

**INCOMPLETE PROTECTION: THE  
INADEQUACY OF CURRENT PENALTY  
ENHANCEMENT PROVISIONS IN  
DETECTING FRAUD SCHEMES TARGETING  
THE ELDERLY**

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*Before committing a criminal act, offenders generally evaluate the relative size, strength, and age of their victims. Many offenders consider the elderly, with their perceived vulnerability, easy targets for violent and property crimes. The increased victimization of the elderly led to increased penalties for violent crimes; however, few enhanced penalties exist to punish the offender adequately or deter future violations of financial crimes or fraud against the elderly. This Note examines the need for federal penalty enhancement statutes with regard to financial crimes by strangers that target the elderly. The Note discusses the actual and perceived vulnerability of the elderly to these crimes and whether the incidence of the criminal behavior warrants special attention. The Note addresses the efficacy of criminal sanctions in combating financial crimes and the laws currently in effect. Mr. Fallik proposes a comprehensive, two-fold investigatory and legislative solution to combat the growing epidemic of financial crimes against the elderly.*

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The author would like to dedicate this Note to his wife, Mary Fallik, for her unbelievable patience, fantastic sense of humor, and constant support for more than a decade. He would also like to thank his mother, Dr. Beverlie Fallik, for reminding him that limits are a creation of his own imagination.

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## I. Introduction

Just after dark, Ms. M, an eighty-six-year-old woman, walks down Main Street alone, carrying a light bag of groceries from the corner store to her apartment a couple of blocks away. Although not deserted, the street lacks crowds, so Ms. M walks quickly, thinking of *Law & Order* episodes and reports of purse-snatchings on the local news. Unbeknownst to her, a teenager starts following her when she leaves the store. Most likely, he targets Ms. M in particular because of the general vulnerability in her physical frailty and advanced age. He runs up behind her, grabs her purse, and shoves her to the ground before making off with the proceeds. Ms. M suffers no physical injuries but finds herself in the same position as most victims of crime—feeling helpless, violated, and fearful.

Ms. M's attacker, if caught, not only would face punishment for his acts that violate the elements of a criminal statute, such as robbery or a variation thereof, but in many jurisdictions, he would also face enhanced penalties for having perpetrated his crime against an elderly person.<sup>1</sup> This seems morally right to most, and several theories of punishment express strong arguments in support of this intuition.

Now, however, assume that Ms. M sits safely in her apartment on a Wednesday afternoon and receives an enthusiastic email from "Sandy" telling her that the Publisher's Clearinghouse selected her as the lucky winner of \$500,000—"Don't you remember submitting that application?" Sandy explains that everything is set to go out, but the large prize requires certain taxes, handling charges, and certification fees that must be satisfied first. Sandy asks if Ms. M could stop by Western Union and wire \$1530.86 to another Western Union in Florida. In fact, Sandy continues excitedly, those handling charges can be reduced significantly if they simply deposit the funds directly into her bank account. Persuaded by Sandy's fast-talking enthusiasm, Ms. M divulges her bank account and routing numbers. Soon, funds mysteriously disappear from her account, and she has not heard from

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1. See D.C. CODE § 22-3703 (2001) ("A person charged with and found guilty of a bias-related crime shall be fined not more than 1 1/2 times the maximum fine authorized for the designated act and imprisoned for not more than 1 1/2 times the maximum term authorized for the designated act."); FLA. STAT. § 775.085 (2010) (enhancing penalties for crimes evidencing "prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability, or advanced age of the victim").

Sandy since wiring those “fees.” Again, Ms. M suffers no physical injury but suffers emotional effects that mirror those in the purse-snatching hypothetical. The offender chose Ms. M because of her age and perceived vulnerability to the crime, and yet, in many jurisdictions, including federal, no enhanced penalties exist to punish adequately the offender or deter future occurrences, either by Sandy or others similarly situated.<sup>2</sup>

It may lack the dramatic flair of a flashy headline or courtroom battle, but property crime occurs at a far higher rate than violent crime.<sup>3</sup> Many of these crimes, like the sweepstakes or advance payment scheme described above, specifically target the elderly because of their substantially greater assets, their frequent physical presence in the home due to decreased social activities, and their fear of losing financial independence.<sup>4</sup> Some suggest that deterioration in cognitive ability makes the elderly more susceptible to fraud victimization than younger individuals.<sup>5</sup> Additionally, the elderly may be uniquely susceptible to fraud schemes perpetrated via the Internet.<sup>6</sup> Unfortunately, despite this increased risk, many law enforcement jurisdictions lack increased punishments for these circumstances.<sup>7</sup> Most important-

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2. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (2009) (providing for a two-level increase in federal sentencing guidelines “[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim,” while also narrowing the use of this departure in Application Note 2: “The adjustment would apply, for example, in a fraud case in which the defendant marketed an ineffective cancer cure or in a robbery in which the defendant selected a handicapped victim. But it would not apply in a case in which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile.”).

3. MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION, 2008 1 (2009), available at <http://bjs.ojp.usdoj.gov/Content/pub/pdf/cv08.pdf>.

4. *Fraud Target: Senior Citizens*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/majcases/fraud/seniorsfam.htm> (last visited Oct. 17, 2010).

5. *Old Scams-New Victims: Breaking the Cycle of Victimization: Hearing Before the S. Spec. Comm. on Aging*, 109th Cong. 59 (2005) [hereinafter *Old Scams-New Victims*] (statement of Denise C. Park, Ph.D.).

6. Eric L. Carlson, Note, *Phishing for Elderly Victims: As the Elderly Migrate to the Internet Fraudulent Schemes Targeting Them Follow*, 14 *ELDER L.J.* 423, 424 (2006).

7. Many states currently have laws that criminalize abuse of the elderly by persons in a position of trust, including financial exploitation; however, very few have enacted statutes that encompass the taking advantage of such circumstances by strangers. One example of a state that does encompass these crimes is New Hampshire. See N.H. REV. STAT. ANN. § 651:6(I)(I) (2007) (extending the term of imprisonment for persons convicted of extortion or fraud when the jury finds beyond a reasonable doubt that the offender “[h]as committed or attempted to commit any of the crimes . . . against a victim who is 65 years of age or older or

ly, the federal government, whose various law enforcement agencies possess a superior ability to investigate and prosecute such crimes, explicitly limits its enhanced penalty provisions to a very narrow and outdated set of circumstances.<sup>8</sup>

Although research and legislation has addressed, to a certain extent, the financial exploitation of the elderly by persons in a position of trust, this Note examines the need for penalty-enhancement statutes for financial crimes by strangers that target the elderly. Part II discusses the actual and perceived vulnerability of the elderly to these financial crimes and whether the incidence of such criminal behavior warrants special attention. Part III provides a brief examination of the primary purposes of punishment and seeks to evaluate the deterrent effect of sanctions in general, and more specifically, towards fraud and Internet crime. Part IV examines the current laws and regulations that provide for such increased penalties and investigates their inherent weaknesses and loopholes. Part V concludes by proposing a comprehensive, two-fold investigatory and legislative solution that will effectively combat this growing epidemic.

## II. Vulnerability of Elderly to Financial Crimes

Whether persons beyond a certain age are more susceptible to victimization by fraud is a sensitive and complex issue. Regardless of actual susceptibility, the pertinent concern remains the prospective perpetrator's perception of said vulnerability and whether this factor plays a role in victim selection.

Examining this view across society, which necessarily includes offenders searching for a potential victim, requires an investigation of how the public perceives the elderly in this context. In a practitioner's guide for law enforcement training, the Center for Problem-Oriented Policing explained, "The prevailing stereotype of elderly fraud victims is that they are poorly informed, socially isolated individuals—

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who has a physical or mental disability and that in perpetrating the crime, the defendant intended to take advantage of the victim's age or a physical or mental condition that impaired the victim's ability to manage his or her property or financial resources or to protect his or her rights or interests . . . .").

8. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (2009); see also 18 U.S.C. § 2326 (2006) (enhancing federal penalties for fraud offenses either victimizing a group of ten or more persons over the age of fifty-five or intentionally targeting persons over the age of fifty-five only in connection with telemarketing).

potentially suffering from mental deterioration—who cling to old-fashioned ideas of politeness and manners that interfere with their ability to detect fraud.”<sup>9</sup> Dennis Lormel, Chief of the FBI’s Financial Crimes Section, testified before the U.S. Senate Special Committee on Aging that people prey upon the elderly because of their relative affluence and good credit, general polite and trustworthy nature, reduced likelihood of reporting the crime—either out of shame or fear that others will take it as indicative of their inability to care for themselves—and the opinion that the elderly would make poor witnesses because of poor memory.<sup>10</sup> Even the American Association of Retired Persons characterizes the elderly as “tempting targets for abuse” due to their general trust in people and possibility of reduced cognitive ability.<sup>11</sup> Referring to her study of the cognitive abilities of older Americans to process and store the influx of information provided by public service advertisements designed to inform them about consumer fraud, Professor D.C. Park testified before Congress that her empirical research suggests that “[w]ith age, we become slower at processing information; our memory becomes somewhat less effective; and our ability to take in a large quantity of information at one time and reason about it decreases.”<sup>12</sup>

True or not, criminals get the message: the elderly make uniquely gullible targets. As one convicted felon testified before Congress:

In the case of senior citizens, who in most cases, had their lives affected by having lived as children or younger adults through the Great Depression, the key is to work on the greed and insecurity caused by those times . . . because most senior citizens are more trusting of supposedly “caring” strangers, because they grew and

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9. KELLY D. JOHNSON, OFFICE OF CMTY. ORIENTED POLICING SERV., U.S. DEP’T OF JUSTICE, FINANCIAL CRIMES AGAINST THE ELDERLY 11, available at [http://www.popcenter.org/problems/pdfs/crimes\\_against\\_elderly.pdf](http://www.popcenter.org/problems/pdfs/crimes_against_elderly.pdf).

10. *Swindlers, Hucksters and Snake Oil Salesmen: Hype and Hope Marketing Anti-Aging Products to Seniors: Hearing Before the S. Spec. Comm. on Aging*, 107th Cong. 187–89 (2001) [hereinafter *Swindlers, Hucksters and Snake Oil Salesmen*] (statement of Dennis M. Lormel, Chief, FBI Financial Crimes Section).

11. Cynthia Ramnarace, *How Can We Protect Against Elder Abuse During a Down Economy?*, AARP BULL., July 1, 2009, available at [http://bulletin.aarp.org/yourworld/law/articles/how\\_can\\_we\\_protect\\_against\\_elder\\_abuse\\_during\\_a\\_down\\_economy\\_.html](http://bulletin.aarp.org/yourworld/law/articles/how_can_we_protect_against_elder_abuse_during_a_down_economy_.html).

12. *Old Scams-New Victims*, *supra* note 5, at 59 (statement of Denise C. Park, Ph.D.).

matured in less threatening times, they are incredibly easy to con out of everything they have.<sup>13</sup>

This perception may be reflected in the victimization statistics as well. In a mass prosecution of telemarketing companies soliciting charitable contributions in return for prizes, the Federal Trade Commission (FTC) found that eighty-five percent of a randomly selected group of victims were age sixty-five or older.<sup>14</sup> In another survey published by the FTC, eighty percent or more of consumer fraud victims of certain types of scams were age sixty-five or older.<sup>15</sup> Studies that focus on consumer fraud victimization report that anywhere from twenty to sixty percent of adult Americans (without separating prevalence across age) have reported being a victim, or attempted victim, of consumer fraud.<sup>16</sup>

Unfortunately, little data exists from which to ascertain accurately the prevalence of financial crimes perpetrated against the elderly. This is true for several reasons. First, the clearinghouses normally relied upon for the compilations of information on criminal conduct do not contain the data necessary for this analysis. The closest that the annually conducted National Crime Victimization Survey comes is a breakdown by age of victims of property crimes involving economic loss; it does not individualize instances of fraud from other offenses like theft or burglary.<sup>17</sup> The FBI's Uniform Crime Report, which receives data from over 17,000 U.S. law enforcement agencies, limits their collection to "murder and nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson . . . because they are the crimes most likely to be re-

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13. *Telescams Exposed: How Telemarketers Target the Elderly: Hearing Before the S. Spec. Comm. on Aging*, 104th Cong. 16 (1996) (statement of Edward Bruce Gould, Jr., convicted telemarketer).

14. *Telemarketing Fraud Against Older Americans*, FED. TRADE COMMISSION, <http://www.ftc.gov/reports/Fraud/fraudcon.shtm> (last visited Oct. 18, 2010).

15. *Activities Affecting Older Americans: January 1999–August 2001*, FED. TRADE COMMISSION, <http://web.archive.org/web/20080204073600/http://www.ftc.gov/os/2001/10/agingrpt.htm> (accessed via the Internet Archive Index) (last visited Oct. 19, 2010).

16. JOHNSON, *supra* note 9, at 8 (citing Richard M. Titus et al., *Victimization of Persons by Fraud*, 41 CRIME & DELINQ. 54, 54-58 (1995)).

17. U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2007 STATISTICAL TABLES 133 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus07.pdf>.

ported and most likely to occur with sufficient frequency to provide an adequate basis for comparison.”<sup>18</sup>

Even if the federal government collected such figures, the reliability of the data would be inherently suspect. Classification of financial crimes varies widely among local jurisdictions as do victim age classifications.<sup>19</sup> In addition, an elaborate fraud scheme creates investigative challenges for the local law enforcement agencies that generally function as the reporting agency, because they often involve “highly technical issues of disclosure and fraudulent misrepresentation [requiring] extensive fact-finding and background work that may take months to complete.”<sup>20</sup>

Simply put, the training and resources needed to investigate these crimes adequately do not exist at the local level. In a study delving into the problems faced by local law enforcement agencies investigating crimes committed over the Internet, data from the 700 largest police and sheriff’s departments in the United States revealed that these departments received very little training in such crimes and committed few resources to its development.<sup>21</sup> The authors stated that these issues “might be a result of resistance to change from historical crime fighting approaches . . . choosing instead to do what was customary.”<sup>22</sup> The study also found that significant issues of communication and corroboration existed among these agencies and especially with federal agencies.<sup>23</sup>

Fraud investigations often create difficult jurisdictional hurdles since offenders generally commit these crimes across state borders, and local departments lack the necessary information sharing resources.<sup>24</sup> In an article reviewing police response to the problem of identity theft, LAPD Sergeant Ed Dadisho explained:

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18. *UCR Frequently Asked Questions*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/ucr/ucr\\_general.html](http://www.fbi.gov/ucr/ucr_general.html) (last visited Oct. 18, 2010).

19. See JOHNSON, *supra* note 9, at 9.

20. LISA NERENBERG, NAT’L CTR. ON ELDER ABUSE, FORGOTTEN VICTIMS OF ELDER FINANCIAL CRIME AND ABUSE 10 (1999).

21. See Ronald G. Burns et al., *Assessing Law Enforcement Preparedness to Address Internet Fraud*, 32 J. CRIM. JUST. 477, 484 (2004) (noting that approximately eighteen percent of studied agencies believed their investigators were trained adequately, and about fifteen percent believed they possessed necessary resources).

22. *Id.* at 489.

23. See *id.* at 485 (noting that fifty-five percent of studied agencies effectively cooperated with federal law enforcement agencies).

24. JOHNSON, *supra* note 9; see also Burns et al., *supra* note 21.

Some of these investigations are difficult because they may involve jurisdiction issues. For example, the victim may live in one state, but the charge on the victim's account may have been committed in another state. Jurisdiction issues can be confusing for law enforcement agencies that are not familiar with identity theft law or do not have departmental procedures for receiving and investigating complaints of identity theft.<sup>25</sup>

Once investigated, several obstacles hinder successful prosecution, such as the availability of relevant documentation and the possibility that the victim, for the same reasons he was targeted in the first place, may not be a reliable witness.<sup>26</sup>

This is not to say, however, that federal law enforcement does not recognize that a problem exists. In his testimony before the Senate, FBI Financial Crimes Section Chief Dennis Lormel emphasized:

[T]he FBI has identified elder fraud . . . [among] the most insidious of all white collar crimes being perpetrated by today's modern and high tech con-man. The Internet, high speed dialers, mail drops, and computers are just some of the tools available to the fraudster to separate a victim from his money. Many elderly citizens rely on pensions, social security and life savings to support themselves. . . . The losses inflicted by these unscrupulous con-men and their organizations are both financially and emotionally devastating to these victims.<sup>27</sup>

In fact, numerous resources from various private and governmental agencies specifically seek to inform the elderly on how to protect themselves from scams and fraud schemes.<sup>28</sup> As for the general public, fraud and scam prevention tips are available in many convenient locations, such as websites for many major financial institutions, to assist consumers in protecting themselves against these schemes.<sup>29</sup> However, some question the effectiveness of the content of these sug-

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25. Ed Dadisho, *Identity Theft and the Police Response: The Problem*, 72 THE POLICE CHIEF, Jan. 2005, available at <http://policechiefmagazine.org> (follow "Archives Past Issue" hyperlink; then scroll down to Jan. 2005 issue).

26. NERENBERG, *supra* note 20, at 9.

27. *Swindlers, Hucksters and Snake Oil Salesmen*, *supra* note 10, at 187.

28. See, e.g., *Fraud Target: Senior Citizens*, *supra* note 4; see also AARP, *Fraud Prevention*, AARP ELDER WATCH, [http://www.aarpelderwatch.org/public/fraud\\_prevention.html](http://www.aarpelderwatch.org/public/fraud_prevention.html) (last visited Oct. 17, 2010) (listing and linking to monthly newsletters and warning sheets concerning scams targeting senior citizens).

29. See, e.g., *Chase Security Center*, CHASE.COM, [https://www.chase.com/ccp/index.jsp?pg\\_name=ccpmapp/privacy\\_security/protection/page/security\\_home](https://www.chase.com/ccp/index.jsp?pg_name=ccpmapp/privacy_security/protection/page/security_home) (last visited Oct. 18, 2010); see also *Boston Private Bank: Fraud Tips for Individuals*, BOSTON PRIVATE BANK & TR. COMPANY, [http://www.bostonprivatebank.com/fraud\\_indiv.cfm](http://www.bostonprivatebank.com/fraud_indiv.cfm) (last visited Oct. 18, 2010) (providing advice on avoiding fraud and identity theft).

gestions with regard to senior citizens due to differences in cognitive abilities of older individuals.<sup>30</sup>

In an attempt to keep up with the times, the FBI and the National White Collar Crime Center established a joint project in 2000 “to receive Internet related criminal complaints and to further research, develop, and refer the criminal complaints to federal, state, local, or international law enforcement and/or regulatory agencies for any investigation they deem to be appropriate.”<sup>31</sup> This collaboration, formerly known as the Internet Fraud Complaint Center and later renamed IC3, has published annual reports of their data since 2001.<sup>32</sup> Although the 2008 Annual Report notes a 33.1% increase in reporting of Internet crime complaints over 2007 (from 206,884 in 2007 to 275,284 in 2008), for an undisclosed reason they referred much fewer of these crimes to law enforcement (from 90,008 referrals in 2007 to 72,940 in 2008).<sup>33</sup> Also, although the report cautions against drawing conclusions about the “typical” victim, their data shows that complainants age forty and over suffer a substantially greater loss per referred complaint than younger complainants.<sup>34</sup> In aggregate, losses attributed to online fraud—at least those reported to the IC3—have increased substantially. For example, in 2004, IC3 reported a total loss of approximately \$68.14 million dollars, whereas in 2008, that number skyrocketed to \$265 million.<sup>35</sup> Admittedly, the IC3 Annual Report provides only a snapshot of the total incidence of Internet crimes: “This report does not represent all victims of Internet crime, or fraud in general, because it is derived solely from the people who filed a report with IC3.”<sup>36</sup> What it does show, however, is that the laws to combat these crimes—especially on the federal level—remain out-

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30. See *Old Scams-New Victims*, *supra* note 5, at 59–61 (statement of Denise C. Park, Ph.D.).

31. *About Us*, INTERNET CRIME COMPLAINT CTR., <http://www.ic3.gov/about/default.aspx> (last visited Oct. 17, 2010).

32. See *Annual Reports*, INTERNET CRIME COMPLAINT CTR., <http://www.ic3.gov/media/annualreports.aspx> (last visited Oct. 17, 2010).

33. INTERNET CRIME COMPLAINT CTR., NAT’L WHITE COLLAR CRIME CTR., 2008 INTERNET CRIME REPORT 2–3, available at [http://www.ic3.gov/media/annualreport/2008\\_IC3Report.pdf](http://www.ic3.gov/media/annualreport/2008_IC3Report.pdf) [hereinafter 2008 INTERNET CRIME REPORT].

34. *Id.* at 1, 9 (showing that only complainants over age forty averaged at least \$1000 per complaint).

35. INTERNET CRIME COMPLAINT CTR., NAT’L WHITE COLLAR CRIME CTR., 2009 INTERNET CRIME REPORT 4, available at [http://www.ic3.gov/media/annualreport/2009\\_IC3Report.pdf](http://www.ic3.gov/media/annualreport/2009_IC3Report.pdf).

36. 2008 INTERNET CRIME REPORT, *supra* note 33, at 3.

dated and fail to keep pace with the ever increasing problem of financial crimes perpetrated via the Internet.

The pervasiveness of financial crimes that target the elderly based on their perceived or actual vulnerability to such crimes remains unclear. However, it has been recognized as a problem serious enough to garner substantial attention from law enforcement and society in general, and subsequently, various legislative agencies. Before inspecting these legislative measures, one must review the purposes of punishment in the American legal system to accurately contextualize the need for statutes addressing these crimes.

### III. Applicable Theories of Punishment

Before examining the laws in place to combat these crimes, it is necessary to determine whether enhanced penalties even have the desired effects. The primary goals of criminal sentencing are punishing the offender for violating societal norms of conduct (retributive theory) and eliminating future crime by deterring the prospective offender, rehabilitating the offender, or by making an example of him or her to others contemplating similar acts (deterrence theory).<sup>37</sup>

The retributive, or “just-deserts,” theory of punishment justifies sanctions against the offender congruent with the amount of harm perpetrated upon society based on the severity of the offense.<sup>38</sup> Recent revisions to the American Law Institute’s Model Penal Code place an emphasis on this school of thought, “calling for a renewed commitment to proportionality based on the gravity of offenses, the ‘blameworthiness’ of offenders, and the ‘harms done to crime victims.’”<sup>39</sup> As prominent legal theorist Michael Moore articulated, “Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it.

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37. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008); see also 24 C.J.S. *Criminal Law* § 1997 (2010).

38. See, e.g., Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 454, 454 (1997).

39. Anders Walker, *American Oresteia: Herbert Wechsler, the Model Penal Code, and the Uses of Revenge*, 2009 WIS. L. REV. 1017, 1018 (2009) (citing MODEL PENAL CODE: SENTENCING § 1.02(2) (Tentative Draft No. 1, 2007)).

Moral culpability ('desert') is in such a view both a sufficient as well as a necessary condition of liability to punitive sanctions."<sup>40</sup>

Enhanced penalties under hate crime or similar statutes, when viewed through the "just-deserts" theory of punishment, face continued criticism on several fronts, the substances of which are compelling but beyond the scope of this Note.<sup>41</sup> Additionally, as it determines penalty based upon the severity of the violation of societal norms, this perspective is unique in that one would assume that these norms would be reflected in the representational nature of the American legislative system, thus accurate. Perception rather than reality, however, often drives politicians and the public and, consequently, public policy.<sup>42</sup> One study found moderate support for the notion that the public believes that legislators should take into account fear of crime when considering sentencing and correctional policy decisions.<sup>43</sup> This consistently creates frustration among criminologists and social scientists:

The problem is that, although academics appreciate the complexity of rational choice theory in its contemporary form, policy makers generally do not. Instead, the overall message from political pundits has been disturbingly homogeneous in its simplicity since the early 1970s: The "crime problem" in this country is the result of chronic leniency on the part of the criminal justice system. In turn, policy makers from both sides of the political spectrum have consistently embraced policies that crank up sentences for more types of offenses (especially drug offenses) and for more types of offenders (especially nonviolent and youthful offenders) under the rubric of concern over public safety.<sup>44</sup>

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40. Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 181-82 (Ferdinand Schoeman ed., Cambridge University Press 1987).

41. See Marc L. Fleischauer, *Teeth for a Paper Tiger: A Proposal to Add Enforceability to Florida's Hate Crimes Act*, 17 FLA. ST. U. L. REV. 697, 707-10 (1990); see also Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 355-57 (1991). See generally Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081 (2004) (providing a detailed examination of the justifications for and arguments against hate and bias crime legislation in relation to an offender's moral culpability).

42. See Brian S. MacNamara, *New York's Hate Crimes Act of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation*, 66 ALB. L. REV. 519, 530 (2003).

43. Carrie L. Cook & Jodi Lane, *The Place of Public Fear in Sentencing and Correctional Policy*, 37 J. CRIM. JUST. 586, 587-90 (2009).

44. Travis C. Pratt, *Rational Choice Theory, Crime Control Policy, and Criminological Relevance*, 7 CRIMINOLOGY & PUB. POLICY 43, 43-44 (2008).

As this statement references, the retributive theory has a partner where justification for punishment is concerned, alternatively called the “Rational Choice Theory,” “utilitarian theory of punishment,” or, more simply, “deterrence.” This theory of punishment focuses on general deterrence (which looks at the ability of the punishment to send a message to others that the criminal act is not worth the price to be paid) and specific deterrence (which targets the individual defendant).<sup>45</sup> This goal of deterrence similarly has been echoed by the United States Supreme Court on several occasions.<sup>46</sup> Additionally, the United States Code codified it as a purpose of federal sentencing.<sup>47</sup>

The history of the theory of deterrence dates back to the Middle Ages and feudalism, but the more modern constructions find their basis in sociology and economics in the Rational Choice Theory.<sup>48</sup> Under this theory, the potential offender makes a rational calculation of whether the risk of legal punishment outweighs the potential benefit of the crime, and if it does, that person would be deterred from committing the unlawful act.<sup>49</sup> Thus, a prospective offender would note the criminal sanctions available against him, possibly considering those levied against him in the past, and determine whether the chances of getting caught and the reward of successful completion warrant the effort. Sociological research on the effectiveness of this model yields mixed results.<sup>50</sup> Some studies conclude that offenders consider the benefits of the crime but fail to incorporate the perceived probability of sanctions in their decision-making.<sup>51</sup> One study suggests that not only the likelihood of criminal prosecution but also the

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45. Kent Greenawalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1286–87 (Joshua Dressler ed., 2d ed. 2002).

46. See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008); see also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (describing retribution and deterrence as the traditional aims of punishment).

47. 18 U.S.C. § 3553(a)(2)(B) (2006).

48. Ronald L. Akers, *Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken*, 81 J. CRIM. L. & CRIMINOLOGY 653, 654 (1990).

49. *Id.*

50. See Travis C. Pratt et al., *The Empirical Status of Deterrence Theory: A Meta-Analysis*, in TAKING STOCK: THE STATUS OF CRIMINOLOGICAL THEORY 367, 367–96 (Francis T. Cullen et al. eds., 2006) (providing an overview of the methods and conclusions of many empirical studies of the effectiveness of increased sanctions on criminal conduct).

51. Irving Piliavin et al., *Crime, Deterrence, and Rational Choice*, 51 AM. SOC. REV. 101, 117 (1986) (concluding that for persons with a higher risk of formal sanction, “perceptions of the risk of both formal and personal sanctions fail to influence [their] decisions to violate the law”).

potential severity of that punishment plays an integral role in the decision.<sup>52</sup>

Within the studies focusing on white-collar crime, however, researchers posit that these offenders are more susceptible to effective deterrence from criminal sanctions due to the belief that they are more rational actors with more to lose than one who engages in street crime.<sup>53</sup> This assumes, of course, that the potential actors know ahead of time that their criminal actions likely will result in some punishment. On this point, a study of data collected by the National White Collar Crime Center addressed peoples' perceptions of the severity of sanctions for different crimes, ranging from violent street-level crimes to white-collar crimes, such as fraud.<sup>54</sup> Interestingly, this study found that persons believed to have the most opportunity to commit white-collar crime "perceived there to be less certainty and severity of punishment for white collar offenses than street crimes."<sup>55</sup>

A product of the emergence of the Internet, cyber crime arises as a relatively new problem that only recently grabbed the attention of legislators, so there simply may not be enough information, as of yet, to determine the effect of harsh penalties on these offenders. An article examining the role of the Patriot Act's Cyber Security provisions, which primarily focus on anti-terrorism efforts, hypothesized that "[o]ne explanation for the unabated increase in computer crime is that not enough time has passed to see the effects of deterrence on computer criminals. Essentially, it is unfair to assess the success or failure of substantial penalties until a generation has matured under them."<sup>56</sup>

The study of the deterrent effect of harsh penalties remains difficult. Although qualitative research (involving interviews with offenders on their decision-making process) works effectively to cull the sought information, performing such research in a statistically signifi-

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52. Steven Klepper & Daniel Nagin, *Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited*, 27 *CRIMINOLOGY* 721, 722 (1989) (concluding that, at least in the context of tax noncompliance among middle-aged administrators, severity of punishment and likelihood of prosecution played an important role in their decision to commit the offense).

53. See Michael L. Benson & Francis T. Cullen, *The Special Sensitivity of White Collar Offenders to Prison: A Critique and Research Agenda*, 16 *J. CRIM. JUST.* 207, 207-15 (1988); John Braithwaite, *White Collar Crime*, 11 *ANN. REV. SOC.* 1, 16 (1985).

54. Andrea Schoepfer et al., *Do Perceptions of Punishment Vary Between White-Collar and Street Crimes?*, 35 *J. CRIM. JUST.* 151, 155 (2007).

55. *Id.* at 160.

56. Reid Skibell, *Cybercrimes & Misdemeanors: A Reevaluation of the Computer Fraud and Abuse Act*, 18 *BERKELEY TECH. L.J.* 909, 936 (2003).

cant way across the nation would be prohibitively time- and resource-consuming.<sup>57</sup> Conversely, looking at pure statistics (i.e., crime rates), though easier to obtain and applicable to much larger populations, can also be misleading, since they fail to distinguish details about the offender's decision-making process.<sup>58</sup> One can note a correlation between the enacting of certain harsh sentences and a decrease in relevant crime, but the factors that led to the change never would be conclusively known by such arms-length research. Thus, the question remains whether the promulgation of strict enforcement and heavy-handed punishment for crime acts as an effective deterrent. However, the research suggests that these measures may be more successful among prospective white-collar offenders, especially if the possible consequences are made known to the public in no uncertain terms.<sup>59</sup>

Regardless of the theory of punishment applied, enhanced penalties for crimes that society considers especially offensive exist as clear evidence that these theories carry weight among the public and legislators alike. Furthermore, since it appears that society—or the FBI at least—is prepared to recognize crime against the elderly as one of “the most insidious” white-collar crimes perpetrated today,<sup>60</sup> one might assume that these enhanced penalties are already in force. Strangely enough, however, in most cases, the present state of legislation fails to apply these principles to this ever-increasing segment of these crimes.

#### IV. Current Laws and Regulations

One might suppose that punishment for financial crimes in which offenders specifically target the elderly due to their perceived

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57. Richard Moran, *Bringing Rational Choice Theory Back to Reality*, 86 J. CRIM. L. & CRIMINOLOGY 1147, 1149–50 (1996).

58. Andrew E. Taslitz, *The New Data: Over-Representation of Minorities in the Criminal Justice System*, 66 LAW & CONTEMP. PROBS. 1, 5 (2003) (stating that both qualitative and quantitative statistics are needed to assess accurately the trend).

59. See Schoepfer et al., *supra* note 54, at 160. “For example, the data received that those with greater education and income perceived there to be less certainty and severity of punishment for white-collar offenses than street crimes. This suggested that those most likely to have access to white-collar crime opportunities believed there was little chance of getting caught and receiving a severe penalty.” *Id.* See generally Benson & Cullen, *supra* note 53, at 207 (stating the generally held theory that persons likely to commit white-collar crimes suffer more as a result of imprisonment).

60. *Swindlers, Hucksters and Snake Oil Salesman*, *supra* note 10, at 190 (statement of Dennis M. Lormel, Chief, FBI Financial Crimes Section).

vulnerability would be included under the various federal and state laws often referred to as “hate” or “bias” crimes; however, this is rarely the case.<sup>61</sup> In actuality, the majority of the penalty enhancements that apply in these situations (including the federal statutes) are free-standing laws enacted separately from those considered hate or bias crimes.<sup>62</sup> This section discusses hate or bias sentencing enhancement provisions at the federal and state level and examines their applicability to financial crimes specifically targeting the elderly. Then, those free-standing or supplemental statutes that exist will be surveyed. Finally, the actual implementation of these statutes in practice—where the data is available—will be examined to determine their genuine use within the criminal justice system.

In 1994, Congress passed the Hate Crimes Sentencing Enhancement Act, which requires the United States Sentencing Commission (“USSC”) to increase penalties for “crimes in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.”<sup>63</sup> Although the text of the statute clearly applies this sentence enhancement to both property and violent crimes, the elderly are conspicuously absent from the protected classes.<sup>64</sup>

Similarly, as of 2001, only thirteen of the forty-five states with legislation enhancing penalties for “bias” or “hate” crimes included age as one of the protected classes of victims.<sup>65</sup> Most of the protections in these state level hate crime provisions, however, are narrowed further by limitations that only apply the enhanced penalties to certain, specifically delineated offenses, nearly always violent crimes or

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61. *Anti-Defamation League State Hate Crime Statutory Provisions*, ANTI-DEFAMATION LEAGUE, [http://www.adl.org/99hatecrime/state\\_hate\\_crime\\_laws.pdf](http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf) (last visited Oct. 18, 2010). In 2001, only thirteen of the forty-five states that had legislation enhancing penalties for “bias” or “hate” crimes included age as one of the protected classes of victims. *Id.*

62. *See, e.g.*, 18 U.S.C. § 2326 (2006); MD. CODE ANN. CRIM. LAW § 8-801 (c)(1)-(2) (LexisNexis 2002); MO. REV. STAT. § 570.145 (2010); N.H. REV. STAT. ANN. § 651:6(L) (2007).

63. Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003(a), 108 Stat. 1796, 2096 (1994).

64. *See id.*

65. *See ANTI-DEFAMATION LEAGUE, supra* note 61.

crimes involving damage to property, such as vandalism.<sup>66</sup> For example, the District of Columbia mandates an enhanced penalty for crimes motivated by the age of the victim; however, the statute only encompasses the acts or attempted acts of “arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry.”<sup>67</sup> Louisiana similarly limits which offenses apply to its hate crime penalty-enhancement provision.<sup>68</sup>

Even where the statute “covers” inherently violent crimes against the elderly, these rarely achieve “hate crime” classification. For example, Iowa reported that they prosecuted no “hate crimes” against the elderly in 2007.<sup>69</sup> Additionally, the Office of the Florida Attorney General divulged similar statistics for 2008.<sup>70</sup>

Although limited, some exceptions to this rule do exist. Vermont has perhaps the widest-reaching hate crime laws, providing that any “person who commits, causes to be committed or attempts to commit any crime and whose conduct is maliciously motivated by the victim’s actual or perceived race, color, religion, national origin, sex, ancestry, age, [or] service in the armed forces of the United States . . .” faces enhanced penalties.<sup>71</sup> New Mexico’s hate crime statute, enacted in 2003, provides for enhanced penalties upon the “commission of a crime with the intent to commit the crime because of the actual or perceived race, religion, color, national origin, ancestry, age, handicapped

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66. See, e.g., IOWA CODE §§ 729A.1-A.2, 708.2C (2010); see also D.C. CODE §§ 22-3701-3703 (2010); FLA. STAT. § 775.085(1)(b)(2) (2010); N.Y. PENAL LAW § 485.05 (McKinney 2010).

67. D.C. CODE § 22-3701(2) (2010).

68. LA. REV. STAT. ANN. § 14:107.2 (2009) (“First or second degree murder; manslaughter; battery; aggravated battery; second degree battery; aggravated assault with a firearm; terrorizing; mingling harmful substances; simple, forcible, or aggravated rape; sexual battery, second degree sexual battery; oral sexual battery; carnal knowledge of a juvenile; indecent behavior with juveniles; molestation of a juvenile; simple, second degree, or aggravated kidnapping; simple or aggravated arson; placing combustible materials; communicating of false information of planned arson; simple or aggravated criminal damage to property; contamination of water supplies; simple or aggravated burglary; criminal trespass; simple, first degree, or armed robbery; purse snatching; extortion; theft; desecration of graves; institutional vandalism; or assault by drive-by shooting.”).

69. IOWA DEP’T OF PUB. SAFETY, 2007 IOWA UNIFORM CRIME REPORT 110, available at [http://www.dps.state.ia.us/commis/ucr/2007/2007\\_UCR\\_Publication.pdf](http://www.dps.state.ia.us/commis/ucr/2007/2007_UCR_Publication.pdf).

70. OFFICE OF THE FLA. ATTORNEY GEN., HATE CRIMES IN FLORIDA 8, available at [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7X3MY8/\\$file/2008HateCrimesReport.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7X3MY8/$file/2008HateCrimesReport.pdf).

71. VT. STAT. ANN. tit.13, § 1455 (2010).

status, gender, sexual orientation or gender identity of the victim, whether or not the offender's belief or perception was correct . . . ."<sup>72</sup> These types of broad provisions, however, remain rare.

Despite the fact that the federal and majority of state systems leave the elderly as a class of victims unprotected by hate or bias crime penalty enhancement statutes, many systems have made strides towards closing these gaps through separate and distinct laws that address the problem of financial crimes against the elderly.<sup>73</sup> The majority of these laws, however, either remain unnecessarily narrow or too antiquated in the age of the Internet and instant communication.

On the federal level, Congress made a valiant attempt to provide a supplemental provision designed to protect the elderly against some fraud schemes, but the burgeoning influx of crimes that reach their intended target via the Internet rendered it utterly ineffective.<sup>74</sup> Offenders face enhanced penalties if they either *target* a person over the age of fifty-five or *victimize* a group of ten or more persons over the age of fifty-five through several different fraud-related offenses but only if committed in connection with a telemarketing scheme.<sup>75</sup> Unfortunately, the statute very narrowly defines "telemarketing" as necessarily involving the "use of 1 or more interstate telephone calls" in the commission of the crime.<sup>76</sup> This focused interpretation results in the exclusion of fraudulent schemes perpetrated by mail, Internet, or other means.

The United States Sentencing Commission (USSC) similarly promulgated a sentencing enhancement that appears on its face to provide an enhanced penalty for criminals that target the elderly for their fraud schemes; however, it also falls short of the much-needed protection because of an unnecessarily focused definition.<sup>77</sup> In that provision, penalty enhancement by a specific amount occurs only "if the defendant knew or should have known that a victim of the offense

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72. N.M. STAT. ANN. § 31-18B-2 (2010).

73. See, e.g., 18 U.S.C. § 2326 (2006); MD. CODE ANN. CRIM. LAW § 8-801 (c)(1)-(2) (LexisNexis 2002); MO. REV. STAT. § 570.145 (2010); N.H. REV. STAT. ANN. § 651:6(L) (2007).

74. 18 U.S.C. § 2326 (2006) (providing enhanced penalties for crimes committed against or targeting victims over fifty-five years of age but narrowly defining the means by which the crime is committed).

75. *Id.*

76. 18 U.S.C. § 2325 (2006).

77. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (2009).

was a vulnerable victim . . . .”<sup>78</sup> However, the USSC defines a “vulnerable victim” very narrowly and provides the following examples for when to apply the enhancement:

The adjustment would apply, for example, in a fraud case in which the defendant marketed an ineffective cancer cure or in a robbery in which the defendant selected a handicapped victim. But it would not apply in a case in which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile.<sup>79</sup>

The fraudulent securities scenario put forth by the USSC, of course, lies closer to the fraud addressed in this Note and the enhancement may not apply. There is a circuit split on the application of this provision; the Tenth Circuit holds that, for purposes of sentencing under this provision, elderly status cannot be equated as per se vulnerability, whereas other circuits allow the application of this provision to fraud that targets elderly victims without any showing of special vulnerability.<sup>80</sup> The ambiguous nature of this “vulnerable victim” class has been recognized for nearly two decades, yet no solutions have been presented or implemented.<sup>81</sup>

In any case, the federal penalty enhancement statutes discussed above are utilized very rarely. The USSC guideline for penalty enhancement due to a vulnerable victim has been applied in less than 0.4% of federal sentencings since 2000.<sup>82</sup> As for prosecutions of defendants convicted under 18 U.S.C. § 2326 (Enhanced Penalties for Te-

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78. *Id.*

79. *Id.* § 3A1.1, Application Note 2.

80. *See, e.g.,* United States v. Stewart, 33 F.3d 764, 770-71 (7th Cir. 1994) (holding that for the purpose of sentencing enhancement, some victims are particularly vulnerable to criminal conduct because of their age, especially those elderly clients facing physical or mental decline and their own mortality).

81. *See* John Garry, Note, “Why Me?”: Application and Misapplication of § 3A1.1, *The “Vulnerable” Victim Enhancement of the Federal Sentencing Guidelines*, 79 CORNELL L. REV. 143 (1993), for an early discussion of the structure, goals, application, and difficulties in the “vulnerable victim” provision.

82. *See* U.S. SENTENCING COMM’N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2000); U.S. SENTENCING COMM’N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2001); U.S. SENTENCING COMM’N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2002); U.S. SENTENCING COMM’N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2003); U.S. SENTENCING COMM’N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2004); U.S. SENTENCING COMM’N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2005); U.S. SENTENCING COMM’N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2006); U.S. SENTENCING COMM’N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2007); U.S. SENTENCING COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2008).

lemarketing Fraud), only ten can lay claim to that honor since 2000. Furthermore, it is unknown how many of the ten had their penalties enhanced under 18 U.S.C. § 2326(2), which concerns targets over the age of fifty-five.<sup>83</sup>

Although state statutes generally fail to provide penalty enhancements for financial crimes targeting the elderly within their bias or hate crime provisions, several states enacted separate statutes to perform this function.<sup>84</sup> The vast majority of these statutes specifically direct provisions towards those who take advantage of their positions of trust with the elderly victim to perpetrate the offense, which neglects crimes perpetrated by strangers.<sup>85</sup> In fact, as of 2009, all fifty states and the District of Columbia possess laws that directly combat crimes of abuse, neglect, and financial exploitation of the elderly by persons in a position of trust.<sup>86</sup>

Some states do provide aggravated penalties for financial exploitation of the elderly by strangers. For example, New Hampshire provides for greater penalties when the court finds that the offender “intended to take advantage of the victim’s age or a physical or mental condition that impaired the victim’s ability to manage his or her property or financial resources or to protect his or her rights or interests . . . .”<sup>87</sup> Missouri instituted progressive penalties for any fraud offense committed against a person age sixty or older, beginning with a Class A Misdemeanor, depending upon the amount of the fraud.<sup>88</sup> Similarly, Maryland provides for a distinct offense, with increased penalties,

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83. BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/fjsrc/> (follow “U.S. Criminal Code: Choose a Statistic: Outcomes for defendants in cases closed” hyperlink; then select year and 18 U.S.C. § 2326) (last visited Oct. 3, 2010).

84. See *Hate Crimes Laws Around the Country*, PARTNERS AGAINST HATE, [http://www.partnersagainsthate.org/hate\\_response\\_database/laws.html](http://www.partnersagainsthate.org/hate_response_database/laws.html) (last visited Oct. 3, 2010) (offering a searchable database of each state’s penalty enhancement provisions for crimes based on hate, bias, or prejudice).

85. See, e.g., 720 ILL. COMP. STAT. § 5/16-1.3(a) (2003) (“A person commits the offense of financial exploitation of an elderly person or a person with a disability when he or she stands in a position of trust or confidence with the elderly person . . . .”); MINN. STAT. § 609.2335(1) (2009) (“Whoever does any of the following acts commits the crime of financial exploitation . . . in breach of a fiduciary obligation.”).

86. AM. PROB. & PAROLE ASS’N, OFFICE OF CRIME VICTIM SERV., ELDER ABUSE, NEGLECT, AND EXPLOITATION STATE STATUTES, [http://www.appanet.org/eweb/Training/IREA/assets/EA\\_Neglect.pdf](http://www.appanet.org/eweb/Training/IREA/assets/EA_Neglect.pdf) (last visited Oct. 19, 2010).

87. N.H. REV. STAT. ANN. § 651:6(c) (2007).

88. MO. REV. STAT. § 570.145 (2010).

for a fraud perpetrated against an individual at least sixty-eight years old.<sup>89</sup>

Unfortunately, these state level penalties, while commendable, remain scattered and piecemeal. Also, specific concern exists for the previously highlighted difficulties that these local agencies face when investigating such crimes. Thus, this problem requires an integrated investigatory and prosecutorial scheme to combat these particular financial crimes against the elderly.

## V. Resolution

Even though financial crimes that specifically target the elderly due to their perceived or actual vulnerability are becoming more prevalent and are acknowledged as such by law enforcement, the laws currently in place at both the state and federal level remain inadequate. On the federal level, these laws are insufficient and outdated due to their narrow focus on the process by which the perpetrators communicate with their intended victims. Additionally, even when an offense triggers a penalty enhancement, the victim may choose not to report the crime, the report may be filed with local law enforcement who fail to refer the matter to federal authorities, or the statute fails to be utilized fully. On the state level, these laws are deficient because the local law enforcement agencies either face insurmountable jurisdictional hurdles in their investigations of such crimes or lack the resources and training to respond effectively to these intricately devised and complex crimes.

Based upon the relevant theories of criminal punishment, penalty enhancement statutes for these specific offenses appear warranted. From the retribution perspective and as reflected in current laws providing for such when the elderly are targeted for violent crimes or crimes perpetrated against them by persons of trust due to their vulnerability, society views the perpetrators as inflicting a greater harm on average because the perpetrators choose victims less able to defend themselves; thus, their crimes justify greater punishment. The deterrence theory posits that potential offenders would think twice about targeting the elderly if harsher punishment existed.

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89. MD. CODE ANN. CRIM. LAW § 8-801(c)(1)-(2) (LexisNexis 2002) (providing for a sentence of up to fifteen years and/or a fine of up to \$10,000 when \$500 or greater is obtained).

The resolution, then, must be two-fold. First, the investigatory scheme currently utilized within state and federal agencies must be addressed. This is important because, generally, the investigatory body determines the applicable statutes once brought for prosecution.<sup>90</sup> As the investigation of financial crimes targeting the elderly via the Internet is essentially the same as other Internet-based fraud schemes, this will be examined in the larger context. Second, these statutes must be reformulated in a way to encompass financial crimes targeting the elderly in the modern age.

The most difficult and time-consuming option available to combat this scourge would involve reformation at the state level. As noted, local law enforcement agencies frequently run into jurisdictional barriers when pursuing an investigation that runs across state lines. These jurisdictional issues are “much greater for enforcement involving evidence from outside the United States.”<sup>91</sup> Also, the lack of training and resources, the current lack of communication among agencies, and the aversion to change that is common in local law enforcement agencies bodes poorly for effective implementation at the local level.<sup>92</sup>

In order to create uniformity in penalty-enhancement statutes for financial crimes targeting the elderly and to implement them effectively, changes must occur at the federal level. While the initial reaction of any crime victim is to call their local police department to report the crime (when they choose to report the crime), the relevant federal agencies possess concurrent jurisdiction. For example, 28 U.S.C. § 1030 authorizes the United States Secret Service to investigate computer fraud, including “advance-fee fraud,”<sup>93</sup> such as Mrs. M’s victimization by Sandy in the sweepstakes scheme. The FBI evaluates these crimes and several other cyber crimes and possesses authority to investigate them.<sup>94</sup> Another weapon in the federal government’s ar-

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90. See, e.g., *Senior Fraud*, OFFICE OF THE INDIANA ATT’Y GEN., <http://www.in.gov/attorneygeneral/2389.htm> (last visited Oct. 19, 2010).

91. *Internet Crime*, WASHINGTON STATE OFFICE OF THE ATT’Y GEN., <http://www.atg.wa.gov/page.aspx?id=19150> (last visited Oct. 19, 2010).

92. Burns et al., *supra* note 21, at 489.

93. 28 U.S.C. § 1030(d)(1) (2006); *Criminal Investigations*, U.S. SECRET SERVICE, <http://www.secretservice.gov/criminal.shtml> (last visited Oct. 19, 2010).

94. *What We Investigate*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/hq.htm> (last visited Aug. 24, 2010) (listing computer intrusions, online predators, privacy/intellectual property theft, and Internet fraud as cyber crimes that the agency investigates).

senal is the Internet Crime Complaint Center (IC3), which serves as a federally administered clearinghouse for the reporting of Internet crime.<sup>95</sup> These cases are evaluated and (occasionally) referred to law enforcement.<sup>96</sup>

The question remains whether local law enforcement agencies should be investigating these crimes at all. The argument for federal agencies taking the reins in all such investigations is obvious: they have superior training, resources, and generally face no jurisdictional hurdles.<sup>97</sup> The primary argument against is one of practicality: federal agencies have fewer people in the field to investigate thoroughly and far fewer prosecutors to try the cases.<sup>98</sup> Is there a compromise that can be achieved here? This Note proposes that there is. As the data provided by the IC3 shows, many of these crimes do not involve large sums of money. In fact, more than half of all Internet crimes reported to the IC3 involve a loss under \$1000.<sup>99</sup> If a threshold dollar amount (such as \$1000) were proposed, not as a per se requirement, but as a suggestion to local authorities to refer the case federally, low-level schemes could continue to be investigated and prosecuted accordingly at the local level while those involving higher losses could utilize the greater resources of the federal agencies.

Although not a perfect system, it does have some advantages. First, the victims can still call their local police initially; they would merely be referred to the nearest federal agency field office to report the crime, if necessary. Second, it would be clear at the outset whether the victim's loss meets the threshold and suggests referral, as these crimes typically are not continuing crimes likely to aggregate greater loss over time against a particular victim.<sup>100</sup> Third, and perhaps most

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95. *File a Complaint*, INTERNET CRIME COMPLAINT CTR., <http://www.ic3.gov/complaint/default.aspx> (last visited Oct. 19, 2010).

96. *Id.*

97. See Burns et al., *supra* note 21, at 487 (noting the existence of a "difference between state and federal laws, the multi-state jurisdiction of federal law enforcement agencies, and the greater degree of resources available at the federal level").

98. See *id.* "Given the limited number of federal law enforcement agents, however, and the current and increasing frequency of Internet fraud complaints, one could argue that federal agencies need to hire a significant number of new agents if they are to be the primary group fighting internet fraud." *Id.*

99. 2008 INTERNET CRIME REPORT, *supra* note 33, at 1 (showing that the median loss to fraud reported to IC3 was \$931).

100. See *Internet Crime Schemes*, INTERNET CRIME COMPLAINT CTR., <http://www.ic3.gov/crimeschemes.aspx> (last visited Oct. 19, 2010) (showing that

important over the long run in the actual apprehension of these offenders, is improved data collection and analysis. If the IC3 compiled data on every Internet fraud with a loss over \$1000 as opposed to the spotty reporting that occurs now, patterns undoubtedly would emerge, and investigators could make those pertinent connections more easily. Very likely, this data also would identify the pervasiveness of targeting older Americans in these schemes through categorization of victim characteristics. The threshold dollar amount, obviously, would need to be subject to examination and adjustment depending on the actual resources that could be directed to the problem, and it is noted that the investigatory shifting recommended here not only would include Internet fraud against the elderly but all types of Internet fraud. However, this appears unavoidable at this time, especially considering the differing age classifications and criminal offense categories of the many law enforcement jurisdictions. Having determined that federal agencies investigate more substantial losses, the next step requires turning to the federal sentencing provisions needed to appropriately punish or deter the offenders from intentionally targeting the elderly in their fraud schemes.

Two distinct options present themselves. First, the federal Hate Crimes Sentencing Act could be amended to include the elderly as one of the protected classes of people.<sup>101</sup> As this statute does not delineate a “closed-world” of offenses, the amended version would encompass several crimes targeting the elderly and simultaneously eliminate the need for specific enforcement provisions, such as the telemarketing fraud penalty.<sup>102</sup>

This solution does present some issues, especially in practice. In order to sentence an offender under this Act, the prosecution must merely show that the offender “intentionally selected” the victim and offers no further limitations. One envisions a slippery slope argument against the use of this provision with the assertion that most criminals take into account their target’s vulnerability to the crime in any mischievous endeavor. This argument addresses the danger of overzealous prosecutors seeking to obtain higher penalties for a myriad of

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most perpetrators only collect money from victims once, such as with parcel courier email schemes).

101. Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003(a), 108 Stat. 1796, 2096 (1994).

102. 28 U.S.C. § 2326 (2006).

crimes; however, if the statute added only the elderly to its classes of protected victims, it seems unlikely that this type of prosecutorial abuse would arise.

Another issue that amending the Hate Crimes Sentencing Act presents would be external in nature. Recently, President Obama signed into law the Matthew Shepard Act, which expanded the federal hate crimes provision to include crimes committed against another based on their actual or perceived gender, sexual orientation, or gender identity.<sup>103</sup> This bill faced strenuous opposition, much of it rehashing familiar arguments against hate and bias crime legislation and its constitutionality.<sup>104</sup> Additionally, a valid argument exists that the expansion of the hate crime provision to protect classes of victims not the target of animus based on prejudice, but rather on vulnerability, exceeds the goals of the provision in the first place.<sup>105</sup>

The second and more preferable option would provide for a per se penalty enhancement within the sentencing guidelines currently under United States Sentencing Guidelines § 3A1.1 when an individual over a specified age is specifically targeted rather than leaving it to courts to create a definition for a “vulnerable victim.”<sup>106</sup>

This approach advances several benefits not present in the previous option. First, it resolves the current circuit split regarding application of the guideline and further provides a bright-line rule for courts to follow. Second, the baseline arguments of First Amendment

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103. See Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701–4713, 123 Stat. 2190, 2835–44 (2009).

104. See, e.g., Nat Hentoff, *Hate Crime Bill Goes Against the Constitution*, REALCLEARPOLITICS (Aug. 1, 2009), [http://www.realclearpolitics.com/articles/2009/08/01/hate\\_crime\\_bill\\_goes\\_against\\_the\\_constitution\\_97727.html](http://www.realclearpolitics.com/articles/2009/08/01/hate_crime_bill_goes_against_the_constitution_97727.html) (arguing that the bill violates the Constitution’s Fourteenth Amendment protections by creating a specialized collective class of victims); see also Ben Pershing, *Capitol Briefing: Hate Crimes Bill Set to Become Law*, WASH. POST (Oct. 22, 2009, 5:27 PM), [http://voices.washingtonpost.com/capitol-briefing/2009/10/senate\\_approves\\_hate\\_crimes\\_me.html](http://voices.washingtonpost.com/capitol-briefing/2009/10/senate_approves_hate_crimes_me.html) (“Social conservatives argued that the hate crimes bill was in violation of the First Amendment, and a step toward a larger gay-rights agenda they strongly oppose.”).

105. See Frederick M. Lawrence, Commentary, *Federal Bias Crime Law Symposium*, 80 B.U. L. REV. 1437, 1437 (2000) (“In expanding the definition, we may be including within the rubric of ‘bias crimes’ criminal behavior that does not truly fit the nature of those crimes.”). But see Jordan B. Woods, *Taking the “Hate” Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes*, 56 UCLA L. REV. 489, 540 (2008) (arguing that crimes of bias based on opportunity and those based on prejudice, while categorically different, both justify enhanced penalties).

106. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (2009).

free-speech violations presented by opponents of hate and bias crime penalty enhancements would be moot, as the penalty enhancements would not be based on prejudice. Third, passage of such a bill likely would not face stiff resistance from any political party since opposing a bill created to protect the elderly is considered political suicide.<sup>107</sup> Finally, and most important from an implementation perspective, a sentence enhancement requires no further training or knowledge within law enforcement; the § 3A1.1(b) enhancement applies if the trier of fact (or the court in the case of a plea) finds, beyond a reasonable doubt, that the defendant knew or should have known that the victim was over the threshold age and thus a “vulnerable victim.”<sup>108</sup>

The unfortunate difficulty from this change would not arise from its application or implementation, but more likely from vocal special interest groups or senior advocates who would oppose the categorization of someone over a certain age as particularly vulnerable. The danger inherent in all threshold matters of this sort remains that context will not be addressed. As one author eloquently put it, “generic inquiry into both sides of the analysis (victim and conduct) cannot substitute for the particularized inquiry into victim, conduct and context which consistent application of the enhancement requires.”<sup>109</sup>

Although it seems that traditional justifications for enhanced penalties continue to gain acceptance among the public, legislature, and courts alike and that these justifications clearly apply to crimes that target the elderly due to their actual or perceived vulnerability to financial crimes, the current status of penalty enhancement provisions in the United States remains fatally flawed. To transform the status quo successfully, it is essential that modifications be made in both the investigative and prosecutorial stages. Effective application of these changes, however, depends upon enforcement by federal agencies instead of local police, since the federal investigative agencies possess the requisite resources and the unitary jurisdiction necessary to combat this unique criminal conduct.

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107. Margot Hornblower, Steven Holms & Michael Riley, *AARP's Gray Power*, TIME, Jan. 4, 1988, available at <http://www.time.com/time/magazine/article/0,9171,966379,00.html>.

108. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (2009).

109. Garry, *supra* note 81, at 176.

## VI. Conclusion

Empirical data show that the frequency of financial crimes, especially those committed via the Internet and across jurisdictions, continues to rise. For various reasons, the elderly are distinctively vulnerable as targets for these crimes, and the current laws in place simply are inadequate if one adheres to traditional theories of retributive and deterrent punishment.

Although a few states provide penalty enhancements for financial exploitation of the elderly by strangers, either through bias or hate crime statutes or by other free-standing laws, these provisions remain few and far between. In addition, the federal government's attempts at providing these protections remain antiquated and too narrowly focused to effectively punish or deter those that would intentionally target the elderly for these schemes. Currently, it appears that legislators continue to agree with the United States Supreme Court that deterrence is a goal of sentencing and classical sociological theory positing that harsher penalties will result in said deterrence.

Federal law enforcement agencies are in the best position in terms of resources and jurisdiction to investigate these crimes, and the use of these superior investigative abilities requires a consolidated approach to effectuate a substantial change. As such, it remains imperative that federal law reflects these measures in enhanced penalties. Instead of adding yet another narrowly-construed and soon-to-be-outdated provision to the already piecemeal approach taken by Congress, this Note recommends that the current penalty enhancement statutes be broadened to encompass these crimes that target the elderly due to their perceived or actual vulnerability.

Financial exploitation of the elderly remains a serious, yet underappreciated problem that has not been effectively addressed. Reforms of the current investigatory and prosecutorial structures in place are necessary if society seeks to change the status quo. Otherwise, these crimes, as the evidence demonstrates, will continue to slip through the cracks and one of the country's most vulnerable populations will remain underserved and inadequately protected.

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