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Finding the Middle Ground On a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse

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FINDING THE MIDDLE GROUND ON A SLIPPERY SLOPE: BALANCING AUTONOMY AND PROTECTION IN MANDATORY REPORTING OF ELDER ABUSE

Benjamin Pomerance*

Millions of older Americans suffer from physical, mental, emotional, or financial abuse. Frequently, their abusers are family members, close friends, or other individuals who occupy positions of trust in their elderly victims' lives. Unfortunately, due to a variety of factors, elder abuse is a tragically underreported crime. Experts estimate that for every case of elder abuse revealed to law enforcement authorities, five more cases go unreported, allowing the abuse to continue unchecked.

To combat this secrecy surrounding elder abuse, federal and state lawmakers enacted statutes requiring certain people—or, in some jurisdictions, all people—to report instances of suspected elder abuse to designated authorities. These laws circumvent the need for victims to self-report the crimes perpetrated against them, shining a light on perpetrators of these terribly damaging offenses. However, some commentators argue that laws mandating reporting of perceived elder abuse unnecessarily impinge upon the constitutionally protected liberties of older Americans. Critics claim that these statutes discriminate against elderly individuals, infantilizing older men and women by assuming that they need greater state oversight because of their age.

This article seeks to reconcile the valid points on both sides of this debate. Rather than abandoning the important protections that mandatory elder abuse reporting laws provide, this article

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calls for these laws to remain on the books. However, it also suggests that these laws include several much-needed provisions safeguarding older Americans' constitutional liberty interests. By examining mandatory elder abuse reporting laws in several jurisdictions and identifying best practices, this article aims to provide steps toward finding a better balance between autonomy and protection in this area of the law.

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I. INTRODUCTION

When his forty-seven-year-old son tried to kill him with a hatchet, seventy-nine-year-old Sal finally reported him to the police.¹ For decades, going back to when his child was a teenager, the boy had battered Sal physically and mentally, from throwing objects at the 5'3" man to threatening to "piss on [his] grave."² Still, neither Sal nor anybody else took any action to curb the abuse.³ Law enforcement officials never received any notification about the son's verbal and bodily attacks on the father.⁴ Only when the cruelty rose to attempted murder—which likely would have been actual murder had the drunken son not missed his target with that brand-new hatchet—did Sal report his offspring's brutality to law enforcement.⁵ Even when the authorities intervened, however, Sal was reluctant to press charges.⁶ "He was such a handsome boy," the father told reporters, his eyes filling with tears.⁷

Sal's near-death occurred in 1989.⁸ In the twenty-five years between that sickening crime and the present day, scenarios of abuse in various physical, mental, and emotional forms played out in the lives of millions of older Americans.⁹ In an equally staggering figure, an estimated five million Americans over the

1. Bella English, *It's Society's Secret Crime*, BOSTON GLOBE, Aug. 2, 1989. "Sal" is a pseudonym that the Globe article used to represent the victim in this case. This article follows the Globe's practice by using this pseudonym.

2. *See id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *See, e.g.*, Eve M. Brank, Joseph A. Hamm & Lindsey E. Wylie, *Potential for Self-Reporting of Older Adult Maltreatment: An Empirical Examination*, 19 ELDER L.J. 351, 352 (2012); *see also* Xinqi Dong, *Elder Abuse: Research, Practice, and Health Policy*, 54 THE GERONTOLOGIST 153, 153 (2014) ("Evidence suggests that 1 out of 10 older adults experiences some form of elder abuse, and only a fraction of cases are actually reported to social service agencies."). *See* Edward Roybal, *Elder Abuse: A Decade of Shame and Inaction: A Report by the Chairman of the Subcomm. on Health and Long-Term Care of the Select Comm. on Aging, House of Representatives*, 101st Cong., 2d Sess. 752 at XI (Comm. Print 1990). Some commentators also list "sexual abuse" as a separate category of elder abuse. This article includes "sexual abuse" within the listed classifications of physical, mental, and emotional abuse, as these extremely detrimental acts adversely affect the older adult's well-being in all three of these categories.

age of sixty-five suffer financial exploitation every year.¹⁰ Often, physical, mental, emotional, or financial abusers of the elderly are often family members, close friends, or other individuals who gain positions of trust with their victims, ultimately leveraging this power and control against them.¹¹ Overall, elder abuse is now widespread in America, a heinous crime that has reached “epidemic” proportions in the United States today.¹²

Unfortunately, the precise extent of this “epidemic” is unknown.¹³ Elder abuse is a tragically underreported crime.¹⁴ Experts estimate that for every case revealed to law enforcement, five more cases of elder abuse go unreported.¹⁵ Frequently,

10. See Brank, Hamm & Wylie, *supra* note 9, at 352–53 (stating that even though the number of older victims of physical, mental, and emotional abuse is unacceptably high, the number of elderly victims of financial exploitation is approximately five times that amount).

11. Currently, the National Center on Elder Abuse estimates that family members comprise an astounding 90% of elder abuse perpetrators. See *Statistics/Data*, NAT'L CTR. ON ELDER ABUSE, <http://www.ncea.aoa.gov/Library/Data/>.

12. The term “epidemic” is now used frequently regarding the elder abuse problems confronting the United States. See, e.g., *America's Invisible Epidemic: Preventing Elder Financial Abuse*, Hearing Before The Senate Special Comm. on Aging, 112th Cong. 1 (2012) (opening statement of Sen. Herb Kohl, Chairman, Senate Special Committee on Aging) (“It’s time to build on our efforts to remedy this invisible epidemic and break the cycle of stigma attached to this horrible crime.”); MARY JOY QUINN & SUSAN K. TOMITA, ELDER ABUSE AND NEGLECT: CAUSES, DIAGNOSIS, AND INTERVENTION STRATEGIES ix (1997); Seymour Moskowitz, *Saving Granny From The Wolf: Elder Abuse and Neglect — The Legal Framework*, 31 CONN. L. REV. 77, 124 (1998); Jane Gray, *Elder Abuse: ‘A Nearly Silent Epidemic’*, EPOCH TIMES (Feb. 25, 2014, 5:49 AM), <http://www.theepochtimes.com/n3/528337-elder-abuse-a-nearly-silent-epidemic/> (quoting the chair of the New York City Council’s Committee on Aging saying that elder abuse is “a nearly silent epidemic due largely to underreporting and a lack of public awareness.”); Press Release, *Fighting Back Against the Hidden Epidemic of Elder Abuse*, U.S. DEPT OF JUSTICE (June 14, 2012) available at <http://www.justice.gov/opa/blog/fighting-back-against-hidden-epidemic-elder-abuse>.

13. See, e.g., Nina A. Kohn, *Elder (In)justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 2–3 (2012). Unfortunately, the hidden nature of elder abuse in recent days appears to show little improvement over the situation from a few decades ago. See Moskowitz, *supra* note 12, at 79.

14. See, e.g., Robert B. Blancato, Brian W. Lindberg & Charles P. Sabatino, *Bringing National Action to a National Disgrace: The History of the Elder Justice Act*, 7 NAT'L ACAD. ELDER LAW ATTORNEYS J. 105, 107 (2011) (“[T]he quality of elder abuse data is severely limited. Studies consistently show that elder abuse is far more widespread than the number of cases actually reported.”); Pamela B. Teaster, Tenzin Wangmo & Georgia J. Anetzberger, *A Glass Half Full: The Dubious History of Elder Abuse Policy*, 22 J. ELDER ABUSE & NEGLECT 6–7 (2010); Nina Santo, *Breaking the Silence: Strategies for Combating Elder Abuse in California*, 31 MCGEORGE L. REV. 801, 808–09 (2000); Dong, *supra* note 9, at 153; Brank, Wylie & Hamm, *supra* note 9, at 353.

15. See Pamela B. Teaster, *The Wicked Problem of Elder Abuse*, ELDER JUSTICE COLLOQUIUM (Mar. 23, 2012), at 6, available at <http://uwf.edu/media/university-of->

victims refrain from reporting these offenses because they do not want to “betray” the family member or other trusted individual committing the abuse.¹⁶ Many individuals feel ashamed of receiving maltreatment from a family member or friend and allow the abuse to continue behind closed doors.¹⁷ Fear of retaliation by the perpetrator, as well as apprehension about being sent to a nursing home or other institution themselves, also contributes heavily to the scant reporting from elder abuse victims.¹⁸ Often, older individuals depend heavily on their abusers for some form of counsel or care, leaving these victims feeling as if they have no choice but to accept this cycle of fear and pain.¹⁹

west-florida/colleges/cas/departments/center-on-aging/Teaster---The-Wicked-Problem-of-Elder-Abuse.pdf; Robert A. Hawks, *Grandparent Molesting: Sexual Abuse of Elderly Nursing Home Residents and its Prevention*, 8 MARQ. ELDER'S ADVISOR 159, 166 (2006); Blancato, Lindberg & Sabatino, *supra* note 14, at 107.

16. The troubling case of Sal and his son is a classic example of this choice. Despite his child's demonstrated propensity to harm him, Sal did not report him to law enforcement officials because he did not want to see any harm come to his son. Indeed, even after making the report after his son attempted to kill him, Sal remained concerned about his son and expressed his love for him. *See supra* notes 1-7 and accompanying text.

17. *See, e.g.*, UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY 56 (2011), *available at* <http://www.lifespan-roch.org/documents/undertheradar051211.pdf>; Considering that most elder abuse perpetrators are family members or close friends, these situations of shame for older victims are far too common and indeed are more prevalent than anyone today will ever fully know. *See* NAT'L CTR. ON ELDER ABUSE, 15 QUESTIONS & ANSWERS ABOUT ELDER ABUSE 7 (2005), *available at* <http://www.ncea.aoa.gov/Resources/Publication/docs/FINAL%206-06-05%203-18-0512-10-04qa.pdf> (“Hard as it is to believe, the great majority of abusers are family members, most often an adult child or spouse.”).

18. Quinn & Tomita, *supra* note 12, at 5–6; *see also* David Brown, Janet O'Keeffe & Donna J. Rabiner, *Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them*, 16 J. ELDER ABUSE & NEGLECT 65, 66–69 (2004).

19. *See, e.g.*, Molly Dickinson Velick, *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*, 3 ELDER L.J. 165, 174 (1995). For just a select few of many recent specific examples, *see* Tanyanika Samuels, *Checking Elder Abuse at the Door*, WALL ST. J. (Sept. 18, 2014), *available at* <http://online.wsj.com/articles/checking-elder-abuse-at-the-door-1411001794>; Patrick McNamara, *Elder Abuse On the Rise, Often at the Hands of Those Closest*, ARIZONA DAILY STAR (June 9, 2014, 12:00 AM), http://tucson.com/news/local/elder-abuse-on-the-rise-often-at-the-hands-of/article_ce247bac-d12e-5bce-9d52-3d0cf12bfce2.html; Jan Skutch, *Savannah Elder Abuse Victim Wins in Court, Loses Battle for Life*, SAVANNAH MORNING NEWS (June 7, 2014, 9:57 PM), <http://savannahnow.com/news/2014-06-07/savannah-elder-abuse-victim-wins-court-loses-battle-life>; Yesenia Amaro, *Elder Abuse Underreported, On Rise in Nevada*, LAS VEGAS REV.-J. (Apr. 27, 2014, 11:41 PM), <http://www.reviewjournal.com/news/nevada/elder-abuse-underreported-rise>.

To lift this veil of secrecy, federal and state lawmakers have attempted to establish a more vigorous investigatory and reporting framework in this area during the past few decades.²⁰ Since the 1970s, a nationwide legislative trend emerged favoring greater government oversight of this troubling issue.²¹ Today, every state in the country, as well as the federal government, offers a legal framework aimed at identifying abusers of elderly men and women and protecting older individuals from this

nevada; *Elder Abuse, Including Neglect, On the Rise as World's Population Beings to Age*, N.Y. DAILY NEWS (Dec. 23, 2013, 6:45 AM), <http://www.nydailynews.com/news/world/elder-abuse-rising-growing-senior-population-worldwide-article-1.1556184>; Dan Sewell, *Aging America: Elder Abuse on the Rise*, NBC NEWS (Jan. 27, 2013, 2:07 PM), [aging-america-elder-abuse-rise-f1C8135730](http://www.nbcnews.com/health/aging-america-elder-abuse-rise-f1C8135730); Becky Yerak, *Elder Financial Abuse in Illinois on Rise*, CHI. TRIB. (Aug. 12, 2012), http://articles.chicagotribune.com/2012-08-12/business/ct-biz-0812-bf-elder-abuse-20120812_1_financial-exploitation-financial-abuse-abuse-cases.

20. See *supra* pp. 5-6. Notably, elder abuse is certainly not a problem exclusive to the United States. See generally Jordan I. Kosberg & Juanita L. Garcia, *Background, ELDER ABUSE: INTERNATIONAL AND CROSS-CULTURAL PERSPECTIVES* 1, 2-3, 5 (1995) (describing attempted responses to rising numbers of elder abuse cases in nations throughout the world). Other nations recently reporting serious concerns about widespread elder abuse include Australia, Canada, Hong Kong, Ireland, Israel, and Japan. Zoldy Kate Moloney, *Ireland Fails its Elderly Citizens: The Issue of Elder Abuse and the Lack of Legislation to Protect Victims—An Investigation*, THE CIRCULAR (Feb. 12, 2014), <http://thecircular.org/ireland-fails-its-elderly-citizens-the-issue-of-elder-abuse-and-the-lack-of-legislation-to-protect-victims-an-investigation/>; Patsy Leung, *Elderly Need More Protection*, SOUTH CHINA MORNING POST (Mar. 20, 2013, 3:11 AM), <http://www.scmp.com/comment/letters/article/1194954/elderly-need-more-protection>; Barbara Black Blundell, Mike Clare & Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia* (2011), available at http://www.advocare.org.au/uploaded/files/client_added/Examination%20of%20the%20Extent%20of%20Elder%20Abuse%20in%20Western%20Australia.pdf; Sawako Obara, *Abuse of Elderly Up, Said Often Unintended*, JAPAN TIMES, Jan. 30, 2010, <http://www.japantimes.co.jp/news/2010/01/30/national/abuse-of-elderly-up-said-often-unintended/#.VEXqKMJ0zIU>; *Elder Abuse: It's Time to Face Reality*, PUB. HEALTH AGENCY OF CAN. (2009), available at <http://www.phac-aspc.gc.ca/sfv-avf/sources/age/age-abuse-broch/assets/pdf/age-abuse-broch-eng.pdf>; Ariela Lowenstein, Zvi Eisikovits, Tova Band-Winterstein & Guy Enosh, *Is Elder Abuse and Neglect a Social Phenomenon? Data from the First National Prevalence Study in Israel*, 21 J. ELDER ABUSE & NEGLECT 253 (2009).

21. See *supra* Part 1. In recent years, certain “celebrity cases” helped garner particularly ardent legislative support for initiatives combating elder abuse, as widely recognized public figures from Mickey Rooney to Brooke Astor became abuse victims. Ed Gjertsen, *The ‘Double Life’ of Mickey Rooney*, CNBC, Apr. 10, 2014, <http://www.cnbc.com/id/101568802#>; Russ Buettner, *Appeals Exhausted, Astor Case Ends as Son is Sent to Jail*, N.Y. TIMES, June 21, 2013, http://www.nytimes.com/2013/06/22/nyregion/astors-son-his-appeals-exhausted-goes-to-prison.html?_r=0. While such cases represented only a fraction of the total number of elder abuse incidents occurring throughout the United States each year, they helped augment public support for the necessary effort of elder abuse prevention.

harmful misconduct.²² As part of these safeguards, every state requires witnesses of elder abuse at certain institutions, such as nursing homes and assisted-living facilities, to report the mistreatment to the relevant state agency for investigation.²³

In recent years, however, many jurisdictions took these statutory measures to another level entirely. Practically every state in America now offers its own “mandatory elder abuse reporting law,” requiring certain people—or, in some cases, all people—to report suspected abuse of non-institutionalized older persons.²⁴ Intended to protect elderly individuals from harm, these statutes circumvent the need for victims to self-report these criminal acts.²⁵ Instead, by placing a duty to report on others, mandatory reporting requirements are designed to shine a light on these often-obscured offenses without forcing the victim to start the investigatory process.²⁶

Under these laws, the countless victims like Sal who are unlikely to notify law enforcement about an abuser’s actions have a new pathway to the criminal justice system, with outside

22. Every state government has enacted some sort of elder abuse prevention law since at least 2002. *See* AM. BAR ASS’N, COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY: REPORT TO THE HOUSE OF DELEGATES 4 (2002) (“State legislatures have paid considerable attention to the problem of elder abuse. All fifty states and the District of Columbia have enacted legislation addressing domestic or institutional elder abuse, creating reporting systems to identify cases and adult protective services systems to investigate alleged incidents and respond to the needs of victims.”). Today, all states still have at least one functioning elder abuse prevention statute on their books. *See* JOHN MARX, ROBERT HOCKBERGER & RON WALLS, ROSEN’S EMERGENCY MEDICINE – CONCEPTS AND CLINICAL PRACTICE 890–91 (2014). Since March 23, 2010, the Elder Justice Act has provided a codified federal response to the problems that elder abuse poses. Blancato, Lindberg & Sabatino, *supra* note 14, at 105–06.

23. Xinqi Dong, *Medical Implications of Elder Abuse and Neglect*, 21 CLINICS IN GERIATRIC MEDICINE 293, 293 (2005).

24. In 2014, Colorado became the forty-eighth state to enact a mandatory elder abuse reporting statute. Victoria A.F. Camron, *Reporting Elder Abuse Now Colorado Law*, TIMES-CALL, July 11, 2014, http://www.timescall.com/longmont-local-news/ci_26133570/reporting-elder-abuse-now-colorado-law.

25. *See* 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 (2005); Velick, *supra* note 19, at 173.

26. *See supra* note 25; *see also* Carolyn L. Dessin, *Should Attorneys Have a Duty to Report Financial Abuse of the Elderly?*, 38 AKRON L. REV. 707, 708 (2005) (“This is an attractive addition to the arsenal of weapons to combat exploitation. The rationale underlying these reporting statutes is simple: many more cases of abuse are likely to receive the attention they require from law enforcement and protective services agencies if we impose a duty to report suspected abuse to one or both of these agencies.”).

individuals ordered to report signs of abuse.²⁷ If a mandatory reporter suspected that Sal was experiencing harm and delivered this report to the appropriate parties, an ensuing investigation hopefully would have identified the son's abusive behaviors and resulted in appropriate measures to stop the abuse before it escalated to attempted murder.²⁸ For the many elder abuse victims who feel too frightened or powerless to take action, or who are physically or mentally unable to seek recourse, mandatory reporting laws bring them the protective services that they otherwise would not obtain.²⁹ Furthermore, such laws affirm that the public will not stand for maltreatment of older men and women, and conceivably deter potential future bad actors from preying on the elderly in this fashion.³⁰

However, the greatest strengths of mandatory reporting laws are simultaneously their greatest drawbacks. By forcing people to report suspected instances of elder abuse, these statutes raise significant questions about whether constitutionally protected liberty interests of older Americans are in danger.³¹ Mandatory reporting laws can take the ball out of the alleged victims' hands, imposing a government-led investigation without their

27. *Id.*

28. Of course, this assumes that all moving parts in this process function precisely as they are designed to operate. Naturally, this will not always occur in real life. However, in examining the mandatory elder abuse reporting framework, one can hope and reasonably expect that this system will function as planned in the majority of cases.

29. See, e.g., Dessin, *supra* note 26, at 722 (“[T]here is no reason to do away with [mandatory reporting laws] if some reports of suspected abuse are made that would otherwise not be made.”); Glick, *supra* note 25, at 723 (“The argument continues that once victims and abusers are identified, the state might render services to prevent further abuse.”); Moskowitz, *supra* note 12, at 111 (“[V]ictims of elder abuse are unlikely to have the support they need to make a free choice about self-reporting.”).

30. See Kohn, *supra* note 13, at 18 (discussing the incapacitation and deterrence effects of a concentrated criminal justice response to elder abuse). In addition to the public safety benefits of deterring would-be offenders, a financial benefit arises from deterring elder abuse as well. Currently, victims of elder abuse in the United States lose more than a combined \$2 billion annually. Blancato, Lindberg & Sabatino, *supra* note 14, at 107. If these victims then turn to public programs such as Medicaid as a way to compensate for their wrongful losses, the entire country implicitly pays a financial price for the harm done by abusers.

31. See, e.g., Nina A. Kohn, *Outliving Civil Rights*, 86 WASH. U. L. REV. 1053, 1067 (2009) (hereinafter *Outliving Civil Rights*); Joseph W. Barber, *The Kids Aren't All Right: The Failure of Child Abuse Statutes as a Model for Elder Abuse Statutes*, 16 ELDER L.J. 107, 122–23 (2008); David P. Matthews, *The Not-So-Golden Years: The Legal Response to Elder Abuse*, 15 PEPP. L. REV. 653, 668–69 (1988); Moskowitz, *supra* note 12, at 107–109.

approval.³² Critics claim that such measures reek of age discrimination, infantilizing older individuals, and undermining their autonomy.³³ By proceeding with a criminal investigation against a purported abuser without the elderly individual's consent — and even doing so in the face of objections from the alleged victim — these measures seem to insult the ability of perfectly competent elderly individuals to make their own decisions.³⁴ By substituting their own judgments for those of the older person in question, the state could even unintentionally assume the role of abuser, wielding its power to force an elderly woman or man do something against his or her wishes.³⁵

Consequently, commentators have called upon states to repeal mandatory elder abuse reporting laws for at least three decades, claiming that the statutes are paternalistic, discriminatory, and detrimental from both an ethical and a legal

32. See *supra* note 31 and accompanying text; see also 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 (1982).

33. Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution the Problem?*, 34 MCGEORGE L. REV. 267, 320–21 (2003); Dyana Lee, *Mandatory Reporting of Elder Abuse: A Cheap but Ineffective Solution to the Problem*, 14 FORDHAM URB. L.J. 723, 731 (1985); see also Sandra Guerra Thompson, *The White-Collar Police Force: "Duty To Report" Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3, 19–22 (2002) (arguing that mandatory reporting laws could impinge upon the autonomy of competent older adults).

34. See *Outliving Civil Rights*, *supra* note 31, at 1067; Brank, Hamm & Wylie, *supra* note 9, at 353 ("By forcing older adult maltreatment into the *parens patriae* framework of child maltreatment statutes, state legislatures have effectively disempowered older adults who should be considered competent decision makers unless adjudicated otherwise."). Some commentators argue that mandatory elder abuse reporting laws actually discourage older individuals from seeking medical care, as they fear that their physician(s) might suspect elder abuse or neglect and issue a report, causing the government to take away their ability to live independently. See, e.g., Moskowitz, *supra* note 12, at 108–09. However, other studies state that mandatory reporting for medical personnel does not dissuade older Americans from visiting their doctors. See Debra Houry et al., *Mandatory Reporting Laws Do Not Deter Patients From Seeking Medical Care*, 34 ANNALS EMERGENCY MEDICINE 336, 339 (1999).

35. See M.E. Burnett & J.M. Krauskopf, *The Elderly Person — When Protection Becomes Abuse*, 19 TRIAL 61, 63 (1983) (explaining that these well-intentioned governmental protective measures for elderly individuals can actually become abusive under certain conditions, using powers of control to manipulate the older individual into thinking or acting a certain way); Glick, *supra* note 25, at 729 ("[O]bligatory reporting and investigation of purported elder abuse, coupled with compulsory services further infantilizes the elder person, chipping away at the victim's already fractured self-image.").

standpoint.³⁶ However, legislators remain unreceptive to these demands for change.³⁷ Today, the United States features more mandatory reporting laws regarding elder abuse than at any prior point in its history.³⁸

This article proposes a middle ground in this admittedly challenging debate. Overall, one cannot ignore the protective merits of mandatory reporting laws on a largely hidden crime. Helping elderly individuals who might truly desire law enforcement support against their abuser, but do not seek it due to fear, dependence, shame, lack of capacity, or some other perfectly understandable factor, is an extremely compelling goal.³⁹ Communicating the general public's commitment to providing adequate protection for older members of society, and hopefully deterring would-be perpetrators from committing horrid acts against elderly men and women, are commendable aspirations as well.⁴⁰ Additionally, from a political realist's perspective, a legislator or executive branch official speaking out against a law aimed at preventing elder abuse would be a surprising move, one likely harming that politician's re-election chances.⁴¹ Chances are, therefore, mandatory reporting laws are likely here to stay.

However, many of these laws are indeed overbroad in certain areas and deficient in others, posing significant questions that deserve answers.⁴² Amending these existing laws in a manner

36. See generally *supra* notes 29–33 and accompanying text (describing critiques of mandatory elder abuse reporting statutes from the early 1980s to the present day).

37. See *Outliving Civil Rights*, *supra* note 31, at 1055 (pointing out that legislators continued passing new laws in this area, likely buoyed by legal challenges raised against mandatory elder abuse reporting statutes).

38. At the time of this writing, only two states lacked a mandatory elder abuse reporting statute. See Camron, *supra* note 24. Observers noted that the speed at which states established mandatory elder abuse reporting laws was rare, and the discussions regarding the creation of such laws were surprisingly civil. See Lee, *supra* note 33, at 724 (“Seldom has a specific kind of legislation received such popular support and been enacted so quickly.”).

39. See, e.g., *supra* notes 20–29 and accompanying text.

40. See *supra* note 30.

41. Indeed, while this article cites multiple sources describing the enactment of new mandatory elder abuse reporting laws, not one source could be located that describes the actual repeal of such a law. Eliminating a law focusing on bringing perpetrators of elder abuse to justice could brand the politician with the label of being “soft on crime,” a designation that no elected official wants in contemporary political races. See Max Brantley, *The Problem with ‘Soft On Crime’ Advertising*, ARK. TIMES (Oct. 21, 2014), <http://www.arktimes.com/ArkansasBlog/archives/2014/10/21/the-problem-with-soft-on-crime-advertising>.

42. See *Outliving Civil Rights*, *supra* note 31, at 1065–66.

that affords greater respect to the autonomy of older persons is a step that policymakers should take. Ideally, these statutes need to protect older men and women without discriminating against them on the basis of their age and, where relevant, their disability or disabilities. By highlighting some areas of particular concern, and briefly proposing some potential alterations, this article hopes to show the merits of altering these laws without tearing them down entirely.

Part II of this article summarizes the history of statutes aimed at preventing elder abuse, demonstrating how these laws expanded in scope throughout recent years. Part III recommends a set of protective components in mandatory reporting laws that policymakers should retain, in an effort to safeguard the best interests of older men and women facing abusive situations. Lastly, Part IV proposes the inclusion of provisions aimed at preserving the autonomy of older Americans as much as possible, preventing governments from intruding into the private lives of these individuals unnecessarily. While none of these lists are exhaustive, they at least should provide steps toward finding a balance between autonomy and protection in this area of the law.

II. A HISTORY OF EXPANSION: SUMMARIZING GOVERNMENTAL EFFORTS TO INCREASE ELDER ABUSE PREVENTION

Originally, the seeds of a coordinated response to elder abuse were planted in the 1950s.⁴³ After the first National Conference on Aging, an effort initiated by President Harry Truman, government-funded demonstration projects emerged for “protective service units” to assist older Americans.⁴⁴ Eleven years later, the inaugural White House Conference on Aging spurred additional efforts to address the basic rights of older persons, including passage of the broad-based Older Americans Act in 1965.⁴⁵

The first significant abuse-prevention measure, however, occurred in 1974.⁴⁶ That year, Congress passed Title XX of the Social Security Act, requiring creation of Adult Protective Services units in every state.⁴⁷ At the outset, these units focused

43. Blancato, Lindberg & Sabatino, *supra* note 14, at 107.

44. *Id.*

45. *Id.*

46. *Outliving Civil Rights*, *supra* note 31, at 1056–57.

47. See Title XX, Soc. Security Act, Pub. L. 93-674 (1974).

on protecting adults from self-harm, with particular attention paid to people with cognitive disabilities like dementia.⁴⁸ While many states adopted laws establishing Adult Protective Services offices to assist adults of any age, the bulk of their caseloads generally focused on helping elderly victims.⁴⁹

Overall, the scope of work for these units was initially rather limited.⁵⁰ This corresponded with the accepted societal view at the time that elder abuse was “an issue of vulnerability” affecting only those older persons in a considerably weakened state.⁵¹ Importantly, the Adult Protective Services units had little interaction with the criminal justice system in elder abuse cases.⁵² Efforts to protect older Americans from abuse were viewed as social services concerns to be dealt with privately.⁵³

By the end of this decade, however, this line of thinking was already beginning to shift.⁵⁴ In 1975, articles using such vivid terms as “granny bashing” and “battered old person syndrome” emerged in both scholarly journals and popular literature, leading to the recognition that elder abuse truly was a criminal act with substantial consequences.⁵⁵ Gerontologist Robert

48. See Jessie L. Krienert, Moriah Turner & Jeffrey A. Walsh, *Elderly in America: A Descriptive Study of Elder Abuse Examining National Incident-Based Reporting System (NIBRS) Data, 2000–2005*, 21 J. ELDER ABUSE & NEGLECT 325, 329 (2009); *Outliving Civil Rights*, *supra* note 31, at 1056–57; see also Brian K. Payne, *An Integrated Understanding of Elder Abuse and Neglect*, 30 J. CRIM. JUSTICE 535, 536–38 (2002) (discussing the evolving changes in the overall public perspective about the appropriate response to elder abuse).

49. S. SPECIAL COMM. ON AGING, AN ADVOCATE’S GUIDE TO LAWS AND PROGRAMS ADDRESSING ELDER ABUSE, S. Prt. 102-89, at 46 (October 1991), available at <http://www.aging.senate.gov/imo/media/doc/reports/rpt891.pdf> (hereinafter LAWS AND PROGRAMS ADDRESSING ELDER ABUSE)(stating that the majority of Adult Protective Services clients are adults age 60 and above).

50. See Krienert, Turner & Walsh, *supra* note 48, at 329.

51. See *Outliving Civil Rights*, *supra* note 31, at 1056–57.

52. See *id.* Even as late as 1991, Adult Protective Services units still appeared to have fewer interactions with the criminal justice system than they do today. See LAWS AND PROGRAMS ADDRESSING ELDER ABUSE, *supra* note 49, at 57 (“[R]elatively few cases of elder abuse and exploitation actually reach the criminal courts. . . . Thus, while the criminal justice system is a tool for the advocate of abused elders, it cannot provide all the answers.”).

53. Krienert, Turner & Walsh, *supra* note 48, at 329 (“[E]lder abuse was . . . [i]nitially viewed as a social problem, and a private one at that, to be dealt with by adult protective services.”).

54. INTERNATIONAL PERSPECTIVES ON ELDER ABUSE 4–5 (Amanda Phelan, ed., 2013).

55. *Id.* at 4; Frank Glendenning, *Attitudes Toward Older People*, in THE MISTREATMENT OF ELDERLY PEOPLE 16 (Peter Delcalmer & Frank Glendenning, eds., 1997).

Butler's book, *Why Survive? Being Old in America*, which spoke at length about elder abuse beyond the walls of nursing homes and other institutions, won a Pulitzer Prize in 1976.⁵⁶ Two years after that, sociologist Suzanne K. Steinmetz published the first of several eye-opening papers about "the battered elderly," sharing her research about sons and daughters intimidating, battering, and harming their aging parents.⁵⁷ Importantly, Steinmetz's commentaries emphasized the reasons why the older victims rarely told law enforcement authorities about their abusive situations.⁵⁸ "The elderly have a double reason for keeping quiet," one journalist wrote in summarizing Steinmetz's findings.⁵⁹ "They're afraid of the unknown, a nursing home or institution, and they feel they have failed as parents — 'I raised a child who is treating me this way.'"⁶⁰

Such reports, and the widespread publicity that they received in mainstream media, caught the attention of federal and state lawmakers.⁶¹ State legislatures enacted the first mandatory reporting laws regarding elder abuse in the late-1970s.⁶² By 1980, sixteen states had developed and implemented mandatory reporting requirements, with criminal penalties for

56. See Thomas H. Maugh II, *Dr. Robert N. Butler Dies At 83; Pulitzer Prize-winning Pioneer in the Study of Aging*, L.A. TIMES (July 7, 2010), <http://articles.latimes.com/2010/jul/07/local/la-me-robert-butler-20100707>. *Why Survive?* was the product of Butler's decade-long research on "healthy aging," a groundbreaking study on non-institutionalized and relatively physically and mentally fit older adults. *Id.* Among other things, the work determined that age itself was not the cause of cognitive diseases commonly associated with aging, such as Alzheimer's disease, a key revelation that changed how future observers studied elderly individuals on the whole. *See id.*

57. Suzanne K. Steinmetz, *Battered Parents*, 15 SOCIETY 54–55 (1978). Research on this topic in greater depth soon followed for Dr. Steinmetz. *See, e.g.*, Suzanne K. Steinmetz, DUTY BOUND: ELDER ABUSE AND FAMILY CARE (1988); Suzanne K. Steinmetz, *Family Violence Toward Elders*, VIOLENT INDIVIDUALS AND FAMILIES 137–63 (Susan Saunders et al. eds., 1984); JOINT HEARING BEFORE THE S. SPECIAL COMM. ON AGING AND THE H. SELECT COMM. ON AGING, 96th Cong. 25–35 (1980) (statement of Suzanne K. Steinmetz).

58. *See supra* note 57.

59. Mary Beth Murphy, *'Home, Sweet Home' Is Hotbed of Violence*, MILWAUKEE SENTINEL, Mar. 30, 1979, at 6.

60. *Id.*

61. *See supra* notes 56-60.

62. Blancato, Lindberg & Sabatino, *supra* note 14, at 108. States began enacting mandatory elder abuse reporting laws for the first time shortly after Congress passed Title XX of the Social Security Act, authorizing the creation of Adult Protective Services units. *See id.*

statutorily designated reporters who did not comply.⁶³ In 1981, Congress took its first official stand on the issue when House of Representatives' Select Committee on Aging hearings led to a set of proposals for combating elder abuse, including the recommendation that states pass mandatory reporting statutes.⁶⁴ By 1995, twenty-seven more states had followed this recommendation, bringing the grand total of states with mandatory reporting laws to forty-three.⁶⁵ Interestingly, many of these states used existing statutes regarding mandatory reporting of child abuse when developing mandatory elder abuse reporting laws, a legislative pattern that continues in this area today.⁶⁶

Today, virtually every state in America offers a mandatory elder abuse reporting law.⁶⁷ During the past three decades, several states also enacted statutes creating new criminal offenses aimed at ending abusive practices toward older persons.⁶⁸ Several United States Attorneys' offices and District Attorneys' offices now feature units devoted exclusively devoted to prosecuting elder abuse crimes, with many of these units obtaining high conviction rates.⁶⁹ Among the executive bodies aiding this effort is the United States Department of Justice, the provider of substantial funding to stimulate anti-elder abuse initiatives at the state level.⁷⁰ The 2010 enactment of the Elder Justice Act, the most comprehensive Congressional response to elder abuse prevention in history, carves out a more hands-on role for the federal government in fighting elder abuse than ever before.⁷¹

63. Velick, *supra* note 19, at 169–70.

64. *Id.* at 169.

65. *Id.* at 170.

66. ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA 123 (Richard J. Bonnie & Robert B. Wallace ed., 2002) (hereinafter *ELDER MISTREATMENT*); Nina A. Kohn, *Second Childhood: What Child Protection Systems Can Teach Elder Protection Systems*, 14 *STAN. L. & POL'Y REV.* 175, 176 (2003); Lee, *supra* note 33, at 730, 733; Barber, *supra* note 31, at 122–23; Glick, *supra* note 25, at 721; Moskowitz, *supra* note 12, at 85; Brank, Hamm & Wylie, *supra* note 9, at 356; see also Georgia J. Anetzberger, J. Kevin Eckert & Jill E. Korbin, *Elder Abuse and Child Abuse: A Consideration of Similarities and Differences in Intergenerational Family Violence*, 1 *J. ELDER ABUSE & NEGLECT* 1, 1–14 (1990).

67. See *supra* note 38 and accompanying text.

68. Robert A. Polisky, *Criminalizing Physical and Emotional Elder Abuse*, 3 *ELDER L.J.* 377, 392–93 (1995); Kohn, *supra* note 13, at 3, 8–12.

69. Kohn, *supra* note 13, at 6.

70. *Id.*

71. See Blancato, Lindberg & Sabatino, *supra* note 14, at 105 (“The EJA [Elder Justice Act] is the first federal law ‘to specifically state that it is the right of older

Through examining this history, certain trends in elder abuse prevention initiatives become apparent. Once handled privately by social service programs, elder abuse is now largely dealt with publically by the criminal justice system.⁷² In the beginning, legislation regarding elder abuse focused primarily on protecting the victim, whereas more recent statutes resolve to prosecute the perpetrator for the wrongs committed.⁷³ While early incarnations of Adult Protective Services agencies concentrated on protecting the most vulnerable older individuals, more contemporary laws in this area often encompass all individuals above a certain age.⁷⁴

The question that should confront policymakers today is whether these trends produce positive societal results. The answer, it seems, is both “yes” and “no.” Mandatory elder abuse reporting laws, particularly the more recent statutes in this area, derive their authority from two broad foundations of power. One of these sources is the state’s police power—the ability of a government to take measures that protect its citizens from harm, maintain order, and promote public safety.⁷⁵ The other

adults to be free of abuse, neglect, and exploitation.”). Surprisingly, the federal government previously was largely silent regarding concrete legal measures to protect older adults from abuse. *See id.* at 114–15 (“The EJA remedies a decades-long void in which older people and younger disabled adults who are victims of abuse, neglect, or exploitation constituted the only group of major crime victims to receive no direct federal support for protective services and other victim services.”). Even still, however, the Elder Justice Act did not satisfy many observers, who stated that the entire initiative lacked enforceability. *See, e.g.,* Lori A. Stiegel, *Elder Justice Act Becomes Law, But Victory Is Only Partial*, 31 BIFOCAL 73, 73–74 (2010).

72. Krienert, Turner & Walsh, *supra* note 48, at 329.

73. *See* Polisky, *supra* note 13, at 392–93; Kohn, *supra* note 13, at 6–7; *see generally* Bruce L. Berg & Brian K. Payne, *Perceptions About the Criminalization of Elder Abuse Among Police Chiefs and Ombudsmen*, 49 CRIME AND DELINQUENCY 439 (2003) (discussing reactions from both law enforcement leaders and ombudsmen for rights of older Americans to the increased use of criminal justice measures to combat elder abuse).

74. Brank, Hamm & Wylie, *supra* note 9, at 359 (“Generally, older adults are protected based on a statutorily defined qualifying age—sometimes as young as sixty years old.”); *see also id.* at 363 (discussing the challenges of finding an appropriate threshold age in mandatory elder abuse reporting laws). Using age-based cutoffs, and consequently treating all people over a particular age as a homogeneous population, is one of the primary areas of concern highlighted by critics of mandatory elder abuse reporting laws. *See infra* Part IV(i).

75. One commonly cited United States Supreme Court holding defines a state’s police power as “the authority to provide for the public health, safety, and morals.” *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991). Notably, though, this is not a new concept. The Supreme Court has upheld state governments’ abilities to exercise their police powers since at least the year 1827. *See Brown v. Maryland*, 25 U.S. (12 Wheat)

fundamental area is the government's *parens patriae* authority—allowing the state to protect individuals who cannot protect themselves due to illness, incompetency, or any other form of incapacity.⁷⁶ Common uses of this power emerge throughout a broad spectrum of protective contexts, including child custody laws, guardianship procedures and provisions, and civil commitment of individuals with mental illnesses.⁷⁷

In the mandatory reporting context, proponents of these laws hold that the state owes an obligation to provide enhanced protection to elderly men and women against wrongdoers.⁷⁸ Indeed, age historically is a basis for recognizing legal incapacity and exercising *parens patriae* authority.⁷⁹ Governments

419, 442–43 (1827); *See also* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 493 (2004) (“A state may also justify its laws by showing that it is merely regulating liberty in a way that protects the rights of others . . . [The Fourteenth Amendment] does not bar [states] from subjecting these privileges to publicly accessible ‘standing rules’ of law, provided that such rules are also shown to be necessary to protect the rights that everyone possesses.”).

76. *See, e.g.*, Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 215, 221 (1975) (describing the state’s power “to protect the well-being of individual citizens unable to care for themselves.”); *Addington v. Texas*, 441 U.S. 418, 426 (1979). The key distinction between police powers and *parens patriae* authority is that police powers focus on the community at large, while *parens patriae* decisions are meant to be made with the well-being of the incapacitated individual primarily in mind. *See* Neil B. Posner, *The End of Parens Patriae in New York: Guardianship Under the New Mental Hygiene Law—Article 81*, 79 MARQ L. REV. 603, 605–06 (1995).

77. *See, e.g.*, MATTHEW T. HUSS, FORENSIC PSYCHOLOGY 204 (2009) (discussing the use of *parens patriae* in the civil commitment context); Vivek Sankaran, *Parens Patriae Run Amuck: The Child Welfare System’s Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP L. REV. 55, 59 (2009); A. Frank Johns & Vicki Joiner Bowers (ed.), *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 21 (1997). Often, as suggested by the titles of some of these articles, the governmental exercise of *parens patriae* authority can be a source of controversy regarding the extent of the government’s reach into the personal decisions of individuals.

78. *See, e.g.*, Marie-Therese Connolly, *Where Elder Abuse & the Justice System Collide: Police Power, Parens Patriae, and 12 Recommendations*, 22 J. ELDER ABUSE & NEGLECT 37, 38–40 (2010); Glick, *supra* note 25, at 729 (“Where an individual lacks capacity, as defined below, the doctrine of *parens patriae* serves as persuasive justification for interfering with a person’s right to self-determination.”).

79. *See* Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUVENILE L. & POL’Y 275, 287–88, 321 (2006) (discussing governmental age-based usages of *parens patriae* authority to intervene and make decisions on behalf of children); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 551–52 (2000) (describing legal presumptions that children “lack the capacity for reasoning, understanding, and mature judgment,” thus justifying the

frequently recognize that children need additional safeguards against abusive practices.⁸⁰ Extending this level of state-led protection to incapacitated older individuals who face a heightened risk of harm seems, at least according to advocates for mandatory reporting laws, to be a logical move.⁸¹

In addition, mandatory elder abuse reporting statutes seem to provide broad societal benefits, maintaining order and promoting public safety by bringing previously hidden criminals into the justice system and away from more prospective victims.⁸² Given the infrequency of older victims reporting abuse, mandatory reporting laws serve the general welfare by identifying abusers and stopping them from harming not only their current target, but other victims as well.⁸³

However, overbreadth in measures implementing police powers and *parens patriae* protections can create a new problem: infringement upon the individual liberties of both the society in general and the allegedly incapacitated “protected” person in particular.⁸⁴ Claims of excessive use of this authority form the backbone of most critiques about mandatory elder abuse reporting laws.⁸⁵ Detractors argue that these statutes open the

intervention by the state).

80. See *supra* note 77; see also Kay P. Kindred, *God Bless The Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 521 (1996) (stating that perceived parental abuses can lead the state, utilizing its *parens patriae* authority, to remove the child against his or her wishes from the family home). Notably, though, this power is not without certain limits, especially when the state’s intervention directly clashes with a parent’s ability to raise his or her own child. See Sarah Collins, *Unreasonable Seizure: Government Removal of Children from Homes with Drugs but No Evidence of Neglect*, 20 GEO. MASON L. REV. 631, 635 (2012).

81. THE ENCYCLOPEDIA OF AGING, VOL. 1 29 (Richard Schultz eds., 4th ed. 2006); BRIAN K. PAYNE, CRIME AND ELDER ABUSE: AN INTEGRATED PERSPECTIVE 144 (2d ed. 2005); Connolly, *supra* note 78, at 38–40; Glick, *supra* note 25, at 729–30.

82. Kohn, *supra* note 13, at 18.

83. See *supra* note 29 and accompanying text.

84. See JOEL B. TEITELBAUM & SARA E. WILENSKY, ESSENTIALS OF HEALTH POLICY AND LAW 120 (2d ed. 2013) (“The government’s police powers are oftentimes invasive . . .”); LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 128–29 (2d ed. 2008); Thomas H. Koenig & Michael L. Rustad, *Reforming Public Interest Tort Law to Redress Public Health Epidemics*, 14 J. HEALTH CARE L. & POL’Y 331, 368 (2011) (discussing arguments about the state abusing their police powers and *parens patriae* authority to unduly intrude in private decisions); Naomi Cahn, *State Representation of Children’s Interests*, 40 FAM. L.Q. 109, 113 (2006) (cautioning against governmental overreaching when using the *parens patriae* power to step in on behalf of a minor).

85. ELDER ABUSE: CONFLICT IN THE FAMILY 335 (Karl A. Pillemer & Rosalie S.

door for the government to abuse its *parens patriae* power, wrongfully interfering with the decision-making of people who neither need nor want the state's protection and who are perfectly competent to understand the consequences of refusing such assistance.⁸⁶

Critics also point to police powers problems in this area, arguing that society as a whole is damaged, not helped, when the government imposes its judgment on older people, assuming that they need greater levels of safety-based oversight solely because of their age.⁸⁷ The vigorous response from the criminal justice system that is a hallmark of modern mandatory reporting statutes is, according to these commentators, an unintended form of abuse, treading upon the personal autonomy of older

Volf, eds., 1986) (“The appropriateness of [exercising *parens patriae* authority] in many cases of suspected elder abuse or neglect is dubious.”) (hereinafter CONFLICT IN THE FAMILY); ELDER MISTREATMENT, *supra* note 66, at 407 (stating that *parens patriae* can lead to attempted solutions that are overly “paternalistic” toward elder abuse victims); David P. Mathews, *The Not-So-Golden Years: The Legal Response to Elder Abuse*, 15 PEPP. L. REV. 653, 663–64 (1988); Connolly, *supra* note 78, at 37–40; Lee, *supra* note 33, at 731 (“Instituting elder abuse reporting statutes based on such a premise implies that elders are incompetent and are unable to make a report on their own.”); Glick, *supra* note 25, at 730 (“Where an individual is not judged incompetent, however, but merely elderly, relying on the doctrine of *parens patriae* would seem entirely inappropriate.”).

86. Mandatory elder abuse reporting law is hardly the only area in which the government's use of *parens patriae* authority receives significant scrutiny from observers. State adult guardianship laws, for example, are commonly criticized as examples of governmental overreaching into private laws and infringements on personal autonomy. See MARY JOY QUINN, GUARDIANSHIP OF ADULTS: ACHIEVING JUSTICE, AUTONOMY, AND SAFETY 20–21 (2005); Johns & Bowers, *supra* note 77, at 21.

87. *Outliving Civil Rights*, *supra* note 31, at 1066 (“Many autonomy-based critiques also express concern that mandatory elder abuse reporting statutes are ageist insofar as they selectively undermine the autonomy of older adults based on stereotypes about aging, or that they encourage ageism by promoting inappropriate stereotyping of older adults.”). However, arguments stating that mandatory elder abuse reporting laws are unnecessarily protective of all elderly men and women, even if they appear perfectly competent and able to care for themselves, often overlook an important point. A state may (within reason) employ its police powers not only to help an allegedly incapacitated person, but also for the safety and general welfare of its citizenry as a whole. See Posner, *supra* note 73, at 605–06. Thus, claiming solely that a law may intrude too deeply on an individual's personal liberties is not enough to show that the statute is an improper exercise of state police powers. Indeed, mandatory elder abuse reporting laws seem likely to deter would-be perpetrators from committing these atrocities, thus providing a public safety and welfare basis for using state police powers to enact these laws. See, e.g., Kohn, *supra* note 13, at 18 (“Prosecution can reduce elder abuse by incapacitating offenders and removing them from a position in which they can engage in future offenses.”).

Americans without adequate reason to do so.⁸⁸

Both camps raise meritorious points. This article now proceeds to a legislative balancing act addressing both sides in this debate. By attempting to identify the most important protective aspects from these statutes and the greatest areas where personal autonomy seems at risk, the forthcoming sections propose at least a basic framework for amending mandatory elder abuse reporting laws with both autonomy and protection objectives in mind.

III. PROTECTIVE MEASURES: MANDATORY REPORTING PROVISIONS FULFILLING THE STATE'S RESPONSIBILITIES OF DEFENDING OLDER AMERICANS AGAINST ABUSE

The mere presence of a mandatory elder abuse reporting law signifies a substantial protective action by the state. Many observers would prefer that these statutes vanish entirely.⁸⁹ However, as discussed already, repeal of such laws is neither socially desirable nor politically likely.⁹⁰ Therefore, the remaining questions center on what provisions these laws should contain. This section recommends a group of protective measures for inclusion in mandatory elder abuse reporting statutes, concentrating on the state's ability to best defend current and future victims against physical, mental, emotional, and financial harm.

A. CLASSIFYING A WIDE VARIETY OF PROFESSIONALS AS MANDATORY REPORTERS

Existing mandatory reporting laws differ significantly regarding the number of individuals listed as mandatory reporters. Some statutes limit the duty of mandatory reporting exclusively to medical professionals and law enforcement

88. Glick, *supra* note 66, at 730; Lee, *supra* note 33, at 731 n. 46 ("It would indeed be ironic if these statutes were to further the very attitudes that their enactment was designed to quell.")

89. *See generally supra* note 85 (critiquing existing mandatory elder abuse reporting statutes and generally calling for their repeal on the grounds that they are too intrusive).

90. *See supra* notes 20–29, 39–41, and accompanying text; *see also* Brank, Hamm & Wylie, *supra* note 9, at 381 ("If scholars are to argue that mandatory reporting laws for older adult abuse are problematic, then alternative protections are needed.")

personnel.⁹¹ Others take an expansive, all-inclusive approach, imposing a mandatory duty to report on all people who in good faith believe that an elderly individual is suffering from abuse.⁹²

Between these two polar ends of the spectrum is an extremely wide range of statutorily prescribed provisions, with specifically named reporters including, in various laws, the following professionals: Adult Protective Services employees, social workers, firefighters, attorneys, alcohol and substance abuse counselors, school officials, members of the clergy, adult foster care providers, senior services outreach workers, animal control officers and humane society officials, nursing home workers, United States Postal Service employees, and staff members at banks and other financial institutions.⁹³ In addition, a number of state statutes designate legal guardians and conservators, and individuals who hold a legally mandated fiduciary duty to the person in question, as mandatory reporters as well.⁹⁴

91. *See, e.g.*, ALA. CODE § 38-9-8(a) (2012); GA. CODE ANN. § 30-5-4(a)(1)(A) (2013); HAW. REV. STAT. § 346-224(a) (2014); IDAHO CODE ANN. § 39-5303(1) (2014); IOWA CODE ANN. § 235B.3(2) (West 2014); MD. CODE ANN., FAM. LAW § 14-302(a) (LexisNexis 2012); NEB. REV. STAT. § 28-372(1) (2008); N.J. STAT. ANN. § 52:27D-409(a)(1) (West 2013); S.D. CODIFIED LAWS § 22-46-9 (2013); W. VA. CODE ANN. § 9-6-9a (2012).

92. *See* DEL. CODE ANN. tit. 31, § 3910(a) (2014); FLA. STAT. § 415.1034(1)(a) (2014); IND. CODE ANN. § 12-10-3-9(a) (West 2007); KY. REV. STAT. ANN. § 209.030(2) (LexisNexis 2013); LA. REV. STAT. ANN. § 403.2(C) (2013); N.H. REV. STAT. ANN. § 161-F:46 (2013); N.M. STAT. ANN. § 27-7-30(A) (West 2013); N.C. GEN. STAT. § 108A-102(a) (2011); OKLA. STAT. ANN. tit. 43A § 10-104(A) (West 2014); R.I. GEN. LAWS § 42-66-8 (2014); S.C. CODE ANN. § 43-29-50 (2014); TENN. CODE ANN. § 71-6-103(b)(1) (2012); TEX. HUM. RES. CODE ANN § 48.051 (West 2013); UTAH CODE ANN. § 62A-3-305(1) (LexisNexis 2011); WYO. STAT. ANN. § 35-20-103(a) (2013).

93. *See* ALASKA STAT. § 47.24.010(a) (2012); ARIZ. REV. STAT. ANN. § 46-454(A)-(B) (2013); ARK. CODE ANN. § 12-12-1708(a)(1) (2013); CAL. WELF. & INST. CODE § 15630(a) (2014); COLO. REV. STAT. § 18-6.5-108(1)(a)-(b) (2014); CONN. GEN. STAT. § 17b-451(a) (2014); D.C. CODE § 7-1903(a)(1) (2014); 320 ILL. COMP. STAT. § 20/2 (f-5) (2014); KAN. STAT. ANN. § 39-14319(a) (2013); ME. REV. STAT. tit. 22 § 3477(1)(A) (2013); MASS. GEN. LAWS ANN. ch. 19A, § 15(a) (West 2010); MICH. COMP. LAWS § 400.11(a) (2008); MINN. STAT. ANN. § 626.5572 (16) (2014); MO. ANN. STAT. § 660.300(1) (2014); MONT. CODE ANN. § 52-3-811(3) (2013); NEB. REV. STAT. § 28-372(1) (2008); NEV. REV. STAT. § 200.5093(4) (2014); N.Y. SOC. SERV. LAW § 473.5 (Consol. 2014); N.D. CENT. CODE § 50-25.2-03 (2014); OHIO REV. CODE ANN. § 5101.61(A) (LexisNexis 2014); OR. REV. STAT. ANN. § 124.050(9) (2014); PA. CONST. STAT. § 2713 (2014); VT. STAT. ANN. tit. 33, § 6903(a) (2013); VA. CODE ANN. § 63.2-1606(C) (2014); WASH. REV. CODE ANN. § 74.34.020(11) (West 2014); WIS. STAT. ANN. § 46.90(4) (West 2014).

94. *See, e.g.*, ALASKA STAT. § 47.24.010(a) (2012); ARIZ. REV. STAT. ANN. § 46-454(A) (2013); CAL. WELF. & INST. CODE § 15630(a) (2011); COLO. REV. STAT. § 18-6.5-108(1)(a)-(b) (2013); D.C. CODE § 7-1903(a)(1) (2014); GA. CODE ANN. § 30-5-4(a)(1)(B) (2013); ME. REV. STAT. tit. 22 § 3477(1) (2013). States placing the duty to report on all

Precise determinations about what professionals should be mandatory reporters rightfully depend on the various laws, standards, and values of the individual states. On the whole, however, it seems beneficial to include a wide range of professionals on the mandatory reporting list, requiring them to report if they observe something in the course of their professional activities that triggers a reasonable suspicion of elder abuse.⁹⁵ Considering that many older individuals experiencing abuse will not self-report the mistreatment to authorities, establishing a duty to report for a broad scope of individuals seems beneficial, augmenting the overall likelihood that someone will catch the abuse.⁹⁶ On the other hand, if only a couple of professions are named in the law, chances increase that the maltreatment will remain undetected.⁹⁷ Notably, studies show that abused elderly men and women often withdraw from many social interactions, especially as the mistreatment intensifies.⁹⁸ Designating a broad spectrum of professionals as

people who in good faith suspect elder abuse also inherently include these individuals within the list of mandatory reporters. *See supra* note 92. Additionally, state laws governing guardians, conservators, and fiduciaries also impose their own duties on these individuals, including (in many instances) a duty to report known or reasonably suspected misconduct to the proper authorities.

95. One could even argue that limiting mandatory reporters to only medical personnel and law enforcement officers is another form of ageism, assuming that these are the only groups of professionals with whom older Americans are likely to come in contact. However, plenty of people whom society would classify as “elderly” based on their age regularly interact with a number other groups, such as financial professionals, members of the clergy, attorneys, educational leaders, and colleagues at paid jobs or volunteer positions in which they work.

96. This is purely a numbers game. More mandatory reporters means more opportunity for one of those reporters to identify signs or signals of elder abuse and make the report to the designated authorities. Concurrently, the increased number of mandatory reporters reduces the likelihood of the abuser avoiding detection by hiding the victim from certain individuals, such as medical professionals and law enforcement personnel. *See Glick, supra* note 25, at 724–25 (noting the fear that if an abuser learns that medical personnel have a duty to report signs of elder abuse, the abuser might prevent the victim from visiting medical professionals, thus hiding the victim from detection if only medical professionals have the duty to report). Of course, if the number of mandatory reporters is to increase, then it becomes even more important for all mandatory reporters to receive adequate training in identifying the “red flags” of elder abuse, thus hopefully reducing the number of incorrect reports. *See infra* notes 108–10 and accompanying text.

97. Again, this is a numbers game. Fewer reporters mean a greater likelihood that the harm goes undetected and, as a result, the abuse continues.

98. *See, e.g.,* Mahnaz Ahmad & Mark S. Lachs, *Elder Abuse and Neglect: Why Physicians Can and Should Do*, 69 CLEVELAND CLINIC J. MED. 801, 802–03 (2002) (describing isolation and withdrawal as a common signal of elder abuse); Joanna

mandatory reporters amplifies the opportunity for somebody bearing this duty to observe reasonably likely signs of abuse and tell the proper authorities.⁹⁹

Among existing laws, the greatest controversy appears to exist about assigning mandatory reporting duties to financial professionals. Some states do not place this duty on bank employees or other workers at financial institutions.¹⁰⁰ However, financial exploitation is a drastically underreported form of elder maltreatment and deserves legal treatment as such.¹⁰¹ Requiring mandatory reporting from employees at financial institutions could stop perpetrators of this all-too-common offense — the

Hewson, *Literature Review: A Victim's Perspective on Elder Abuse: Shame and Relationships as Barriers to Reporting*, at 3, available at <http://www.respectforseniors.org/pdf/A%20Victim's%20Perspective%20on%20Elder%20Abuse.pdf> (discussing shame arising from being abused as a primary reason why elder abuse victims withdraw from society); Elder Abuse, COLO. GERONTOLOGICAL SOC'Y (last visited Aug. 10, 2014) <https://www.senioranswers.org/legal/elder-abuse/> (listing the appearance of being withdrawn or depressed as a classic signal of elder abuse); Maine Council on Elder Abuse Prevention, *What Is Elder Abuse?*, http://www.mainebankers.com/images/stories/MECB/Elder_Abuse_2013/ELDERABU SE22.pdf (“Victims of elder abuse frequently withdraw from society and are less likely to participate in their communities.”).

99. Brank, Hamm & Wylie, *supra* note 9, at 382.

100. As of this writing, the following states did not place a duty to report on financial institutions: Alabama, Alaska, Connecticut, Hawaii, Idaho, Illinois, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, West Virginia, and Wisconsin. See ALA. CODE § 38-9-8 (2012); ALASKA STAT. § 47.24.010(a) (2012); CONN. GEN. STAT. § 17b-451(a) (2014); HAW REV. STAT. § 346-224(a) (2014); IDAHO CODE ANN. § 39-5303(1) (2014); 320 ILL. COMP. STAT. § 20/2(f-5) (2014); ME. REV. STAT. tit. 22 § 3477(1) (2014); MASS. GEN. LAWS ANN. ch. 19A, § 15(a) (West 2010); MICH. COMP. LAWS § 400.11(a) (2008); MINN. STAT. ANN. § 626.5572(16) (2014); MO. ANN. STAT. § 660.300(1) (2014); MONT. CODE ANN. § 52-3-811(3) (2013); NEB. REV. STAT. § 28-372(1) (2008); NEV. REV. STAT. § 200.5093(4) (2014); N.J. STAT. ANN. § 52:27D-409(a)(1) (West 2013); N.Y. SOC. SERV. LAW § 473.5 (Consol. 2014); N.D. CENT. CODE § 50-25.2-03 (2014); OHIO REV. CODE § 5101.61(A) (LexisNexis 2011); OR. REV. STAT. ANN § 124.050(9) (2014); 18 PA. CONST. STAT § 2713 (2014); S.D. CODIFIED LAWS § 22-46-9 (2013); VT. STAT. ANN. tit 33, § 6903(a) (2014); W. VA. CODE ANN. § 9-6-9(a) (LexisNexis 2012); WIS. STAT. ANN § 46.90(4) (West 2014).

101. *The Metlife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders*, METLIFE MATURE MKT. INST. 4 (2011) (“Despite growing public awareness from a parade of high-profile financial abuse victims, it remains underreported, under-recognized, and under-prosecuted.”); *Broken Trust: Elders, Family, and Finances*, METLIFE MATURE MKT. INST. 4 (Mar. 2009), <http://www.metlife.com/assets/cao/mmi/publications/studies/mmistudy-broken-trust-elders-family-finances.pdf>; Bill Benson & Nancy Aldrich, *Elder Financial Abuse Estimated at \$2.9 Billion Per Year*, THE SENTINEL at 2 (November 2011), http://www.smpresource.org/Handler.ashx?Item_ID=B6BED220-1381-440B-9BAA-ABBF469DBF9F; Carolyn L. Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 205 (2000).

“crime of the twenty-first century,” according to one writer — before they fiscally decimate an elderly individual.¹⁰² For instance, an alert bank teller who makes a report after noticing an abrupt, inexplicable change in a longtime customer’s withdrawals or transfers could be the one person standing between the elderly account-holder and the financial abuser.¹⁰³ Other financial institution workers hold similarly important positions where key observations could lead to abuse-stopping reports.¹⁰⁴

Critics of mandatory reporting laws argue that assigning this duty to so many professionals creates a hazardous situation.¹⁰⁵ By requiring so many different classes of professionals to report potential elder abuse, an older individual could feel spied upon every time he or she visits a doctor’s office, law firm, senior services center, bank, or any other business that employs mandatory reporters.¹⁰⁶ This large number of prospective mandatory reporters could even lead to a number of unintentionally false allegations of abuse levied by reporters who are well-meaning but incorrect in their judgment.¹⁰⁷

However, careful drafting should mitigate many of these concerns, as described in the following section. Additionally, it is worth emphasizing that these statutes mandate reports, not convictions, or even investigations. Requiring professionals interacting with older individuals to alert the proper authorities if they reasonably suspect abuse does not necessarily mean that each report will result in a lengthy examination. Law enforcement and social services professionals receiving these

102. See, e.g., Kristen M. Lewis, *The Crime of the 21st Century: Financial Abuse of Elders*, 28 PROBATE & PROP. 10, 11 (July/Aug. 2014) (estimating that elder financial abuse causes \$2.9 billion of losses to victims each year); Jessica Coombs, *Scamming the Elderly: An Increased Susceptibility to Financial Exploitation Within and Outside of the Family*, 7 ALB. GOV’T L. REV. 244, 244–45 (2014) (describing the prevalence of undetected and unreported elder financial abuse and its damaging societal effects).

103. Coombs, *supra* note 102, at 249 (listing factors for identifying likely elder financial abuse, such as abrupt and unexplained withdrawals from bank accounts).

104. See Jerry Becker & Leslie Callaway, *Stopping the Financial Abuse of Seniors*, AM. BAR ASS’N BANK COMPLIANCE 12, 14–15 (July 2011).

105. See, e.g., Lee, *supra* note 33, at 739–40.

106. See *supra* note 93 and accompanying text; see Velick, *supra* note 19, at 172 (“Another argument against mandatory reporting laws is that they are an unnecessary invasion of the victim’s privacy.”).

107. Glick, *supra* note 25, at 735 (discussing the possibility of both false positives and false negatives when mandatory elder abuse reporting laws are implemented); Lee, *supra* note 33, at 740.

reports should use their training and experience as a guide for determining the appropriate response to each allegation.¹⁰⁸ Thus, if a report proves to be completely baseless, one would expect the authorities to cease their investigation without further intrusion into anyone's private affairs.¹⁰⁹ Furthermore, elderly individuals can choose to subsequently ask law enforcement officials to stop an investigation.¹¹⁰ On the other hand, however, these same authorities cannot take any inquisitorial action if they do not receive a report at all, thus potentially exposing elderly individuals to years more of unchecked abuse.¹¹¹

Mandatory reporting laws also should include steps for providing mandatory reporters with basic training in identifying common signs of elder abuse.¹¹² One cannot reasonably expect postal workers, attorneys, animal control officers, and even medical and law enforcement professionals to automatically feel comfortable making judgments about whether an older individual might be experiencing abuse.¹¹³ Requiring training from experts about "symptoms" that should trigger a report of suspected elder abuse would give these mandatory reporters much-needed guidance in this area, offering them a foundation of knowledge on which they can rely.¹¹⁴ Furthermore, such training should reduce the number of incorrect reports delivered to authorities, improving the overall effectiveness of these laws.

Of course, no law can fully satisfy everyone's interests on both sides of a given issue. Virtually all statutes are products of

108. This includes strictly observing all protocols regarding confidentiality during the pendency of an investigation, preventing personal information about the suspected victim(s) or the suspected abuser(s) from disclosure beyond the means absolutely necessary to resolve the investigation.

109. Again, this would seem consistent with the fundamental regulations concerning any law enforcement investigation, guarding against intrusions into personal affairs beyond what is absolutely necessary to resolve the case.

110. See Lee, *supra* note 33, at 745–46.

111. Consider again the situation involving Sal and his son, described at the beginning of this article. See *supra* notes 1–8 and accompanying text. Had a mandatory reporter observed Sal demonstrating signs of abuse and reported it to the designated authorities, an investigation hopefully would have identified his son as an abuser and appropriately intervened, keeping the son away from Sal and hopefully avoiding the son's murder attempt on his father.

112. See, e.g., Velick, *supra* note 19, at 781–83.

113. See Lee, *supra* note 33, at 739–40.

114. Velick, *supra* note 19, at 181 ("Before reporters can report abuse, they must know how to recognize abuse"). Many states currently offer written guides and other forms of required training for mandatory reporters. While such training may seem burdensome at the time, it is one of the most important pieces of successfully implementing these mandatory reporting laws.

balancing these competing interests and determining the most socially beneficial outcome.¹¹⁵ Here, between the possible inconveniences of some incorrect claims from mandatory reporters and the horrors of allowing abuses against an older individual to continue unimpeded, the latter objective presents the more compelling case for prevention. Establishing a mandatory reporting duty for a broad array of professionals is a significant stride toward reaching this goal.

B. AVOIDING MENS REA EVALUATIONS BY MANDATORY REPORTERS

Finding a manageable definition of “abuse” is one of the most controversial issues facing drafters of any law pertaining to elder abuse.¹¹⁶ In particular, jurisdictions differ as to what mental state(s) of culpability (*mens rea*) — if any — are required for a determination of abuse in this context.¹¹⁷

For instance, some laws, including the federal Elder Justice Act, require a “knowing” *mens rea* for an act or omission to qualify as abusive.¹¹⁸ Others encompass criminally negligent conduct — actions or omissions that are not intended to cause the statutorily forbidden harm, but that a reasonable person clearly *should* know will lead to that prohibited outcome — within the

115. For just a couple of many scholarly studies on this topic, see John M. Greabe, *Constitutional Remedies and Public Interest Balancing*, 21 WM. & MARY BILL RTS. J. 857, 881–83 (2013); Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 603–17 (1988); Theodor Lenckner, *The Principle of Interest Balancing as a General Basis of Justification*, 1986 BYU L. REV. 645, 646–49 (1986).

116. Heath R. Oberloh, *A Call to Legislative Action: Protecting our Elders From Abuse*, 45 S.D. L. REV. 655, 665 (2000) (“The first step in introducing [mandatory elder abuse reporting laws] is to define abuse.”); Lee, *supra* note 33, at 735–36; Glick, *supra* note 25, at 736; Kohn, *supra* note 13, at 10; Brank, Hamm & Wylie, *supra* note 9, at 359–60.

117. Generally speaking, there are four types of *mens rea* in the criminal law context. In order from highest to lowest in terms of the amount of mental certainty required on the part of the actor, the four categories of *mens rea* are intentionally, knowingly, recklessly, and negligently. See MODEL PENAL CODE §§ 2.02(2)(a)(1), 2.02(2)(b), 2.02(2)(c), 2.02(2)(d). Some criminal statutes require no *mens rea* showing, a concept known as “strict liability.” See Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 672 (1993).

118. Blancato, Lindberg & Sabatino, *supra* note 14, at 119 (“The term ‘abuse’ means the knowing infliction of physical or psychological harm or the knowing deprivation of goods or services that are necessary to meet essential needs or to avoid physical or psychological harm.”).

definition of elder abuse.¹¹⁹ Some statutes take a strict liability approach, not requiring any specific *mens rea* to reach the classification of abuse under the law.¹²⁰

Following the Elder Justice Act's pattern, and demanding a heightened *mens rea* for a finding of elder abuse, does have its advantages when it comes to mandatory reporting laws. Some scholars vehemently argue that definitions of abuse are too broad and too vague in the mandatory elder abuse reporting context.¹²¹ "[T]he sweep of some of the definitions is tantamount to legislating against unkindness to the elderly," wrote one commentator.¹²² "It must be borne in mind that 'unreasonable or unrealistic laws serve neither the profession [n]or the public.'"¹²³ Some observers even question whether many definitions of elder abuse are so amorphous that they might violate the Fifth and Fourteenth Amendment protections of due process of law.¹²⁴ Narrowing the definition of abuse by requiring an intentional or knowing *mens rea* might be a step toward solving these concerns about statutory vagueness.¹²⁵

119. For instance, this would apply to any jurisdiction that adopted the definition of elder abuse drafted by the United States Administration on Aging. See *What Is Elder Abuse?*, ADMIN. ON AGING, http://www.aoa.gov/AoA_programs/elder_rights/EA_prevention/whatisEA.aspx ("[E]lder abuse is a term referring to any knowing, intentional, or negligent act by a caregiver or any other person that causes harm or a serious risk of harm to a vulnerable adult.") (emphasis added).

120. See, e.g., Thompson, *supra* note 33, at 20 ("In some cases, statutes define 'abuse' without reference to the intent of the person inflicting the abuse."); Kohn, *supra* note 13, at 10–12 (discussing statutes falling into this category, including laws where the perpetrator does not need to know that the victim is "elderly" to be convicted of a crime for committing an act which would be legal but for the recipient's age).

121. See, e.g., MARSHALL B. KAPP, LEGAL ASPECTS OF ELDER CARE, ELDER CARE 277 (2010) (questioning whether accepted definitions of "elder abuse" are too broad to be functionally useful); SUSANNA D. BOZINOVSKI, SELF-NEGLECT AMONG THE ELDERLY: MAINTAINING CONTINUITY OF SELF 163–64 (1995) (unpublished Ph.D dissertation, University of Denver) (on file with UMI) (discussing certain commentators who claimed that the definition of "elder abuse" is vague and overbroad).

122. Lee, *supra* note 33, at 737–38 (quoting Kathryn D. Katz, *Elder Abuse*, 18 J. FAM. L. 695, 714–15 (1980)).

123. *Id.*

124. *Id.* at 737 n. 68 ("While there are no cases explicitly deciding the issue of the constitutionality of these statutes, arguments attacking their validity would most likely be based on the [F]ifth and [F]ourteenth [A]mendments' requirement of due process of law alleging that the statute was unconstitutionally vague and indefinite.").

125. Then again, other observers caution against tailoring the definition of "elder abuse" too narrowly. See Maria van Bavel, Kristin Janssens, Wilma Schakenraad & Nienke Thurlings, *Elder Abuse In Europe* 15 (June 1, 2010), available at

However, even if a particular jurisdiction requires proof of an intentional or knowing *mens rea* for an elder abuse conviction, that jurisdiction should not require an equivalent *mens rea* to trigger the mandatory reporting obligation. Again, a good faith report of suspected abuse to proper authorities is not equivalent to a criminal conviction.¹²⁶ The report is solely informational in nature¹²⁷ and does not even necessarily need to lead to an investigation, much less a legal proceeding. While an unwarranted investigation into a reported suspect's affairs would be inconvenient and dislikable, the overall outcome would be one primarily of personal unpleasantness and inconvenience.¹²⁸ Certainly, it does not reach the level of social stigma and severity of penalty that usually inspires the attachment of a *mens rea* requirement for a particular offense.¹²⁹

In addition, significant process concerns accompany a *mens rea* requirement for mandatory elder abuse reporting laws. As discussed in the preceding section, mandatory reporters already face a challenge in identifying "red flags" of likely elder abuse, leading to the need for training in this area.¹³⁰ Asking these same individuals not only identify these signs, but also to form a reasonable judgment about the mental state of the suspected perpetrator, would be virtually impossible. Such an evaluation is not always possible even after a detailed law enforcement investigation. Expecting such an analysis as part of a mandatory reporter's reasonable suspicion about elder abuse is unreasonable.

Therefore, mandatory elder abuse reporting laws should not

<http://www.globalaging.org/elderrights/world/2010/ElderAbuseinEurope.pdf> (arguing that a narrow definition of "elder abuse" would leave too many forms of harmful conduct toward older individuals non-punishable and unstoppable); Bozinovski, *supra* note 121, at 164–65 (presenting the viewpoints of scholars and practitioners who oppose the concept of a "too limited" elder abuse definition).

126. See *supra* notes 108–11 and accompanying text.

127. Lee, *supra* note 33, at 740.

128. Velick, *supra* note 19, at 172–73.

129. See, e.g., SANFORD KADISH, *The Use of Criminal Sanctions in Enforcing Economic Regulations*, in BLAME & PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 40 (1987) (calling stigmatization of the wrongdoer "a distinguishing aspect" of criminal sanctions that requires a showing of mental culpability in order to convict); Richard G. Singer, *The Resurgence of Mens Rea: III — The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 389–403 (1989) (discussing the social stigma associated with most criminal convictions and making the point that only those few crimes carrying legitimately low social stigma should be strict liability offenses).

130. See *supra* notes 112–14 and accompanying text.

impose a *mens rea* requirement on reporters. While the breadth of statutory definitions for “elder abuse” could potentially prove problematic from a due process perspective, burdening mandatory reporters with a requirement of guessing the mental state of the alleged abuser is neither appropriate nor beneficial. If these definitions do need tailoring, this is not the right area in which to do it.¹³¹

C. ABROGATING STATUTORY AND ETHICAL PRIVILEGES

For many professionals, mandatory reporting laws create conflicts with statutory and ethical duties of confidentiality.¹³² Doctors, for instance, are subject to the physician-patient privilege.¹³³ Lawyers are bound by the attorney-client privilege, along with ethical confidentiality duties.¹³⁴ Certain financial professionals, such as certified public accountants, work under ethics codes with strict standards regarding disclosure of client information.¹³⁵ Members of the clergy often speak with worshippers in private under an unspoken understanding of non-disclosure.¹³⁶ Consequently, many professionals are reluctant to report suspected elder abuse based on information gained in the course of a relationship covered by one or more of these privileges.¹³⁷

Addressing this tension, many mandatory reporting laws explicitly abrogate these privileges.¹³⁸ This follows the pattern of

131. However, policymakers *would* seem well-served to consider instituting heightened *mens rea* requirements for the statutes that actually criminalize elder abuse. Such measures indeed seem appropriate, considering the high social stigma of being branded an abuser of elderly victims and the pitfalls of applying strict liability standards in these cases, such as criminalizing conduct solely because the victim is elderly in a situation where the perpetrator does not know and reasonably could not be expected to know the victim’s age. *See supra* notes 121-25.

132. Thompson, *supra* note 33, at 20; Dessin, *supra* note 26, at 717–18; Velick, *supra* note 19, at 176–77; Brank, Hamm & Wylie, *supra* note 9, at 366.

133. Brank, Hamm & Wylie, *supra* note 9, at 366 (“Since the early 1800s, the United States has recognized the confidential nature of this relationship because full disclosure by the patient is in the patient’s best interest for treatment.”).

134. Dessin, *supra* note 26, at 717–18.

135. AICPA CODE OF PROF’L CONDUCT § 301.01, Confidential Client Information (“A member in public practice shall not disclose any confidential client information without the specific consent of the client.”).

136. *See* Velick, *supra* note 19, at 176.

137. *See, e.g.*, Dessin, *supra* note 26, at 717–18; Velick, *supra* note 19, at 176–77; Brank, Hamm & Wylie, *supra* note 9, at 366.

138. Mathews, *supra* note 85, at 666; Lee, *supra* note 33, at 750–51; *Outliving Civil Rights*, *supra* note 31, at 1061; Moskowitz, *supra* note 12, at 116–17; *see also*

statutes covering mandatory reporters of child abuse, which commonly waive some or all of these same privileges of confidentiality.¹³⁹ While older men and women certainly are not children, and every strategy regarding mandatory reporting of child abuse does not necessarily correlate nicely with mandatory elder abuse reporting laws, this is one area where the child abuse prevention approach and the elder abuse prevention approach should match.

This is not a radical concept. Most laws imposing duties of confidentiality, as well as most professional codes of ethics, offer certain limited exceptions to the general rule under extenuating circumstances.¹⁴⁰ In particular, many of these statutes and ethical codes allow at least limited disclosure of relevant information if the client is at risk of death or serious bodily harm, or if the client is imminently likely to cause death or serious bodily harm to himself or herself, or to another party.¹⁴¹ Under laws and rules containing this exception, therefore, the duty of confidentiality might not apply when the professional in question recognizes signs of likely elder abuse.¹⁴²

However, including a provision in the mandatory elder abuse reporting statute specifically abrogating these privileges appears to be the safest practice. Doing so prevents confusion on the part of mandatory reporters regarding these statutory and ethical privileges.¹⁴³ Of course, taking such a measure is not devoid of risks. Some commentators assert that carving this exception into confidentiality laws and rules will leave older Americans fearful

Dessin, *supra* note 26, at 723 (“Such reporting is a necessary limitation on the maintenance of client confidences that may help stem the rising tide of abuse of the vulnerable.”).

139. Kari Mercer Dalton, *The Priest-Penitent Privilege v. Child Abuse Reporting Statutes: How to Avoid the Conflict and Serve Society*, 18 WIDENER L. REV. 1, 14 (2012).

140. *See, e.g.*, Brank, Hamm & Wylie, *supra* note 9, at 366 (“[T]he law has carved out exceptions for reasons such as disclosure of criminal activity or maltreatment of children or older adults.”); Dessin, *supra* note 26, at 717–18.

141. *See* ROBERT M. VEATCH, *THE PATIENT-PHYSICIAN RELATION: THE PATIENT AS PARTNER* 140 (1991) (discussing the “bodily harm” exception to the patient-physician privilege); AM. BAR ASS’N MODEL RULES OF PROF’L CONDUCT, Rule 1.6(b); *see also* R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1703–04 (2003).

142. *See supra* note 141.

143. For just one of several possible examples, *see* Dessin, *supra* note 26, at 717–19 (discussing the ambiguities that attorneys currently face when deciding whether they are required to report elder abuse of a client).

of having any conversation with their physician or attorney or other professional.¹⁴⁴ On the other hand, though, some observers suggest that an elderly individual will actually seek out an individual—particularly a medical professional—for assistance if that professional has the power to report suspected wrongdoings to the proper authorities.¹⁴⁵

Overall, our understanding about how older individuals would likely react to abrogating these privileges seems inconclusive.¹⁴⁶ Without taking this measure, however, mandatory elder abuse reporting statutes would become largely toothless instruments, leaving medical professionals and many other individuals uncertain about whether they could legally and ethically make the required reports.¹⁴⁷ A provision removing these privileges for the limited purpose of complying with the statute therefore seems to be a necessary component of any mandatory elder abuse reporting law.

D. PROTECTING GOOD FAITH REPORTERS

Individuals will more willingly report suspected elder abuse if the government absolves them from certain legal risks.¹⁴⁸ Even the most diligent mandated reporter might look the other way in questionable situations if the law does not protect the reporter from civil and criminal liability arising out of the referral.¹⁴⁹

144. Thompson, *supra* note 33, at 23–24 (“This lack of confidentiality raises a concern that these individuals or their care-givers may be deterred from seeking medical treatment for fear of being reported to the authorities and subjected to involuntary investigation and treatment.”); Lee, *supra* note 33, at 750 (“Creating such an exception to the doctor-patient privilege in adult abuse statutes may discourage the person from seeking medical assistance.”).

145. Moskowitz, *supra* note 12, at 113 (“[S]ince patients will be informed that the report to authorities is statutorily required, disclosure is unlikely to reduce trust in the relationship . . . [n]or is it likely that elders will not seek medical or other help when they need it, given the exigent nature of such needs.”). In fact, even the American Medical Association has supported enactment of mandatory elder abuse reporting laws. Velick, *supra* note 19, at 177 (“This stance demonstrates that physicians are more concerned about getting help for elder-abuse victims than they are about potential breaches of physician-patient privilege.”).

146. Compare *supra* note 140, with *supra* note 141.

147. Dessin, *supra* note 26, at 718–19.

148. See Velick, *supra* note 19, at 187 (discussing the difficulties that mandatory reporters can face when an abuser tries to bring a legal action against the reporter).

149. For example, this understandable fear could be an underlying reason for the low rate of elder abuse reporting by physicians. See Carol M. Mangione, Michael A. Rodriguez, Steven P. Wallace & Nicholas H. Woolf, *Mandatory Reporting of Elder Abuse: Between a Rock and a Hard Place*, 4 ANN. FAM. MED. 403, 404–05 (2006); Amy R. Eisenstein & Martin J. Gorbien, *Elder Abuse and Neglect: An Overview*, 21 CLIN.

People do not want to be exposed to a lawsuit or criminal prosecution as result of trying to help someone else, particularly if federal or state law mandates that act of assistance.¹⁵⁰

Therefore, mandatory elder abuse reporting laws should immunize good faith actors against civil and criminal liability for making a report required or authorized by the statute. Indeed, the majority of jurisdictions in the United States already do so.¹⁵¹ Where applicable, this immunity should apply to the reporter in his or her official capacity as well as in his or her individual capacity.¹⁵²

However, this provision should not be uniformly absolute. Instead, immunity should attach only to good faith reporters of alleged elder abuse.¹⁵³ Put another way, individuals who knowingly make a false report of elder abuse should not benefit from this shield against liability.¹⁵⁴ Malicious actors who make a bogus report that they know to be baseless are also abusers, attempting to exploit the criminal justice system to harass innocent people. Victims of false reports made out of spite or vengeance should not lose their available legal weapons against such damaging actions.

Good faith mandatory reporters, however, deserve this protection. In addition, voluntary reporters who disclose their reasonable suspicions of elder abuse should receive immunity as

GERIATRIC MED. 279, 285 (2005); Velick, *supra* note 19, at 187.

150. Instead, mandatory reporters acting in good faith want and deserve the shield of immunity, keeping them out of court battles for doing their legally imposed duty. For a look at how this protection functions, see Thompson, *supra* note 33, at 21 (“The court simply dismissed the case against the reporting nurse and physician who were immunized from civil liability based on the filing of the report.”). Importantly, however, the scenario described in Professor Thompson’s examination involves a situation where even mandatory reporters acting in bad faith received immunity — a position not supported by this article. See *infra* notes 151-54.

151. SHIRLEY LAMPKIN & LOIS RITTER, COMMUNITY MENTAL HEALTH 390 (2012); Payne, *supra* note 81, at 146; Velick, *supra* note 19, at 187.

152. Just as an individual reporting in good faith should not be held civilly or criminally liable for the report, this same individual would not want to expose his or her business to liability for fulfilling a legal duty to report.

153. For an example of what can happen if good faith is not a requirement for immunity, see Thompson, *supra* note 33, at 21.

154. Many states already require a demonstration of good faith for immunity to attach. See, e.g., Lampkin & Ritter, *supra* note 151, at 390 (“[M]any [states] also provide immunity from civil suits or prosecution to those who make reports in ‘good faith.’”); Becker & Callaway, *supra* note 104, at 15 (“And whereas most statutes establish penalties for those who fail to report, many, such as California, provide immunity from civil suits or prosecution to those who make reports in good faith—even if those reports cannot be substantiated.”).

well. Doing so will encourage individuals to make reports about suspected abuse to the proper authorities, knowing that they can do so without fear of becoming the subject of actions in civil or criminal tribunals.¹⁵⁵

E. AVOIDING UNFUNDED MANDATES

When mandatory reporters fulfill their obligations of exposing elder abuse, the effects go far beyond a potential investigation and criminal prosecution. If authorities determine that the elderly individual is caught in an abusive situation, social services entities—most typically the Adult Protective Services unit in that state—will generally intervene.¹⁵⁶ In many instances, Adult Protective Services staff members will provide a range of assistive opportunities to help return the victim of elder abuse to a safer, more “normalized” living situation.¹⁵⁷

If mandatory reporting laws do indeed reveal more instances of elder abuse, an often-forgotten outcome of this disclosure is the increased need for Adult Protective Services assistance for abuse victims.¹⁵⁸ While social services responses were traditionally the hallmark of elder abuse prevention policies,¹⁵⁹ Adult Protective Services is sometimes overlooked amid the greater attention to criminal prosecutions for elder abuse offenses today.¹⁶⁰ Still, the social services component of dealing with elder abuse is a vital aspect of these issues, ensuring that the victim returns to a more

155. See Lee, *supra* note 33, at 741-43.

156. See Glick, *supra* note 25, at 722-23. As Ms. Glick correctly points out, one of the challenges with some mandatory elder abuse reporting laws is a lack of clarity regarding which organization or organizations should receive the report of suspected abuse. See *id.* This is a problem that jurisdictions with such ambiguities in their elder abuse reporting laws need to fix.

157. See generally *Instruments for Assessing Elder Mistreatment: Implications for Adult Protective Services*, 9 U. CAL. AT BERKLEY (September 2007) available at http://cssr.berkeley.edu/research_units/bassc/documents/C61602_9_web.pdf (describing the ways in which Adult Protective Services assess whether elder abuse occurred and, if so, what the appropriate responses should be). Frequently, the Adult Protective Services unit will lead or help facilitate a “multidisciplinary team” of professionals from various fields collaborating to provide an appropriate response to the abuse. Shelly L. Jackson, *The Complexity of Responding to Elder Abuse Demands the Use of Multidisciplinary Teams*, NAT'L COUNCIL CRIME & DELINQUENCY, Oct. 30, 2013, <http://www.nccdglobal.org/blog/the-complexity-of-responding-to-elder-abuse-demands-the-use-of-multidisciplinary-teams>; Kohn, *supra* note 13, at 6.

158. Velick, *supra* note 19, at 178.

159. See *supra* notes 50-54 and accompanying text.

160. See *supra*, notes 61-68 and accompanying text.

stable environment and situation.¹⁶¹

Unfortunately, Adult Protective Services offices have reported daunting financial challenges in recent years.¹⁶² Even the promise of federal funding from the Elder Justice Act has not materialized in the form of substantial concrete monetary results.¹⁶³ As a result, Adult Protective Services offices seek money from a wide variety of sources and claim to be quite vulnerable due to this lack of stability.¹⁶⁴ With a growing need for their services due to the work of mandatory reporters and an apparent lack of fiscal resources at their disposal, these statutes could unintentionally place Adult Protective Services in a very uncomfortable spot.¹⁶⁵

161. This responds to one of the most meritorious concerns raised by mandatory elder abuse reporting statutes: namely, the question of what happens to the victim after a report leads to a confirmed finding of elder abuse. Even if the perpetrator is removed by law enforcement, safeguards must be in place to make sure that the victim is not abandoned or forgotten afterward. Social service agencies like Adult Protective Services play a vital role in making an appropriate response in such situations. *See, e.g.,* Velick, *supra* note 19, at 178.

162. Blancato, Lindberg & Sabatino, *supra* note 14, at 116 (“[I]nadequate funding and staffing chronically plague [Adult Protective Services] programs nationwide”).

163. The Elder Justice Act authorized \$400 million in appropriations to provide funding for state and local Adult Protective Services offices. Blancato, Lindberg & Sabatino, *supra* note 14, at 116. However, at the time of this writing, this promising-sounding funding stream for Adult Protective Services has not materialized out of the federal appropriations process. Judith Baigis, Nancy L. Falk & Catharine Kopac, *Elder Mistreatment and the Elder Justice Act*, ONLINE J. ISSUES IN NURSING (September 2012), <http://www.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Vol-17-2012/No3-Sept-2012/Articles-Previous-Topics/Elder-Mistreatment-and-Elder-Justice-Act.html> (“Despite authorization of spending for elder abuse programs, the implementation of these programs is subject to the appropriations process, whereby Congressional representatives determine how the annual budget is to be spent.”); *Policy & Advocacy*, NAT’L ADULT PROTECTIVE SERVS. ORG., <http://www.napsa-now.org/policy-advocacy/eja-implementation/> (“To date, Congress has appropriated no money for implementation of the Elder Justice Act.”).

164. *See supra* notes 162–64; Brenda I. Marshall & Mary C. Sengstock, *Adult Protective Services Workers Assess the Effectiveness of Mandatory Reporting of Elder Maltreatment in Michigan*, 7 J. APPLIED SOC. SCI. 220, 221–25 (2013) (asserting that many Adult Protective Services units suffer from a number of shortcomings, including extremely limited financial circumstances that lead to understaffing and a lack of training provided to staff); Blancato, Lindberg & Sabatino, *supra* note 14, at 109 (“Sadly, for several decades, lack of funding for abuse prevention was the primary barrier to establishing and expanding elder justice services.”).

165. *See* Lee, *supra* note 33, at 734 (describing the problems of the lack of appropriations included within mandatory reporting statutes); Velick, *supra* note 19, at 178 (“The importance of fully funded [A]dult [P]rotective [S]ervices, beyond assisting the victim, is that reporters will have a greater incentive to report elder

Analyzing the budgetary situations of individual states and their Adult Protective Services branches is beyond the scope of this article. However, a discussion of mandatory elder abuse reporting laws would be remiss if this issue were not mentioned. When enacting these statutes, state lawmakers would be wise to carefully examine the financial implications upon the affected parties and plan accordingly.¹⁶⁶ Ensuring that the Adult Protective Services office in their state possesses the resources to cope with an increased number of elder abuse victims needing assistance would seem to be a key part of that planning process. An unfunded mandate that separates the victim from an abusive situation, but lacks the ability to do anything further, would not be a satisfying solution for anybody involved.

IV. SAFEGUARDING AUTONOMY: INSTALLING MEASURES TO PRESERVE PERSONAL LIBERTIES OF ALLEGED ELDER ABUSE VICTIMS

All of the legal provisions discussed in the previous section involve intrusive actions by the government. Such measures are necessary to give the state enough power to better combat this currently rampant, damaging, and underreported crime of elder abuse.¹⁶⁷ Stopping elder abuse quickly after it starts, and preventing abusive actions toward older victims from occurring altogether, is a compelling enough interest to justify this use of the state's police powers and *parens patriae* authority through the mandatory reporting concepts described above, especially since the likelihood of victims self-reporting this crime is exceptionally low.¹⁶⁸

However, in any instance where the state is allowed to wield significant control, policymakers should also install safeguards to prevent the government from unnecessarily treading on the

abuse if they know that adequate remedial services are available to support the victim.”); Brank, Hamm & Wylie, *supra* note 9, at 367 (listing inadequate funding for appropriate services as one of the key problems with mandatory elder abuse reporting laws today).

166. This does not mean that lawmakers are expected to predict the future. Rather, it simply calls for an improvement under the current circumstances, where enactment of mandatory elder abuse reporting laws—a measure which will certainly increase the workload of Adult Protective Services’ units in that state—does not necessarily come accompanied by an increase in funding to manage the increased workload. *See supra* notes 162–65.

167. For an overview of the extent of this problem, *see supra* notes 14–19 and accompanying text.

168. *See supra* notes 10–19, 75–83, and accompanying text.

personal liberties of individuals. Even when the state focuses on the vital goal of preventing abusers from preying upon elderly victims, there should be limits regarding how much power the government can exercise behind the closed doors of American citizens' private lives.¹⁶⁹ Starting with the civil liberties guaranteed by the United States Constitution, preserving individual freedoms to say certain things, do certain things, and make certain choices free from government intervention has been a component of the American legal system.¹⁷⁰ In remaining true to these principles, concerns about safeguarding personal liberties should not evaporate even in a situation where the essential objective of protecting older men and women against abusive conduct is at stake.¹⁷¹

Many discussions about the state's use of its police powers and *parens patriae* authority center on this tension between governmental controls in the name of safety and personal autonomy of affected individuals.¹⁷² The debate about mandatory

169. See generally *Outliving Civil Rights*, *supra* note 31, at 1067–90 (discussing ways in which the author of that article believes that mandatory elder abuse reporting laws infringe on fundamental constitutionally protected liberty interests of older Americans).

170. Or, in the words of American politician Ron Paul: “Freedom to make bad decisions is inherent in the freedom to make good ones. If we are only free to make good decisions, we are not really free.” Ron Paul, *Personal Freedoms and the Internet*, SafeHaven (June 30, 2008), <http://www.safehaven.com/article/10646/personal-freedoms-and-the-internet>. See, e.g., James Kenneth Nelsen, *From No Choice to Forced Choice to School Choice: A History of Educational Options in Milwaukee Public Schools*, U. WISCONSIN-MILWAUKEE THESES AND DISSERTATIONS, August 2012, at 1 (“Freedom of choice is a basic concept in America.”); John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1757 (1981) (discussing the right of Americans to freely make choices, and insisting that this right not be unduly abridged for individuals adjudged incapacitated); *Outliving Civil Rights*, *supra* note 31, at 1110 (praising domestic violence response models that continue to empower the victim right to make decisions, even if those decisions appear ill-advised to the average bystander). Freedom to make decisions is held by a number of commentators to be a bedrock principle of democracy itself. See, e.g., Manfred J. Holler, *Freedom of Choice, Power, and the Responsibility of Decision Makers*, DEMOCRACY, FREEDOM AND COERCION: A LAW AND ECONOMICS APPROACH 22 (Jean-Michel Josselin & Alain Marciano, eds., 2006); Adam Przeworski, *Freedom to Choose and Democracy*, 19 ECON. & PHIL. 265, 278–79 (2003).

171. Mathews, *supra* note 85, at 672 (“State statutes designed to detect and alleviate elder abuse are not free from the strictures of federal constitutional law.”); Glick, *supra* note 25, at 727–29 (discussing concerns that mandatory elder abuse reporting laws may represent a form of governmental over-intrusiveness into the lives of many competent adults).

172. See *supra* note 84.

elder abuse reporting laws is no exception.¹⁷³ Already, this article has recommended measures on one side of this equation, proposing some provisions for carrying out necessary protective goals.¹⁷⁴ Now, in this section, we turn to the flip side of this coin, looking at methods of safeguarding the personal autonomy of individuals affected by these statutes.

A. PREVENTING LEGALIZED AGEISM

One of the recognized causes of elder abuse is “ageism,” loosely defined as “practices, including prejudices and stereotypes, which are negative in their appraisal of older persons and their role in society.”¹⁷⁵ Overt acts of bias or bigotry against older men and women, such as intentionally depriving them from opportunities, benefits, or services based solely on their age, are the most obvious examples of ageism.¹⁷⁶ However, less-identifiable — and probably more commonplace — manifestations of ageism involve well-intentioned measures that ultimately result in some unjustifiably disparate treatment for men and women who are older.¹⁷⁷ Common paternalistic stereotypes of all older individuals as weak, feeble, helpless, and requiring the protection of a younger, stronger society typically create this form of ageism, with well-meaning efforts producing regrettable abridgements of older individuals’ autonomy.¹⁷⁸

Unfortunately, a number of mandatory elder abuse reporting statutes incorporate ageist elements into their frameworks.¹⁷⁹ In some of these laws, the duty to report suspected abuse becomes effective when the allegedly abused person is at or above a certain age threshold.¹⁸⁰ Frequently, age sixty is the age triggering the mandatory reporting duty in these laws.¹⁸¹ Others

173. See *supra* note 85 and accompanying text.

174. See *supra* pp. 17.

175. Lee, *supra* note 33, at 731 n. 46.

176. ERDMAN BALLAGH PALMORE, AGEISM: NEGATIVE AND POSITIVE 5–8 (2d ed. 1999).

177. *Id.*

178. *Id.*

179. See Ahmad & Lachs, *supra* note 98, at 808; Lee, *supra* note 33, at 738; *Outliving Civil Rights*, *supra* note 31, at 1108; Glick, *supra* note 25, at 727–29; Brank, Hamm & Wylie, *supra* note 9, at 363.

180. Brank, Hamm & Wylie, *supra* note 9, at 381.

181. See, e.g., CONN. GEN. STAT. §17b-450 (1) (2014); 320 ILL COMP. STAT. 20/2(e) (2014); MASS. GEN. LAWS ANN. ch.19A, § 14 (West 2010); MO. ANN. STAT. § 660.250(5) (2014); MONT. CODE ANN. § 52-3-803(8) (2013); NEV. REV. STAT. § 200.5092(5) (2014); OHIO REV. CODE § 5101.60(B) (LexisNexis 2014); R.I. GEN. LAWS ANN. § 42-66-8

use age sixty-five and, in at least one instance, age seventy.¹⁸²

Regardless of the chosen age, however, the problem remains the same. Laws carrying such provisions impose a governmental judgment as to the age at which all individuals require heightened state protection and intervention.¹⁸³ Such measures fall into the ageist trap of making two assumptions: first, that all individuals above a particular age are in fact “elderly” people, and secondly, that “the elderly” are a homogeneous population with similar or even identical needs, disabilities, shortcomings, and vulnerabilities.¹⁸⁴

These beliefs are flawed on multiple levels. Variances among the members of the population that we commonly consider elderly are vast.¹⁸⁵ Plenty of sixty and seventy-year-old individuals are in better physical, mental, and financial condition than many thirty and forty-year olds.¹⁸⁶ Newspapers are filled with stories about older men and women doing “exceptional things for their age”—running marathons, climbing mountains, holding high-workload jobs with long hours, volunteering to work in exceptionally difficult environments, and other attention-grabbing feats.¹⁸⁷ Beyond these headliners, however, exist an

(2014); VA. CODE ANN. § 63.2-1603 (2014); WASH. REV. CODE ANN. § 74.34.020 (West 2014); WIS. STAT. ANN. § 46.90(4) (West 2014).

182. See, e.g., CALIF. WELF. & INST. CODE § 15610.27 (2014); COLO. REV. STAT. § 18-6.5.102(3) (2014); GA. CODE ANN. § 30-5-3(6) (2013); MD. CODE ANN. FIN. INST. § 1-306(a)(3) (LexisNexis 2012); ORE. REV. STAT. ANN. § 124.050(2) (2014); S.D. CODIFIED ANN § 22-46-1(3) (2013); TEX. HUM. RES. CODE ANN. § 48.002(a)(1) (West 2013).

183. Ahmad & Lachs, *supra* note 98, at 808; Mathews, *supra* note 85, at 676; Lee, *supra* note 33, at 738; *Outliving Civil Rights*, *supra* note 31, at 1108; Glick, *supra* note 25, at 727–29; Brank, Hamm & Wylie, *supra* note 9, at 381.

184. See *supra* note 175 and accompanying text; See also HOWARD EGLIT, *ELDERS ON TRIAL: AGE AND AGEISM IN THE AMERICAN LEGAL SYSTEM* 10-11, 15 (2004) (calling this form of stereotyping and infantilizing one of the most common strains of ageism in American culture today).

185. Brank, Hamm & Wylie, *supra* note 9, at 362–64.

186. See *id.*

187. For only a couple of many possible examples, see Jaring Timmerman, *Age 104, Sets 2 World Swimming Records*, CBC (Jan. 24, 2014, 10:11 PM), <http://www.cbc.ca/news/canada/manitoba/jaring-timmerman-age-104-sets-2-world-swimming-records-1.2510764>; Valerie Strauss, *America's Oldest Working Teacher Turns 100*, WASH. POST (Jan. 10, 2014, 11:58 AM), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/01/10/americas-oldest-working-teacher-turns-100/>; Katie Nix, *Ohio's Longest-Serving Journalist Keeps on Writing at Age 95*, OHIO NEWS (Nov. 11, 2013), http://ohionews.org/aws/ONA/pt/sd/news_article/97336/blank/blank/true; Kevin Helliker, *Marathon Runners Stop Aging Out of the Race*, WALL. ST. J. (Oct. 29, 2012, 4:31 PM),

untold number of Americans above the age of 60 who are in good health, care for themselves, live independent lives, and are not slowed simply because society has labeled them as “senior citizens.”¹⁸⁸

Of course, plenty of older Americans do have heightened care needs, weaknesses, and vulnerabilities, and benefit from the added protections against abuse that mandatory reporting laws should provide.¹⁸⁹ Yet assuming that all people who have celebrated a particular number of birthdays need and want a heightened level of state protection is a faulty concept.¹⁹⁰ Indeed, even establishing a uniform age for a classification of elderly is extraordinarily tricky, if not utterly impossible, in modern times.¹⁹¹ Plenty of studies prove that Americans are living longer lives than ever before.¹⁹² Even more importantly, recent research shows that individuals in the United States generally remain physically and mentally healthy for greater periods of their lives, too, thanks in large part to medical advances and better utilization of preventive care.¹⁹³ Commentaries claiming that

<http://online.wsj.com/articles/SB10001424052970204005004578081342092087414>.

188. See Philip Moeller, *Study Finds That Seniors Are Living Longer, Healthier Lives*, U.S. NEWS & WORLD REPORT (Aug. 28, 2013, 10:40 AM), <http://money.usnews.com/money/blogs/the-best-life/2013/08/28/study-finds-seniors-are-living-longer-healthier-lives>; Alexandra Sifferlin, *We're Living Longer — and Healthier*, TIME (July 29, 2013), <http://healthland.time.com/2013/07/29/were-living-longer-and-healthier/>.

189. See Moskowitz, *supra* note 12, at 99 (describing certain vulnerabilities common to many older individuals that place them at risk of becoming abuse victims).

190. Marilynn Larkin, *Tackling Graywashing: What Drives It, How to Recognize and Avoid It*, J. ON ACTIVE AGING, July/Aug. 2011, at 24, 26, 28 (describing common cultural biases about the elderly and discussing the broad but often overlooked diversity among older American adults).

191. See Linton Weeks, *An Age-Old Problem: Who Is 'Elderly'?*, NPR (Mar. 14, 2013, 11:09 AM), <http://www.npr.org/2013/03/12/174124992/an-age-old-problem-who-is-elderly>; Tara Parker-Pope, *How Old Is Old Age?*, N.Y. TIMES (June 30, 2009, 1:35 PM), http://well.blogs.nytimes.com/2009/06/30/how-old-is-old-age/?_r=0; see also Moskowitz, *supra* note 12, at 88 (“We should not categorize the aged in a negative, monolithic vision.”).

192. Sam Frizell, *Americans Can Now Expect to Live Longer Than Ever*, TIME (Oct. 8, 2014), <http://time.com/3481226/life-expectancy-record/>; Richard Knox, *Oldest Americans Living Longer, And Are Fitter And Richer, Too*, NPR, (Aug. 21, 2012, 9:42 AM), <http://www.npr.org/blogs/health/2012/08/21/159521631/oldest-americans-living-longer-and-are-fitter-and-richer-too>; Moeller, *supra* note 188; Sifferlin, *supra* note 188.

193. *Older Americans 2012: Key Indicators of Well-Being*, FED. INTERAGENCY FORUM ON AGING-RELATED STATISTICS, xv–xvi (2012) (describing improvements for older Americans overall in indicators such as household income, length of life, and, in the long-term, health status and adoption of healthy behaviors); David M Cutler, Allison B. Rosen & Susan T. Stewart, *Comparison of Trends in US Health-Related*

“[sixty] is the new [forty],” along with similar assertions, fill the literature today.¹⁹⁴

Therefore, claiming that attaining an age viewed as elderly automatically stimulates the need for heightened state involvement and protection that activates the government’s police powers and *parens patriae* authority is an untenable argument.¹⁹⁵ Instead, policymakers should revisit the foundational principle underlying these powers: the government’s ability to intercede on behalf those members of society who are unable to help themselves.¹⁹⁶ Laws with a strictly age-based definition of elder abuse improperly broaden the state’s ability to intervene beyond the scope of its authority.¹⁹⁷

As commentators have noticed, the presence of such broad age-based generalizations in these laws may arise from the fact that policymakers typically used mandatory child abuse reporting statutes as their models.¹⁹⁸ In certain areas, federal and state laws presume that individuals below a certain age are partially or totally incapacitated.¹⁹⁹ The state is therefore justified in exercising its protective authority to step in and make decisions

Quality of Life Over the 2000s Using the SF-6D, HALex, EQ- 5D, and EQ-5D Visual Analog Scale Versus a Broad Set of Symptoms and Impairments, MEDICAL CARE 6 (2014), available at <http://scholar.harvard.edu/files/cutler/files/comparisons.pdf> (concluding that Americans are generally remaining healthier for longer periods of their lives, commonly staying healthy until the year or two before their death).

194. See, e.g., ‘In Our Prime’? What It Means To Be Middle-Aged, NPR (Jan. 15, 2012, 5:58 AM), <http://www.npr.org/2012/01/15/145118783/in-our-prime-what-it-means-to-be-middle-aged>; Rachel Bogert, *Is 60 the New 40?*, CHI. TRIBUNE (Jan. 7, 2010), <http://www.chicagotribune.com/sns-health-60-new-40-story.html>.

195. A number of commentators have recognized the missing link in arguments that all persons who are deemed “elderly” automatically need this increased level of protective oversight from the state. See Mathews, *supra* note 85, at 668 (“However, age alone cannot validly trigger the state’s *parens patriae* power.”); Glick, *supra* note 25, at 730 (“Where an individual is not judged incompetent, however, but merely elderly, relying on the doctrine of *parens patriae* would seem entirely inappropriate.”); Brank, Hamm & Wylie, *supra* note 9, at 381 (“Such bias assumes that older adults are incompetent, and such assumptions seem to be an underlying reason why the law ‘needs’ to provide protection.”); see also Horstman, *supra* note 76, at 215 (“If the aged are suspect in their ability to be self-reliant, it is not because lack of self-reliant is a biological dictate of old age.”).

196. See *supra* note 71 and accompanying text.

197. CONFLICT IN THE FAMILY, *supra* note 85, at 335; Mathews, *supra* note 85, at 668; Lee, *supra* note 33, at 731; *Outliving Civil Rights*, *supra* note 31, at 1089–90; Glick, *supra* note 25, at 730; Brank, Hamm & Wylie, *supra* note 9, at 381.

198. Thompson, *supra* note 33, at 19, 23; Barber, *supra* note 31, at 122–23, 134; *Outliving Civil Rights*, *supra* note 31, at 1108; Kohn, *supra* note 13, at 26; Brank, Hamm & Wylie, *supra* note 9, at 355–57.

199. See *supra* notes 78-80.

on the child's behalf, including the choice of reporting suspected abuse to the proper authorities.²⁰⁰ However, no equivalent legal presumption of incapacity exists for people *above* a designated age.²⁰¹ Consequently, treating all people of a certain age group as if they lacked the ability to care for themselves and make competent decisions is not a justifiable framework for mandatory elder abuse reporting laws.

A better solution exists, at least in part, within the original conception of laws guarding against elder abuse. Earlier statutes, and their corresponding programs, treated elder abuse as “an issue of vulnerability” to be dealt with primarily by social services agencies.²⁰² This article certainly does not argue that lawmakers should remove elder abuse prevention and prosecution from the criminal justice system. However, the previous concentration on individuals exhibiting heightened susceptibility seems more in line with the government's source of authority for exercising these protective powers than a system of uniform treatment for all people of a particular age.

Moving away from the categorical stimulus of age and toward the functional stimulus of vulnerability provides a way to utilize mandatory reporting laws without lapsing into ageism.²⁰³ Thus, returning to this prior focus on individuals who reasonably appear particularly at risk of abuse—while allowing the criminal justice system to retain its important contemporary role in prosecuting perpetrators of elder abuse offenses—seems a rational balance to strike.

Notably, many states have recently enacted new mandatory reporting laws or amended existing laws to reflect this more appropriate approach. Some of these states now mandate reporting of suspected abuse of any individual, regardless of age, who “lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.”²⁰⁴

200. See Daniel L. Hatcher, *Purpose vs. Power: Parens Patriae and Agency Self-Interest*, 42 N.M. L. REV. 159, 159 (2012); Cunningham, *supra* note 79, at 288.

201. Thompson, *supra* note 33, at 23; Barber, *supra* note 31, at 123; *Outliving Civil Rights*, *supra* note 31, at 1108; Glick, *supra* note 25, at 730–31.

202. See *Outliving Civil Rights*, *supra* note 31, at 1056–57. See *supra* notes 49–53.

203. This narrows the focus of mandatory elder abuse reporting laws, thus addressing the legitimate critiques of overbreadth highlighted by many authors. See, e.g., *supra* notes 195–196. Instead of assuming that all older Americans need heightened protections from the government, a vulnerability standard tailors the attention exclusively to those individuals whom the *parens patriae* power is designed to assist—those people who most greatly need the state to intervene on their behalf.

204. See ARK. CODE ANN. § 12-12-1703(5)(A) (2013); IDAHO CODE ANN. § 39-

Other jurisdictions also eliminate any age-based criteria, but broaden the protected class to include individuals who are “unable to meet [their] own needs or to seek help without assistance,” even if such a person is not totally incapacitated.²⁰⁵ Still others continue to use age as one criterion for triggering mandatory reporting, but additionally require this duty with regard to individuals who demonstrate heightened vulnerability to abuse²⁰⁶ or complete incapacity.²⁰⁷

All of these solutions are improvements over a strictly age-based stimulus of mandatory reporting. Among them, provisions centering on determinations of vulnerability—rather than requiring a finding of total incapacity—appear to be the more advantageous option.²⁰⁸ Scholars of abusive behavior and the

5302(10) (2014) (adding that a person who lacks sufficient understanding and capacity to “implement decisions regarding his person” qualifies as vulnerable under this law).

205. See ALASKA STAT. § 47.24.900(21) (2012); ARIZ. REV. STAT. ANN. § 14-5101(1) (2013); MO. ANN. STAT. § 192.2400(5) (2014) (protecting persons “unable to protect [their] own interests or adequately perform or obtain services which are necessary to meet [their] essential human needs.”); 18 PA. CONS. STAT. § 2713(f) (2014) (A care-dependent person is “[a]ny adult who, due to physical or cognitive disability or impairment, requires assistance to meet his needs for food, shelter, clothing, personal care or health care.”); W. VA. CODE ANN. § 9-6-1(4) (2012) (“Incapacitated adult” means any person who by reason of physical, mental or other infirmity is unable to independently carry out the daily activities of life necessary to sustaining life and reasonable health.”).

206. See ALA. CODE § 38-9-2(2) (2012); CAL. WELF. & INST. CODE § 15610.23(a)-(b) (2014); COLO. REV. STAT. § 18-6.5-102(2) (2014); D.C. CODE § 7-1903(a)(2) (2014); FLA. STAT. § 415.102 (27) (2014); GA. CODE ANN. § 30-5-3(6)-(10) (2013); HAW. REV. STAT. § 346-222(7) (2014); IND. CODE ANN. § 12-10-3-2(a) (West 2007); MINN. STAT. § 626.5572(21) (2014); MISS. CODE ANN. § 43-47-5(q) (2012); N.M. STAT. ANN. § 27-7-16(L) (West 2011); N.D. CENT. CODE § 50-25.2-01(17) (2014); OHIO REV. CODE ANN. § 5101.60(B) (LexisNexis 2014); OKLA. STAT. ANN. tit. 43A, § 10-103(5) (West 2014); S.C. CODE ANN. § 43-35-10(11) (2013); TENN. CODE ANN. § 71-6-102(2) (2012); TEX. HUM. RES. CODE ANN. § 48.002(a)(8) (West 2013); UTAH CODE ANN. § 62A-3-301(28) (LexisNexis 2013); VT. STAT. ANN. tit. 33, § 6902(14) (2013).

207. See DEL. CODE ANN. tit. 31, § 3902(23) (2014); IOWA CODE ANN. § 235B.2(4) (West 2014); KAN. STAT. ANN. § 39-1430(a) (2013); KY. REV. STAT. ANN. § 209.020(4) (LexisNexis 2013); LA. REV. STAT. ANN. § 15:1504(A) (2013); ME. REV. STAT. tit. 22, § 3472(6) (2013); MD. CODE ANN., FAM. LAW § 14-101(q) (LexisNexis 2012); NEB. REV. STAT. § 28-371 (2008); N.H. REV. STAT. ANN. § 161-F:46 (2013); N.J. STAT. ANN. § 52:27D-407 (West 2013); N.C. GEN. STAT. § 108A-101(d) (2011); S.D. CODIFIED LAWS § 22-46-1(2) (2013); WASH. REV. CODE ANN. § 74.34.035 (West 2013); WYO. STAT. ANN. § 35-20-102(a)(xviii) (2013).

208. The key question is whether such a system of protection can withstand judicial scrutiny. See *Outliving Civil Rights*, *supra* note 31, at 1089 n.164 (“By comparison, a distinction based on ‘vulnerability’ might not [withstand review by a court wanting proof of a rational basis for such a plan], at least as long as the targeted

response of victims observe that “vulnerability stopping short of incapacity can and does impact apparent choice,” including the decision of whether to report an abuser’s actions.²⁰⁹ In other words, an individual who is not completely physically or mentally incapacitated, but who presents with one or more factors that enhance their vulnerability to abuse, is often less likely to report abusive actions to authorities.²¹⁰ Including such people within the protected class will increase the effectiveness of these laws in combating abusive conduct, targeting individuals whose decision-making abilities are temporarily or permanently impaired without making discriminatory generalizations based on age.

Such measures, of course, do not come without potential concerns. Earlier, this article addressed the challenge of mandated reporters identifying indicators that raise reasonable suspicions of elder abuse.²¹¹ Now, by moving away from simply applying the law to all people of a particular age group, mandated reporters must also decide whether the person in question also possesses a heightened vulnerability to abusive conduct.²¹²

However, requiring such determinations is not an unheard-of demand. For instance, professionals in certain finance careers are asked to judge whether customers possess capacity before

group includes persons as young as sixty or sixty-five.”). However, it seems that using “vulnerability” as a factor should withstand this review. To prevail, the measure in question must be rationally related to a legitimate state interest. *See* Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139, 166 (2012). Here, the government has a legitimate interest in providing enhanced protections to older adults who are particularly vulnerable to abuse, as abuse is a crime that harms not only the victims, but also society as a whole. Mandating reporting when a vulnerable individual presents with signs that he or she is experiencing abuse is a measure rationally related to that state interest of preventing abuse from occurring and stopping abuse as rapidly as possible after it starts.

209. Kohn, *supra* note 13, at 20 n. 116 (quoting Deborah O’ Connor, Margaret Isabel Hall & Martha Donnelly, *Assessing Capacity Within a Context of Abuse or Neglect*, 21 J. ELDER ABUSE & NEGLECT 156, 166 (2009)).

210. *See id.*; *see also* Velick, *supra* note 19, at 174–75. Indeed, this article has already noted a number of situations where an older individual who does not lack capacity is still placed in a vulnerable position, leading to the unreported abuse. *See supra* notes 11, 14, 16–19 and accompanying text (addressing various factors contributing to unreported elder abuse, including several situations where an individual who does not lack capacity is nonetheless restrained from reporting due to vulnerability factors such as dependency, fear, shame, or just outright uncertainty about what to do).

211. *See supra* notes 108–10 and accompanying text.

212. *See* Glick, *supra* note 25, at 733–34 (describing how the challenge of judging a potential victim’s capacity or vulnerability can affect the work of statutorily mandated elder abuse reporters).

entering into transactions on their behalf.²¹³ Similarly, medical professionals need to determine whether patients have capacity to make certain choices about their treatment.²¹⁴ Lawyers, too, must make judgments about whether an individual has “diminished capacity.”²¹⁵ If our legal system expects such determinations in situations that could profoundly affect a person’s medical or financial condition, it is not unreasonable to request a similar decision from mandatory reporters in this context—especially considering that the commonly accepted standard in this area is reasonable suspicion, not definitiveness.²¹⁶ Certainly, the necessary training for mandatory reporters discussed earlier in this article should include detailed guidance from experts about recognizing vulnerability.²¹⁷ Also, the immunity from civil and criminal liability granted to good faith reporters of elder abuse should reduce the trepidation for mandatory reporters in identifying vulnerability factors among potential victims.²¹⁸

Ageist approaches to mandatory elder abuse reporting laws are not acceptable. Triggering the duty to report strictly because of an alleged victim’s age is not a reasonable approach to combating this crime. Admittedly, this article does not claim that the solutions recommended within this section are perfect.

213. See Sarah Beckett Ference, *Considerations When Working with an Aging Client Base*, J. OF ACCOUNTANCY (June 2014), available at <http://www.journalofaccountancy.com/Issues/2014/Jun/20149801.htm>.

214. Raphael J. Leo, *Competency and the Capacity to Make Treatment Decisions: A Primer for Primary Care Physicians*, J. CLINICAL PSYCHIATRY: PRIMARY CARE COMPANION, Oct. 1999, at 132.

215. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.14(a)-(b) (“Client With Diminished Capacity.”).

216. See *supra* note 202 (describing some state statutes requiring a “reasonable suspicion” that the adult in question is “vulnerable” to abuse).

217. See *supra* notes 112–14 and accompanying text. One good guide in assessing whether an older adult is placed in a vulnerable situation and position comes from a description of Adult Protective Services evaluations. A layperson can at least begin forming a reasonable assessment about whether an older individual appears to be in a position of vulnerability by asking the four questions listed in this description:

- (1) Is the person able to communicate an understanding of his or her choices?
- (2) Can the person understand relevant information, including specific facts, as well as his or her role in the decision-making process?
- (3) What is the quality of the person’s thinking process?
- (4) Is there an understanding of the consequences the decision will have for his or her self and for others?

BOZINOVSKI, *supra* note 121, at 37.

218. See *supra* Part I(iv).

However, the approaches proposed here are improvements over allowing substantial governmental intrusions into individuals' lives solely because of they are statutorily classified as elderly.

**B. REMOVING SELF-NEGLECT FROM MANDATORY ELDER
ABUSE REPORTING REQUIREMENTS**

Self-neglect is “the behavior of an elderly person that threatens his [or] her own health or safety.”²¹⁹ This problem emerges when an older individual cannot or will not take measures to maintain adequate shelter, food, hydration, sanitation, medical care, or other essential aspects of daily living.²²⁰ Many factors can lead to self-neglect by themselves or in combination, including physical or cognitive impairments, social isolation, substance abuse, denial, or limited financial resources.²²¹ Presently, self-neglect situations represent a substantial portion of the caseload that Adult Protective Services units handle.²²²

Considering this information, it is safe to deem self-neglect a serious concern that deserves significant attention from caregivers and policymakers.²²³ However, the issue facing this article is whether a reasonable suspicion of self-neglect should instigate a mandatory reporting duty. Some mandatory elder abuse reporting laws currently impose such a duty, requiring reporting of these self-perpetrated problems.²²⁴

Certainly, the underlying reasons behind imposing such a duty are understandable. Keeping elderly men and women from

219. *Types of Abuse*, NAT'L CTR. ON ELDER ABUSE, http://ncea.aoa.gov/FAQ/Type_Abuse/#self.

220. *See id.*

221. *See Eisenstein & Gorbien, supra* note 149, at 283.

222. Carol Levine, *What's Happened to My Mother?*, AARP (Nov. 8, 2012), <http://www.aarp.org/home-family/caregiving/info-11-2012/recognizing-abuse-self-neglect.html> (“More than half the cases of elder abuse reported to authorities are because of self-neglect and don't involve others at all, according to the National Center on Elder Abuse.”).

223. *See* Louise Starmann, *The Epidemic of Self-Neglect*, AGING CARE CONNECTIONS (Jan.-Mar. 2012), *available at* http://www.agingcareconnections.org/forms/2012Publications/ACC_News_Jan_March2012.pdf; Bozinovski, *supra* note 121, at 163; *see also* Eisenstein & Gorbien, *supra* note 149, at 281 (“The area of self-neglect remains one of the greatest areas of variability among states.”).

224. *See, e.g.*, D.C. CODE § 7-1903(a)(2) (2014); 320 ILL. COMP. STAT. 20/2(e) (2014); KY. REV. STAT. ANN. § 209.030(2) (LexisNexis 2014); LA. REV. STAT. ANN. § 14:403.2(A) (2014); N.H. REV. STAT. ANN. § 161-F:46 (2014); R.I. GEN. LAWS § 42-66-8 (2014); WYO. STAT. ANN. § 35-20-103(a) (2014).

committing acts that cause self-harm is a commendable objective. In this specific context, however, including self-neglect within the category of reasonably suspected actions requiring mandatory reporting does not seem to be a proper exercise of governmental power. Rather, doing so runs the significant risk of infringing on the rights of competent adults to make independent decisions about their own lives.²²⁵

Broadly speaking, the freedoms that the American legal system protects include the liberty to make choices.²²⁶ Generally, if these choices by a competent adult fall within the confines of the law, the government is not asked to interfere.²²⁷ Again, use of a state's police powers and *parens patriae* authority comes from a discernible need to protect people who cannot protect themselves.²²⁸ The government is not designed to intervene simply because a competent individual makes a decision that the majority of the populace, or the majority of policymakers, considers a poor or undesirable choice.²²⁹

Bearing this in mind, mandating reporting of self-neglect immediately becomes suspect. Legally demanding that reporters disclose information to government authorities based on a reasonable suspicion that an elderly person is not properly caring for himself or herself, potentially triggering an investigation and additional intrusive action by the state, could carry considerable constitutional problems.²³⁰ Conceivably, such a report could lead

225. See, e.g., *Outliving Civil Rights*, *supra* note 31, at 1064 (pointing out criticism toward mandatory elder abuse reporting statutes that include self-neglect within the definition of "elder abuse").

226. See *supra* notes 170-71 and accompanying text.

227. *Id.*

228. See *supra* note 76 and accompanying text.

229. See *supra* notes 170-71.

230. For instance, the United States Supreme Court has held that a competent adult, regardless of that adult's age, has a constitutionally protected liberty interest in refusing medical treatment. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 285-86 (1990). However, one could reasonably consider a competent elderly person's refusal of medical treatment to be self-neglect. Statutes mandating reporting would therefore require reporting of such a decision to the authorities designated in the law. Conceivably, a similar issue could even arise when a competent older adult freely decides to marry someone who appears to clearly be a "bad choice," such as a person who seems very likely to exploit the elderly individual. An older individual's decision to marry such a person could appear to be a form of self-neglect, putting him or her in a path of likely imminent harm, and thus requiring reporting under statutes that include self-neglect as a form of elder abuse. Still, the Supreme Court has recognized a constitutionally protected liberty interest in the right to marry for more than a century, thus creating another potential constitutional problem for mandatory

to an individual being assigned to a nursing home or other institution against his or her will simply for making a conscious decision with which government actors disagree.²³¹

A narrow but important division exists between self-neglect and other forms of conduct requiring reporting. Abusive actions by another person force a negative situation upon the victim.²³² While the abused elder may choose to stay in the same residence with the abuser, or make some other decision that continues to expose himself or herself to the mistreatment, the individual's decision-making capacity is often severely compromised because of the abusive conditions.²³³ The misconduct occurs first, while the choice (if any) of the victim comes second, made under the conditions created and sustained by the abuser. On the other hand, no perpetrator exists in a scenario of self-neglect.²³⁴ By definition, the circumstances are the sole product of choices that the older individual makes.²³⁵

Thus, in comparing elder abuse and self-neglect, it becomes clear that the root causes of each are notably different. This distinction merits contrasting treatment. Mandatory elder abuse reporting laws exist to protect older individuals who are unable

reporting of self-neglect. *See Meyer v. Neb.*, 262 U.S. 390, 399 (1923); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888).

231. *Outliving Civil Rights*, *supra* note 31, at 1089 (noting the possible constitutional problems of mandatory reporting responses such as assignment to nursing homes or other institutions and assignment of a court-appointed guardian); *See also* MORLEY D. GLICKEN, EVIDENCE-BASED COUNSELING AND PSYCHOTHERAPY FOR AN AGING POPULATION 182 (2009); Leigh Donaldson, *Elder Abuse in Maine: A Problem We All Must Acknowledge*, PORTLAND PRESS-HERALD (June 21, 2010), http://www.pressherald.com/2010/06/21/elder-abuse-in-maine-a-problem-we-all-must-acknowledge_2010-06-21/; Moskowitz, *supra* note 12, at 111 (listing, in all of these sources, “fear of institutionalization” as a primary motivator for older Americans often refraining from reporting elder abuse).

232. *See Glick*, *supra* note 25, at 720.

233. *See e.g.*, *supra* notes 16–19, 96 and accompanying text (discussing multiple perpetrator-induced causes of underreporting of elder abuse). This is particularly relevant when the abuser is a primary caregiver of the victim, a scenario that occurs far too frequently. *See Glick*, *supra* note 25, at 720 (“Having no one with whom to interact on a daily basis beyond the caregiver, the victim of mistreatment has less opportunity to secure professional help, legal assistance[,] or social support, and can easily get trapped in the cycle of abuse.”); *See also Velick*, *supra* note 19, at 173 (“One commentator has described these mentally competent victims who nevertheless fail to report abuse as ‘in a dependent position [on the abuser] and frail, confused[,] or ignorant of the societal protection mechanism available.’”); Moskowitz, *supra* note 12, at 111 (“[V]ictims of elder abuse are unlikely to have the support they need to make a free choice about self-reporting.”).

234. *See supra* notes 220–21, 224 and accompanying text.

235. *Id.*

to protect themselves from infliction of harm, and to protect society against wrongdoers who inflict the harm.²³⁶ Under this framework, elder abuse deserves inclusion within mandatory reporting law protections. Self-neglect by a competent older person, however, does not fall within this scope of conduct warranting government intervention. Government intervention should not result merely from a lucid individual's choice that deviates from a "normal" course of action, even if that choice seems detrimental to the decider.

The key exception occurs when the individual making the decision is not competent. In such a situation, mandatory reporting could be allowable. Under the *parens patriae* power, the government can step in to assist an incapacitated person from self-neglect.²³⁷ Indeed, states already often do substitute their decisions for the choices of an incompetent individual, via perfectly legitimate actions such as guardianship proceedings.²³⁸

This distinction would once again require mandated reporters to make a finding about the competency of the individual in question. As already noted, this is not the easiest of determinations to make.²³⁹ However, as also discussed earlier, making this type of judgment is not an out-of-the-ordinary requirement for many professionals.²⁴⁰ Also, proper training of all mandatory reporters should increase the accuracy of their conclusions in this area.²⁴¹

Nobody wants to see an elderly individual neglect his or her personal care to the point of causing harm. However, the state lacks the authority to interfere in a competent person's private life solely because that individual appears to be making bad choices. Keeping this intrusive practice of regulating self-neglect out of mandatory elder abuse reporting laws is an important safeguard on individual autonomy that policymakers should respect.

236. See Dessin, *supra* note 26, at 708; Glick, *supra* note 25, at 723; Blancato, Lindberg & Sabatino, *supra* note 14, at 107; Kohn, *supra* note 13, at 18; Moskowitz, *supra* note 12, at 110–11.

237. See *supra* note 76.

238. See *supra* note 77 and accompanying text.

239. See *supra* Part IV(i).

240. *Id.*

241. Once again, the training component of mandatory elder abuse reporting laws becomes a key piece of the solution. See *supra* notes 112–15.

C. *LIMITING DISTRIBUTION OF REPORTED INFORMATION*

When a mandatory reporter discloses his or her observations to authorities, the need to safeguard an individual's autonomy does not end. In fact, concerns about respecting the apparent victim's self-sufficiency are more important than ever once the report is made.²⁴² Key questions exist about what parties—and how many parties—should receive the information from the mandatory reporter.²⁴³ Concerns about what the recipients are allowed to do with the information within the report also come to the forefront once a mandatory reporter fulfills his or her duty.²⁴⁴ These queries highlight issues that policymakers in this area need to address.

In order to shelter the alleged victim, mandatory elder abuse reporting statutes should institute measures limiting the use of collected information in the report.²⁴⁵ At the same time, these laws must also ensure that the proper people receive the data necessary to carry out the necessary investigations and other protective measures to halt the abuse.²⁴⁶ Finding a stable point of balance between these interests should be a paramount concern for lawmakers.

In her article *Outliving Civil Rights*, Professor Nina A. Kohn points to Wisconsin's mandatory elder abuse reporting law as a

242. See, e.g., Becker & Callaway, *supra* note 104, at 15 (“The biggest concern voiced by banks in reporting financial abuse is based on . . . strong privacy and information-sharing provisions.”); Velick, *supra* note 19, at 175 (“Once a report is made under a mandatory reporting system, almost all states restrict access to elder-abuse records in some manner.”); see generally *Outliving Civil Rights*, *supra* note 31, at 1067-87 (evaluating possible constitutional privacy rights problems raised by mandatory elder abuse reporting laws).

243. *Id.*

244. *Id.* These concerns are not unique to mandatory elder abuse reporting laws. Any mandatory reporting scheme, regardless of the age of the targeted population, will lead to questions about what happens to the information once a mandatory reporter performs his or her duty, especially while an ensuing investigation is in progress. See, e.g., Jessica Ansley Bodger, *Taking the Sting Out of Reporting Requirements: Reproductive Health Clinics and the Constitutional Rights to Informational Privacy*, 56 DUKE L.J. 583, 586 (2006); Sherry F. Colb, *Should Sexually Active Minors Have a Rights to Privacy? A Kansas Case Reveals the Dark Side of Mandatory Reporting*, FINDLAW (Feb. 8, 2006), <http://writ.news.findlaw.com/colb/20060208.html>.

245. *Outliving Civil Rights*, *supra* note 31, at 1067–87; Velick, *supra* note 19, at 175.

246. In other words, the data disclosure limitations cannot be so constrained that the authorities who need to take proper action are precluded from receiving the information.

sound example of this balance.²⁴⁷ This statute closely regulates both the parties who can use this information and the extent to which these parties can utilize the data.²⁴⁸ Under this law, all submitted mandatory reporting forms are confidential unless otherwise specified.²⁴⁹ Disclosure of the gathered information is extremely limited.²⁵⁰

The alleged victim named in the report can request a copy, as can the purported perpetrator and, if applicable, the suspect's attorney.²⁵¹ A legally appointed guardian for the apparent victim of abuse, or for the suspected abuser, can also request a copy of the report.²⁵² Federal, state, and local governmental agencies required to protect older adults from abuse, such as Adult Protective Services units, can do the same.²⁵³ Offices providing treatment for mental illness, substance abuse, developmental disabilities, or drug abuse can receive the report if it affects an individual assigned to their care.²⁵⁴

Courts have discretion to order disclosure where necessary, as can law enforcement officials within narrowly defined circumstances.²⁵⁵ Agencies and other entities that the report recipient asks for assistance in ending the abuse can receive the reporting information.²⁵⁶ Researchers can obtain certain limited pieces of information under very specific conditions.²⁵⁷ Auditors can gain the few items that they need to make their reports and nothing else.²⁵⁸ Lastly, the individual who made the report in his or her professional capacity may request a copy of the documentation filed.²⁵⁹

Beyond those enumerated individuals, however, the

247. *Outliving Civil Rights*, *supra* note 31, at 1084–85.

248. *Id.* at 1085.

249. *Id.*

250. *Id.* (“Although Wisconsin allows records of abuse to be shared with a wide variety of persons and organizations, it delineates limited purposes for which such shared information may be used.”).

251. WIS. STAT. ANN. § 46.90(6)(b)(1) (West 2014).

252. WIS. STAT. ANN. § 46.90(6)(b)(7) (West 2014).

253. WIS. STAT. ANN. § 46.90(6)(b)(9) (West 2014). Interestingly, this provision also includes agencies responsible for protecting elderly individuals from self-neglect.

254. WIS. STAT. ANN. § 46.90(6)(b)(6) (West 2014).

255. WIS. STAT. ANN. § 46.90(6)(b)(5) (West 2014); WIS. STAT. ANN. § 46.90(6)(b)(8) (West 2014).

256. WIS. STAT. ANN. § 46.90(6)(b)(2) (West 2014).

257. WIS. STAT. ANN. § 46.90(6)(b)(4) (West 2014).

258. WIS. STAT. ANN. § 46.90(6)(b)(3) (West 2014).

259. WIS. STAT. ANN. § 46.90(6)(b)(10) (West 2014).

Wisconsin statute forbids the release of information gathered from a mandatory elder abuse reporter to any other parties.²⁶⁰ Authorities receiving these reports can tell a questioning entity not specifically named in the law only that a report exists and was received pursuant to the mandatory reporting duty.²⁶¹ From reading the statute, it appears that no exceptions are made in this regard.²⁶²

Yet the Wisconsin mandatory reporting law does not end there. Instead, this statute also includes an additional safeguard for the alleged victim of the abuse.²⁶³ If the agency receiving the reports alleging elder abuse decides that sharing this information with any of the specifically named parties is “contrary to the best interests of the elder adult at risk,” then the receiving agency can unilaterally decide to withhold the data entirely.²⁶⁴ Likewise, a district attorney’s office in Wisconsin may decide by itself to deny any release of reported information about elder abuse if that office determines that disclosure would impede future investigations or criminal prosecutions, or potentially deny the defendant his or her right to a fair trial.²⁶⁵

This article does not claim that every jurisdiction should follow Wisconsin’s example in this field verbatim. However, all mandatory elder abuse reporting statutes would benefit from a similar or equivalent set of provisions within their terms. By specifically listing the classifications of individuals who are permitted to receive data from the reports and describing the extent of the data that each entity is allowed to receive,²⁶⁶ the Wisconsin law provides a marked layer of protection for the individuals named in the report, particularly the alleged victim. Offering the escape clause of complete non-disclosure if revealing the information is not in the alleged victim’s best interest gives an additional layer of protection over this individual’s personal information.²⁶⁷

260. WIS. STAT. ANN. § 46.90(6)(b) (West 2014). (“Departmental report forms are confidential and may not be released by the elder-adult-at-risk agency or other investigative agency [except under the narrowly defined circumstances described in footnotes 241 through 249]”).

261. WIS. STAT. ANN. § 46.90(6)(bd) (West 2014).

262. Nothing in the text of this provision allows for any alternatives to the rule. See WIS. STAT. ANN. § 46.90(6)(bd) (West 2014).

263. WIS. STAT. ANN. § 46.90(6)(br)(1) (West 2014).

264. *Id.*

265. WIS. STAT. ANN. § 46.90(6)(br)(2) (West 2014).

266. *Outliving Civil Rights*, *supra* note 31, at 1085.

267. WIS. STAT. ANN. § 46.90(6)(br)(1) (West 2014).

Once again, the goal here centers on striking a balance. Mandatory elder abuse reporting laws cannot be so constrained regarding the use of collected data that the appropriate services and authorities cannot obtain essential information. Such a measure would undermine the fundamental objectives of these statutes—protecting older men and women from the tragic harm of abuse, and improving the safety of society by deterring abusers—by keeping important data out of the proper hands.²⁶⁸ However, these laws should also honor the privacy of alleged victims, ensuring that only the limited number of entities which are absolutely necessary to achieving these goals receive this personal and extremely sensitive material.²⁶⁹ Understandably, while this sounds fine on paper, it is not the easiest tightrope for policymakers to walk, particularly when it comes to determining which entities in their individual states should receive this information and which should be excluded.²⁷⁰ Still, it is an aspiration that is vital for achieving laws that attack the problem of an underreported crime while still respecting the independence of those individuals whom such legislation is designed to protect.²⁷¹

V. CONCLUSION

For more than three decades now, mandatory elder abuse reporting laws have existed throughout the United States. Today, such statutes are commonplace across the country. Emerging out of the government's police power and *parens*

268. For a discussion about the commonly accepted aims of mandatory elder abuse reporting laws, and mandatory reporting statutes in general, *see supra* notes 23-35.

269. *See Outliving Civil Rights, supra* note 31, at 1067-87; Velick, *supra* note 19, at 175.

270. However, it seems that states should err on the side of greater informational protection when possible. For instance, Florida's mandatory elder abuse reporting statute includes a number of informational privacy protections, but then also includes a number of exceptions that virtually swallow the rule. *See Outliving Civil Rights, supra* note 31, at 1086 (pointing out that in Florida, individuals who can gain access to the report records include a needlessly broad range of legislative staff members and other state employees). Greater limitations would reduce the odds of these sensitive records falling into the hands of people who are not essential to ensuring a proper investigation and appropriate response regarding the alleged abuse.

271. These protections are particularly important given the necessary abrogation of patient-physician, attorney-client, clergy-penitent, and other common professional privileges in the elder abuse reporting context. *See supra* pp. 26-29. Keeping disclosure of these extremely personal, typically protected communications as limited as possible is essential in respecting the rights and autonomy of older adults.

patriae authority, they serve the important purpose of identifying perpetrators of elder abuse, engaging the criminal justice system in stopping this devastating and under-reported crime, and providing older Americans with the means of escaping abusive situations. Without these laws, one can reasonably assume that a considerably higher number of elder abuse offenses would go unreported, leaving more individuals in the terrible position described at the outset of this article in the case of Sal and his son—facing grave danger of substantial harm, but declining to tell law enforcement or social services leaders due to a variety of factors.²⁷²

Despite heavy criticism from a multitude of commentators, states have not pulled back their mandatory reporting requirements regarding elder abuse. However, policymakers should not ignore the disapproving voices in this field. Observations that many of these laws could produce undue intrusions into the private affairs of competent adults, and create unnecessary distinctions between people based solely on an individual's chronological age, deserve thorough attention.

While many of these analysts call for an all-out repeal of these mandatory reporting laws, this article explained why such action is quite unlikely. Eliminating these statutes would detrimentally affect the compelling interests that these laws protect. Furthermore, it is politically improbable that lawmakers would ever take such measures.

Instead, this article recommended a different solution: finding an appropriate middle ground in this area of the law and, where necessary, amending these statutes to produce a fairer, more rights-protective framework. Policymakers in this field should aim to reconcile the goals of protecting older Americans against abusive conduct and respecting their autonomy to make decisions about their lives.'

This article proposed a number of suggestions on both sides of this balancing act. First, to ensure that these laws maintain their protective purpose, this article recommended classifying a wide range of professionals as mandatory reporters, all of whom should receive proper training in identifying signs of probable elder abuse, and called for a removal of *mens rea* judgments from mandatory elder abuse reporting statutes. Furthermore, this article proposed abrogation of patient-physician, attorney-client, clergy-parishioner, and other privileges in the limited context of

272. See *supra* notes 1-9 and accompanying text.

reporting suspected elder abuse, and called for immunization of elder abuse reporters from civil and criminal liability arising from their reports. Lastly, it cautioned about the danger of unfunded mandates in this area, asking policymakers to ensure that adequate funding was in place for Adult Protective Services units and other affected entities to properly handle the likely increase in reported elder abuse cases that these laws will bring.

However, this article also emphasized the importance of safeguarding the individual autonomy of alleged elder abuse victims. In particular, it warned about the prevalence of ageism in certain mandatory elder abuse reporting statutes, and called for the elimination of protected classes that are based solely on a person's age. As a corrective measure, this article recommended that amended laws use factors of vulnerability, not age, as a factor triggering the mandatory duty to report. Additionally, this article suggested specifically eliminating self-neglect by competent adults from the definition of "elder abuse" leading to mandatory reporting, thereby respecting the right of competent individuals to make decisions about their own private lives. Finally, the article proposed certain protections for personal data of alleged victims named in mandatory reports, ensuring that only those entities that are absolutely necessary for achieving the statutory goals receive this sensitive information.

Of course, proposing these ideas on paper is always easier than implementing them in practice. Indeed, this article does not claim that achieving perfect equilibrium between interests of autonomy and protection in these laws is possible, or even necessary. Instead, it merely puts forth a potential framework for amending mandatory elder abuse reporting statutes to address meritorious concerns without rejecting these laws entirely. In doing so, it suggests a method of both protecting the far too many older Americans like Sal who face abusive situations while simultaneously respecting their privacy and independence. The middle ground is not always the easiest terrain on which to walk, but to realize the maximum potential of these well-intentioned laws, it is a pathway for which policymakers should strive.