ACT § 116(a)(8).

240. *Id.* § 114(h).

241. *Id.* § 117.

242. *Id.* § 111(d).

243. *Id.* § 117 cmt.

244. *Id.* §§ 123, 117 cmt.

245. *50-State Power of Attorney Laws Chart*, *supra* note 42.

#### IV. INADEQUATE PREVENTION AND PROSECUTION OF FINANCIAL EXPLOITATION

The current piecemeal approach to prevention and prosecution of financial exploitation, whether it be power of attorney abuse or another form, is a mix of civil and criminal options with varying levels of success. Legal remedies available to a victim of financial exploitation include criminal prosecution, civil litigation, or an order of protection.<sup>246</sup> Although each provides a possible avenue to protection or redress, they have all been ineffective at substantial success.

##### A. Criminal Prosecution Lags Behind

All states have a mechanism under criminal statutes to punish financial abuse. These vary from criminal statutes of general applicability, to specific statutes protecting vulnerable adults, to enhanced penalties for financial abuse of the elderly.<sup>247</sup> Criminalizing financial abuse is the primary way most states attempt to protect vulnerable elders. The benefit of this approach is that law enforcement can be specially trained and prepared to handle this abuse.<sup>248</sup> Police can freeze assets and threaten criminal penalties, and the risk of conviction may be a deterrent. However, this approach relies on the victim to report and law enforcement to investigate, both of which seldom occur. As power of attorney abuse often involves family members or well-known caregivers, victims can be hesitant to report or prosecute. In addition, capacity issues may further muddy the waters in determining the factual circumstances, especially if an agent had valid authority.<sup>249</sup>

Unfortunately, the prosecution of elder financial exploitation cases is quite rare due to lack of detection and reporting. This may result because an elder is hesitant to expose a family member for fear of reprisal, unaware of the exploitation, or unsure of where to report.<sup>250</sup> There are additional challenges to prosecuting financial exploitation cases, including the completion of a lengthy police investigation, meeting the state's criminal code constraints, and a lack of trained law enforcement in elder financial exploitation.<sup>251</sup> Many prosecutors find elder abuse cases difficult to prosecute

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246. Andres, *supra* note 114, at 305.

247. Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267, 288 (2003) [hereinafter Dessin, *Is the Solution a Problem?*]; Hansen et al., *supra* note 149, at 13, 21–22; *see, e.g.*, COLO. REV. STAT. ANN. § 18-6.5-103.5 (West 2022) (setting forth crime of theft against at-risk person), CAL. PENAL CODE § 368 (West 2022) (classifying crimes against elderly as higher than similar crimes).

248. Dessin, *Is the Solution a Problem?*, *supra* note 247, at 289–90.

249. Craft, *supra* note 19, at 425–26.

250. Andres, *supra* note 114, at 307–08.

251. Morgan & Thomas, *supra* note 138, at 32; Hansen et al., *supra* note 149, at 22.

due to complex medical and financial details that often require expert testimony.<sup>252</sup> Recent efforts have been made to address these limitations, including the passage of the Elder Abuse Prevention and Prosecution Act of 2017,<sup>253</sup> which requires training for police officers to assist in investigation and prosecution.<sup>254</sup>

Even if a case is initiated, charges may be dropped if the victim can no longer testify due to dementia. In one recent case in Wisconsin, a caretaker using a power of attorney, that had been revoked, stole nearly \$20,000 from the principal.<sup>255</sup> The State dropped all charges because the prosecutors determined that the patient's dementia made her an unreliable witness.<sup>256</sup> In a Canadian case, the Crown withdrew the charges when the defendant agreed to pay back \$20,000 of the \$78,000 allegedly stolen.<sup>257</sup> The Attorney General stated there is "an ongoing obligation to assess the strength of the case throughout a prosecution and is duty-bound to withdraw the charges if there is no reasonable prospect of conviction, or if it is not in the public interest to proceed."<sup>258</sup>

Power of attorney abuse can also be blurred by the claimed defense of "consent."<sup>259</sup> Agents assert, sometimes successfully, both informally to APS as well as in defense to criminal charges, that the principal consented or that the actions were in furtherance of the principal's wishes.<sup>260</sup> While some observers suggest that a centralized process for elder abuse cases within law enforcement and prosecutorial offices may be more effective at preventing these cases, few jurisdictions have invested in elder abuse units.<sup>261</sup>

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252. Elisia Gatmen Kupris, *Protection of Our Elderly: A Multidisciplinary Collaborative Solution for Alaska*, 30 ALASKA L. REV. 47, 54 (2013).

253. Pub. L. No. 115-70, 131 Stat. 1207 (2017).

254. Mary Helen McNeal & Maria Brown, *Elder Restorative Justice*, 21 CARDOZO J. CONFLICT RESOL. 91, 100 (2019); 34 U.S.C. § 21711(a)(1). For a full summary of the legislation, see Elder Abuse Prevention and Prosecution Act, S. 178, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/178>.

255. Bryan Polcyn, *'It's Sad:' Dementia Leads to Dropped Charge Against Caregiver Accused of Stealing \$17k*, FOX 6 MILWAUKEE (Nov. 14, 2019), <https://www.fox6now.com/news/its-sad-dementia-leads-to-dropped-charge-against-caregiver-accused-of-stealing-17k>.

256. *Id.*

257. Aaron Saltzman, *'She Wanted to Do That for Me': Woman with Power of Attorney Takes Thousands from 97-Year-Old with Dementia*, CBC (Mar. 5, 2020), <https://www.cbc.ca/news/business/power-of-attorney-seniors-elder-abuse-senior-financial-crime-1.5476820>.

258. *Id.*

259. Morgan & Thomas, *supra* note 138, at 33.

260. *See, e.g.*, *People v. Bailey*, 948 N.E.2d 690, 701, 707 (Ill. App. Ct. 2011); *Franke v. State*, 188 So. 3d 886, 888 (Fla. Dist. App. 2016).

261. Ulrey, *supra* note 138. Others suggest increasing criminal prosecution through legislative action. *See, e.g.*, Priscilla Vargas Wrosch, *What More Can Congress Do About the Elder Abuse Epidemic? A Proposal for National Movement*, 23 TEMP. POL. & C.R. L. REV. 1 (2003); Andrew

*B. Civil Remedies Inadequate and Inaccessible*

Bringing a civil action may be more acceptable to an elder than filing criminal charges against a loved one or caregiver. State statutes determine whether a victim of financial exploitation will be successful in the courts, in particular based on how the law defines “financial abuse.”<sup>262</sup> For example, Maryland defines “financial exploitation” and “financial abuse” differently.<sup>263</sup> Other states require that someone other than the victim must benefit from the actions.<sup>264</sup> While criminal statutes are against all victims, in some states a civil claim must be committed against someone defined as “vulnerable.” States again vary in how to define a “vulnerable” adult and whether age alone can meet the definition.<sup>265</sup>

Civil actions can include a combination of traditional tort claims, breach of fiduciary duty claims, breach of contract claims, and statutory fraud claims.<sup>266</sup> Litigants may seek a variety of remedies including damages, rescission of a property transfer, or accounting of assets.<sup>267</sup> The UPOAA provides for civil remedies in a breach of fiduciary duty case, including to “restore the value of the principal’s property to what it would have been had the violation not occurred” as well as attorney’s fees and costs.<sup>268</sup> However, this requires the principal to first be aware that the abuse occurred and have the ability to access a lawyer. If capacity is a concern, it is unlikely the principal will have knowledge of the wrongdoing or the ability to stop it. If the principal has passed away and the abuse happened months or even years earlier, recourse may be futile.<sup>269</sup> Additionally, if the perpetrator absconded with the last vestiges of the elder’s wealth and spent it years earlier, there may not be a civil remedy available.

Protection orders are often the first line of defense to stop financial abuse. An individual can quickly get into court, without notice to the perpetrator, and obtain an ex parte court order preventing interaction. Again, some states do not offer protection orders for financial exploitation.<sup>270</sup> Part of the benefit of this course is that violation of a protection order often results

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Jay McClurg, *Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation*, 65 HASTINGS L.J. 1099 (2014).

262. Andres, *supra* note 114, at 300.

263. MD. CODE ANN., FIN. INST. § 1-306 (2022).

264. Dessin, *Financial Abuse of the Elderly*, *supra* note 113, at 206; *see, e.g.*, WASH. REV. CODE ANN. § 74.34.020(7)(a) (West 2022).

265. Andres, *supra* note 114, at 301; Hansen et al., *supra* note 149, at 22.

266. *Id.* at 311.

267. *Id.*

268. *See* UNIF. POWER OF ATT’Y ACT § 117 (NAT’L. CONF. OF COMM’RS ON UNIF. STATE L. 2006).

269. Craft, *supra* note 19, at 423.

270. Andres, *supra* note 114, at 311–12.

in jail time, if the ex parte order is enforced.<sup>271</sup> However, these have the same drawbacks requiring principal knowledge and access.

One obvious option to protect vulnerable adults at risk of financial abuse is guardianship. Of course, one of the primary purposes of a power of attorney is to avoid the court process and more invasive impact on the elder's civil rights. Guardianship has been called "the most intrusive, non-interest serving, impersonal legal device known" and "one which minimizes personal autonomy and respect for the individual."<sup>272</sup> For some elders who have significant diminished capacity, guardianship may be necessary to ensure the individual remains safe from imminent harm. While preventing exploitation is a central goal of guardianship, it is not the most effective or valuable means to protect those with diminished capacity from unscrupulous actors.<sup>273</sup>

### *C. The Underfunded Federal Response*

While elder abuse, fraud, and financial exploitation continue to gain attention as national public policy concerns, historically, solutions were left primarily to the states.<sup>274</sup> The first federal laws to protect older citizens from abuse were part of the Older Americans Act ("OAA") passed in 1965, which included funding for social services programs.<sup>275</sup> In 1974, Title XX of the Social Security Act provided subsidies to states to create APS agencies.<sup>276</sup> Since 1992, the OAA has provided approximately \$4.5 million for "the prevention of elder abuse, neglect, and exploitation."<sup>277</sup>

To respond to the intricacy of the issue of elder abuse and provide a coordinated national effort, Congress passed the Elder Justice Act ("EJA") in 2010.<sup>278</sup> The EJA was the first major piece of federal legislation to address various forms of elder abuse, including financial exploitation.<sup>279</sup> In fact, it was the first federal law "to specifically state that it is the right of older adults

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271. *Id.* at 312.

272. Winsor C. Schmidt, *Guardianship of the Elderly in Florida, Social Bankruptcy and the Need for Reform*, 55 FLA. BAR J. 189, 189 (1981).

273. Dessin, *Financial Abuse of the Elderly*, *supra* note 113, at 215–16.

274. *See generally* Hugh M. Lee & Jennifer N. Marshall, *Waiting for Elder Justice: An Overview of the Elder Justice Act, Its Implementation and Future Viability*, 275 ELDER L. ADVISORY, Feb. 2014, at 1.

275. Kupris, *supra* note 252, at 55; 42 U.S.C. § 3001 et seq.

276. Kupris, *supra* note 252, at 55; 42 U.S.C. §§ 1397–1397f.

277. Kupris, *supra* note 252, at 56 (citing *Federal Elder Abuse Legislation*, ARK. ADULT PROTECTIVE SERVS., <http://www.aradultprotection.com/Evolved.htm> (last visited Dec. 30, 2022)).

278. The Elder Justice Act was enacted as part of the Patient Protection and Affordable Care Act. It created a new subtitle to Title XX of the Social Security Act codified at 42 U.S.C. §§ 1397j to 1397m. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6703, 124 Stat. 119, 782 (2010).

279. Patient Protection and Affordable Care Act § 6703, 124 Stat. at 782.

to be free of abuse, neglect, and exploitation.”<sup>280</sup> It aimed to provide federal dollars to states to fight elder abuse through a national effort based on public health and social service approaches to prevention.<sup>281</sup> While the legislation raised the level of importance of elder abuse nationally, funding challenges hampered program implementation. Even though the EJA authorized \$777 million dollars in appropriations for the first four years, by 2014, less than one percent had been approved by Congress.<sup>282</sup> The authorizations for the majority of EJA activities expired on September 30, 2014. Most of the activities and programs outlined in the EJA have not been funded by Congress and only exist on paper.<sup>283</sup>

The EJA was a four-level initiative that aimed to: (1) increase national coordination of activities and research; (2) create forensic centers to establish expertise in elder abuse; (3) strengthen APS agencies; and (4) fortify long-term care facilities to prevent abuse.<sup>284</sup> The bulk of the funding, however, went primarily to states for additional resources to support state-run “APS offices.”<sup>285</sup> APS programs are established in each state and provide a system for reporting and investigating elder abuse. States vary in eligibility, mandatory reporting requirements, investigatory procedures, and available remedies.<sup>286</sup> The federal dollars infused into these programs were designed to enhance methods to detect and prevent elder abuse.<sup>287</sup> Despite this federal reporting mechanism, APS data does not capture the entire picture of elder abuse. Prevention efforts are tied to state statutory definitions of elder abuse. In particular, financial exploitation cases can be screened out by APS if the victim does not meet the state statutory eligibility definition. There is concern

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280. Brian W. Lindberg et al., *Bringing National Action to a National Disgrace: The History of the Elder Justice Act*, 7 NAT’L ACAD. ELDER L. ATT’YS J. 105, 105 (2011) (quoting Pamela B. Teaster et al., *A Glass Half Full: The Dubious History of Elder Abuse Policy*, J. ELDER ABUSE & NEGLECT 6, 22 (2010)).

281. KIRSTEN J. COLELLO, CONG. RSCH. SERV., R43707, THE ELDER JUSTICE ACT: BACKGROUND AND ISSUES FOR CONGRESS 4–7 (2020), <https://sgp.fas.org/crs/misc/R43707.pdf>.

282. Lee & Marshall, *supra* note 274, at 6.

283. COLELLO, *supra* note 281, at 4–7.

284. Lindberg et al., *supra* note 280, at 115.

285. COLELLO, *supra* note 281, at 12.

286. *Id.* at 8.

287. *Id.* at 14. The EJA also funded the National Adult Maltreatment Reporting System (“NAMRS”) which was the first national data system to collect statistics on abuse and exploitation of older adults reported to state APS agencies. Since 2016, NAMRS has collected data from states on adult maltreatment. The 2019 report, the latest report published, shows an increase in the number of reports made to APS from 2018 to 2019. U.S. DEP’T OF HEALTH AND HUM. SERVS., ADMIN. ON CMTY. LIVING, ADULT MALTREATMENT 12 (2019), <https://namrs.acl.gov/getattachment/Learning-Resources/Adult-Maltreatment-Reports/2019-Adult-Maltreatment-Report/2019NAMRSReport.pdf.aspx?lang=en-US>. Of the substantiated allegations, 15.3% were for financial exploitation. *Id.* at 14.

that APS agencies do not have the tools, resources, or ability to ferret out exploitation.<sup>288</sup>

The COVID-19 pandemic brought an increased awareness of the need to better protect vulnerable elders and a renewed enthusiasm for congressional funding.<sup>289</sup> Congress passed two laws that included provisions for addressing elder abuse and appropriated \$376 million for Elder Justice Act programs.<sup>290</sup> This energized federal response to elder abuse provides the needed opportunity, funding, and interest to bolster the existing framework to address financial abuse, including power of attorney exploitation.

#### V. CREATING AN ELDER INFRASTRUCTURE TO PREVENT POWER OF ATTORNEY ABUSE

This Article argues for a federal regulatory response, funded through the Elder Justice Act, to bolster a multidisciplinary elder justice approach to prevent power of attorney abuse. Such a model would empower elders by creating a preventive structure and a more successful avenue of prosecution. Including agent supervision and a centralized power of attorney registry would increase detection while not overburdening agents or elders. It is no longer sufficient to allow the power of attorney to remain unregulated for the benefit of decent agents while a growing number of elders remain at risk.

While some have argued that the UPOAA provides both a level of protection and a commitment to maintaining autonomy, in reality it has failed to achieve this balance.<sup>291</sup> The perilous nature of the balancing act has tipped towards autonomy. Critics fear that placing restrictions, oversight, or barriers on power of attorney use would lead clients to choose less useful instruments or to avoid future planning completely.<sup>292</sup> Returning to Violet, Juan, and Liu, what would have successfully prevented the agent exploitation and subsequent emotional harm? Was there a way to empower them to find

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288. Ulrey, *supra* note 138, at 11.

289. Bob Blancato, *Ways the New COVID-19 Relief Law Will, and Won't, Help Older Americans*, NEXT AVE. (Jan. 11, 2021), <https://www.nextavenue.org/ways-the-new-covid-19-relief-law-will-and-wont-help-older-americans/>.

290. The first, the Consolidated Appropriations Act, passed in December 2020, and the American Rescue Plan Act was signed into law in March 2021. Pub. L. No. 116-260, 134 Stat. 1181 (2020); Pub. L. No. 117-2, 135 Stat. 3 (2021). In June 2021, momentum for elder abuse prevention funding led to the passage of the Elder Abuse Protection Act in the House, though the bill was not considered by the Senate. H.R. 2922, 117th Cong. (2021). This required the Department of Justice to establish a permanent Elder Justice Initiative. Most recently, the Elder Justice Reauthorization and Modernization Act of 2021 was introduced in the House to reauthorize and fund the Elder Justice Act. H.R. 4969, 117th Cong. (2021); Laura Stauning, *The Elder Justice Act at 11: Its Best Years are Ahead*, COAL. FOR ELDER JUST. CONN. (Mar. 23, 2021), <https://elderjusticect.org/the-elder-justice-act-at-11-its-best-years-are-ahead/>.

291. Whitton, *Striking a Balance*, *supra* note 39, at 363.

292. English & Wolff, *supra* note 142, at 35.



information and stop the agent's actions? Would supervision or oversight have prevented the exploitation? Could there have been a more efficient way to remedy the harm?

Elder abuse has been described as “a complex cluster of distinct but related phenomena involving health, legal, social service, financial, public safety, aging, disability, protective services, and victim services, aging services, policy, research, education, and human rights issues.”<sup>293</sup> It has also been acknowledged that the solution “requires a coordinated multidisciplinary, multi-agency, and multi-system response.”<sup>294</sup> The Elder Justice Act failed to fully adopt (or fund) a comprehensive approach that included public health, social services, and criminal justice.<sup>295</sup> At the same time, it provided a starting point for addressing and preventing elder financial abuse from a holistic standpoint. Enhancing the existing structure with additional resources to both prevent and remedy exploitation would provide more success.

#### A. *The Need for Regulation to Prevent Exploitation*

The rationale for government regulation should be analyzed by considering motive and reasoning.<sup>296</sup> At times, the justification for regulation is “to advance broad, diffuse interests, even at the expense of more powerful, concentrated interests.”<sup>297</sup> One theory of regulation—public interest theory—is grounded in a goal “to achieve certain publicly desired results.”<sup>298</sup> Advocates, therefore, act as agents for the larger public interest at play.<sup>299</sup> For example, governments may develop regulations to further certain social policies such as prevention of discrimination.<sup>300</sup>

Despite debate among academics about the value and definition of public interest theory, it is viewed as “an ideal that is shaped by each generation, on a case-by-case basis by a society motivated to secure its common interests.”<sup>301</sup> The public interest is intertwined with notions of

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293. MARIE-THERESE CONNOLLY ET AL., THE ELDER JUSTICE ROADMAP 5, <https://www.justice.gov/file/852856/download> (last visited Dec. 30, 2022).

294. *Id.*

295. Elder Abuse Prevention and Prosecution Act, Pub. L. No. 115-70, 131 Stat. 1208 (2017). The criminal justice provisions were left out and later introduced as separate legislation as part of the Elder Abuse Prevention and Prosecution Act of 2017. COLELLO, *supra* note 281, at 4.

296. ROBERT BALDWIN & MARTIN CAVE, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 9 (Oxford University Press 1999).

297. Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. L. REV. 7, 8 (2000).

298. BALDWIN & CAVE, *supra* note 296, at 19.

299. *Id.*

300. *Id.* at 15.

301. Sofia Ranchordás, *Public Values, Private Regulators: Between Regulation and Reputation in the Sharing Economy*, 13 L. & ETHICS HUM. RTS. 203, 212 (2019).

public values shared by society. These community values have been defined as a “normative consensus about . . . the rights, benefits, and prerogatives to which citizens should (and should not) be entitled.”<sup>302</sup> It is derived from “standards that society has decided to give collective attention to . . . .”<sup>303</sup> Certainly, ending elder financial exploitation is a universal common societal interest.

Traditional models of regulation can be criticized as “identified with rule-bound bureaucracy and deference to ineffable expertise.”<sup>304</sup> These models have been described as representing a “hierarchy” where Congress decides on a policy, empowers an agency to implement it, and courts review the action with deference.<sup>305</sup> Some regulatory agencies have begun to shed that outdated skin in the age of technological advances and globalization. Instead of acting within a hierarchy, agencies work within a framework.<sup>306</sup> By developing best practices in a specific area, regulatory agencies utilize “a method of regulation in which central administrators provide advice and disseminate information, instead of mandating a one-size-fits-all regulatory scheme.”<sup>307</sup> While this innovative model of regulation is used primarily in emerging technologies, the theme of “building cooperation, facilitating coordination, and elevating the level of trust in an entire sector that comes from a shared commitment” is applicable to elder abuse prevention.<sup>308</sup> Power of attorney regulation could capture the flexibility, innovation, and best practices of this approach by utilizing a multidisciplinary model.

Critics may argue that such regulation is unwarranted, intrusive, and may not result in desirable outcomes. Some may analogize power of attorney regulation to mandatory reporting laws and argue they will be similarly

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302. *Id.* (citing BARRY BOZEMAN, PUBLIC VALUES AND PUBLIC INTEREST: COUNTERBALANCING ECONOMIC INDIVIDUALISM 132 (2007)).

303. *Id.*

304. Philip J. Weiser, *Entrepreneurial Administration*, 97 B.U. L. REV. 2011, 2015 (2017) (quoting Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 54 (2011)).

305. *Id.*

306. *Id.* at 2016.

307. David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 297 (2006). “Although best-practice rulemaking has been largely ignored by the legal literature, regulation through best practices has increased seven-fold in the past ten years . . . .” *Id.* at 295.

308. Weiser, *supra* note 304, at 2058. One successful example of this innovative model is the Obama Administration’s approach to cybersecurity regulation in an effort to enhance online safety. In issuing an Executive Order, President Obama called on the National Institute of Standards and Technology (“NIST”) to develop a cybersecurity framework by working collaboratively within the industry and relying on proven effective practices and procedures. NIST established a successful and effective framework based on an “evolving set of best practices,” which can be adapted by the organization using it. *Id.* at 2065–66.

paternalistic and harmful.<sup>309</sup> Opponents claim that compulsory reporting violates an elder's right to self-determination and choice whether to seek help.<sup>310</sup> Much of the argument against mandatory reporting laws takes aim at treating elder abuse as a criminal justice issue.<sup>311</sup> Certainly, a criminal justice response provides increased protection for certain victims and, like in the domestic violence context, improves public attitudes towards elder abuse.<sup>312</sup> But, it can also be argued that circumventing self-reporting disempowers elders and fuels ageist notions of elders as weak and helpless.<sup>313</sup> Additionally, it is maintained that mandatory reporting by doctors, caregivers, and social service providers discourages victims from seeking help when abuse occurs.<sup>314</sup> Going one step further, one commentator argued mandatory reporting laws infringe on an elder's constitutional rights, including the rights to privacy and equal protection.<sup>315</sup>

Those in favor of maintaining mandatory reporting laws do so by centering the conversation on balancing protection and autonomy of elders.<sup>316</sup> They argue that the compulsory measures increase protection of vulnerable elders and "shine a light on these often-observed offenses without forcing the victim to start the investigatory process."<sup>317</sup> Mandatory reporting laws affirm that we as a society will not allow elder maltreatment; however, such laws share the same paradox as powers of attorney, namely that the benefits can also create the drawbacks.<sup>318</sup>

The proposed multi-disciplinary approach to power of attorney regulation would alleviate the possibility of disempowerment and

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309. See, e.g., 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, 723–29 (2005); Nina A. Kohn, *Elder (In)justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 13–17 (2012) [hereinafter Kohn, *Elder (In)justice*]; Lawrence R. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69, 76–80 (1982); Nina A. Kohn, *Outliving Civil Rights*, 86 WASH. U. L. REV. 1053, 1065–67 (2009) [hereinafter Kohn, *Outliving Civil Rights*].

310. Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 108–09 (1998).

311. Kohn, *Elder (In)justice*, *supra* note 309, at 3 ("A defining characteristic of modern elder abuse policy is that elder abuse is seen as a crime, and that the criminal justice system is therefore seen as a critical actor in the public response to elder abuse.").

312. *Id.* at 18.

313. *Id.* at 20.

314. Moskowitz, *supra* note 310, at 109.

315. Kohn, *Outliving Civil Rights*, *supra* note 309, at 1068–88; Kohn, *Elder (In)justice*, *supra* note 309, at 28.

316. Benjamin Pomerance, *Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse*, 16 MARQ. BENEFITS & SOC. WELFARE L. REV. 439, 447–48 (2015); Glick, *supra* note 309, at 726–29.

317. Pomerance, *supra* note 316, at 446.

318. *Id.* at 447.

criminalization. It would leverage the positive aspects of the mandatory reporting laws—increasing protection of vulnerable elders and communicating societal condemnation of abuse—but avoid criminalization, paternalistic approaches, or ageist stereotypes.<sup>319</sup> Instead of doing an end run around elders self-reporting exploitation, enhanced forensic centers could put elders in the driver's seat.

### *B. Prioritizing Harm Reduction and Empowerment*

The large-scale threat of financial exploitation, coupled with the potential for elder disempowerment, demands more than an unregulated, one-size-fits-all instrument. Practitioners and academics alike have clung to the power of attorney as an informal, user-friendly document. While reform efforts have made significant progress in enhancing principal protections, they stop short of implementing rules that would restrict honorable agents. In essence, we have prioritized those who are well cared for and have decent loved ones able to make decisions on their behalf at the cost of those at the greatest risk for exploitation. It is crucial to examine ways to prevent exploitation of vulnerable elders by putting safeguards in place. This requires a reordering of priorities with harm reduction as the primary focus over utility and efficacy.

Some solutions have focused only on the harm reduction side of the equation by increasing prosecution of elder abuse.<sup>320</sup> Creating a multi-tiered framework for elders as they navigate retirement, end-of-life planning, and cognitive decline would offer a solution that avoids the perpetuation of ageist stereotypes and reframe the response towards empowerment. Much has been written about viewing elder financial exploitation prevention through an ageist lens.<sup>321</sup> One elder advocate termed the negative stereotyping of elders as “New Ageism” and described it as “[y]ou are poor, lonely, weak, incompetent, ineffectual, and no longer terribly bright. You are sick, in need of better housing and transportation and nutrition, and we . . . are finally going to turn our attention to you, the deserving elderly, and relieve your suffering from ageism.”<sup>322</sup> Others question whether providing enhanced protection from financial exploitation fuels ageist notions by classifying an entire group of people based solely on age as needing protection.<sup>323</sup> Combine

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319. Kohn, *Elder (In)justice*, *supra* note 309, at 19.

320. *See, e.g.*, Wrosch, *supra* note 261, at 21; McClurg, *supra* note 261, at 1120.

321. *See, e.g.*, Dessin, *Is the Solution a Problem?*, *supra* note 247, at 294; Whitton, *Striking a Balance*, *supra* note 39, at 355–60; Pomerance, *supra* note 316, at 473.

322. Richard A. Kalish, *The New Ageism and the Failure Models: A Polemic*, 19 GERONTOLOGIST 398, 398 (1979).

323. Professor Dessin argues that abuse prevention should focus on the “vulnerable” and should not classify an entire group as weak and in need of protection based solely on age. Dessin, *Is the Solution a Problem?*, *supra* note 247, at 307–11.

that with our societal obsession with youth, as well as the common assumption that increased age equates to decreased ability, and there is a risk to view all elders as less capable and more in need of protection.<sup>324</sup> Not only is such an overgeneralization unreasonable and offensive, but it may lead to additional harm if financial institutions become reluctant to do business with those over a certain age.<sup>325</sup>

Perhaps the creation of an accessible infrastructure that puts elders in control to act when they feel violated or detect abuse is the ultimate empowering action. The adversarial legal system is not the ideal place to prevent financial exploitation of elders. It is a system focused on the legal determination of “incompetence” rather than preventing abuse or creating a holistic, therapeutic approach.<sup>326</sup> Instead, this Article suggests creating a framework for elder justice that would focus on not only protecting those who are vulnerable, but providing a system of resources, facilities, services, and institutions to provide access for elders to both prevent and remedy exploitation.

### *C. Enhancing the Coordinated, Multi-Disciplinary Approach*

While the Elder Justice Act has been fractured and under-resourced, the core structure “provides a vehicle for setting national priorities and establishing a comprehensive, multidisciplinary elder justice system in this country.”<sup>327</sup> In 2012, the United States Government Accountability Office issued a report which called for “a more cohesive and deliberate approach governmentwide” and found a “clearly articulated national strategy is needed

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324. In fact, some states explicitly link elders to weakness and view them similar to children, as seen in California’s penal code:

The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves . . . .

CAL. PENAL CODE § 368(a) (West 2016). The comparison between children and elders was removed from the statutory language in 2019. It now reads: “The Legislature finds and declares that elders, adults whose physical or mental disabilities or other limitations restrict their ability to carry out normal activities or to protect their rights, and adults admitted as inpatients to a 24-hour health facility deserve special consideration and protection.” *Id.* § 368(a) (West 2023).

325. Dessin, *Is the Solution a Problem?*, *supra* note 247, at 301.

326. *Id.* at 320.

327. COLELLO, *supra* note 281, at 17 (quoting U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-208, STRONGER FEDERAL LEADERSHIP COULD ENHANCE NATIONAL RESPONSE TO ELDER ABUSE (2011)).

to coordinate and optimize such federal efforts to effectively prevent and respond to elder financial exploitation . . . .”<sup>328</sup>

A multi-disciplinary model not only provides a basis and pathway to prosecution of financial exploitation, but it also offers a framework for prevention and remedies. Convening various professionals with different expertise, backgrounds, and connections in the community is the most effective way to prevent a convoluted issue like elder abuse.<sup>329</sup> Such an approach is necessary as “[o]ften, law enforcement, social service agencies, and public guardianship officials do not interact on a daily basis, and in effect speak different languages and have different (and sometimes competing) priorities and definitions of what constitutes a good outcome in an elder abuse case.”<sup>330</sup>

The path forward should include coordinated efforts locally, statewide, and at the national level to both identify the elements of the elder exploitation problem and to implement successful, cost-effective solutions.<sup>331</sup> Observers have noted that “most communities do not have comprehensive elder abuse prevention efforts that engage a broad set of individuals and institutions that can play a role in combating abuse, such as health care professionals, law enforcement and legal services agencies, social workers, clergy, and community organizations.”<sup>332</sup>

Research demonstrates that the “multidisciplinary collaboration response model has been touted as the optimal method of responding to a myriad of under-reported crimes.”<sup>333</sup> An interdisciplinary model is particularly useful as financial exploitation is complicated by “blurred lines regarding expenditure, capacity and consent as well as issues related to

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328. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-110, NATIONAL STRATEGY NEEDED TO EFFECTIVELY COMBAT ELDER FINANCIAL EXPLOITATION 38 (2012), <https://www.gao.gov/assets/gao-13-110.pdf>.

329. Donna Schuyler & Bryan A. Liang, *Reconceptualizing Elder Abuse: Treating the Disease of Senior Community Exclusion*, 15 ANNALS HEALTH L. 275, 291 (2006). As someone with both an M.S.W. and J.D., I have seen first-hand the benefits of marrying social work values with legal analysis to work towards the joint goal of social justice.

330. Kupris, *supra* note 252, at 65 (quoting CATHERINE MCNAMEE & CARRIE MULFORD, INNOVATIONS ASSESSMENT OF THE ELDER ABUSE FORENSIC CENTER OF ORANGE COUNTY, CALIFORNIA 1, 3 (2007)).

331. CONNOLLY ET AL., *supra* note 293, at 5–6.

332. COLELLO, *supra* note 293, at 16–17 (citing U.S. DEP'T OF HEALTH AND HUM. SERVS., ADMIN. ON CMTY. LIVING, PROTECTING AMERICAN'S SENIORS: THE ELDER ABUSE PREVENTION INTERVENTIONS PROGRAM (2017), [https://acl.gov/sites/default/files/news%202017-03/Protecting\\_Americas\\_Seniors-%20The\\_%20Elder\\_%20Abuse\\_%20Prevention\\_%20Interventions\\_%20Program.pdf](https://acl.gov/sites/default/files/news%202017-03/Protecting_Americas_Seniors-%20The_%20Elder_%20Abuse_%20Prevention_%20Interventions_%20Program.pdf)).

333. CATHERINE MCNAMEE & CARRIE MULFORD, INNOVATIONS ASSESSMENT OF THE ELDER ABUSE FORENSIC CENTER OF ORANGE COUNTY, CALIFORNIA 1, 2 (2007).

family expectations and cultural norms.”<sup>334</sup> While the specific methodology may vary based on the diverse needs of the locality and population, communities can address elder financial exploitation by using a robust mix of legal, social, educational, and political services. Success depends on interweaving education, training, and direct action to increase awareness, pinpoint risk areas, and then problem-solve solutions.<sup>335</sup>

This interdisciplinary approach has already been successfully utilized in the creation of elder abuse, neglect, and exploitation forensic centers.<sup>336</sup> Like the majority of the appropriations under the EJA, Congress failed to fully fund the forensic centers, although there are several around the country making an impact.<sup>337</sup> These centers are based on the Multi-Disciplinary Teams (“MDT”) model that was first identified in 1994 as an approach to preventing elder abuse.<sup>338</sup> The MDT model is the core premise of forensic centers and is focused on the cross coordination among health care, social services, and legal services.<sup>339</sup>

Unlike traditional MDT, forensic centers are “more focused [and] action-oriented.”<sup>340</sup> The goal is to provide “one-stop shopping” to address elder abuse through a collaborative team approach of various professionals. Cases of financial exploitation are assessed by considering not only the factual scenario, but also by assessing the client’s physical health, capacity, and need for social services intervention.<sup>341</sup> The first elder abuse and neglect forensic center was developed in California in 2003.<sup>342</sup> Studies show that utilizing forensic centers in elder abuse matters leads to cases submitted for prosecution more often.<sup>343</sup> Forensic skill and experience are critical to

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334. AMANDA PHELAN, *ADVANCES IN ELDER ABUSE RESEARCH, PRACTICE, LEGISLATION AND POLICY* 101 (Amanda Phelan ed., 2020).

335. CONNOLLY ET AL., *supra* note 293, at 6–7.

336. COLELLO, *supra* note 281, at 14.

337. In addition to a lack of funding, authorizations of appropriations for most programs under the EJA expired on September 30, 2014. *Id.* at 15.

338. Adria E. Navarro et al.,  *Holding Abusers Accountable: An Elder Abuse Forensic Center Increases Criminal Prosecution of Financial Exploitation*, 53 *GERONTOLOGIST* 303, 305 (2013).

339. *Id.*

340. Diana Cafaro Schneider et al.,  *Elder Abuse Forensic Centers*, 22 *J. ELDER ABUSE & NEGLECT* 255, 259 (2010).

341. Navarro et al., *supra* note 338, at 305.

342. Marguerite DeLiema et al.,  *Prosecutors’ Perspectives on Elder Justice Using an Elder Abuse Forensic Center*, 41 *AM. J. CRIM. JUST.* 780, 782 (2016). There are other multi-disciplinary models that provide a stronger physical presence in the community and provide “walk-in” services. The Elder Abuse Forensic Center in Santa Ana, California utilizes a multi-disciplinary team model called Vulnerable Adult Specialist Team (“VAST”), which includes not only case management and prosecution but also medical and mental health geriatric specialists. The center can evaluate cognitive impairments, medical conditions, medication management, assist in guardianship cases, and connect victims with law enforcement. Schuyler & Liang, *supra* note 329, at 294.

343. DeLiema et al., *supra* note 342, at 13.

successful prosecution of cases involving violation of a fiduciary duty, such as power of attorney abuse.<sup>344</sup> Additionally, the centers provide evaluations to determine elder psychological and physical functioning across multiple domains, as well as an assessment of the living environment.

With this innovative approach, professionals from multiple agencies become team members, bringing various strengths and assets to the table. Once the team develops trust, they are able to be “collaborative and synergistic” and “there is an additive effect of the members’ expertise and the whole is greater than the sum of its parts.”<sup>345</sup> Evaluation of these centers found strengthened coordination among agencies, increased communication, and growth of elder abuse prevention units.<sup>346</sup> Importantly, they have been instrumental in successful prosecution of financial abuse cases.<sup>347</sup>

In June 2021, the Department of Justice, Office of Justice Programs, and Office for Victims of Crime issued a request for proposals for “enhanced MDTs” (“E-MDTs”) to better identify and respond to cases of elder financial exploitation.<sup>348</sup> The E-MDTs seek to expand the multidisciplinary teams to include forensic accountants, neuropsychologists, medical personnel, and other professionals to effectively meet the needs of financial exploitation victims.<sup>349</sup> Forensic centers should be enhanced by building out layers of detection and prevention, while also providing resources to remedy exploitation.

#### *D. Recommendations for Elder Infrastructure*

In considering reform options, the discussion to date has largely presented a false dichotomy—either we leave the power of attorney alone and embrace the usefulness of the tool, or we unnecessarily restrict the document so that it becomes impractical. Building on the forensic center model would provide elders a more user-friendly, accessible atmosphere that is outside the judicial system. Utilizing the multi-disciplinary approach would deliver a coordinated infrastructure that creates a consistent, efficient

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344. Erika Falk & Nancy Hoffman, *The Role of Capacity Assessments in Elder Abuse Investigations and Guardianships*, 30 *CLINICS IN GERIATRIC MED.* 851, 851–68 (2014).

345. Schneider et al., *supra* note 340, at 268–69.

346. *Id.* at 271.

347. DeLiema et al., *supra* note 342, at 781. Research found that cases reviewed at a forensic center were 22% more likely to be referred to a prosecutor and recurrence of elder abuse was significantly reduced. Terry Taylor & Carrie Mulford, *Evaluating the Los Angeles County Elder Abuse Forensic Center*, *NAT’L INST. OF JUST. J.*, Dec. 2015, at 1, 3, <https://www.ojp.gov/pdffiles1/nij/249222.pdf>.

348. U.S. DEP’T OF JUST., *TRANSFORMING AMERICA’S RESPONSE TO ELDER ABUSE: ENHANCED MULTIDISCIPLINARY TEAMS (E-MDTs) FOR OLDER VICTIMS OF FINANCIAL EXPLOITATION AND ABUSE 5* (2021), <https://ovc.ojp.gov/funding/fy-2021/o-ovc-2021-96002.pdf>.

349. *Id.*



system to address elder financial exploitation. Partnering with related fields such as disability services, public health, and financial services would increase efficiency and efficacy.<sup>350</sup> In addition to abuse detection and prevention, it could provide an administrative and legal framework to assist elders as they navigate substitute decision-making.

### 1. Increase Detection and Prevention

The UPOAA has been adopted in nineteen states, but it does not include supervision or oversight provisions, nor do most states have power of attorney safeguards in place.<sup>351</sup> Experts worry such supervision would create a quasi-guardianship, arguing, “[t]o include a thorough monitoring process would essentially gut the usefulness of the power of attorney because the increased costs and intrusiveness would turn it into a de facto guardianship, which was deemed inadequate years ago.”<sup>352</sup> Others have lost hope that power of attorney abuse can be prevented, believing “that regulations cannot ensure goodness.”<sup>353</sup> Going further, it is argued that “we must be willing to accept a certain degree of failure.”<sup>354</sup>

Detecting financial abuse of elders can be complicated by various factors, such as lack of knowledge, hesitancy to report family members, decreased cognitive function, and memory deficits.<sup>355</sup> As such, monitoring agent actions seems like an obvious corollary. While many know that agent oversight would decrease power of attorney abuse, most are

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350. CONNOLLY ET AL., *supra* note 293, at 21.

351. Over the years, individual states added protective devices to answer the call of elder advocates upset over financial exploitation. North Carolina added mandatory recording of a power of attorney and an inventory once the principal became incapacitated but repealed it in 2018 when it passed the UPOAA. N.C. GEN. STAT. ANN. § 32A-9 (West 1987) (repealed 2018). In Arkansas, prior to adopting the UPOAA in 2012, all powers of attorney had to be filed with the probate court and recorded. Whitton, *Durable Powers*, *supra* note 18, at 10 n.10 (citing ARK. CODE ANN. §§ 28-68-304, 28-68-307 (LexisNexis 1987 & Supp. 2006)); N.C. GEN. STAT. ANN. § 32A-9(b) (West 1987), § 32A-11 (West 2005) (repealed 2018)). Several states used to allow interested persons to petition the court to force the agent to provide an accounting. Boxx, *supra* note 24, at 45. With the adoption of the UPOAA, Section 116 provides standing for individuals to petition the court for remedies. UNIF. POWER OF ATT’Y ACT § 116 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2006). The majority of states that have or had standing provisions allow any person with a sufficient interest to petition the court. *See* CAL. PROB. CODE § 4540 (2022); 755 ILL. COMP. STAT. ANN. 45/2-10 (2022); IND. CODE ANN. § 30-5-3-5 (2022); KAN. STAT. ANN. § 58-662 (2022); MO. ANN. STAT. § 404.727 (2022); WASH. REV. CODE ANN. § 11.125.160 (West 2016) (repealed 2017).

352. Boxx, *supra* note 24, at 46.

353. Whitton, *Durable Powers*, *supra* note 18, at 17 (quoting English & Wolff, *supra* note 142, at 35).

354. English & Wolff, *supra* note 142, at 35.

355. PHELAN, *supra* note 334, at 111.

hesitant to overburden an agent and regulate use.<sup>356</sup> Oversight is “probably the element most likely to prevent abuse,” and yet movement in that direction is overdue.<sup>357</sup>

It is undisputed that oversight would increase awareness and identification of financial abuse. It is estimated that for every case of elder abuse that is exposed, another twenty-three remain concealed.<sup>358</sup> Critics of reform identify the hidden nature of power of attorney abuse as a reason many reforms will fail.<sup>359</sup> Often those tasked with exposing elder abuse (police officers, bank tellers, mortgage lenders, and caregivers) are untrained in the warning signs and unsure of what to do if they detect potential exploitation. Increasing detection efforts on the front end before the abuse has occurred or materialized is the most effective means to prevent serious harm.<sup>360</sup>

*a. Registration and Notification*

Some scholars have urged power of attorney supervision and regulation,<sup>361</sup> advocating for “prophylactic measures to deter improper use of power of attorney before it occurs.”<sup>362</sup> Including oversight and supervision, housed within the forensic centers, would provide a flexible response to regulating powers of attorney. Instead of requiring registration of powers of attorney within the court system, the forensic centers could house the registry and oversight mechanism. Creating a supervisory scheme would

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356. Boxx, *supra* note 24, at 46; Kohn, *Elder Empowerment*, *supra* note 64, at 37; English & Wolff, *supra* note 142, at 35. One academic, Carolyn Dessin, has suggested limited agent oversight when the principal is incapacitated. She has also argued for periodic accountings and an agent registry. Dessin, *Acting as Agent*, *supra* note 52, at 608–11, 617; Dessin, *Is the Solution a Problem?*, *supra* note 247, at 317.

357. Boxx, *supra* note 24, at 55. Beginning as early as 1994, oversight proposals to deter abuse included creating a central registry for agents, adding recordation as a requirement, notification of significant transactions, and annual accountings. FEDERMAN & REED, *supra* note 36, at 44–45.

358. CONNOLLY ET AL., *supra* note 293, at 15 (citing LIFESPAN OF GREATER ROCHESTER, INC. ET AL., *supra* note 124, at 8).

359. Boxx, *supra* note 24, at 52–53.

360. CONNOLLY ET AL., *supra* note 293, at 15.

361. Professor Craft argues reform efforts over the last few decades have been myopic, focusing only on improving functionality and making a power of attorney widely available. He asserts that power of attorney reforms should focus more heavily on preventing financial exploitation, enhancing principal self-determination, and moving away from a pure usefulness approach. He ultimately posits that we need to rein in the unfettered power that agents accumulate and wield to ultimately reduce financial exploitation. Craft, *supra* note 19, at 456 (citing FEDERMAN & REED, *supra* note 36, at 1). Professor Dessin called for a mandatory court registry of powers of attorney in the guardianship court. She noted that this would put the court on notice that a power of attorney is in use and signal to an agent that oversight is in effect. Dessin, *Is the Solution a Problem?*, *supra* note 247, at 317–18. Another author recommended adopting mechanisms for agent monitoring, including agent registry and periodic accountings modeled after the Mental Capacity Act (“MCA”) in the United Kingdom. Rhein, *supra* note 13, at 194–97.

362. Rhein, *supra* note 13, at 187.

affirmatively protect elders against financial exploitation who can no longer guide the agency relationship against financial exploitation.<sup>363</sup>

One supervision model to consider is the United Kingdom's Mental Capacity Act ("MCA").<sup>364</sup> To achieve the MCA's goals of empowering and protecting vulnerable adults, it provides for a "lasting power of attorney."<sup>365</sup> The MCA includes several safeguards specifically aimed at preventing improper power of attorney use.<sup>366</sup> In particular, there is an oversight mechanism that requires registration in a centralized location before the power of attorney can be effective, rather than after it was executed.<sup>367</sup> This not only notifies the principal of its use, but encourages the agent and principal to communicate in advance to enhance the likelihood of collaboration.<sup>368</sup> The MCA adds an additional safeguard of a certificate provider who attests that the principal understands the purpose of the power of attorney and is not signing it under fraud or undue pressure.<sup>369</sup> The signature of the agent is also required, signifying the importance of their role. This ensures both parties understand the significance and power of the document as well as accompanying duties.<sup>370</sup>

A central registry of powers of attorney offers several benefits. Registration would ensure that the document comports with the statutory requirements and possibly ensure it was not signed under duress or fraud. Agents as well as principals could register the document, giving them control

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363. *Id.* at 198.

364. The MCA is based on five core principles to protect the financial assets of individuals who lack capacity. These include a presumption of capacity until proven otherwise, and that a substitute decision-maker must act in the person's best interest and in the least restrictive manner. Mental Capacity Act 2005, c. 9, § 1 (Eng.), <https://www.legislation.gov.uk/ukpga/2005/9/section/1>. The hope and aim of the MCA was to "enshrine[] in statute current best practice and common law principles concerning people who lack mental capacity and those who take decisions on their behalf." Rhein, *supra* note 13, at 190 (citing DEP'T OF HEALTH, MENTAL CAPACITY ACT 2005—SUMMARY 1 (2008), [https://cdn.ymaws.com/www.tmn.ac.uk/resource/collection/2EB2EEFB-06A1-4780-9423-88469A9BEE4B/Department\\_of\\_Health\\_Summary\\_of\\_Mental\\_Capacity\\_Act\\_2005.pdf](https://cdn.ymaws.com/www.tmn.ac.uk/resource/collection/2EB2EEFB-06A1-4780-9423-88469A9BEE4B/Department_of_Health_Summary_of_Mental_Capacity_Act_2005.pdf)).

365. U.K. DEP'T FOR CONST. AFFS., MENTAL CAPACITY ACT 2005 CODE OF PRACTICE 2 (2007), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/921428/Mental-capacity-act-code-of-practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921428/Mental-capacity-act-code-of-practice.pdf). It also created the Court of Protection as the entity to adjudicate issues relating to individuals who lack capacity. It has the power and authority to determine whether a power is valid, to remove improper agents, and to send a court visitor to the home of the principal for a welfare check. Rhein, *supra* note 13, at 192.

366. Mental Capacity Act 2005, c. 9 (Eng.), <https://www.legislation.gov.uk/ukpga/2005/9/contents>; Rhein, *supra* note 13, at 184.

367. Mental Capacity Act 2005, c. 9, sch. 1 (Eng.), <https://www.legislation.gov.uk/ukpga/2005/9/schedule/1/part/2>; Rhein, *supra* note 13, at 187.

368. Rhein, *supra* note 13, at 187–88.

369. U.K. DEP'T FOR CONST. AFFS., *supra* note 365, at 117.

370. Rhein, *supra* note 13, at 188–89; Mental Capacity Act 2005, c. 9 (Eng.), <https://www.legislation.gov.uk/ukpga/2005/9/contents>.

over its use and empowering them to decide next steps.<sup>371</sup> Advance registration prior to the document becoming effective puts an individual or entity on notice that an agent is acting under believed authority. It could also serve as a deterrent to agents as they are on notice that they are being watched.<sup>372</sup> Additionally, creating a depository of all powers of attorney in a central location could lead to an accessible database for banks and other financial institutions to use to prevent abuse.<sup>373</sup> Such a registry could easily track usage, who obtains copies, and whether the document has been revoked or remains valid.<sup>374</sup>

An additional protective recommendation is to require principal notification when a power of attorney becomes effective. This could include not only the principal, but third parties identified by the principal for notification as well. Under the MCA, a principal can choose up to five people who will be notified when the lasting power of attorney is registered and can object on behalf of the principal.<sup>375</sup> This provides an opportunity and a mechanism for objection and challenge if necessary.<sup>376</sup>

A similar reform offered by several commentators as a less restrictive option is the requirement to notify the principal prior to any “fundamental transaction.”<sup>377</sup> This type of transaction has been described as one that “significantly alter[s] the principal’s lifestyle,”<sup>378</sup> including selling a home or liquidating a portion of the principal’s assets. Advance notification not only puts the principal on notice prior to action, therefore allowing prevention, but also gives a principal the opportunity to revoke certain authority or the power of attorney completely.<sup>379</sup> Taking it one step further, an added precaution could be that if an agent fails to give advance notice and the principal later objects, it is the agent who has the burden to show the activity was consistent with her fiduciary duty. Failing to meet this burden would result in agent liability.<sup>380</sup>

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371. Rhein, *supra* note 13, at 195.

372. Dessin, *Is the Solution a Problem?*, *supra* note 247, at 317; Rhein, *supra* note 13, at 196.

373. The database could be used to ensure compliance and good-faith usage. Rhein, *supra* note 13, at 195.

374. FEDERMAN & REED, *supra* note 36, at 59.

375. Rhein, *supra* note 13, at 187–88; Mental Capacity Act 2005, c. 9 (Eng.), <https://www.legislation.gov.uk/ukpga/2005/9/contents>.

376. Rhein, *supra* note 13, at 195.

377. Kohn, *Elder Empowerment*, *supra* note 64, at 49; *see also* Whitton, *Durable Powers*, *supra* note 18, at 35.

378. Kohn, *Elder Empowerment*, *supra* note 64, at 49.

379. *Id.* at 50.

380. *Id.* at 50–51.

*b. Integrating Financial Institutions*

Recently, there has been a recognition of the prime opportunity for third-party entities, such as banks and financial institutions, to provide a layer of prevention.<sup>381</sup> Often, banking activity is the vehicle for exploitation whether it is the transfer of assets, withdrawal of funds, or the acquisition of debt.<sup>382</sup> Financial institutions have the opportunity and motivation to observe and report suspicious activity that is unusual for the principal, transactions with sudden increases, or actions that involve someone other than the principal.<sup>383</sup> Forensic centers could provide training for a variety of specialists, such as financial professionals, to better identify risk.<sup>384</sup>

Including financial institutions in the sea of multidisciplinary professionals would provide a front-line level of protection. Recent regulatory developments have given financial professionals new tools to confront and prevent financial exploitation. In 2018, Financial Industry Regulatory Authority (“FINRA”) rules were instituted to allow firms to quickly respond to suspected financial abuse, including allowing a broker to place a temporary hold on a financial account disbursement if abuse is suspected.<sup>385</sup> This has led to state law revisions to mandate or prod banks into reporting suspected exploitation.<sup>386</sup> Various banking projects have also popped up to better prepare and train bank employees to recognize improper conduct.<sup>387</sup> Technology advances in information technology (“IT”) and artificial intelligence (“AI”) may provide additional devices to detect and prevent exploitation in the future.<sup>388</sup>

Adding financial institutions to the collaboration process is critical to detection as they are in a unique circumstance to flag potential unscrupulous actors before harm is done. If a bank, for example, suspects an elder is at risk of exploitation, it could set off a warning signal to other connected entities,

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381. Craft, *supra* note 19, at 459.

382. Dessin, *Is the Solution a Problem?*, *supra* note 247, at 319.

383. Craft, *supra* note 19, at 459.

384. CONNOLLY ET AL., *supra* note 293, at 15–16.

385. Deane, *supra* note 161, at 15.

386. Craft, *supra* note 19, at 459–60.

387. Recognizing the unique front-line position of financial institutions, AARP created BankSafe™, an online interactive training program aimed to prepare bank employees to not only recognize and report financial exploitation, but to prevent it. A recent study of the pilot program found that the training program was quite successful at preventing exploitation before money even left the account. Compared to a control group without training, participants saved sixteen times more elderly people from financial exploitation than the control group, with each participant saving on average \$865 compared to \$70 for non-trained employees. JILENNE GUNTHER & PAMELA TEASTER, THE IMPACT OF TRAINING FINANCIAL PROFESSIONALS TO PREVENT FINANCIAL EXPLOITATION 1–2 (2019), <https://liberalarts.vt.edu/research-centers/center-for-gerontology/research-report-bank-safe.html>.

388. Deane, *supra* note 161, at 18–19.

including the forensic center, and possibly prevent a significant, fraudulent transfer of assets.<sup>389</sup> As one author suggests, there could be a “single, unified consumer protection tool” that would have the ability to send a cautionary notification to all the interconnected financial institutions for that elder if there is suspicious activity.<sup>390</sup>

Dr. Jason Karlawish coined the term “whealthcare” in a 2015 *Forbes* column, in which he advocated for merging the financial sector and healthcare sector to stem the tide of financial exploitation.<sup>391</sup> As Dr. Karlawish notes, decline in financial capability is one of the first signs of cognitive decline. While some abilities, often language and knowledge, can remain constant or even improve with age, the skills necessary for financial acuity, such as thinking fast and holding multiple facts, often are the first to deteriorate.<sup>392</sup> The approach to aging has been binary—either protectionist or upholding individuality.

A “buyer beware” and “everyone for themselves” ethic has created extremes. A person is either independent, or dependent under a power of attorney or even a guardian. We are in fact interdependent and interconnected. Financial services professionals, their clients and those who care about the clients must collaborate to preserve the clients’ financial and cognitive well-being. A middle space should exist where older adults give trusted others the ability to see transactions but not the ability to manage the account or even see its balances. Such interventions permit early detection of changes such as missed payments.<sup>393</sup>

In situations where there is a concern of exploitation or confirmed improper actions, intervention may include a holistic evaluation—consideration of capabilities and dependencies, as well as a history of the individual’s values, interests, and needs.

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389. *Id.* at 19. A new tool, Interview for Decisional Abilities (“IDA”), aims to prevent financial exploitation by determining potential risk through a series of questions. The purpose of the tool is to capture an older individual’s understanding and appreciation of risk, as well as their ability to make reasoned decisions. It is currently used by APS workers to ascertain whether an older adult is the victim of exploitation. Paula Span, *Sizing Up the Decisions of Older Adults*, N.Y. TIMES (May 9, 2022), <https://www.nytimes.com/2022/05/09/health/ida-elderly-help.html>; see also *The Cornell-Penn Interview for Decisional Abilities (IDA)*, WEILL CORNELL MED., <https://geriatrics-palliative.weill.cornell.edu/innovative-programs/IDA> (last visited Jan. 4, 2023).

390. Deane, *supra* note 161, at 20 (quoting LARRY SANTUCCI, CAN DATA SHARING HELP FINANCIAL INSTITUTIONS IMPROVE THE FINANCIAL HEALTH OF OLDER AMERICANS? (2017)).

391. Jason Karlawish & Dan G. Blazer, *Why Bankers, Financial Analysts and Doctors Need to Start Working Together*, FORBES (July 22, 2015, 9:10 AM), <https://www.forbes.com/sites/sciencebiz/2015/07/22/why-bankers-financial-analysts-and-doctors-need-to-start-working-together/?sh=5f9284a75415>.

392. *Id.*

393. *Id.*

## 2. *Remedying Exploitation*

The goal in enacting a robust regulatory framework is to first prevent power of attorney exploitation before it harms an elder. However, as argued earlier, prevention can be hampered when an agent has legitimate authority to act. These technically sanctioned transactions may be difficult to prevent, but there are mechanisms that would improve discovery in order to remedy harm.

### *a. Accounting*

Proponents of regular oversight assert that “[i]n terms of uncovering past abuse, there is perhaps no surer way to expose improper behavior than by periodically reviewing an agent’s transactions . . . .”<sup>394</sup> Mandating consistent account filings, in particular once a principal becomes incompetent and when the principal dies, would likely deter abuse.<sup>395</sup> Periodic accountings are relatively simple, especially for honest agents, and create not only actual accounting but an expectation of oversight.<sup>396</sup> It is argued that agents are less likely to engage in exploitation if they know they are being watched and will need to provide a list of all transactions. The UPOAA has a provision allowing broad standing to petition the court for an accounting but stopped short of mandating one.<sup>397</sup>

Certainly, an accounting is useful only if it is reviewed.<sup>398</sup> While it has been suggested that accountings be filed with a court,<sup>399</sup> placing agent review under the purview of the forensic center would provide a more practical solution. Instead of burdening an already overtaxed system, the forensic center would provide a more efficient model of oversight.

### *b. Revocation*

Although a competent principal has the power to revoke a power of attorney at any time, they may not know the mechanism and procedure to do so. Part of the appeal of fortifying the forensic center model is to provide elders with a central location to not only remedy abuse but revoke the power of a rogue agent. An additional benefit of a central registration process is simplifying the revocation process for principals. With increased

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394. FEDERMAN & REED, *supra* note 36, at 86.

395. Dessin, *Is the Solution a Problem?*, *supra* note 247, at 317. In the 1994 Albany study, fifty-two percent of respondents believed an annual accounting requirement would be helpful. FEDERMAN & REED, *supra* note 36, at 87.

396. Dessin, *Is the Solution a Problem?*, *supra* note 247, at 317.

397. UNIF. POWER OF ATTORNEY ACT § 116 cmt. (NAT’L. CONF. OF COMM’RS ON UNIF. STATE L. 2006).

398. FEDERMAN & REED, *supra* note 36, at 86.

399. Dessin, *Is the Solution a Problem?*, *supra* note 247, at 317.

collaboration with financial institutions, once a registered power of attorney is revoked there would be immediate notification to banks and other entities. In addition to revocation forms, the forensic centers could provide power of attorney forms and the option of legal advice to assist elders as they navigate substitute decision making. An elder could meet with a lawyer and execute a power of attorney with available witnesses and a notary. A legal professional could provide counsel on who to appoint as an agent, educate the elder on relevant duties and authority, and ensure that the client chooses someone they trust. If necessary, and the elder does not have a person to serve as agent, there could be a registry of public agents trained to serve.

### 3. *Restorative Justice*

Once exploitation is discovered, the forensic center model can quickly and efficiently complete an investigation and work with law enforcement and prosecutors to remedy the abuse.<sup>400</sup> There is also an opportunity to broaden the criminal justice model to include restorative justice principles to address elder financial exploitation.<sup>401</sup> As discussed earlier, family member perpetrators complicate elder exploitation and create a significant barrier to prevention efforts. Traditional legal remedies can be underutilized, as seniors feel embarrassment and shame that their loved one exploited them, as well as fear or hesitation to report a family member. Reporting a perpetrator could mean the loss of a caregiver or the elder's independence if they lose the assistance.<sup>402</sup>

Restorative justice lends itself well to elder exploitation prevention, as a guiding principle is "to foster relationships based upon respect, concern, and dignity, and to facilitate those relationships to function in a positive way."<sup>403</sup> It is suggested that financial exploitation, in particular, may be the type of elder abuse most amenable to using restorative justice intervention.<sup>404</sup> The perpetrator could explain their conduct and take responsibility, and the system would allow the parties to resolve the matter outside the criminal or civil context.<sup>405</sup> The multidisciplinary approach is aligned with restorative

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400. Navarro et al., *supra* note 338, at 305; Dessin, *supra* note 247, at 318.

401. McNeal & Brown, *supra* note 254, at 91.

402. *Id.* at 98–99.

403. *Id.* at 106. "Restorative justice" has been defined as "an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations in order to heal and put things as right as possible." *Id.* at 104 (quoting HOWARD ZEHR ET AL., *THE LITTLE BOOK OF RESTORATIVE JUSTICE: REVISED AND UPDATED* 50, 108 (Good Books, 2d ed. 2015)).

404. *Id.* at 124.

405. *Id.*



principles “by identifying and implementing creative alternatives.”<sup>406</sup> It is “responsive to the needs of those harmed, those committing the harm, and communities.”<sup>407</sup>

### *E. Overcoming Potential Burdens*

Arguments against regulation and oversight include violation of principal privacy, the associated cost and resources, and the possibility that overburdening the power of attorney would create a chilling effect on usage.<sup>408</sup> The privacy concern is that a principal would be forced to divulge financial information to the court during the accounting or registration process. Additionally, such a court proceeding could trigger a guardianship and a judicial investigation into principal capacity.<sup>409</sup> The forensic center model would eliminate the issue of a recorded power of attorney becoming a public record. Instead, the centralized registry would be contained in the forensic center outside the adversarial and overburdened court system. A unified location would increase efficiency and access and could serve as a confidential database.<sup>410</sup>

Critics may contend that, if the principal loses capacity, there is no one to report a bad actor or insist on an accounting.<sup>411</sup> Under current power of attorney laws, when a principal loses capacity and the agent begins to act, there is no oversight at all. With registration, a principal could choose to register the power of attorney prior to losing capacity to add a layer of protection.<sup>412</sup> Additionally, this issue may be resolved by the forensic center sending an annual form letter requesting an accounting to all registered agents. The prospect of supervision will likely deter some abusive agents since they are on notice.<sup>413</sup> For those that continue to flaunt accounting, the prosecutorial arm of the forensic center may be able to resolve the matter.

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406. *Id.* Restorative justice is based on three principles: (1) “Wrongdoing is a violation of people and of interpersonal relationships”; (2) “Violations create obligations”; and (3) “The central obligation is to put right the wrongs, i.e. to repairs the harms caused by wrongdoing.” *Id.* at 104–05 (quoting ZEHR ET AL., *supra* note 403, at 30–31, 108).

407. *Id.* at 139–40.

408. Whitton, *Durable Powers*, *supra* note 18, at 15; Boxx, *supra* note 24, at 46 (arguing the potential costs of monitoring agents outweigh any advantages); see also SUSAN KEILITZ, PAULA HANNAFORD-AGOR & JARRET HANN, NAT’L CTR. FOR STATE CTS.: CTR. FOR ELDERS & THE CTS., ADDRESSING POWER OF ATTORNEY ABUSE: WHAT COURTS CAN DO TO ENHANCE THE JUSTICE SYSTEM RESPONSE 8 (2013), [https://www.eldersandcourts.org/\\_\\_data/assets/pdf\\_file/0018/6246/poa-white-paper-final-9\\_3\\_2013.pdf](https://www.eldersandcourts.org/__data/assets/pdf_file/0018/6246/poa-white-paper-final-9_3_2013.pdf).

409. Whitton, *Durable Powers*, *supra* note 18, at 15–16.

410. Rhein, *supra* note 13, at 195.

411. Whitton, *Durable Powers*, *supra* note 18, at 16.

412. Rhein, *supra* note 13, at 195.

413. Dessin, *Is the Solution a Problem?*, *supra* note 247, at 317.

Lastly, an additional criticism of regulation is the potential burden it will create for principals, agents, and the regulatory entity.<sup>414</sup> One reason to utilize a forensic center instead of the already taxed court system is to decrease associated costs on overburdened systems. There could be a sliding fee for registration available to low-income elders, and abusive agents could be assessed fees for violations to cover some costs. Instead of feeling burdened by onerous procedures, many principals may be empowered by the access to information, legal assistance, and remedies that are less expensive than accessing the court system.<sup>415</sup> It is argued that agents will be wary of the time associated with additional regulatory duties; however, agent tasks already include assisting a principal with paying bills, managing investments, and transferring assets.<sup>416</sup> It is unlikely that a one-time registration and annual accounting would cause family members or loved ones to refuse to serve.

There is no doubt that agent supervision would increase detection and prevention of financial exploitation. Utilizing a multi-system framework with integrated service providers would not only provide preventive measures, but also deliver practical remedies for exploited elders. The need to provide structured, holistic protection of vulnerable elders outweighs a completely unregulated power of attorney.

#### CONCLUSION

The durable power of attorney has outgrown its initial goal “to assist persons interested in establishing non-court regimes for the management of their affairs in the event of later incompetency or disability.”<sup>417</sup> While this goal is useful, it is incomplete, or worse, short-sighted. It fails to protect clients such as Violet, who regain capacity only to be denied the ability to revoke her power of attorney from a rogue agent. Or Juan and Liu, who gave a trusted person wide-reaching power only to have it used against their interests. Often, those victimized are unaware of the exploitation, or unsure of how to stop it or remedy the abuse. Utilizing the legal system can be daunting or inaccessible for many reasons, including if the elder cannot afford an attorney.

The primary goal of a power of attorney is to provide surrogate property management for an incapacitated adult. The agent is charged with completing tasks the principal can no longer do, in alignment with the principal’s values and known wishes.<sup>418</sup> In order to accomplish this goal, a power of attorney

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414. Vu-Dinh, *supra* note 79, at 22–24.

415. *Id.* at 23.

416. *Id.*

417. FEDERMAN & REED, *supra* note 36, at 13 (citing UNIF. PROB. CODE §§ 5-501 to -505 (1969) (prefatory note)).

418. Whitton, *Durable Powers*, *supra* note 18, at 9.

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has remained accessible, flexible, and informal. These benefits provide agents with extensive authority while also maintaining an elder's ability to make autonomous financial decisions. The unsupervised nature of powers of attorney became a double-edged sword as "making them easier to use often involves making them easier to abuse."<sup>419</sup>

Despite a desire by the elder law community to both empower and protect vulnerable elders, reform efforts have ultimately failed to prevent widespread financial exploitation. While states and elder advocates are concerned about growing power of attorney exploitation, many remain overly committed to efficiency and ubiquity. Allowing the power of attorney to remain unregulated and unsupervised for the benefit of benevolent families has left an ever-growing swath of our elder population at extreme risk.

In order to realistically prevent the growing harm of elder financial exploitation at the hands of agents under a power of attorney, the solution must include oversight and regulation. Ultimately, had Violet been able to go directly to a forensic center and request an accounting of her agent's actions, or get a copy of the power of attorney, or revoke it, she might have been able to prevent or salvage the situation. At the very least, her agent would have been on notice of Violet's wishes and that she was being watched. A multidisciplinary approach would have provided Violet with social service support to assist her with housing options, a link to a prosecutor who could investigate the agent, and a possible health care provider to determine whether Violet had capacity concerns, which ultimately may have prevented the harm. Certainly, intervention at an earlier point, before her home was sold and her possessions were given away, would have been effective at staving off the financial loss and emotional turmoil.

The proposed infrastructure includes oversight provisions that provide a much-needed layer of protection but also maintain elder autonomy and do not render a power of attorney useless. Advance notification to Liu that her agent was attempting to transfer her home to himself would have saved her property. If Juan had received periodic accountings, he may have been able to stop the abuse by his son. Even if it did not fully prevent the exploitation, a mandatory accounting would have revealed the improper transactions.

The Elder Justice Act has the necessary structure to implement a nationwide multidisciplinary system linking multiple federal agencies, social service organizations, and financial institutions to end elder financial exploitation. Expanding the forensic center system could provide an interconnected, cross-communication system of medical, social services, financial, and legal professionals trained and prepared to ferret out power of

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419. FEDERMAN & REED, *supra* note 36, at 19.

attorney abuse.<sup>420</sup> Not only would it address the myriad of competing issues, but it would also bring together the various specialists attempting to address financial abuse. Elders would not be left to wonder if they can trust their agents, but instead would be empowered to find out.

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420. Deane, *supra* note 161, at 20.