

TOP TEN MYTHS OF SOCIAL SECURITY

Richard L. Kaplan

In this article, Professor Kaplan exposes the ten biggest myths surrounding the Social Security program as a means of evaluating potential budget reform proposals affecting this program. Professor Kaplan begins by noting the resiliency with which the Social Security program has deflected budget-cutting pressures. Next, Professor Kaplan identifies and then debunks each of the ten myths. Finally, Professor Kaplan concludes that the current level of Social Security benefits could be justifiably reduced, that certain eligibility requirements for benefits could be legitimately narrowed, and that certain taxes on recipients could be reasonably extended.

For over a decade now, major attention has been paid to the federal government's budget deficit. Congress began this focus in 1982 when it passed the Tax Equity and Fiscal Responsibility Act.¹ This act purported to raise revenues by \$100 billion over three years,² an amount that was to be matched by cuts in federal expenditures. Those spending cuts never materialized,³ and another major tax-raising law was then enacted as part of the Deficit Reduction Act of 1984.⁴ Other measures followed,⁵ including the massive Omnibus Budget Reconciliation Act of 1993.⁶ Each of these enactments focused on one or more of the same elements of the budget deficit equation: revenues (also known as "taxes"), defense spending, domestic non-

Richard L. Kaplan is Professor of Law, University of Illinois at Urbana-Champaign.

1. Pub. L. No. 97-248, 96 Stat. 324 (1982).

2. H.R. REP. NO. 404, 97th Cong., 1st Sess. 79 (1981), *reprinted in* 1982 U.S.C.C.A.N. 781, 849.

3. *See* C. EUGENE STEUERLE, *THE TAX DECADE* 61 (1992).

4. Pub. L. No. 98-369, 98 Stat. 494 (1984). This statute also cut spending in various areas. *See id.* §§ 2001-2907, 98 Stat. at 1057-1210.

5. *See, e.g.*, Revenue Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330; Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388.

6. Pub. L. No. 103-66, 107 Stat. 312 (1993).

mandated spending, and the federal health care entitlement programs (Medicare and Medicaid).⁷

The one constant during these debates has been the political untouchability of Social Security. All forms of federal spending have their detractors and their defenders, but Social Security is unique among government programs in being described as “the third rail of American politics,”⁸ meaning that any politicians who dare touch it will be electrocuted, politically speaking. Even the reform-minded Republicans elected in 1994 declared Social Security to be “off the table” in their efforts to balance the federal budget.⁹ Nevertheless, it is becoming clearer every year that the “third rail” of Social Security must in fact be touched if the federal government’s budget deficit is to be effectively contained.¹⁰ Thus far, however, the invincibility of the Social Security program remains unabated.

The purpose of this article is to examine the principal myths surrounding the Social Security program as a prelude to understanding budget reform proposals that might emerge affecting this program. As the Kerrey-Danforth Commission Study revealed, Social Security must contribute to the ongoing effort to bring the federal budget deficit under control.¹¹ How that is accomplished will, in many ways, depend upon the resiliency of what might be described as the “Top Ten Myths of Social Security.”

I. There Is a Trust Fund

There is probably no single, more enduring myth among Americans than the existence of some separately constituted Social Security trust fund. In public opinion surveys and collections of anecdotes, Americans, particularly older Americans, genuinely believe that there is an accumulation of funds in some dedicated account somewhere

7. See e.g., Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §§ 13201-13243, 13501-13571, 13611-13625, 107 Stat. 312, 457-529, 572-609, 7622-36 (raising taxes, cutting Medicare spending, and cutting Medicaid spending, respectively).

8. Sarah Neville, *Oregon May Hold the Key to Public Acceptance of Health Care Rationing*, WASH. POST, July 11, 1995, at A06.

9. Michael Wines, *The 104th Congress: Balanced Budget: Budget Measure Is Delayed Again in Angry Senate*, N.Y. TIMES, Mar. 2, 1995, at 1.

10. See BIPARTISAN COMM’N ON ENTITLEMENT & TAX REFORM, FINAL REPORT TO THE PRESIDENT 22-24, 216-38 (1995).

11. *Id.* at 22-24, 32-33.

that consists of genuine financial assets.¹² Such a fund does not exist and was never envisioned even when Social Security was created.¹³ Quite to the contrary, Social Security collects revenues from a payroll tax on current workers. That payroll tax is 12.4%—split between the employee and the employer—of a worker’s earnings, imposed on earnings up to an annually adjusted cap.¹⁴ For 1995, that cap was \$61,200.¹⁵ Workers earning above this cap do not pay Social Security taxes. These tax revenues, however, do not get placed into some isolated fund. Instead, the program uses these revenues to pay benefits to current beneficiaries, and that has always been the program’s operative design.¹⁶

At the present time, Social Security brings in revenues in excess of the amounts needed to pay benefits to current recipients.¹⁷ In 1995, for example, Social Security revenues were \$390 billion, while benefits were only \$332 billion.¹⁸ This \$58 billion difference, or “surplus,” is used *currently* by the federal government to pay other federal expenditures; e.g., defense, other domestic spending, and interest on the national debt.¹⁹ To be sure, the federal government does not simply take this money without obligating itself to repay it in the future. In fact, the federal government *does* obligate itself to repay those funds to the Social Security program, with interest, at a regular market rate.²⁰ But no funds accumulate in some Social Security trust account. Rather, it is simply a bookkeeping entry, recording the fact that the federal government has taken the currently generated surplus and has given obligations that are essentially tantamount to government IOU’s.²¹ In some sense, this government IOU is the fiscal equivalent of a U.S. gov-

12. See, e.g., George J. Church & Richard Lacayo, *Social Insecurity*, TIME, Mar. 20, 1995, at 24, 29; Michael Kinsley, *The Best Way to Fix Medicare*, TIME, Sept. 4, 1995, at 24.

13. MICHAEL J. BOSKIN, TOO MANY PROMISES: THE UNCERTAIN FUTURE OF SOCIAL SECURITY 7-8, 126 (1986); Kinsley, *supra* note 12, at 24.

14. I.R.C. §§ 3101(a), 3111(a), 3121(a) (1995); 42 U.S.C. § 430 (Supp. 1995).

15. Spencer Rich, *Plan Deepens Cuts for Future Retirees; Separate Social Security Panel Appears Split*, WASH. POST, May 22, 1995, at A21.

16. *Social Security Q&A*, BOSTON GLOBE, June 18, 1995, at 17.

17. David Steinberg, *Don't Tamper with Social Security*, S.F. EXAMINER, July 29, 1995, at C-7.

18. See Church & Lacayo, *supra* note 12, at 28.

19. See *id.* at 27; see also BIPARTISAN COMM’N ON ENTITLEMENT & TAX REFORM, *supra* note 10, at 4.

20. Church & Lacayo, *supra* note 12, at 26; see BOSKIN, *supra* note 13, at 7-8, 126.

21. Carolyn Lochhead, *Trust Fund Myth Sank Budget Plan—Social Security Is Spent, Not Saved*, S.F. CHRON., Mar. 6, 1995, at A1.

ernment bond. Indeed, even if there were a bona fide “trust fund,” Social Security’s need for absolute safety of principal and predictable convertibility into cash would probably compel it to invest in the world’s safest security—namely, U.S. government obligations. But the point remains that there is no single accumulation of marketable government securities, nor is there some wad of money sitting in some Federal Reserve Bank account.²²

To be fair, one source of the confusion is the practice of the federal government reporting the status of Social Security’s “trust fund.”²³ These reports show the difference between current revenues and current outlays for the Social Security program. These reports also show how long those streams of income and expenditures are expected to remain in balance and how they will eventually switch over and begin producing net deficits.²⁴ These reports are replete with statistical projections, demographic assumptions, and the economic consequences of those factors. *But at no time do these reports verify the existence of any separately constituted monetary accumulation that can properly be called a trust fund.*

II. Social Security Does Not Increase the Federal Budget Deficit

A myth related to the preceding Social Security trust fund myth is that Social Security does not “contribute” or aggravate the federal budget deficit in any manner. In a sense, this assertion is factually correct. *At the present time*, Social Security brings in more money than it pays out.²⁵ To that extent, therefore, the program produces a net increase in revenues, which operates to reduce what the government’s budget deficit would otherwise look like. For example, in the preceding section, it was noted that Social Security brought in revenues in excess of beneficiary payments of some \$58 billion in 1995. Were that \$58 billion segregated into some sort of separate account—and not available to the federal government generally—the current year’s budget deficit would be \$58 billion larger than is being currently re-

22. BOSKIN, *supra* note 13, at 7-8, 126; Church & Lacayo, *supra* note 12, at 28.

23. See, e.g., BOARD OF TRUSTEES, 1994 ANNUAL REPORT, FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND DISABILITY TRUST FUNDS (1994).

24. See *id.*; see also BIPARTISAN COMM’N ON ENTITLEMENT & TAX REFORM, *supra* note 10, at 22.

25. Lochhead, *supra* note 21, at A1.

ported.²⁶ In other words, the federal government is spending the net revenue intake of the Social Security program on current expenditures, rather than using non-Social Security revenues to fund those needs exclusively. As a result, it is indeed true that if the Social Security program did not exist, the federal budget deficit would actually be *higher* than currently reported.

Nevertheless, the current use of those net revenues is simply a means of borrowing from Peter to pay Paul. That is, in future years when the Social Security program will require more outlays than revenues will provide, the federal government will need to raise funds from other sources to cover all of its commitments. In those later years, it will be obvious to all that the Social Security program is a net drain on the federal budget and does in fact aggravate the budget deficit on a current-year basis.

But long before that switchover in the balance between revenues and expenditures takes effect, Social Security will be a factor in the federal budget deficit dilemma. The taxation of worker's wages, as described previously, is one part of the revenue sources of the federal government, and payment of benefits to Social Security recipients is one type of governmental expenditure.²⁷ The composition of those benefit payments is not some absolutely mathematical correlate of the payroll taxes paid.²⁸ Social Security is, quite self-consciously, a program of social insurance and not just a collection of actuarially derived benefits. Thus, if the government chooses to reduce, alter, or even eliminate certain categories of Social Security benefits, it could do so without affecting the present payroll taxation structure. It could, for example, decide to lower benefit payouts from \$332 billion (1995 figures) to, say \$300 billion, without diminishing the \$390 billion it receives from Social Security's payroll tax. Indeed, Social Security benefits have been enhanced, reduced, and augmented over the years as Congress has responded to social developments and/or political forces—all without necessarily changing its financing mechanism.²⁹ To the extent that Social Security's beneficiary payments are not re-

26. See Church & Lacayo, *supra* note 12, at 27.

27. *Id.* at 29-30.

28. See C. Eugene Steuerle & Jon M. Bakija, *Basic Features of the Social Security System*, 62 TAX NOTES 1457, 1458-60 (1994).

29. Nancy J. Altman, *The Reconciliation of Retirement Security and Tax Policies: A Response to Professor Graetz*, 136 U. PA. L. REV. 1419, 1426-27 (1988).

duced, they constitute expenditures that increase the government's current outlays and increase the federal budget deficit.

To summarize, although Social Security as a distinct program is currently in "surplus," that situation will change within a few decades. More importantly, the constitution of Social Security beneficiary payments is a government expenditure like any other expenditure, and failing to reduce or change those payments impacts federal budget outlays and the resulting deficit.

III. Retirees Are Only Recovering Their Own Money

One of the myths that makes the Social Security program so politically untouchable is the belief that current retirees are simply recovering their own contributions. If this were true, one would indeed be hard pressed to suggest reducing Social Security benefits. If people do not recover their own investments, after all, Social Security might be seen as just another tax-like government imposition. Social Security, in fact, is partially a program of social insurance³⁰ and partially a program of ensuring retirement income.³¹ Yet many, if not most, retirees seem to believe that its retirement income function is its overwhelmingly predominant, if not sole, characteristic. Accordingly, they view the monthly payments that they receive as a return of the taxes that they paid to the system during their working life.

During much of Social Security's existence, its taxes were imposed at much lower rates and on a much lower wage base than is currently the case. For example, from 1937 through 1949, the Social Security tax rate was only 2% rather than the present 12.4%, which continues to be split between the employer and employee.³² Rates were increased after that date, but on an irregular schedule—sometimes once every four years, sometimes every year. But the total tax rate was only half of the current rate as recently as 1962, and did not reach 10% until 1978.³³ Similarly, the wage base on which this tax was

30. Kelly W. Schemenave, *Adams v. Weinberger and Dubinski v. Bowen: Posthumous Illegitimate Children and the Social Security Child Survivorship Provision*, 25 Soc. Sec. Rep. Serv. (West) 685, 686 (1989); see *infra* text accompanying notes 69-70 (surviving spouse benefits), 85-88 (disability benefits).

31. Altman, *supra* note 29, at 1425.

32. See COMMERCE CLEARING HOUSE, 1994 SOCIAL SECURITY EXPLAINED 25 (1994) [hereinafter CCH]. Since 1950, Social Security taxes have multiplied 10 times.

33. CCH, *supra* note 32, at 25.

imposed was only \$3,000 through 1950, and was then raised on an irregular schedule until it reached \$7,800 in 1968.³⁴ The wage base was then raised again in 1972 and every year thereafter. Even so, it did not rise above \$30,000 until 1982.³⁵ Due to these low rates and low wage base during many of the years in which current retirees were working, their maximum Social Security tax—including their employer's portion—was only \$60.³⁶ As recently as 1972, in fact, the maximum amount paid in was only \$828.³⁷ And of course, during those years, persons who did not earn the maximum wage cap paid in even smaller amounts. Consequently, when current retirees relate their payments of Social Security taxes—both their own and their employer's share—to current benefits, a low-wage earner retiring in 1995 at age sixty-five recovers all of the Social Security taxes paid in forty months.³⁸ Even a maximum-wage earner who paid tax on whatever wage cap was in effect, recovers the cumulative investment in less than seven years.³⁹ In other words, after four and one-half years of receiving Social Security benefits, an average-wage-earning retiree is collecting welfare.⁴⁰ That is, *all* of that worker's money has been repaid, including the employer's portion paid on the worker's behalf. Even if one includes interest earned during that interval, at some point most current retirees are receiving funds in excess of what they had put into the system.⁴¹

On the other hand, the relationship between payments to, and benefits received from, Social Security is changing over time. As noted above, the Social Security tax rate has increased dramatically in the past twenty years or so.⁴² The wage base on which those Social Security taxes are collected, moreover, has risen dramatically since

34. *Id.* at 36.

35. *Id.*

36. *See id.* at 25-38 (wage base of \$3,000 \times 1.0% = \$30 paid by both employer and employee, or \$60 in total).

37. *See id.* (wage base of \$9,000 \times 4.6% = \$414 paid by both employer and employee, or \$828 in total).

38. *See Church & Lacayo, supra* note 12, at 29 (20 months \times 2 [employer + employee] = 40 months); *see also* BOSKIN, *supra* note 13, at 8. *See generally* CRS *Finds Falling Social Security Recovery*, Daily Tax Rep. (BNA) No. 11, at H-1 (Jan. 18, 1994).

39. Church & Lacayo, *supra* note 12, at 29.

40. Robert D. Hershey Jr., *Misunderstanding Social Security*, N.Y. TIMES, Aug. 20, 1995, § 4, at 4.

41. *Id.*; *see also* BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, *supra* note 10, at 32.

42. *See supra* note 32.

1972, and has more than tripled since 1978.⁴³ As a result, people who retire in the future may not, in fact, recover all of their investments in the form of retirement benefits. Some computations involving unmarried men earning maximum earnings and having average life expectancies indicate that they may not recover all of their Social Security taxes when they retire.⁴⁴ Another way of describing this phenomenon is that the number of years needed to recover the much-greater Social Security taxes paid into the system in recent years may exceed the person's anticipated life expectancy upon attaining retirement age.⁴⁵ On the other hand, huge categories of beneficiaries will not face this predicament for many years—namely, married men (whose spouses receive additional Social Security benefits and who have longer life expectancies generally), women (who have longer life expectancies generally), and workers who earned less than the wage cap (whose taxes paid into the system were necessarily lower).⁴⁶

To summarize, in the future, some retirees will be simply recovering their own funds. But *at the present time*, and for many years to come, almost all retirees will have long since recovered their tax payments into the Social Security program, often many times over.

IV. Social Security Will Not Be There When One Retires

A prevailing myth among current *workers*, rather than current retirees, is that the Social Security program is so doomed to insolvency that the program will not be there for them at all. In one widely quoted survey of younger Americans, only 28% believed that the Social Security system would pay benefits to them when they retire.⁴⁷ In that same survey, fully 46% of the respondents said that they believed that unidentified flying objects (UFO's) exist.⁴⁸ Young Americans, in other words, have nearly twice as much faith in UFO's than in the continued existence of Social Security.

The idea that Social Security will disappear is a particularly pernicious canard, because it demoralizes younger workers whose cur-

43. See *supra* note 34.

44. *Data Show Class of Retirees Already Will Receive Less in Benefits than Taxes Paid*, Daily Tax Rep. (BNA) No. 47, at G-5 (Mar. 12, 1993).

45. *Id.*

46. *Id.*

47. *Boomers, Generation X'ers May Fight over Benefit Scraps*, ARIZ. REPUBLIC, Feb. 4, 1995, at E1.

48. *Id.*

rent taxes are needed to fund the program. It is also patently untrue. Regardless of whether one can fully recover one's contributions to Social Security, the program will continue to provide retirement benefits for future generations of retirees. Those retirement benefits may not be as generous as those being received by the current generation of retirees, and the qualifying retirement age may be delayed, but Social Security will certainly continue to pay benefits when people retire.

In a sense, the myth of Social Security's impending collapse is related to the myth described earlier that there is a single isolated trust fund. After all, if there is a trust fund, and if that fund is depleted, then presumably no further benefits will be paid. But the obligations of Social Security are not limited to some finite trust fund.⁴⁹ Social Security is backed by the full faith and credit of the federal government.⁵⁰ It is precisely because there is no single segregated fund that the government's commitment to generations of future retirees continues even when the balance in that "fund" is gone. To put this matter somewhat differently, even if no balance remains in the Social Security fund, and even if benefit expenditures exceed Social Security's revenues, the government remains obligated to make those payments to retirees.⁵¹

Indeed, one of the most significant differences between Social Security and other pension plans is the absolute solvency, in a cash flow sense, of the Social Security system. No matter what happens, the government cannot go bankrupt, unlike a private company. If worse comes to worst, the federal government will simply raise federal taxes generally, reduce other government spending, or borrow the funds necessary to continue Social Security's commitments. The absolute worst case scenario would have the government inflating the value of its currency by printing up enough money to meet its Social Security commitments. While this prospect is hardly reassuring, the point remains that the federal government is the single most reliable creditor. Accordingly, Social Security will be there when a person retires, and its benefits will be paid on time.

49. BOSKIN, *supra* note 13, at 7-8, 126.

50. *Id.*

51. *Id.*

V. Retirement Benefits Are Proportional to One's Lifetime Earnings

Most Americans, both current retirees and workers, seem to believe that there is a mathematically correlative relationship between one's lifetime earnings and one's Social Security retirement benefits. To be sure, the more that one earns while working, the more one will receive in Social Security benefits. But the correlation is not nearly as mathematical as would exist in a true pension plan.

The derivation of Social Security benefits follows an extremely convoluted methodology that is almost never alluded to, let alone explained, in any materials that are available to the general public. This methodology is not exactly secret, for it is explained in treatises that are addressed to professional advisors.⁵² But only rarely do these treatises clearly set forth the bottom-weighted calculation of Social Security retirement benefits.

When a person reaches "full retirement age" (presently, sixty-five years old), that worker is entitled to a retirement benefit equal to his or her "primary insurance amount," or PIA.⁵³ The calculation of PIA has undergone numerous changes over the years, but the current methodology applies a three-part formula to a worker's "average indexed monthly earnings," or AIME—a rough surrogate for average lifetime earnings.⁵⁴ This three-part formula applies 90%, 32%, and 15%, to portions of a worker's AIME broken into three brackets. These percentages remain constant, but the "bend points" that determine where the three brackets begin and end are adjusted annually for inflation.⁵⁵ The relevant "bend points" are those for the year in which a person reaches age sixty-two. If a worker turned age sixty-two, for example, during 1995, the applicable "bend points" that sepa-

52. See, e.g., Hans Sprohge & Carl A. Brooks, *Understanding Social Security Retirement Benefits*, 174 J. ACCOUNTANCY 53, 56-57 (1992); Steuerle & Bakija, *supra* note 28, at 1458-60; Richard B. Toolson, *Should a Worker Who Continues to Work Beyond Normal Retirement Age Immediately Draw Social Security Benefits?*, 57 TAX NOTES 539, 540 (1992); see also LOUIS A. MEZZULLO & MARK WOOLPERT, *ADVISING THE ELDERLY CLIENT* §§ 15:184 to 15:195 (1992); PETER J. STRAUSS ET AL., *AGING AND THE LAW* 147-49 (1990).

53. 42 U.S.C. § 402(a) (1988). As to the concept of "full retirement age," see generally LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL* 279-80 (1995).

54. See generally CCH, *supra* note 32, at 170-74 (illustrating the computation of "average indexed monthly earnings").

55. See *id.* at 176-78.

rated the three brackets were \$426 and \$2,567.⁵⁶ So, if this worker had average indexed monthly earnings of, say \$3,000, this worker's PIA would be calculated as follows:

90% of the first \$426 = \$383.40

32% of the next \$2,141 (\$2,567 - \$426) = \$685.12

15% of AIME over \$2,567 (\$3,000 - \$2,567 = \$433) = \$64.95

The sum of these components—namely, \$1,133.47—would then be rounded to the next lower multiple of ten cents, and the person's PIA becomes \$1,133.40.⁵⁷

A worker who earned more than \$3,000 of AIME would have a larger PIA. But additional amounts of AIME in excess of the second bend point would add to a person's PIA to the extent of only 15%. For example, if the worker described above had an AIME of \$4,000 instead of \$3,000, that person's PIA would be \$150 more, because all of the additional earnings of \$1,000 would fall into the top 15% bracket. The PIA in that instance would be \$1,283 (\$1,133 + \$150)—an improvement of only 13.2% over the PIA previously computed, despite an increase in the worker's AIME of more than 33%. In other words, the higher one's AIME, the higher one's PIA, although the relationship is not proportional.

Similarly, a worker who had lesser amounts of average earnings would face a smaller PIA, but not proportionately smaller. For example, a worker with an AIME of only \$1,500 would have a PIA of \$727—clearly less than the \$1,133 derived from an AIME of \$3,000, but more than half of the latter PIA. As this example demonstrates, Social Security's PIA formula is redistributive in its impact.⁵⁸ The bottom-weighted nature of this formula contrasts with most employer-provided defined benefit pension plans, which base their payouts on a worker's earnings history. Under such plans, if Jan earns twice as much as Colin, Jan's retirement benefit is twice as much as Colin's.

Social Security calculates its benefits using the bottom-weighted PIA formula for several reasons. The AIME statistic is an average of a worker's earnings over thirty-five years, regardless of whether that worker has thirty-five years of earnings.⁵⁹ Accordingly, the PIA

56. *Social Security Benefits Explained*, 1A Unempl. Ins. Rep. (CCH) ¶ 12,211 (Feb. 6, 1995).

57. *See id.*

58. *See generally* C. Eugene Steuerle & Jon M. Bakija, *How Social Security Redistributes Income*, 62 TAX NOTES 1763 (1994).

59. *See* Sprohge & Brooks, *supra* note 51, at 57.

formula compensates, to some extent, for people who are out of the work force for several years and whose AIME is thereby diluted by having several years of zero or low earnings. There is also an explicit welfare component to the Social Security program, as it was intended to provide only a safety net, or base level of retirement earnings.⁶⁰ It was not intended to be the sole means of financing one's retirement.⁶¹ But the point remains that Social Security benefits are not directly proportional to a person's lifelong earnings.

In contrast, a person's *contributions* into Social Security are proportional to one's earnings. But as the preceding analysis has shown, one's *benefits* are not. Thus, a person making \$40,000 a year pays exactly twice the amount of Social Security tax as someone making \$20,000 a year. While that first person will get a larger Social Security benefit than will the second person, the first person's benefit will not be twice as large, and therein lies the rub.

A further complicating factor is the fact that only those Social Security earnings that were initially subject to tax—that is, that were under the annually adjusted wage cap—are ever considered in deriving Social Security benefits. Thus, someone with earnings of \$100,000 in 1995 would be treated for Social Security's purposes as earning only \$61,200—the wage cap for that year. Earnings above the wage cap are completely ignored in deriving the AIME statistic. Consequently, the Social Security benefit for a high-wage earner will be a smaller percentage of that person's lifelong earnings, even if the PIA formula did not exist.

VI. Social Security Favors Two-Income Married Couples

It is frequently alleged that Social Security tends to favor two-income married couples, as opposed to single-earner couples, because benefits are paid according to one's earnings. And indeed, the bottom-weighted calculation of Social Security retirement benefits, as described above, results in payments to a two-income couple in excess of those to a single-income couple, even if both couples have the same underlying earnings. Using the benefit calculations derived previously, assume that Sam has AIME of \$3,000 which produces a PIA of \$1,133. In contrast, Ken and Andrea each have AIME of \$1,500 (one-

60. Altman, *supra* note 29, at 1427-32, 1446.

61. *Id.*

half of Sam's AIME), but their PIA is \$727 each, for a total of \$1,454, compared to Sam's benefit of \$1,133. Thus, it would appear that Social Security favors two-earner married couples over single-earner couples.

But Social Security also provides a spousal benefit equal to one-half of the worker spouse's retirement benefit.⁶² So, if Sam is receiving \$1,133 per month as a Social Security retirement benefit, his wife Leah would receive \$567 per month (one-half of \$1,133) as a spousal benefit derived from Sam's work record. This spousal benefit is paid as long as it is more than Leah would be able to claim on her own work record. And although the spousal benefit is only one-half of the worker's benefit, many spouses find that the spousal benefit actually pays more than a worker's benefit that is based on their own work record. This result may reflect the fact that their own wages were significantly less than their spouse, and/or that they had many years out of the compensated work force. For example, even if Leah earned as much as her husband but she was out of the work force for, say twenty years—due either to educational plans, family commitments, or other lifestyle choices—she may well find that 50% of Sam's benefit exceeds 100% of a benefit based on her own work record.

If that is the case, Sam and Leah's total Social Security benefit is \$1,700 per month, made up of Sam's worker's retirement benefit of \$1,133 plus Leah's spousal benefit of \$567, one-half of Sam's. As a result, the single-earner couple of Sam and Leah actually receive *higher* Social Security benefits than the two-earner couple of Ken and Andrea (who received \$1,454), even when the two-income couple's combined AIME is exactly the same. Thus, Social Security does *not* favor two-earner married couples.

Perhaps, Social Security's spousal benefit can be described as supportive of "family values." Although the spousal benefit is not tied to the nonemployed spouse's activities of homemaking and child rearing, it does provide some financial recognition to spouses who have devoted themselves to those pursuits. Moreover, if Sam had never married, he would have been entitled only to his PIA of \$1,133—*less* than Ken and Andrea would receive, based on the same total earnings. It is Leah's status as Sam's wife—at least after one year of marriage⁶³—that entitles them to the additional \$567 which

62. 42 U.S.C. § 402(b)(2), (c)(2) (1988).

63. *Id.* § 416(b)(2), (f)(2).

enables Sam to receive more than Ken and Andrea.⁶⁴ Thus, although the bottom-weighted nature of the PIA formula penalizes Sam vis-à-vis Ken and Andrea, Social Security's spousal benefit compensates—overcompensates in many cases—for that penalty. In effect, Social Security *rewarded* Sam for getting married rather than remaining single—further supporting “family values,” as that concept seems to be conventionally understood.

VII. Social Security Favors Long-Lived Marriages

Social Security is often described as a program that rewards the “traditional” marital relationship, sometimes called “Ozzie and Harriet” after a popular 1950's television program, of a working man married his entire adult life to a woman who does not work in the compensated work force.⁶⁵ Indeed, the preceding discussion demonstrated that married couples receive greater benefits when only one spouse is employed than when both spouses produce the equivalent earnings. Nevertheless, it is not true that Social Security favors life-long marital partners.

Social Security provides a derivative benefit not only to the spouse of a worker who has retired, but also to the ex-spouse of a worker, if that ex-spouse was married at least ten years to the worker and has not remarried.⁶⁶ In certain circumstances, subsequent remarriages are ignored—namely, when the remarriage occurs after reaching age sixty.⁶⁷ But in any case, a person who is a divorced spouse can collect benefits based on the worker's work history without affecting benefits that are paid to that worker, to that worker's current spouse, or to any other recipients (for example, children) who may be, however, collecting derivative benefits from that worker's account.⁶⁸ Their marriage, however, must have lasted at least ten years. So if, for example, Hank was married to Alice for eleven years, then to Betty for twelve years, and then to Carol for ten years, all three of his ex-wives could collect benefits equal to one-half of his worker's retirement benefit. Once a person has been married at least ten years, in other

64. SOCIAL SECURITY MANUAL 80 (William W. Thomas III ed., 1995).

65. Steve Sakson, *Women Become Losers Under Conditions of Social Security Rules; Retirement: Married Working Women Usually Earn No More in Benefits Than If They Had Never Worked a Day*, L.A. TIMES, Nov. 25, 1990, at A46.

66. 42 U.S.C. § 416(d)(1), (4) (1988).

67. *Id.* § 402(e)(3)(A).

68. See CCH, *supra* note 32, ¶ 524.

words, that person's spouse has become vested in that person's Social Security record, and further years of marriage do not increase the amount of that spouse's Social Security benefit. In effect, Social Security provides no incentive to stay married once a marriage has lasted ten years.

For example, assume that Ozzie and Hank both qualify for a worker's retirement benefit of \$1,000. Ozzie and Harriet (Ozzie's wife) will receive Social Security benefits of \$1,500 per month—assuming that Harriet would not receive more than \$500 based upon her own work record, and assuming that both Ozzie and Harriet have reached “full retirement age.” Using the same assumptions about spousal work records and age, Hank would receive his \$1,000 per month, and his former wives (Alice, Betty, and Carol) would each receive \$500, as would his current spouse, Deborah—a grand total of \$3,000 per month, compared to Ozzie and Harriet's \$1,500.

Moreover, when a retired worker dies, his or her surviving spouse succeeds to the retired worker's *entire* benefit.⁶⁹ Therefore, if Ozzie dies, Harriet's benefit would rise from \$500 to \$1,000 per month, ignoring intervening cost-of-living adjustments. This stepped-up benefit rule, however, also applies to surviving former spouses⁷⁰—once again, assuming that the marriage lasted at least ten years, and that the spouse's own work record does not provide a greater benefit. As a result, Hank's three surviving ex-wives and his surviving spouse will each receive \$1,000 after Hank dies, producing a grand total of \$4,000 from Hank's account compared to \$1,000 for Harriet from Ozzie's account.

Thus, Social Security recognizes the increasing prevalence of divorce and does not tilt its benefits in the direction of long-lived marriages once a couple celebrates their tenth wedding anniversary.

VIII. One Could Do Better Investing Directly

Few myths are more violently asserted than the idea that Social Security is a rip-off to workers who could take the taxes that they pay to Social Security and obtain better benefits on their own. At a certain level, this assertion actually is true. Because of the bottom-weighted PIA benefit formula methodology described above, a person's Social

69. *Id.* ¶ 525.

70. *Id.* ¶ 525.1.

Security payments *could* typically provide a larger benefit upon retirement, if those funds were invested privately.⁷¹

But there are several major caveats to that assertion. First, one must recognize that Social Security payments are collected from the employee automatically, every year, regardless of the person's other financial needs and preferences.⁷² The payments do not depend upon the fiscal discipline of the particular person involved. Second, as indicated above, Social Security is guaranteed to make its payments on time.⁷³ Unlike private pension systems, there is no realistic risk of default. Whether the government will use borrowed or newly printed funds to meet its obligations, the fact remains that private pension plans are not able to "print their way" out of any fiscal difficulties that might arise. Social Security is uniquely dependable in that regard. Third, Social Security is completely portable. With very limited exceptions, virtually every type of employment is covered by Social Security,⁷⁴ including self-employment. No other defined benefit plan credits *every* year of a person's work life, regardless of that person's employer, industry, or profession.

But the benefits of Social Security go much beyond the complete portability and guaranteed liquidity of Social Security's retirement benefit program. The entire range of derivative benefits adds to a person's potential benefits far in excess of what private pension plans could ever hope to provide. For example, even in a "traditional" marriage such as Ozzie and Harriet's from the preceding section, Social Security pays the retired worker's spouse half of the worker's benefit.⁷⁵ No private pension plan provides *any* spousal benefit while the worker spouse is still alive. Joint-and-survivor annuities and other survivor-oriented benefits are paid only when the worker/retiree has died.⁷⁶ Social Security is unique in this regard. Moreover, Social Security provides benefits to a divorced spouse,⁷⁷ or as in the case of

71. See, e.g., Church & Lacayo, *supra* note 12, at 29 (illustrating how Social Security payments invested in U.S. Treasury Bills or corporate bonds would have yielded a higher monthly payout than Social Security provides).

72. 42 U.S.C. § 430 (Supp. 1995); I.R.C. §§ 3101(a), 3102(a) (1995).

73. See Church & Lacayo, *supra* note 12, at 29.

74. Noncovered employment includes the following principal categories: most employees of state and local governments, students who work at the school or college that they attend, children under age 18 who are employed by their parent, and certain religious objectors. See generally FROLIK & KAPLAN, *supra* note 53, at 277-78.

75. 42 U.S.C. § 402(b)(2), (c)(2) (1988).

76. See 29 U.S.C. § 1055(e) (1988 & Supp. 1993); I.R.C. §§ 401(a)(11), 417 (1995).

77. 42 U.S.C. § 416(d)(1), (4) (1988).

Hank from the preceding section, to several divorced spouses. Once again, there is simply no private sector counterpart that would try to provide benefits to more than one spouse of a worker based upon that worker's work history.

In addition to these spousal and former spouse benefits, Social Security pays benefits to certain children under age nineteen.⁷⁸ These benefits can also be half of the retiree's PIA, but there is a "family maximum" that limits payments to a worker's current spouse and dependent minor children.⁷⁹ The family maximum is derived from a four-part formula tied to the worker's PIA,⁸⁰ but the point remains that certain children receive derivative benefits while the retiree is still alive—a benefit that is also unmatched by any private sector pension plan.

Moreover, these derivative benefits are all augmented when the retiree dies. A surviving spouse or ex-spouse receives increased benefits, as described previously. A surviving child's benefit is increased to 75% of the worker's PIA, although still subject to the "family maximum." Even a worker's *parents* may be eligible for Social Security benefits if they received half of their support from the deceased worker.⁸¹ Once again, this package of survivors' benefits simply has no counterpart in private plans.

Perhaps even more significantly, *all* Social Security benefits are adjusted annually, across the board, on the basis of inflation, via the mechanism of a cost-of-living allowance, or COLA.⁸² Some version of a cost-of-living allowance may characterize other public pension systems, but few are as comprehensive as Social Security's. Moreover, inflation adjustments are very uncommon in private pension plan payouts.⁸³ Most private plans utilize annuities and other mechanisms that fix the payment amount when the payments begin. These private plans simply ignore inflation that occurs after payments begin. Social Security, in short, is inflation-protected to a degree that few other pension plans even attempt.

78. 42 U.S.C. § 402(d)(1) (children must generally be under age 18, but children who are 18 years old can qualify if they are still attending elementary or high school).

79. See CCH, *supra* note 32, ¶ 538.

80. *Id.* (illustrating the computation of the "family maximum").

81. 42 U.S.C. § 402(h) (1988).

82. See CCH, *supra* note 32, ¶ 541.

83. GARY S. FIELDS & OLIVIA S. MITCHELL, *RETIREMENT, PENSIONS, AND SOCIAL SECURITY* 39 (1984).

Finally, but by no means insignificantly, Social Security provides benefits beyond retirement benefits, derivative benefits, and survivors' benefits. Social Security's official name is the Old-Age, Survivors, and Disability Insurance.⁸⁴ The focus of this article has thus far been on the old-age and survivors aspects of Social Security. But the taxes that workers pay into Social Security also provide the person with *disability* coverage.⁸⁵ Though most workers simply ignore this feature of Social Security unless and until they are disabled, the coverage remains in effect nevertheless. Under this program, if a person is unable to perform "any substantial gainful activity by reason of any medically determinable physical or mental impairment,"⁸⁶ then the person can receive disability payments starting as young as twenty-one years of age. These payments continue until that person reaches full retirement age, at which time the person's Social Security retirement benefit begins. In addition, if a person receives Social Security disability benefits for twenty-four consecutive months, he or she becomes eligible for Medicare,⁸⁷ the federal government's health care program, which covers most of the person's medical needs. Qualification for disability benefits is not easy, to be sure, and in fact, Social Security presumes that a person who earns more than \$500 per month has the ability to perform "substantial gainful activity."⁸⁸ But the point remains that disability coverage is a major component of the Social Security program, one that provides coverage for *all* workers, regardless of preexisting conditions, the nature of their employment, and their general health history. Only a government program could provide such virtually universal disability coverage.

The sum of these features—universal access, complete portability, guaranteed liquidity, derivative benefits, survivors' benefits, inflation adjustments to all benefits paid, and disability coverage—is a comprehensive package that would be impossible to replicate on a private basis, at any price. To be sure, some employees might prefer a less comprehensive package if they had the choice, but the fact remains that Social Security—when analyzed as an entire package—is simply better than what they could otherwise obtain.

84. 42 U.S.C. § 401(a), (b) (1988).

85. See generally CCH, *supra* note 32, at 202-23; LAWRENCE A. FROLIK & MELISSA C. BROWN, ADVISING THE ELDERLY OR DISABLED CLIENT 4-19 to 4-33 (1992).

86. 42 U.S.C. § 416(i)(1)(A) (1988).

87. *Id.* § 1395c(2).

88. 20 C.F.R. § 404.1574 (1995).

IX. Working After Retirement Makes Financial Sense

As noted previously, Social Security benefits are payable as early as age sixty-two. At that age, however, one's Social Security benefit is reduced actuarially to take account of the longer period over which those benefits will be paid.⁸⁹ Many such persons can, of course, still earn income as an employee or from self-employment. Accordingly, some retirees consider working part-time while receiving Social Security. The question becomes: does this strategy make financial sense?

Continuing to work past age sixty-two might provide additional years of earnings history and could lead to a recalculation of a person's PIA, especially if that person's earnings average increases due to these additional years of earnings.⁹⁰ For example, someone with less than thirty-five years of wages before age sixty-two would benefit by replacing a year of zero or low wages with a year of higher wages after age sixty-two, thereby increasing that person's average. This effect is moderated rather significantly, however, by the bottom-weighted PIA formula. As a result of that formula, increases in average earnings produce relatively small increases in one's Social Security benefits. But the point remains that increased earnings can produce higher Social Security benefits if the impact on one's average earnings is large enough.

On the other hand, Social Security imposes a "retirement earnings" test on recipients who perform compensated work while receiving retirement benefits.⁹¹ Reduced to its essence, this test limits the amount of earnings that a retiree can receive before losing some of his or her Social Security benefits.

The "retirement earnings test" focuses exclusively on income earned from performing personal services. It ignores a person's income from investment sources, such as interest income, dividends, capital gains, rentals, and annuities. Similarly, it ignores pension payments. Only income from wages and self-employment, including director's fees and commissions, is considered,⁹² thereby reflecting the

89. The benefits are reduced by 5/9 of 1% for every month that benefits commence before the recipient reaches "full retirement age." 42 U.S.C. § 402(q)(1)(A) (1988). Thus, someone who starts receiving benefits at age 62 would receive 80% of what that person would receive at age 65 (3 years early \times 12 months = $36 \times 5/9 = 20\%$ reduction).

90. 42 U.S.C. § 402(q)(10) (1988).

91. *Id.* § 403(b).

92. *Id.* § 403(f)(5). See generally CCH, *supra* note 32, ¶ 555.1.

test's underlying rationale—namely, that retirement benefits are for persons who have retired from active employment.

When the “retirement earnings” test applies, it provides that persons who receive earnings from work will lose a portion of their Social Security benefits if certain thresholds are exceeded. The thresholds are based upon a person's age and are adjusted annually for inflation. The first threshold applies to persons who have not yet reached “full retirement age” (presently, age sixty-five), and was \$8,160 in 1995.⁹³ A second threshold applies to persons who have reached full retirement age, and was \$11,280 in 1995.⁹⁴ Persons using the lower threshold (i.e., younger than “full retirement age”) lose one dollar in benefits for every two dollars of excess earnings.⁹⁵ Persons using the higher threshold lose one dollar for every three dollars of excess earnings.⁹⁶ Earnings received after a person reaches age seventy, however, are not affected by the “retirement earnings” test, regardless of the amount of such earnings. In other words, the “retirement earnings” test impacts only those benefit recipients who are between the ages of sixty-two and sixty-nine years. But when this test applies, affected retirees can face extremely high effective tax rates on those earnings which are above the applicable threshold.

For example, assume that Suzanne would normally receive a Social Security benefit of \$12,700 per year, but she earned income of \$10,160 in 1995 when she was sixty-three years old. The excess of those earnings over the lower threshold of \$8,160—namely, \$2,000—reduces her Social Security benefit by half of that excess (i.e., \$1,000). Accordingly, her Social Security benefit would be reduced from \$12,700 per year to \$11,700 per year (\$12,700 – \$1,000). The impact of this rule is that her “excess” earnings were effectively taxed at a 50% rate, because her Social Security benefit was reduced by 50% of those “excess” earnings. In addition, of course, she would owe federal income tax on those “excess” earnings, and probably state income tax as well. In a final ironic twist, Suzanne also would be required to pay Social Security's 12.4% payroll tax on those “excess” earnings, as well as Medicare's 2.9% payroll tax.⁹⁷ The effect of these several layers of tax (assuming a state income tax rate of 5%) is an effective marginal

93. See CCH, *supra* note 32, ¶ 555.1.

94. *Id.*

95. 42 U.S.C. § 403(f)(3) (1988).

96. *Id.*

97. I.R.C. §§ 3101(b), 3111(b) (1995).

tax rate of 85.3% on the \$2,000 of earnings that Suzanne received in excess of the applicable threshold.⁹⁸ If Suzanne were a few years older, the effective tax rate would be lower, because the benefit reduction would be one dollar for every three dollars of earnings, rather than one dollar for every two. Moreover, she would be able to earn more income before the retirement earnings test would apply. Even so, on these facts, the effective marginal rate would be 68.6% on income in 1995 over \$11,280.⁹⁹

Clearly, if a person wishes to continue working beyond a certain age, that person should consider delaying receipt of Social Security retirement benefits, because those benefits will be reduced in many cases.¹⁰⁰ There are, of course, many sound social and psychological reasons for continuing to work after one retires. But the point remains that if post-retirement earnings would trigger Social Security's retirement earnings test, working after retirement usually does *not* make financial sense, particularly for persons who have not yet reached "full retirement age."

X. Retirement Benefits Are Taxed More Heavily Than Other Pension Payments

In nearly all private pension plans, the entire amount of the benefit payment is taxable when received.¹⁰¹ Recipients have had, of course, the advantage of deferring tax on this income from when the pension benefit was earned during their working years until the date of its receipt, but when the benefit is finally received, it is taxable *in full*, in most cases.¹⁰²

In contrast, Social Security retirement benefits are generally received tax-free. Until 1983, in fact, Social Security recipients did not

98. That is, 50% effective tax rate from loss of benefits + 15% federal income tax + 5% state income tax + 12.4% Social Security tax + 2.9% Medicare tax = 85.3%. For these purposes, the remote possibility of deducting state income taxes from the worker's federal income tax can be ignored.

99. Same as above, but using 33.3% instead of 50% as the effective tax rate from loss of benefits.

100. There is a compensating adjustment for persons who lose Social Security benefits due to "excess" earnings. Their age of benefit commencement is increased to take account of the lost benefits, and this adjustment will increase their benefits in the future, although by relatively small amounts. See 42 U.S.C. § 402(q)(7) (1988); see also Bruce D. Schobel, *Letter to the Editor*, 57 TAX NOTES 1219 (1992).

101. I.R.C. § 61(a)(11) (1995); see FROLIK & BROWN, *supra* note 85, at 7-8.

102. *Id.* See generally DIANNE BENNETT ET AL., TAXATION OF DISTRIBUTIONS FROM QUALIFIED PLANS (1991).

pay tax on *any* Social Security benefits.¹⁰³ In that year, Congress imposed a tax on up to one-half of Social Security benefits, if a person had income from all sources—not just earned income—of more than \$25,000 for singles, or \$32,000 for married couples filing joint returns.¹⁰⁴ These thresholds apply to a person's "adjusted gross income" from all sources, plus any tax-free interest income, plus one-half of the person's Social Security benefits¹⁰⁵—a sum that is often described as one's "provisional income."

For example, if Steve has Social Security benefits of \$13,000, and income from interest, dividends, and a private pension of \$24,000, his "provisional income" would be \$30,500 (\$24,000 + \$6,500 [one-half of his Social Security benefits of \$13,000]). This amount is then compared to his single-person threshold of \$25,000, and the excess (namely, \$5,500 = \$30,500 - \$25,000) is then multiplied by one-half. This result—here, \$2,750 (\$5,500 × 50%)—is taxable, but never more than one-half of the person's Social Security benefit. Therefore, of Steve's \$13,000 Social Security benefit, \$2,750 is taxable, but \$10,250 is not.

The thresholds of \$25,000 for singles and \$32,000 for marrieds are not adjusted for inflation and accordingly have not changed since 1983. As a result, the number of Social Security recipients who are subject to tax on a portion of their benefits has increased steadily since this tax was enacted, and presently is approximately 22%.¹⁰⁶ Nevertheless, some 78% of Social Security recipients pay *no* federal income tax on their Social Security benefits, and of the 22% who do pay tax on their Social Security benefits, many of them pay tax on only a small portion of their benefits.

In 1993, a second tier of tax was imposed for persons with "provisional income" exceeding \$34,000 for single persons and \$44,000 for married couples filing jointly.¹⁰⁷ These thresholds are not adjusted for inflation, so the number of Social Security recipients subject to this second tier is also likely to rise over time. Nevertheless, at the present

103. CCH, *supra* note 32, ¶ 250A.

104. I.R.C. § 86(a), (c)(1) (1995). For married persons filing separate returns, there is *no* threshold; i.e., all of the person's "provisional income" is treated as excess. *See id.* § 86(c)(1)(C).

105. *Id.* § 86(b).

106. Georgette Jasen, *How Clinton's Tax Plan Will Hit the Elderly*, WALL ST. J., Mar. 11, 1993, at C1; *see also* CONGRESSIONAL BUDGET OFFICE, *REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS* (1995).

107. I.R.C. § 86(c)(2), *added by* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13215(a)(1), 107 Stat. 312 (1993).

time, only one in eight Social Security recipients is subject to this second tier of tax.¹⁰⁸ The essence of this second tier is that a portion of Social Security benefits beyond 50% is subject to tax. The proportion rises as one's income rises, but the absolute maximum is 85% of one's Social Security benefits. For example, if Steve in the preceding example had income from all sources of \$50,000, 85% of his \$13,000 benefit, or \$11,050, would be subject to tax.¹⁰⁹ Even then, the remaining \$1,950 would not be taxable.

To summarize, three out of four Social Security recipients pay no federal tax at all on their benefits. About one in eight pay tax on between 50% and 85% of their Social Security benefits. This treatment is far more generous than that accorded to private pension plans, the benefits of which are fully taxable to all recipients, regardless of their income from other sources.

XI. Conclusion

The preceding analysis of the principal mythologies surrounding Social Security is not intended to prescribe solutions for the ultimate reform of the Social Security system. Debunking these myths does, however, suggest that the current level of benefits could be justifiably reduced, that certain requirements for eligibility for benefits could be tightened, and that certain taxes on recipients could be extended, without breaking faith with the American people. As attention is increasingly focused on the federal government's budget deficits, Social Security is too big a target to be ignored. Proposed solutions will certainly be politically charged, but an understanding of how the present system works must be a precondition to a rational evaluation

108. Prepared Testimony by Assistant Treasury Secretary for Tax Policy Leslie B. Samuels Before House Ways and Means Comm., *reprinted in* BNA, DAILY TAX REP., Jan. 11, 1995, at 41.

109. The taxable portion is phased in above the second tier's threshold, but at \$50,000, the income in excess of the applicable threshold (namely, \$34,000) already exceeds Steve's entire Social Security benefit of \$13,000. See FROLIK & KAPLAN, *supra* note 53, at 310-11.

of the policy alternatives. Only if Social Security can be demythologized and its workings understood can progress be made in adapting Social Security to the budgetary demands and demographic forces that now constrain its fiscal environment.¹¹⁰

110. See generally BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, *supra* note 10, at 24-26, 216-38 (proposals to change "bend point" indexation mechanism, raise "full retirement age," alter the PIA formula, limit COLA's, provide a private investment option in lieu of current benefits, modify spousal benefits, extend coverage to all state and government employees, reform the disability program, tax benefits more extensively, increase payroll tax rates, expand the wage base to include employer-provided fringe benefits, increase or eliminate the wage cap); BOSKIN, *supra* note 13; C. EUGENE STEUERLE & JON M. BAKIJA, *RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY: RIGHT AND WRONG APPROACHES TO REFORM* (1994).

GRANDPARENTS RAISING GRANDCHILDREN: PROBLEMS AND POLICY FROM AN ILLINOIS PERSPECTIVE

Mary C. Rudasill

In this very important article, Professor Mary C. Rudasill examines the growing phenomenon of grandparents raising grandchildren. As she notes at the outset, the number of grandparents raising their grandchildren has multiplied over the past two decades, and the size of this group continues to grow. Professor Rudasill begins her analysis with a discussion of the legal problems encountered by grandparents who seek to acquire the legal authority to care for and make decisions for their grandchildren. Next, she outlines the various options available to grandparents in Illinois, including custody proceedings, guardianship proceedings, juvenile court proceedings, and adoption and habeas corpus actions. Finally, Professor Rudasill examines the various state and federal benefit programs available to grandparents who care for their grandchildren with the hopes of offering suggestions and guidance to grandparents and their attorneys. Although Professor Rudasill's article focuses on Illinois law, her analysis and recommendations will be useful to attorneys nationwide as they assist their elderly clients in gaining legal authority to protect and nurture the grandchildren left in their care.

I. Introduction

The number of grandparents raising their grandchildren has multiplied over the past two decades and the size of this group continues to grow. The growth of these grandparent-headed households has drawn national attention to the problems that confront these older "parents" and the policy considerations that affect them. The realization that the problems encountered by this group

Mary C. Rudasill is Director of Clinical Programs and Associate Professor of Law, Southern Illinois University School of Law, Carbondale, Illinois. She would like to acknowledge the assistance of her Research Assistant, Rhonda Jenkins.

will become more pressing as their numbers increase has spurred national legislation, extensive study, and revisions in state policy.

On the national level, Congress demonstrated its awareness of the increasing incidence of grandparents parenting grandchildren with the enactment of Public Act 103-368 which declared 1995 the "Year of the Grandparent."¹ This joint congressional resolution recognized that "grandparents are a strong and important voice in support of the happiness and well-being of children" and that "grandparents often serve as the primary caregivers of their grandchildren."² The resolution called for the President to "issue a proclamation calling on the people of the United States to observe the year 1995 with appropriate programs, ceremonies, and activities."³

A recent publication by the American Association of Retired Persons (AARP)⁴ brings this phenomenon into focus. In the last twenty-five years, the number of children living in households headed by grandparents has increased by over fifty percent.⁵ In approximately one-third of these grandparent households, neither parent of the grandchild is present.⁶ In other words, nearly 551,000 mid-life (aged forty-five to sixty-four) and older adults (aged sixty-five and older) in 353,000 households are caring for their grandchildren with neither parent present. If other nontraditional types of households are included (roommate, unmarried partners, etc.) the number of households is closer to 634,000.⁷

1. S. Con. Res. 198, 103d Cong., 2d Sess., 108 Stat. 3475 (1994).

2. *Id.*

3. *Id.*

4. DEBORAH CHALFIE, GOING IT ALONE, A CLOSER LOOK AT GRANDPARENTS PARENTING GRANDCHILDREN (AARP Women's Initiative, 1994) [hereinafter AARP WOMEN'S INITIATIVE].

5. *Id.* at 1 n.1.

6. *Id.* at 1. The statistical estimates provided in the AARP Women's Initiative report are derived from the March 1992 Current Population Survey (CPS), an annual survey of approximately 150,000 persons in nearly 60,000 households. See *id.* at 2 & n.6.

7. *Id.* at 3. The AARP Report provides the following demographic information: The median age for these mid-life and older grandparent care givers is age 57 and nearly 23% of these care givers are 65 or older. *Id.* Sixty percent of the grandparent care givers are grandmothers while 40% are grandfathers. *Id.* However, 96% of the grandfather care givers are married and thus presumably have a spouse to share the parenting duties. *Id.* at 4. Only 63% of the grandmother care givers share this responsibility with a spouse. *Id.* This means that 93% of all single grandparent care givers are women. *Id.* Proportionally, nearly twice as many grandparent care givers are black (approximately 9% overall). *Id.* Ten percent are of Hispanic origin. *Id.* Fifty-eight percent of all grandparent care givers did not graduate from high school. *Id.* Grandparent care givers are among the poorest of the nontraditional households studied. *Id.* Twenty-seven percent live at or below

As acknowledged by Congress and illustrated by the AARP report, these half-million grandparent “parents” face problems not often confronted by more traditional single-parent or nuclear family households. Because most of these household arrangements are not legally formalized, grandparents caring for grandchildren live in a state of legal limbo with regard to decision making and obtaining financial assistance for the children in their care.

This article explores the difficulties encountered by grandparents who shoulder the responsibility of raising their children’s children and analyzes the legal aspects of the grandparent household. This article addresses the options available to grandparents in Illinois for acquiring the legal authority to care for and to make decisions for the children in their care. These options include custody proceedings, guardianship proceedings, juvenile court proceedings, adoption and habeas corpus actions. This article also discusses various state and federal benefits and suggests possible avenues of financial assistance to the grandparent-headed family. The goal of this article is to offer suggestions and guidance to grandparents and their attorneys with regard to the protection and care of grandchildren entrusted to them by fate or a family member.

II. Pursuing Legal Parenting Authority

A. The Problem

Many of the problems experienced by grandparents raising grandchildren arise from the lack of official or legal authority to make day-to-day decisions for the child. In theory, written consent from one of the child’s parents is all that is needed to give the grandparent the required authority to make personal, medical, educational, and other decisions on behalf of the child. In reality, parents almost never give this kind of written consent when they leave their children with a relative or unrelated third party. Even when written consent is given, it rarely covers every situation which may arise when a child is in the

the poverty level and another 14% are near-poor (100-149% of poverty). *Id.* This means that 56% of grandparent care givers have household incomes of less than \$20,000 per year. *Id.* Only six percent of these households report having received child support payments. *Id.* Fifty-seven percent of these households are concentrated in the South. *Id.* The remaining households are evenly divided between the Northeast, Midwest, and West. *Id.* at 4-5. Interestingly, 40% of these grandparent care-giver households are located in nonmetropolitan areas having populations of less than 100,000. *Id.* at 3-5.

full-time care of a third party.⁸ Grandparents must usually decide between doing the best they can for the child while remaining a "de facto" parent or taking some form of legal action to obtain "de jure" parenting status.⁹ This decision sometimes depends on how long the grandparents believe that they will be caring for the child. Many grandparents lack the financial resources to institute action to legalize their role of primary care giver and, therefore, will not seek legal formalization of the relationship unless they are forced to do so in order to obtain medical care for the child or to qualify for financial assistance. Others do not act to formalize the relationship until it becomes apparent that the parent intends to leave the child for a long period of time or permanently in their care or when it becomes obvious that the parent is no longer fit or able to properly care for the child.¹⁰

Even after court proceedings, the grandparent remains in a precarious legal position. In all but adoption actions, the children's parents may initiate legal proceedings and seek the return of their children to their custody regardless of the legal authority obtained by the grandparent.¹¹ The success of these actions by parents to regain custody and control over their children depends upon the circumstances under which the parents lost or relinquished custody, the length of time the child has been living with the grandparent, and any change in circumstances alleged by the parent at the time the application for return of custody is made.¹²

Despite these potential challenges, the grandparent raising grandchildren in a long-term or permanent situation should take legal

8. The Illinois legislature recently enacted 755 ILL. COMP. STAT. § 5/11-5.4 (West 1993 & Supp. 1995), a short-term guardianship act under the Probate Act, allowing a parent to designate a nonparent as a short-term guardian of a child for up to 60 days but does not permit interference with the rights of the child's other parent who may be able and willing to care for the child. The statute includes a suggested form to use. (Short-term guardianship and standby guardianship are discussed in more detail *infra* part II.D.1.e).

9. AARP WOMEN'S INITIATIVE, *supra* note 11, at 5. The report explains that de jure (by law) relationships are legally recognized and confer parent-like powers and impose parent-like obligations on the grandparent care giver. *Id.* Adoption, permanent or temporary custody (called guardianship in some jurisdictions), certification as a foster parent, and powers of attorney are methods of establishing a de jure relationship. *Id.* In contrast, de facto (in fact) relationships are informal arrangements, usually initiated when the situation is expected to be temporary or the parent refuses to surrender legal authority over the child. *Id.* These relationships are not officially recognized by law and do not endow the grandparent care giver with any rights or duties with respect to the child. *Id.*

10. *Id.*

11. *Id.* at 5.

12. These factors will be discussed in more detail throughout this article.

action to acquire the authority necessary to care for a child and meet the child's financial, medical, and educational needs. Once this authority is obtained, if the parent attempts to regain custody of the child, the grandparent may seek a court ruling.¹³ This judicial oversight lessens the chance of disruption in the grandparent-headed household.

In Illinois, there are five ways to secure the legal right to care for a child when both parents are absent, unable, or unwilling to raise a child. A grandparent may initiate a custody proceeding under the Illinois Marriage and Dissolution Act,¹⁴ a guardianship proceeding under the Illinois Probate Act,¹⁵ a juvenile court proceeding under the Juvenile Court Act to obtain custody or guardianship,¹⁶ a habeas proceeding under the Habeas Corpus Act¹⁷ and finally, adoption of the child under the Adoption Act.¹⁸ These legal actions each have their own distinct advantages and disadvantages and each are discussed separately. Before reaching these issues, however, it is necessary to examine the threshold questions of jurisdiction.

B. Jurisdiction

1. SUBJECT MATTER JURISDICTION

To initiate legal action, the grandparent or the grandparent's attorney must first ascertain which court may hear the custody matter. Jurisdictional requirements are included in each statute concerned with the care and custody of a child.¹⁹ In years past, when society was less mobile, the determination of which court could hear and decide custody issues was a fairly simple matter. The custody actions were brought either where the petitioning party resided, where the child resided, or in the court where a party to the action had substantial

13. Should a parent remove a child from the grandparent's control and custody in violation of a court order, the grandparent will at least have the opportunity to bring an action in court in light of the previous court order.

14. 750 ILL. COMP. STAT. § 5/601(b)(2) (West 1993 & Supp. 1995).

15. 755 ILL. COMP. STAT. § 5/11-1 to 11-18 (West 1993 & Supp. 1995).

16. Juvenile Court Act, 705 ILL. COMP. STAT. § 405/2-1 to 2-31 (West 1993 & Supp. 1995).

17. 735 ILL. COMP. STAT. § 5/10-101 to 10-137 (West 1993 & Supp. 1995).

18. 750 ILL. COMP. STAT. § 50/1 (West 1993 & Supp. 1995).

19. Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. § 5/601 (West 1993 & Supp. 1995); Illinois Adoption Act, *id.* § 50/4; Illinois Juvenile Court Act, 705 ILL. COMP. STAT. § 405/2-1 and 2-2 (West 1993 & Supp. 1995); Illinois Probate Act, 755 ILL. COMP. STAT. § 5/11-1, 11-5, 11-7 (West 1993 & Supp. 1995); Illinois Habeas Act, 735 ILL. COMP. STAT. § 5/10-102 (West 1993 & Supp. 1995).

connections or contacts.²⁰ Once a court made the initial custody determination, it maintained continuing jurisdiction over future modifications of that decision.²¹

As society became more mobile, increasing numbers of people seeking custody orders engaged in forum shopping, moving from one state to another in pursuit of a favorable custody decision.²² This practice led to child snatching by parents unhappy with one court's custody determination and often resulted in children being moved from state to state and hidden from the other parent and family members to avoid a change of custody.²³ State courts, seemingly eager to ignore custody determinations from other jurisdictions, actually aided and abetted these schemes.²⁴ Each state had its own particular laws governing subject matter jurisdiction, and there was little consistency amongst the states.²⁵ In 1968, the National Conference of Commissioners on Uniform State Laws and the American Bar Association, recognizing the need for uniform legislation, approved the Uniform Child Custody Jurisdiction Act (UCCJA).²⁶

The UCCJA drafters explained:

Underlying the entire Act is the idea that to avoid the jurisdictional conflicts and confusions which have done serious harm to innumerable children, a court in one state must assume major responsibility to determine who is to have custody of a particular child; that this court must reach out for the help of courts in other states in order to arrive at a fully informed judgement which transcends state lines and considers all claimants, residents and non-residents, on an equal basis and from the standpoint of the welfare of the child.²⁷

The UCCJA has now been adopted in all fifty states as well as the District of Columbia and the Virgin Islands.²⁸ States that have enacted the UCCJA have incorporated their own individual amendments and nuances, but, in general, the UCCJA limits custody jurisdiction to the state where the child has his home or with which the child and the family have other significant contacts.²⁹ Also, the

20. *Siegel v. Siegel*, 417 N.E.2d 1312, 1314 (Ill. 1981).

21. *Id.*

22. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 116-18 note (1968) (Prefatory Note).

23. *Id.*

24. *Id.* at 116-17.

25. *Id.*

26. UNIF. CHILD CUSTODY JURISDICTION ACT §§ 1-28 (1968).

27. 9 U.L.A. at 118.

28. 9 U.L.A. Table of Jurisdictions (Supp. 1994).

29. UNIF. CHILD CUSTODY JURISDICTION ACT § 3.

UCCJA provides for the recognition and enforcement of out-of-state custody decrees.³⁰

Jurisdictional preference is given to the prior court in modification of custody matters under certain conditions.³¹ Access to the court may be denied to persons who have engaged in child snatching or similar misconduct.³² The UCCJA also provides for procedural due process rights such as notice for all persons, including nonresidents, who claim a right to custody.³³ Courts with pending custody cases are encouraged to contact one another and exchange information to determine which court should proceed to decide the custody matter.³⁴

The UCCJA has been adopted by Illinois.³⁵ The Illinois version of the uniform act is very similar to the UCCJA and embodies the overall intent of the UCCJA to limit forum shopping in custody matters and to provide guidelines for state courts to use to determine when they should not exercise jurisdiction over a particular case.³⁶ As courts have noted, the term "jurisdiction" as used in the UCCJA is not used in its traditional sense to confer subject-matter jurisdiction on certain courts, as courts have always presumably possessed continuing jurisdiction over child custody matters originated in their state. Rather, it limits state courts in their exercise of existing jurisdiction over custody proceedings.³⁷ The UCCJA is intended to apply to all custody proceedings. The term "proceedings" has been broadly defined in the UCCJA and construed by the case law to include most cases where the custody of a child is at issue.³⁸ The UCCJA is applicable to initial custody proceedings;³⁹ modification of custody proceedings;⁴⁰ adoption proceedings;⁴¹ abuse, neglect, and dependency

30. *Id.* §§ 13, 15.

31. *Id.* § 14.

32. *Id.* § 8.

33. *Id.* § 11.

34. *Id.* §§ 17-22.

35. 750 ILL. COMP. STAT. § 35/1 to 35/26 (West 1994).

36. *See* Siegel v. Siegel, 417 N.E.2d 1312, 1316 (Ill. 1981); Noga v. Noga, 443 N.E.2d 1142, 1143-44 (Ill. App. Ct. 1982); *In re Levy*, 434 N.E.2d 400, 403 (Ill. App. Ct. 1982).

37. *Siegel*, 417 N.E.2d at 1316; *Levy*, 434 N.E.2d at 403.

38. 750 ILL. COMP. STAT. §§ 35/3, 35/3.02, 35/3.03; *see also* Danny R. Veilleux, Annotation, *What Types of Proceedings or Determinations are Governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA)*, 78 A.L.R. 4TH 1028 (1994).

39. *See, e.g., In re Breyley v. Breyley*, 617 N.E.2d 423 (Ill. App. Ct. 1993); *In re Elblkasy*, 610 N.E.2d 139 (Ill. App. Ct. 1993); *In re Bozarth*, 538 N.E.2d 785 (Ill. App. Ct. 1989).

40. *See, e.g., Siegel*, 417 N.E.2d at 1316; *Levy*, 434 N.E.2d at 403.

proceedings;⁴² guardianship proceedings brought by nonparents;⁴³ and habeas attacks on prior custody determinations.⁴⁴

2. PERSONAL JURISDICTION OVER THE PARENTS

Once subject-matter jurisdiction is established, personal jurisdiction over all interested parties becomes a crucial consideration. Failure to obtain personal jurisdiction over the child's parents can mean that, at any time, a parent can institute legal action seeking the return of custody of the child.⁴⁵

Although it is true that a parent whose parental rights have not been terminated may seek custody of his child at any time from the court, appropriate legal action by the grandparent offers some protection in preserving the grandparent's custodial position. If the grandparent has obtained custody through a legitimate court proceeding and the parent received proper notice of the proceeding, the burden is on the parent to show that, due to a change in the circumstances that led to the relinquishment of the child, it is now in the child's best interest to be returned to the custody of the parent.⁴⁶ If the parent was not given proper notice or made a party to the initial custody proceeding brought by the grandparent, the burden on the parent is less onerous. Rather than requiring a showing of changed circumstances, the court will probably base the determination on the superior right of the parent to raise his or her child balanced with the best interest of the child under the facts and circumstances of the case. Thus, the grandparent may seriously disadvantage himself or herself in the proceedings by failing to give proper notice to the parent.

Jurisdictional issues are an integral part of every custody action. The jurisdictional factors may affect the balancing of burdens of proof and the weight of presumptions. Therefore, jurisdiction should be the threshold concern addressed by a grandparent or the grandparent's attorney in initiating a custody action.

41. See, e.g., *Noga v. Noga*, 443 N.E.2d 1142, 1143 (Ill. App. Ct. 1982).

42. Annotation, *Child Custody; When Does State That Issued Previous Custody Determination Have Continuing Jurisdiction Under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA)*, 28 USCS § 1738A, 83 A.L.R. 4TH 742 (1991) [hereinafter Annotation].

43. *In re Donaldson*, 223 Cal. Rptr. 707 (Cal. Ct. App. 1986).

44. *McGuane v. McGuane*, 645 N.E.2d 575, 578 (Ill. App. Ct. 1995); see also Annotation, *supra* note 42.

45. *In re Doe*, 638 N.E.2d 181, 182 (Ill. 1994), cert. denied, 115 S. Ct. 499 (1994).

46. *Nye v. Nye*, 105 N.E.2d 300, 304 (Ill. 1952); *Marcus v. Marcus*, 248 N.E.2d 800, 804-05 (Ill. App. Ct. 1969).

C. Custody Under the Illinois Marriage and Dissolution of Marriage Act

A grandparent seeking custody of a minor grandchild in an Illinois court will usually proceed under the custody provisions of the Illinois Marriage and Dissolution Act (IMDMA).⁴⁷ One need not be seeking a dissolution of marriage or legal separation to seek a custody determination under the IMDMA.⁴⁸ Instead, a grandparent may seek an original order of custody in the situation where the matter has not been before the court previously, or the grandparent may seek a modification of an order of custody made by the court in another proceeding such as a dissolution of marriage or legal separation.⁴⁹

One who is appointed a minor's custodian under the IMDMA "may determine the child's upbringing, including but not limited to, his education, health care and religious training," unless otherwise limited by the court order at the time of the custody determination.⁵⁰ A child's custodian has plenary authority over all decisions concerning the child and becomes, as the Illinois Supreme Court has stated, "in effect, the general guardian of the child . . . 'who has the general care and control of the person and estate of the ward.'"⁵¹

The court retains jurisdiction over a custody matter once a determination is made, and the IMDMA provides procedures for challenging a custody order.⁵² The Uniform Child Custody Jurisdiction Act operates concurrently with the custody provisions of the IMDMA to determine which court will hear a custody matter.⁵³ If all parties reside in Illinois and custody has not been previously adjudicated in another state, the Illinois court will have jurisdiction over the custody matter.⁵⁴ Venue is determined by the IMDMA.⁵⁵ In general, an original custody matter is filed in the county where either the plaintiff or the defendant resides.⁵⁶ If a third party such as a grandparent files for custody, the case must be filed in the county where the child is a permanent resident or is found.⁵⁷ If a parent or a third party is seeking modification of an original custody determination, the petition must

47. 750 ILL. COMP. STAT. §§ 5/601 to 5/611 (West 1993 & Supp. 1995).

48. *Id.* § 5/601(b).

49. *Id.* §§ 5/601, 5/610.

50. *Id.* § 5/608(a).

51. *Stevenson v. Hawthorne Elementary Sch.*, 579 N.E.2d 852, 856 (Ill. 1991).

52. *Id.* at 855, *see also* 750 ILL. COMP. STAT. § 5/610.

53. 750 ILL. COMP. STAT. § 5/601; *id.* § 35/1.

54. *Id.* §§ 5/601, 35/1.

55. *Id.* § 5/601.

56. *Id.* § 5/104.

57. *Id.* § 5/601(b)(2).

be filed in the court which made the original determination unless some or all of the original parties no longer reside in the state.⁵⁸

1. PARENTAL SUPERIOR RIGHTS DOCTRINE

A third party is specifically allowed to file a petition for custody under the IMDMA.⁵⁹ However, the third party must show that at the time of filing, the child was "not in the physical custody of one of his parents."⁶⁰ This codifies the "parental superior rights doctrine," a doctrine historically recognized by Illinois courts to protect the right of the natural parent of a child to raise the child.⁶¹ Traditionally, the parent had the right to custody of the child as against all the world unless that right was forfeited or the welfare of the child demanded that the parent should be deprived of custody.⁶² Parents have a fundamental liberty interest in the care, custody, and management of their child.⁶³

As articulated in *In re Townsend*,⁶⁴ when the custody matter is brought against the child's natural parent, the superior rights doctrine is always recognized and the nonparent must show a "compelling reason" why the parent should not have the custody of the child. In *Townsend*, the mother and father of the child were not married, but the father had acknowledged paternity when the child was born.⁶⁵ When the child was about two years old, the child's mother shot and killed the father's wife and was subsequently convicted and sent to prison.⁶⁶

The child remained in the care and custody of her adult half-sister with whom the child and the child's mother had lived since the child was born.⁶⁷ Both the father and the half-sister sought custody of the child.⁶⁸ In examining the relative burdens of the two parties, the court noted that the nonparent and the natural parent did not start on equal footing because the father possessed a superior right to the cus-

58. *Id.* § 35/4(b).

59. *Id.* § 5/601(b)(2).

60. *Id.* § 5/601(b)(2).

61. See *Edwards v. Livingston*, 247 N.E.2d 417 (Ill. App. Ct. 1969); *In re Custody of Townsend*, 427 N.E.2d 1231 (Ill. App. Ct. 1981).

62. H. Joseph Gitlin, *Defining the Best Interest of Children: Parents v. Others in Custody Proceedings*, 79 ILL. B.J. 566 (1991) (citing *Stafford v. Stafford*, 217 Ill. App. 548 (1920)).

63. *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651 (1971).

64. *In re Townsend*, 427 N.E.2d 1231 (Ill. App. Ct. 1981).

65. *Id.* at 1233.

66. *Id.* at 1234.

67. *Id.*

68. *Id.*

tody of the child.⁶⁹ The nonparent must establish “good cause or reason” to overcome the presumption that the parent has a superior right to the custody of the child.⁷⁰ In this case, the trial court, in granting custody to the half-sister, had failed to give proper weight and consideration to the father’s superior right.⁷¹ The high court reversed and remanded for appropriate consideration.⁷²

In addition, in deference to the superior rights of the parent, under the IMDMA, a third party bringing a custody action must first establish standing by showing that the child “is not in the physical custody of one of his parents.”⁷³ A finding that the natural parent has actually relinquished custody of the child confers standing on the grandparent to pursue custody under the IMDMA.⁷⁴

Generally, standing connotes whether a litigant has a justiciable interest in a controversy, and the standing of the litigants before the court is one of the components of the court’s subject matter jurisdiction. The term “standing” . . . involves a threshold issue of whether a parent has custody of a child for purposes of satisfying the requirements of section 601(b)(2) [of the IMDMA].⁷⁵

Furthermore, the third party must show that his or her custody of the child is more than mere “physical possession . . . of the child at the moment of filing a petition for custody.”⁷⁶ To find that a child is “not in the physical custody of one of his parents,” the grandparent must show that there has been a voluntary relinquishment of the child by the parent.⁷⁷ The grandparent also must show that he or she has more than mere physical possession of the child.⁷⁸ “The determina-

69. *Id.* at 1234-35.

70. *Id.* at 1235.

71. *Id.* at 1238.

72. *Id.*

73. 750 ILL. COMP. STAT. § 5/601(b)(2).

74. *See, e.g., In re Custody of Barokas*, 440 N.E.2d 1036, 1042 (Ill. App. Ct. 1982) (“Overnight contact with third parties fails to fulfill the statutory provision that the child not be in the physical custody of one of her parents. A parent’s ‘actual possession and control of a child’ . . . is not lost everytime the child visits or spends a vacation with a relative or friend. We do not accept petitioners’ theory that physical custody may be relinquished by default if a parent performs the task of parenting in a less than adequate manner.”); *In re Menconi*, 453 N.E.2d 835, 839 (Ill. App. Ct. 1983) (The grandparents had custody of the child for six and one-half years without interruption. The court found “the voluntary nature of the initial transfer of the child, coupled with the lengthy period of care by the grandparents and the corresponding integration of the child into the home of her grandparents sufficient to divest the father of physical custody of the child.”). *Id.*

75. *Sechrest v. Sechrest*, 560 N.E.2d 1212, 1214 (Ill. App. Ct. 1990).

76. *In re Peterson*, 491 N.E.2d 1150, 1152 (Ill. 1986).

77. *Peterson*, 491 N.E.2d at 1152.

78. *Id.*

tion of whether a child is in a person's physical custody has included factors such as how the child came to be in the nonparent's physical possession and the duration of the possession.⁷⁹

If the grandparent fails to make the required showing, he or she lacks standing to bring the action and may not proceed under the IMDMA to attain legal custody of a child.⁸⁰ These procedural requirements are designed to protect the superior right of the natural parent in custody determinations; however, this right of natural parents to raise their children without interference from the state or other third persons is not absolute.⁸¹ The superior right of the natural parent must yield to the "best interest of the child."⁸²

2. BEST INTEREST OF THE CHILD

The presumption in favor of the natural parent in custody matters has been held to be only one factor which the court weighs in determining the best interest of the child.⁸³ The court need not find a natural parent unfit or find that the parent forfeited parental rights in order to award custody to a grandparent so long as the best interest of the child will be served.⁸⁴

Once a grandparent meets the standing requirement to bring a custody action before the court, the grandparent will be considered for legal custody of the child under the "best interest of the child"

79. *Sechrest*, 560 N.E.2d at 1215 (citing *In re Santa Cruz*, 527 N.E.2d 131, 136 (Ill. App. Ct. 1988)). Illinois case law illustrates the principle. For example, it was not sufficient to establish physical custody of the child by a grandparent when the grandparent took the child from an adult sister's home where the child went for an overnight visit. *In re Custody of Barokas*, 440 N.E.2d 1036, 1042 (Ill. App. Ct. 1982). Nor was it sufficient when the grandparents obtained custody of the child immediately following the death of the custodial mother, as it is presumed that a noncustodial parent gains physical custody of his child at the death of the custodial parent. See *Dile v. Lundak*, 618 N.E.2d 1165, 1167 (Ill. App. Ct. 1993) (citing *Peterson*, 491 N.E.2d at 1152). It was sufficient to establish standing when the child in question had been residing with the grandparent for nearly four years before the custody action arose. *Rose v. Potts*, 577 N.E.2d 811 (Ill. App. Ct. 1991). Standing to bring a custody action was also found where the custodial mother and child had lived with the maternal grandparents for six years before the mother's death and the child was residing with the grandparents at the time the child's father brought a modification proceeding. *Stephens v. Piccirilli*, 410 N.E.2d 1086 (Ill. App. Ct. 1980). A neighbor who cared for children whose father was incarcerated for murdering their mother had standing to seek custody. *Milenkovic v. Milenkovic*, 416 N.E.2d 1140 (Ill. App. Ct. 1981).

80. 750 ILL. COMP. STAT. § 5/602(b).

81. *In re Townsend*, 427 N.E.2d 1231, 1234 (Ill. 1981).

82. *Giacopelli v. Florence Crittenton Home*, 158 N.E.2d 613, 618 (Ill. 1959).

83. *Townsend*, 427 N.E.2d at 1234.

84. *Giacopelli*, 158 N.E.2d at 618.

standard.⁸⁵ Illinois courts have never hesitated to assert their power to decide matters concerning the rights and interests of minors. Traditionally, the courts have declared plenary jurisdiction over the persons and estates of infants and the right to "cause to be done whatever may be necessary to preserve their estates and protect their interest."⁸⁶ The "best interest of the child" standard is the "guiding star" for courts making custody determinations.⁸⁷ The standard is a "simple one designed to accommodate the often complex and unique circumstances of a particular case."⁸⁸ The premise has been described in this way: "Giving full consideration to the primary and superior right of the natural parents to the custody of their child, what does the best interest of the child demand?"⁸⁹

Although theoretically a simple principle, the standard is not easily applied.⁹⁰ All matters that have a bearing upon the welfare of the child must be considered.⁹¹ The particular facts and circumstances of each case are dispositive.⁹² Because the facts and circumstances presented to the trier of fact are crucial to this determination, the trial court's findings generally will not be disturbed unless the holding is against the manifest weight of the evidence.⁹³

In original custody proceedings, where the court has not previously rendered a custody decision involving the minor, section 602 of the IMDMA applies.⁹⁴ Section 602(a) sets out the factors which the court must consider along with all other relevant factors in attempting to arrive at the custody arrangement that serves the best interest of the child. These factors are:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school and community;
- (5) the mental and physical health of all individuals involved;

85. *In re Peterson*, 491 N.E.2d 1150, 1152 (Ill. 1986).

86. *Ames v. Ames*, 37 N.E. 890 (Ill. 1894).

87. *Nye v. Nye*, 105 N.E.2d 300, 304 (Ill. 1952).

88. *In re Townsend*, 427 N.E.2d 1231, 1234 (Ill. 1981).

89. *Giacopelli v. Florence Crittenton Home*, 158 N.E.2d 613, 618 (Ill. 1959).

90. *Edwards v. Livingston*, 247 N.E.2d 417, 421 (Ill. App. Ct. 1981).

91. *Giacopelli*, 158 N.E.2d at 618 (citing *Kuhn v. Weeks*, 228 Ill. App. 262 (1923)).

92. *Edwards*, 247 N.E.2d at 422.

93. *Becton v. Sanders*, 474 N.E.2d 1318, 1324 (Ill. App. Ct. 1985) (citing *Schulenburg v. Signatrol, Inc.* 226 N.E.2d 624 (Ill. 1967)).

94. 750 ILL. COMP. STAT. § 5/602.

- (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
- (7) the occurrence of ongoing abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986 . . . whether directed against the child or against another person; and
- (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.⁹⁵

The court need not recite these factors in its order, but the record should indicate that the court considered these factors as well as all other relevant circumstances in arriving at its decision.⁹⁶ Although the factors listed in the IMDMA are not the only considerations in custody determinations and other pertinent factors may be considered, grandparents seeking custody of a grandchild should address as many of the statutory factors as possible when presenting their case to the court.

Under the IMDMA, only conduct of the present or proposed custodian which affects the custodian's relationship with the child is to be considered.⁹⁷ Therefore, the grandparent attempting to show the misconduct of the parent as a factor must also show that the misconduct has some affect on the parent's relationship with the child. Otherwise, the parent's behavior will not be considered by the court.

The grandparent's chances of acquiring custody of the child are greatly enhanced if the grandparent establishes that the child has been living with the grandparent for a long period of time and is well adjusted and happy in that environment. This could provide the "compelling reason" sought by the court to award custody to the grandparent over the superior right of the natural parent. Also it is helpful to show that the parent of the child has not provided support for the child and continues to be unwilling or unable to do so.

In *Look v. Look*,⁹⁸ the maternal grandparents intervened in a court proceeding seeking to transfer custody of the child from the mother to the father. The grandparents cared for the child for five years after the child's mother had left the child with them.⁹⁹ The father paid child

95. *Id.* § 5/602(a). In addition, "[t]he court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child." *Id.* § 602(b).

96. *Shedbalkar v. Shedbalkar*, 419 N.E.2d 409, 410-11 (Ill. App. Ct. 1981).

97. 750 ILL. COMP. STAT. § 5/602(b).

98. 315 N.E.2d 623 (Ill. App. Ct. 1974).

99. *Id.* at 624.

support regularly and visited the child periodically.¹⁰⁰ The court held that custody should remain with the grandparents, noting that:

[w]hen the people having the actual custody of the child at the time a change is sought have properly provided and supervised its needs for a substantial period of time and the child has become attached to the environment and to the grandparents who have made possible the happiness, security and comfort of its early years, a court is not justified in transferring custody to another except for the most cogent reasons.¹⁰¹

The court observed that the father, who is presumed to have a superior right to the custody of his child, waited five years to assert his right and his failure to act constituted a forfeiture of his right to custody.¹⁰²

In another case, a two-month-old child was left with the paternal grandmother where she remained for four years until a custody proceeding was brought by the parents of the child. The court found that the length of time the child had been in the custody of the grandmother could be a determinative factor in a custody decision.¹⁰³

Conditions showing that the natural parent is unable to care for the minor are also effective in overcoming the presumption favoring the natural parent in custody actions. In *Montgomery v. Roudez*,¹⁰⁴ the fourteen-year-old mother gave the child to her great-aunt soon after his birth.¹⁰⁵ The mother then lived in various places including a series of foster homes.¹⁰⁶ The mother subsequently sought custody of the child from the great-aunt in a habeas proceeding allegedly to become eligible for public aid benefits.¹⁰⁷ She was found unfit to have custody of the child, and the great-aunt was awarded permanent custody.¹⁰⁸

In affirming, the reviewing court noted that the superior rights doctrine is just one of several factors the court must consider in finding the best interest of the child.¹⁰⁹ It is not necessary to find a parent unfit in order to award custody to a third party.¹¹⁰ The court cited factors in the record supporting the determination that the child's best

100. *Id.* at 624-25.

101. *Id.* at 625-26.

102. *Id.* at 626.

103. *Rose v. Potts*, 577 N.E.2d 811, 814 (Ill. App. Ct. 1991) (citing *In re Townsend*, 427 N.E.2d 1231, 1238 (Ill. 1981)).

104. *Montgomery v. Roudez*, 509 N.E.2d 499 (Ill. App. Ct. 1987).

105. *Id.* at 501.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 502.

110. *Id.* at 503.

interest would be met by awarding custody to the great-aunt.¹¹¹ The factors included: the fact that the mother originally sought custody in order to qualify for public aid benefits; at the time she filed, she was a ward of the state with no permanent home; she was just being released from a structured group home where she had been placed by the Department of Children and Family Services; she had no employment and no financial security; and her current situation failed to demonstrate any pattern of maturity or stability in her own life.¹¹²

Depending on the circumstances, the paramount concern of Illinois courts for the best interests of the child may provide an advantage or present an obstacle for a grandparent seeking custody of his or her grandchild. The grandparent seeking custody should be aware of the statutory factors and strive to use these factors to persuade the court that supplanting the superior parental right of the natural parent would be in the best interest of the child.

3. MODIFICATION OF AN ORIGINAL CUSTODY DETERMINATION

In order to promote the stability of custody determinations made by the court, the IMDMA makes it difficult to modify a custody arrangement ordered by the court. According to Section 610 of the IMDMA, no motion to modify a custody judgment may be brought earlier than two years after its date, unless the child's present environment seriously endangers the child's physical, mental, moral, or emotional health.¹¹³ Under Section 610(a), a party seeking modification of a custody order must establish three things: first, the child must be seriously endangered by his present environment; second, there must be changed circumstances warranting modification of the existing order of custody; and, finally, the proposed modification must be in the best interest of the child.¹¹⁴ These requirements are the legislative attempt to provide stability and continuity in the child's life by preventing the "ping-pong" nature of litigation involving custody disputes, yet provide a "safety valve" for the modification of custody in emergency situations.¹¹⁵

111. *Id.*

112. *Id.*

113. 750 ILL. COMP. STAT. § 5/610(a).

114. *Naylor v. Kindred*, 620 N.E.2d 520, 524 (Ill. App. Ct. 1993) (citing § 610(a)).

115. *Id.*

If the custodial parent dies or is rendered incapable of caring for the child before the two-year period has passed, it appears that serious endangerment need not be shown.¹¹⁶ Nonetheless, a party seeking modification still needs to show that the modification is in the best interest of the child.¹¹⁷

After this two-year waiting period has passed, a party seeking to modify a custody order must show by clear and convincing evidence based upon facts "that have arisen since the entry of the prior judgment or upon facts unknown to the court at the time of entry of the prior judgment, that a change has occurred in the circumstances of the child or his custodian . . . and that the modification is necessary to serve the best interest of the child."¹¹⁸

The showing, as required by the IMDMA of a change of circumstances prior to a custody modification codifies Illinois case law. As indicated by the Illinois Supreme Court in *Nye v. Nye*,¹¹⁹

After a divorce decree in this State the custody of the children is always subject to the order of the court which enters the decree and may be changed from time to time as the best interests of the children demand. The decree is *res judicata* as to the facts which existed at the time it was entered but not as to facts arising thereafter. . . . New conditions must have arisen to warrant the court changing its prior custody determination¹²⁰

The welfare of the child is the sole consideration in deciding if there should be a change in custody.¹²¹ Changed conditions alone do not warrant modification unless the changes affect the welfare of the child.¹²² Proof of the change of circumstances must be made by clear and convincing evidence.¹²³ In addition, as in other custody actions, the superior parental rights doctrine applies in actions seeking to modify a prior court custody determination.¹²⁴ This parental preference is demonstrated in the requirement that the court "state in its

116. *Id.* at 531.

117. *Id.* at 532.

118. 750 ILL. COMP. STAT. § 5/610(b).

119. 105 N.E.2d 300 (Ill. 1952).

120. *Id.* at 304 (internal citations omitted).

121. *Id.*

122. *Nolte v. Nolte*, 609 N.E.2d 381, 385 (Ill. App. Ct. 1993).

123. 750 ILL. COMP. STAT. § 5/610(b) (the clear and convincing evidence standard was added to the IMDMA in 1982). The clear and convincing standard requires a high level of certainty. The standard is higher than a preponderance of the evidence standard while not quite approaching the degree of proof necessary to convict a person of a criminal offense. *Nolte*, 609 N.E.2d at 385.

124. *In re Walters*, 529 N.E.2d 308 (Ill. App. Ct. 1988).

decision specific findings of fact in support of its modification . . . if either parent opposes the modification."¹²⁵

As a deterrent to seeking a modification without good cause, the court is allowed to assess attorney fees and costs against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment.¹²⁶

Grandparents may have a very difficult time attempting to modify a prior custody judgment of the minor child if the child is still living with the custodial parent. Absent very compelling circumstances which affect the child's welfare, it is unlikely that a grandparent will succeed. However, the grandparent's chances of success are greatly enhanced if the child has resided with the grandparent for a significant length of time.

In *Barclay v. Barclay*,¹²⁷ the paternal grandparents, as intervenors, sought to have a Connecticut judgment for divorce which awarded custody to the father, modified in Illinois to award the child's custody to them. The custodial father had placed the child with his parents soon after the divorce was final.¹²⁸ The child's mother visited the child at his grandparents periodically and filed a counterclaim in the Illinois action seeking custody.¹²⁹ The child had lived almost exclusively with his grandparents. The court found that the natural right of the parents for custody must yield to the best interest of the child under circumstances such as these where the child had actually resided with the grandparents for nearly six years.¹³⁰ The court concluded that this action was not actually a change of custody from the father to the grandparents but rather a modification of the original order to conform to the realities of the situation.¹³¹

In *In re Walters*,¹³² a grandmother had custody of her grandchild for more than ten years under a court order. The natural mother's motion seeking a modification and custody of the child failed.¹³³ Noting that the mother had shown little interest in the child over the years

125. 750 ILL. COMP. STAT. § 5/610(b).

126. *Id.* § 5/610(c).

127. *Barclay v. Barclay*, 384 N.E.2d 564 (Ill. App. Ct. 1978) (this case was decided prior to the statutory amendment requiring proof of a change in circumstances by clear and convincing evidence).

128. *Id.* at 565.

129. *Id.* at 566.

130. *Id.* at 568.

131. *Id.*

132. *In re Walters*, 529 N.E.2d 308 (Ill. App. Ct. 1988).

133. *Id.*

and that the mother was unemployed and engaged to marry a man with physical and mental impairments, the court held that the modification sought was not in the best interest of the child.¹³⁴

The case law demonstrates that a grandparent will have the greatest chance of success in a custody proceeding if he or she can show that the child has been in his or her physical custody for an extended period of time and that the child is happy, well adjusted, and fully integrated into the grandparent's household. The court also will consider all other pertinent factors in order to find the custody arrangement that serves the best interest of the child.

D. Legal Guardianship of a Minor in Illinois

A guardian is "one who legally has the care and management of the person or the estate, or both, of a child during its minority."¹³⁵ For most minors, there is no need for the court to appoint a guardian, as a child's parents are his legal guardians.¹³⁶ It is only when a minor's parents are unwilling or unable to act that a guardian may be needed.¹³⁷ In Illinois, both the Probate Act¹³⁸ and the Juvenile Court Act¹³⁹ allow for the appointment of a guardian for a minor. A guardianship, however, involves more than mere custody of a minor.¹⁴⁰ The guardian serves at all times under the supervision of the court.¹⁴¹ The guardian must follow the duties and responsibilities stipulated by the statute, unless a court order limits or expands statutory requirements.¹⁴²

A grandparent who is appointed the guardian of a grandchild must accept that the court is a participant in the parenting of the minor child. Although the court will not initiate intervention in the parenting process, any interested party, not necessarily a relative of the minor, may petition the court and bring the grandparents' actions regarding the minor to the court's attention.¹⁴³ The court retains the

134. *Id.* at 311.

135. BLACK'S LAW DICTIONARY 706 (6th ed. 1990).

136. ROBERT S. HUNTER, ESTATE PLANNING AND ADMINISTRATION IN ILLINOIS § 30.1 (2d ed. 1981).

137. *Id.*

138. 755 ILL. COMP. STAT. § 5/11-1 to 11-18.

139. 705 ILL. COMP. STAT. §§ 405/2-1 to 2-31.

140. *In re Schomer*, 411 N.E.2d 554, 558 (Ill. App. Ct. 1980).

141. *Id.*

142. See Illinois Probate Act, 755 ILL. COMP. STAT. § 5/11-13(a) and the Illinois Juvenile Court Act, 705 ILL. COMP. STAT. § 405/1-3(8) (West 1993 & Supp. 1995).

143. See Illinois Probate Act, 755 ILL. COMP. STAT. § 5/23-2; Illinois Juvenile Court Act, 705 ILL. COMP. STAT. § 405/2-28(4).

authority to modify or terminate any guardianship for acts committed by the guardian which are not in the minor's best interest.¹⁴⁴

The guardian must seek the court's approval if he or she takes certain actions relating to the minor's personal and real property.¹⁴⁵ Although such judicial oversight and possible intrusion by the court may be intimidating to a grandparent guardian, the court's retention of jurisdiction over the matter can be helpful as well. For example, this requirement allows the grandparent guardian to seek approval from the court for any potentially controversial action he may be required to take on behalf of the minor. The grandparent may file a petition with the court describing the action for which he desires court approval and give notice as required by the statute (which generally includes close relatives of the minor, including parents). After a hearing on the matter, the court will enter an order either allowing or disallowing the action requested. Thus, the court's continuing involvement with the guardian and the minor child is not necessarily a reason to avoid seeking appointment. Rather, the court's continuing involvement provides guidance and legal authorization with regard to actions taken by the grandparent on behalf of the minor.

1. GUARDIANSHIP UNDER THE PROBATE ACT

In Illinois, the Probate Act¹⁴⁶ sets out the statutory procedures for obtaining a guardianship over a minor child. The Probate Act establishes judicial authority for the protection of persons whose age renders them incapable, in the eyes of the law, of protecting themselves.¹⁴⁷ The Probate Act codifies the court's inherent broad and plenary jurisdiction over the persons and estates of minors.¹⁴⁸

a. Statutory Provisions The probate guardianship procedure may be the simplest way for grandparents to seek legal authority over a minor grandchild. A guardianship proceeding is initiated by filing a petition with the court.¹⁴⁹ The information required in the petition for

144. See Illinois Probate Act, 755 ILL. COMP. STAT. § 5/23-2; Illinois Juvenile Court Act, 705 ILL. COMP. STAT. § 405/2-28(4).

145. See 755 ILL. COMP. STAT. §§ 5/19-1 to 19-13, 5/20-1 to 20-24.

146. *Id.* §§ 5/1 to 5/30-3.

147. 2 HORNOR PROBATE PRACTICE AND ESTATES § 883 (Lawyers Co-op. 4th ed. 1994). Although at common law, minority did not end until age 21, the Act specifies that guardianships for minors are limited to those under the age of 18 years of age. *Id.* § 884; see also 755 ILL. COMP. STAT. § 5/11-1.

148. *Smythe v. Smythe*, 213 N.E.2d 609, 613 (Ill. App. Ct. 1965).

149. 755 ILL. COMP. STAT. § 5/11-5(a).

guardianship is contained in the Probate Act.¹⁵⁰ Two kinds of guardians are allowed by the Probate Act, guardian of the person and guardian of the estate.¹⁵¹ The guardian of the person of the minor "shall have the custody, nurture and tuition and shall provide education of the ward"¹⁵² The guardian of the estate of the minor "shall have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort, suitable support and education of the ward"¹⁵³ The same person may act as both the guardian of the person and estate; however, the guardian of the estate must be a resident of Illinois.¹⁵⁴ If the personal guardian is not an Illinois resident and an estate guardian is needed, a second person who is an Illinois resident must be named guardian of the minor's estate.¹⁵⁵ Under the statute, a guardian must be at least eighteen years old, a resident of the United States, must not be of unsound mind or adjudged a disabled person, and must not have been convicted of a felony.¹⁵⁶ The court will not appoint someone as guardian of the person of a minor "whom the court has determined had caused or substantially contributed to the minor becoming a neglected or abused minor as defined in the Juvenile Court Act of 1987"¹⁵⁷ unless 2 years have elapsed since the last proven incident of abuse or neglect and the court determines that the appointment of such person as guardian is in the best of the minor.¹⁵⁸

The petition initiating the action may be filed in the county where the minor resides if the minor is an Illinois resident, and in the county in which the minor's real or personal estate exists if the minor is not an Illinois resident.¹⁵⁹ Thus the residence of the minor at the time a guardianship is sought is important in determining where to bring the action. However, in *In re Smythe*,¹⁶⁰ a guardianship action for two minor children was filed in Illinois, even though neither minor

150. *Id.* § 5/11-8.

151. *Id.* § 5/11-5(a).

152. *Id.* § 5/11-13(a).

153. *Id.* § 5/11-13(b).

154. *Id.* § 5/11-3(a).

155. *Id.*

156. *Id.*

157. 705 ILL. COMP. STAT. § 405/2-3(1) and 2-3(2).

158. 755 ILL. COMP. STAT. § 5/11-5(d).

159. 755 ILL. COMP. STAT. § 5/11-6.

160. *In re Smythe*, 213 N.E.2d 609 (Ill. App. Ct. 1965).

resided in Illinois and neither had an estate in Illinois.¹⁶¹ The minors resided in Kentucky with their parents until the parents were killed in an automobile accident in Illinois.¹⁶² The maternal grandparents of the minors resided in Illinois and the paternal grandfather resided in Indiana.¹⁶³ There was a possibility of a lawsuit in Illinois arising out of the accident which killed the minors' parents.¹⁶⁴ The court held that its inherent power to act on behalf of minors, independent of any statute, allowed it to act in the matter, stating:

[t]he jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the child. It arises out of the power that every sovereignty possesses as *parens patriae* to every child within its borders to determine its status and custody that will best meet its needs and wants.¹⁶⁵

b. Best Interest of the Child Prior to January 1, 1994, the Probate Act required the court to appoint a guardian for a minor if it appeared from the evidence that the appointment was "necessary and convenient."¹⁶⁶ Although the courts nearly always indicated the appointment was either "necessary" or "convenient," the standard actually applied by the courts was the best interest of the child standard.¹⁶⁷ In 1994, the best interest of the child standard formally replaced the necessary and convenient standard in the Probate Act.¹⁶⁸ As explained by the court in *Estate of Brown*,¹⁶⁹ "[t]he best interest standard considers both the present and the prospective welfare of the minor child. Such

161. *Id.* at 609-10.

162. *Id.* at 610.

163. *Id.*

164. *Id.*

165. *Id.* at 615 (citations omitted) (citing *People ex rel. Noonan v. Wingate*, 33 N.E.2d 467, 470 (Ill. 1941)). It should be noted that this case was decided prior to the adoption of the Uniform Child Custody Jurisdiction Act. Application of the UCCJA may have influenced the court to decline jurisdiction over this matter if another state with closer connections to the minors had instituted similar proceedings. See the discussion of the UCCJA, *supra* notes 26-44 and accompanying text.

166. 755 ILL. COMP. STAT. § 5/11-5(a) (amended 1993).

167. *Estate of Whittington*, 483 N.E.2d 210, 215 (Ill. 1985); *In re Schomer*, 411 N.E.2d 554, 558 (Ill. App. Ct. 1980).

168. 755 ILL. COMP. STAT. § 5/11-5(a).

169. *Estate of Brown*, 565 N.E.2d 312 (Ill. App. Ct. 1990). The child's mother challenged the maternal grandparents' petition for guardianship of their grandchild. The court found that the appointment of the grandparents as guardians was supported by evidence of an existing integrated familial relationship between the child and the grandparents and the grandparents' ability to adequately meet the reasonable needs of the child, all of which created a stable home with a wholesome environment whereas the mother was barely self-supporting and her lifestyle was unstable. *Id.* at 317.

consideration is not the simplest of matters. It requires a deep appreciation of the emotional impact that both custodial and guardianship determinations have on any familial relationship between litigants."¹⁷⁰

The court in *Eaton v. Eaton*,¹⁷¹ a case in which the paternal grandparents sought guardianship over their grandchildren after the children's father died in an accident, discussed the best interest of the child standard. The children's mother filed a petition for writ of habeas corpus to have the children returned to her custody.¹⁷² The paternal grandparents filed for guardianship of the person and the estate of the children.¹⁷³ The trial court, considering evidence based upon the mother's lack of ability to care for the children at the time of the parent's divorce, appointed the grandparents guardians of the children. However, the appellate court noted that under the Illinois Probate Act, the grandparents had the burden of establishing that, due to the parent's unfitness, it would be in the best interest of the child to take custody from the natural parent.¹⁷⁴ Moreover, the court noted that the surviving parent's unfitness at the time of the divorce was irrelevant.¹⁷⁵ It is the parent's fitness at the time of the other parent's death which is determinative.¹⁷⁶ Because the grandparents failed to prove that the mother was unfit at the time of the father's death, the court awarded custody of the children to the mother and appointed the paternal grandfather the guardian of the children's Illinois estate.¹⁷⁷ Absent a showing of the mother's unfitness, the court determined that it was in the best interest of the children to be raised by their mother.¹⁷⁸

In many guardianship cases, the best interest of the child tends to override the superior parental rights doctrine. In *In re Estate of Becton*,¹⁷⁹ the putative father and the child's maternal grandmother each petitioned for guardianship of the person and estate of the child. The child's parents had never married but had lived together for six years with the child until the mother's illness, when the child was placed

170. *Id.* (citations omitted).

171. *Eaton v. Eaton*, 365 N.E.2d 647 (Ill. App. Ct. 1977).

172. *Id.* at 648.

173. *Id.*

174. *Id.* at 650-51.

175. *Id.* at 651.

176. *Id.*

177. *Id.* at 653.

178. *Id.*

179. *Estate of Becton*, 474 N.E.2d 1318 (Ill. App. Ct. 1985).

with the maternal grandparents.¹⁸⁰ The court acknowledged the presumption in favor of awarding custody to a natural parent and indicated that the third party seeking custody bears the burden of overcoming this presumption by a demonstration of good cause or reason for the nonparent to be given custody.¹⁸¹ The *Becton* court affirmed the trial court's appointment of the grandparents as guardians, noting several factors supporting the lower court's determination that naming the grandparents as guardian was in the child's best interest.¹⁸² These factors included the stable environment of the grandparent's home, the father's lack of a permanent home, and the father's failure to contribute to the support or medical care of the minor child while living with the mother and the child.¹⁸³

In *In re Schomer*,¹⁸⁴ both sets of grandparents sought custody of their grandchildren after both parents were killed. One set of grandparents filed a petition to adopt the children while the other grandparents filed a petition for guardianship.¹⁸⁵ The cases were consolidated. The lower court denied the adoption petition and granted the guardianship petition.¹⁸⁶ On appeal, the losing grandparents claimed the lower court failed to apply the "best interest of the child" factors listed in section 602(a) of the IMDMA and failed to specify the basis for its decision.¹⁸⁷

The appellate court in *Schomer* held that the Probate Act did not require consideration of the section 602(a) factors in guardianship determinations.¹⁸⁸ However, the court further explained that, even though not required, the preferred practice is to consider the relevant section 602(a) factors, "as these are important considerations in ensuring that the guardianship of a young child corresponds to the best interests of that child."¹⁸⁹ The court affirmed the lower court ruling, noting with approval that the lower court had considered the best interest of the child standards, which included the amount of time the children had previously spent with each set of grandparents, the stability of the two families, and the fact that the children were always

180. *Id.* at 1321.

181. *Id.* at 1323.

182. *Id.* at 1324.

183. *Id.*

184. *In re Schomer*, 411 N.E.2d 554 (Ill. App. Ct. 1980).

185. *Id.* at 556.

186. *Id.*

187. *Id.* at 556-57.

188. *Id.* at 558.

189. *Id.*

well cared for by the grandparent guardians when left with them. The court held that these factors were sufficient to support the lower court's finding.¹⁹⁰

c. Presumption Favoring Parents Specific requirements are enumerated in the Probate Act to recognize and protect the superior right of a natural parent to the custody of the child.¹⁹¹ The Probate Act makes several clear references to this parental preference. For example, the Probate Act codifies the right of a parent, if parental rights have not been terminated, to designate a testamentary guardian for his children in the parent's will or to nominate a standby guardian to act for the parent in the event of the parent's disability or death.¹⁹² In addition, the Act specifically states that the court will

not have jurisdiction to proceed on a petition for guardianship if the minor has a living parent, adoptive parent or adjudicated parent whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor
 . . .¹⁹³

unless that parent either consents to the guardianship appointment or fails to appear and object at the hearing on the petition after receiving proper notice. Further, the Probate Act includes a rebuttable presumption that a parent is willing and able to make decisions for the minor.¹⁹⁴

To overcome these statutory obstacles, a grandparent petitioning for guardianship must show that the whereabouts of the minor's parents are unknown. If the parents' whereabouts are known, the grandparent must show that the parents are not willing or able to care for the child, or have consented to the guardianship. The Probate Act also requires that close relatives of the minor receive notice of the hearing on the petition for guardianship.¹⁹⁵ If the parent appears at the hearing and objects to the guardianship, the grandparent must present evidence to rebut the presumption that the parent is willing and able to make decisions regarding the child.¹⁹⁶ The standard of

190. *Id.* at 560.

191. 755 ILL. COMP. STAT. § 5/11-1 to 11-18.

192. *Id.* § 5/11-5(a-1).

193. *Id.* § 5/11-5(b).

194. *Id.*

195. *Id.* § 5/11-10 (1)(a).

196. *Id.* § 5/11-5(b).

proof required to rebut this presumption is a preponderance of the evidence.¹⁹⁷

d. Standing to Bring the Action Another hurdle for the grandparent to clear before proceeding under the Probate Act is the standing requirement imposed by the Probate Act.¹⁹⁸ As mentioned, section 11-7 of the Probate Act clearly states that a parent has a superior right to custody of the minor child unless the parent is unfit or incompetent.¹⁹⁹ If one parent is dead, the other parent is similarly entitled. The parents have equal powers, rights, and duties concerning the minor.²⁰⁰ The Probate Act has been construed by the courts to require both a showing that the child was not in the physical custody of a parent at the time the petition was filed and a showing that there is a good reason for the custody change.²⁰¹ However, the court may, for good reason, award custody to a third party if the parents live apart.²⁰²

The court in *Newsome v. Newsome*²⁰³ first applied this standing requirement in a guardianship case. In *Newsome*, the children went to live with their maternal grandparents after the death of their mother.²⁰⁴ The maternal grandparents filed a petition for guardianship of the two children, and, at the same time, the putative father of one of the children filed for custody of his children under section 601 of the IMDMA.²⁰⁵ The grandparents also filed a petition seeking permanent custody under the IMDMA.²⁰⁶ The lower court, relying on *In re Peterson*,²⁰⁷ held that the grandparents lacked standing to bring a petition for custody under both section 601(b)(2) of the IMDMA and the Probate Act.²⁰⁸

197. *Id.*

198. *Id.* § 5/11-7.

199. *Id.*

200. *Id.*

201. *See, e.g.,* *Barnhart v. Barnhart*, 597 N.E.2d 1238 (Ill. App. Ct. 1992); *Brown v. Brown*, 565 N.E.2d 312 (Ill. App. Ct. 1990); *Newsome v. Newsome*, 527 N.E.2d 524 (Ill. App. Ct. 1988). Note that this is the same requirement codified at § 5/601(b)(2) of the Illinois Marriage and Dissolution of Marriage Act.

202. 755 ILL. COMP. STAT. § 5/11-7.

203. *Newsome*, 527 N.E.2d 524.

204. *Id.*

205. *Id.* at 525.

206. *Id.*

207. *In re Peterson*, 491 N.E.2d 1150, 1152 (Ill. 1986) (holding that “nonparents must first show that the child is ‘not in the physical custody of one of his parents’ ” (quoting § 601(a)(2) of the IMDMA).

208. *Newsome*, 527 N.E.2d at 525.

Mere "physical possession of a minor" is not sufficient.²⁰⁹ In light of *Peterson*, the *Newsome* court determined that acquiring custody when one parent dies is not sufficient to give a grandparent standing.²¹⁰ The *Newsome* court reasoned that because the superior rights doctrine was incorporated into the Probate Act at section 11-7, the standing requirement of the IMDMA must also apply to the Probate Act.²¹¹

In *Brown v. Brown*, the minor's mother opposed the grandparents' appointment as guardian and challenged the standing of the grandparents to bring the petition.²¹² Noting that the petitioners must show that the child was not in the physical custody of the parent at the time the case was filed, the court determined that the standing test would be satisfied "when the petitioners depend on the voluntary, not fortuitous relinquishment of child custody . . . [T]he facts of obvious importance here concern the legal incidents of custody: (1) who has immediate physical possession of the minor child; (2) how that person took over control; and (3) the nature, manner, and duration of possession."²¹³

The presumed superior right of a parent and the standing requirement applied in probate guardianship proceedings present significant barriers for grandparents seeking guardianship of a minor when the minor is in the custody of a parent. Filing for guardianship under the Probate Act is the best choice when the minor child is not in the physical custody of a parent and the sole issue before the court is whether the guardianship is in the best interest of the minor based on the facts and circumstances presented to the court.

e. Standby and Short-term Guardianship Designations Two new sections of the Probate Act may be of some assistance to grandparents seeking legal authority over a grandchild. In January of 1994, the Probate Act was amended to add two new types of guardians for minors, a "standby" guardian and a "short-term" guardian.²¹⁴ Both of these new guardianships require the minor's parent to take affirmative steps to create the guardianships. Because the parent's involvement

209. *Peterson*, 491 N.E.2d at 1152-53.

210. *Newsome*, 527 N.E.2d at 526.

211. *Id.* at 525.

212. *Estate of Brown*, 565 N.E.2d 312 (Ill. App. Ct. 1990).

213. *Id.* at 316.

214. 1993 Ill. Laws 88-529.

and consent are required to institute these guardianships, they will be of limited use to a grandparent seeking legal authority over a minor without the parent's cooperation.

A "standby guardian" is "a guardian of the person or estate, or both, of a minor as appointed by the court under section 11-5.3, to become effective at a later date . . ." ²¹⁵ A parent may make a written designation appointing someone to act as guardian of the person or estate of his child in the event of the parent's future disability or death. Previously, this designation was allowed only by will. ²¹⁶ A statutory designation form is included in the Act. ²¹⁷

The standby designation is accomplished by filing a petition with the court. The appointment is subject to the court's determination that the appointment is in the best interest of the child. ²¹⁸ "The rights of the minor's other parent are protected by denying jurisdiction to the court if the minor has a living natural or adoptive parent whose rights have not been terminated, whose whereabouts are known and who is willing and able to make and carry-out day-to-day child care decision concerning the minor . . ." ²¹⁹ The standby guardianship statute creates a rebuttable presumption that the other parent is willing and able to care for the child. ²²⁰

This new provision for standby guardianship was added to the Probate Act to allow a parent with a serious illness to make advance plans for the care of a minor child. If the designation by the parent is witnessed and attested to in the same manner as a will, the designation will have prima facie validity, subject only to the rights of the other parent. ²²¹ If the court finds that the appointment of a guardian is in the minor's best interest and the parent has previously designated a standby guardian, "the court shall appoint the standby guardian as the guardian of the person or estate, or both, of the minor, unless the court finds, upon good cause shown that the appointment would no longer be in the best interest of the child." ²²²

Once appointed by the court, the standby guardian cannot act on the child's behalf until the guardian receives notice that the parent has

215. 755 ILL. COMP. STAT. § 5/1-2.23.

216. *Id.* § 5/11-5(a-1).

217. *Id.* § 5/11-5.3.

218. *Id.* § 5/11-5.3(b), 5/11-8.1.

219. *Id.* § 5/11-5.3(c).

220. *Id.*

221. *Id.* § 5/11-5.3(a).

222. *Id.* § 5/11-5(b).

died or is unable to care for the minor children, unless consent to act sooner is given by the parent.²²³ Once the guardian begins to act on behalf of the minor child, he may act for sixty days without the authority of the court.²²⁴ After sixty days he must file a petition with the court seeking appointment as permanent guardian under section 11-5 of the Probate Act.²²⁵

The Probate Act also provides for appointment of a short-term guardian.²²⁶ Under this statute, a minor's parent may appoint a person to act for sixty days as the guardian of the minor child without court approval.²²⁷ However, no short-term guardian is to be appointed if the minor has another living natural, adoptive or adjudicated parent, whose whereabouts are known and who is willing and able to act on behalf of the minor child.²²⁸ This appointment does not affect the rights of the other parent in the minor.²²⁹ A form is included in the Act.²³⁰

The short-term guardianship statute is intended for situations in which the parent knows that another person will be needed to care for the minor child temporarily. Grandparents asked to care for children by a parent temporarily should ask the parent to make this designation. Unless otherwise limited, the designation gives the grandparent the authority of the guardian of the person under section 13(a) of the Probate Act. The designation is effective for only sixty days, but the Act allows the execution of successive designations if needed.²³¹ A short-term guardian is not authorized to act as guardian of the minor's estate. If authority is needed for the grandparent to deal with the minor's estate, this designation will not suffice. This limitation probably was included because a short-term guardian serves without the authority or oversight of the court.

It is unlikely that these two new statutory sections will help most grandparents who are raising a grandchild because the parent of the child must cooperate by executing the written designation of guardian. However, designation as the standby or short-term guardian of a

223. *Id.* § 5/11-13.1(b).

224. *Id.*

225. *Id.* § 5/13.1(b), (c).

226. *Id.* § 5/11-5.4.

227. *Id.* § 5/11-5.4(c).

228. *Id.* § 5/11-5.4(b).

229. *Id.* § 5/11-5.4(e).

230. *Id.* § 5/11-5.4(f).

231. *Id.* § 5/11-5.4(c).

grandchild will provide evidence favoring a grandparent seeking more permanent authority over a child as it indicates that the parent clearly preferred the grandparent over others to care for the child.

2. GUARDIANSHIP OR CUSTODY UNDER THE JUVENILE COURT ACT

Juvenile practice in Illinois is governed by the Juvenile Court Act of 1987 (Juvenile Court Act).²³² The purpose and policy of the Juvenile Court Act is:

to secure for each minor . . . such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him or her from custody of his or her parents only when his or her welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and when the minor is removed from his or her own family, to secure for him or her custody, care and discipline as nearly as possible equivalent to that which should be given by his or her parents, and in case where it should and can properly be done to place the minor in a family home so that he or she may become a member of the family by legal adoption or otherwise.²³³

The Juvenile Court Act codifies the court's ancient equitable jurisdiction over infants under the doctrine of *parens patriae*,²³⁴ covering four different categories of minors: delinquent minors, minors in need of supervision, addicted minors, and minors who are abused, neglected, or dependent.²³⁵

Grandparents may have grandchildren who fit into any of these descriptions. However, the following discussion regarding guardianship or custody of a minor grandchild will focus on only Article II of the Act which addresses minors who are deemed to be abused,²³⁶ ne-

232. 705 ILL. COMP. STAT. § 405/1-1 to 1-16.

233. *Id.* § 405/1-2(1).

234. *Houghland v. Leonard*, 112 N.E.2d 697, 699 (Ill. 1953). "Historically, courts of chancery, representing the government, have exercised jurisdiction over the person and property of infants to insure that they were not abused, defrauded, or neglected." *Id.*

235. 705 ILL. COMP. STAT. §§ 405/1-1 to 1-16.

236. *Id.* § 405/2-3(2). An abused minor is one:

whose parent or immediate family member, or any person responsible for the minor's welfare, or any person who is in the same family or household as the minor, or any individual residing in the same home as the minor, or a paramour of the minor's parent: (i) inflicts, causes to be inflicted, or allows to be inflicted upon such a minor physical injury, by other than accidental means, which causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function; (ii) creates a substantial risk of physical injury to such a minor by other than accidental means which

glected,²³⁷ or dependent.²³⁸ Proceedings under the Juvenile Court Act are considered civil in nature, and the standard of proof is a preponderance of the evidence.²³⁹ The primary concern of the court throughout the entire process is the best interest of the minor, the minor's family, and the community.²⁴⁰

A general overview of how the juvenile court system and Article II of the Juvenile Court Act operate is useful in understanding how and when a grandparent may seek guardianship or custody of a grandchild. Generally, the Act allows the state to intervene in family situations on behalf of a minor child who is in need of some kind of protection or intervention.²⁴¹ Juvenile court petitions usually are filed and presented by the state's attorney in the county where the minor

would be likely to cause death, disfigurement, impairment of emotional health, or loss or impairment of any bodily functions; (iii) commits or allows to be committed any sex offense against such minor . . . ; (iv) commits or allows to be committed an act or acts of torture upon such minor; or (v) inflicts excessive corporal punishment.

Id.

237. *Id.* § 405/2-3(1)(a). Neglected minors are described as any minor under 18 years of age whose parent or other person responsible for the minor's welfare does not provide the proper or necessary support, education as required by law, or medical or other remedial care recognized under State law as necessary for a minor's well-being, or other care necessary for his or her well-being, including adequate food, clothing and shelter, or who is abandoned by his or her parents or other person responsible for the minor's welfare.

Id. Also characterized as neglected are minors "whose environment is injurious to his or her welfare" and newborn infants who are born with any amount of a controlled substance in their blood or urine. *Id.* § 405/2-3(1)(b), (c).

238. *Id.* § 405/2-4. A dependent minor includes a minor

- (a) who is without a parent, guardian, or legal custodian;
- (b) who is without proper care because of physical or mental disability of his parent, guardian or custodian; or
- (c) who is without proper medical or other remedial care recognized under State law or other care necessary for his or her well being through no fault, neglect or lack of concern by his parents, guardian or custodian, provided that no order may be made terminating parental rights, nor may a minor be removed from the custody of his or her parents for longer than 6 months, pursuant to an adjudication as a dependent minor under this subsection (c); or
- (d) who has a parent, guardian or legal custodian who with good cause wishes to be relieved of all residual parental rights and responsibilities, guardianship or custody, and who desires the appointment of a guardian of the person with power to consent to the adoption of the minor under Section 2-29.

Id.

239. *Id.* § 405/2-18(1).

240. *In re J.M.*, 613 N.E.2d 1346, 1355 (Ill. App. Ct. 1993).

241. 705 ILL. COMP. STAT. § 405/1-2.

resides or is located at the time of the intervention by authorities.²⁴² The state's attorney is authorized to represent the people in juvenile court proceedings and to determine how and when to proceed on a petition.²⁴³ The right to initiate proceedings, however, is not limited to the state's attorney. Any adult may bring a petition alleging that a minor is in need of the court's protection.²⁴⁴ Grandparents and others may file a petition under the provisions of the Juvenile Court Act and present evidence to support the allegations of the petition in the proceeding.²⁴⁵

In *In re J.M.*,²⁴⁶ the adoptive parents of J.M. wished to forego their parental rights to J.M. because the child was emotionally disturbed and required institutional care. They filed a petition alleging that J.M. was a dependent child.²⁴⁷ The state's attorney declined to prosecute the dependency petition and instead proceeded on a neglect petition. The state's attorney alleged that J.M.'s parents were refusing to provide support, medical care, or other remedial care necessary for the child's well-being.²⁴⁸ The issue on appeal was whether the trial court could order the state's attorney to prosecute the petition brought by the adoptive parents.²⁴⁹ The appellate court held that the trial court had the authority to order the state's attorney to prosecute the dependency petition brought by the adoptive parents.²⁵⁰ However, because the state's attorney had proceeded under the neglect petition first, he could not then be required to prosecute the parent's dependency petition calling for conflicting findings and results.²⁵¹ The parents' attorney was allowed to present evidence of dependency while the state's attorney proceeded on the neglect petition.²⁵² Ultimately, the appellate court upheld the trial court's determination that J.M. was neglected but not dependent.²⁵³

In general, "neglect" is considered to be the failure by a responsible adult to exercise the care that circumstances justly demand and encompasses both wilful and unintentional disregard of pa-

242. *Id.* § 405/2-2.

243. 705 ILL. COMP. STAT. §§ 405/2-1 to 2-6, 405/2-13.

244. *Id.* § 405/2-13(1).

245. *Id.* §§ 405/2-13(1), 405/2-22.

246. *In re J.M.*, 613 N.E.2d 1346 (Ill. App. Ct. 1993).

247. *Id.* at 1348-49.

248. *Id.* at 1348.

249. *Id.* at 1352.

250. *Id.* at 1353.

251. *Id.*

252. *Id.* at 1355.

253. *Id.*

rental duty. The term is not one of "fixed and measured meaning" and takes its content from the specific circumstances of each case. In dependency and neglect proceedings, both the State's Attorney and the court are charged with the duty of ensuring that at each step of the wardship adjudication process the best interests of the minor, the minor's family, and the community are served.²⁵⁴

The declaration of J.M.'s adoptive father that the parents did not intend to provide further food, shelter, clothing, education, medical or remedial care, or emotional support to J.M., along with other evidence, was sufficient to support the state's allegations that J.M. was neglected.²⁵⁵ The state met its burden of proving neglect by a preponderance of the evidence.²⁵⁶

a. Temporary Custody Proceedings under Article II of the Juvenile Court Act may be initiated either when a minor is taken into temporary custody²⁵⁷ or when a petition is filed alleging a minor is abused, neglected, or dependent.²⁵⁸ If the state or local authorities take a minor into protective custody and the designated authority (usually the state's attorney) determines that the minor should be retained in custody, a petition alleging the basis for retention must be filed.²⁵⁹ There must be a temporary custody hearing (sometimes called a shelter care hearing) within forty-eight hours.²⁶⁰ At this hearing, a judicial officer presides and will determine if the minor should be retained in custody.²⁶¹ The minor's parent, guardian, custodian, or responsible relative is to be given notice of the time and place of this hearing.²⁶² The minor, who has essentially the same due process rights as an adult who is being detained, must be provided with counsel before any hearing.²⁶³ When a petition is filed alleging that the minor is either abused or neglected, the court must appoint a guardian ad litem to represent the best interest of the minor and make recommendations to the court.²⁶⁴

254. *Id.* at 1354-55 (citations omitted).

255. *Id.* at 1355.

256. *Id.*

257. 705 ILL. COMP. STAT. § 405/2-9.

258. *Id.* § 405/2-1.

259. *Id.* § 405/2-9(2).

260. *Id.* § 405/2-9(1).

261. *Id.*

262. *Id.* § 405/2-9(2).

263. *Id.* § 405/1-5.

264. *Id.* § 405/2-17.

At the temporary custody hearing, which is generally more informal than many other civil hearings, the court will examine all witnesses with regard to the allegations of the petition.²⁶⁵ If the court finds that there is no probable cause to believe that the minor is abused, neglected, or dependent, the petition is dismissed and the minor is released.²⁶⁶ Each juvenile case is decided on the basis of its particular facts, although the court's primary concern remains the best interest and welfare of the child.²⁶⁷ To this end, the juvenile court is vested with wide discretion.²⁶⁸ The trial court's finding of neglect will not be disturbed on review unless the findings are contrary to the manifest weight of the evidence.²⁶⁹

If the court determines that probable cause exists that the child is abused, neglected, or dependent, the court will examine all persons able to give relevant evidence, including the parent, guardian, custodian, or responsible relative of the minor.²⁷⁰ After hearing this evidence the court will determine if the minor should be released to the custody of his parent or guardian, or if an "immediate and urgent necessity" requiring protection of the minor in a shelter care setting arranged by the court or through the Department of Children and Family Services.²⁷¹ Once the court determines that the protection of the minor requires placement away from the minor's home, the minor may not be returned to the custody of the parent or guardian until the court finds that the placement is no longer necessary for the protection of the minor.²⁷²

A grandparent who is the primary care giver of the minor, or who appears at the temporary custody hearing, may be allowed, at the court's discretion, to present evidence concerning the allegations of the juvenile petition, and may also, if not involved in the alleged misconduct, be able to persuade the court to place the minor in his care until the next court proceeding. Otherwise, the child will most likely be placed in a licensed foster care home until further court order.

265. *Id.* § 405/2-10.

266. *Id.* § 405/2-10(1).

267. *In re M.B.*, 609 N.E.2d 731, 737 (Ill. App. Ct. 1992).

268. *Id.*

269. *In re B.M.*, 618 N.E.2d 374, 376 (Ill. App. Ct. 1993).

270. 705 ILL. COMP. STAT. § 405/2-10(2).

271. *Id.*

272. 755 ILL. COMP. STAT. § 405/2-10(2).

At this early stage in the juvenile court process, the minor has an attorney, a guardian ad litem, or both, and sometimes a special advocate.²⁷³ The grandparent should contact these individuals and offer suggestions with regard to the best interests of the minor. If a grandparent can convince these individuals that her home is an appropriate placement for the minor and that she can provide adequate care and supervision for the minor, it is unlikely that a foster home will be considered an option in subsequent court proceedings. The grandparent should appear at all court proceedings, demonstrating support for the minor and displaying a willingness to assist the court in protecting the minor and alleviating the conditions which brought the matter to the court's attention.

b. Adjudicatory Hearing Once temporary placement of the minor is arranged or the minor is released to his parents, the matter will be set for an adjudicatory hearing.²⁷⁴ At this hearing, the court will hear the allegations of the petition and determine if the minor is abused, neglected, or dependent.²⁷⁵ There are strict time limits for holding this hearing, and continuances are not allowed except for "good cause."²⁷⁶ This is to insure that delays do not cause harm to the minor or the family or adversely effect the best interest of the minor.²⁷⁷ The adjudicatory hearing will be the first court appearance for minors who were not taken into temporary custody prior to the filing of the petition. All persons named as respondents in the petition must receive notice of the adjudicatory hearing in accordance with the Juvenile Court Act.²⁷⁸ All respondents have a right to representation, and the court must appoint counsel for each respondent if the respondent cannot afford to hire private counsel.²⁷⁹ If a grandparent is the relative responsible for the minor and has been caring for the minor prior to the court proceeding, the grandparent is a "respondent" and, accordingly, has the right to notice as required by the Act and to appointed counsel if he or she is indigent.²⁸⁰

273. 705 ILL. COMP. STAT. § 405/2-17.1.

274. *Id.* §§ 405/2-14, 405/1-3(1).

275. *Id.* § 405/2-18.

276. *Id.* § 405/2-14(c).

277. *Id.* § 405/2-14(a).

278. *Id.* § 405/2-15.

279. *Id.* § 405/1-5(1).

280. *In re Jennings*, 368 N.E.2d 864, 867 (Ill. 1977).

The court's first consideration at the adjudicatory hearing is whether the minor is abused, neglected, or dependent.²⁸¹ In many hearings, the parties will agree to admit to or stipulate to the allegations of the petition. When this happens, the court may continue the case under supervision without proceeding to make findings and adjudication.²⁸² The court will then enter an order which will include where the minor will reside and with whom, what services the minor and other family members will be provided, how long the supervision will continue, and any other conditions the court may wish to impose.²⁸³ If any of these conditions are violated, a petition may be filed bringing the violation to the court's attention, and further action, including proceeding to findings and adjudication, may be taken by the court.²⁸⁴

If the case is not continued under supervision, the court must hear the evidence and make findings and adjudications on the record.²⁸⁵ The minor is presumed to be competent to testify at the hearing either in open court or in chambers. The court determines the weight to be given to the minor's testimony.²⁸⁶ If the court finds the minor is not abused, neglected, or dependent, the petition will be dismissed.²⁸⁷ If a finding of abuse, neglect, or dependency is made, the court will set a date for the dispositional hearing and may order a predisposition investigation to develop information that may be helpful to the court.²⁸⁸ If an investigation is ordered, the grandparent should meet with the person conducting the investigation and inform the investigator of his or her interest in caring for the minor and of his or her ability to do so.

c. Dispositional Hearing At the dispositional hearing, the court must first determine whether it is in the best interests of the minor and the public that he or she become a ward of the court, and, if so, what disposition will best serve the interests of the minor and the public.²⁸⁹ The court may consider oral and written reports as well as other evi-

281. 705 ILL. COMP. STAT. § 405/2-18(1).

282. *Id.* § 405/2-20.

283. *Id.* § 405/2-20(4).

284. *Id.* §§ 405/2-20(4), 405/2-20(5).

285. *Id.* § 405/2-21.

286. *Id.* § 405/2-18(4)(d).

287. *Id.* § 405/2-21(1).

288. *Id.* § 405/2-21(2).

289. *Id.* § 405/2-22(1).

dence to determine the proper disposition.²⁹⁰ The child and the child's parents, guardian, legal custodian, or responsible relative have the right to be present at the hearing, to be heard, and to present evidence.²⁹¹ A grandparent may be heard at the dispositional hearing if he or she is classified as a "responsible relative" under the Juvenile Court Act.²⁹² He or she would be classified as a responsible relative only if he or she were the person having custody and control over the child, or is the child's nearest known relative, and he or she would have been made a respondent in the petition.²⁹³

After all evidence is heard, the court must issue a dispositional order. There are many kinds of disposition orders which may be entered.²⁹⁴ Under some circumstances, the court might order the minor to be returned to the custody of his or her parents and services ordered.²⁹⁵ However, the court may determine that it is in the minor's best interest that he or she not be returned to the custody of his or her parents. In that case, the court must enter a finding that the minor's parents are unfit or unable to care for the minor and that it is in the minor's best interest that he or she be placed elsewhere.²⁹⁶ "To deprive the parents of custodial rights requires a finding that the parents are unfit or unable, other than for financial reason alone, to properly care for the minor or unwilling to do so and that the custody change is in the minor's best interest."²⁹⁷ This is not the same unfitness determination which terminates parental rights and frees a child for adoption.²⁹⁸ The determination merely supports a change in the custody of the minor from his or her parents to another individual or agency.²⁹⁹ The court will then commit the minor to the care of an agency such as the Department of Children and Family Services for foster home placement, or to the custody of a suitable relative or other person as legal custodian or guardian.³⁰⁰ The suitable relative could be the minor's grandparent.

290. *Id.*

291. *In re Jennings*, 368 N.E.2d 864, 867 (Ill. 1977).

292. *Id.*

293. *Id.*

294. 705 ILL. COMP. STAT. § 405/2-23.

295. *Id.* § 405/2-23(a).

296. *Id.* § 405/2-27.

297. *In re Powers*, 418 N.E.2d 1145, 1147 (Ill. App. Ct. 1981).

298. *Id.*

299. *Id.*

300. 705 ILL. COMP. STAT. §§ 405/2-27(1)(a), 405/2-27(1)(d).

When a minor is placed with a relative or another unrelated person, the court is required to give that person the legal status of either legal custodian of the minor or guardian of the person of the minor.³⁰¹ These terms are defined in the Juvenile Court Act, which defined the duties and responsibilities of this position.³⁰² Custody or guardianship continues until the court otherwise directs but terminates once the minor reaches nineteen years of age.³⁰³

The court continues to supervise the minor by periodic review of the placement and may require reports to be filed.³⁰⁴ The Act requires permanency review hearings at various intervals after the placement.³⁰⁵ Even when the minor is not initially placed with the grandparent, any interested person, including the minor or a grandparent, may apply to the court for a change of custody of the minor and the appointment of a new legal custodian or guardian.³⁰⁶ Thus, a grandparent who learns of a minor grandchild's court-ordered placement in a foster home may petition the court to request that the grandparent be considered for custody of the minor. At the hearing on this peti-

301. *Id.* § 405/2-27(2).

302. *Id.* § 405/1-3 (8), (9). "Guardianship of the person" of a

(8) "Guardianship of the person" of a minor means the duty and authority, subject to residual parental rights and responsibilities, to make important decisions in matters having a permanent effect on the life and development of the minor and to be concerned with his or her general welfare. It includes but is not necessarily limited to:

(a) the authority to consent to marriage, to enlistment in the armed forces of the United States, or to a major medical, psychiatric, and surgical treatment; to represent the minor in legal actions; and to make other decisions of substantial legal significance concerning the minor;

(b) the authority and duty of reasonable visitation, except to the extent that these have been limited by court order;

(c) the rights and responsibilities of legal custody except where legal custody has been vested in another person or agency; and

(d) the power to consent to the adoption of the minor, but only if expressly conferred on the guardian in accordance with Section 2-29, 3-30, 4-27 or 5-31.

(9) "Legal custody" means the relationship created by an order of court which imposes on the custodian the responsibility of physical possession of a minor and the duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, except as these are limited by residual parental rights and responsibilities and the rights and responsibilities of the guardian of the person, if any.

303. *Id.* § 405/2-27(5).

304. *Id.* § 405/2-28(1).

305. *Id.* § 405/2-28(2).

306. *Id.* § 405/2-28(4); *see also In re Jennings*, 368 N.E.2d 864, 866 (Ill. 1977).

tion, the grandparent must show that the change of custody is in best interest of the minor.

In *In re Robinson*,³⁰⁷ two minors were found neglected and made wards of the court.³⁰⁸ They were initially placed with an unrelated couple. The mother of the minors was residing at the same location. Two years later, the minors' father petitioned the court for a change of custody, claiming that the minors' mother no longer lived with the minors or had contact with them, and asked that custody be awarded to his mother, the paternal grandmother.³⁰⁹ The trial court granted the change of custody, and the mother appealed.³¹⁰ The appellate court upheld the lower court's decision, finding the change of custody to be in concert with the Juvenile Court Act's policy of preserving and strengthening family ties.³¹¹ The court further noted that no change in circumstances was required to be shown in cases where custody was awarded and subject to change at the court's discretion.³¹² All the petitioner needed to show was that the grandmother was a fit and proper person to have the custody of the minors and that she could properly maintain, rear, and educate them.³¹³

In a more recent case, a grandmother, who was caring for two of her daughter's children, intervened in a juvenile proceeding alleging that a third grandchild was neglected.³¹⁴ The trial court, after making the minor a ward of the court, awarded permanent custody and guardianship of the minor to a nonrelated person who had been caring for the minor at the mother's request.³¹⁵ The grandmother, who had intended to adopt all three of the minors, appealed the court's decision.³¹⁶ In reversing the decision, the reviewing court was critical of the expert psychiatric testimony relied upon by the lower court in its determination that changing custody from the primary care giver to the grandmother would be psychologically damaging to the child.³¹⁷ The court noted that the prime directive in custody or guardianship cases is to reach a disposition that serves the best interest of

307. 332 N.E.2d 14 (Ill. App. Ct. 1975).

308. *Id.* at 15.

309. *Id.*

310. *Id.*

311. *Id.* at 16.

312. *Id.*

313. *Id.*

314. *In re C.B.*, 618 N.E.2d 598 (Ill. App. Ct. 1993).

315. *Id.* at 603.

316. *Id.*

317. *Id.*

the child.³¹⁸ The court should not rely solely on the recommendations of experts but should consider all available information in determining the best interest of the minor.³¹⁹ Citing a "glaring lack of competent evidence" concerning the child's situation, the court remanded the case for further consideration of the best interest of the minor.³²⁰

d. Termination of Parental Rights At any time during the wardship, a petition may be filed with the court alleging that the minor's best interest would be served if the court appointed a guardian with the power to consent to the minor's adoption.³²¹ This step is usually not taken until the court has attempted to rectify the initial misconduct and reunite the minor with his or her family. This petition must comply with the requirements of the Adoption Act.³²² Unless the parents of the minor have consented to the adoption of the minor, the court must find the parents unfit as defined in the Adoption Act.³²³ The finding of unfitness must be made by clear and convincing evidence.³²⁴ The court does not consider the best interest of the child when determining if the parent is unfit.³²⁵ Once there is a finding of unfitness, the finding may operate as a termination of parental rights.³²⁶ The court will then determine whether it is in the child's best interest to allow adoption by the petitioners.³²⁷ The grandparent may attempt to intervene at this point in the juvenile proceeding to assert his or her right to custody of the minor.³²⁸

318. *Id.*

319. *Id.* at 603-04.

320. *Id.* at 604-06.

321. 705 ILL. COMP. STAT. § 405/2-29(2).

322. *Id.*; see also 750 ILL. COMP. STAT. §§ 50/.01 to 5/20.

323. 750 ILL. COMP. STAT. § 50/1(1)(D).

324. *In re Clarence T.B.*, 574 N.E.2d 878, 889 (Ill. App. Ct. 1991); see also 705 ILL. COMP. STAT. § 405/2-29(2).

325. *In re Clarence T.B.*, 574 N.E.2d at 889 (citing *In re Syck*, 562 N.E.2d 174 (Ill. 1990)).

326. *In re D.L.W. & J.W. III*, 589 N.E.2d 970, 973 (Ill. App. Ct. 1992). "A finding of unfitness may lead to the termination of parental rights and a court may take such action after finding it to be in the best interests of the minor." *Id.*

327. 705 ILL. COMP. STAT. § 405/2-29(2).

328. See *In re Jennings*, 368 N.E.2d 864 (Ill. 1977), in which a grandmother was allowed to intervene in the proceedings even though the minors' mother had consented to the appointment of a guardian with power to consent to the adoption of the children, who were found to be neglected and dependent. The grandmother alleged that she had raised the children since infancy and that the mother was mentally retarded and illiterate and therefore unable to give her consent to the adoption of the children. The case was remanded for an evidentiary hearing on the rights of the grandmother to be made a necessary party in the juvenile proceeding based on her allegations that she had raised the children since birth. *Id.*

As in a guardianship under the Probate Act, a grandparent acquiring custody or guardianship through proceedings under the Juvenile Court Act will retain custody at the discretion of the court and under the court's continuing supervision.³²⁹ The minor's parents may petition for a return of custody at any time, and the court will determine if the change in custody is in the minor's best interest.³³⁰ Nonetheless, intervention of the grandparent during the pendency of the juvenile matter and the subsequent appointment of guardianship by the court affords the grandparent legal authority over the child. This legal authority may not be disturbed unless the court later determines that a change of custody is warranted.

D. Adoption

The Illinois Adoption Act³³¹ is to be liberally construed and used in conjunction with the Juvenile Court Act.³³² Adoption of a minor terminates the parental right of the minor's parents, stripping them of all rights, duties, and responsibilities toward that minor.³³³ Adoption by a grandparent transfers these parental rights, duties, and responsibilities for the minor to the grandparent.

Parental rights may be terminated voluntarily by the consent of the parent to an adoption or by the parent's surrender of the child to an agency for future adoption.³³⁴ The consent or surrender by natural parents must be in a writing that complies with the requirements set out in the Adoption Act.³³⁵ Once a consent or surrender is given in accordance with the Adoption Act, it becomes irrevocable unless the parent can show that it was obtained by fraud or duress.³³⁶ A consent or surrender should be obtained from both of the minor's natural parents whenever possible. However, recent amendments to the Adoption Act allow some exceptions to the consent requirement with regard to putative fathers who have not asserted their parental rights over the minor.³³⁷

329. 705 ILL. COMP. STAT. § 405/2-28(1).

330. *Id.* § 405/2-28(4).

331. 750 ILL. COMP. STAT. §§ 50/1 to 24.

332. *Id.* §§ 50/2.1, 50/20.

333. *Id.* § 50/17.

334. *Id.* § 50/8.

335. *Id.* § 50/10.

336. *Id.* § 50/11.

337. *Id.* § 50/8(b)(1)(B).

If the minor's natural parents refuse to consent to his or her adoption by the grandparent, or do not surrender the minor to an agency to be placed for adoption, the parents' rights can only be terminated by a finding of unfitness. The Adoption Act defines eighteen grounds for finding a parent unfit.³³⁸ The grounds must be specified in the petition for adoption, and, because the termination of parental rights is an extraordinarily serious measure, the grounds must be proven by clear and convincing evidence.³³⁹ The burden of proving parental unfitness is on those seeking to adopt.³⁴⁰ Evidence of how the minor would benefit from the adoption is not appropriate until parental unfitness has been established.³⁴¹

An adoption action is instituted by filing a verified petition for adoption in compliance with the Adoption Act.³⁴² Statutory requirements for a related child adoption, such as the adoption of a grandchild, are less stringent than the requirements for the adoption of an unrelated child.³⁴³ A grandparent need not be a resident of Illinois in order to file a petition to adopt a minor grandchild; however, if the grandparent is married, the petition must be brought by both spouses.³⁴⁴ The action may be brought in any county where the petitioner resides if he or she is an Illinois resident, in the county where the minor child resides or was born, or in a county where one of the respondents resides.³⁴⁵ Unless parental rights have been terminated in a previous court proceeding or the parent has previously surrendered the child to an agency for adoption, the petition must contain the names and last known addresses of the parents, if known, and must also disclose if any parent is a minor or disabled.³⁴⁶ All persons named in the petition, except the petitioners and any person who has previously denied paternity or whose parental rights have been termi-

338. *Id.* § 50/1(D).

339. *Id.* § 50/8(a)(1); see also *In re Syck*, 562 N.E.2d 174 (Ill. 1990).

340. 750 ILL. COMP. STAT. § 50/8(a)(1); *In re Syck*, 562 N.E.2d at 183.

341. 750 ILL. COMP. STAT. § 50/8(a)(1).

342. *Id.* § 50/5.

343. *Id.* In particular, a related child adoption may be filed at any time, whereas an unrelated adoption must be filed within 30 days of the child becoming available for adoption unless otherwise allowed by the court. *Id.* § 50/5(A).

344. *Id.* § 50/2.

345. *Id.* § 50/4. The UCCJA applies to adoption matters so the court may decline jurisdiction under the UCCJA; although jurisdiction seems to be accorded under the Adoption Act.

346. *Id.* § 50/8.

nated, are made defendants to the action and must be served with process in accordance with the Adoption Act.³⁴⁷

Once a petition is on file and the parties have notice as required, a hearing will be held, during which the court will determine the validity of the parental consent, or surrender if applicable, along with the entry of appearance and waiver of summons.³⁴⁸ The court will also consider the proof of service on any minor and on any consenting parent who has not waived service. At this hearing the court will appoint a guardian ad litem for the child and a guardian ad litem for any minor or disabled party defendants, such as underage parents.³⁴⁹

If a nonconsenting parent is alleged to be unfit, that parent is entitled to counsel, and the court will appoint counsel for that parent if he or she is indigent.³⁵⁰ If the parent challenges the allegations of unfitness, the court will hear the evidence and determine whether or not the petitioner has met the burden of proof for parental unfitness by clear and convincing evidence.³⁵¹ If so, parental rights will be terminated.

Each case of parental unfitness is *sui generis*, and factual comparisons between cases must not be relied upon by anyone.³⁵² As noted earlier, in addition to naming all interested persons in the petition for adoption, if a parent will not consent to the adoption, the petition must set forth the specific grounds of the parent's alleged unfitness.³⁵³ Many of the grounds enumerated in section 50/1(D) have been defined in adoption case law. For example, "abandonment" is defined as conduct by the parent evidencing the desire to forego all parental responsibilities and duties; "desertion" is defined as evidence of conduct during the three months preceding the filing of the petition which demonstrates the parent's desire to relinquish permanent custody of the child; and "habitual drunkenness or addiction" means that the condition existed for at least one year prior to the filing of the petition.³⁵⁴

347. *Id.* § 50/7(A).

348. *Id.* § 50/13(A).

349. *Id.* § 50/13(B)(b).

350. *Id.* § 50/13(B)(c).

351. *Id.* § 50/8(a)(1); see also *In re Syck*, 562 N.E.2d 174 (Ill. 1990).

352. *In re S.J.*, 598 N.E.2d 456, 472 (Ill. App. Ct. 1992) (citing *Syck*, 562 N.E.2d 174).

353. 750 ILL. COMP. STAT. § 50/5.

354. ILLINOIS INST. FOR CONTINUING LEGAL EDUC., FAMILY LAW, ch. 13, §§ 13.20-13.27 (1992 & Supp. 1995).

If parental rights are terminated, the minor will become a ward of the court and will be placed in the custody of the petitioner.³⁵⁵ In the case of adoption by a relative, once parental rights are terminated, the court may enter a judgment of adoption immediately.³⁵⁶ Once the adoption is final, the Adoption Act provides for the issuance of a new birth certificate³⁵⁷ for the child and for the confidentiality of adoption files and records.³⁵⁸

Often an adoption proceeding will arise out of a Juvenile Court case where the minor was first determined to be abused, neglected, or dependent, and made a ward of the court. If the parent of the child has not made reasonable progress toward the return of the child to the family, grounds for unfitness may exist. Recent amendments require that the parent complete the service plan established to correct the conditions that were the basis for the removal of the child within twelve months after adjudication or risk being declared unfit and deprived of his or her parental rights.³⁵⁹ If a parent fails to comply with the terms of the service plan, the agency or person acting as the child's guardian, or any interested party, such as a grandparent, may petition the court for a guardian with the power to consent to adoption.³⁶⁰ In the alternative, a grandparent may file a petition to adopt the minor based on the parent's unfitness. The court first determines parental unfitness.³⁶¹ If parental unfitness is established by clear and convincing evidence, the court then considers whether the adoption requested is in the best interest of the minor.³⁶² Here the Juvenile Court Act and the Adoption Act operate together to address the best interest of the minor.

Aside from petitioning through the Juvenile Court, a grandparent with evidence of parental unfitness may simply institute an adoption proceeding. In *Adams v. Adams*,³⁶³ the maternal grandparents sought to adopt their two granddaughters. The mother had placed the two girls with her father and stepmother soon after their birth and

355. 750 ILL. COMP. STAT. § 50/13(B)(d).

356. *Id.* § 50/14(a). In an unrelated adoption, the petitioners and the agency involved must file expense affidavits and a six-month waiting period must pass before a judgment of adoption can be entered. *Id.* § 50/14(f).

357. 750 ILL. COMP. STAT. § 50/19.

358. *Id.* § 50/18.1.

359. *Id.* § 50/1(D)(m).

360. See Juvenile Court Act, 705 ILL. COMP. STAT. § 405/2-13.

361. 750 ILL. COMP. STAT. § 50/5.

362. *Id.* § 50/20a.

363. 430 N.E.2d 744 (Ill. App. Ct. 1982).

failed to support them or visit them for nearly five years.³⁶⁴ The grandparents alleged the mother's unfitness was evidenced by her failure to maintain a reasonable degree of interest, concern, or responsibility for the welfare of the children.³⁶⁵ In finding the mother unfit, the trial court noted that the mother voluntarily gave up her first child to the grandparents when the child was seven months old and did not see the child or maintain contact with her for the next five years.³⁶⁶ She then gave her second child voluntarily to the grandparents and did not see her for four years. During this entire time, she failed to provide adequate support for the two children, and her conduct as a whole exhibited an "unreasonable regard [sic] for the welfare of her daughters."³⁶⁷ On appeal, the reviewing court noted that, though the evidence was conflicting, it would not disturb the lower court's findings unless they are palpably against the manifest weight of the evidence.³⁶⁸ In looking at a parent's conduct toward her children, the court must look at the entirety of the parent's conduct over the entire period of time and not just a single isolated period of time.³⁶⁹ In this light, the court found that the lower court's determination of unfitness was not against the manifest weight of the evidence.³⁷⁰

Illinois policy appears to favor the adoption of children by relatives. In considering the attempt of grandparents to adopt their grandchild, the court in *Smith v. Smith*³⁷¹ maintained that

[t]he legislature, in the provision of the Adoption Act, while defining the child's best interests as the paramount concern recognized it to be an important interest of a child that his relationships to the persons, places and course of inheritance where Providence has placed him be preserved where possible, and that this interest should be subordinated only when, considering other important interests, a different placement is clearly indicated.³⁷²

The court further asserted that when the natural parents have given their consent to the adoption and the grandparents are fit to assume the role of adoptive parents, social service agencies should not intervene and attempt to force their own ideas regarding the best place-

364. *Id.* at 745.

365. *Id.* at 746.

366. *Id.* at 747-48.

367. *Id.* at 748.

368. *Id.*

369. *Id.*

370. *Id.*

371. 347 N.E.2d 292 (Ill. App. Ct. 1976).

372. *Id.* at 300-01.

ment of the child.³⁷³ The legislative purpose behind the Adoption Act is to “preserve and strengthen the child’s natural family ties” whenever possible.³⁷⁴ The court also rejected the argument that the age of grandparents precludes adoption.³⁷⁵ The court observed that if age alone could prevent adoption, the legislature’s intent, which specifically contemplated related adoptions, would be frustrated.³⁷⁶

Grandparents do not fare as well when attempting to intervene in a private adoption proceeding involving a grandchild. In two very similar cases, the grandparents had been living with and helping to care for a grandchild when the child’s mother removed the child from their home and gave consent to the child’s adoption by unrelated persons.³⁷⁷ In both cases, by the time the grandparents located their grandchildren, a private petition for adoption with consent of the parent had been filed.³⁷⁸ In both cases, the grandparents attempted to intervene in the adoption proceedings.³⁷⁹ In *In re Ruiz*, the grandparents filed their own petition to adopt the minor child.³⁸⁰ In both cases, the court found that there was no right of intervention for a grandparent in a private adoption proceeding under the Illinois Code of Civil Procedure.³⁸¹ Thus, intervention was at the discretion of the court.³⁸² The courts also noted that there is no preference given to grandparents in adoption proceedings that would infer the right to intervene in a private adoption.³⁸³ The *Ruiz* court did find, however, that a grandparent may file a petition to adopt a grandchild as a related adoption at any time, even when another adoption proceeding already has been initiated.³⁸⁴ In that case, there would be two petitions to adopt on file. The same judge would hear both petitions in two separate and distinct proceedings and then make a decision based on the best interest of the child.³⁸⁵

373. *Id.* at 301.

374. *Id.*

375. *Id.* at 302.

376. *Id.*

377. *In re Ruiz*, 518 N.E.2d 436 (Ill. App. Ct. 1987); *In re Benavidez*, 367 N.E.2d 971 (Ill. App. Ct. 1977).

378. *Ruiz*, 518 N.E.2d at 437; *Benavidez*, 367 N.E.2d at 972.

379. *Ruiz*, 518 N.E.2d at 437; *Benavidez*, 367 N.E.2d at 972-73.

380. *Ruiz*, 518 N.E.2d at 438.

381. *Id.* at 439; *Benavidez*, 367 N.E.2d at 974.

382. *Ruiz*, 518 N.E.2d at 439; *Benavidez*, 367 N.E.2d at 974.

383. *Ruiz*, 518 N.E.2d at 441; *Benavidez*, 367 N.E.2d at 974.

384. *Ruiz*, 518 N.E.2d at 442.

385. *Id.*

Choosing adoption as a means of obtaining custody of a grandchild is the most drastic option available to a grandparent. It is also the most final and permanent solution for the child and the grandparent family, because once accomplished, the grandparent is legally responsible for the child and the rights of the natural parents have been permanently severed. If the child's natural parent will not consent to the adoption, the process can be emotionally devastating for all involved. It may also be expensive and time-consuming. Whether adoption is the appropriate choice for a grandparent depends upon the facts and circumstances of the particular situation.

One final note of caution exists. The law regarding a putative father's rights in an adoption action is in a state of flux in Illinois. This is largely the result of one well-publicized case. *In re Doe*,³⁸⁶ commonly known as the "Baby Richard case," involved a newborn adoption by unrelated persons. However, the Baby Richard case resulted in changes to the Adoption Act which affect all adoptions. In the Baby Richard case, the mother consented to her son's adoption four days after his birth without informing the biological father.³⁸⁷ Because the mother told the biological father that the baby had died, the father did not find out about the baby until fifty-seven days after the baby's birth.³⁸⁸

The trial court found that the consent of the biological father was unnecessary because he failed to show sufficient interest in the child during the first thirty days of the child's life.³⁸⁹ The father appealed this ruling, and the appellate court affirmed with one justice dissenting.³⁹⁰ The Illinois Supreme Court reversed. In reversing, the court stated that the finding that the father had not shown a reasonable degree of interest in the child during the first days was not supported by the evidence, specifically noting that the father's various attempts to locate the child were frustrated or blocked by the actions of the mother.³⁹¹ The mother's actions were aided and abetted by the attorney for the adoptive parents who failed to make any effort to ascertain the name or address of the father, despite the fact that the mother

386. *In re Doe*, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994).

387. *Id.* at 182.

388. *Id.*

389. *Id.* The court noted that the failure of the father to show a reasonable degree of interest within the first 30 days of his life constituted grounds for parental unfitness as defined by the Adoption Act, 750 ILL. COMP. STAT. § 50/1(D)(1).

390. *In re Doe*, 638 N.E.2d at 182.

391. *Id.*

indicated that she knew the identity of the father.³⁹² The court found that under these circumstances, the father had no opportunity to discharge his parental duties.³⁹³ Because the father's rights were not properly terminated, there was no reason to address the child's best interest in the adoption proceeding.³⁹⁴

The Illinois Supreme Court observed that it was unfortunate that a period of three years had elapsed since the child was born.³⁹⁵ The burden, however, lies with the adoptive parents to establish the relinquishment or the unfitness of the natural parent.³⁹⁶ The adoptive parents persisted in the adoption despite knowing that the natural father had not been told of the baby's existence.³⁹⁷ According to the court, the adoptive parents proceeded at their own risk.³⁹⁸

The "Baby Richard" decision has been immensely unpopular. Critics claim it is inhumane to order a child, who has known only the adoptive parents as his parents, to be returned to his natural father. Most notable among the critics, First Lady Hillary Rodham Clinton condemned the decision, declaring, "I think it's an outrage that the child was not considered with respect to his best interests. That child had bonded. That child was not just the child of the adopted parents; that child was the child of an entire extended family and neighborhood, and it was as though a bomb had gone off and he was the only survivor."³⁹⁹ The Governor of Illinois, Jim Edgar, denounced the decision as a "travesty"⁴⁰⁰ and characterized the court as "smug and arrogant" in refusing to consider the best interests of the child.⁴⁰¹ The Governor's wife, Brenda Edgar, publicly appealed to the biological father to drop his case.⁴⁰²

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. Nancy Ryan, *First Lady Upset by Baby Richard*, CHI. TRIB., May 17, 1995, Chicago Land Sec., at 3. Ms. Clinton made these comments during an appearance on the "Oprah Winfrey Show" to discuss issues related to children. *Id.*

400. Edward Walsh, *Controversial Illinois Adoption Ruling Upheld Without Comment, Supreme Court Affirms Biological Father's Right to Baby Richard*, WASH. POST, Nov. 8, 1994, Final Ed., at A6.

401. *Illinois Father Granted Custody of Baby Richard*, WASH. POST, Jan. 26, 1995, Final Ed., at A4.

402. Edward Walsh, *Justices Refuse to Delay Transfer of Baby Richard, Adoptive Parents to Continue Legal Battle*, WASH. POST, Feb. 14, 1995, Final Ed., at A3.

Illinois House Bill 2424 became law on July 3, 1994, as a direct result of the Baby Richard decision.⁴⁰³ Several portions of the bill addressed the Baby Richard problems and have been tagged the "Baby Richard Laws."⁴⁰⁴ The "Baby Richard Laws" attempt to clarify the circumstances under which a putative father must be made an active participant in an adoption proceeding.⁴⁰⁵

A recent amendment to the Adoption Act defines putative father as "a man who may be a child's father, but who (1) is not married to the child's mother on or before the date that the child was or is born and (2) has not established paternity of the child in a court proceeding before the filing of a petition for the adoption of the child."⁴⁰⁶ Mothers who consent to a child's adoption or surrender the child to an agency, allowing the agency to place the child for adoption, must now sign an "Affidavit of Identification" concerning the father of the child, which is retained in the adoption file along with her consent or surrender.⁴⁰⁷ This affidavit is conclusive evidence of the biological mother's knowledge of the child's father.⁴⁰⁸ The affidavit creates a rebuttable presumption of truth as to the identity of the biological father.⁴⁰⁹ It prohibits a later attack on the adoption proceeding except when fraud and duress were used to obtain the mother's consent or surrender.⁴¹⁰

Putative fathers are required to take certain steps under the Adoption Act, as amended, to preserve their right to receive notice of a proceeding to adopt their child. Under the amended Act, the Department of Children and Family Services must create a "Putative Father Registry."⁴¹¹ The Registry must contain information about the putative father such as his name, address, social security number, and date of birth.⁴¹² It also will contain information acquired from him concerning the mother of the child and the child he believes may be his own.⁴¹³ The putative father must register with this Registry, which is free of charge, no later than thirty days after the birth of the child.⁴¹⁴

403. Shelley B. Bostick, *The Baby Richard Law: Changes to the Illinois Adoption Act*, 82 ILL. B.J. 654 (1994).

404. *Id.*

405. *Id.*

406. 750 ILL. COMP. STAT. § 50/1(R).

407. *Id.* § 50/11(b).

408. 755 ILL. COMP. STAT. § 50/11(b).

409. *Id.* § 50/11(b).

410. 750 ILL. COMP. STAT. § 50/11(b).

411. *Id.* § 50/12.1.

412. *Id.* § 50/12.1(a)(1), (2).

413. 755 ILL. COMP. STAT. § 50/12.1(a)(1), (2).

414. 750 ILL. COMP. STAT. § 50/12.1(B).

Interested parties, including persons intending to adopt a child or the agency with whom the child is placed, may inquire of the Registry to determine if a putative father is registered.⁴¹⁵ A certified copy of the registration form or, if there is none, a certified statement indicating no registration is found as to the child in question serves as proof that the search was conducted.⁴¹⁶ If a putative father fails to register, he is barred from bringing an action to assert an interest in the child unless he proves, by clear and convincing evidence, that it was impossible for him to register through no fault of his own and that he registered within ten days after it became possible for him to register.⁴¹⁷ His lack of knowledge of the pregnancy is not an acceptable reason for failure to register.⁴¹⁸ Unless he proves that he was unable to register through no fault of his own, the failure to register operates not only as a waiver and surrender to the adoption of the child without further consent, but also constitutes abandonment, a ground falling under the Adoption Act's definition of unfitness.⁴¹⁹

The burden on adoptive grandparents, thus modified, is the requirement that they have the consent of the child's parents, or prove by clear and convincing proof that: (1) the parent is unfit; or (2) the person is not the biological or adoptive parent of the child; or (3) there has been a waiver of his or her parental rights under section 12a or 12.1 of the Adoption Act.⁴²⁰ The notice provisions regarding a putative father, as amended, require that notice go to a person who has been adjudicated in Illinois to be the child's father, or was adjudicated the father in another state, and the court order is included in the Registry, was registered in the Registry as the putative father, is recorded on the child's birth certificate as the father, is openly living with the child or the child's mother at the time the proceeding is started and holds himself out to be the child's father, is identified as the father in the mother's Identification Affidavit, or is married to the child's mother at the child's birth or within thirty days after the birth.⁴²¹ Finally, the Adoption Act, as amended, includes language to expedite

415. *Id.* § 50/12.1(C).

416. *Id.* § 50/12.1(D).

417. *Id.* § 50/12.1(G).

418. 755 ILL. COMP. STAT. § 50/12.1(G).

419. 750 ILL. COMP. STAT. § 50/12.1(H).

420. *Id.* § 50/8(a)(1-3).

421. *Id.* § 50/12A(1.5)(a-g).

the appeal of adoption matters and to limit the time for challenging an adoption judgment to one year from the date of the judgment.⁴²²

The significance of these changes for grandparents seeking to adopt will not be as profound as in newborn adoptions. Nonetheless, if there is a putative father, the new steps must be taken to comply with the new sections of the Adoption Act. The new provisions of the Adoption Act strive to balance the rights of the natural parents, the rights of the adoptive parents, and the child's best interest. Only the passage of time will determine if the new "Baby Richard Laws" clarify this muddy area of adoption law.

E. Habeas Corpus

Grandparents may attempt to acquire legal custody of a grandchild by initiating an action seeking a writ of habeas corpus.⁴²³ The habeas corpus writ challenges the detention or custody of someone being held by another and commands the production of the detained person before the court for a determination of the legality of his or her detention.⁴²⁴ The Illinois Constitution protects this right to habeas corpus.⁴²⁵ Generally, however, habeas proceedings and practice are regulated by statute.⁴²⁶

Under the statute, the petitioner need not meet a standing requirement to petition for a writ of habeas corpus.⁴²⁷ However, the petitioner must show that the authority under which the other party claims the right to custody of the child is void and of no effect.⁴²⁸ If the petitioner cannot demonstrate that the court entering the challenged custody order was without jurisdiction, the petition for a writ will be denied.⁴²⁹

A habeas action can be brought in the circuit court or directly to the Illinois Supreme Court.⁴³⁰ However, the Supreme Court will not assume jurisdiction of an original petition for a writ of habeas corpus

422. *Id.* § 50/20, 20a, 20b.

423. *Edwards v. Livingston*, 247 N.E.2d 417, 421 (Ill. 1969).

424. 20 ILLINOIS LAW AND PRACTICE, HABEAS CORPUS § 1 (West 1992 & Supp. 1994).

425. ILL. CONST. art. I, § 9.

426. *See* 735 ILL. COMP. STAT. §§ 5/10-101 to 5/10-137.

427. *Id.*

428. 20 ILLINOIS LAW AND PRACTICE, HABEAS CORPUS § 32 (West 1992 & Supp. 1994).

429. *Id.*

430. 735 ILL. COMP. STAT. § 5/10-103.

if a question of fact is presented.⁴³¹ Application for a writ is made by a complaint signed by the person for whose relief it is intended, or by some other person in his or her behalf, and is verified by affidavit.⁴³² The complaint must state: (1) that the person on whose behalf the relief is sought is restrained at a described place by named individuals; and (2) that the detention is not by virtue of a valid process or judgment.⁴³³ If the detention is by any warrant or process, a copy of this should be attached to the complaint, or the reason it cannot be attached should be described.⁴³⁴ The basis of the complaint must be that the judgment, order, warrant, or process under which the person is held is illegal and void due to lack of jurisdiction by the issuing court.⁴³⁵ Unless it is clear from the complaint that the detention is lawful, the court must issue a writ of habeas corpus, commanding that the detained party be brought before the court to be dealt with according to the law.⁴³⁶

In habeas actions pertaining to the custody of a child, as in all other custody actions, the best interest of the child within the context of the superior parental rights doctrine is paramount. In custody disputes it is an accepted presumption that the right or interest of a natural parent in the care, custody, and control of a child is superior to the claim of a third person.⁴³⁷ However, the presumption is not absolute and serves as only one factor in the ultimately controlling question of where the best interests of the child lie.⁴³⁸ A third party does not stand on equal footing with the natural parent of a child in a custody determination and, therefore, must show a "compelling reason" or "convincing grounds" to support placement of the child with one other than his natural parent.⁴³⁹

Grandparents have succeeded in obtaining the custody of a grandchild through habeas corpus actions. In *Zook v. Spannaus*,⁴⁴⁰ the maternal grandmother brought a habeas action challenging the jurisdiction of a juvenile court dependency determination of her four

431. *People v. Rugen*, 117 N.E.2d 390 (Ill. 1954).

432. 735 ILL. COMP. STAT. § 5/10-103.

433. *Id.* § 5/10-104.

434. *Id.*

435. 20 ILLINOIS LAW AND PRACTICE, HABEAS CORPUS § 32 (West 1992 & Supp. 1994).

436. 735 ILL. COMP. STAT. §§ 5/10-106, 5/10-107.

437. *In re Townsend*, 427 N.E.2d 1231, 1234 (Ill. 1981).

438. *Id.*

439. *Id.* at 1235.

440. 217 N.E.2d 789 (Ill. 1966).

grandchildren after their mother died.⁴⁴¹ Upon the petition of the Lutheran minister who had attended the mother at her deathbed, a dependency proceeding had been filed and heard on the same day as the mother's funeral.⁴⁴² No notice was given to the grandmother or the children's half-sisters; and although the relatives were told there would be such a hearing, they were not told the time of the hearing.⁴⁴³ The grandmother did not appear until after the hearing.⁴⁴⁴ The trial court found the children dependent and neglected and awarded temporary custody to a third party.⁴⁴⁵ At a later hearing, the grandmother and her attorney were present.⁴⁴⁶ The court reiterated the finding that the children were dependent and neglected and further ordered that their custody be awarded to the Lutheran Child Welfare Association of Chicago with a named guardian who could consent to the adoption of the children.⁴⁴⁷ The children were then split up and placed in prospective adoptive homes.⁴⁴⁸ The grandmother filed a petition for writ of habeas corpus challenging the orders of the juvenile court for lack of jurisdiction of the person or the subject matter.⁴⁴⁹ Because the original petition did not ask that a guardian with the authority to consent to the adoption of the minors be appointed and the lower court made no findings as to the best interests of the children, the Illinois Supreme Court found the judgment of the juvenile court to be void.⁴⁵⁰ Ultimately, the parties presented evidence as to the children's best interest, and the court awarded custody of the four children to the grandmother and her husband.⁴⁵¹

In *Edwards v. Livingston*,⁴⁵² a grandfather who had helped raise his grandson for eleven years successfully defended a habeas action brought by the boy's father after the boy's mother died. The grandfather alleged that the father was unfit due to abandonment of the child.⁴⁵³ The father left his wife and son shortly after the child was born, secured a divorce, and did not attempt to see the child or con-

441. *Id.* at 789-90.

442. *Id.* at 790.

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.* at 791.

451. *Id.*

452. *People ex rel. Edwards v. Livingston*, 247 N.E.2d 417 (Ill. 1969).

453. *Id.* at 418.

tribute to his support for the next eleven years.⁴⁵⁴ The mother and the child resided with the grandfather as a family.⁴⁵⁵ The lower court found that the father was not unfit and that it was in the child's best interest to reside with his natural father.⁴⁵⁶ The Illinois Supreme Court reversed,⁴⁵⁷ observing that a habeas corpus action had long been recognized as an appropriate proceeding to determine the custody of children.⁴⁵⁸ The court also recognized the superior right of a natural parent to have the custody of his child.⁴⁵⁹ However, the court further noted that a finding of parental unfitness is not necessary in order to find that the child's best interest would best be served by awarding custody of the child to a third party.⁴⁶⁰ The court concluded that it was not in the child's best interest to be removed from the stable and wholesome environment of his grandfather's home and sent to live with his father who was, for all practical purposes, a stranger.⁴⁶¹ Custody was awarded to the grandfather with visitation rights for the father to facilitate the development of a father/son relationship.⁴⁶²

Habeas corpus actions also have been used to challenge adoptions and custody modifications in divorce cases. A common thread running through habeas cases involving the custody of a child is the existence of a court order challenged for lack of subject matter or personal jurisdiction.⁴⁶³ However, even if the custody order is declared void by the court, the best interests of the child will be considered in determining custodial arrangements. A grandparent will not obtain custody of a grandchild in a habeas action unless the grandparent has some cognizable claim or right to custody. Generally, a habeas action will not be effective to challenge a parent's right to custody of a child, unless the grandparent has previously been awarded custody or guardianship over the child. Thus, a habeas action is more useful as a defensive weapon, to deflect or defeat a challenge to the grandpar-

454. *Id.*

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.* at 421.

460. *Id.*

461. *Id.* at 422.

462. *Id.* at 422-23.

463. See *Faris v. Faris*, 220 N.E.2d 210 (Ill. 1966); *Giacopelli v. Elorencia Crittenton Home*, 158 N.E.2d 613 (Ill. 1959); *In re Smilga*, 103 N.E.2d 378 (Ill. App. Ct. 1952).

ent's already established right to custody, than as an offensive weapon seeking to establish a right to custody, especially against a parent who has not been declared unfit in a previous proceeding.

III. Financial Assistance

Financial hardship plagues the majority of grandparent-headed households. The majority of grandparent care givers are women.⁴⁶⁴ Three-fourths of the nation's four million elderly poor are women.⁴⁶⁵ Most grandparents are retired and living on fixed incomes.⁴⁶⁶ The more fortunate grandparent care givers have income from social security coupled with private retirement funds or savings set aside for their old age.⁴⁶⁷ The less fortunate exist solely on social security benefits without other sources of income. These fixed incomes do not allow for the considerable expense of caring for grandchildren.⁴⁶⁸ According to the AARP study, the median income for all grandparent care giver households is \$18,000. This is approximately one-half as much as traditional households with children.⁴⁶⁹

Given these facts, it is difficult to understand why more grandparent care givers do not receive financial assistance from currently established programs. Only twenty percent of the grandparent care givers identified in the AARP study have ever asked for public benefits.⁴⁷⁰ Of this twenty percent, however, more than one-fourth indicated that they had eligibility problems when they did apply for financial assistance.⁴⁷¹

The two main sources of financial assistance available to grandparents raising grandchildren are Aid to Families with Dependent Children (AFDC) and foster care stipends.⁴⁷² Both of these programs are federally funded but administered by the state. AFDC was created by Title IV-A of the Social Security Act and is intended to provide cash assistance to households with dependent children. These

464. Amicus Curiae Brief of the American Association of Retired Persons in Support of Respondents, *Anderson v. Edwards*, 12 F.3d 154 (9th Cir. 1994), *rev'd and remanded*, 115 S. Ct. 1291 (1995) [hereinafter AARP Amicus Brief].

465. *Id.*

466. AARP WOMEN'S INITIATIVE, *supra* note 11, at 6.

467. See AARP Amicus Brief, *supra* note 464.

468. *Id.*

469. AARP WOMEN'S INITIATIVE, *supra* note 11, at 4.

470. *Id.* at 6-7.

471. *Id.* at 7.

472. *Id.* at 6.

children must be somehow deprived of parental support or care and living with a "caretaker relative."⁴⁷³ Grandparent caretakers are among the many relatives who fit the "caretaker relative" category. Residence is the only requirement and thus no formal parenting relationship must be established in order to receive benefits.⁴⁷⁴

The AARP study indicates that twenty-eight percent of mid-life and older grandparent care givers receive AFDC benefits for children in their care. Still, many grandparents who apply for these benefits are turned down by state officials who refuse to comply with federal regulations.⁴⁷⁵ Some state officials simply refuse these benefits to nonparents, while others require the grandparent to obtain legal custody over the children involved when the law does not require this.⁴⁷⁶ Still other states have devised eligibility requirements which penalize a grandparent care giver who is parenting two or more grandchildren from different nuclear families.⁴⁷⁷ These problems exist despite the fact that the AFDC program was specifically set up to encourage the care of needy and dependent children by parents or relatives, and to maintain and strengthen family life.⁴⁷⁸

Even if the family is eligible for AFDC, it is unlikely that the benefits will fulfill the family's financial need. Each state is allowed to establish a "standard of need" for program eligibility and benefit amount.⁴⁷⁹ No state's AFDC benefit amount reaches the federal poverty threshold established by the Census Bureau.⁴⁸⁰ In 1993, this federal policy level for a family of three persons was \$11,521 or \$960 per month. Illinois's AFDC benefit level for a one-parent family of three persons, stated as a percentage of the 1993 poverty level, was thirty-

473. 42 U.S.C. §§ 606(a), 607(a) (1988 & Supp. 1993).

474. *Id.* Problems may arise when a child's parent seeks AFDC benefits on behalf of the child and claims the child is residing with her, while in reality, the child is residing in the grandparent's household. Interview with Theresa Doerr, Local Office Administrator of Union and Jackson County Public Aid Offices, Illinois Department of Public Aid, in Murphysboro, Ill. (June 23, 1995).

475. AARP WOMEN'S INITIATIVE, *supra* note 11, at 6.

476. *Id.*

477. *See, e.g.,* Anderson v. Edwards, 115 S. Ct. 1291 (1995). Here the Court upheld California's "consolidated filing unit rule" which penalizes households with nonsibling children. Under this rule, all nonsibling children living in the same household with one caretaker are combined into a single assistance unit. The AFDC payment is based on this single unit. Thus, the payment is much less than if the household were deemed to be two or more units.

478. AARP Amicus Brief, *supra* note 464 (citing 42 U.S.C. § 601 (1988)).

479. *Id.* (citing 42 U.S.C. § 602(a)(23)).

480. *Id.* (citing HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS: 1994 GREEN BOOK 366-67, tbls. 10-11 (1994)).

eight percent. This level is the median monthly AFDC benefit for the fifty states, Guam, Puerto Rico, and the Virgin Islands.⁴⁸¹

According to the AARP study, however, AFDC benefits are not the biggest problem grandparents face when seeking financial assistance to raise their grandchildren. The biggest complaint heard from grandparent care givers was the disparity between the financial help grandparents receive compared to the financial help foster parents receive.⁴⁸²

Foster care stipends are also federally subsidized and administered by the states.⁴⁸³ Under Title IV-E of the Social Security Act, foster care maintenance stipends and related costs for out-of-home placement of children in a foster family home are available. In order to be a "foster family home," however, a family must undergo a lengthy and thorough process of becoming licensed or certified by state and local officials.⁴⁸⁴ Each state controls these requirements, and few, if any, grandparents are certified or licensed as foster care homes. Indeed, even if they were so certified, foster care placement is controlled by the state, which can remove children and place them elsewhere over the objection of the foster parent.⁴⁸⁵

Once approved as a foster care provider, the care giver becomes eligible for financial assistance that is two or three times higher than AFDC benefits.⁴⁸⁶ The Supreme Court in *Miller v. Youkim*⁴⁸⁷ held that federally subsidized foster care payments cannot be administered by the states in such a way as to discriminate against related care givers as opposed to unrelated foster parents. If all other requirements are met, the payment amounts must be the same. When grandparents are providing essentially the same kind of care for their dependent grandchildren as foster parents provide for the children of others, this disparity between AFDC benefits and foster care payments makes little sense. It is no wonder that grandparents who learn of this disparity are upset and discouraged. Some states are trying to solve this problem and make it easier for grandparents to qualify for federal fos-

481. *Id.*

482. AARP WOMEN'S INITIATIVE, *supra* note 11, at 7 (citing Lawrence Kutner, *More and More, Grandparents Raise Grandchildren*, N.Y. TIMES, Apr. 7, 1994, at C12).

483. 42 U.S.C. § 672 (1988).

484. *Id.* § 672(c).

485. AARP WOMEN'S INITIATIVE, *supra* note 11, at 7.

486. *Id.* (citing Michele Norris, *Grandmothers Who Fill Void Carved by Drugs*, WASH. POST, Aug. 30, 1991, at A1, A4).

487. *Miller v. Youkim*, 440 U.S. 125 (1979).

ter care benefits. Illinois, New York, and California have recently changed their programs to allow grandparents and other related care givers to receive benefits on par with licensed foster care parents.⁴⁸⁸ Illinois's attempt to allow relative care givers to qualify for foster care stipends under lesser standards has resulted in over \$14 million in lost revenues to the state.⁴⁸⁹ This loss stems from the fact that many relative caretaker homes could not meet even the less stringent requirements, and federal funding was denied for these homes.⁴⁹⁰ Because of these losses, Illinois will now require that relative caretakers be licensed as foster homes before receiving the higher benefits.⁴⁹¹ This change will mean a drastic loss in monthly income to many grandparents caring for grandchildren.

According to the AARP study, some state providers simply fail to inform nonparent care givers of their eligibility for either AFDC or foster care benefits.⁴⁹² Other states suggest that the care givers legally adopt the children in their care, thereby making the grandparent legally responsible for the children and ineligible for either program benefits.⁴⁹³

Another serious problem facing grandparent care givers is providing health care for their grandchildren.⁴⁹⁴ Most grandparents are old enough to qualify for Medicare coverage and many have Medicare supplemental insurance through their former employment.⁴⁹⁵ Neither of these benefits, however, will inure to a dependent child or children in the same household. Some companies will cover the children if the care giver has obtained court-ordered custody but not all will do so.⁴⁹⁶

Medicaid is a federal program which provides health care benefits to needy persons and automatically to children who receive AFDC

488. Louise Kiernan, *New Rules May Break Backbone of Foster Care*, CHI. TRIB., May 25, 1995, Chicagoland Final, at C.

489. *Id.*

490. *Id.*

491. See 225 ILL. COMP. STAT. § 10/5.2. On June 30, the day before the licensing requirement was to take effect, a U.S. district judge issued an order prohibiting DCFS from reducing foster care reimbursement amounts to unlicensed relative care givers who are unable to meet the July 1 deadline. Aaron Elstein, *Foster Parents Reprieved—Judge Prohibits State from Cutting Benefits for Unlicensed Relatives*, ILL. TIMES, July 6, 1995.

492. AARP WOMEN'S INITIATIVE, *supra* note 11, at 8.

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.* (citing Patricia DeMichele, *Grandparents and Child Care*, ELDER LAW FORUM, Nov./Dec. 1992, at 7).

or Supplemental Social Security Benefits.⁴⁹⁷ Thirty-five percent of grandparent care giver households have some, but not all, household members on Medicaid.⁴⁹⁸ Each state administers its own Medicaid program and eligibility standards vary.⁴⁹⁹ In addition, grandparent care giver households may qualify for other federal or state benefits, such as food stamps or Women, Infants, and Children (WIC) program benefits.⁵⁰⁰

Although there is not an abundance of financial and other assistance for grandparents who assume the responsibility of caring for their grandchildren, some help is available. In Illinois, grandparents should ask about these programs at the local office of the Illinois Department of Public Aid or the Illinois Department of Public Health.

IV. Conclusion

Grandparent care givers face many problems and challenges when they accept the responsibility of caring for their grandchildren. They are likely to be frustrated in the day-to-day decision making required to raise children if they lack legal authority over the children. Without legal authority, the grandparent-headed household is subject to upheaval at the whim of the children's parent. Thus, neither the grandparent nor the children can claim any certainty or security in their relationship or their living arrangements. Further exacerbating the problems, grandparents, the population least able to afford the cost of child rearing, often find public financial assistance programs and services difficult to obtain.

The law does not offer a flawless solution to these grandparents. As indicated by this article, the law favors natural parents, and, except when parental rights have been judicially terminated, this favored status prevents grandparents from avoiding custody challenges. None-

497. 42 U.S.C. § 1396 (1988).

498. AARP WOMEN'S INITIATIVE, *supra* note 11, at 9.

499. *Id.*

500. Interview with Theresa Doerr, *supra* note 474. The WIC program is a supplemental nutrition program administered by the Department of Public Health for pregnant and postpartum women and children up to the age of five years. A care giver for a child may obtain coupons to obtain WIC-approved food items for that child if specific financial and nutritional needs criteria are met. The care giver must take the child to a local clinic or the health department every six months to certify the continuing need for the supplemental food benefits and to receive education regarding proper nutrition. Illinois Department of Public Health Information Telephone Line 1-800-545-2200 (July 6, 1995).

theless, the grandparent seeking the legal authority to raise a grandchild and governmental assistance to provide for that child may fortify his or her legal status as care giver through a custody, guardianship, or habeas proceeding. By understanding the applicable law and complying with the required procedures, the grandparent may claim a degree of security through legal recognition of his or her role. Without official acknowledgment and approval of the grandparent's status, however, the grandparent-headed household is precariously insecure and subject to repeated disruption at the whim of the natural parent.

PREVENTING SOCIAL SECURITY OVERPAYMENTS TO OLDER CLAIMANTS

Deborah I. Ginsberg

Although a social security overpayment might initially seem like a welcome windfall, the reality is much the opposite. Claimants who receive overpayments eventually face a Social Security Administration (SSA) eager for repayment and persistent about collection. In this note, Ms. Ginsberg discusses the SSA's recollection practices and procedures, and how the elderly are unfairly affected by inconsistent application of the SSA's policies. First Ms. Ginsberg explains how excessive distribution of social security benefits to the elderly might arise. For example, elder individuals may suffer from a physiological condition that prevents them from giving accurate information on their application for benefits. Alternatively, elder persons may not comprehend English well enough to heed warnings for reporting overpayments. Such factors become "pertinent circumstances" when the SSA reviews applications to waive the requirement to repay excess benefits. According to Ms. Ginsberg's analysis, this waiver process is plagued with inconsistency: neither regulations governing SSA review, decisions made by administrative law judges, nor federal district courts have clearly established a method of considering whether these pertinent circumstances should relieve recipients from repayment. Next, Ms. Ginsberg considers how administrative changes might prevent overpayments. She suggests that the SSA provide the elderly with more assistance in the application stage of the process. Further, the SSA should clarify when elders may rely upon the representative payee system, a process by which the SSA designates a person to carry out the claimant's responsibility when the claimant is unable. Finally, Ms. Ginsberg concludes by exploring several measures which would prevent unfair repayments such as the consistent application of pertinent circumstances when determining if repayment waivers are appropriate.

An elderly blind woman lived alone in an apartment in East Boston. Every month, she received \$210 in Disability Insurance and \$245.70 in Supplemental Security Income. In March 1986, the Social Security Administration formally notified her that because she neglected to report a certain bank account in her name, the amount of Supplemental Security Income benefits the Administration paid her was too great. From that day forward, the Social Security Administration decreed, it would withhold fifty dollars of her

monthly benefits until the government fully recovered the amount overpaid.¹

A seventy-two-year-old Vietnamese woman who had difficulty with English provided erroneous information to the Social Security Administration about her living arrangements. Consequently, Social Security overpaid her. When the Administration discovered the overpayment, it elected to decrease her benefits by \$37.92 a month until it recovered the excess amount.²

A sixty-five-year-old man with an eighth-grade education appealed a Social Security Administration decision not to waive recoupment of an overpayment. The claimant had no prior experience with Social Security, and his wife had handled the family's finances before her death. When he was forced to deal with Social Security on his own, the man became confused. His misunderstanding of Social Security regulations caused an overpayment of \$21,209.20.³

A sixty-seven-year-old woman found herself expected to repay \$3,049.60 to the Social Security Administration. The woman had only a ninth-grade education and was unable to comprehend that she had a duty to report to the Administration earnings from her employment. Because the absence of such earnings greatly increases an individual's benefit entitlement, the Administration overpaid her.⁴

I. Overpayments to Older Claimants

The idea of a government agency handing out excess benefits to individual claimants may seem bizarre, yet the Social Security Administration often mistakenly overpays its claimants. These overpayments, however, do not result in a windfall for the "fortunate" recipient. If the Administration discovers its error, it will make every effort to recover excess benefits. In the Administration's pursuit of recovery, the responsibility lies with the claimant to show whether and why repayment would be inequitable.

For the older claimant, overpayments can become a particularly cumbersome problem. Physical and social problems inherent within

1. *Cotter v. Secretary of Health & Human Servs.*, [1990 Jan.-June Transfer Binder] 35 Unempl. Ins. Rep. (CCH) ¶ 15,231A (D. Mass. July 10, 1989).

2. *Nguyen v. Sullivan*, [1991 Jan.-June Transfer Binder] 37 Unempl. Ins. Rep. (CCH) ¶ 15,968A (D. Mass. Feb. 27, 1991).

3. *Torre v. Bowen*, 673 F. Supp. 1180 (E.D.N.Y. 1987).

4. *Arik v. Bowen*, No. CIV.A.88-3708(JCL), 1990 WL 118751 (D.N.J. July 27, 1990).

the older population (such as dementia and illiteracy) often lead to situations that result in overpayment. In addition, older people may find themselves repaying excess benefits from what may be a low income and asset base. But while reducing the impact of overpayments can be a difficult task, both the older claimant and the Social Security Administration can take measures to prevent many overpayments.

II. Effect of Overpayments on the Older Population

A. Problem of Overpayment Increasing

Overpayments result when the Social Security Administration (SSA) grants claimants excess benefits.⁵ This problem costs the SSA millions of dollars every year.⁶ After attempting to curb these costs, the SSA managed to reduce the rate of loss in the mid-1980s—from a \$2.04 billion loss in 1984 down to a \$1.0 billion loss in 1986⁷—but since 1986, the rate has increased to a \$1.55 billion loss in 1990.⁸

In 1990, the United States Accounting Office commissioned a study to determine the causes of this increase.⁹ The study found three sources of this problem.¹⁰ First, the 1986 statistic (showing the large drop in overpayments) had been underreported by \$300 million.¹¹ Second, the SSA had improved its ability to detect overpayments.¹² Finally, the Social Security program had gained 1.8 million additional claimants between 1986 and 1989.¹³

In addition to investigating causes of the immediate increase, the study probed the general causes of overpayments.¹⁴ The government found that beneficiary error caused most overpayments.¹⁵ Beneficiaries caused overpayments nearly seventy-nine percent of the time, by reporting vital information late, providing inaccurate information, or failing entirely to report necessary information.¹⁶ The study found that seventeen percent of the time, the SSA itself caused the errors,

5. 42 U.S.C. § 404 (1994); 20 C.F.R. § 404.501 (1995).

6. U.S. GEN. ACCOUNTING OFFICE, SOCIAL SECURITY: CAUSES OF INCREASED OVERPAYMENTS, 1986 TO 1989, at 3 (1992) [hereinafter GAO STUDY].

7. *Id.*

8. *Id.*

9. *Id.* at 1.

10. *Id.* at 4.

11. *Id.*

12. *Id.*

13. *Id.* at 5.

14. *Id.*

15. *Id.* at 15.

16. *Id.*

generally through inaccurate earnings' posting, processing delays, and general administrative errors.¹⁷ Four percent of the errors resulting in overpayments were inexplicable.¹⁸

B. Overpayments to the Older Population

A significant part of the overpayment problem involves older Social Security claimants.¹⁹ In 1990, the average age of claimants receiving overpayments from Retirement, Survivors, and Disability Insurance was fifty-two.²⁰ The average age of those receiving overpayments from Supplemental Security Income that year was fifty.²¹ These statistics suggest that the older population (fifty years or older) receives a large portion of all Social Security overpayments.

The cause of overpayments is often related to communication or comprehension difficulties that characterize many older people. These difficulties, in turn, contribute to reporting errors, which then result in overpayments. Older claimants often cannot understand that they need to account for certain information when they apply for benefits or cannot remember conditions that they agreed to when they signed a particular form.²² Yet, the SSA commonly holds claimants accountable for overpayments arising from these difficulties.²³

1. SOURCE OF PROBLEMS

That overpayments occur is not surprising. The SSA is a large, complex organization, and its statutes and regulations are similarly complicated and hard to assimilate.²⁴ Receiving and processing claims involves a large number of rules and procedures. The entire process provides ample opportunity for error.

17. *Id.*

18. *Id.*

19. *Id.* at 17.

20. *Id.*

21. *Id.*

22. *See, e.g.,* Arik v. Bowen, No. CIV.A.88-3708(JCL), 1990 WL 118751 (D.N.J. July 27, 1990) (67-year-old woman was unable to comprehend her duty to report her outside earnings to the SSA, at least partly as a result of having only a ninth-grade education).

23. *See, e.g., id.* (SSA originally wished to reclaim the overpayment—later the district court reversed this decision).

24. *See* Orsini v. Sullivan, No. CIV. 88-1891AET, 1990 WL 56412 (D.N.J. Apr. 30, 1990). "The Social Security Act is an exceedingly complex and detailed law, and the Secretary cannot arbitrarily assume that a claimant understood its application to his particular situation." *Id.* at *4 (citing Kendrick v. Califano, 460 F. Supp. 561, 572 (E.D. Va. 1978)).

Claims for retirement benefits are particularly susceptible to error because the application is very long—six pages—and fairly complex,²⁵ presenting a number of opportunities for claimants completing the form to make mistakes.²⁶ To simplify the process, SSA employees often fill out the forms, while claimants sign in the required areas.²⁷ Errors at this stage can arise not only from claimants' inaccurate information, but also from employees' misinterpreting or incorrectly transcribing claimants' answers.²⁸ Applicants are advised to read the completed application and look for errors, but many applicants either fail to check the information or give the forms only a cursory reading.²⁹

Moreover, aspects of the application process may lead to later difficulties even if claimants accurately complete the forms. The SSA application requests that claimants report certain changes when they occur.³⁰ Claimants either become confused about which changes to report or forget to report changes entirely, causing the SSA to overpay

25. Telephone Interview with Ms. Higgins, Representative, SSA Teleservice Center, Chicago (Jan. 15, 1994). The Application for Retirement Insurance Benefits asks for detailed information concerning a claimant's family, business dealings, wages, and biographical history. Claimants can also complete the application by phone. *Id.*

26. *See, e.g.,* Giordono v. Bowen, No. 87 C 4080, 1989 WL 32810 (E.D.N.Y. Mar. 28, 1989) (claimant did not indicate that he would become eligible for a federal pension when he applied for retirement benefits (the Application for Retirement Insurance Benefits requests this information in question 6c). This error resulted in an overpayment of \$9,819.30).

27. Telephone Interview with Ms. Higgins, *supra* note 25.

28. *See, e.g.,* Austin v. Sullivan, 830 F. Supp. 329 (N.D. Tex. 1992) (older claimant for widow's benefits claiming that the overpayment resulted from the SSA employee's incorrect notation of her current marital status; claimant was planning to divorce, and the SSA employee noted on the application that the claimant had already divorced).

29. *Id.* (claimant's cursory reading missed the error the employee had made on the application).

30. NATIONAL ORG. OF SOCIAL SEC. CLAIMANT'S REPRESENTATIVES, SOCIAL SECURITY PRACTICE GUIDE § 4A (Michael L. Glancy ed., 1995) (reprinting form entitled Application for Retirement Insurance Benefits). Specifically, the form requests claimants report changes in their mailing addresses, if they leave the United States, their deaths or incapacitation, work changes, imprisonment, receipt of a pension or annuity, any change in custody, and any change in marital status. *Id.* § 4A, at 5. Also, the SSA requests that claimants submit annual earnings reports if they earn more than the yearly limit and the applicant is younger than 70 years old. *Id.* § 4A, at 3.

benefits based on outdated information.³¹ Still other errors may arise from internal miscommunications within the SSA itself.³²

2. COMMUNICATION AND COMPREHENSION PROBLEMS

Although the SSA causes many of the errors that result in overpayment, most can be traced to the claimants themselves.³³ In dealing with the SSA, many of the problems the older population confronts arise from communication or cognitive difficulties, which in turn may be caused by social, physiological, or psychological factors.

Most of the common communication or cognitive problems resulting in overpayment stem from social problems. Often, claimants make errors when they have not achieved a high level of formal schooling, they are illiterate, or they do not speak or read English well.³⁴ Any one of these difficulties can cause claimants to misunderstand their duties as Social Security beneficiaries, leading to overpayment.

Education is an important tool in building the skills needed to deal with Social Security. Older generations, however, are likely not to have attained the same level of formal education as younger generations. In 1990, 75% of the American adult population (twenty-five or older) had at least a high school diploma.³⁵ But among older Americans, a high school education was much less common.³⁶ For example, among Americans aged twenty-five to thirty-four, 84.1% had at least a high school education as of 1990.³⁷ For the thirty-five to fifty-four group, this number was 82.6%.³⁸ Within the oldest age groups, the number of people with a high school diploma drops radically.³⁹ In 1990, Americans fifty-five to sixty-four years old were only 67.6% likely to have attained an educational level of high school or greater.⁴⁰ Those sixty-five to seventy-four years old have a 59.2% likelihood of

31. See *Tannehill v. Bowen*, 687 F. Supp. 555 (N.D. Ala. 1987) (claimant initially agreed to file earnings reports when needed, but forgot to do so, resulting in overpayment).

32. See GAO STUDY, *supra* note 6.

33. See *supra* text accompanying note 16.

34. See, e.g., *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986) (woman with only a fourth-grade education failed to understand Social Security duties and caused an overpayment).

35. U.S. DEP'T OF COMMERCE, *WE THE AMERICANS: OUR EDUCATION* 3 (1993).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

having received at least a high school diploma.⁴¹ And among those Americans over seventy-four, the number drops to 44.8%.⁴²

Examining the national average of educational achievement levels yields similar results.⁴³ For Americans over twenty-five, the average level of educational attainment in 1991 was 12.7 years of schooling.⁴⁴ Americans fifty-five to sixty-four years old attended on the average only 11.8 years of school, while those sixty-five and over had an average of only 10.7 years.⁴⁵ This lack of formal schooling can lead to problems later when encountering the SSA.⁴⁶

The lack of educational foundation among the elderly population may account partly for the low degree of literacy found within this population by the National Adult Literacy Survey.⁴⁷ The survey consisted of a three-part test designed to evaluate English-reading skills among Americans.⁴⁸ First, the prose literacy test evaluated the ability to understand and use information found within textual material.⁴⁹ Next, the document literacy test covered the ability to use documents such as tables, schedules, charts, graphs, maps, and forms.⁵⁰ Finally, the quantitative literacy test examined the quantitative ability to perform numerical operations found in everyday life.⁵¹

41. *Id.*

42. *Id.*

43. *Id.*

44. CENSUS BUREAU, *Table 17. Years of School Completed by Persons 25 Years Old and Over, by Age and Sex: Selected Years 1940 to 1991*, CENSUS TABLE RN 16 10 02 110 SECTION: 16 (1993) [hereinafter CENSUS BUREAU].

45. IRWIN S. KIRSCH ET AL., *ADULT LITERACY IN AMERICA* 32 (1993).

46. Among the older minority population, the problem is even more severe. See, e.g., *Planning for an Aging America: The Void in Reliable Data: Hearing Before the House Select Committee on Aging*, 100th Cong., 1st Sess. 2 (1987) (statement of Emily M. Agee, Research Associate, Kennedy Institute of Ethics, Georgetown University). Among African American elderly, although only 6% have no formal education at all (as opposed to 1.6% for whites), only 17% have completed high school. *Id.* at 107. Thirteen percent of older Asian Americans are likely not to have had any formal education (*id.* at 100), and 26% are likely to have finished high school. EMILY M. AGEE, *AMERICAN ASS'N OF RETIRED PERSONS, A PORTRAIT OF OLDER MINORITIES* 13 (1992). Sixteen percent of Hispanic elderly are likely to have no formal education, with 19% having high school diplomas. *Planning for an Aging America: The Void in Reliable Data: Hearing Before the House Select Committee on Aging*, 100th Cong., 1st Sess. 92 (1987). Finally, one-eighth of the Native American elderly have had no formal education, with only 23% completing high school. *Id.* at 84.

47. KIRSCH ET AL., *supra* note 45, at 30. "Thus, it appears that some of the decrease in literacy skills across the age cohorts can be attributed to fewer years of schooling." *Id.*

48. *Id.* at 70-73.

49. *Id.* at 73.

50. *Id.* at 74.

51. *Id.* at 71.

The average national score (for people sixteen and over) on the prose test was 272 (out of a possible 500, high scores were around 375),⁵² the average on the document test was 267,⁵³ and the average on the quantitative proficiency test was 271.⁵⁴ For Americans fifty-five to sixty-four years old, however, these scores were 260, 245, and 261, and for Americans sixty-five and older the scores dropped to 230, 217, and 237.⁵⁵

52. *Id.* at 113.

53. *Id.* at 114.

54. *Id.* at 115. The higher the number, the better the score. *Id.*

55. *Id.* at 31. To get an idea of what these numbers mean, it is helpful to examine what the scoring looks like by degree of education:

TABLE 1

LEVEL OF EDUCATION	PROSE SCORE	DOCUMENT SCORE	QUANTITATIVE SCORE
Still in high school	271	274	269
0 to 8 years	177	170	169
9 to 12 years	231	227	227
GED	268	264	268
High school	270	264	270
Some college—no degree	294	290	295
2 year college degree	308	299	307
4 year college degree	322	314	322
Graduate studies/degree	336	326	334

Id. at 116-18. This test was scored in five levels.

TABLE 2

PROSE AGE	PERCENT SCORING	LEVEL 2 226 TO 275	LEVEL 3 276 TO 335	LEVEL 4 326 TO 375	LEVEL 5 376 OR MORE
	LEVEL 1 225 OR LESS				
Total population	21%	27%	32%	17%	3%
55-64 years	26%	31%	30%	12%	1%
65 years and over	44%	32%	19%	5%	1%

Id. at 113, 116.

TABLE 3

DOCUMENT AGE	PERCENT SCORING	LEVEL 2 226 TO 275	LEVEL 3 276 TO 335	LEVEL 4 326 TO 375	LEVEL 5 376 OR MORE
	LEVEL 1 225 OR LESS				
Total population	23%	28%	31%	15%	3%
55-64 years	30%	34%	26%	8%	1%
65 years and older	53%	32%	13%	2%	0 (less than 5%)

Id. at 114, 117.

Of these three categories, document literacy is the most important skill for dealing with Social Security. Although the survey did not test SSA documents, someone with a higher score in document literacy presumably would find using the SSA forms and documents easier and would be less likely to make mistakes than someone with a lower score. It is troublesome, then, that Americans fifty-five to sixty-four scored twenty-two points below the national average, while those sixty-five and over scored a full fifty points below average.⁵⁶ These results indicate that the elder population is probably at a considerable disadvantage when dealing with the SSA and its many documents.⁵⁷

In addition to a lack of education and problems with literacy, the claimants' inability to speak English well also can interfere with an older claimant's ability to deal with the SSA.⁵⁸ No study has yet been done to determine the number of non-English speaking ("linguistically isolated") people among the elder population. Because linguistic isolation is prevalent within the general population (six percent of the American population does not speak any English),⁵⁹ the problem probably has a strong presence within the elder population.

TABLE 4

QUANTITATIVE AGE	PERCENT SCORING LEVEL 1	LEVEL 2	LEVEL 3	LEVEL 4	LEVEL 5
	225 OR LESS	226 TO 275	276 TO 335	326 TO 375	376 OR MORE
Total population	22%	25%	31%	17%	4%
55-64 years	25%	30%	30%	13%	2%
65 years and older	45%	26%	20%	7%	2%

Id. at 115, 118.

56. See *supra* text accompanying note 55.

57. The National Adult Literacy survey found that older minority adults are at an additional disadvantage. African American adults between 55 and 65 years of age scored 212 on the prose test, 201 on the document test, and 203 on the quantitative test. *Id.* at 120. Hispanic Americans of this age scored 192 on the prose test, 187 on the document test, and 195 on the quantitative test. *Id.* Similarly aged whites, in contrast scored 273, 262, and 275 respectively. *Id.* For those 65 and older, African Americans scored 187 on the prose, 173 on the document, and 163 on the quantitative tests. *Id.* Hispanic Americans the same age scored 170, 151, and 144 respectively on these tests, while white Americans scored 240, 266, and 240. *Id.* The test did not accumulate sufficient data on older Asian Americans, Native Americans, and Americans of other heritages to include in the study. *Id.*

58. See *Matthanasak v. Sullivan*, 769 F. Supp. 103 (W.D.N.Y. 1991) (inability to speak English resulted in claimant not reporting needed information and caused an overpayment).

59. CENSUS BUREAU, *Americans Speaking Language Other than English*, CENSUS USER NEWS RN 05 99 02 120, SECTION: 05, 1 (1993).

Physiological problems also can play a large role in impeding claimants' communication with the SSA. The older population is particularly vulnerable to physical problems that affect communication and cognition.⁶⁰ Although communicative- or cognitive-impairing health problems affect only some older people,⁶¹ many of the conditions, such as strokes, cardiovascular disease, and Alzheimer's Disease, can severely impair mental functions.⁶²

Moreover, any one of these problems can lead to impaired mental abilities or dementia.⁶³ Even in its earliest stages, dementia can affect communication.⁶⁴ As the condition progresses, communication and cognition become increasingly impaired, until it is impossible for the victim to interact with his or her surroundings.⁶⁵ Furthermore, strokes sometimes cause aphasia.⁶⁶ Aphasia specifically interferes with the affected person's ability to use language, usually by eliminating significant portions of the stroke victim's grammar or vocabulary.⁶⁷

In addition to specific debilitating conditions, the aging process itself often impairs older peoples' ability to think and communicate. Among other changes, sight and hearing may wane, cognitive skills may decrease, and comprehension may become impaired.⁶⁸

60. ROSEMARY GRAVELL, COMMUNICATION PROBLEMS IN ELDERLY PEOPLE—PRACTICAL APPROACHES TO MANAGEMENT 3-28 (1988) (describing these conditions).

61. *Id.* at 2. Although the older population consumes a significant portion of medical resources, partly because of those conditions that affect communication, the statistics can be misleading. Admittedly, one study found that those over 65, who represent 10% of the population, use "30 percent of annual health care costs, 30 percent of acute beds, and 25 percent of prescription drugs." *Id.* At the same time, 42% of the older population is never admitted into a hospital in a given year, and 20% of all days spent in hospitals by the older population are used by only 2% of that group. *Id.* Particular conditions that may affect an older person's ability to communicate are not overly common. Strokes affect 9 out of 1000 people between the ages of 65 and 74, 20 per 1000 in the 75 to 84 group, and 40 per 1000 to those over 85. *Id.* at 17. Parkinson's Disease affects 1% of the population over fifty. *Id.* Finally, Alzheimer's Disease affects 1 person in 5 over the age of 80. *Id.* at 54.

62. *Id.* at 53. Other causes of severe communications impairment include strokes, Pick's Disease, Parkinson's Disease, infections, metabolic disorders, tumors, and depression. *Id.*

63. Dementia is defined as "a 'chronic, progressive brain disease, characterized by intellectual deterioration, impaired memory, and disorientation—all occurring without drowsiness and persisting.'" *Id.* at 52 (citing BRICE PITT, PSYCHOGERIATRICS (1982)).

64. *Id.* at 52-65.

65. *Id.*

66. Aphasia is defined as "a disruption of language as a result of brain damage." *Id.* at 21.

67. *Id.* at 21-24.

68. *Id.* at 3-28.

While older people generally retain previously learned knowledge and skills, they may find new information harder to assimilate.⁶⁹

Finally, physical conditions may impair a claimant's ability to deal with the SSA. The National Adult Literacy Survey noted that people with certain physiological difficulties scored lower on all three parts of the literacy test.⁷⁰ In fact, the average scores for those suffering any physical or mental health condition were forty-five points lower than the general average.⁷¹

Problems stemming from either social or physiological sources can cause older claimants to misunderstand their duties as Social Security claimants. They may not learn of or comprehend a particular rule, regulation, or form. Errors that arise from such misunderstanding can easily lead to situations in which claimants find that the SSA expects them to repay a substantial sum.

III. The Administration of Overpayment Cases Involving Older Claimants

A. The Social Security Overpayment System

Overpayments are governed by Title 42 ("The Public Health and Welfare"), Subchapter II ("Social Security"), Section 404 ("Overpayments and Underpayments") of the Code of the Laws of the United States of America.⁷² For retirement, survivors, and disability benefits, this statute is in turn regulated by Title 20 ("Employee's Benefits"), Chapter III ("Social Security Administration, Department of Health

69. *Id.* at 7-11.

70. KIRSCH ET AL., *supra* note 45, at 135-37.

71. *Id.*

TABLE 5
Average Scores by Type of Physical, Mental, or Health Condition

DISABILITY	PROSE SCORE	DOCUMENT SCORE	QUANTITATIVE SCORE
None	272	267	271
Any Physical or Mental Health Condition	227	222	224
Visual Difficulty	217	215	214
Hearing Difficulty	243	239	247
Physical Disability	231	226	228
Long-term Illness, 6 mo. or more	236	230	233
Any other health impairment	237	231	239

Id.

72. 42 U.S.C. § 404 (Supp. 1991).

and Human Services”), Part 404 (“Federal Old-age, Survivors and Disability Insurance (1950-)”), Subpart F (“Overpayments, and Liability of a Certifying Officer”) of the Federal Code of Regulations.⁷³ Parts of the Program Operating Manual System (POMS), Section 02245, also govern benefit overpayments.⁷⁴

Under the statute and regulations, the Secretary of Health and Human Services is empowered to recover overpayments from all claimants except those who are “without fault if such . . . recovery would defeat the purpose of this [statute] or would be against equity and good conscience.”⁷⁵

The waiver process itself is fairly straightforward. When the Social Security Administration attempts to collect an overpayment, it notifies the claimant.⁷⁶ This notice must be constitutionally adequate, and must explain the amount overpaid, the time period for which overpayment is alleged, the reason for the overpayment, and the claimant’s rights to appeal the overpayment.⁷⁷ The SSA must include with its payment demand a notice of the claimant’s right to request a waiver.⁷⁸

Once charged with an overpayment, a claimant may take one of three actions.⁷⁹ First, the claimant may repay the excess benefits, and not challenge the SSA’s determination.⁸⁰ Alternatively, the claimant

73. 20 C.F.R. §§ 404.501-522 (1995).

74. The Program Operating Manual System is a multivolume social security handbook that sets forth procedures necessary to implement the statutory and regulatory provisions of this Act. The United States Supreme Court has acknowledged the appropriateness of handbooks and claims manual provisions. *Gilbert v. Sullivan*, No. 89 C 20378, 1990 WL 304307 (N.D. Ill. Dec. 28, 1990) (referring to *Sullivan v. Everhart*, 494 U.S. 83 (1990)).

75. 42 U.S.C. § 404(b) (1994).

76. 59 Fed. Reg. 35,378 (1994) (in accordance with 25 C.F.R. § 422.406(b)(1)). “The Ruling states the Social Security Administration’s longstanding policy of giving adequate written notice of a determination of overpayment and the right to contest recovery with an opportunity for a face-to-face oral hearing before we deny that person’s request for waiver of recovery of the overpayment.” *Id.*

77. According to one Social Security lawyer, however, these notices are often unclear and do not adequately explain the overpayment situation to the claimant. She notes, “The claimant usually receives a series of notices entitled ‘Notice of Planned Action,’ ‘Notice of Change in Payments,’ ‘Notice of Overpayment’ and/or ‘Important Information.’ These notices usually contain different, often inconsistent, advice and ‘information’ and may arrive as often as every other day for a month or more.” Jill A. Boskey, *Elder Law Institute 1994: Supplemental Security Income*, in *PLI NEW YORK ELDER LAW HANDBOOK* 51, 132 (Annette L. Kasle ed., 1994); see also Charles T. Hall, *SOCIAL SECURITY DISABILITY PRACTICE*, Part I, Ch. 5, § 5.20, *1, available in WESTLAW, Texts and Periodicals Database, SSDISP File.

78. 20 C.F.R. § 404.502a (1995).

79. Boskey, *supra* note 77, at 131.

80. *Id.*

may request that the SSA reconsider the overpayment charge and reevaluate the facts upon which the charge is based.⁸¹ Finally, the claimant may apply for a waiver of overpayment.⁸²

Claimants who wish to request a waiver must first complete a Request for Waiver of Overpayment Recovery or Change in Repayment Due form, available at Social Security offices.⁸³ The form is long and complex.⁸⁴ In completing the form, the claimant will need to explain the circumstances of the overpayment, the reasons he or she cannot pay, the reasons why the overpayment occurred, and, if the claimant is not receiving supplemental financial assistance, detailed financial information. The SSA will use the information on this form to decide whether to grant the waiver.⁸⁵

Unfortunately, the SSA often does not grant many claimants this initial request for a waiver. Upon request, the SSA will review a negative determination along with any evidence the claimant submits, and, if the claimant wishes, the SSA will hold an oral hearing.⁸⁶ If the SSA continues to deny the claimant's waiver, the claimant next may request a hearing before an Administrative Law Judge (ALJ).⁸⁷ The ALJ is not bound by the factual evidence and issues presented in the initial determinations, but may examine the case anew.⁸⁸ If a claimant disagrees with the ALJ's decision, he or she may ask for reexamination by the SSA's Appeals Council.⁸⁹ If the Appeals Council also rejects the claimant's waiver request, the claimant may seek review in a federal district court.⁹⁰ Once the case has reached this level, the federal district court is bound by the factual determinations of the ALJ or the Appeals Council as long as they are supported by substantial evi-

81. *Id.*

82. *Id.*

83. *Id.*

84. The form is a total of eight pages. It asks 23 questions (not all need to be answered in every situation). Some questions have subparts, up to 17 in the question concerning the claimant's expenses. The form states that it will take 25 minutes to complete the entire written process.

85. Request for Waiver of Overpayment Recovery or Change in Repayment Rate, Social Security Administration Form 632-BK (on file with *The Elder Law Journal*).

86. 20 C.F.R. § 404.522 (1995); see *Califano v. Yamasaki*, 442 U.S. 682 (1979). "[A]n opportunity for a pre-recoupment oral hearing is required where a recipient requests a waiver under [the statute]." *Id.* at 697.

87. 20 C.F.R. §§ 404.929, 404.930 (1995).

88. *Id.* § 404.946.

89. *Id.* § 404.967.

90. *Id.* § 404.981.

dence.⁹¹ In addition, courts will accord significant weight to agency interpretations of related statutes and regulations.⁹²

Deciding the initial factor in a test for waiver—whether a particular claimant is at fault—is not so straightforward. The regulations have provided a few guidelines, stating that a claimant will be found to be at fault if the overpayment resulted from:

- (a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or
- (b) Failure to furnish information which he knew or should have known to be material; or
- (c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.⁹³

In addition, the claimant can be at fault even if the SSA is also at fault.⁹⁴ Further, federal law provides that “any determination of whether any individual is without fault [requires that] the Secretary shall specifically take into account any physical, mental, educational, or linguistic limitation such individual may have (including lack of facility with the English language).”⁹⁵

Additional “without fault” standards will apply depending on the type of aid involved.⁹⁶ If the problem concerns excess entitlement benefits,⁹⁷ the claimant will be without fault if he or she acted in reasonable reliance on information from an official source or if certain changes in the law cause specific errors.⁹⁸ More likely, the SSA will overpay a claimant because he or she has continued working while

91. *Richardson v. Perales*, 402 U.S. 389 (1971).

92. *See Whiteside v. Secretary*, 834 F.2d 1289 (6th Cir. 1987).

The scope of this court’s review is not . . . *de novo*, [the application of] legal principals, legal conclusions arrived at by agency interpreting its organic statute are not without weight. As the Supreme Court explained: “The interpretation put on the statute by the agency charged with administering it is entitled to deference . . . but the courts are the final authority on issues of statutory interpretation [and may change the interpretation if the agency’s construction is manifestly incorrect].”

Id. at 1295 (quoting *Federal Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981)).

93. 20 C.F.R. § 404.507 (1995).

94. *Boskey*, *supra* note 77, at 136.

95. 42 U.S.C. § 404 (1994). In addition, this language has recently been added to a number of regulations. *See* 20 C.F.R. §§ 404.507, .510-.511, 416.552 (1995).

96. *See* 20 C.F.R. §§ 404.510-.510a (1995).

97. Errors in determining entitlement affect whether the claimant has a general right to benefits.

98. 20 C.F.R. § 404.510a (1995).

receiving retirement benefits.⁹⁹ Errors in such situations result in deduction overpayments.¹⁰⁰ If deduction overpayments are at issue, a large but specific array of circumstances will determine whether a claimant is not without fault. The claimant will be held responsible if he or she facilitates¹⁰¹ “[r]eliance upon erroneous information from an official source within the [SSA] (or other governmental agency which the individual had reasonable cause to believe was connected with the administration of benefits).”¹⁰² Additionally, the claimant is responsible for “[f]ailure to understand the deduction provisions of the Act or the occurrences of unusual or unavoidable circumstances the nature of which clearly shows the individual was unaware of a violation of such deduction provisions.”¹⁰³ At the same time, the regulations require that those individuals who have received deduction overpayments to have exercised a high degree of care to avoid overpayment.¹⁰⁴

Even if claimants can convince the SSA, the ALJs, or the courts that they are without fault in receiving the overpayment, they may still be required to repay.¹⁰⁵ Regardless of fault, in order to waive overpayment, claimants must also establish either that (1) repayment would defeat the purpose of the Social Security Act or that (2) repayment would be inequitable.¹⁰⁶ Although what is inequitable is ambiguous,¹⁰⁷ often claimants do not have much difficulty meeting the first

99. See, e.g., *Ballard v. Sullivan*, 905 F.2d 257 (9th Cir. 1990); *Davis v. Bowen*, 840 F.2d 822 (11th Cir. 1988); *Morris v. Harris*, 663 F.2d 1014 (10th Cir. 1981); *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986); *Alser v. Secretary*, [1988 Jan.-June Transfer Binder] 31 Unempl. Ins. Rep. (CCH) ¶ 17,988.1 (N.D. Ill. Mar. 11, 1987); *Orling v. Secretary*, No. CV-86-3428, 1987 WL 14132 (E.D.N.Y. July 14, 1987). All of the foregoing cases are examples of claimants receiving overpayments due to errors involving earnings after retirement.

100. Deduction overpayments are overpayments of retirement insurance caused by the claimant continuing to work without the full knowledge of the Administration. Had the SSA been aware of the claimant's employment, it would have been entitled to take deductions from the original payment of retirement benefits. 42 U.S.C. § 403 (1994) (provides an overall description of conditions that will result in a deduction of Social Security benefits).

101. 20 C.F.R. § 404.510 (1995).

102. *Id.* § 404.510(b).

103. *Id.* § 404.510(n).

104. *Id.* § 404.511.

105. 42 U.S.C. § 404 (1988 & Supp. 1993).

106. 20 C.F.R. § 404.508 (1995) (defeats the purposes of the act); *id.* § 404.509 (against equity and good conscience).

107. It is clear that claimants will meet this test if they can establish that they changed some position for the worse or gave up a valuable right to receive benefits. *Boskey*, *supra* note 77, at 137.

part.¹⁰⁸ The purpose of the Social Security Act is to provide financial means to meet basic needs, and many claimants would be unable to fulfill those needs should they lose even a small portion of their Social Security benefits.¹⁰⁹

If a claimant is found to be either “not without fault” or without fault in a situation where repayment would not defeat the purpose of the Act or be inequitable, the SSA may not require full repayment immediately. The SSA recognizes that many claimants would never be able to afford to repay what can become a very large liability (sometimes into the tens of thousands of dollars)¹¹⁰ in one payment. Therefore, instead of requiring claimants to repay overpayments in a lump sum, the SSA commonly withholds a small amount from the claimant’s check each month until the overpayment is fully recovered.¹¹¹

B. Judicial Reflection of Communication/Cognitive Problems of the Older Population in Overpayment Cases

Because courts are the final adjudicators of SSA overpayment cases, the case record contains many examples of communication and cognitive problems causing overpayments. As noted above, these communication and cognitive difficulties can arise from social causes (e.g., illiteracy), psychological causes (e.g., implicit trust in the government), or physiological causes (e.g., injury). As a result, claimants may become confused and misunderstand their duties as Social Security beneficiaries. These misunderstandings, in turn, can lead to overpayments.

Social factors contribute to many SSA overpayments. Often, these factors cause overpayments because, although claimants are able to understand some of what they were required to do to receive benefits, they may miss important rules (such as having to report all sav-

108. See *Wallin v. Bowen*, No. CV 87-L-326, 1990 WL 159928 (D. Neb. July 12, 1990); *Myers v. Bowen*, 704 F. Supp. 45 (S.D.N.Y. 1989) (meets the requirements of the second part of the test due to lack of adequate resources). *But see Farnham v. Secretary*, No. 85-5123, 1985 WL 14144 (6th Cir. Dec. 27, 1985) (claimant has not shown lack of resources and income and must repay the overpayment).

109. Cf. 42 U.S.C. § 404 (1988 & Supp. 1993) (listing factors considered in determining whether repayment is inequitable).

110. See, e.g., *Anderson v. Sullivan*, 914 F.2d 1121 (9th Cir. 1990) (SSA overpaid claimant \$19,057.20 in retirement benefits).

111. 20 C.F.R. § 404.502 (1995). In most circumstances, unless the overpayment was caused by some fraudulent act, the SSA will only withhold up to 10% of the claimant’s check. *Boskey*, *supra* note 77, at 132.

ings accounts) that affect the permitted amount of retirement benefits.¹¹²

Social factors include low literacy rates and lack of facility with English. For example, older claimants who comprehend little or no English can easily find themselves in situations lending to payment error. This note began with the example of a seventy-two-year-old Vietnamese woman who had difficulty with English incorrectly reporting her lodging status to the SSA.¹¹³ In a second case, a sixty-four-year-old claimant with only an eighth-grade education was unable to understand the benefits she was entitled to, leading to overpayment.¹¹⁴ As a large number of court cases reflect, these factors have a significant impact on the problem of overpayments.¹¹⁵

Frequently, social factors cause claimants to become confused about their ability to continue earning money from employment after applying for retirement benefits.¹¹⁶ Depending on the claimant's age, the SSA guidelines limit the amount a claimant can earn and still collect full benefits: when claimants' earnings are greater than the SSA cap, claimants will be entitled to benefits only if they are older than seventy.¹¹⁷ Should claimants under seventy continue to work, they will lose benefits.¹¹⁸ Claimants, however, may lose track of how much they can earn and still retain benefits, or may be entirely unaware that by continuing to work, they are not entitled to full benefits. Their confusion often results in overpayments.

One striking example of this problem can be seen in an Eleventh Circuit case, *Jefferson v. Bowen*.¹¹⁹ In 1972, Lois Jefferson's husband

112. See, e.g., *Torre v. Bowen*, 673 F. Supp. 1180 (E.D.N.Y. 1987) (neglected to report a savings account and caused overpayment).

113. *Nguyen v. Sullivan*, [1990 Jan.-June Transfer Binder] 35 Unempl. Ins. Rep. (CCH) ¶ 15,231A (D. Mass. Feb. 27, 1991).

114. *Kincaid v. Sullivan*, CV 88-1444-PA, 1989 WL 281959 (D. Or. Sept. 22, 1989).

115. Some of the examples cited in the following discussion do not directly involve older claimants, but do involve situations which are analogous to those encountered by older claimants.

116. See *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986).

117. Richard B. Toolson, *Should a Worker Who Continues to Work Beyond Normal Retirement Age Immediately Draw Social Security Benefits?*, TAX NOTES, Oct. 26, 1992, at 539. In 1992, this limit was \$7,440 for claimants between 62 and 64 years of age, and \$10,200 for claimants between 65 and 70 years. *Id.* at 541. The limits are indexed by year. *Id.*

118. *Id.* Claimants will lose \$1 of their benefits for every \$2 earned if they are between 62 and 64, and \$1 for every \$3 earned if they are between 65 and 70. *Id.*

119. 794 F.2d 631 (11th Cir. 1986).

applied for retirement and disability benefits,¹²⁰ and Jefferson herself applied for wife's benefits (benefits to which she was entitled as another claimant's spouse).¹²¹ When her husband died, Jefferson reported his death to the SSA.¹²² At that time, the SSA told her that her benefits would continue.¹²³ The application she initially completed in 1972, however, had informed her that she would only receive benefits if she earned less than a set yearly minimum.¹²⁴ Because Jefferson had only a fourth-grade education, she was unable to understand this system.¹²⁵ Once Jefferson earned more than the SSA income cap after her husband's death, the benefits that the SSA sent her were too great.¹²⁶

Claimants' confusion from misunderstandings caused by social factors often lead them to overly trust the SSA. "They know what they are doing," was the sentiment expressed by one sixty-nine-year-old woman who continued to receive children's benefits even after her children had reached majority age.¹²⁷ Similar problems can arise when SSA employees complete application forms for claimants. Believing that SSA employees know the application process, claimants may allow SSA employees to complete the application forms. The claimants will often sign the employee-completed forms without reading their contents.¹²⁸ Despite claimants' trust in SSA employees' knowledge and competence, the forms often contain incorrect information. These inaccuracies can have serious consequences. For example, a district court recently affirmed an SSA determination that one claimant was at fault for causing an overpayment when she did not thoroughly inspect the employee's work before signing.¹²⁹ The claimant had failed to notice that the clerk had incorrectly described the claimant's current marital status on the application form.¹³⁰

In addition to social and psychological factors, physiological problems often cause claimants to become confused about or forget the procedures the SSA explained to them when they first applied.

120. *Id.* at 632.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 633.

126. *Id.*

127. *Archuleta v. Bowen*, 655 F. Supp. 1196 (D. Wyo. 1987).

128. *See, e.g., Austin v. Sullivan*, 830 F. Supp. 329 (N.D. Tex. 1992) (claimant did not read form after SSA employee completed it. Error on the form later resulted in an overpayment).

129. *Id.*

130. *Id.*

Even problems like minor memory loss, prevalent within the older population, may cause overpayments, as the SSA may expect a claimant to remember and be responsible for one check mark in a multiple-page application form years after completing the form.¹³¹ Sometimes the SSA will remind claimants of their duties,¹³² but confusion, dementia, or mental illness may cause claimants to forget or interpret these procedures in an irrational manner, leading to overpayment.

C. Taking Pertinent Circumstances into Account

The statutes and regulations controlling SSA overpayments clearly require that evaluators examining overpayment cases consider all of the factors discussed above—social, psychological, and physical—when determining fault. To underscore the importance of these pertinent circumstances, the SSA has recently added specific language to its regulations.¹³³ According to current statutes and regulations, evaluators must consider circumstances such as a claimant’s “age, intelligence, education, and physical and mental condition” and “linguistic limitation[s] such individual may have (including any lack of facility with the English language).”¹³⁴

Unfortunately, those evaluating overpayments will seldom take into account specific “pertinent circumstances.” For example, a number of cases describe how often administrative law judges (ALJs) do not take into account social factors—such as the claimant’s inability to speak English or the claimant’s low level of education—when determining that an overpaid claimant is at fault.¹³⁵ Other cases indicate that ALJs often do not consider relevant mental or physical factors such as mental illness, mental impairment, or debilitating

131. For example, in *Tannehill v. Bowen*, a recent federal district court case, the SSA determined that the claimant was liable for an overpayment for not filing annual reports. Evidently, the claimant had checked on the application that she agreed to file the reports some years before the overpayment occurred. *Tannehill v. Bowen*, 687 F. Supp. 555 (N.D. Ala. 1987).

132. The SSA periodically sends notices to claimants to avoid anticipated problems (e.g., the SSA periodically sends recipients of retirement benefits notices concerning earnings reports). Telephone Interview with Ms. Higgins, *supra* note 27.

133. See 20 C.F.R. §§ 404.507, .510-.511, 416.552 (1995).

134. 42 U.S.C. § 404(b) (1994).

135. See, e.g., *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986) (ALJ did not fully consider that claimant’s lack of education contributed to overpayment). *But see Eder v. Sullivan*, No. 91-C-0638, 1991 WL 212175 (N.D. Ill. Oct. 4, 1991) (ALJ rightfully concluded that claimant was well educated and should have understood SSA requirements).

physical impairments.¹³⁶ Failure to consider these circumstances can be especially hard on older people, because many of them are affected by at least one of these impairments.

The case of Ermano Valente is a well-known example of how ALJs can fail to take relevant circumstances into account.¹³⁷ In 1975, the SSA began paying claimant Valente Disability Insurance Benefits when a heart condition rendered him unable to work.¹³⁸ In April 1976, Valente notified the SSA that he had resumed employment.¹³⁹ In July 1976, the SSA sent Valente a letter explaining that it would continue to pay him during a nine-month "trial-work" period.¹⁴⁰ Although the letter promised that the SSA would contact Valente in September, he never heard from the agency.¹⁴¹ Instead, he continued to receive and cash benefit checks.¹⁴²

Valente again became ill and unable to work in mid-1977, and did not return to his job until October 1978.¹⁴³ Valente's wife claimed that she visited the SSA office on a number of occasions in 1978 to notify the agency that Valente had resumed working.¹⁴⁴ She testified that she believed that because her husband had returned to work, he was no longer entitled to SSA checks.¹⁴⁵

Eventually, in October 1979, the SSA reviewed Valente's case.¹⁴⁶ As a result of this review, the SSA found that it had overpaid him \$19,859.60.¹⁴⁷ Citing that it had explained the workings of a trial-work period to Valente in 1977, the SSA determined that he was not without

136. See, e.g., *Wimbish v. Sullivan*, [1990 July-Dec. Transfer Binder] 36 Unempl. Ins. Rep. (CCH) ¶ 15,677A (D.D.C. July 24, 1990) (ALJ did not properly consider how claimant's injury affected overpayment). But see *Anderson v. Sullivan*, 914 F.2d 1121 (9th Cir. 1990) (ALJ correctly concluded that claimant's blindness, minimal education, and present confusion were not relevant in causing overpayment).

137. Although the case does not specifically mention Valente's age, the disabilities for which he received Disability Insurance Benefits are common among the older population.

138. *Valente v. Secretary of Health & Human Servs.*, 733 F.2d 1037, 1038 (2d Cir. 1984).

139. *Id.* at 1039.

140. The SSA uses trial work periods to determine whether a worker who has been disabled is ready to return to employment. After nine months, the SSA reviews the claimant's condition. If the claimant is found to be no longer disabled "within the meaning of the law," the SSA will grant no further benefits. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

fault in causing the overpayment.¹⁴⁸ The ALJ hearing Valente's request for a waiver agreed with this argument.¹⁴⁹

Valente then appealed this decision to the federal district court.¹⁵⁰ The court found that the ALJ failed to consider many important aspects of his case, including the fact that the SSA had failed to contact Valente for several years after it had promised to do so, the fact that Valente's wife "barely understands English," and the fact that both of the Valentés were "barely literate."¹⁵¹ The Second Circuit, on appeal, did not agree with some of the specific circumstances that the district court had admonished the ALJ for overlooking,¹⁵² but agreed with the lower court's general finding that the ALJ had, in fact, failed to consider the claimant's pertinent circumstances as required by the statute. The court noted, "[a]lthough the ALJ recited these criteria at the beginning of his opinion, he did not indicate how, or whether, he applied them."¹⁵³ The circuit court was especially concerned that the ALJ had failed to take into account Valente's physical condition.¹⁵⁴

Remanding a case back to the ALJ for further consideration does not mean that the ALJ will amend his or her failure to review pertinent circumstances. The Second Circuit made very clear to the ALJ what aspects of the case the ALJ needed to consider in order to find Valente "not without fault."¹⁵⁵ Yet, six years later, Valente once again appeared before the Second Circuit, asking the court to examine the ALJ's most recent determination against him.¹⁵⁶ The court found that on remand, the ALJ "refused to determine Valente's physical condition" during the time in question; if he was disabled at any point, he was entitled to the benefits.¹⁵⁷ Despite the fact that federal judges are not to second guess the judgment of the Secretary of Health and Human Services,¹⁵⁸ the Second Circuit determined that remanding the case would be a further waste of time and resources.¹⁵⁹ The court held

148. *Id.*

149. *Id.*

150. *Id.* at 1040.

151. *Id.*

152. *Id.* at 1042 n.4.

153. *Id.* at 1043.

154. *Id.*

155. *Id.*

156. *Valente v. Sullivan*, 897 F.2d 54 (2d Cir. 1990).

157. *Id.* at 56.

158. *Valente v. Secretary of Health & Human Servs.*, 733 F.2d 1037, 1041 (2d Cir. 1984) (citing *Bastien v. Califano*, 572 F.2d 908, 912 (2d Cir. 1978)).

159. *Valente*, 733 F.2d at 1041.

that there was only enough evidence to support the Secretary's contention that Valente was "not without fault" for causing three months (out of thirty-five total in question) of the overpayment.¹⁶⁰

Even after the Valente and Jefferson decisions, ALJs continue to evaluate pertinent circumstances improperly.¹⁶¹ For example, in March 1988, a diabetic condition prevented Joyce Lieberman from working.¹⁶² In response, Lieberman sought and collected disability insurance.¹⁶³ In March 1989, she found employment, and notified SSA of this change in May.¹⁶⁴ The SSA told her that it would continue to pay benefits throughout a nine-month trial period.¹⁶⁵ At the end of the trial period, the SSA told her it would reevaluate her claim.¹⁶⁶

Over a year after her trial period expired, the SSA discovered Lieberman was still employed.¹⁶⁷ The SSA also discovered that it had paid her benefits for several months after the trial period had expired.¹⁶⁸ The SSA subsequently demanded repayment.¹⁶⁹

Lieberman requested a waiver, which the SSA denied.¹⁷⁰ When she eventually came before an ALJ, he, too, denied her waiver.¹⁷¹ His decision was affirmed by the Appeals Council.¹⁷² Lieberman then requested that the federal court review her situation.¹⁷³

The district court found many faults in the ALJ's evaluation of her "pertinent circumstances."¹⁷⁴ The court found that the ALJ failed to make explicit findings of Lieberman's credibility (or lack thereof).¹⁷⁵ In addition, the ALJ made no specific findings on whether any pertinent circumstances caused the overpayment.¹⁷⁶ For example, the ALJ did not determine Lieberman's level of education or intelligence.¹⁷⁷ Also, the ALJ did not determine whether the claimant suffered side

160. *Valente v. Sullivan*, 897 F.2d 54, 58 (2d Cir. 1990).

161. *Lieberman v. Shalala*, 878 F. Supp. 678, 681 (S.D.N.Y. 1995).

162. *Id.* at 679.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 680-82.

175. *Id.* at 681.

176. *Id.*

177. *Id.*

effects from the many medications she took, and how the side effects, if any, might have influenced the overpayment.¹⁷⁸ Finally, the ALJ failed to determine whether Lieberman reasonably relied on information given by the SSA when she accepted the additional benefits, noting that while she had been told that she would receive benefits during a nine-month trial period, the SSA did not indicate that subsequently, those payments would automatically stop.¹⁷⁹

Although in some circumstances claimants are expected to exercise a high degree of care to avoid overpayment,¹⁸⁰ this additional duty does not excuse the ALJ from taking pertinent circumstances into account.¹⁸¹ For example, in *Albalos v. Sullivan*,¹⁸² a 1990 Ninth Circuit case, the ALJ below had found Albalos to be not without fault in causing an overpayment of \$868.60 in retirement benefits because he failed to file earnings reports.¹⁸³ The Second Circuit, however, noted that the ALJ had failed to take a number of important circumstances into account in making this decision, including that Albalos spoke English as a second language and had completed only a sixth-grade education.¹⁸⁴ Admittedly, the SSA had required that Albalos exercise a high degree of care in avoiding errors, but “[b]ecause the ALJ did not make findings regarding those [statutory] circumstances,” the court reversed.¹⁸⁵

As seen in *Valente* and *Albalos*, if courts determine that the ALJ did not properly take relevant circumstances into account, they can remand the trial for another hearing. At the same time, the courts do not review all cases that come before a particular ALJ. There are probably many cases where the ALJ’s failure to consider relevant circumstances has forced claimants to repay the SSA unfairly. Worse, if the ALJs are obstinate (as in the case of *Valente*), older people can find themselves trying for many years to have an overpayment waived.

Even when the ALJ takes the statutory “pertinent circumstances” into account, the ALJ presiding over the case often does not know how to properly evaluate these circumstances.¹⁸⁶ This tendency to un-

178. *Id.*

179. *Id.* at 681-82.

180. 20 C.F.R. § 404.510 (1994) (to prevent deduction overpayments).

181. 42 U.S.C. § 404(b) (1994).

182. 907 F.2d 871 (9th Cir. 1990).

183. *Id.* at 873.

184. *Id.* at 872-73.

185. *Id.* at 873.

186. See *Wimbish v. Sullivan*, No. 89-1293-OG, 1990 WL 180704, at *7-8 (D.D.C. July 24, 1990) (ALJ incorrectly evaluated impact of claimant’s injury on causing overpayment).

derconsider relevant circumstances can potentially cause unfair results if the circumstances are of a physical nature and must be evaluated by experts.

One example well illustrates this problem.¹⁸⁷ The District Court for the District of Columbia noted after Cecillia Wimbish's car accident, "[her] skull was fractured, one eye became totally blind, both legs require[d] braces, and she use[d] two canes. She [had] frequent headaches, dizzy spells, loss of concentration, and memory lapses. She also suffered from depression and feelings of helplessness."¹⁸⁸ Because she worked while receiving benefits, the SSA determined that she had been overpaid by more than \$66,000 (this later was reduced to \$31,750).¹⁸⁹ Wimbish claimed that she was without fault in receiving the overpayments for a number of reasons, including that "her severe memory lapses made her unaware of any such reporting requirement."¹⁹⁰ With regard to this claim, the Secretary and Wimbish submitted conflicting reports from expert witnesses.¹⁹¹ Despite a detailed report supporting Wimbish's contention that her physical problems led to the overpayment, the ALJ elected to accept the Secretary's more perfunctory evaluation and determined that she "was not without fault."¹⁹² The district court found the ALJ's rejection of the more detailed report unacceptable.¹⁹³ "[T]he fact of plaintiff Wimbish's impaired memory lies at the heart of this case," the court stated.¹⁹⁴ The court continued:

In deciding whether plaintiff should have known to report her employment to the SSA, the ALJ was bound by regulation to consider 'all pertinent circumstances' By rejecting [the more thorough] report, the ALJ failed to consider all pertinent circumstances, and the agency's resulting decision holding plaintiff accountable for her failure to report her employment to the SSA is unsupported by the record.¹⁹⁵

187. Although the claimant was only 39 at the time of the case, the issues are analogous to those facing older claimants. The issues in this case are much clearer than any on record involving older claimants. This does not mean, however, that because no strong case has been made with an older claimant, ALJs will effectively consider those claimants' relevant circumstances.

188. *Wimbish v. Sullivan*, No. 89-1293-OG, 1990 WL 180704, at *1 (D.D.C. July 24, 1990).

189. *Id.* at *2.

190. *Id.*

191. *Id.* at *5.

192. *Id.*

193. *Id.*

194. *Id.* at *6.

195. *Id.* at *7.

Although Wimbish was not an older claimant, analogizing her situation to that of an older claimant is not difficult. A comparable situation would be a case involving older claimants receiving an overpayment because they did not report their employment after commencing Social Security retirement benefits. Claimants may fail to report because their lack of education made them confused about their responsibilities (as seen in *Jefferson*)¹⁹⁶ or because memory lapses caused them to forget the requirement to report employment.¹⁹⁷ Older claimants would be in a more precarious position than Wimbish because the resulting overpayment would likely be a deduction overpayment, which, as noted above, claimants must exercise a high degree of care to avoid.¹⁹⁸ An ALJ may be tempted to use this standard to dismiss many relevant circumstances as not controlling, and the claimant would not even have had the chance for her particular circumstance to render her “without fault” in causing the overpayment.

In addition to either refusing to evaluate circumstances or evaluating circumstances incorrectly, ALJs sometimes improperly use their personal opinions to evaluate a claimant’s situation; ALJs may attempt to use their own “personal awareness” as a basis for evaluating the claimant’s circumstances.¹⁹⁹ For example, in *Fremont v. Sullivan*, a recent Ninth Circuit case, the court discovered that, “[i]n his decision to deny Fremont’s request for a waiver, the ALJ appeared to base his finding on the ALJ’s personal awareness that federal employees received notice of pension offset provisions on many occasions.”²⁰⁰ This “personal awareness” led the ALJ to conclude that the claimant was not without fault in causing the overpayment because the claimant should have been aware of the provisions.²⁰¹ The Ninth Circuit found the ALJ’s action entirely “improper,” and reversed the ALJ’s decision.²⁰²

196. *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986).

197. *See id.* (In addition to not understanding the SSA requirements, Jefferson probably had forgotten any initial explanation received when she first applied in 1972).

198. *See supra* note 104.

199. *See Fremont v. Sullivan*, No. 90-56076, 1992 WL 68263 (9th Cir. Apr. 7, 1992) (ALJ improperly uses “personal awareness” to evaluate case).

200. *Id.*

201. *Id.*

202. *Id.* In a more recent example, a federal district court held that ALJs could not overly read into the facts and interpret them in light of their own ideas concerning the causes of an overpayment without providing evidentiary support for those ideas. *Valente v. Sullivan*, 862 F. Supp. 514 (D.D.C. 1994).

Moreover, even if claimants can establish that they suffer from some impairment that would reasonably affect their ability to interact with the SSA, evaluators commonly assume that claimants will have support (such as translators) available to aid them with Social Security.²⁰³ In one example, the Ninth Circuit expected a blind claimant to have someone help him read correspondence from the SSA, even though nothing indicated that such support was available.²⁰⁴

D. Inconsistencies Within the Overpayment System

Because the SSA and courts have no established measures for handling claimants with certain problems, areas of inconsistency have arisen, at least two of which affect older claimants. First, no general consensus exists on claimants' accountability to signed forms and applications.²⁰⁵ Second, judges disagree as to whether older claimants who do not have strong English skills are responsible for securing interpreters for their dealings with the SSA.²⁰⁶

Much disagreement exists over claimants' responsibilities for signed applications. The general application to receive retirement benefits is six pages long.²⁰⁷ The form asks claimants to provide a great deal of information, some of which they must update if circumstances change.²⁰⁸ Claimants do not always remember the information they provided to the SSA when they signed the form or do not remember to provide updates when the original information changes.²⁰⁹

Some courts prefer the SSA and ALJs to take into account the fact that claimants, especially if they are older, will not always remember what they wrote on the forms or the precise procedures the claim-

203. See *Anderson v. Sullivan*, 914 F.2d 1121 (9th Cir. 1990).

204. *Id.* It is unclear whether this inconsistency will disappear under the new regulations that stress lack of facility with the English language as an important pertinent circumstance.

205. See, e.g., *Tannehill v. Bowen*, 687 F. Supp. 555, 556 (N.D. Ala. 1987) (claimant was not expected to remember every condition agreed to at the time of application); *Clifford v. Sullivan*, No. 92-2029, 1993 WL 118836 (10th Cir. Apr. 15, 1993) (claimant responsible for all conditions agreed to at time of application).

206. See, e.g., *Matthanasak v. Sullivan*, 769 F. Supp. 103 (W.D.N.Y. 1991) (claimant knew he could not speak English well and was therefore responsible for getting his own aid to deal with the SSA); *Valle v. Secretary*, No. 84 Civ. 2885 (WCC), 1985 WL 1993 (S.D.N.Y. June 28, 1985) (SSA (here, through the ALJ) expected to use additional care with claimant who did not speak English well).

207. See *supra* note 25.

208. *Id.*

209. See also *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986) (claimant did not remember to report changes in earnings).

ants agreed to by signing the application.²¹⁰ A 1987 district court case, *Tannehill v. Bowen*, provides a good example of this view.²¹¹ When applying for benefits for her dependent children in 1977, claimant Tannehill marked the box on the form that indicated that she agreed to file annual earnings reports.²¹² When she subsequently failed to file those forms, the SSA overpaid her.²¹³ The court noted that “[t]he fact that she checked the box on the application is . . . not persuasive” to establish fault.²¹⁴ The court found, “[i]t is simply unreasonable, therefore, that Mrs. Tannehill ‘would recall a checkmark in a box from a form filled out’ in 1977.”²¹⁵

Other courts insist that claimants adhere to all information and conditions they had agreed to when they signed the application forms.²¹⁶ These courts fear that to hold otherwise would allow claimants to lie and claim forgetfulness.²¹⁷ For example, in *Clifford v. Sullivan*,²¹⁸ a recent Tenth Circuit case, the court expected the claimant to remember that he had agreed to report any pension changes when he first applied for retirement benefits.²¹⁹ The court concluded that, in signing the form, Clifford showed his consent to comply with SSA duties, and therefore he was not without fault in causing the overpayment that resulted when he neglected to inform the SSA of federal pension changes several years after applying.²²⁰

Just as no set policy dictates what claimants are expected to remember when they sign their application, no set policy establishes what responsibilities those claimants unable to speak English have when dealing with the SSA. Certain courts have considered poor English to be a relevant circumstance which prevents claimants from effectively communicating with the SSA.²²¹ These courts are willing to waive repayment when the claimant’s inability to communicate in

210. See, e.g., *Tannehill v. Bowen*, 687 F. Supp. 555, 558 (N.D. Ala. 1987) (claimant did not remember all conditions agreed to when signed form around 10 years before).

211. *Id.*

212. *Id.* at 556.

213. *Id.*

214. *Id.* at 558.

215. *Id.* (citing *Jefferson v. Bowen*, 794 F.2d 631 (11th Cir. 1986)).

216. *Clifford v. Sullivan*, No. 92-2029, 1993 WL 118836 (10th Cir. Apr. 15, 1993).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. See *Valente v. Sullivan*, 773 F.2d 1037 (2d Cir. 1984).

English caused the initial difficulty.²²² For example, in *Valle v. Secretary*,²²³ the District Court of the Southern District of New York remanded the case because the ALJ did not take into account all of the circumstances of the claimant's inability to speak English. The record showed that the claimant did not understand the events surrounding the hearing in front of the ALJ.²²⁴ In fact, statutes and regulations mandate that the SSA, the ALJs, and the courts consider lack of strong English skills a pertinent circumstance.²²⁵

At the same time, a number of courts have held that claimants who do not speak English are responsible for their problem.²²⁶ Such claimants should get translators to ensure that no errors arise due to miscommunication.²²⁷ Consequently, a New York district court found one claimant, Syno Matthanasak, to be not without fault in an overpayment that stemmed from his poor ability to communicate in English.²²⁸ The court stated, "[t]he record is replete with numerous instances in which plaintiff was placed on notice regarding his obligation to have SSA forms and communications translated and explained for his understanding."²²⁹ Therefore, the court concluded, the claimant knew or should have known to get the assistance that would have allowed him to understand his responsibilities and prevented the overpayment.²³⁰

Cases concerning those claimants who do not speak English well do not clarify whether the SSA itself must aid these claimants or whether these claimants are on their own. The courts have not set a concrete policy. Currently, the SSA provides many services and translators to non-English-speaking claimants, including telephone applications and help services in Spanish.²³¹ At the same time, the SSA maintains that it is under no duty to provide translators.²³²

222. *Id.*

223. No. 84 Civ. 2885 (WCC), 1985 WL 1993 (S.D.N.Y. June 28, 1985).

224. *Id.*

225. See *supra* text accompanying note 94.

226. *Matthanasak v. Sullivan*, 769 F. Supp. 103 (W.D.N.Y. 1991).

227. *Id.* at 106.

228. *Id.*

229. *Id.*

230. *Id.* at 107.

231. Telephone Interview with Ms. Higgins, *supra* note 25.

232. See *Tomic v. Sullivan*, No. 89-C-2054, 1992 WL 43241 (N.D. Ill. Mar. 2, 1992).

IV. Alleviating the Problem of Overpayments

Obviously, within an organization as large as the Social Security Administration, which deals with nearly the entire population of the United States, large numbers of errors are inevitable. At the same time, both the SSA and its claimants can take steps to alleviate the problem of overpayments through preventative measures. In addition, the SSA, the ALJs, and the courts can take measures to ensure that recoupment of overpayments is handled as equitably as possible.

A. Stopping Overpayments at the Administrative Level

The SSA already has taken a number of steps to alleviate problems caused by errors at the administrative level. For example, the SSA has had for a long time one program specifically designed to address the problem of those claimants who are unable to manage their own affairs—the representative payee system. This system allows the SSA to designate another person to carry out the claimant’s responsibilities when the claimant is unable to do so.²³³ The process of selecting the payee and delineating that person’s responsibilities is relatively thorough.²³⁴ Yet, the regulations provide only a general definition of when a representative payee will be used for an older claimant.²³⁵ For such claimants, a representative payee will be used if the claimant is “[l]egally incompetent or mentally incapable of managing benefit payments” or “[p]hysically incapable of managing or directing the management of his or her benefit payments.”²³⁶ The regulation does not detail what situations are included by these conditions. This system, however, is designed to prevent the errors that arise when an incapable person attempts to handle SSA benefits alone.

At the same time, many errors continue to arise when older claimants attempt to deal with the SSA. For example, many of the errors that result in overpayments stem from situations that occur when the claimant completes the application. The claimant may provide incorrect information, fail to provide information, or fail to read the application filled out by an SSA employee. In order to avoid inaccurate applications, both claimants and SSA employees need to be more diligent. The application process has become hurried—the claimant either fills out the application without knowing the process

233. 20 C.F.R. § 404.2001 (1995).

234. *See id.* §§ 404.2001-.2021.

235. *Id.* § 404.2010.

236. *Id.* § 404.2010(a).

or signs the form without double-checking the information written down by the employee. As the cases above demonstrate, this process often leads to errors or misunderstandings that cause overpayments.

Furthermore, problems arise when the SSA office does not assist those claimants who are unable to complete the forms alone. For example, non-English-speaking claimants often cannot get translators to help explain forms and regulations. Yet these claimants are unaware that they will be held accountable for all misunderstandings. Either proper resources need to be available to claimants with special needs, or the SSA needs to inform those in need of extra help that, as Social Security claimants, they have a responsibility to secure aid in getting the right benefits.

B. Preventing Unfair Repayments

In addition to preventing overpayments, preventing unfair repayments is important. Congress and the SSA have gone to great lengths to ensure that only those claimants who are not without fault repay overpayments. Those evaluating overpayment cases, however, do not always seem to be pursuing this goal.

That ALJs continue to ignore the “pertinent circumstances” requirement of evaluating fault is incongruous. Understandably, ALJs wish to reach the correct result. Claimants were never entitled to excess benefits in the first place and would have had to go without the extra resources had they received their correct allotment. If the legislature and the SSA had wished to be that strict, they would not have provided for the large number of circumstances in which the SSA can waive the requirement to repay. The ALJs should not try to thwart legislative efforts by denying waivers altogether.

Moreover, both the SSA as well as the courts need to be better aware of what problems give rise to “pertinent circumstances.” This awareness is especially important for older claimants whose difficulties might not be obvious. Many younger claimants who receive aid from Social Security are getting disability insurance; their physical or mental conditions which might lead to an overpayment will most likely be obvious. Older claimants, however, often receive overpayments of retirement benefits; their conditions which cause overpayment initially might not be as obvious. The SSA and courts need to be aware of those conditions affecting the older population that cause overpayment. Most importantly, they need to be aware of those con-

ditions that affect the older population in general—such as changes in comprehension and memory.

C. Changing the System

In its most simple form, the older population's interaction with the overpayment system shows that more needs to be done to prevent overpayments and the unfair denial of waivers. As this note has discussed, many overpayments are caused through miscommunication or confusion. Any solution aimed at reducing the amount the SSA overpays older claimants will have to include ways to facilitate communication between the agency and its claimants and ways to facilitate claimants' understanding of their responsibilities as recipients of SSA benefits.

A number of possible changes could be made to alleviate the overpayment problem. First, the required paperwork should be simplified. Currently, the application form for retirement benefits tries to encompass every contingency, which makes the form long and hard to read. Perhaps making applications streamlined, with different versions targeted toward specific groups, might stop common errors before they occur. The SSA could provide, for example, one version for federal employees which emphasizes that pensions count against Social Security, and one version for those claimants between the ages of sixty-two and seventy who wish to continue to work, which makes any deductions known from the beginning.

Second, the SSA should forbid its employees from filling out application forms for claimants without reviewing the information thoroughly with the claimant before the claimant signs the form. In addition, although telephone applications may be convenient for routine claimants, they should be done with the utmost care and avoided in cases where the claimant's situation is complex.

Third, the SSA should keep track of its claimants' current status. As providing follow-up for all SSA claimants is unfeasible, the SSA may wish to limit this inquiry to only those claimants with potential communication problems (e.g., the claimant has little schooling or little facility with English), or to claimants who are known to be or may still be working (especially if the claimant is under seventy). Although the SSA sends periodic reminders with benefit checks alerting its claimants of potential problems, claimants are not always aware that the information applies to them. More personal communi-

cation is needed, such as individualized letters or phone calls, to overcome this problem.

Furthermore, SSA employees, ALJs, and courts must be more aware of the specific problems that should be included among the statutory "pertinent circumstances." They need to know which social and physiological problems to expect, and what resources the Administration provides to deal with claimants who cannot easily communicate with or understand the SSA and its employees.

Finally, claimants themselves are not powerless to prevent unfair overpayments. At the outset, claimants should endeavor to learn as much as possible about their duties and rights as SSA beneficiaries. Should claimants find themselves charged with overpayment, they can ensure that their request for a waiver is handled expediently and arrives at the correct result by keeping thorough and accurate records of the circumstances of the alleged overpayment. In addition to providing good evidence for their case, complete records also enhance claimant credibility, increasing their chances for a waiver.²³⁷

V. Conclusion: Will the Problem Fix Itself?

Even if the Social Security Administration improves its system to curb overpayments, this problem can never be eliminated entirely. A system as large as Social Security is bound to make some errors in distributing its benefits: paying some greater benefits than entitled, paying some less, not paying some applicants entitled to benefits, and paying benefits to a few applicants who are not entitled. With \$1.5 billion a year lost due to overpayments, however, any improvement would be of great value.

Part of this problem may solve itself in the future. As noted early in this note, poor education and illiteracy were two problems found associated with the elder population that lead to overpayments. At the same time, the National Adult Literacy Survey and the 1990 census noted a trend towards a higher level of literacy and educational attainment within the American population.²³⁸ Currently, the median educational level for the United States population over twenty-five is 12.7 years of school, with those twenty-five to thirty-four averaging 12.9 years, and those thirty-four to fifty-five averaging

237. See Boskey, *supra* note 77, at 138. "Documentation and credibility are the two crucial elements in any appeal of an overpayment." *Id.*

238. See KIRSCH ET AL., *supra* note 45; CENSUS BUREAU, *supra* note 44.

13.0 years.²³⁹ Moreover, those in the twenty-five to fifty-four category scored around 20 to 25 points higher on the literacy test than those in the fifty-five to sixty-four group, and around 35 to 60 or more points higher than those in the sixty-five and over group (taking into account all three tests).²⁴⁰ Those in the younger group, who have a higher literacy and educational level should be able to deal with the SSA better, thus causing fewer errors. Fewer errors, meanwhile, should lead to fewer overpayments—and a proportional decline in headaches for both the SSA and its constituents.

At the same time, waiting for the problem to fix itself will not help reclaim the billions currently lost to overpayments. Although an increase in literacy rates would reduce overpayments, this increase would fail to alleviate those overpayments caused by other social and physiological situations. To curb this loss, measures need to be taken now to reduce the loss in overpayments caused by both lack of literacy as well as other physiological and social circumstances.

239. See KIRSCH ET AL., *supra* note 45.

240. *Id.* In the document category, the numbers are 27 to 37 points higher than the 55 to 64 group, and a full 56 to 66 higher than the 65 and over group. *Id.*

ELDERLY DRIVERS: THE NEED FOR TAILORED LICENSE RENEWAL PROCEDURES

Jennifer L. Klein

For many elderly people, the ability to drive provides not only a means of transportation, but also a sense of independence. Unfortunately, as the percentage of elderly drivers increases, so too does the number of accidents involving elderly drivers. In her note, Ms. Jennifer Klein analyzes the current status of licensing renewal procedures for elderly drivers and the need for procedures more focused on the elderly. After noting variations among the states, Ms. Klein focuses on the Illinois driver's license renewal statute, the most rigid of its kind. Next, Ms. Klein examines other approaches such as counseling, restricted licenses, and anonymous reporting. Before any kind of safeguards can be adopted to confront the problem of elderly drivers, Ms. Klein recognizes two potential roadblocks: political support and constitutional protections. However, Ms. Klein demonstrates that these obstacles can be overcome by implementing procedures to insure that only incompetent drivers remain off the road. Driver's license renewal procedures should be ability-focused, not age-focused. To protect elderly drivers, Ms. Klein concludes by recommending that states initially pattern their driver's license renewal statutes after the Illinois model. Next, states should implement legislation to insure that further research is instigated to promote safer road conditions for all drivers. Finally, Ms. Klein urges states to consider using technology to develop simulation and sensory perception tests that more accurately gauge elderly driving ability.

I. Introduction

One motor vehicle fatality occurs every thirteen minutes in the United States.¹ Furthermore, motor vehicle accidents represent the most frequent types of accidental deaths and injuries in this country.² In 1992, automobile collisions accounted for 40,300 fatalities, 2.2 million injuries, and \$156.6 billion in losses.³ For those Americans under eighty years old, motor vehicle accidents are the most common type of fatal injury.⁴ In recent years, the number of older licensed drivers has increased rapidly. Currently, there are approximately 14,477,000 licensed drivers seventy years of age and over, which is a fifty-nine percent increase from 1981.⁵ These older drivers make up over eight percent of the total number of licensed drivers.⁶ The number of licensed drivers over the age of seventy-five will more than double to 17.5 million by the year 2020.⁷ Drivers age eighty-five and over are involved in the highest number of accidents per mile traveled when compared to all other age groups, with the cause of the accidents usually due to the elderly driver's error, misjudgment, or violation of traffic laws.⁸

With the population of elderly people in the United States steadily increasing,⁹ there will be more elderly drivers and consequently more accidents per mile driven in the upcoming decades. Furthermore, the next generation of elderly will be much more dependent on their ability to drive than were their predecessors as a result of their current level of high dependence on the automobile. This increase in

1. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 25 (1993).

2. *Id.*

3. *Id.*

4. *Id.* at 23.

5. *Id.*

6. *Id.* For purposes of this note, "elderly" is considered to be those persons 75 years of age and older. See *infra* text accompanying note 175 for an explanation. Note that for commercial aviation, pilots must retire at age 60. Patricia F. Waller, Driver Licensing for the Elderly, Presented to Fifth International Conference on Mobility and Transport for Elderly and Disabled Persons 3 (1989) (transcript on file with *The Elder Law Journal*).

7. Joan E. Rigdon, *Older Drivers Pose Growing Risk on Roads as Their Numbers Rise*, WALL ST. J., Oct. 29, 1993, at A1.

8. NATIONAL SAFETY COUNCIL, *supra* note 1, at 23. Driver action, such as error or misjudgment, is more often the cause of motor-vehicle accidents with older drivers than with younger drivers. Younger drivers tend to be in accidents due to reckless driving and alcohol-related causes. *Id.*

9. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, THE NATIONAL DATA BOOK 24 (1993). In 1995, approximately 12.8% of the population will be 65 years of age or older, whereas in 2025, approximately 18.7% of the population will be in this age group. *Id.*

miles driven by the elderly drastically affects the accident rate, due to the typical causes of the accidents involving elderly drivers. While younger drivers may be a danger to society because of their reckless and careless behavior behind the wheel,¹⁰ elderly drivers may be far more dangerous because of their deteriorating ability to drive. In other words, although elderly drivers are involved in fewer accidents, elderly drivers are in far more accidents on a per-mile-driven basis. When they are involved in accidents, drivers over age eighty-five are fifteen times more likely to die than drivers in their forties.¹¹

Although perhaps the most dangerous mode of transportation, driving "is viewed not merely as a mode of transportation, but as a symbol of independence and freedom."¹² "Just as the young person views the license as a rite of passage into the adult world of independence, so the elderly driver views its loss as a loss of independence and even identity."¹³ In order to balance the desire to drive with the need for safe highways, the issuance and renewal of a driver's license is regulated in every state and the District of Columbia.¹⁴ Prospective drivers must satisfy their respective jurisdiction's statutory requirements before being issued a driver's license.¹⁵ Unfortunately, the system is not perfect. Many incompetent drivers¹⁶ continue to remain behind the wheel rather than being denied the renewal of their license or being issued a restricted license.

This note focuses on the need to change the license renewal procedures for elderly drivers. Although not all elderly drivers are poor drivers, there is a statistically proven decline in the general ability of older drivers. Therefore, this note will analyze the current state renewal procedures and the need for more thorough testing methods

10. Motor-vehicle accidents were the leading cause of accidental death from birth to age 77 in 1989. Those 19 years old experienced the greatest number of motor-vehicle fatalities in 1989. NATIONAL SAFETY COUNCIL, *supra* note 1, at 9.

11. Rigdon, *supra* note 7, at A1.

12. Ellen H. DeMont, Comment, *High-Risk Drivers: The Privilege to Drive Does Not Include a License to Kill*, 93 DICK. L. REV. 819, 819 (1989).

13. Patricia F. Waller, *Renewal Licensing of Older Drivers*, in TRANSPORTATION RESEARCH BD., NATIONAL RESEARCH COUNCIL, SPECIAL REPORT 218, 2 TRANSPORTATION IN AN AGING SOCIETY: IMPROVING MOBILITY AND SAFETY FOR OLDER PERSONS 72 (1988).

14. See *infra* note 61.

15. See *infra* note 61.

16. This note focuses on the elderly driver and the risks that are involved with the aging driver. This note does not address the driver who may be incompetent due to disease or physical disabilities. The terms "incompetent," "high-risk," "unsafe," and "elderly" are used interchangeably. The elderly population is analyzed as a group and is generalized as such, rather than on a case-by-case basis.

for elderly drivers. This note will also recommend that counseling and educational procedures be implemented to allow elderly drivers to remain on the road as long as they are capable of driving safely. Furthermore, new procedures need to be developed and then used by all state licensing examiners to insure that only once a driver becomes a hazard to public safety is his or her driver's license either restricted or denied renewal.

II. Background

A. The Increasing Age of America

Predictions vary slightly among studies, but there is no doubt that the older population is steadily increasing over the decades.¹⁷ Two major influences account for the increasing elderly population: the high birth rate from 1945 to 1970 and the improvements in health care and medicine.¹⁸ These changes in the age structure of our population have been referred to as the "squaring of the pyramid" (Figure 1).¹⁹ Not only is the older population increasing steadily, but the desire of older people to drive more often reflects the changing characteristics of the general population.²⁰ Most noteworthy is the increasing use of the automobile due to the growing population residing in suburban areas as opposed to the city.²¹

B. Accident and Fatality Rates Among Elderly Drivers

The population and the driving frequency of the elderly generation are increasing, although their sensory, perceptual, cognitive and motor faculties are substantially deteriorating.²² Consequently, there are not only more accidents per mile driven by elderly drivers (Figure

17. By the year 2080, 30% of the United States population will be over age 60 and almost 6% of those people will be over age 85. WILLIAM J. SEROW ET AL., POPULATION AGING IN THE UNITED STATES 3 (1990). According to a 1990 Transportation Research Board Report, discussed in a Senate report, entitled "Safety Research for a Changing Highway Environment," the aging of the United States population is expected to reach a peak by 2030, when those age 65 and older will represent 22% of the population. S. REP. NO. 199, 103d Cong., 1st Sess. 2-3 (1993).

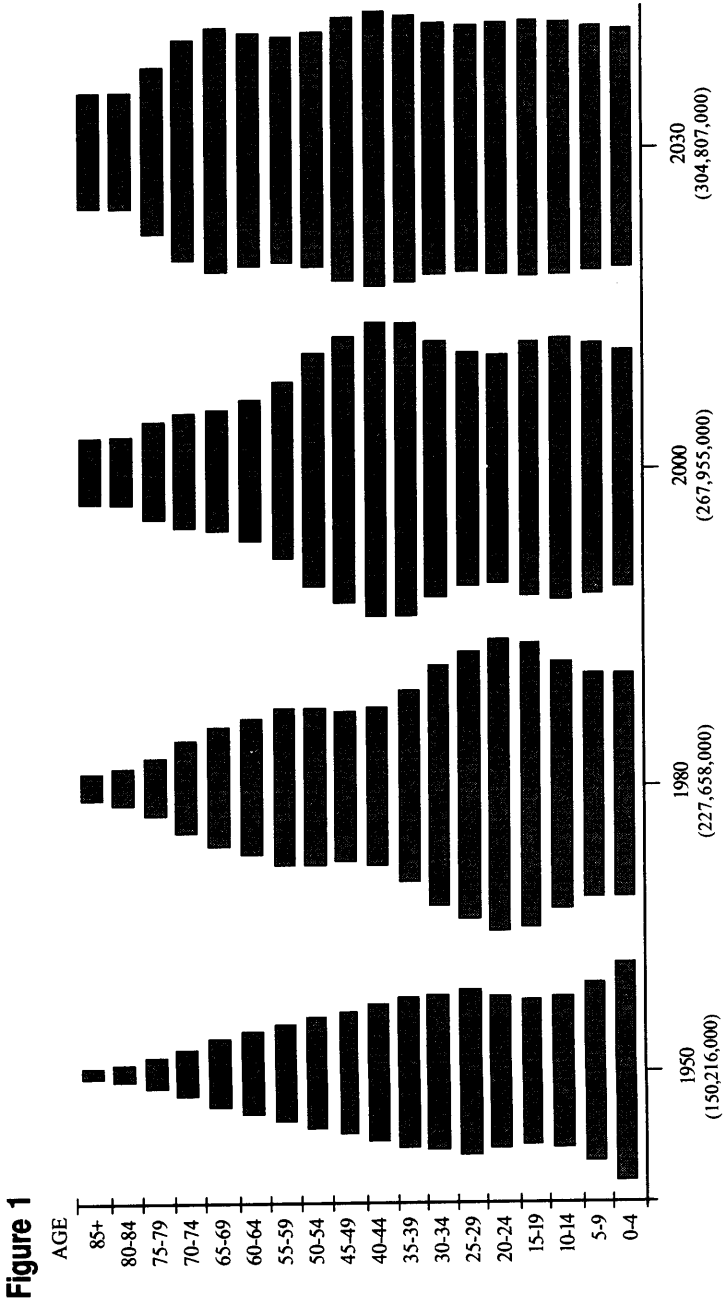
18. TRANSPORTATION RESEARCH BD., NATIONAL RESEARCH COUNCIL, SPECIAL REPORT 218, 1 TRANSPORTATION IN AN AGING SOCIETY: IMPROVING MOBILITY AND SAFETY FOR OLDER PERSONS 21 (1988).

19. *Id.*

20. *Id.* at 22.

21. *Id.*

22. RAHIM F. BENEKOHAL ET AL., FINAL REPORT: HIGHWAY OPERATIONS PROBLEMS OF ELDERLY DRIVERS IN ILLINOIS 3 (1992) [hereinafter FINAL REPORT].



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2),²³ but also more fatalities. In 1992, drivers seventy-five years of age and older were involved in 11.5 fatal crashes per 100 million miles driven, whereas drivers thirty-five to fifty-nine years of age were involved in two fatal crashes per 100 million miles driven.²⁴ Because older drivers are physically more vulnerable and frail than other drivers, they are more likely to be killed or injured in crashes.²⁵ When elderly drivers remain on the road, the safety of the elderly drivers is actually more of a concern than the safety of the public.²⁶ The consequences of an accident are more severe for elderly drivers and occupants, than for younger drivers and occupants.²⁷ Although elderly drivers' per capita involvement in accidents is the lowest of any age group, this is because as a group they tend to drive fewer miles and avoid driving at night.²⁸ On a mile-for-mile basis, elderly drivers over age eighty-five are involved in accidents more than four times as often as the safest drivers, those who are age fifty to fifty-nine.²⁹ *Motor vehicle* accidents represent the most common cause of accidental death for the sixty-five to seventy-four-year-old age group and the second most common cause for the age seventy-five or older age group.³⁰

C. Deteriorating Driving Ability in Elderly Drivers

Age alone is not an accurate indicator of driving ability.³¹ However, the physical and cognitive changes that accompany aging affect the driving abilities of older drivers in a variety of ways.³² Although "[t]he relative overinvolvement in crashes per mile driven in the elderly today, while still high, is lessening as more experienced drivers

23. TRANSPORTATION RESEARCH BD., NATIONAL RESEARCH COUNCIL, SPECIAL REPORT 229, SAFETY RESEARCH FOR A CHANGING HIGHWAY ENVIRONMENT 26 (1990) [hereinafter SPECIAL REPORT].

24. S. REP. NO. 199, 103d Cong., 1st Sess. 3 (1993).

25. *Id.*

26. JOHN W. EBERHARD, U.S. DEP'T OF TRANSPORTATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., MOBILITY AND SAFETY: THE MATURE DRIVER'S CHALLENGE 2 (1994).

27. *Id.* at 8.

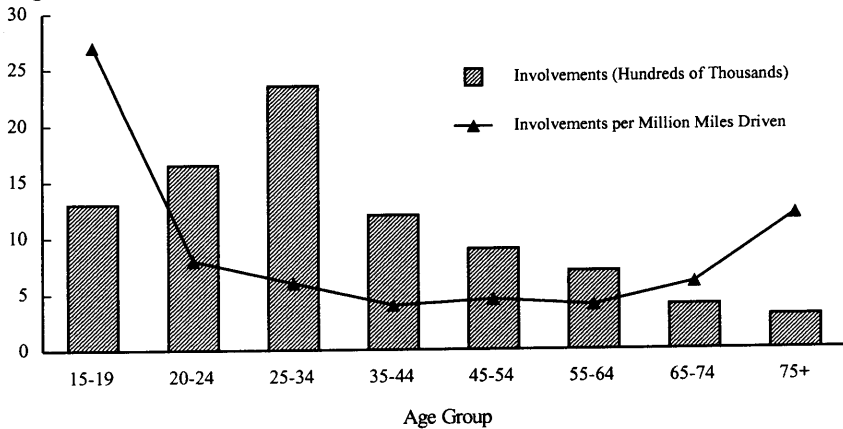
28. S. REP. NO. 199, 103d Cong., 1st Sess. 3 (1993).

29. Rigdon, *supra* note 7, at A1.

30. Arthur R. Copeland, *Traffic Fatalities Among the Elderly Population: The Metro Dade County Experience from 1981 to 1983*, 29 MED. SCI. LAW. 159, 159 (1989).

31. William H. Danne, Jr., Annotation, *Denial, Suspension, or Cancellation of Driver's License Because of Physical Disease or Defect*, 38 A.L.R.3D 452, 471 (1971); 60 C.J.S. *Motor Vehicles* § 164.4 (1969).

32. DeMont, *supra* note 12, at 820.

Figure 2

Reprinted, by permission of Transportation Research Board, National Research Council, Washington, D.C., from *Safety Research for a Changing Highway Environment 26* (1990) (Special Report 229).

reach their older years,”³³ elderly drivers continue to be involved in some tragic accidents. In 1992, a seventy-five-year-old drove into an afternoon crowd in New York City’s Washington Square Park, killing four people and injuring twenty-seven others.³⁴ In July of 1993, an eighty-three-year-old lost control of his car in a supermarket parking lot, hit a tree, careened through the air, and landed at a bus stop, striking three children and killing one.³⁵ An eighty-eight-year-old former truck driver had been prescribed nine different medications when he ran down his wife and killed her in a shopping-mall parking lot while trying to pick her up at the door.³⁶ An eighty-two-year-old continues to drive with a license after driving into three pedestrians in a parking lot, injuring all of them.³⁷ As a final example, an eighty-seven-year-old was pulling in behind two buses that contained sixty-three third-graders at O’Hare Airport in Chicago, when the car’s accelerator allegedly malfunctioned. One child was killed and the rest were in-

33. Patricia F. Waller, *Aging and Driving Performance*, Presented to Symposium on Aging and Driving, Swedish Medical Society 6 (1994) (transcript on file with *The Elder Law Journal*).

34. Rigdon, *supra* note 7, at A1.

35. *Id.*

36. *Id.*

37. *Id.* at A6.

jured. The police found no evidence that the accelerator actually was defective.³⁸

Although these tragic accidents of the elderly represent the subjective impressions of journalists, it is still apparent that the ability of elderly drivers decreases with age, especially in high risk situations.³⁹ High risk situations are those in which it is more likely that a driver will not be able to avoid an accident.

Driving a modern passenger vehicle on a clear day in light traffic does not overtax any dimension of performance (perceptual, cognitive, or physical). However, in heavy traffic at high speed, at night on poorly marked roads, at a complex intersection, or in a potential accident situation, the demands placed on drivers can exceed their abilities.⁴⁰

Nevertheless, elderly drivers may still be involved in accidents during the daytime or while driving a familiar course.

Driving becomes more difficult with age because of the abilities required to complete the process of driving an automobile. Driving consists of four discrete phases.⁴¹ A driver (1) sees or hears a situation developing, at the visual or auditory level; (2) recognizes it, at the cognitive level; (3) decides how to respond, at the cognitive level; and (4) executes the physical maneuver, at the motor level.⁴²

Aging involves cognitive and physiological changes that may affect all four of these phases.⁴³ For instance, older persons often experience deteriorating eyesight.⁴⁴ Vision is one of the most important functional abilities for driving⁴⁵ and the most commonly used sense in driving a vehicle.⁴⁶ Common visual problems among the elderly include cataracts, glaucoma, increased sensitivity to glare, decreased ability to focus on both static and dynamic objects, and less acute night vision, all of which make performance of the first phase of the driving task more difficult.⁴⁷ The ability to hear also decreases with

38. Ted Gregory, *Sycamore Still Stung by Tragedy*, CHI. TRIB., May 3, 1992, § 2, at 1.

39. Rigdon, *supra* note 7, at A1.

40. TRANSPORTATION RESEARCH BD., *supra* note 18, at 54.

41. *Id.* at 55.

42. *Id.* at 54-55.

43. *Id.*

44. *Id.*

45. *Id.*

46. FINAL REPORT, *supra* note 22, at 4.

47. DeMont, *supra* note 12, at 822; see also Paul L. Olson, *Problems of Nighttime Visibility and Glare for Older Drivers*, in EFFECTS OF AGING ON DRIVER PERFORMANCE, SP-762, at 53 (Engineering Soc'y for Advancing Mobility Land Sea Air & Space ed., 1988) (giving results of a study on the problems of nighttime visibility and glare

age, although the importance of hearing to safe driving has not been definitively established.⁴⁸ A person's cognitive capabilities, which are fundamental to recognizing and responding to a stimulus such as an impending accident, also diminish with age.⁴⁹ Older persons process information at a slower rate and experience memory loss at a greater rate, which affect the driver's ability to execute a physical maneuver.⁵⁰ Drivers must be able to analyze information in order to make decisions about actions while driving.⁵¹ For example, a driver reading a directional sign must not only interpret the message, but also relate that message to the trip destination objective.⁵² The speed of simple motor responses also diminishes with age, which affects the execution phase of driving.⁵³ Due to these deteriorating abilities, the older driver may initiate responses to control the automobile later than younger drivers.⁵⁴ Other physiological changes create more vulnerability among elderly people, making the outcome of crashes more severe for elderly drivers than for younger drivers.⁵⁵

Unlike younger drivers, whose traffic violations tend to involve reckless behavior, older drivers tend to get into accidents as a result of failing vision or inattention. More often than not, the elderly driver is at fault.⁵⁶ Crashes involving elderly drivers are more likely to result from errors of omission such as failure to yield the right-of-way, running traffic signals, and turning in front of oncoming traffic, rather than errors of commission such as speeding or drunk driving.⁵⁷ Thus, the accidents tend to involve more than one vehicle.⁵⁸ Studies show that elderly drivers are the cause of an accident over fifty percent of the time when they are involved.⁵⁹ Failure to yield caused forty-four

for older drivers); Douglas Poynter, *The Effects of Aging on Perception of Visual Displays*, in EFFECTS OF AGING ON DRIVER PERFORMANCE, *supra*, at 43 (giving results of a study on the effects of aging on perception of visual displays).

48. TRANSPORTATION RESEARCH BD., *supra* note 18, at 58.

49. *Id.*

50. DeMont, *supra* note 12, at 823.

51. FINAL REPORT, *supra* note 22, at 7.

52. *Id.*

53. DeMont, *supra* note 12, at 823.

54. FINAL REPORT, *supra* note 22, at 9.

55. TRANSPORTATION RESEARCH BD., *supra* note 18, at 61.

56. William E. Schmidt, *Graying of America Prompts New Highway Safety Efforts*, N.Y. TIMES, Apr. 6, 1988, at A1, A17.

57. Waller, *supra* note 6, at 2.

58. *Id.*

59. See Rene Monforton et al., *Accident Experience of Older AAA Drivers in Michigan*, in EFFECTS OF AGING ON DRIVER PERFORMANCE, *supra* note 47, at 3. This

percent of all fatal accidents involving drivers over age eighty-five compared to less than seven percent for drivers under age fifty-five.⁶⁰

The accident and fatality rates of elderly drivers are high. Elderly drivers are in the highest risk group for motor vehicle accidents per mile driven. Furthermore, driving abilities have been shown to decrease with age. Therefore, the driver's license renewal policy, both on the state and federal level, needs to be improved and tailored, not only to protect America's senior citizens, but also to protect the general public.

III. Analysis: License Renewal Procedures Do Not Adequately Test Elderly Drivers

A. Current Attempts to Address the Problems Posed by Elderly Drivers

1. STATE LAW

The motor vehicle codes of the fifty states and the District of Columbia offer a variety of approaches to renewing driver's licenses.⁶¹

survey of seven accident types showed that drivers over 70 were at fault over 50% of the time in all accident modes except rear-end collisions. *Id.*

60. Rigdon, *supra* note 7, at A6.

61. The following cites represent that part of each state's statute which addresses the expiration period and, if addressed in the same section, the renewal requirements. ALA. CODE § 32-6-1 (Michie Supp. 1994); ALASKA STAT. § 28.15.101 (Michie 1994); ARIZ. REV. STAT. ANN. § 28-426 (West Supp. 1994); ARK. CODE ANN. § 27-16-901 (Michie 1994); CAL. VEH. CODE § 12816 (West Supp. 1995); COLO. REV. STAT. § 42-2-118 (Bradford Supp. 1994); CONN. GEN. STAT. ANN. § 14-41 (West Supp. 1995); DEL. CODE ANN. tit. 21, § 2716 (Michie Supp. 1994); D.C. CODE ANN. § 40-301 (Michie Supp. 1995); FLA. STAT. ANN. § 322.18 (West Supp. 1995); GA. CODE ANN. § 40-5-32 (Michie 1994); HAW. REV. STAT. § 286-106 (Michie 1991); IDAHO CODE § 49-319 (Michie 1994); 625 ILL. COMP. STAT. § 5/6-115 (West 1993); IND. CODE ANN. § 9-24-12-1 (West 1992); IOWA CODE ANN. § 321.196 (West Supp. 1995); KAN. STAT. ANN. § 8-247 (Supp. 1994); KY. REV. STAT. ANN. § 186.410 (Michie Supp. 1994); LA. REV. STAT. ANN. § 32:412 (West Supp. 1995); ME. REV. STAT. ANN. tit. 29, § 542 (West Supp. 1994); MD. CODE ANN., TRANSP. § 16-115 (Michie 1992 & Supp. 1994); MASS. ANN. LAWS ch. 90, § 8 (Law. Co-op. 1994); MICH. COMP. LAWS. ANN. § 257.314 (West 1990); MINN. STAT. ANN. § 171.27 (West Supp. 1995); MISS. CODE ANN. § 63-1-47 (Law. Co-op. Supp. 1994); MO. ANN. STAT. § 302.177 (Vernon 1994); MONT. CODE ANN. § 61-5-111 (1993); NEB. REV. STAT. § 60-490 (1993); NEV. REV. STAT. ANN. § 483.380 (Michie 1994); N.H. REV. STAT. ANN. § 263:10 (Butterworth 1993); N.J. STAT. ANN. § 39.3-10 (West Supp. 1995); N.M. STAT. ANN. § 66-5-21 (Michie 1995); N.Y. VEH. & TRAF. LAW § 503 (McKinney 1986 & Supp. 1995); N.C. GEN. STAT. § 20-7 (Michie Supp. 1994); N.D. CENT. CODE § 39-06-19 (Michie 1987); OHIO REV. CODE ANN. § 4507.09 (Anderson Supp. 1994); OKLA. STAT. ANN. tit. 47, § 6-115 (West Supp. 1995); OR. REV. STAT. § 807.130 (Michie 1995); 75 PA. CONS. STAT. ANN. § 1514 (West 1977); R.I. GEN. LAWS § 31-10-30 (Michie 1994); S.C. CODE ANN. § 56-1-210 (Law. Co-op. Supp. 1994); S.D. CODIFIED LAWS ANN. § 32-12-42 (Michie Supp. 1994); TENN. CODE ANN. § 55-50-337 (Michie 1993); TEX. REV. CIV. STAT. ANN. art. 6687b (West Supp. 1995); UTAH CODE ANN. § 41-3-206 (Michie

Only a few states have specific licensing statutes which attempt to identify high-risk elderly drivers.⁶² Most states roughly follow the Uniform Vehicle Code which states that a driver's license shall not be renewed to any person "[w]hen the commissioner has good cause to believe that such person by reason of physical or mental disability would not be able to operate a motor vehicle with safety upon the highways."⁶³ This restriction is broad, however, and fails to address the particular problems of elderly drivers. The Code, and therefore many of the states, require applicants to take such additional tests as the state driver's licensing bureau finds reasonably necessary to determine the applicant's incompetency or qualification to drive.⁶⁴ However, these tests are not uniformly enforced by state licensing bureaus.

The renewal standards in each state vary as to the frequency of testing. Furthermore, the effectiveness of required examinations can be questionable. In evaluating the effectiveness of the examinations, four main areas are usually considered: vision screening,⁶⁵ knowledge testing,⁶⁶ road testing,⁶⁷ and medical and physical evaluations.⁶⁸

1993); VT. STAT. ANN. tit. 23, § 601 (Equity 1987); VA. CODE ANN. § 46.2-330 (Michie 1994); WASH. REV. CODE ANN. § 46.20.181 (West Supp. 1995); W. VA. CODE § 17B-2-12 (Michie Supp. 1994); WIS. STAT. ANN. § 343.20 (West 1991); WYO. STAT. § 31-7-119 (1994).

62. See sources cited *infra* note 72.

63. UNIF. VEHICLE CODE § 6-103 (1987). Note that when referring to "states," the District of Columbia will be deemed to be included for statistical purposes, making the total number of "states" fifty-one.

64. UNIF. VEHICLE CODE §§ 6-116, -210(a)(4), -212 (1987).

65. A variety of vision functions can be tested. Those commonly tested include: (1) static visual acuity, the ability to discriminate fine, stationary, high-contrast details; (2) dynamic visual acuity, the ability to distinguish detail in moving objects; and (3) visual field, the degree of arc that a person sees when looking straight ahead. TRANSPORTATION RESEARCH BD., *supra* note 18, at 56-57. The primary vision examinations in the United States test only static visual acuity. DeMont, *supra* note 12, at 834.

66. The term *knowledge test* applies to the written part of the examination that tests the driver's knowledge of safe driving practices and the traffic laws of the state, including the ability to read and understand official traffic-control devices such as signs and traffic lights. DeMont, *supra* note 12, at 833 nn.118-19.

67. The term *road test* applies to the part of the examination that tests the driver's ability to exercise ordinary and reasonable control in the operation of an automobile by having the driver demonstrate his or her ability on the road while accompanied by a driver's license examiner. *Id.* at 833 n.120.

68. A medical and physical examination involves an examination performed by a licensed physician for the purpose of determining the driver's potential as a safe driver. *Id.* at 834.

a. *Frequency of Testing* Thirty-one states and the District of Columbia issue a driver's license for a term of four years.⁶⁹ The remaining states have driver's license renewal terms ranging from one year to six years, with one state not requiring drivers to renew their licenses until they reach age sixty.⁷⁰ Although forty-nine states require periodic reexaminations of all drivers,⁷¹ only eight states require more frequent license renewals by the elderly.⁷² Several states even allow mail-in renewals.⁷³ Florida, which has the nation's largest proportion of seniors, allows drivers to renew by mail for up to twelve years at a time.⁷⁴ Delaware allows drivers, regardless of age, to maintain a permanent license if the driver chooses to do so.⁷⁵

69. These states are Alabama, Arkansas, California, Connecticut, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See sources cited *supra* note 61.

70. Florida and Maine issue a license for six years. Ten states issue a license for five years, including Alaska, Colorado, Maryland, Massachusetts, North Carolina, Rhode Island, South Carolina, South Dakota, Tennessee, and Virginia. New York issues a driver's license for four and one-half years. Missouri issues driver's licenses for three years. North Dakota has a two-year renewal period. Utah issues driver's licenses for only one year. Iowa allows the drivers to choose whether they want a two- or four-year license. Arizona does not require drivers to renew their licenses until age 60. Finally, Delaware allows citizens to maintain a permanent license. See sources cited *supra* note 61.

71. Only Arizona and Delaware do not require periodic reexaminations of all drivers. ARIZ. REV. STAT. ANN. § 28-426 (West Supp. 1994); DEL. CODE ANN. tit. 21, § 2716 (Michie Supp. 1994).

72. Arizona does not require a periodic renewal until the driver reaches age 60 and then requires renewal every five years. ARIZ. REV. STAT. ANN. § 28-426 (West Supp. 1994). Connecticut and Hawaii require drivers 65-years-old and older to renew every two years, as opposed to every four years. CONN. GEN. STAT. ANN. § 14-41a (West Supp. 1995); HAW. REV. STAT. § 286-106 (Michie 1991). In Illinois, drivers ages 81 to 86 must renew every two years and drivers age 87 and over must renew every year. 625 ILL. COMP. STAT. § 5/6-115 (West 1992). A driver age 75 and over must renew every three years in Indiana. IND. CODE ANN. § 9-24-12-1 (West 1992). In Iowa and Rhode Island, a driver age 70 and over must renew every two years. IOWA CODE ANN. § 321-196 (West Supp. 1995); R.I. GEN. LAWS. § 31-10-30 (Michie 1994). Maine decreases their renewal period from six years to four years once the driver reaches age 65. ME. REV. STAT. ANN. tit. 29, § 542 (West Supp. 1994). New Hampshire critiques their drivers more carefully beginning at age 75. N.H. REV. STAT. ANN. § 263:10 (Butterworth 1993).

73. Rigdon, *supra* note 7, at A6.

74. FLA. STAT. ANN. § 322.18 (West 1995). Florida, however, has recently introduced legislation that would require all drivers over age 75 to complete an eye test for each driver's license renewal and would decrease the renewal period to every four years instead of six years. Bill Moss, *Bill Would Restrict Oldest, Youngest Drivers in Florida*, ST. PETERSBURG TIMES, Mar. 16, 1995, at 11A.

75. DEL. CODE ANN. tit. 21, § 2713 (1985).

Some states have special requirements for elderly drivers. For example, a few states allow driver's licenses to be renewed by mail if the applicant is under a certain age.⁷⁶ Some states shorten the renewal term when the applicant reaches a certain age.⁷⁷ This shorter renewal term allows the examiner to observe the applicant in person, which facilitates earlier detection and evaluation of potential problems,⁷⁸ thereby possibly preventing accidents. Furthermore, it allows more frequent reexamination of elderly drivers' vision.

b. Effectiveness of Examinations In addition to determining the required frequency of driver's license renewals, a state must also evaluate the effectiveness of each test. The state must determine whether to require a certain test at a specific age in order to renew a license. Standard, and elderly, renewal procedures vary widely among the states.

States most commonly require drivers to pass a vision examination before their licenses can be renewed.⁷⁹ Few states restrict vision examinations to only those applicants over a certain age.⁸⁰ The typical standard for static visual acuity is "20/40 vision with both eyes open for licensure without restriction to corrective lenses."⁸¹ Most states do not require testing for visual field, dynamic visual acuity, color perception, depth perception, or other visual proficiency for the renewal of a standard driver's license.⁸²

Vision is essential to safe driving. However, it is difficult to show a direct relationship between performance on standard vision tests and driving records.⁸³ More research is needed in this area, but the importance of routine vision testing for all applicants is demonstrated by the fact that drivers of all ages fail standard tests of visual acuity which demonstrates that vision constantly changes.⁸⁴ Often

76. See, e.g., ALASKA STAT. § 28.15.101 (1994); CAL. VEH. CODE § 12814.5 (West Supp. 1995); LA. REV. STAT. ANN. § 32:412 (West Supp. 1995).

77. See *supra* note 72.

78. Waller, *supra* note 13, at 85.

79. DeMont, *supra* note 12, at 834.

80. For example, Arizona requires a vision examination once the renewal applicant reaches age 60. ARIZ. REV. STAT. ANN. § 28-426.01 (West Supp. 1994). Maine requires a vision examination every third renewal for drivers between the ages of 40 and 65. ME. REV. STAT. ANN. tit. 29, § 545A (West Supp. 1994). For drivers age 65 and above, Maine requires a vision examination every renewal period. *Id.*

81. Waller, *supra* note 13, at 74.

82. *Id.* See *supra* note 65 for a definition of some of these terms.

83. Waller, *supra* note 13, at 75.

84. *Id.*

those who perform best on tests of vision, for other reasons, such as carelessness, may have the worst driving records.⁸⁵

The inaccuracy of vision examinations for the elderly may be caused by the lack of reliable vision testing. For example, the elderly have more vision problems at night than at any other time. Furthermore, studies show that the elderly have a more difficult time finding information from a cluttered field of view than do younger drivers.⁸⁶ One of the main problems for elderly drivers is that their vision performance deteriorates so gradually that it is often not detected early enough.⁸⁷ "The eye is the only source of driver information about objects on the roadway . . . [and] the only source of information on roadway signs, traffic signals, and vehicle signals,"⁸⁸ and therefore it is vital that vision be tested regularly. Although most states do require vision screening with each renewal, several states have eliminated in-person renewal for drivers with safe-driving records.⁸⁹ In these states, an eighty-three-year-old driver could avoid at least one in-person renewal, and therefore vision screening, until age ninety-one.⁹⁰

Only a few jurisdictions require applicants to pass a knowledge test in order to renew their licenses.⁹¹ No state specifically requires elderly drivers to take a knowledge test at a certain age.⁹² The evidence for the effectiveness of knowledge tests is less available than the evidence for the effectiveness of vision testing.⁹³ The elimination of routine knowledge testing for older license renewal applicants with

85. Waller, *supra* note 33, at 8. Note that safe-driving records usually mean no violation convictions, rather than no crashes. *Id.*

86. Joanne M. Wood & Rod J. Troutbeck, *Effect of Age and Visual Impairment on Driving and Vision Performance*, in TRANSPORTATION RESEARCH RECORD NO. 1438, SAFETY AND HUMAN PERFORMANCE, RESEARCH ISSUES ON BICYCLING, PEDESTRIANS, AND OLDER DRIVERS 89 (1994).

87. *Id.*

88. MERRILL J. ALLEN, VISION AND HIGHWAY SAFETY 5 (1970).

89. Waller, *supra* note 33, at 8.

90. *Id.*

91. DeMont, *supra* note 12, at 834. Those states that do require a knowledge examination for all renewal applicants are Arizona, Hawaii, Kansas, Louisiana, Massachusetts, Virginia, and Washington. ARIZ. REV. STAT. ANN. § 28-426 (West Supp. 1994); HAW. REV. STAT. § 286-107 (Michie 1991); KAN. STAT. ANN. § 8-247 (Supp. 1994); KY. REV. STAT. ANN. § 186.480 (Michie Supp. 1994); LA. REV. STAT. ANN. § 32:408 (West Supp. 1995); MASS. ANN. LAWS ch. 90, § 8 (Law. Co-op. 1994); VA. CODE ANN. § 46.2-330 (Michie 1994); WASH. REV. CODE ANN. § 46.20.120 (West Supp. 1995).

92. Although Hawaii requires drivers age 65 and over to renew every two years, as opposed to every four years, the knowledge test is still only required every four years. HAW. REV. STAT. § 286-107 (Michie 1991).

93. Waller, *supra* note 13, at 75.

no convictions during the prior renewal period appears to have no adverse effect on driving performance.⁹⁴ Studies do show, however, that performance on a well-constructed knowledge test is related to driving performance.⁹⁵

States rarely require periodic road tests for driver's license renewal.⁹⁶ Although road testing may have some relationship to subsequent driving records, it is time-consuming, expensive, and generally avoided by states.⁹⁷ Evidence suggests that the present method of road testing is not useful in renewal testing, even for elderly drivers.⁹⁸ Road tests usually test typical daytime driving patterns. However, older drivers most often encounter difficulties when driving at night, driving which involves either sudden changes in driving conditions, or driving a new route. Therefore, road tests may still be useful for testing specific older driver's performances, if the tests could be made more realistic.

Medical and physical examinations are not part of the routine renewal procedure in any state.⁹⁹ Arizona requires that applicants pass a medical examination starting at age sixty with each renewal.¹⁰⁰ Some states have Medical Advisory Boards that provide expertise to the licensing authority on medical questions relating to an applicant's ability to drive safely.¹⁰¹ In-person renewal allows examiners to evaluate applicants and, with proper training, to detect potential medical problems that may interfere with safe driving performance.¹⁰² It is vital for the driver's license examiner to recognize when an applicant should be referred for more extensive professional evaluation.¹⁰³ Most states have provisions within their statutes that allow the state to require further examination of the renewal applicant if necessary. The examiner must be aware that the probability of developing medical problems increases with age, but that there is no evidence that age

94. *Id.* However, younger drivers who were excused from knowledge testing showed worse subsequent performance than their counterparts who were required to take the knowledge test. *Id.*

95. *Id.*

96. Illinois, however, requires a road test at the age of 75. 625 ILL. COMP. STAT. § 5/6-109 (West 1992).

97. Waller, *supra* note 13, at 75.

98. *Id.* at 76.

99. See sources cited *supra* note 61.

100. Arizona requires a renewal applicant that is at least age 60 to pass certain medical standards. ARIZ. REV. STAT. ANN. § 28-426 (West Supp. 1994).

101. DeMont, *supra* note 12, at 834.

102. Waller, *supra* note 13, at 77.

103. *Id.*

alone is associated with poorer driving performance.¹⁰⁴ The examiner at least must be able to detect that an elderly driver has a potential impairment and refer that applicant to a physician before his or her license is renewed.

2. FEDERAL LAW

The federal highway safety standard for licensing drivers includes requirements for a reexamination preceding renewal. The reexamination should:

1. Occur at least every four years;
2. Include testing for visual acuity and for knowledge of the rules of the road;
3. Be designed to identify any driver deficiencies and limitations;
4. Provide remedial measures for applicants with any deficiencies and limitations;
5. Include provisions for terminating the driving privileges of those who are unable to meet these safe driving standards; and
6. Provide remedial procedures for improving driver performance by refreshing the driver's knowledge and educating him or her in areas unknown to him or her.¹⁰⁵

These guidelines are a start, but like many of the state laws, they do not adequately address the needs of elderly drivers.

Congress attempted to pass the High Risk Drivers Act of 1993 but was unable to enact the law before the end of the term.¹⁰⁶ Although the bill focused on younger drivers, the bill would have required extensive research to determine ways to improve traffic records of older drivers and to improve licensing examiners' ability to recognize the physical limitations of older drivers.¹⁰⁷ Unfortunately, bills geared towards more frequent reexamination of elderly drivers receive much opposition. Part of the opposition to any state or federal

104. *Id.*

105. *Id.* at 73. Item four refers to drivers with deficiencies whereas item six refers to improving all drivers' performances.

106. S. REP. NO. 199, 103d Cong., 1st Sess. (1993). This bill (H.B. 1719 and S.B. 738) was introduced to the House Committee on Public Works and Transportation on April 19, 1993, by Representative Wolf and to the Senate Committee on Commerce, Science and Transportation on April 2, 1993, by Senator Danforth. It passed the Senate as amended on November 20, 1993, and then it went to the House. It never made it through the House or to the President's desk. This measure was combined with an unrelated bill and renamed H.R. 5248. On October 7, 1994, the House passed this new bill by voice vote. The Senate did not consider the House resolution upon passage. As of the spring of 1995, the two versions must now be reconciled in conference. Thus, the bill does not appear to be progressing satisfactorily. If and when the bill does become law, it now has little focus on elderly drivers and would not have the necessary impact on current law.

107. *Id.*

statutory reform is the elderly generation's fear of losing their independence and society's perception that licensing requirements based on age are a form of age discrimination.

3. ILLINOIS'S DRIVER'S LICENSE RENEWAL STATUTE

Illinois's Driver's License Renewal Statute provides the most rigid standards of any current law for elderly drivers to renew their licenses.¹⁰⁸ Illinois requires more frequent license renewals by elderly drivers than by younger drivers.¹⁰⁹ Until the age of eighty-one, a driver must renew his or her license every four years.¹¹⁰ Between the ages of eighty-one and eighty-six, the renewal period is every two years.¹¹¹ A driver over the age of eighty-seven must renew his or her license every year.¹¹² After the age of seventy-five, every Illinois driver must pass a road test in order to renew his or her license.¹¹³ Illinois is also one of the few states to require a complete vision test, which examines acuity, peripheral vision, and depth perception, rather than simply requiring the static visual acuity test.¹¹⁴

4. OTHER SOLUTIONS

Some states have tried methods other than heightened license renewal requirements to monitor elderly drivers effectively and to help elderly drivers keep their driver's licenses. Some of the more common methods are restricted licenses, anonymous reporting, highway improvements, educational courses, and individual counseling.

Restricted licenses are offered by most states in the form of daylight driver's licenses.¹¹⁵ A few states offer further restrictions, such as restricting driving to non-rush hours.¹¹⁶ These restricted license programs have not always been successful.¹¹⁷ For example, Sun City, Arizona, abandoned its program after an elderly woman with a restricted license ran down and killed a pedestrian in a parking lot.¹¹⁸ The state also had given a restricted license to an older man even

108. 625 ILL. COMP. STAT. § 5/6-115 (West 1992).

109. *Id.*

110. *Id.*

111. *Id.* § 5/6-115(g).

112. *Id.*

113. *Id.* § 5/6-109(c).

114. Rigdon, *supra* note 7, at A6.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

though he failed his test several times.¹¹⁹ The man later struck and crippled a child.¹²⁰ One study found that fatal accident rates of the elderly are not significantly different in those states that have restricted license programs.¹²¹ Furthermore, many elderly drivers decide not to drive at night.¹²² Therefore, restricting their licenses to daytime driving would have little effect. In any event, seventy-nine percent of fatal accidents involving people age sixty-five and older occur during the daytime.¹²³

Another proposal is to encourage anonymous reporting of poor drivers.¹²⁴ However, few people are willing to turn in a neighbor or a friend and confine that person to his or her home, even for safer highways. Further, when adult children are compelled to report their elderly parents, it may result in trauma within these families. "Children see their parents getting slower, and they become frightened. Parents see their children's horror and either become depressed about their declining abilities or try to reassert the authority they had when their children were young."¹²⁵ Therefore, this method is unreliable because many people are hesitant to make the reports.¹²⁶

Improved driving conditions on the roads would eliminate many of the problems that the elderly encounter such as the inability to read signs. Although improving roads can be costly and time-consuming, states can implement several relatively low-cost remedies. For example, elderly drivers would benefit from road signs that were bigger, brighter, and wider.¹²⁷ Road signs pose problems for the elderly, not only in terms of visual acuity, but also in relation to the rate at which they process information.¹²⁸ Other design features of highways, such as intersection lighting and pavement markings, also warrant attention.¹²⁹ These improvements would help older drivers to

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Janet Elder, *Older Drivers: Just How Safe?*, N.Y. TIMES, Apr. 8, 1987, at C1, C15 (quoting Dr. Thomas Planek, Director of Research and Statistical Services at the National Safety Council in Chicago).

126. Rigdon, *supra* note 7, at A6.

127. Office of the Secretary of State, Driver Servs. Dep't, Ill., Senior Drivers: A Review of Current Issues and Studies 5 (Feb. 1989) (available through the Office of the Secretary of State of Illinois).

128. FINAL REPORT, *supra* note 22, at 69.

129. *Id.* at 70.

perceive changes in the driving environment, as long as the improvements do not involve drastic design changes that could confuse the elderly driver. The improvements in the signs should be geared towards the size and clarity of the message, not their content.

One solution is to educate the elderly about their changing driving needs. Because many elderly drivers have never taken a driver education course, an educational course would be extremely beneficial.¹³⁰ One such course is the "55 Alive/Mature Driving" course offered by the American Association of Retired Persons.¹³¹ Many states offer incentives to take the course, such as discounts in insurance or deduction of points on a bad-driving record.¹³² The course teaches elderly drivers to take another route when traffic moves too fast on the highway and to take three right turns in order to avoid a left turn.¹³³ Of course, drivers must be careful not to take certain suggestions, such as no left turns, too literally. As one practicing attorney reported, he had an eighty-year-old client who was having trouble keeping his driver's license.¹³⁴ The client complained that he could not understand why "they" wanted to take away his license, as he only made right turns and never turned left. One has visions of this driver making huge loops, always turning right, to arrive at his destination. As this eighty-year-old driver learned, following this advice religiously does not guarantee keeping one's license, as other problems may be associated with one's abilities.

130. Betsy Wade, *Back to School for Older Drivers*, N.Y. TIMES, Apr. 3, 1988, at xx3. No objective scientific evidence proves that these programs are effective. Waller, *supra* note 33, at 12. However, this does not mean that they are ineffective; it simply means that it remains to be determined whether these special courses are helpful. *Id.*

131. 55 ALIVE/Mature Driving is an eight-hour classroom refresher course that is taught by volunteers nationwide. Thirty-two states and the District of Columbia have enacted legislation which requires all automobile insurance companies within the state to provide a multi-year premium discount to graduates of state-approved courses, which includes 55 ALIVE/Mature Driving. The AARP actively lobbies states to pass this legislation in order to combat the problems of the elderly driver. AMERICAN ASS'N OF RETIRED PERSONS, 55 ALIVE, FACT SHEET (1994).

132. Wade, *supra* note 130, at xx3. Of the states that mandate a discount on auto insurance for those who have taken the course, only three—Delaware, New York, and Texas—provide discounts for drivers of all ages. Connecticut provides discounts only for drivers over age 62. The other states have discounts for drivers age 55 and over. These are: Arkansas, California, the District of Columbia, Florida, Kentucky, Illinois, Louisiana, Minnesota, Mississippi, Montana, North Dakota, New Mexico, Oklahoma, Rhode Island, Tennessee, Virginia, Washington, West Virginia, and Wyoming. *Id.*

133. Wade, *supra* note 130, at xx3.

134. Interview with Ronald G. Klein, Attorney at Law, DeKalb, Ill. (Mar. 26, 1995).

Finally, some states offer counseling in order to encourage elderly drivers to evaluate their own driving ability. In 1985, Oregon state highway officials began the first program in the country to screen and privately counsel elderly drivers who may no longer be able to drive.¹³⁵ The goal is to keep elderly drivers on the road as long as possible while insuring the safety of the public.¹³⁶ These counseling programs, as well as the courses discussed above, will encourage elderly drivers to evaluate their own skills and to recognize their limitations. By recognizing significant changes in their driving abilities, elderly drivers will respond through compensatory behavior and self-imposed restrictions on driving.¹³⁷

Although these self-analysis programs seem to be successful in motivating elderly drivers to drive less at night and to be more cautious, self-analysis alone cannot solve the problems of renewing driver's licenses of the elderly. The "[t]rouble is, seniors can't compensate for problems they may not even be aware of, such as slower reaction times and senility. Nor can they correct for the side effects of medications."¹³⁸ Furthermore, "the older driver may develop compensatory attitudes and behaviors, some of which are positive and contribute to safety and some of which are negative and promote unsafe practices."¹³⁹ On the positive side, elderly drivers become more responsible, cautious, and courteous drivers. On the negative side, they may practice too much avoidance behavior or deny the existence of any problem with their driving abilities.¹⁴⁰

B. Roadblocks to More Restrictions on Elderly Drivers

The reason for the lack of state or federal legislation is twofold. First, the elderly are a powerful political group who are fiercely holding onto their independence. Second, the implementation of driver's licensing laws based on age are perceived to violate age discrimination and due process laws.

135. William E. Schmidt, *Graying of America Raises Road Safety Concern*, N.Y. TIMES, Apr. 6, 1988, at A1, A17.

136. *Id.*

137. FINAL REPORT, *supra* note 22, at 68.

138. Rigdon, *supra* note 7, at A1.

139. Darlene J. Winter, *Older Drivers—Their Perception of Risk*, in EFFECTS OF AGING ON DRIVER PERFORMANCE, *supra* note 47, at 19, 19.

140. *Id.*

1. INDEPENDENCE

"[R]estrictions smack of cruelty toward elderly people who might, without cars, become shut-ins."¹⁴¹ As one eighty-one-year-old said, "I'd rather be pushing up daisies than live without a car."¹⁴² For some elderly drivers, a license represents a "passport to independence—the last stop before a nursing home."¹⁴³ Taking away the license from a senior might cause depression and rapid deterioration in the quality of living.¹⁴⁴ Although a driver's license will not be taken away without just cause, "[s]ooner or later many people will have to stop driving. We have to start preparing them for that inevitability."¹⁴⁵ Unfortunately, mobility is a problem. Additionally, the number of elderly drivers is increasing while the number of younger drivers is decreasing.¹⁴⁶ "Thus, as older drivers reach the point at which they can no longer qualify for full or partial licensure, there will not be a younger cohort coming along to provide the necessary transportation."¹⁴⁷ The elderly driver will be forced to rely on inadequate public transportation.

2. AGE DISCRIMINATION AND DUE PROCESS ISSUES

Perhaps the most commonly raised argument opposing elderly driver's licensing programs is that of the Fourteenth Amendment. First, the Fourteenth Amendment protects against discrimination by affording equal protection to all citizens. Second, the Fourteenth Amendment protects certain property interests of citizens.

The Fourteenth Amendment to the United States Constitution forbids discrimination by entitling all citizens to the equal protection of the laws.¹⁴⁸ When a court reviews an equal protection claim with no suspect class or fundamental right at issue, it examines whether a

141. Rigdon, *supra* note 7, at A1.

142. *Id.*

143. *Id.* at A6.

144. Elder, *supra* note 125.

145. *Id.* at C15.

146. Waller, *supra* note 33, at 1.

147. *Id.*

148. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. This note only peripherally addresses the age discrimination and due process issues in order to give the reader a clearer understanding of the issues involved in the license renewal procedure of the elderly driver. The writer does not intend to fully address this complicated issue. See generally DeMont, *supra* note 22; Stephen J. Soule, Comment, *Constitutional Law: Due Process Requires No Hearing Before Suspension of Driver's License*, 19 WASHBURN L.J. 338 (1980) (providing a more thorough analysis of due process issues).

rational basis exists for the challenged action.¹⁴⁹ According to the Supreme Court, because age distinctions do not require heightened scrutiny, cases alleging age discrimination are reviewed under the lower rational basis standard.¹⁵⁰ As a result, the challenging party, or the party who is claiming discrimination, bears the burden of proving that the legislation at issue is irrational.¹⁵¹ The plaintiff "must convince the court that the legislative facts on which the classification apparently is based could not reasonably be conceived to be true by the governmental decision maker."¹⁵² Because this is a difficult burden to meet, age discrimination is a challenging case for the elderly individual to win and has not been attempted in this context.

A stronger argument for the elderly population is based on the Fourteenth Amendment's entitlement of procedural due process protection of certain property interests.¹⁵³ Although most people consider a driver's license to be a privilege, the Supreme Court has determined that a driver's license is a property interest that is entitled to Fourteenth Amendment protection.¹⁵⁴ Courts also have held that the high-risk driver's procedural due process rights outweigh the state's interest in the preservation of safety on its roads.¹⁵⁵ Although these cases show that a driver's license is a property interest entitled to Fourteenth Amendment protection, the cases do not involve elderly drivers and the states' implementation of stricter licensing requirements. Instead, the cases address suspension or revocation of driver's licenses due to a lack of insurance, driving under the influence of alcohol, or other similar violations.¹⁵⁶ Despite the courts' interpretation, the American Association of Retired Persons has not constitutionally challenged existing state restrictions on elderly drivers, although they had earlier lobbied against Florida legislation requiring regular road tests for drivers over age eighty and had advocated mandatory renewal tests for all drivers and not just the elderly.¹⁵⁷

Although a driver's license is a property interest entitled to Fourteenth Amendment protection, the nature of the procedural due

149. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

150. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

151. *Harrish Indep. Sch. Dist. v. Martin*, 440 U.S. 194 (1979).

152. *Vance v. Bradley*, 440 U.S. 93 (1979).

153. No state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

154. *Bell v. Burson*, 402 U.S. 535 (1971).

155. *Jones v. Penny*, 387 F. Supp. 383 (M.D.N.C. 1974).

156. *See, e.g., Bell*, 402 U.S. 535; *Jones*, 387 F. Supp. 383.

157. *Rigdon*, *supra* note 7, at A6.

process that is required to satisfy that protection is still unclear. The guarantee of procedural due process dictates that a citizen be afforded the protections of notice and hearing prior to the deprivation of an important property interest.¹⁵⁸ The court in *Bell v. Burson* held that procedural due process necessitated that a state afford a driver notice and opportunity for a meaningful hearing that is appropriate to the nature of the case, before revocation of the driver's license, unless an emergency situation exists.¹⁵⁹ However, courts have since modified the *Bell* holding with regard to the timing of a revocation hearing.¹⁶⁰ The current standard for procedural due process concerns of state driver's licensing statutes is described by the court in *Mackey v. Montrym*.¹⁶¹ The *Mackey* court suggested that a summary suspension of a driver's license does not offend procedural due process if the statutory scheme provides for an immediate postsuspension hearing.¹⁶² Furthermore, the court stated that two factors are considered in determining whether to revoke a driver's license: the possibility of retroactive compensation and the length of the deprivation of the driver's license prior to a hearing.¹⁶³

State statutory provisions prescribing the conditions on which the driver's license may be maintained, revoked, or suspended have not been held unconstitutional by the Supreme Court.¹⁶⁴ Furthermore, there is still a debate as to the nature of the constitutional rights involved in a driver's license. For example, it has been held that the refusal to issue a driver's license under a statute fixing the minimum age at sixteen years did not constitute a taking of private property without due process.¹⁶⁵ Furthermore, a state has the undisputed ability to regulate licensing requirements and restrictions as long as it is with just cause.¹⁶⁶

Current state statutes addressing the revocation of a driver's license vary in their provisions for notice and a hearing prior to the revocation of the driver's license.¹⁶⁷ According to the *Mackey* court,

158. U.S. CONST. amend. XIV, § 1.

159. *Bell*, 402 U.S. 535.

160. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975).

161. *Mackey v. Montrym*, 443 U.S. 1 (1979).

162. *Id.* at 19.

163. *Id.* at 11-12.

164. 60 C.J.S. *Motor Vehicles* § 164.1 (1969).

165. Wayne F. Foster, Annotation, *Validity, Construction, and Application of Age Requirements for Licensing Drivers*, 86 A.L.R.3D 475, 477 (1978).

166. *Id.*

167. *See* sources cited *supra* note 61.

however, if the statutes allow for an immediate postsuspension hearing, the statutes will not offend procedural due process standards. Nevertheless, these cases, which are interpreting the statutes, address revocation of driver's licenses, not nonrenewal of driver's licenses due to a failure to pass examinations upon the expiration of a driver's license. Whether courts would view this situation differently is unclear. Nonetheless, there does not appear to be any outright Fourteenth Amendment bar to state statutes regulating the renewal of driver's licenses.

C. Current Attempts to Address the Dilemma of Elderly Drivers Do Not Remedy the Situation

Although several attempts have been made to address the dilemma of elderly drivers, the methods used thus far do not remedy the situation. Elderly drivers who are no longer safe drivers remain on the road. Current state license renewal examinations do not adequately test the elderly drivers' abilities. Furthermore, renewal periods are too long in some states. Programs such as counseling and educational courses are helpful, but more adequate renewal procedures must be developed to make the roads safer.

IV. Resolution

Both the state and federal government should focus on safer roads, but not by simply revoking the driver's licenses of the elderly. Renewal should be ability-focused as opposed to age-focused. Furthermore, additional research is necessary in several areas.

The current highway travel environment is not well adapted to the problems of older drivers and pedestrians. Cars and occupant restraints are not designed with the frailty of older persons in mind; highway design standards and roadway signs and markings do not account for the poorer vision of older people and their slower decision-reaction times; and licensing officials lack valid screening procedures to identify those older drivers, or those drivers of any age group, who are at a higher risk of crash involvement.¹⁶⁸

State licensing renewal procedures need to be changed and further research needs to be conducted in order to create better solutions.

Until better solutions are developed, states should model their driver's license renewal statutes after Illinois's statute. Illinois offers

168. SPECIAL REPORT, *supra* note 23, at 63.

more rigid requirements for elderly drivers than any other state. This is not a proposal aimed at depriving elderly citizens of their freedom, but a proposal aimed at making the roads safer, both for the elderly driver and for the rest of the public. Studies show that older drivers, in general, experience declining driving abilities as they age. The Illinois statute and other similar state statutes are not based on age discrimination, but instead on insuring that only capable drivers are on the road. It is critical to test elderly drivers more frequently as their driving abilities deteriorate.

Illinois's statute requires that drivers over the age of seventy-five pass certain examinations.¹⁶⁹ The statute mandates that an applicant seventy-five years of age and older must successfully complete a road test.¹⁷⁰ All applicants, regardless of age, must pass a vision test, a knowledge test, and any further physical and mental examination deemed necessary.¹⁷¹ Anyone who is not age seventy-five and has no traffic convictions needs to take only the vision examination, not the knowledge test or the physical and mental examinations.¹⁷² A restricted license may be issued when appropriate.¹⁷³ Finally, a license expires after four years for anyone under age eighty-one, after two years for a driver age eighty-one to eighty-six, and every year for any driver eighty-seven and older.¹⁷⁴

Illinois's statute is definitely a step in the right direction. The statute requires elderly drivers to renew their licenses more frequently at no additional cost to the driver. Requiring elderly drivers to renew their licenses, in person, at a higher frequency, assures that fewer incompetent drivers will remain on the road. However, the tests that are currently used, even those used by Illinois, are not adequate.

An ideal solution is to develop a simulation test or a sensory perception test that would be given to every driver upon license renewal. Rather than using an arbitrary age that may raise age discrimination issues, this device would not only test for potentially dangerous drivers but also record the driver's score at each renewal. This information would be kept in a federally regulated file, accessible to all states. Presumably, at some point, the driver's ability will no-

169. 625 ILL. COMP. STAT. § 5/6-109 (West 1992).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* § 5/6-113.

174. *Id.* § 5/6-115(a), (g).

ticeably decrease as the driver ages, at which time the driver would undergo more rigorous testing. This would result in either a restricted license or nonrenewal of the license, depending on the degree of score change and the results of subsequent testing. If such a device could be created, renewing elderly driver's licenses would no longer be based on age, but rather on ability. When abilities decrease to a certain level, the driver, regardless of age, would be required to undergo further testing.

Unfortunately, states cannot wait until this type of technology is implemented, as the problems of elderly drivers are current issues. The most often debated issue may be choosing the age at which to require drivers to renew their licenses more frequently. All elderly drivers experience neither the same rate of deterioration nor the same changes in driving ability. However, seventy-five seems to be a likely age when more frequent visits to the license bureau may be needed.

Because of the rapid increase in crash risk after 75, it appears reasonable to increase the frequency of routine reexamination beginning at this age. With in-person renewal at least every two years, the examiner could determine whether a license should be issued for 1 or 2 years. Any arbitrary cutoff age is likely to trigger opposition, but the available data suggest that 75 would be defensible. . . . [I]f states do not implement some special procedures, they may find themselves under attack or even liable for failure to act on the basis of evidence that crash risk increases dramatically at these upper ages.¹⁷⁵

Although any age may seem somewhat arbitrary to the elderly driver, the majority of studies would support the age of seventy-five as identifying an elderly individual.

Reexamination of elderly drivers is crucial because elderly drivers' abilities have been shown to decline with age. Most states require vision tests with each driver's license renewal for all ages. However, a state should require more rigorous and frequent vision tests once a driver is deemed elderly, in addition to the general examinations. Again, these vision examinations should be studied and improved in order to be geared towards the deteriorating vision of elderly drivers.

States need to create examinations which are geared towards elderly drivers. It already has been established that the current tests, although not useless, are inadequate in predicting incompetent drivers. The road tests, for example, focus on whether a driver is capable

175. Waller, *supra* note 13, at 86.

of operating a vehicle. The tests are not designed to determine which drivers will fail under unusual or high-risk circumstances.

States should require more accurate road tests than are currently offered for elderly drivers attempting to renew their licenses. Road tests seem to be the best option currently available to determine the driver's ability. However, these road tests need to be dramatically improved in order to focus on elderly drivers' abilities. To improve these tests, an area that should be pursued vigorously is that of driving simulators. Research should be done to make this type of technology available for state driver's license examination bureaus. Although road tests are more predictive of a driver's ability than a written examination or a vision test, they certainly do not test the driver's ability, with any regularity, to deal with unusual situations. Surprises, such as cars unexpectedly pulling out in front of them, and harsh driving conditions, are the types of situations that elderly drivers find difficult. Simulators would be able to test these abilities more accurately. Although some work in this area has been done, those simulations that have been developed have yet to solve the problem adequately.¹⁷⁶ With the current rage in virtual reality, a realistic driving simulator would seem to be attainable.

To further the necessary research, the federal government should pass legislation, such as the High Risk Drivers' Act, to promote research aimed at elderly drivers and to encourage adaptation of the highway system to elderly drivers' needs. Congress should also pass legislation that requires states to study their elderly drivers' needs. These actions should be geared towards keeping elderly drivers on the road as long as neither the public nor the elderly drivers are in danger. Furthermore, the federal government should implement legislation that will insure uniformity among states. It will do little good if two bordering states have entirely different restrictions on high-risk drivers.

In addition to research, state governments should promote guidelines and incentives for programs to educate drivers over age fifty-five,¹⁷⁷ including specially designed courses on traffic and driv-

176. See generally Mary K. Janke, *Age-Related Disabilities that May Impair Driving and Their Assessment*, at 3-1 to 3-115 (June 1994) (unpublished manuscript, on file with *The Elder Law Journal*).

177. Although 75 is arguably the age when most people can be considered elderly, drivers should begin to take the courses at age 55 in order to be informed of the possibility of their declining abilities before the changes begin. Therefore,

ing, which promote more educated self-analysis and behavior adapted to changing abilities. "Drivers who understand their own limitations tend to change their behavior to accommodate declining capabilities. Those unaware of limitations tend not to take corrective action, placing them at higher risk of crashes."¹⁷⁸ The program offered by the AARP, 55 Alive/Mature Driving, is a good example of a successful course. The states should insure that more of these courses are available to all drivers.

We are never too old to learn. Most people of average health continue to learn throughout life and can expect to maintain or even increase their level of performance with advancing age. While the sharpest decline in intelligence seems to occur about age 62, the adult student enters the learning environment with a great deal of internal motivation, especially if what he is to learn is immediately useful.¹⁷⁹

Elderly drivers are not bad drivers by definition. Studies have simply shown that elderly drivers, in general, are high-risk drivers. These studies indicate that education should focus on how to improve elderly drivers' abilities.

To encourage elderly drivers to participate in educational programs, states should offer insurance incentives to take the courses. Illinois, for example, has approved a Defensive Driving Credit on Private Passenger Vehicles that is applied towards insurance premiums.¹⁸⁰ The discount applies when the driver is at least fifty-five years old and has successfully completed an approved Motor Vehicle Accident Prevention Course.¹⁸¹ To continue the discount, the course must be repeated every three years.¹⁸² If an elderly driver does not perceive himself or herself as a challenged driver, he or she will probably opt against spending time at this type of course. Therefore, by offering a financial incentive to take the course, the elderly driver will be more apt to take this course and to restrict their driving as it becomes ap-

there would be a better chance of coping with and learning to adapt to different driving habits.

178. EBERHARD, *supra* note 26, at 1.

179. Adele M. Milone, *Training and Retraining the Older Driver*, in *DRIVERS 55+*, at 39 (James L. Malfetti ed., 1985).

180. 215 ILL. COMP. STAT. § 5/143.29 (West 1992). However, studies have shown that there is no correlation between course completion and a reduction in motor vehicle accidents. Mary K. Janke, *Mature Driver Improvement Program in California*, in *TRANSPORTATION RESEARCH RECORD NO. 1438, SAFETY AND HUMAN PERFORMANCE, RESEARCH ISSUES ON BICYCLING, PEDESTRIANS, AND OLDER DRIVERS 77*, 83 (1994). Further research needs to be conducted.

181. 215 ILL. COMP. STAT. § 5/143.29 (West 1992).

182. *Id.*

propriate. Furthermore, these courses, and incentives, should be offered to all age groups. By starting early, drivers are more apt to be safe drivers longer.

Unfortunately, changing the behavior of elderly drivers is not always easy. "Trying to change the behavior of the elderly is not just a problem of conveying information and training for defensive skills. Behavior is strongly influenced by stereotypes held by contemporary society, as well as the society from which the elderly . . . acquired some predominant views on aging."¹⁸³ By offering specific, comprehensive, and unambiguous messages, some of these problems can be overcome.¹⁸⁴

Education also should be offered on an individual basis. Oregon's counseling program is a good example. This program counsels those individuals who show signs of declining ability but who have not yet reached the level at which their licenses should be denied. States should implement this type of program for elderly drivers who have questionable driving skills but have not deteriorated to the level at which a license should be denied. Individual counseling and driver training of elderly drivers also allow the examiners to develop a better understanding of the abilities of each driver.

Many elderly drivers learn to evaluate themselves and personally restrict their driving. States should acknowledge the restrictions to which elderly drivers have already adapted. Furthermore, some states restrict driving privileges to non-rush hours or daylight only, a concept known as a "graduated license."¹⁸⁵ However, graduated licenses must be exercised with "the greatest caution in imposing formal restrictions on drivers who have already adapted their driving habits to fit their changing capabilities."¹⁸⁶ Elderly drivers should be allowed to restrict themselves, preferably encouraged through educational courses and counseling.

In addition to the research to develop more accurate reexamination procedures for elderly drivers, programs also must be developed to improve the training of licensing bureau employees. Even if more reliable tests are developed, these tests will probably not reveal all potentially dangerous drivers. The employees who administer the tests and approve the renewal of licenses must be knowledgeable

183. J. PETER ROTHE, *THE SAFETY OF ELDERLY DRIVERS* 51 (1990).

184. *Id.* at 52.

185. EBERHARD, *supra* note 26, at 2.

186. *Id.*

about the characteristics of high-risk drivers. If these characteristics are demonstrated by the elderly driver, then further testing or medical examinations should be required of the elderly driver.

States should not only require stricter standards for elderly drivers and encourage research to determine more reliable techniques for testing elderly drivers, but they should also initiate research on road conditions. Road conditions, such as signs and pavement markings, are not always conducive to older drivers. For example, signs are not always large and clear enough for the elderly driver to perceive and pavement markings lack clarity. These road conditions should be corrected rather than deny a driver his or her license.

Furthermore, although researching programs to better examine elderly drivers is crucial, research also must be conducted to determine both the elderly drivers' safety and transportation needs.¹⁸⁷ As elderly drivers become more frail with age, vehicles should be designed to better protect elderly drivers. If elderly drivers reach the level where it is better that they do not drive, then alternative modes of transportation need to be provided. Simply because an elderly individual is deemed unsafe on the roads, that person should not be denied their independence.

Numerous studies have revealed the decreasing ability of elderly drivers due to the natural process of aging. Although a great deal of sympathy exists for the elderly driver, enormous concern exists not only for public safety, but also for the safety of the elderly drivers themselves. Asking elderly drivers to undergo more tests with each driver's license renewal and more frequent renewals is not asking for too much, considering the lives, including the elderly drivers' lives, saved on the roads.

187. Some research has begun to develop new technology to facilitate the driving task in order to allow elderly drivers to continue to meet their own mobility needs. Waller, *supra* note 33, at 10. Although these systems may mean information overload and lead to driver confusion, they may prove helpful once they become familiar to the elderly driver. New developments include adaptive cruise control, near object detection system, run-off-the-road warning, cooperative intersection, collision warning/avoidance, night vision enhancement, call for help, driver impairment warning, and platooning (a way to increase the capacity of existing highways in order to avoid paving more real estate). *Id.*

V. Conclusion

Elderly drivers are at a higher risk than other drivers behind the wheel. Nobody likes to admit that they are getting older and cannot function as well as they did in the past, but it is an inevitable fact of life. The states and the federal legislature must recognize this change and act to protect society. Congress and the states should offer insurance incentives to all drivers to take continuing driver education courses, implement counseling and educational programs for questionably competent drivers, enforce more frequent and more rigorous renewal procedures for elderly drivers, and initiate research into more accurate testing technology. Developing tests to determine at what age each individual should be deemed an unsafe driver should be the highest priority. States should also reexamine their road conditions in order to determine how to serve the needs of their elderly residents. These suggestions for stricter standards are not proposals to take away all driver's licenses at a certain age, but instead represent proposals to monitor more closely those drivers who pose a significantly higher risk to the safety of society. Another hour at the driver's licensing bureau for the elderly, but otherwise capable, driver is not much to require, when the end result could save a life.

**AFTER *PRICE WATERHOUSE* AND THE CIVIL
RIGHTS ACT OF 1991: PROVIDING
ATTORNEY'S FEES TO PLAINTIFFS
IN MIXED MOTIVE AGE
DISCRIMINATION CASES**

Nancy L. Lane

*The Civil Rights Act of 1991 (CRA) reaffirmed the congressional commitment to oppose discrimination in the workplace. Section 107 of the CRA directly overrules the Supreme Court's decision in *Price Waterhouse v. Hopkins* which denied an award of attorney's fees to an employee plaintiff who proved that her employer considered illegitimate factors in making an employment decision. *Price Waterhouse* is a mixed motive sex discrimination case brought under Title VII of the Civil Rights Act of 1964.*

*Age Discrimination in Employment Act (ADEA) case law has traditionally followed the judicial model provided by Title VII. Ms. Lane argues that following the *Price Waterhouse* model in age discrimination suits would undermine the objective of eliminating age-based discrimination in the workplace—the ADEA's primary goal. In order to achieve the aims of the ADEA, it is imperative that courts grant attorney's fees to plaintiffs who prove their employers improperly consider age in making employment decisions.*

*The ADEA remedial structure is designed to compensate victims of age discrimination and to deter employers from such discrimination. The award of attorney's fees is consistent with the congressional and societal interest in eliminating age-based employment discrimination. The ADEA's statutory language and legislative history supports a liberal construction of its remedial provisions to realize its compensatory and social policy purposes. Thus, because *Price Waterhouse* allows an employer to avoid liability—and attorney's fees—when it considers impermissible factors in an employment decision, it should not be followed in ADEA suits.*

I. Introduction

With the passage of the Civil Rights Act of 1991¹ (CRA), Congress reaffirmed its commitment to fight employment discrimination and to promote the important social interest furthered by employment discrimination litigation. The CRA illuminated the conflict between the liberal construction of civil rights legislation intended by Congress and the Supreme Court's parsimonious interpretation of those statutes during the past twenty years. In passing the CRA, Congress directly overruled four Supreme Court cases interpreting employment discrimination statutes, signaling its disapproval of the Supreme Court's position.²

One of the provisions of the CRA directly addressed the Supreme Court's decision in *Price Waterhouse v. Hopkins*,³ a *mixed motive*⁴ case brought under Title VII of the Civil Rights Act of 1964⁵ (Title VII). To the extent that *Price Waterhouse* denied attorney's fees to a plaintiff who proved that an employer improperly considered a proscribed factor in reaching an employment decision,⁶ it was specifically overruled by section 107 of the CRA. Section 107⁷ provides limited remedies, including attorney's fees, when a plaintiff proves that an

1. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075 (codified as amended at 42 U.S.C. § 1981 (Supp. 1993)).

2. See M. DeSales Linton & Elliot M. Minberg, *The Civil Rights Act of 1991: A Section-by-Section Analysis*, 26 CLEARINGHOUSE REV. 1317 (1993), for a brief overview of the Act. The Civil Rights Act of 1991 reversed *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (severely limiting the range of § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981); *Wards Cove Packing v. Atonio*, 490 U.S. 642 (1989) (shifting the burden of proving business necessity of a discriminatory policy to the employee and establishing barriers to proving claims of disparate impact discrimination); *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) (holding that Title VII and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-213, did not cover U.S. citizens employed overseas); and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that an employer is not liable under Title VII when he can prove that permissible factors also motivated a discriminatory employment decision).

3. 490 U.S. 228 (1989).

4. A mixed motive case is one in which the employer is motivated by both permissible and impermissible factors in making an employment decision. *Id.* at 232.

5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5, 2000e-17 (1988).

6. *Price Waterhouse* held that an employer who is motivated by both permissible and impermissible factors (under Title VII) does not violate Title VII. *Price Waterhouse*, 490 U.S. at 258. Because Title VII awards attorney's fees only to prevailing plaintiffs, 42 U.S.C. § 2000e-5(k), the plaintiff will be denied attorney's fees.

7. Pub. L. No. 102-166, § 1071, 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-5 (Supp. 1993)).

employer used illegitimate as well as legitimate factors in its employment decision.

Section 107 of the CRA neither specifically mentions the Age Discrimination in Employment Act (ADEA)⁸ nor lists age as an impermissible factor subject to the provisions of the section.⁹ Section 107 overruled the denial of attorney's fees in the *Price Waterhouse* mixed motive case, but *Price Waterhouse* is a Title VII case and does not discuss the case's applicability to ADEA. As a result, section 107 seems to be limited to cases brought under Title VII. Nevertheless, ADEA case law has historically paralleled Title VII case law.

This note will explore whether judicial application of the *Price Waterhouse* mixed motive analysis to age discrimination cases requires denying a plaintiff attorney's fees or whether authority would support the award of attorney's fees in a mixed motive age discrimination case. Part II will describe the background of the ADEA and its genesis as a hybrid of Title VII and the Fair Labor Standards Act (FLSA).¹⁰ It will discuss the history of attorney's fees in civil rights litigation, with particular emphasis on their role as a tool for effectuating the ADEA's policy. Part III reviews the current judicial and legislative treatment of mixed motive cases. Part III will also analyze the Supreme Court's recent approach to statutory interpretation which has undermined the congressional purpose of civil rights legislation in general and of the ADEA in particular. Part IV will discuss the judicial treatment of mixed motive cases brought under the ADEA using the *Price Waterhouse* model which denies plaintiff attorney's fees, and alternatives that may support attorney's fees awards in mixed motive cases.

The tension between Congress's intent in promulgating civil rights statutes and the Supreme Court's narrow reading of the statutes may be played out again in ADEA mixed motive cases. Judicial reliance on the *Price Waterhouse* model to analyze mixed motive age discrimination claims would be consistent with the Supreme Court's pattern of undermining employment discrimination protection. Unless the CRA model, with its limited remedies, can be applied to mixed motive suits brought under the ADEA, an older victim of employment discrimination will be at a decided disadvantage in pursuing an employment discrimination claim.

8. 29 U.S.C. §§ 621-34 (1984).

9. Pub. L. No. 102-166, § 107, 105 Stat. 1071.

10. 29 U.S.C. §§ 201-16, 217-19, 557 (1988).

II. Background

A. The Age Discrimination in Employment Act of 1967

1. HISTORY AND PURPOSE OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Congress passed the Age Discrimination in Employment Act of 1967¹¹ during the civil rights movement in the 1960s.¹² Prior to its passage, age had been considered, along with race and sex, as a possible protected class under Title VII of the Civil Rights Act of 1964.¹³ The attempt to include age as a protected class under Title VII was unsuccessful, partly due to the nature of age discrimination, which was perceived to be substantially different in quality than the other protected classes.¹⁴ Nevertheless, as part of Title VII, Congress ordered the Secretary of Labor to study the issue of age discrimination.¹⁵ In 1966, the Secretary presented proposals for legislation prohibiting age discrimination. This led directly to enactment of the ADEA in 1967.¹⁶

Although it is not the first legislative effort to protect the rights of older people,¹⁷ the ADEA is the most comprehensive. It has both a remedial goal to compensate age discrimination victims and a broad

11. 29 U.S.C. §§ 621-34 (1984).

12. The ADEA was an "outgrowth of the civil rights legislation that started with the Equal Pay Act of 1963, followed by Title VII of the Civil Rights Act of 1964." JOSEPH E. KALET, *AGE DISCRIMINATION IN EMPLOYMENT LAW* 1 (1986).

13. Members of Congress believed that there was insufficient information available to make a considered judgment about the nature of age discrimination. 110 CONG. REC. 2596-99, 9911-13, 13490-92 (1964).

14.

Racial bigotry . . . often is generated by hatred or fear. Ill will is a component of racism. In contrast, discrimination based on age is much less emotionally charged. Ageism typically is not grounded on the perpetrator's dislike of old people generally; rather, age discrimination in most instances is the product of ignorance—the expression of an employer's ill-founded notions about the competency of older workers.

Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other than Age Exception*, 66 B.U. L. REV. 155, 220 (1986) (describing the 1965 report by the Secretary of Labor, U.S. DEP'T OF LABOR, *THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT ACT* (1965), reprinted in EEOC, *LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT* 16-41 (1981)).

15. See Civil Rights Act of 1964, tit. VII, § 715, 78 Stat. 265 (superseded by § 10 of the Equal Employment Opportunity Act of 1972, 86 Stat. 111 (current version at 42 U.S.C. § 2000e-14 (1970))).

16. KALET, *supra* note 12, at 2.

17. *Id.* at 1; see also Eglit, *supra* note 14, at 160 n.14 (stating that efforts to prohibit age discrimination by federal statute date back to the 1950s).

social policy goal to eliminate arbitrary age discrimination in society. The ADEA prohibits discrimination across a broad range of employment activities, including hiring, discharges, decisions regarding compensation, terms, conditions, and privileges of employment, job classifications, job referrals, and exclusion from union membership.¹⁸ In its statement of findings and purpose, Congress stated that the ADEA is intended to “promote the employment of older workers based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.”¹⁹

2. THE STRUCTURE OF THE ADEA

The ADEA relies on both Title VII²⁰ and the FLSA²¹ for its structure. Title VII provides the ADEA’s substantive structure while the FLSA provides the ADEA’s remedies and procedures.

a. The ADEA and Title VII The ADEA’s drafters intended to grant age the same status as a protected class that Title VII grants to sex and race.²² However, the different characteristics of race, sex, religion, and national origin on the one hand, and age on the other,²³ have resulted in some differences between the statutes.

18. Eglit, *supra* note 14, at 161.

19. 29 U.S.C. § 621(b) (1988).

20. 42 U.S.C. § 2000e-5, 2000e-17 (1988).

21. 29 U.S.C. §§ 201-16, 217-19, 557 (1988).

22. KALET, *supra* note 12, at 2.

23. Then-Secretary of Labor Wirtz described the origin of age discrimination as distinct from other forms of discrimination, stating that age discrimination develops because of oversight, lack of common sense, and lack of recognition given to the capacity of an older person, whereas racial discrimination is rooted in bigotry. *Hearings on the Age Discrimination in Employment Act of 1967 Before the Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90th Cong., 1st Sess. 6 (1967) (statement of Willard Wirtz). The ADEA’s legislative history affirms Congress’s recognition that discrimination based on age differs from discrimination based on sex or race. “Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry.” 113 CONG. REC. 34,742 (1967) (statement of Rep. Burke).

The judiciary has also recognized these differences in, for example, modifying a plaintiff’s burden in establishing a prima facie case. KALET, *supra* note 12, at 60; *see also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (stating that “[W]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a ‘history of purposeful unequal treatment’ or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”); Rod-

The difference between discrimination based on age versus discrimination based on Title VII classifications is a recurring theme. Title VII makes unlawful all discrimination based on the factors listed in the statute.²⁴ However, rather than condemning *all* discrimination based on age, Congress viewed the ADEA as directed at the *arbitrary* use of age as a proxy for lack of ability.²⁵ In addition, Congress stated in the ADEA that it is not unlawful for employers to differentiate “based on reasonable factors other than age.”²⁶ Although this distinction is implicit in the statute, its express inclusion in the ADEA “highlight[s] [Congress’s] concern that older workers be evaluated objectively on the basis of their performance.”²⁷ It is equally clear that Congress did not intend the ADEA to provide a general remedy for unemployment among older workers.

Nevertheless, Title VII’s substantive provisions and proof considerations were followed extensively when the ADEA was drafted,²⁸ and the Supreme Court has recognized the resulting similarity between the two statutes. In *Lorillard v. Pons*,²⁹ the Court stated, “[t]here are important similarities between the two statutes . . . both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions.”³⁰ In *Oscar Mayer & Co. v. Evans*,³¹ the Court observed that the prohibitions of the ADEA were derived in

riquez v. Taylor, 569 F.2d 1231, 1236-37 (3d Cir. 1977) (stating that “[a]lge concededly differs from the Title VII classifications in that, for some jobs, statistically significant correlations might demonstrate that persons above certain middle ages are inherently disabled from performing as satisfactorily as their younger counterparts.”).

24. 42 U.S.C. § 2000e (1988). Title VII prohibits employers from making employment decisions because of an individual’s race, color, religion, sex, or national origin.

25. The ADEA’s statement of findings and purpose mentions the problems of “arbitrary age limits regardless of potential for job performance” and the need “to promote employment of older persons based on their ability rather than age.” 29 U.S.C. §§ 621(a)-(b) (1988).

26. *Id.* § 623(f)(1).

27. *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1399 (3d Cir. 1984).

28. KALET, *supra* note 12, at 2. Title VII already had an established framework for enforcing the prohibition on employment discrimination. *Id.*

29. 434 U.S. 575 (1978) (an ADEA case concerning jury trial availability in actions for back pay).

30. *Id.* at 584.

31. 441 U.S. 750 (1979) (an ADEA case holding that failure to file a timely charge in a deferral state is not fatal to an ADEA action).

haec verba from Title VII.³² As a result, courts rely heavily on judicial treatment of Title VII to interpret cases brought under the ADEA.³³

b. The ADEA and the FLSA Although the ADEA's substantive provisions are patterned after Title VII, the ADEA follows the enforcement and remedial provisions of the Fair Labor Standards Act.³⁴ The Supreme Court recognized the importance of the FLSA's remedial provisions in *Lorillard*, in which the Court stated that remedies under the ADEA include those identified in existing interpretations of FLSA violations.³⁵

Section 7(b) of the ADEA³⁶ explicitly incorporates section 11(b) and part of section 16 of the FLSA.³⁷ Section 7(b) authorizes a private suit for unpaid wages and an equal amount in liquidated damages and authorizes the Secretary of Labor to sue for injunctive relief, as well as the unpaid wages and liquidated damages. Section 7(b) of the ADEA³⁸ also authorizes "legal or equitable relief" to effectuate the

32. *Id.* at 755.

33. "The ADEA was patterned after Title VII The seventh circuit has held that ADEA claims should be analyzed the same way Title VII claims are analyzed, with the only difference being that protected plaintiffs are classified according to age rather than race, color, religion, gender, or national origin." *Hinton v. Board of Trustees*, 53 F.E.P. 1475, 1481 (N.D. Ill. 1990) (citing *Golomb v. Prudential Ins. Co. of Am.*, 688 F.2d 547, 551 (7th Cir. 1982)); see *Fields v. Clark Univ.*, 817 F.2d 931, 934 n.1 (1st Cir. 1987) (stating that "the *McDonnell Douglas* test is followed to the same extent under [the ADEA] as under [Title VII]."); see also *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (holding an interpretation of Title VII applies "with equal force in the context of age discrimination").

34. KALET, *supra* note 12, at 43. Senator Jacob Javits, one of the bill's floor managers, described the enforcement section that became part of the ADEA as follows: "The enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact, [the ADEA] incorporates by reference, to the greatest extent possible, the provisions of the [FLSA]." 113 CONG. REC. 31254-55 (1967). "[T]he absence of a full remedial scheme in Title VII, apparently for political reasons, required the drafters to look elsewhere." KALET, *supra* note 12, at 89.

35. *Lorillard v. Pons*, 434 U.S. 575, 581-83 (1978).

36. 29 U.S.C. § 626(b) (1988). This section reads in part:

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection a thereof), and 217 of this title, and subsection (c) of this section In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter

.....

Id.
37. 29 U.S.C. §§ 211(b), 216(b)-(e) (1988 & Supp. 1991).

38. 29 U.S.C. § 626(c)(1) (1988). This section states, "[a]ny aggrieved person may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Chapter." *Id.*

Act's purposes.³⁹ The only limit placed on relief available under the ADEA is that the remedy be consistent with the ADEA's purposes.⁴⁰

Furthermore, the FLSA, as incorporated in section 7(b) of the ADEA, expressly requires that attorney's fees shall be granted to successful plaintiffs.⁴¹ This provision makes attorney's fees mandatory for successful plaintiffs in suits brought under the ADEA.

While recognizing that the FLSA provides the basic remedial framework for the ADEA, the judiciary acknowledges that the ADEA authorizes remedies not found in the FLSA.⁴² The authority provided by the ADEA's broad grant of "legal and equitable relief" is clearly in addition to the remedial scheme provided by the FLSA⁴³ and is without limitation except to effectuate the ADEA's purposes.⁴⁴

With both Title VII and the FLSA as models for the ADEA, Congress's final legislation is a "hybrid [statute], reflecting, on the one hand, Congress' desire to use an existing statutory scheme [Title VII] and a bureaucracy [provided by the FLSA] with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the preexisting schemes."⁴⁵

Congress has amended the ADEA several times, sometimes to reflect new policy and circumstances,⁴⁶ but more often to clarify the Act for the judicial system.⁴⁷ The need to amend the ADEA will undoubtedly continue in light of the divergent views of Congress and the judiciary.

39. *Lorillard*, 434 U.S. at 581-83.

40. *Id.*

41. 29 U.S.C. § 216(b). This section reads in part, "[t]he court in such action [against an employer violating the Act] shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." *Id.* (emphasis added).

42. "[I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Lorillard*, 434 U.S. at 581.

43. *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984).

44. *Id.* "When we read this section [29 U.S.C. § 626(b)] as a whole and construe it liberally, as we must, . . . we conclude that the legal and equitable remedies available under the ADEA are not limited either to those specifically listed or to those available under the FLSA, so long as the relief is 'appropriate to effectuate the purposes of [the Act].'" *Id.* (citation omitted) (quoting 29 U.S.C. § 626(b)).

45. *Lorillard*, 434 U.S. at 578.

46. *KALET*, *supra* note 12, at 11.

47. See Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 *NOTRE DAME L. REV.* 1095, 1099 (1993) (discussing congressional overruling of the Supreme Court's decisions concerning employment discrimination).

B. Attorney's Fees

The importance of attorney's fees in age discrimination litigation cannot be overstated. Without an attorney's aid, civil rights violations will often go unchallenged, and discrimination victims will very likely receive no relief.⁴⁸ The award of attorney's fees to an elderly plaintiff helps achieve both the ADEA's compensatory goal and the social policy goal of eliminating arbitrary age discrimination.

1. ATTORNEY'S FEES UNDER THE COMMON LAW

The United States judicial system is characterized by the "American Rule," which provides that each party to a lawsuit will normally pay his or her own attorney's fees, regardless of the suit's resolution.⁴⁹ Although the American Rule is firmly established,⁵⁰ there are exceptions to the rule. Generally, the circumstances under which fee shifting may occur fall into three categories: bad faith litigation, fee shifting by contract, and "public rights" litigation.⁵¹ The last category has been called the private attorney general doctrine. This doctrine customarily allows the plaintiff to recover attorney's fees when the plaintiff has vindicated a "right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance."⁵² The private attorney general doctrine forms the basis for fee shifting in civil rights cases, such as employment discrimination suits.

The common-law private attorney general doctrine allows parties to shift attorney's fees "when the interests of justice so require."⁵³ Historically, the doctrine has been very important in civil rights litigation for several reasons. First, the rights being litigated have great societal importance. Second, because civil rights plaintiffs often are

48. David Schub, Note, *Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney's Fees Awards for Civil Rights Plaintiffs*, 42 DUKE L.J. 706, 706 (1992).

49. Daniel L. Lowery, "Prevailing Party" Status for Civil Rights Plaintiffs: *Fee-Shifting's Shifting Threshold*, 61 U. CIN. L. REV. 1441, 1442 (1993).

50. In a proposed act called the Common Sense Legal Reform Act, Congress is currently considering abandoning the American Rule in favor of a system in which the losing party pays the attorney's fees of the winning party. The Common Sense Legal Reform Act is part of the GOP's Contract with America. Tony Mauro, *Contract with America—The Common Sense Legal Reform Act*, USA TODAY, Nov. 17, 1994, at 10A.

51. See MACK A. PLAYER ET AL., EMPLOYMENT DISCRIMINATION LAW 733-46 (3d ed. 1990).

52. Carl Cheng, Comment, *Important Rights and the Private Attorney General Doctrine*, 73 CAL. L. REV. 1929, 1929 (1985).

53. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 272 (1975) (Marshall, J., dissenting).

not in a financial position to pursue an employment discrimination suit, including attorney's fees in the recovery gives attorneys an incentive to represent these plaintiffs. Violations often involve lower-income plaintiffs who would be unable to seek judicial relief if they had to pay attorney's fees from their own funds.⁵⁴ Third, the deterrent effect of an attorney's fees award provides an effective tool for discouraging civil rights violations.

Age discrimination in employment typifies an area where the private attorney general doctrine is especially appropriate. The employee's right to be evaluated based on ability, rather than age, is important to society. Furthermore, older employees frequently are not in a financial position to hire an attorney to oppose discriminatory treatment by an employer. Finally, it is generally recognized that requiring an employer to pay for the enforcement of an individual's civil rights acts as a deterrent to further violations.⁵⁵ Congress and the judiciary have both recognized the compelling role of attorney's fees in this context.

Prior to 1975, courts often employed the common-law private attorney general doctrine to shift fees in civil rights litigation and other public litigation.⁵⁶ The Supreme Court recognized the doctrine's importance in *Newman v. Piggie Park Enterprises, Inc.*,⁵⁷ stating that where a plaintiff obtains relief under Title II, "he does so not for himself alone, but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."⁵⁸

54. Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 299 (1990). Claimants often request injunctive relief or might be awarded only nominal damages, therefore, courts often award plaintiffs no monetary damages from which attorneys might receive compensation. *Id.*

55. *Id.*

56. Lowery, *supra* note 49, at 1444; *see, e.g.*, *Fowler v. Schwarzwald*, 498 F.2d 143, 146 (8th Cir. 1974) (ordering the district court to employ private attorney general doctrine to determine whether fees should be awarded to the plaintiff); *Cornist v. Richland Parish Sch. Bd.*, 495 F.2d 189, 192 (5th Cir. 1974) (upholding the district court's finding that plaintiff was entitled to fees under the private attorney general doctrine); *Hoitt v. Vitek*, 495 F.2d 219, 220-21 (1st Cir. 1974) (holding that "[a]ppropriate bases for fee awards include statutory authority for such grants, the desire to encourage settlement of cases, punishment of a losing party for misconduct or bad faith, and as here to encourage important policy enforcement through 'private attorneys general.'").

57. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (*per curiam*) (holding that a plaintiff who obtains an injunction under Title II should ordinarily recover attorney's fees).

58. *Id.* at 402.

In 1975, however, judicial discretion to shift attorney's fees was severely undercut when the Supreme Court explicitly disapproved the common-law private attorney general doctrine. In *Alyeska Pipeline Service Co. v. Wilderness Society*,⁵⁹ the Court held that it would no longer recognize a common-law doctrine that public policy may suggest fee shifting "to permit meaningful private enforcement of protected rights with a significant public impact."⁶⁰ The Court claimed to be deferring to Congress in the area of attorney's fees awards when it disapproved further use of common-law fee shifting based on the private attorney general doctrine.⁶¹

After *Alyeska*, fee shifting was allowed only when expressly provided for by federal statute or under the "bad faith" exception to the American Rule. The bad faith exception gives courts discretion to order a party who has litigated unfairly to pay the other party's attorney's fees.⁶²

2. STATUTORY AUTHORIZATION OF ATTORNEY'S FEES AND THE JUDICIAL RESPONSE

After rejecting the private attorney general doctrine in *Alyeska*, the Supreme Court requested that Congress clarify for the courts when fee shifting ought to be judicially enforced.⁶³ Congress has long recognized the importance of attorney's fees as a tool for fighting civil rights discrimination⁶⁴ and quickly perceived the consequences of the

59. *Alyeska v. Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Plaintiffs sought to enjoin the government from issuing permits for constructing an oil pipeline in violation of federal environmental statutes; the Court rejected the "private attorney general" basis for recovering attorney's fees. *Id.* at 242-43, 263-68.

60. *Id.* at 283 (Marshall, J., dissenting).

61. The Court stated the matter of attorney's fees was within the province of Congress, apparently choosing to ignore the fact that the American Rule was judicially created. *Id.* at 262-64.

62. Rochelle C. Dreyfuss, Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 349 n.22 (1980).

63. *Alyeska*, 421 U.S. at 262-64.

64. As a sponsor of the Fees Act, United States Senator Tunney promoted the use of attorney's fees as a remedy, saying:

The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven. In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws. The very first attorneys' fee statute was a civil rights law, the Enforcement Act of 1870, 16 Stat. 140, which provided for attorneys' fees in three separate provisions protecting voting rights.

Court's ruling. Following *Alyeska*, Congress immediately acted to reinstate the private attorney general doctrine by passing the Civil Rights Attorney's Fees Awards Act of 1976⁶⁵ (Fees Act). The Fees Act had one overriding goal: "to promote compliance with civil rights legislation by enabling citizens to bring civil rights claims and by encouraging attorneys to accept such cases."⁶⁶ The Fees Act was intended to allow fee shifting as it had occurred prior to the Supreme Court's decision in *Alyeska*, consistent with existing fee-shifting statutes.⁶⁷

The ADEA expressly provides attorney's fees to prevailing plaintiffs.⁶⁸ Nevertheless, the Fees Act is relevant to the ADEA because of a Supreme Court ruling involving the interpretation of "prevailing." In *Hensley v. Eckerhart*,⁶⁹ the Supreme Court stated, "the standards [defining prevailing] set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'"⁷⁰ Because Congress authorized attorney's fees for prevailing plaintiffs under the ADEA, the Fees Act definition of prevailing plaintiff, as interpreted by the Supreme Court, applies to the ADEA.⁷¹ In *Hensley*, the Supreme Court went on to describe a prevailing plaintiff as one who has "succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."⁷² This meant a plaintiff could be awarded partial attorney's fees for "prevailing" on only part of the suit. Therefore, partial attorney's fees may be awarded to a plaintiff who succeeds on some but not all claims in an age discrimination suit.

SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUB. L. 94-559, S. 2278) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 9 (Comm. Print 1976); see Lowery, *supra* note 49, at 1444.

65. 42 U.S.C. § 1988 (1976).

66. Lowery, *supra* note 49, at 1446.

67. *Id.*

68. 29 U.S.C. § 626(b) (1988). This section incorporates the FLSA's remedial provisions on fee shifting into the ADEA.

69. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Plaintiffs successfully challenged the constitutionality of the treatment and conditions of persons involuntarily confined in the forensic unit of a Missouri state hospital; the Court held that a plaintiff who wins substantial relief should recover some attorney's fees even though the plaintiffs did not prevail on *every* claim. *Id.* at 440.

70. *Id.* at 433 n.7.

71. See KALET, *supra* note 12, at 114.

72. *Hensley*, 461 U.S. at 433 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

Subsequent Supreme Court decisions have narrowed the meaning of prevailing plaintiff, again undercutting the effectiveness of the ADEA and other civil rights statutes.⁷³ In *Hewitt v. Helms*,⁷⁴ the Supreme Court held that although a formal judgment was not necessary for a plaintiff to “prevail,” the judicial process must cause the defendant to alter his behavior toward the plaintiff in some way that results in significant private relief for the plaintiff, such as paying damages, specific performance, or termination of inappropriate conduct.⁷⁵ Thus, declaratory judgments and judicial statements alone are not sufficient to indicate that a plaintiff has prevailed without some additional action by the defendant.⁷⁶

In 1989, the Supreme Court created yet another test for determining whether the plaintiff prevailed.⁷⁷ The “legal relationship” test requires that a plaintiff “be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant,”⁷⁸ although the Court did not require that the lawsuit’s central issue be resolved in favor of the plaintiff.

The most recent decision by the Supreme Court combines the two prior tests into one. In *Farrar v. Hobby*,⁷⁹ the Court stated that a plaintiff would prevail under the Fees Act “when actual relief on the merits of his claim materially alters the legal relationship between the

73. Lowery, *supra* note 49, at 1447. The Supreme Court has consistently contradicted Congress’s specific intent to extend existing fee-shifting provisions to all civil rights legislation. According to legislative history, a “prevailing party” may include a plaintiff involved in a case when a final judgment on the merits had not been reached, when a consent decree was issued, when a case was settled out of court, when a defendant discontinued an illegal practice after a complaint was filed, or when a plaintiff successfully brought a class action suit, whether the individual plaintiff received any direct benefit, and when no formal equitable relief was given. *Id.* at 1446-47.

74. 482 U.S. 755 (1983). The plaintiff, a state prison inmate, successfully challenged a misconduct conviction on due process grounds. By the time of the decision, however, the plaintiff had already been released. Because the plaintiff received no relief, he was not a “prevailing party” for the purposes of attorney’s fees. The Court held specifically that (1) a plaintiff seeking vindication for a violation of his rights under 42 U.S.C. § 1983 was not a prevailing plaintiff when he was unable to obtain damages, and (2) although the defendant subsequently changed the contested policy, the plaintiff was not a “catalyst” for the change. *Id.*

75. “In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow is not a judgment, but some action (or cessation of action) by the defendant that the judgment produces.” *Id.* at 761.

76. *Id.* at 761-63.

77. *Texas State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989).

78. *Id.* at 792.

79. 113 S. Ct. 566 (1992).

parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."⁸⁰ As a result of this ruling, a declaratory judgment or an award of nominal damages may not be sufficient to qualify a plaintiff for attorney's fees under the Fees Act. Even though the Court in *Farrar* stated that the plaintiff would technically "prevail" under those circumstances, the tangible relief was considered insufficient to merit an attorney's fees award.⁸¹

As a result of the Supreme Court's inclusive language in *Hensley*, these cases apply in age discrimination cases to determine when a plaintiff "prevails" under the ADEA. The effect of these cases has been to reduce the number of circumstances in which a plaintiff may recover attorney's fees, thus making it more difficult for a plaintiff to pursue an age discrimination claim.

3. COMPARING ATTORNEY'S FEES UNDER THE ADEA AND OTHER STATUTES

The language in the ADEA addressing attorney's fees differs significantly from the language in Title VII or in the Fees Act. The language of the ADEA provides mandatory attorney's fees for successful plaintiffs.⁸² In contrast, the language in the Fees Act and in Title VII gives courts discretion to award attorney's fees to prevailing parties.⁸³

Title VII also expressly allows an award of attorney's fees to defendants if the plaintiff's litigation is found to be "frivolous, unreasonable, or without foundation," even though the plaintiff may have prosecuted the suit in good faith.⁸⁴ The ADEA makes no provision for frivolous or bad faith litigation, but the inherent power of the courts has been used to grant attorney's fees awards to defendants when plaintiffs prosecuted in bad faith.⁸⁵

Finally, unlike Title VII, the ADEA does not provide a successful plaintiff the right to recover attorney's fees from a federal employer.

80. *Id.* at 573.

81. *Id.*

82. 29 U.S.C. § 216(b) (1988) states: "The court in such action shall, in addition to any judgement awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant."

83. Both Title VII and the Fees Act state: "[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . ." 42 U.S.C. §§ 1988, 2000e-5(k) (1988 & Supp. 1991) (emphasis added).

84. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

85. See *PLAYER ET AL.*, *supra* note 51, at 741; see, e.g., *Kreager v. Solomon & Flanagan, P.A.*, 775 F.2d 1541 (11th Cir. 1985).

However, trial courts regularly grant attorney's fees to successful plaintiffs who have sued the federal government.⁸⁶

III. Analysis

The holdings in *Alyeska*, *Hensley* and its progeny, and *Farrar* have undermined the ADEA's ability to successfully deter age discrimination in employment by reducing the number of situations in which a plaintiff may recover attorney's fees.⁸⁷ The Supreme Court's decisions regarding attorney's fees show that the Court places little value in the public interest furthered by employment discrimination litigation—a cornerstone of Congress's purpose in providing attorney's fees to prevailing plaintiffs.⁸⁸

The judicial trend to restrict attorney's fees awards seriously frustrates the ADEA's ability to combat age discrimination. If attorneys cannot rely on compensation, the number of attorneys who are willing to take age discrimination cases will decline. As a result, older employees will have difficulty protecting their civil rights, and the deterrent effect of potential litigation will decrease.

Although the ADEA's language grants attorney's fees to successful plaintiffs, the statute does not expressly authorize recovery of attorney's fees in mixed motive cases. Yet, Congress's response to the Supreme Court's denial of attorney's fees in Title VII mixed motive cases clearly signals its continuing desire to expand, rather than contract, the use of attorney's fees as a weapon to fight employment discrimination.

A. Mixed Motive Cases

A mixed motive case is one where the employer bases an employment decision on both illegitimate and legitimate factors. The mixed motive analysis evolved as a form of disparate treatment employment discrimination.

86. *DeFries v. Haahrues*, 488 F. Supp. 1037 (C.D. Ill. 1980). In this case, in which the plaintiff sued the federal government, the court based its award of attorney's fees on the general language in § 216(b) of the FLSA, incorporated into the ADEA, 26 U.S.C. § 626(b), allowing "legal and equitable relief" to "effectuate the purposes of the Act." 488 F. Supp. at 1044-45.

87. Schub, *supra* note 48, at 721-25 (arguing that these decisions, beginning with *Hewitt v. Helms*, show the Court's trend to wholly disregard the purpose of the Fees Act, and ignore the "private attorney general" intent behind the Act).

88. *Id.*

The ADEA forbids discrimination in employment “because of” an employee’s age.⁸⁹ The Supreme Court has developed two distinct concepts of what “because of” means in the context of liability for employment discrimination: “disparate treatment” and “disparate impact.”⁹⁰ Disparate treatment occurs when the employer treats some employees less favorably than others because of a proscribed trait, such as age. Proof of discriminatory motive is critical to this theory.⁹¹ On the other hand, disparate impact involves employment practices that are facially neutral, but in fact burden one group more than another.⁹²

According to judicial interpretation, there are three categories of disparate treatment under the ADEA: pure discrimination, pretext, and mixed motive⁹³ cases. The Supreme Court established the elements of a prima facie pretext case in *McDonnell Douglas Corp. v. Green*⁹⁴ and *Texas Department of Community Affairs v. Burdine*.⁹⁵ *Price Waterhouse v. Hopkins*⁹⁶ is the seminal case discussing the judicial process in mixed motive cases. Although *Price Waterhouse* was a sex dis-

89. 29 U.S.C. § 623(a) (1988). This section states, “[i]t shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s age.” *Id.* (emphasis added).

90. *E.g.*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

91. *Id.*

92. Disparate impact is not a subject of this note.

93. *But see* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17 (1991). Gudel claims that there is no such thing as a mixed motive case; instead, courts use the mixed motive analysis as an “evasion device in factually difficult discrimination cases.” *Id.* at 21, 106.

94. 411 U.S. 792 (1973). A black civil rights activist engaged in disruptive and illegal activity against his employer as part of his protest that his discharge was racially motivated. When the employer subsequently rejected the plaintiff’s application for employment, the plaintiff filed a complaint with the EEOC. The EEOC found there was reasonable cause to believe that the employer’s rejection violated § 704(a) of Title VII but did not address whether § 703(a)(1) had been violated. The Court held that a complainant’s right to sue is not limited to EEOC charges and established the burden of proof for Title VII complainants. *Id.*

95. 450 U.S. 248 (1981). The plaintiff, a female employee, was fired during a departmental reorganization and subsequently replaced by a male employee. She filed a suit claiming sex discrimination under Title VII. The Court refined the *McDonnell Douglas* burden of proof framework, holding that when the plaintiff in a Title VII case has proved a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. *See also* *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221 (3d Cir. 1993) (discussing burden of proof issues for these two types of disparate treatment).

96. 490 U.S. 228 (1989).

crimination case brought under Title VII, judicial interpretation of mixed motive cases under the ADEA has historically relied heavily on Title VII interpretation.⁹⁷

A pretext case arises once the plaintiff establishes a prima facie case that an employment decision has been improperly based on proscribed factors.⁹⁸ Establishing a prima facie case creates a presumption of unlawful discrimination.⁹⁹ The burden of production¹⁰⁰ then shifts to the employer who must "articulate some legitimate, nondiscriminatory reason"¹⁰¹ for the employment decision. The employer is not required to show that the legitimate reason was the actual motivating reason—only that legitimate reasons also entered into the decision-making process. Once the employer establishes the existence of legitimate reasons, the employee must then prove that the legitimate reasons were just a pretext to hide the actual discriminatory motive. The employee may do this "directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unwor-

97. *Hill v. Bethlehem Steel Corp.*, 729 F. Supp 1071, 1072 n.2 (E.D. Pa. 1989) (an age discrimination case in which plaintiff tried to establish mixed motives). The district court stated:

Whereas the plaintiff in *Price Waterhouse* alleged sex discrimination pursuant to Title VII, the plaintiffs in the present case allege age discrimination pursuant to the Age Discrimination in Employment Act (ADEA). Nonetheless, the burdens of production and proof established for Title VII cases are applied to ADEA cases because of the similarity between the two statutes.

Id.

98. The employee establishes a prima facie case of age discrimination by showing, by a preponderance of the evidence, that (1) the employee belongs to a protected class; (2) the employee was qualified for the position; (3) an adverse employment decision was made despite the employee's sufficient qualifications; and (4) the employee was ultimately replaced by (or the promotion went to) a person sufficiently younger to permit an inference of age discrimination. *Chipolini v. Spencer Gifts Inc.*, 814 F.2d 893, 897 (3d Cir. 1987).

99. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973).

100. Courts disagree as to precisely what burden is shifted to employers in ADEA cases. Some courts state that the employer must only produce evidence that a nondiscriminatory reason exists, while others state that the burden of proof shifts to the employer, requiring the employer to prove that the articulated reason was the real reason for the employment decision. *KALET*, *supra* note 12, at 68. Most courts follow the Title VII approach, requiring the employer to assume only the burden of production.

101. *McDonnell Douglas*, 411 U.S. at 802. The *McDonnell Douglas* test for pretext cases has been extended to the ADEA. See *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117 (3d Cir. 1983); *Douglas v. Anderson*, 656 F.2d 528, 531-32 (9th Cir. 1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Schwager v. Sun Oil Co. of Pa.*, 591 F.2d 58, 60 (10th Cir. 1979).

thy of credence."¹⁰² Unless there is direct proof that the decision was motivated by discriminatory intent, the process requires the court to weigh the parties' credibility to determine if the plaintiff satisfied the burden of proof.

The mixed motive theory of employment discrimination recognizes that both legitimate and illegitimate factors may contribute to discriminatory employment decisions.¹⁰³ In mixed motive discrimination cases, once a plaintiff provides evidence that an illegitimate factor played some determining role¹⁰⁴ in an employment decision, the burden of production¹⁰⁵ shifts to the employer to show that it had legitimate reasons for the employment decision.¹⁰⁶

In *Price Waterhouse v. Hopkins*,¹⁰⁷ Ann Hopkins sued her employer, an accounting firm, for sex discrimination after it denied her promotion to partnership. The district court found that sex stereotypes played an important, motivating role in the decision. Although Hopkins billed more hours than other partnership candidates and brought in new business, Hopkins was described as needing "a course at charm school" and to "walk more femininely."¹⁰⁸ However, Hopkins also had been criticized for treating staff harshly.¹⁰⁹ As a result, the district court found that the employer denied the promotion for both discriminatory and legitimate reasons. The court held the em-

102. *McDonnell Douglas*, 411 U.S. at 804.

103. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989) (plurality opinion).

104. At one time, courts disagreed about whether age (or other illegitimate factors) had to be "a" determining factor or "the" determining factor in the employment decision. This distinction will more often than not be irrelevant to liability. STEPHEN N. SHULMAN & CHARLES F. ABERNATHY, *THE LAW OF EQUAL OPPORTUNITY* 14-31 (1990). The debate over how much of a role age or another illegitimate factor must play in the employment decision seems to have subsided. *Id.* But see Gudel, *supra* note 93, at 21. Gudel postulates that looking at causation is the wrong approach to take, stating that the question should be resolved by "interpretation." *Id.*

105. Some courts shift the burden of proof to the defendant. See Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991*, 39 WAYNE L. REV. 1093, 1152 (1993).

106. Until *Price Waterhouse*, the circuits were split on how much burden shifted to the defendant. Some circuit courts required the plaintiff to prove that "but for" the plaintiff's age (or other illegitimate consideration), the employer would have hired or promoted the plaintiff. Other circuits allowed the defendant to avoid liability, even though the plaintiff proved that discriminatory considerations were present, by proving that the employer would have made the same decision even if there was no discrimination involved. *Id.* at 1151.

107. 490 U.S. 228 (1989).

108. *Id.* at 235.

109. *Id.*

ployer liable, but denied back pay or reinstatement.¹¹⁰ The U.S. Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision on liability and reversed its decision on relief.¹¹¹

The Supreme Court reversed the appellate court.¹¹² The plurality opinion rejected the idea that the employer violated Title VII when it impermissibly used sex as a motivating factor in the employment decision. The Court held that if the employer can show it would have made the same decision even without considering the proscribed factor and can show the plaintiff sustained no injury from the employer's consideration of an illegitimate factor, the plaintiff has no remedy and may not recover attorney's fees.¹¹³

Mixed motive cases are philosophically and substantively different from pretext cases. To prevail in a pretext case, the employee must show that the employer's articulated legitimate reasons for an employment decision are not true. A traditional pretext case requires an inquiry into the employer's "real" motive—an inquiry that assumes that employment decisions are based upon either completely illegitimate or completely legitimate factors, which is not a realistic view of the decision-making process.¹¹⁴ In contrast, the mixed motive theory recognizes that many factors may enter into an employment decision. When one of these factors is improper, the question of discrimination arises.

Prior to *Price Waterhouse*, courts disagreed as to what degree of causation would shift the burden and what burden would be shifted to the defendant.¹¹⁵ Courts also disagreed on the appropriate remedy available to an employee who was able to prove the employer considered illegitimate factors. The Supreme Court addressed these conflicts in deciding *Price Waterhouse*, a case brought under Title VII, in which an employer used both sex-based impermissible factors and legitimate

110. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1114-19 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458, 473 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228 (1989).

111. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 473 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228 (1989).

112. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

113. *Id.* at 258.

114. During the Title VII debates, Senator Case stated, "[i]f anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." 110 CONG. REC. 13, 837-38 (1964).

115. *Price Waterhouse*, 490 U.S. at 238 n.2.

business concerns in reaching its decision to bypass a female employee for partnership.¹¹⁶

Price Waterhouse was a Title VII sex discrimination case. The Court held that if a plaintiff proves that an employer improperly used a proscribed factor as a motivating reason for an adverse employment decision, the employer could avoid liability by proving that it would have made the *same decision* even without relying on the illegitimate factor. The "same decision" defense is critical to the *Price Waterhouse* analysis of mixed motive cases,¹¹⁷ because it determines whether an employer has violated Title VII.¹¹⁸ Unless a plaintiff can prove that the employer has violated Title VII, the plaintiff cannot recover attorney's fees.

The Supreme Court adapted the "same decision" standard for avoiding liability from *Mt. Healthy City School District Board of Education v. Doyle*.¹¹⁹ *Mt. Healthy* was a mixed motive constitutional tort case involving a teacher who proved that exercising his right to free speech had played a substantial role in the board's decision to terminate him.¹²⁰ The Court affirmed the school board's right to prove by a preponderance of the evidence that it would have reached the same decision in the absence of the constitutionally protected behavior by the teacher and remanded the case for further consideration.¹²¹ Once the school board met its burden of proof, the district court determined that the plaintiff had not been injured and, therefore, was not entitled to recover damages or attorney's fees.¹²²

The decision to relieve the employer of liability, even though the employee proves that the employer considered an impermissible factor, is based on the principle that a remedy should make a party whole, but should not provide a windfall.¹²³ When the plaintiff suffers no injury, there is no need to provide a remedy. Although *Mt. Healthy*

116. *Id.* at 228.

117. Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 *RUTGERS L. REV.* 921, 942 (1993).

118. *Id.*

119. 429 U.S. 274 (1977).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*; see also *Smallwood v. United Air Lines, Inc.*, 728 F.2d 614 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982).

was a First Amendment case, its reasoning has been applied to cases brought under both Title VII and the ADEA.¹²⁴

Even after *Price Waterhouse*, the Supreme Court's opinion on the degree of causation required in mixed motive cases is unclear. The plurality asserted that the plaintiff must demonstrate that discrimination was a "motivating"¹²⁵ factor for the employer's actions. In concurring opinions, Justices White and O'Connor said the discrimination must play a "substantial" role in the decision.¹²⁶ Although this division has resulted in some disagreement among lower courts,¹²⁷ it is generally accepted that reconciling the opinions results in a "substantial" standard.¹²⁸

However, the *Price Waterhouse* decision did resolve a split in the circuits on the correct burden that the defendant must shoulder in mixed motive cases. According to the standard set by *Price Waterhouse*, once the employee shows that impermissible factors played a role in the employer's employment decision, the employer must prove by a preponderance of the evidence that "it would have made the same decision even if it had not allowed [the illegitimate factor] to play such a role."¹²⁹ As a result, if the employer can satisfy this "same decision" test, it can successfully avoid liability under *Price Waterhouse*, even though the employee has proven that the employer improperly considered a factor proscribed by Title VII in the employment decision.¹³⁰ In such a situation, the employee has no remedy and cannot recover attorney's fees.

124. SHULMAN & ABERNATHY, *supra* note 104, at 14-32; *see, e.g.*, *Smith v. University of N.C.*, 632 F.2d 316 (4th Cir. 1980) (an ADEA case); *East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395 (1977) (a Title VII case).

125. The Court tried to define "motivating factor," stating, "[i]n saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

126. *Id.* at 259 (White, J., concurring in the judgment); *id.* at 278 (O'Connor, J., concurring in the judgment).

127. *See Crommie v. California*, 840 F. Supp. 719 (N.D. Cal. 1994) (requiring the impermissible consideration to be a "motivating" factor); *Hill v. Bethlehem Steel Corp.*, 729 F. Supp. 1071 (E.D. Pa. 1989) (interpreting the causation required by *Price Waterhouse* to be "motivating").

128. Eglit, *supra* note 105, at 1152-53 (citing the explanation in *Marks v. United States*, 430 U.S. 188, 193 (1977), that when there is a plurality decision with no identifiable rationale followed by a majority of justices, the holding is that position taken by those justices who concurred on the narrowest grounds; in this case, the "substantial" standard). *But see supra* note 127.

129. *Price Waterhouse*, 490 U.S. at 244-45 (plurality opinion).

130. *Id.*

Although *Price Waterhouse* clarified the burden of proof and the appropriate remedy for Title VII mixed motive cases, a number of ambiguities remain. The Court's decision left unclear both the degree of causation required to prove discriminatory motive¹³¹ and whether direct or indirect evidence is required to prove discriminatory motive.¹³²

However, the judicial resolution of mixed motive issues did not last long. Shortly after the Supreme Court's disposition of *Price Waterhouse* in 1989, Congress began working on legislation that would overturn the decision. In 1991, Congress passed the Civil Rights Act of 1991,¹³³ and much of the substance of *Price Waterhouse* was abandoned for Title VII employment discrimination claims.

Based on the ADEA's traditional reliance on Title VII precedent, the *Price Waterhouse* analysis for mixed motive cases ordinarily would apply to age discrimination cases. If mixed motive age discrimination cases follow the *Price Waterhouse* precedent, the ADEA plaintiff has a greater burden of proof than the Title VII plaintiff. Furthermore, even if the plaintiff could meet the burden of proof, the plaintiff would not be able to recover the attorney's fees. However, Congress's overruling of *Price Waterhouse* has created confusion in the courts as to how mixed motive age discrimination cases should be analyzed, and has opened up the possibility that the plaintiff may recover attorney's fees in a mixed motive age discrimination case.

B. The Civil Rights Act of 1991

1. THE EFFECT OF THE CIVIL RIGHTS ACT OF 1991 ON PRICE WATERHOUSE

The Civil Rights Act of 1991 (CRA) rejected the Supreme Court's interpretation of mixed motive claims under *Price Waterhouse*.¹³⁴ Section 107 of the CRA adds a new subsection to Title VII and expressly

131. The plurality described "motivating" as lying somewhere between a "but for" degree of causation and any contribution by the illegitimate consideration. *Id.* at 238. The dissent noted that the effect of the Court's decision was to retain "but for" causation as the basis of liability but to change the party who bears the burden of proving "but for" causation. *Id.* at 286 (Kennedy, J. dissenting).

132. Eglit, *supra* note 105, at 1154 n.223. The requirement of direct or indirect evidence is not a subject of this note.

133. Pub. L. No. 102-166, 105 Stat. 1075 (1991) (codified as amended at 42 U.S.C. § 1981 (Supp. 1993)).

134. Heather K. Gerken, *Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions*, 91 MICH. L. REV. 1824, 1837 (1993) (stating the CRA explicitly rejects the *Price Waterhouse* decision); Dennis L. Weedman, *The Civil Rights Act of 1991—Congressional Revision of the Supreme Court's Approach to Employment Discrimination Law*, 17 S. ILL. U. L.J. 381 (1993).

overrules some important aspects of the Court's decision in *Price Waterhouse*. First, the amendment clarifies the treatment of mixed motive cases under Title VII by providing that any invidious consideration of impermissible factors is improper.¹³⁵ When the plaintiff shows that an impermissible factor "motivated" the decision, the employer will be liable and the plaintiff will have available a full range of remedies.¹³⁶

Even in cases when the employer can prove by a preponderance of the evidence that it "would have taken the same action in the absence of the impermissible motivating factor,"¹³⁷ section 107 provides remedies to the plaintiff, including declaratory relief, injunctive relief, costs, and, more importantly, attorney's fees.¹³⁸

This amendment to Title VII reflects Congress's belief that an employee suffers a legally cognizable injury when an employer makes an employment decision based partly on illegitimate factors.¹³⁹ Congress reaffirmed its conviction that any consideration of impermissible factors is improper and should be eliminated. By establishing that consideration of a proscribed factor constitutes a violation of Title VII, and by providing attorney's fees to a plaintiff who proves that an employer considered impermissible factors, Congress penalizes the employer for its discriminatory acts and once again confirms the importance of allowing individuals to act as private attorneys general in opposing employment discrimination.

In contrast, some commentators view section 107 as ineffective,¹⁴⁰ impractical,¹⁴¹ unclear,¹⁴² or even detrimental to the policy un-

135. 42 U.S.C. § 2000e-5(g)(B)(i) (1988 & Supp. 1991). This section states in part, "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *Id.*

136. See Linton & Minberg, *supra* note 2, at 1322.

137. 42 U.S.C. § 2000e-5(g)(B)(i). This section states in part, (B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs

Id.

138. *Id.*

139. Jason M. Weinstein, Note, *No Harm, No Foul?: The Use of After-Acquired Evidence in Title VII Employment-Discrimination Cases*, 62 GEO. WASH. L. REV. 280, 316 n.252 (1994).

140. See Belton, *supra* note 117, at 943 (describing § 107 as a "pyrrhic victory" for employees); Gudel, *supra* note 93, at 60 (arguing that the Civil Rights Act of

derlying civil rights legislation.¹⁴³ Nevertheless, section 107 of the CRA is generally viewed as a victory for plaintiffs because the plaintiff's burden of proof has been eased,¹⁴⁴ and because plaintiffs bringing suit under Title VII now may recover attorney's fees when they prove that an employer considered impermissible factors, regardless of the basis of the employer's ultimate decision.¹⁴⁵

2. THE EFFECT OF SECTION 107 ON THE ADEA

An attorney's fees award is a vital tool for the employee opposing illegitimate employment discrimination. However, unless the CRA applies to mixed motive suits brought under the ADEA, an older victim of employment discrimination is at a decided disadvantage in pursuing an employment discrimination claim.

Section 107 of the CRA lists race, color, religion, sex, and national origin as impermissible factors, exactly following the language in Title VII. The amendment neither includes age as an impermissible factor nor refers to the ADEA in the explanatory phrases. This has led courts and analysts to question whether section 107's provisions should be applied to ADEA cases.¹⁴⁶ On the one hand, Title VII has

1991 "will incorporate into Title VII a concept, 'motivating factor', which has [no] meaningful content").

141. See Weedman, *supra* note 134, at 388 (explaining that § 107 of the CRA is impractical because it creates liability for an employer who considers illegitimate factors even if the employer does *not* make an *adverse* decision).

142. See *id.* at 381. The concept of "motivating factor" is

difficult for a trier of fact to define. It is unclear as to what degree reliance on an illegitimate factor becomes a "motivating factor." Courts may have a more difficult time applying this concept than the "because of" standard enunciated in *Price Waterhouse*. Consequently, Congress has provided the courts with an ambiguous vehicle for inconsistent adjudication.

Id. at 389. But see Gerken, *supra* note 134, at 845 (stating that both supporters and opponents of § 107 agree on the definition of "motivating factor").

143. David J. Shaffer, *The Civil Rights Act of 1991 Expansion of Remedies for Employment Discrimination*, 39 FED. B. NEWS & J. 100, 102 (1992) (creating liability for employers in same-decision cases, but not granting damages to plaintiff makes plaintiff's victory "symbolic"); See Weedman, *supra* note 134, at 402 (stating the proposition that the CRA may lead employers to abolish programs designed to enhance equal opportunity).

144. Eglit, *supra* note 105, at 1154 (explaining that the "motivating" standard is less rigorous than the "substantial" standard).

145. See Weedman, *supra* note 134, at 388.

146. Commentators answer this question differently. See, e.g., Eglit, *supra* note 105, at 1155 (stating that there is substantial uncertainty as to the CRA's role in ADEA litigation); John M. Husband & Jude Biggs, *The Civil Rights Act of 1991: Expanding Remedies in Employment Discrimination Cases*, 21 COLO. LAW. 881, 884 (1992) (stating that "[t]he *Price Waterhouse* mixed motive analysis may have some

historically been used as a substantive model for causes of action based on age discrimination. On the other hand, Congress expressly referred to Title VII in the CRA amendments, but did not refer to the ADEA or to age. Ordinarily, the Supreme Court's ruling in *Price Waterhouse* would have applied to claims brought under the ADEA. Since Congress clearly overruled *Price Waterhouse* for claims brought under Title VII, it is unclear whether the case holding retains viability for ADEA cases.

C. Should Section 107 of the CRA apply to the ADEA?

In considering whether section 107 of the CRA applies to the ADEA, this section begins with a look at the CRA itself, followed by a brief examination of its legislative history to search for insight into Congress's intent. Next, the Supreme Court's statutory interpretation of civil rights legislation will be examined. Finally, the judicial treatment of this issue will be explored.

1. PROVISIONS OF THE CRA

The Civil Rights Act of 1991 is a comprehensive piece of legislation. The CRA modifies Title VII, 42 U.S.C. § 1981, the Fees Act, and the ADEA. Determining whether section 107 of the CRA should apply to ADEA claims requires a consideration of statutory construction. A brief overview of the treatment of the ADEA under the CRA follows.

Congress's treatment of the ADEA in the provisions of the CRA ranges from express reference to the ADEA, to implied application of the statute to the ADEA, to a complete absence of reference to the ADEA. At least one CRA provision expressly modifies the ADEA,¹⁴⁷ while several other provisions implicitly apply to cases brought under the ADEA.¹⁴⁸ Finally, a number of changes made by the CRA's provi-

continuing validity in age discrimination actions which are not covered by" § 107 of the CRA of 1991).

147. Section 115 of the CRA modified the statute of limitations that previously applied to filing ADEA cases. Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1075 (1991) (codified as amended at 42 U.S.C. § 1981 (Supp. 1993)); see Eglit, *supra* note 105, at 1106-07.

148. Eglit, *supra* note 105, at 1106. The Government Employee Rights Act of 1991 guaranteed Senate employees, former employees, and applicants for employment freedom from discrimination based on age, pursuant to the ADEA. Pub. L. No. 102-166, § 111, 105 Stat. 1078. Section 108 of the CRA, which authorizes post-entry challenges to consent decrees, applies to all "civil rights laws," including the ADEA by virtue of its status as a civil rights law. *Id.* § 108, 105 Stat. at 1076-77. Section 111 of the CRA directs the EEOC to begin education, outreach, and techni-

sions are silent regarding their applicability to the ADEA. Section 107 is one of these changes.

There are several possible explanations for Congress's silence regarding the ADEA in section 107.¹⁴⁹ Congress's failure to codify certain provisions of the CRA under the ADEA may impliedly reject the applicability of those provisions to the ADEA. It is equally plausible that the silence means nothing, or that the silence, coupled with historically parallel treatment of cases under the ADEA and Title VII, implies that Congress intended the provisions to apply equally to the ADEA.

The Supreme Court has repeatedly cautioned lower courts of the dangers inherent in attempting to infer some affirmative intention from congressional silence or inaction.¹⁵⁰ Nevertheless, there is support for the theory that Congress intended the CRA to cover claims brought under the ADEA as well as Title VII. One basis for the support is that the CRA's overriding aim was to respond to the most recent Supreme Court rulings interpreting civil rights laws.¹⁵¹ Most of those Supreme Court decisions address Title VII issues. In its preoccupation with overturning these decisions, Congress simply did not address ADEA issues.¹⁵²

Even though the CRA does not expressly state that section 107 applies to cases brought under the ADEA, the modifications to Title VII made by the CRA constitute "responses to Supreme Court rulings enunciating interpretations of Title VII that ordinarily would be ap-

cal assistance activities focusing on those who have historically been employment discrimination victims and those who are covered by other employment discrimination laws. *Id.* § 111, 105 Stat. at 1078. Section 116 provides that the amendments of the CRA do not affect remedies, conciliation agreements, and affirmative action plans previously made in accordance with the law. *Id.* § 116, 105 Stat. at 1079. In addition to the foregoing, § 118 of the CRA encourages using alternative dispute resolution methods to resolve disputes arising "under the Acts of provisions of federal legislation amended by this Title." *Id.* § 118, 105 Stat. at 1081. Because the ADEA was expressly amended by § 115 of the CRA, § 118 applies to age discrimination cases arising under the ADEA. See Eglit, *supra* note 105, at 1114-24.

149. See Eglit, *supra* note 105, at 1172-1202 (discussing alternative theories of the congressional silence with regard to the ADEA).

150. *E.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) (citing *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 381 n.11 (1969)). One district court has relied partly on this principle to conclude that the disparate impact theory is unavailable to claims brought under the ADEA. *Martincic v. Urban Redevelopment Auth.*, 844 F. Supp. 1073, 1076-78 (W.D. Pa. 1994).

151. See *Hiatt v. Union Pac. R.R.*, 859 F. Supp 1416 (D. Wy. 1994).

152. *Id.*

plied by analogy to the age statute."¹⁵³ Nevertheless, as the following sections demonstrate, neither the CRA's legislative history nor statutory interpretation supports applying section 107 to the ADEA. As a result, an attorney's fees award in mixed motive age discrimination cases must be based on other authority.

2. LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1991 AND THE SUPREME COURT'S STATUTORY INTERPRETATION

The legislative history of the CRA of 1991 provides little information about the applicability of the CRA to the ADEA.¹⁵⁴ Congress's inattention to how the CRA's changes to Title VII might affect the ADEA is especially surprising, considering the universal acceptance of the Title VII paradigm as a model for analyzing ADEA cases. Section 107's potential impact on the ADEA was not discussed by Congress during deliberations on the CRA of 1991.

The Supreme Court has made it clear that it relies on the "plain meaning" of a statute in statutory interpretation. The Court has consistently rejected reliance on traditional legislative materials such as legislative debates and committee reports in interpreting statutes.¹⁵⁵ Perhaps for this reason, during the last fifteen years, the Court's interpretation of civil rights statutes has often been at odds with what Congress intended, and Congress has found it necessary to formally clarify its intent through legislative amendments. Since 1977, Congress has passed eight legislative provisions overturning an unprecedented number of Supreme Court decisions on federal civil rights issues.¹⁵⁶ This is particularly notable because prior to 1977, it was uncommon for Congress to overturn a Supreme Court decision on the

153. Eglit, *supra* note 105, at 1103.

154. *Id.* at 1158-72; *see id.* at 1106-07 (giving a detailed review of legislative history of both the CRA of 1991 and its predecessor, the CRA of 1990, which was vetoed by then-President Bush).

155. *See, e.g.,* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

156. Schnapper, *supra* note 47, at 1099. Congress has rejected Supreme Court rulings in 16 cases. "The United States Reports are today littered with the corpses of short-lived opinions purporting to interpret federal anti-discrimination statutes; most were dead on arrival in the bound volumes." *Id.* at 1095. Specific cases overturned by Congress include: Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989); Dellmuth v. Muth, 491 U.S. 223 (1989); Patterson v. McLean, 491 U.S. 164 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); Smith v. Robinson, 468 U.S. 992 (1984); Grove City College v. Bell, 465 U.S. 555 (1984); City of Mobile v. Bolden, 446 U.S. 55 (1980); United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

ground that the Court misinterpreted the law.¹⁵⁷ Congress's dissatisfaction with the judicial interpretation of civil rights statutes is clearly indicated in legislative history.¹⁵⁸

For example, in 1977, Congress overturned the holding in *United Air Lines, Inc. v. McMann*,¹⁵⁹ calling it "erroneou[s]" and inconsistent with the "clear explanation of legislative intent."¹⁶⁰ In 1978, Congress overturned the Supreme Court's decision in *General Electric Co. v. Gilbert*¹⁶¹ when it promulgated the Pregnancy Discrimination Act.¹⁶² The House report stated that "the dissenting Justices correctly interpreted the Act," and warned that "the Supreme Court's narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment."¹⁶³

In addition, Congress rejected the Court's holding in *City of Mobile v. Bolden*¹⁶⁴ when it passed the Voting Rights Acts Amendments of 1982.¹⁶⁵ The Senate Committee stated that the Amendments were "consistent with the original legislative understanding of Section 2," explaining that legislative history was "the most direct evidence of how Congress understood the provision."¹⁶⁶ In 1985, Congress set aside the Court's decision in *Smith v. Robinson*,¹⁶⁷ stating that it contra-

157. Schnapper, *supra* note 47, at 1099.

158. "Even before the 1991 Civil Rights Act, Congress had made unmistakably clear that there were fatal flaws in the way in which Chief Justice Rehnquist and his conservative colleagues were interpreting these laws." *Id.* at 1096.

159. 434 U.S. 192 (1977). An employee voluntarily joined United Air Line's retirement plan, agreeing that retirement would occur at age 60. When he was subsequently retired at age 60, he brought a suit alleging age discrimination. The Court held the retirement plan was bona fide under § 4(f)(2) of the ADEA.

160. S. REP. NO. 493, 95th Cong., 1st Sess. 10 (1977).

161. 429 U.S. 125 (1976). GE's disability plan was challenged as sex discrimination under Title VII because it excluded disabilities arising from pregnancy. The Court upheld the plan because exclusion based on pregnancy is not gender-based discrimination.

162. The Pregnancy Discrimination Act of 1978, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)).

163. H.R. REP. NO. 948, 95th Cong., 2d Sess. 2-3 (1978).

164. 446 U.S. 55 (1980). This class action suit challenged the practice of electing city commissioners by at-large elections because it unfairly diluted the voting strength of African American voters in violation of the Fourteenth and Fifteenth Amendments. The Court upheld the practice.

165. The Voting Rights Act Amendments of 1983, § 2, 96 Stat. 131, 134 (1982) (codified at 42 U.S.C. § 1973b (1988)).

166. S. REP. NO. 417, 97th Cong., 2d Sess. 17 (1982).

167. 468 U.S. 992 (1984). Parents of a disabled child successfully challenged the school district's denial of funding for the child's special education program, based on the Rehabilitation Act of 1973 and 42 U.S.C. § 1983. The parents then requested attorney's fees against state defendants. The Court held the parents were not entitled to fees under § 1988 or the Rehabilitation Act. *Id.*

dicted "Congress'[s] original intent."¹⁶⁸ Congress enacted legislation nullifying *Grove City College v. Bell*,¹⁶⁹ recounting in detail the legislative histories of the laws at issue, and concluding that Congress's view was "[c]ontrary to the view of the Supreme Court."¹⁷⁰

The CRA of 1991 is the latest in a series of congressional promulgations that directly address recent Supreme Court decisions on civil rights legislation. The CRA overturned four Supreme Court decisions including *Price Waterhouse*.¹⁷¹ Yet, Congress's patent dissatisfaction with judicial interpretation of employment discrimination statutes, indicated by the CRA's substance and in the legislative history, has apparently not struck any responsive chords in the Supreme Court.¹⁷² The Supreme Court's interpretation of civil rights legislation during the last fifteen years has been seriously flawed.¹⁷³ The basic flaw in the Court's interpretation of civil rights legislation stems from its unwillingness to consider the legislative history of the statutes, the statutory purposes, and subsequent congressional actions.¹⁷⁴ As a result, Congress has regularly overturned Supreme Court decisions in the civil rights and employment discrimination areas. This legislative response is especially important because it informs the Court how civil rights legislation should be interpreted.¹⁷⁵ Congress, as the "master of

168. S. REP. NO. 112, 99th Cong., 1st Sess. 2 (1985).

169. 465 U.S. 555 (1984). Because some Grove City College students received federal financial aid under Basic Educational Opportunity Grants (BEOGs), the Department of Education required the college to provide an assurance of compliance with Title IX, which prohibits sex discrimination in educational activities that receive federal funding. The Court held that receipt of BEOGs by students did indeed trigger Title IX coverage but only in the financial aid program. *Id.*

170. S. REP. NO. 64, 100th Cong., 1st Sess. 5 (1988). Schnapper, *supra* note 47, at 1096-97. Schnapper explores legislative history in detail to show Congress's continuing frustration with the Supreme Court's actions—and eventually with the Justices themselves. *Id.*

171. The Civil Rights Act of 1991 overturned rulings in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

172. Schnapper, *supra* note 47, at 1097-98. One astonishing example of the Supreme Court's indifference occurred six months after Congress overwhelmingly approved legislation that overturned *Patterson* and castigated the Court for misinterpreting the legislation. Nevertheless, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, later cited *Patterson* as a paradigm of interpretive methodology. *Evans v. United States*, 112 S. Ct. 1881, 1902 n.7 (1992) (dissenting opinion).

173. Schnapper, *supra* note 47, at 1099.

174. *Id.* at 1151.

175. *Id.*

statutory law,¹⁷⁶ should be the Court's first source of methodology for statutory interpretation.¹⁷⁷

The ADEA's legislative history supports a liberal construction to effectuate its remedial purpose.¹⁷⁸ Yet, during the last few years, the Supreme Court has taken a narrow view in deciding civil rights cases and awarding attorney's fees. Eric Schnapper, one of the CRA's drafters, predicted that the Court would ultimately find it useless to rule in opposition to Congress's intent because of the "ease and speed with which such misinterpretations might be overturned by a Democratic Congress and President."¹⁷⁹ Schnapper reached this conclusion before the 1994 election. Because the 1994 election resulted in a Republican majority in Congress, the Court may anticipate congressional support for its conservative rulings on civil rights issues. In such a case, the Court would probably use the Title VII mixed motive analysis in *Price Waterhouse* to limit an employer's liability in mixed motive age discrimination cases. As a result, age discrimination plaintiffs who establish that an employer had mixed motives would not be able to recover attorney's fees, thus accelerating the judicial undermining of age discrimination legislation.

3. CASES ADDRESSING THE QUESTION OF APPLYING THE CRA TO THE ADEA

Because the CRA of 1991 does not apply retroactively, case law addressing the CRA's applicability to the ADEA is not extensive. Some courts have declined to address the issue.¹⁸⁰ When courts have considered the question, most have taken the position that the CRA does not apply to cases brought under the ADEA because the statute does not mention the ADEA.¹⁸¹ However, in one case, a federal district court expressly declined to infer that Congress's silence regard-

176. *Id.*

177. *See id.* (providing a detailed discussion of the lessons in statutory construction to be drawn from Congress's rejection of the 16 Supreme Court rulings).

178. *See, e.g.,* S. REP. NO. 1011, 94th Cong., 2d Sess. 3 (1976), reprinted in 1976 U.S.C.A.N. 5908, 5910-11 (stating "[i]n the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws").

179. Schnapper, *supra* note 47, at 1151.

180. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1181-82 (2d Cir. 1992); *Martincic v. Urban Redevelopment Auth.*, 844 F. Supp 1073, 1078 (W.D. Pa. 1994); *Berlett v. Cargill, Inc.*, 780 F.Supp 560, 562 n.8 (N.D. Ill. 1991) (concluding that Congress's failure to codify the disparate impact theory under the ADEA in the CRA was a conscious omission).

181. *Morgan v. Servicemaster Co. Ltd. Partnership*, 57 F.E.P. Cas. (BNA) 1423 (N.D. Ill. 1992) (ruling that because age was not mentioned in § 107, the court would not apply the CRA).

ing the ADEA implies rejection of the CRA's applicability to the ADEA.¹⁸² In *Crommie v. California*, the district court apparently applied the "motivating" standard for causation established by the CRA to a case brought under the ADEA and also relied on federal law to interpret a state age discrimination statute.¹⁸³ When the plaintiff prevailed on both claims, the court applied the state's private attorney general statute and awarded attorney's fees.¹⁸⁴

Judicial response to this issue is limited at this point because it takes time for cases to make their way through the judicial system. A recent Supreme Court case provides guidance on how courts might resolve the question of awarding attorney's fees in mixed motive ADEA suits, although it does not directly address whether the CRA should be applied to the ADEA. In *McKennon v. Nashville Banner*,¹⁸⁵ the employee proved that the employer improperly considered the employee's age in deciding to terminate the employee. After-acquired evidence subsequently revealed that the employee would have been subject to discharge anyway because of misconduct. The Court decided that after-acquired evidence can be used to limit a damage award but cannot operate to bar all relief under the ADEA. As a result, the Court held the employer liable for violating the ADEA.

In supporting its holding, the Court cited the important dual purposes of the ADEA: deterring discriminatory employment practices and compensating victims for injury caused by prohibited discrimination.¹⁸⁶ The Court emphasized the plaintiff's role in vindicating the important congressional policy against discriminatory employment practice, stating:

The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a

182. *Hiatt v. Union Pac. R.R.*, 859 F. Supp. 1416 (D. Wyo. 1994) (holding that disparate impact is not cognizable under the ADEA, but for reasons other than Congress's silence in the CRA about the ADEA).

183. *Crommie v. California*, 840 F. Supp. 719, 722 (N.D. Cal. 1994) (stating that plaintiff must prove intentional discrimination to prevail under state law, and plaintiff could do that by showing "the unlawful discrimination was a motivating factor in the adverse employment decision (the so-called 'mixed motive' test under *Price Waterhouse*)").

184. *Id.*

185. 115 S. Ct. 879 (1995).

186. *Id.*

misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance.¹⁸⁷

The Court recognized the deterrent nature of the ADEA's remedial provisions, stating that Congress designed the remedies in the ADEA to serve as a "spur or catalyst" to cause employers to examine and evaluate their employment practices and to eliminate discriminatory practices.¹⁸⁸ The Court also relied on the ADEA's language "grant[ing] [federal courts] such legal or equitable relief as may be appropriate to effectuate the purposes of [the ADEA]."¹⁸⁹

Although *McKennon* distinguishes between after-acquired evidence cases and mixed motive cases,¹⁹⁰ the Court stated that "a violation of the ADEA cannot be altogether disregarded."¹⁹¹ This case supports the proposition that the employer is liable whenever an employee proves that the employer has engaged in improper age discrimination. The appropriate remedy may be subsequently limited depending on the circumstances.

IV. Resolution

The ADEA has two important purposes. One purpose is to provide a mechanism to compensate victims of employment discrimination based on age. The second purpose is to eliminate arbitrary age-based employment discrimination in society as a whole. Relying only on remedies that compensate individual age discrimination victims ignores the ADEA's goal of deterring discrimination. Awarding attorney's fees promotes the societal interest in eliminating age-based employment discrimination.

Attorney's fees operate in three ways to deter age discrimination. First, they encourage age discrimination victims to act as "private attorney[s] general."¹⁹² Second, attorney's fees awards encourage attorneys to represent age discrimination plaintiffs. Third, the threat of increased litigation provides an incentive for employers to avoid discriminatory activities.

187. *Id.* at 885.

188. *Id.* at 884.

189. 29 U.S.C. § 626(b) (1988).

190. *McKennon*, 115 S. Ct. at 885. "[P]roving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." *Id.*

191. *Id.* at 884.

192. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968).

A. The “Same Decision” Analysis Is Inappropriate for Age Discrimination Cases

To deter employers from committing discriminatory acts, the employer should be penalized for committing those acts, even though the employer would have made the same employment decision in the absence of discriminatory considerations. The “same decision” analysis is inappropriate in employment discrimination cases because “[o]nce the trier of fact has found that [an impermissible consideration] was a factor ‘in any way’ influencing the decision, it is error to attempt to quantify [the impermissible consideration] as a minor factor.”¹⁹³

Section 107 of the Civil Rights Act of 1991 affirms this message in the context of racial and sexual discrimination and the message is equally valid for age discrimination. Even though age discrimination differs from, for example, race discrimination, because age discrimination is motivated more by ignorance or lack of consideration than by hostility, it is equally important to eliminate arbitrary age discrimination whenever it occurs.

B. *Price Waterhouse* Is an Inappropriate Model for Mixed Motive Age Discrimination Cases

Because of traditional reliance on the Title VII paradigm as an analytical model for ADEA cases, courts have an historical basis for following the *Price Waterhouse* precedent in analyzing mixed motive age discrimination cases. If *Price Waterhouse* provides the model for remedies, the ADEA plaintiff who proves that the employer impermissibly considered age in making an employment decision would receive neither damages nor attorney’s fees when the employer is able to show by a preponderance of the evidence that it would have made the same decision regardless of the impermissible considerations.

Furthermore, if *Price Waterhouse* provides the pattern for analyzing mixed motive cases under the ADEA, the plaintiff has a significantly greater burden of proof than a plaintiff under Title VII. The ADEA plaintiff must prove the illegitimate reason was a “substantial” factor in the decision-making process, whereas the Title VII plaintiff must prove only that the illegitimate reason was a “motivating” factor. Even given the potential vagueness of the term “motivating,” the

193. *Bibbs v. Block*, 778 F.2d 1318, 1327 (8th Cir. 1985) (en banc) (Lay, C.J., concurring).

“substantial” standard is clearly more stringent than the “motivating” standard.¹⁹⁴

The holding in *Price Waterhouse* allowed the employer to avoid liability even though it had impermissibly considered proscribed factors in making an employment decision. As a result, *Price Waterhouse* ignored the injury to the plaintiff and to society. Thus, the *Price Waterhouse* model is inappropriate for mixed motive age discrimination cases.

Price Waterhouse relied on *Mt. Healthy* to conclude that a plaintiff suffers no injury when the employer would have made the same employment decision even without consideration of illegitimate factors. This conclusion may correctly reflect the employee’s economic situation, but it wholly ignores noneconomic aspects of the injury. To conclude that an age discrimination victim has suffered no injury is to “deprecate the federal right transgressed and to heap insult (‘You had it coming’) upon injury.”¹⁹⁵ Whenever an employee is judged on characteristics other than ability, the employee is injured in ways that are difficult to quantify in dollar terms.

Price Waterhouse also virtually ignores the ADEA’s second remedial goal, the societal interest in eliminating arbitrary age discrimination. The language of the ADEA adequately protects the employer by expressly providing that reasonable factors other than age constitute a defense to an ADEA claim. However, when an employee proves that arbitrary age discrimination has occurred, attorney’s fees should be awarded, as they are currently for mixed motive Title VII cases. The employee should not have to bear the financial burden of vindicating the societal interest in deterring age discrimination.

The *Price Waterhouse* decision overlooked these two goals: compensating the employee for the noneconomic injury sustained as a result of the employer’s discriminatory acts and promoting the societal interest of eliminating age discrimination. The award of attorney’s fees would further both interests.

In the *McKennon* decision, the Court recognized the importance of the plaintiff’s role as a private attorney general in opposing age discrimination and demonstrated a willingness to look beyond the

194. Eglit, *supra* note 105, at 1154.

195. *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1232 (3d Cir. 1994) (an age discrimination case holding that back pay should be awarded when an employer discriminated based on employee’s age, even though the employer later discovered evidence of employee’s resume fraud).

statute's words to Congress's underlying policy. The Court also recognized the societal interest in deterring discriminatory employment practices which it had essentially ignored in the *Price Waterhouse* decision. As a result, the *McKennon* case provides a better basis than *Price Waterhouse* for awarding attorney's fees in mixed motive age discrimination cases.

C. Section 107 and Alternative Authority for Attorney's Fees in Mixed Motive Age Discrimination Cases

Because age discrimination is not one of the factors enumerated in section 107 of the CRA of 1991, the judiciary cannot directly apply section 107 to mixed motive age discrimination claims. Nevertheless, absent the assumption that Congress's exclusion of age in section 107 implies an affirmative rejection of the new mixed motive analysis and remedial scheme for age discrimination cases, the judiciary can find support in the ADEA's legislative history and statutory language to bypass *Price Waterhouse's* analytical and remedial framework for analyzing mixed motive age discrimination cases.

The ADEA authorizes "such legal or equitable relief as may be appropriate to effectuate" the ADEA's goals.¹⁹⁶ This comprehensive language provides a basis for more extensive remedies than does Title VII. In addition, the ADEA's legislative history indicates that Congress intended that the courts should liberally construe the ADEA to further its remedial purposes. In the past, courts have adopted the expansive statutory language of section 7(b) to justify broad remedial powers under the ADEA.¹⁹⁷ The judiciary should support the ADEA's broad social policy goals by using the authority provided by the statute to award attorney's fees to plaintiffs who prove that age was improperly considered by the employer in mixed motive age discrimination cases.

Awarding attorney fees to mixed motive plaintiffs who prove that improper consideration of age entered into the employment decision would effectuate Congress's broad remedial intent. Unless the judiciary bypasses *Price Waterhouse* as a model for the ADEA, most age discrimination victims will have to wait for relief until Congress expressly amends the ADEA. By amending section 107 of the CRA to

196. Section 7(b) of the ADEA allows "such legal or equitable relief as is appropriate to effectuate the purposes of [the ADEA]." 29 U.S.C. § 626(b).

197. See Nicholas H. Hantzes, Comment, *Fourth Circuit Review: Pain and Suffering Damages Not Available Under ADEA*, 37 WASH. & LEE L. REV. 659, 667 (1980).

include age, Congress could provide that an unlawful employer practice is established when the plaintiff demonstrates that the employer's improper consideration of age was a motivating factor for any employment practice, even though other factors also motivated the practice. Employer liability under the ADEA would then support an award of attorney's fees, thus furthering the ADEA's remedial goal and deterring employers from arbitrary age discrimination.

V. Conclusion

The societal interest in eliminating age discrimination is no less important than its interest in eliminating racial or sexual discrimination. The effectiveness of attorney's fees as a tool for opposing employment discrimination is well established.

Historical reliance on Title VII analysis for ADEA cases may result in the judiciary following the *Price Waterhouse* analytical and remedial framework for mixed motive age discrimination cases. As a result, plaintiffs will not be able to recover attorney's fees when they prove the employer improperly considered age in making an employment decision. This will undoubtedly have a chilling effect on age discrimination litigation.

Support for awarding attorney's fees in mixed motive age discrimination cases derives primarily from the ADEA's expansive remedial language. The ADEA's comprehensive language¹⁹⁸ provides a basis for more extensive remedies than does Title VII. Furthermore, the legislative history indicates Congress intended that the courts should liberally construe the ADEA to effectuate its remedial purposes.

In the past, courts have adopted the expansive statutory language of section 7(b) to justify broad remedial powers under the ADEA.¹⁹⁹ They could do so again to effectuate Congress's intent. If attorneys cannot count on compensation, the number of lawyers defending civil rights will decline, resulting in an inability of older employees to protect their civil rights and frustrating the intent of Congress.

198. Section 7(b) of the ADEA allows "such legal or equitable relief as is appropriate to effectuate the purpose of the ADEA." 29 U.S.C. § 626(b) (1988).

199. See Hantzes, *supra* note 197, at 667.

CRIMINALIZING PHYSICAL AND EMOTIONAL ELDER ABUSE

Robert A. Polisky

Elderly persons, particularly those who require care givers, are vulnerable to both physical and emotional abuse. In this note, Mr. Polisky discusses the rising problem of elder abuse and offers a solution to reduce its incidence. After a history highlighting the prevalence of elder abuse in care-giving situations, Mr. Polisky analyzes how tort law and criminal law inadequately redress elder abuse victims. Mr. Polisky concludes that state statutes which criminalize both physical and emotional elder abusive acts are the key to protecting the elderly from abuse because they punish the abuse itself rather than relying on proof of the act's impact on the victim. Though some abusers have attacked these statutes on constitutional grounds of overbreadth and vagueness, Mr. Polisky argues that courts have already determined such claims constitutional. In closing, Mr. Polisky proposes model legislation which would best protect the elderly and other vulnerable adults from abuse.

I. Introduction

On Christmas Eve, 1988, when Emily P. Bissell Hospital nursing aide Linda Foley was changing a thirty-nine-year-old quadriplegic man's catheter, an elderly woman afflicted with Alzheimer's disease wandered into the room.¹ Seizing the opportunity to emotionally harm both nursing home residents, Foley reached for the eighty-nine-year-old woman's hand and demanded that she fondle the man.² Fortunately, another nurse's aide witnessed this ordeal and successfully pulled the Alzheimer's patient away before she was forced to touch the man.³

1. Mack Reed, *First Conviction in Delaware for Emotional Abuse*, PHILA. INQUIRER, Jan. 13, 1990, at B1.

2. *Id.*

3. *Id.*

This incident is but one illustration of the scarcely recognized problem plaguing the elderly—elder abuse. In addition to financial exploitation of the elderly, there are two different types of elder abuse: physical and emotional abuse.⁴ Most statutory definitions of physical elder abuse are similar in that they involve a physical attack on an elder's body, such as hitting or kicking an elder. In contrast, statutory definitions of emotional elder abuse differ widely among the states. Basically, however, emotional elder abuse ranges from simple name calling and verbal assaults to a continued and systematic attempt to dehumanize an elder, occasionally pushing an elder to insanity or suicide.⁵

Under most state laws, Foley would face no criminal liability and would be permitted to continue practicing as a nurse's aide. Foley, however, happened to be practicing in Delaware, one of a handful of maverick states imposing criminal liability for physical *and* emotional elder abusive *acts*. In these states, neither proof of physical injury nor mental suffering is needed to sustain a criminal elder abuse conviction. Consequently, the abusive incident was reported, and Foley was subsequently fired.⁶ On January 3, 1990, she pleaded guilty to two misdemeanor counts of emotional patient abuse.⁷

As the above example suggests, the states are not uniform in criminalizing elder abuse. The state statutes criminalizing elder abuse can be viewed on a continuum from least to most restrictive. At the first level, a state requires certain types of persons, such as doctors and nurses, to report elder abuse and imposes criminal liability on those failing to report. Thus, only the nonreporter of elder abuse and not the actual elder abuser is punished. Beginning at the second level, a state punishes an elder abuser. At this level, a state criminalizes physical elder abuse and sanctions nonreporters of elder abuse. At the third level, a state criminalizes physical and emotional elder abuse and sanctions nonreporters of elder abuse. At this level, a prosecutor

4. "Emotional elder abuse" and "psychological elder abuse" are synonymous terms. For simplicity, only the term "emotional elder abuse" is used in this note.

5. CHAIRMAN OF HOUSE SUBCOMM. ON HEALTH AND LONG-TERM CARE OF THE SELECT COMM. ON AGING, 101ST CONG., 2D SESS., REPORT ON ELDER ABUSE: A DECADE OF SHAME AND INACTION 1-28 (Comm. Print 1990) [hereinafter REPORT ELDER ABUSE: A DECADE OF SHAME AND INACTION].

6. Reed, *supra* note 1, at B1. Actually, Foley, who is almost six feet tall, threatened to throw the other aide out the window if she told anyone. *Id.* For this act, she was convicted of a felony charge of aggravated intimidation. *Id.* In all, she received a suspended two-month jail sentence and one year of probation. *Id.*

7. *Id.*

must prove that the victim suffered emotional injury. This "mental anguish" requirement precludes many prosecutions because often the victim is either unable or unwilling to testify. Finally, at the fourth level, a state criminalizes physical and emotional abusive acts and sanctions nonreporters of elder abuse. This level most effectively ensures that elder abusers are prosecuted.

Before analyzing the four types of state statutes, this note will explore the reasoning behind imposing criminal liability for elder abuse. First, this note will discuss the vulnerability of elders to support the contention that elders need added protection. Second, this note will examine the prevalence of both elder abuse in general and, more specifically, emotional abuse occurring in care-giving situations in order to portray physical and emotional elder abuse as a serious national problem requiring attention. Third, this note will contrast tort law with criminal law to bolster the argument that elder abuse needs to be criminalized. Fourth, this note will examine the four types of state statutes and their impact on elder abuse prosecutions. Fifth, this note will scrutinize the constitutionality of imposing criminal liability for physical and emotional abusive acts. Finally, this note will propose model legislation.

II. Background

A. The Vulnerability of Elders

The elderly, as a group, share characteristics that make them especially vulnerable to abuse.⁸ Many elders, particularly those over seventy-five, experience increased frailty, primarily in their declining ability to carry out routine activities.⁹ Impaired hearing or vision, slowed motor and mental response, decreased coordination, and

8. ROSALIE S. WOLF & KARL A. PILLEMER, *HELPING ELDERLY VICTIMS: THE REALITY OF ELDER ABUSE* 14 (1989).

9. *Id.* A nationwide survey found that nursing home residents are very dependent:

- 9 of 10 require assistance bathing;
- 7 of 10 require assistance dressing;
- 1 of 2 require assistance going to the bathroom;
- 1 of 3 require assistance eating;
- 4 of 10 have trouble or cannot control their bowels or bladders.

CHAIRMAN OF THE HOUSE SUBCOMM. ON HEALTH AND LONG-TERM CARE OF THE SELECT COMM. ON AGING, 102D CONG., 1ST SESS., *REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY: THE NEED FOR CONGRESSIONAL ACTION 2* (Comm. Print 1991) [hereinafter *REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY*].

many other physical and mental impairments—and the anxiety they cause—make elders vulnerable to abuse¹⁰ and can affect the nature and effects of abuse when it occurs.¹¹ These frail elderly are dependent on care givers and, consequently, are at their mercy.¹² Elder abuse can have particularly tragic consequences when it comes from the only source of human contact that an elder has or when it occurs in an elder's last days of consciousness.¹³ In these instances, the effects of the abuse fester in the victim because no one is readily available to denounce the abuse or provide solace.

B. The Prevalence of Elder Abuse

National data on the occurrence of elder abuse are scarce.¹⁴ Sadly, elder abuse often has been overlooked because of lack of awareness.¹⁵ Following the "discovery" of child abuse in the 1960s and spousal abuse in the 1970s, elder abuse first received public attention in the late 1970s and early 1980s.¹⁶ By the late 1970s, many studies began to surface indicating that elder abuse is a serious problem in the United States.¹⁷ According to Toshio Tataru, Director of the National Aging Resource Center on Elder Abuse in Washington, D.C., and one of the leading researchers on the elderly, elder abuse is "just beginning to gain public recognition . . . [and is] going to be the problem of the next decade and the next century."¹⁸

10. Robert N. Butler, *Foreword* to ABUSE AND MALTREATMENT OF THE ELDERLY: CAUSES AND INTERVENTIONS at xi (Jordan I. Kosberg ed., 1983).

11. WOLF & PILLEMER, *supra* note 8, at 14.

12. MARY J. QUINN & SUSAN K. TOMITA, ELDER ABUSE AND NEGLECT: CAUSES, DIAGNOSIS, AND INTERVENTION STRATEGIES 58 (1986).

13. JEFFREY L. AMESTOY, ATT'Y GEN., STATE OF VT., OFFICE OF ATT'Y GEN., PEOPLE IN NEED OF CARE: A POPULATION AT RISK 8 (1992).

14. DONNA HUNZEKER, NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LEGISLATIVE RESPONSE TO CRIMES AGAINST THE ELDERLY 3 (1990) (statement of Toshio Tataru, Director of the National Aging Resource Center on Elder Abuse).

15. *Id.*

16. Audrey S. Garfield, Note, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 861, 863-64 (1991).

17. *Id.* at 864 & n.16 (citing HOUSE SELECT COMM. ON AGING, 97TH CONG., 1ST SESS., REPORT ON ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM (Comm. Print 1981) [hereinafter REPORT ON ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM]; THE BATTERED ELDER SYNDROME: AN EXPLORATORY STUDY (M. Block & J. Sinnott eds. 1979); LEGAL RESEARCH & SERVS. FOR THE ELDERLY, ELDER ABUSE IN MASSACHUSETTS: A SURVEY OF PROFESSIONALS AND PARAPROFESSIONALS (1979) (prepared by H. O'Malley et al.)).

18. Steve Bates, *Elderly Abuse Rises Sharply*, THE WASH. POST, Mar. 7, 1993, at A1, A18 (quoting Toshio Tataru, Director of the National Aging Resource Center on Elder Abuse in Washington, D.C.).

Notwithstanding the paucity of research devoted to measuring elder abuse, some researchers have attempted to study elder abuse. It has been estimated that five percent of the elder population, or more than 1.5 million elders nationwide, may be abused annually.¹⁹ This number represents a one percent or 500,000-case increase annually over the number reported in a 1981 House Report.²⁰ According to the National Aging Resource Center on Elder Abuse, reports of elder abuse rose sixty-two percent from 1988 to 1991. This increase far outpaced the increase in the national elder population during the 1980s, which according to census figures, increased by only twenty-two percent.²¹ Research has shown that rather than occurring as isolated incidents, elder abuse occurs frequently, and reoccurs in up to eighty percent of cases.²²

Even more disturbing is the possibility that the aforementioned elder abuse statistics may be seriously lower than the actual existence of elder abuse. The House Subcommittee on Health and Long-Term Care found that elder abuse is significantly less likely to be reported than child abuse. The Subcommittee determined that only one out of every eight cases of elder abuse is reported, which is much lower than the estimate that one out of every three cases of child abuse is reported.²³ In fact, the Subcommittee's 1990 report reflects a decrease in reporting from the 1981 House Report, which estimated that one out of every five cases of elder abuse is reported.²⁴

There are many possible explanations why elder abuse is underreported. Often, the elder abuse victim is overwhelmed by the abuse and is either embarrassed to acknowledge the existence of the abuse or does not know where to find help.²⁵ Moreover, elder abuse victims often do not inform authorities because they fear retaliation from their

19. REPORT ON ELDER ABUSE: A DECADE OF SHAME AND INACTION, *supra* note 5, at 3.

20. *Id.* (referring to REPORT ON ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM, *supra* note 17).

21. Bates, *supra* note 18, at A18. The elder population was defined to constitute persons aged 65 and older. *Id.*

22. Council on Scientific Affairs, *Council Report: Elder Abuse and Neglect*, 257 JAMA 966, 968 (1987) [hereinafter *Council Report: Elder Abuse and Neglect*] (citing T.A. O'Malley et al., *Identifying and Preventing Family-Mediated Abuse and Neglect of Elderly Persons*, 98 ANNALS INTERNAL MED. 998-1005 (1983)).

23. REPORT ON ELDER ABUSE: A DECADE OF SHAME AND INACTION, *supra* note 5, at xi.

24. *Id.*

25. *Council Report: Elder Abuse and Neglect*, *supra* note 22, at 967.

abuser.²⁶ Sadly, some elder abuse victims do not come forward out of the belief that they are the major cause of the abuse occurring and therefore deserving of the abuse.²⁷ Finally, many elder abuse victims are physically unable to report abuse because they are afflicted by a memory-inhibiting condition, such as Alzheimer's disease.²⁸

C. The Prevalence of Emotional Elder Abuse by Professional Care Givers

To date, most of the formal research on elder abuse focuses on the domestic abuse between children and their elder parents.²⁹ Inadequate or inappropriate practices that professional care givers use in the course of patient care is an area that has received much media and public attention but has been virtually ignored by researchers.³⁰ This scarcity of research is surprising considering the large elderly population that is dependant on professional care givers. In 1990, an estimated 1.5 million elders were living in the nation's 20,000 nursing homes³¹ at any given time.³² In addition, over a million elderly and disabled Americans in 1990 were living in approximately 68,000 licensed and unlicensed board and care homes.³³ In all, one out of nine elderly Americans can be found daily in institutions.³⁴ These 3.4 million Americans over the age of sixty-five are among the most vulnerable and dependent people in our society.³⁵

In a leading study on nursing home abuse, self-reported patient abuse data were collected from the nursing staffs of thirty-two skilled

26. REPORT ON ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM, *supra* note 17, at 3 (statement of James A. Bergman, Regional Director, Legal Research and Services for the Elderly).

27. *Id.*

28. Bates, *supra* note 18, at A1.

29. Dorothy I. Meddaugh, *Covert Elder Abuse in the Nursing Home*, 5 J. ELDER ABUSE & NEGLECT 21, 22 (1993).

30. Karl A. Pillemer & David W. Moore, *Highlights from a Study of Abuse of Patients in Nursing Homes*, 2 J. ELDER ABUSE & NEGLECT 5, 7 (1990).

31. Nursing homes are privately operated establishments where maintenance and personal or nursing care are provided for aged or chronically ill persons who are unable to care for themselves properly. REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY, *supra* note 9, at 1.

32. REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY, *supra* note 9, at 1; Meddaugh, *supra* note 29, at 22.

33. REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY, *supra* note 9, at 1. Board and care homes are facilities that provide shelter, food, and protection for frail and disabled individuals. *Id.* Because of an increasing elderly population and a fairly constant number of nursing home beds, many elderly who previously would have been placed in nursing homes are now living in board and care facilities. *Id.*

34. *Id.*

35. *Id.*

nursing and intermediate care facilities in New Hampshire.³⁶ The study defined emotional abuse "as an act carried out with the intention, or perceived intention, of causing emotional pain to another person."³⁷ The acts used to measure emotional abuse included isolating a patient beyond what was needed to gain control, insulting or swearing at a patient, yelling at a patient in anger, denying a patient food or privileges as part of a punishment, and threatening to hit or throw something at a patient.³⁸

Of the 577 staff surveyed, eighty-one percent had observed at least one emotionally abusive incident in the facility during the preceding year.³⁹ Seventy percent of the respondents had witnessed another staff member yell at a patient in anger.⁴⁰ Fifty percent of the

36. Karl A. Pillemer & David W. Moore, *Abuse of Patients in Nursing Homes: Findings from a Survey of Staff*, 29 *THE GERONTOLOGIST* 314, 315 (1989). Intermediate care nursing homes serve persons who do not need intensive nursing care, but who require institutionalization because of functional impairments. *Id.* Skilled nursing facilities provide care under the supervision of a physician, including 24-hour skilled nursing and a variety of therapeutic services. *Id.* Of the 32 facilities, 23 were operated for profit, and nine were nonprofit institutions. *Id.* All of the facilities were certified as intermediate care facilities, and several also had skilled nursing facility units. *Id.*

The data were collected between February and April of 1987. *Id.* Approximately 30% of staff members in each nursing home were randomly selected for telephone interviews. *Id.* Of the 691 staff members contacted, 577 agreed to be interviewed, for a completion rate of 85%. *Id.* All interviews were conducted by telephone and lasted approximately 30 minutes. *Id.* To obtain information on the extent of abuse, respondents were asked to report first on actions they had observed other staff commit, and then on actions they had personally taken. *Id.*

37. *Id.*

38. *Id.* at 316.

39. *Id.* at 317.

TABLE 1
Psychological Abuse Observed by Staff in Past Year (N = 577)

TYPE OF ABUSE	NEVER	ONCE	2-10 TIMES	MORE THAN 10 TIMES
Yelled at patient in anger	30%	11%	44%	15%
Insulted or swore at	50%	9%	30%	11%
Isolated patient inappropriately	77%	7%	12%	4%
Threatened to hit or throw at	85%	5%	9%	1%
Denied food or privileges	87%	2%	8%	3%

Id.

40. *Id.*

respondents had seen a staff member insult or swear at a patient.⁴¹ Twenty-three percent of the respondents had witnessed other staff isolating a patient beyond what was needed to control him or her.⁴² Threats to hit or throw something at a patient were reported less often (fifteen percent), as were denials of food or privileges (thirteen percent).⁴³

In the same survey, forty percent of the respondents admitted they committed at least one emotionally abusive act against an elderly resident within the preceding year.⁴⁴ Thirty-three percent of the staff had yelled at a patient.⁴⁵ Ten percent of the respondents also reported that they had insulted or sworn at a patient during the past year.⁴⁶ Isolating a patient inappropriately was reported by four percent of the staff, as was denying patients food or privileges as a punishment.⁴⁷ Only two percent of the respondents had made threats to hit or throw something at a patient.⁴⁸

Interestingly, these stark statistical differences between those who observe emotional elder abuse and those who commit emotional elder abuse lead to one of two conclusions: either some abusers are reluctant to admit they abuse the elderly, or some staff incorrectly perceive conduct to be emotional abuse. The former conclusion seems

41. *Id.* In both cases of yelling at a patient in anger and swearing or insulting a patient, the majority of those who reported seeing abuse indicated that it had occurred more than once during the preceding year. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

TABLE 2
Psychological Abuse Committed by Staff in Past Year (N = 577)

TYPE OF ABUSE	NEVER	ONCE	2-10 TIMES	MORE THAN 10 TIMES
Yelled at patient in anger	67%	15%	17%	1%
Insulted or swore at isolated patient	90%	4%	5%	1%
Insulted or swore at patient inappropriately	96%	1%	2%	1%
Threatened to hit or throw at	96%	2%	2%	—
Denied food or privileges	98%	1%	1%	—

Id.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

more plausible than the latter because the observer of abuse is more impartial than the actual abuser, who may be in self-denial, may not consider his or her behavior abusive, or may suffer from embarrassment over his or her abusive conduct. The prevalence of emotional elder abuse probably lies somewhere in the middle between the two sets of figures. Yet, even if the lower set of figures (self-reported abuse) are accurate measures of emotional elder abuse, emotional elder abuse by professional care givers is a pervasive problem.

D. Possible Causes of Elder Abuse

Many intertwined factors cause elder abuse. The House Subcommittee on Health and Long-Term Care found that "those caring for nursing home residents are often ill-trained, grossly overworked, and very poorly paid."⁴⁹ Although unlicensed nurses' aides provide as much as ninety percent of all direct care given to elderly nursing home residents, these aides are usually inadequately trained and have little or no nursing experience.⁵⁰ Generally nurses' aides are paid less than janitors; janitors receive an average of \$280 per week, whereas aides only receive an average of \$251 per week.⁵¹ High turnover among aides also contributes to incidents of elder abuse because aides are less likely to feel attached to the nursing home or its residents.⁵² In addition, although nurses' aides are trained to perform only specific duties, including feeding, dressing, and bathing patients, the Subcommittee on Health and Long-Term Care found that responsibilities that should be performed by doctors and nurses are often delegated to aides, such as preparing and administering oral medications, suctioning patients' noses and throats, applying in-dwelling catheters, and applying apical pulses.⁵³

Board and care homes have similar staffing problems.⁵⁴ Board and care home workers perform critical services to elders: they supervise residents, assist in daily living activities, prepare and serve food, and keep the home clean and safe.⁵⁵ The Subcommittee staff visited many board and care homes where the personnel were either not

49. REPORT ON PROTECTING AMERICA'S ABUSED ELDERLY, *supra* note 9, at 6.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 6-7.

54. *Id.* at 7.

55. *Id.*

working at all, or were under the influence of alcohol or drugs.⁵⁶ Moreover, at some locations, the Subcommittee staff observed residents left alone without personnel on duty, and, at other locations, the personnel did not speak the same language as the residents.⁵⁷

Not surprisingly, elder abuse often occurs where care givers are placed in extremely difficult situations and lack the necessary skills to deal effectively with those situations.⁵⁸ A congressional study found that care givers often report symptoms of depression, anxiety, feelings of helplessness, low morale, and emotional exhaustion.⁵⁹ Accordingly, elder abuse is becoming more prevalent because of the increasing level of stress placed on care givers, both personally and professionally.⁶⁰

III. Analysis

A. The Deficiencies of Tort Law and the Virtues of Criminal Law in the Elder Abuse Context

Traditionally, the only redress available to elder abuse victims has been civil action, specifically tort law.⁶¹ Claiming injury under a battery action is the most applicable tort used for physical abuse. A tortious battery is a harmful or offensive contact with a person, resulting from an act intended to cause the victim or a third person to suffer such a contact, or apprehension that such a contact is imminent.⁶² Under the Restatement (Second) of Torts, "contact" extends to any part of the victim's body, or to anything which is attached to the victim's body and practically identified with it.⁶³ Thus, an elder usually can recover under a battery approach only when the elder experiences physical abuse or some acts of emotional abuse in which an object attached and associated with the elder's body is touched. Conse-

56. *Id.*

57. *Id.*

58. Telephone Interview with Thomas E. Carluccio, Deputy Attorney General of Delaware and Director of the Delaware Medicaid Fraud Control Unit (Sept. 13, 1994).

59. HOUSE SUBCOMM. ON HUMAN SERVICES OF THE SELECT COMM. ON AGING, 100TH CONG. 2D SESS., *A STUDY OF EXPLODING THE MYTHS: CAREGIVING IN AMERICA* 30 (Comm. Print 1988).

60. Bates, *supra* note 18, at A18.

61. Telephone Interview with Thomas E. Carluccio, *supra* note 58.

62. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

63. *Id.* § 18 cmt. C.

quently, most forms of emotional abuse, such as ridicule, are not redressable under tortious battery.

Another avenue of tort redressability is claiming injury under an assault action. Tortious assault is an apprehension of a battery.⁶⁴ Traditionally, an abuser's act must consist of a threat to use force⁶⁵ with an apparent ability to carry out the threat immediately.⁶⁶ Most emotional elder abusive acts do not cause imminent fear of a battery, but instead merely cause humiliation, embarrassment, or depression and therefore will not constitute a legal assault.⁶⁷

A third tort remedy that may serve to redress elder abuse victims is infliction of emotional distress. Some courts have been reluctant to consider infliction of emotional distress as a tort, reasoning that "mental consequences are so evanescent, intangible, and peculiar, and vary to such an extent with the individual concerned, that they cannot be anticipated, and so lie outside the boundaries of any reasonable 'proximate' connection with the act of the defendant."⁶⁸ Nonetheless, other courts have recognized infliction of emotional distress as a separate cause of action where a special relationship between the tortfeasor and the victim exists.⁶⁹ Because a special relationship exists between the care giver and the victim, any elderly victim emotionally abused by a care giver, in either a facility or private setting, should have a cause of action for infliction of emotional distress in a jurisdiction allowing this kind of tort.

Although these three tort remedies are often available to victims of physical or emotional elder abuse, tort law inadequately redresses many of these victims. Tort law in the context of elder abuse does not provide remedies for victims who are unable to bring a civil action

64. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 43 (5th ed. 1984).

65. *Id.* at 44 (citing *State v. Daniel*, 48 S.E. 544 (N.C. 1904); *Haupt v. Swenson*, 101 N.W. 520 (Iowa 1905); *Alexander v. Pacholek*, 192 N.W. 652 (Mich. 1923)).

66. *Id.*

67. *Id.* at 55.

68. *Id.* (citing *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896); *Braun v. Craven*, 51 N.E. 657 (Ill. 1898); *Chittick v. Philadelphia Rapid Transit Co.*, 73 A. 4 (Pa. 1909)).

69. *Id.* at 57-58 (citing *Cole v. Atlanta & West Point R.R.*, 31 S.E. 107 (Ga. 1897) (holding a common carrier liable for insulting a passenger); *Birmingham R.R. Light & Power Co. v. Glenn*, 60 So. 111 (Ala. 1912) (holding a common carrier liable for profane and indecent language directed at a passenger); *Milner Hotels v. Dougherty*, 15 So. 2d 358 (Miss. 1943) (holding an innkeeper liable for mental suffering of patron)).

against their abusers.⁷⁰ Many of the same factors which caused the underreporting of elder abuse explain why many elder abuse victims do not bring tort claims against their abusers. The elder abuse victim may be overwhelmed by the abusive situation and embarrassed to acknowledge it.⁷¹ Moreover, the victim may be unaware that the abusive conduct constitutes a tort either because the victim is unfamiliar with tort law or because the victim suffers from dementia, unable to remember the particular details of the abuse.⁷² Even if the elder abuse victim is aware of potential tort remedies, the victim may not know how to bring a cause of action.⁷³ Alternatively, the victim may fear retaliation and consequently may not want to be subjected to the trauma of confronting the abuser.⁷⁴ The victim also may be physically unable to bring a cause of action or may conclude that bringing an action is not worth the time and expense.

Therefore, tort action is fraught with the potential to leave both the harm unredressed and the abuser unsanctioned. Although this deficiency of tort law cannot be cured, criminal prosecution is a means of assuring that, at least, some justice is done. Beyond that, criminal prosecution can have a prospective effect in preventing future abuse.

Although both criminal law and tort law impose sanctions upon those who commit violations, the two areas of law differ in their underlying purposes.⁷⁵ The purpose of criminal law is to protect society against harm by punishing harmful conduct or situations likely to result in harm if allowed to continue.⁷⁶ The elder abuse victims need not bring the criminal action; the state prosecutes the abuser to protect the public.⁷⁷ In contrast, the purpose of tort law is to compensate the victim.⁷⁸ In a tort case, the victim must bring the action alone; the state is not a party to the action.⁷⁹

In addition, tort law inadequately addresses elder abuse because it does not impose a criminal record on an abuser and thus does not

70. Telephone Interview with Thomas E. Carluccio, *supra* note 58.

71. *Council Report: Elder Abuse and Neglect*, *supra* note 22, at 967.

72. See Bates, *supra* note 18, at A1.

73. See *Council Report: Elder Abuse and Neglect*, *supra* note 22, at 967.

74. See REPORT ON ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM, *supra* note 17, at 3 (statement of James A. Bergman, Regional Director, Legal Research and Services for the Elderly).

75. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 1.3 (2d ed. 1986).

76. *Id.*

77. 1 CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 7, at 20 (14th ed. 1980).

78. LAFAVE & SCOTT, *supra* note 75, § 1.3.

79. See 1 TORCIA, *supra* note 77, § 7, at 20.

prevent the abuser from practicing health care elsewhere.⁸⁰ If the prosecutor decides not to prosecute an abuser, the worst punishment that abuser would face is being fired.⁸¹ Without a criminal conviction the abuser could be hired by other nursing homes or facilities.⁸²

Imposing criminal liability for elder abuse is important because it reduces an abuser's ability to practice health care elsewhere. Under the Medicare and Medicaid Patient and Program Protection Act of 1987,⁸³ the Department of Health and Human Services' Office of Inspector General (OIG) is required to exclude individuals convicted of criminal offenses relating to patient abuse from participating in Medicare and state health care programs, such as Medicaid, for a minimum of five years.⁸⁴ The OIG has discretion to extend the period of exclusion for more than five years if any of the four following factors exist: (1) the acts resulting in the conviction, or similar acts, were committed

80. Telephone Interview with Thomas E. Carluccio, *supra* note 58.

81. Tape of Thomas E. Carluccio, Deputy Attorney General of Delaware and Director of the Delaware Medicaid Fraud Control Unit, Emotional Abuse: Is it a Crime, Civil Matter, or Freedom of Speech—A Criminal and Civil Perspective?, Keynote Address at the Silent Suffering: Elder Abuse in America Conference (Feb. 4, 1994) [hereinafter Tape of Carluccio] (on file with *The Elder Law Journal* and the Delaware Office of the Attorney General).

82. Telephone Interview with Thomas E. Carluccio, *supra* note 58.

83. Medicare & Medicaid Patient & Program Protection Act of 1987, Pub. L. No. 100-93, 101 Stat. 680 (codified at 42 U.S.C. § 1320a-7 (1991)).

84. 42 U.S.C. §§ 1320a-7(a), 1320a-7(c)(3)(B) (1991).

42 C.F.R. § 1001.2 (1993) defines "convicted" to mean:

(a) A judgment of conviction has been entered against an individual or entity by a Federal, State, or local court, regardless of whether:

- (1) There is a post-trial motion or an appeal pending, or
- (2) The judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;

(b) A Federal, State, or local court has made a finding of guilt against an individual or entity;

(c) A Federal, State, or local court has accepted a plea of guilty or *nolo contendere* by an individual or entity; or

(d) An individual or entity has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

42 C.F.R. § 1001.2 (1993) defines "exclusion" to mean:

[I]tems and services furnished by a specified individual or entity will not be reimbursed under Medicare or the State health care programs.

42 C.F.R. § 1001.2 (1993) defines "State health care program" to mean:

- (a) A State plan approved under title XIX of the Act (Medicaid),
- (b) Any program receiving funds under title V of the Act or from an allotment to a State under such title (Maternal and Child Health Services Block Grant program), or
- (c) Any program receiving funds under title XX of the Act or from any allotment to a State under such title (Block Grants to States for Social Services).

over a period of at least one year;⁸⁵ (2) the acts resulting in conviction had a significant adverse physical or mental impact on the patient;⁸⁶ (3) the sentence imposed by the court included imprisonment;⁸⁷ or (4) the convicted abuser has a prior criminal, civil, or administrative sanction record.⁸⁸ If any of these four factors are present, the OIG may consider the following mitigating factors to reduce the period of exclusion to no less than five years: (1) the record in the criminal proceeding, including sentencing documents, shows that the court determined the abuser had a mental, emotional, or physical condition before or during the perpetration of the abuse, reducing the abuser's culpability;⁸⁹ or (2) the abuser's cooperation with federal or state officials resulted in others being convicted or excluded from Medicare or any of the state health care programs.⁹⁰ Thus, convicted elder abusers are prevented, for at least five years, from practicing in any facility which receives Medicare or Medicaid funding. In addition to this federally imposed restriction, individual states may permanently ban a convicted patient abuser from practicing in either a public or private facility. Delaware is the leading example of such a state.⁹¹ Therefore, imposing criminal liability for elder abuse is an important way of preventing future elder abuse, because convicted abusers will be severely restricted from working with elders in care-giving situations.

By criminalizing elder abuse, society firmly denounces the notion that abuse is an effective and acceptable means of maintaining power and control.⁹² Abuse is a public concern, not a mere private action, when the criminal justice system prosecutes on behalf of the victim.⁹³ Without criminal laws, the abuser feels licensed to continue the abuse and the victim feels powerless to stop the abuse or to get help.⁹⁴ The many benefits of criminalizing elder abuse include stopping the abuse, protecting the victim, protecting the public, holding the abuser accountable for the abuse, rehabilitating the abuser, com-

85. 42 C.F.R. § 1001.102(b)(2) (1993).

86. *Id.* § 1001.102(b)(3).

87. *Id.* § 1001.102(b)(4).

88. *Id.* § 1001.102(b)(5).

89. *Id.* § 1001.102(c)(2).

90. *Id.* § 1001.102(c)(3)(i).

91. Telephone Interview with Thomas E. Carluccio, Deputy Attorney General of Delaware and Director of the Delaware Medicaid Fraud Control Unit (Feb. 14, 1995); see also DEL. CODE ANN. tit. 16, § 1137 (Michie Supp. 1994).

92. See Candace J. Heisler, *The Role of the Criminal Justice System in Elder Abuse Cases*, 3 J. ELDER ABUSE & NEGLECT 5, 7 (1991).

93. *Id.*

94. *Id.*

municating the societal intent to treat elder abuse as a crime, not a private matter, and, lastly, providing restitution to the victim.⁹⁵

B. The Deficiencies of Traditional Criminal Law in the Elder Abuse Context

Because imposing criminal sanctions on elder abusers is a more effective deterrent of elder abuse than imposing civil sanctions, it is necessary to examine whether traditional criminal law prohibits elder abuse. Criminal law defines battery “as the unlawful application of force to the person of another.”⁹⁶ Traditional criminal battery requires either bodily injury or offensive touching.⁹⁷ The modern approach, however, restricts criminal battery to instances of physical injury.⁹⁸ Thus, jurisdictions adopting this modern approach sanction only the most egregious acts of physical elder abuse as a battery; offensive touching, such as pulling an elder’s hair or slapping an elder, is not punishable. Moreover, those jurisdictions adopting the traditional approach only will sanction forms of physical elder abuse, not emotional elder abuse. Unlike a tort battery, criminal battery does not cover instances where an object, attached and associated with the victim’s body, is harmfully or offensively touched.⁹⁹

A prosecutor also may pursue elder abusers under traditional criminal assault. Common law defines assault as “an attempt to commit a battery.”¹⁰⁰ Most jurisdictions also include, as part of criminal assault, “an act which places another in reasonable apprehension of an imminent contact.”¹⁰¹ Even under this extended definition of criminal assault, which is similar to tort assault, most acts of emotional elder abuse are not sanctionable.

Finally, a prosecutor may opt to bring a charge of breach of the peace; this, however, is unlikely. At common law, breach of the peace involves the use of abusive language toward another in a public place

95. *Id.* at 9.

96. LAFAYE & SCOTT, *supra* note 75, § 7.15, at 685.

97. *Id.*

98. *Id.* (citing MODEL PENAL CODE § 211.1 (1980), which covers only conduct causing “bodily injury”).

99. Examples of where a court may find a tort battery but not a criminal battery are harmful or offensive contact with the victim’s clothing (Piggly-Wiggly Alabama Co. v. Rickles, 103 So. 860 (Ala. 1925)), or any object held in the victim’s hand (Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967) (plate held in hand)). KEETON ET AL., *supra* note 64, § 9, at 39-41.

100. 2 TORCIA, *supra* note 77, § 179, at 298.

101. *Id.* § 180.

and in the presence of others.¹⁰² Accordingly, the stringent requirement of a breach of peace excludes virtually all emotional elder abusive acts; elder abuse primarily occurs within the confines of an elder's institutional room, such as in a nursing home room or residence within a private residence.¹⁰³

Criminal law inadequately addresses the specific problem of emotional elder abuse. Because of the common law's limits, a specific statute that punishes all physical and emotional elder abusive acts is needed. Only the most serious physical elder abusive acts are covered by the modern approach of criminal battery. Moreover, most emotional elder abusive acts do not constitute criminal assault. Finally, criminal law does not sanction infliction of emotional distress.¹⁰⁴

C. The States' Response to Elder Abuse

Between January 1973 and January 1981, prior to the publication of the House of Representatives' first report on elder abuse, only sixteen states had enacted legislation focusing on the problem of adult abuse. This legislation grouped together all adults eighteen years of age and older; until 1979, no statute was specific to elder abuse.¹⁰⁵ By 1980, only five states had passed statutes specifically aimed at protecting elders.¹⁰⁶ By 1985, that number grew to forty-four.¹⁰⁷ As of 1991, fifty states had enacted some type of legislation that addresses elder abuse.¹⁰⁸ Most states include elder abuse provisions in their already existing adult protective services (APS) legislation.¹⁰⁹

The states are not uniform in defining and imposing penalties for elder abuse. Moreover, many of their definitions are ambiguous. Notwithstanding this confusion, a spectrum of four types of state elder abuse statutes seems to appear: (1) states which do *not* impose

102. 4 TORCIA, *supra* note 77, § 530, at 193.

103. Telephone Interview with Toshio Tataru, Director of the National Aging Resource Center on Elder Abuse (Sept. 26, 1994).

104. See generally LAFAYE & SCOTT, *supra* note 75; 1 TORCIA, *supra* note 77.

105. Garfield, *supra* note 16, at 869.

106. *Id.*

107. *Id.*

108. *Id.* This figure includes the District of Columbia and Guam as "states." *Id.* (citing ELDER ABUSE PROJECT, AMERICAN PUBLIC WELFARE ASS'N (APWA), NAT'L ASS'N OF STATE UNITS ON AGING (NASUA), A COMPREHENSIVE ANALYSIS OF STATE POLICY AND PRACTICE RELATED TO ELDER ABUSE, at vi (1986)).

109. *Id.* An APS law is a statute that establishes an APS system. *Id.* APS laws traditionally are defined as "a system of preventive, supportive, and surrogate services for the elderly living in the community to enable them to maintain independent living and avoid abuse and exploitation." John J. Regan, *Intervention Through Adult Protective Services Programs*, 18 THE GERONTOLOGIST 250, 251 (1978).

criminal liability for elder abuse apart from traditional criminal law; (2) states which only impose criminal liability for *physical* elder abuse; (3) states which impose criminal liability for physical elder abuse and for emotional elder abuse but require proof of *mental suffering* by the victim; and (4) states which impose criminal liability for physical as well as emotional elder abusive *acts*, regardless of proof of mental suffering by the victim.

1. STATES THAT DO NOT CRIMINALIZE ELDER ABUSE APART FROM TRADITIONAL CRIMINAL LAW

As of 1989, forty-two states and the District of Columbia had established mandatory reporting requirements for abuse defined by their respective statutes.¹¹⁰ These mandatory reporting laws identify fifty different professionals and groups of persons who are required to report abuse.¹¹¹ The agencies authorized to receive reports are most often state welfare or social service departments, and, less frequently, law enforcement agencies, local social service agencies, and state units on aging.¹¹² As of 1989, thirty state laws contained failure to report penalties that range from imposing no fines to fines of \$1,000, and from no imprisonment to a maximum of six months imprisonment.¹¹³

110. WOLF & PILLEMER, *supra* note 8, at 153; *see, e.g.*, CONN. GEN. STAT. ANN. § 17b-407(a) (West Supp. 1995):

Any physician or surgeon . . . , any resident physician or intern in any hospital in this state, whether or not so licensed, and any registered nurse, licensed practical nurse, medical examiner, dentist, osteopath, optometrist, chiropractor, podiatrist, social worker, clergyman, police officer, pharmacist, physical therapist, nursing home facility administrator, nurses aide or orderly in a nursing home facility, any person paid for caring for a patient in a nursing home facility, any staff person employed by a nursing home facility, any regional ombudsman or patients' advocate and any person who is a sexual assault counselor or a battered women's counselor . . . who has reasonable cause to suspect or believe that a patient in a nursing home facility has been abused . . . , or is in a condition which is the result of such abuse . . . , shall within five calendar days report such information or cause a report to be made in any reasonable manner to the Nursing Home Ombudsmen Office. Any person required to report under the provision of this section who fails to make such report within the prescribed time period shall be fined not more than five hundred dollars.

111. WOLF & PILLEMER, *supra* note 8, at 153.

112. *Id.*

113. *Id.* at 11.

The states that only impose criminal liability outside of traditional criminal law for violations of the mandatory reporting laws¹¹⁴ do not have separate statutes criminalizing elder abuse. If a care giver physically or emotionally abuses a patient or resident, except for a few acts prohibited by traditional criminal law, the abuse is treated as a civil matter.¹¹⁵

2. STATES WHICH ONLY CRIMINALIZE PHYSICAL ELDER ABUSE APART FROM TRADITIONAL CRIMINAL LAW

Some state statutes restrict the definition of criminal elder abuse to include only physical injury, imminent threat of physical injury, and unreasonable confinement.¹¹⁶ Maryland's elder abuse statute is typical of state statutes that only criminalize physical elder abuse. In Maryland, elder abuse includes

the sustaining of any *physical* injury by a vulnerable adult as a result of cruel or inhumane treatment or as a result of a malicious act by a caregiver, a parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a vulnerable adult, or by any household or family member under circumstances that indicate that the vulnerable adult's health or welfare is harmed or threatened.¹¹⁷

States like Maryland do not consider emotional abuse a crime apart from the rare instances of conduct covered by a criminal assault statute. The emotional elder abuser is, at most, sanctioned administratively and through tort law, and is permitted to continue working in the health care industry.

3. STATES WHICH CRIMINALIZE PHYSICAL ELDER ABUSE AND EMOTIONAL ELDER ABUSE WITH PROOF OF MENTAL ANGUISH

Some state statutes define criminal elder abuse to include mental anguish, aside from physical injury, imminent threat of physical in-

114. See ALASKA STAT. § 47.24.010 (Supp. 1994); CONN. GEN. STAT. ANN. § 17b-407(a) (West Supp. 1995); HAW. REV. STAT. § 346-224 (Michie 1994); IOWA CODE § 235B.3 (West 1994); LA. REV. STAT. ANN. § 14:403.2 (West Supp. 1995); N.H. REV. STAT. ANN. § 161-F:46 (Butterworth 1994); N.J. STAT. ANN. § 52:27G-7.1 (West Supp. 1994); N.M. STAT. ANN. § 27-7-30 (Michie 1995).

115. See *supra* text accompanying notes 96-104.

116. See ARIZ. REV. STAT. ANN. § 13-3623 (West Supp. 1994); MD. ANN. CODE art. 27, § 35D(10) (Michie Supp. 1994); NEB. REV. STAT. § 28-386(1) (1989); N.C. GEN. STAT. § 14-32.2(a) (Michie 1993); S.D. CODIFIED LAWS ANN. § 22-46-2 (Michie Supp. 1993); UTAH CODE ANN. § 62A-3-302.5 (Michie 1993); VA. CODE ANN. § 18.2-369 (Michie Supp. 1994); W. VA. CODE § 9-6-1 (Michie 1990); WIS. STAT. ANN. § 46.90 (West 1987); WYO. STAT. § 35-20-102 (Michie 1994).

117. MD. ANN. CODE art. 27, § 35D(10) (Michie Supp. 1994) (emphasis added).

jury, and unreasonable confinement.¹¹⁸ For example, Texas's statute, which is typical of this group, defines elder abuse as

the willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm or pain or *mental anguish* or the willful deprivation by a caretaker or one's self of goods or services which are necessary to avoid physical harm, *mental anguish*, or mental illness.¹¹⁹

In this group of states, prosecutors need to prove that the elder abuse victim mentally suffered as a direct result of the abuse. Unfortunately, elderly victims afflicted with such health problems as Alzheimer's disease, dementia, or stroke, often do not understand or do not remember their abuse.¹²⁰ In these situations, district attorneys will not prosecute these cases due to the difficulty in obtaining evidence.¹²¹

To illustrate, Jeffrey L. Amestoy, Vermont's Attorney General, expressed frustration over the functionality of his state's elder abuse statute.¹²² Amestoy noted that the definition of abuse in Vermont's elder abuse statute "is so vague and difficult to prove that [the Vermont Office of the Attorney General] has never brought charges under this statute."¹²³ Amestoy reasoned that by requiring proof of injury or impairment, Vermont's elder abuse statute "creates an unworkable standard."¹²⁴ Seeking a solution to reinvigorate his state's dormant

118. See ALA. CODE § 38-9-7 (Michie Supp. 1994); FLA. STAT. ANN. § 415.102 (West 1993); MINN. STAT. ANN. § 609.231, § 626.557(d) (West 1987 & Supp. 1995); MISS. CODE ANN. § 43-45-5(a) (Law. Co-op. Supp. 1993); NEV. REV. STAT. § 200.5092(1) (Michie 1992); S.C. CODE ANN. § 43-35-10 (Law. Co-op. Supp. 1994); TENN. CODE ANN. § 71-6-117 (Michie Supp. 1994); TEX. HUM. RES. CODE ANN. § 48.002 (West 1990); VT. STAT. ANN. tit. 33, § 6902(1) (Butterworth Supp. 1995).

119. TEX. HUM. RES. CODE ANN. § 48.002 (West 1990) (emphasis added).

120. Tape of Carluccio, *supra* note 81.

121. *Id.*

122. See AMESTOY, *supra* note 13, at 8. VT. STAT. ANN. tit. 33, § 6902(1) (Butterworth Supp. 1994) defines abuse as:

(A) Any treatment of an elderly or disabled adult which places life, health or welfare in jeopardy or which is likely to result in impairment of health;

(B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering to an elderly or disabled adult;

(C) Unnecessary confinement or unnecessary restraint of an elderly or disabled adult;

(D) Any sexual activity with an elderly or disabled adult by a caregiver, either, while providing a service for which he or she receives financial compensation, or at a caregiving facility or program;

(E) Any pattern of malicious behavior which results in impaired emotional well-being of an elderly or disabled adult.

123. AMESTOY, *supra* note 13, at 8.

124. *Id.*

statute, Amestoy concluded that the definition of abuse in the elder abuse statute "should be redrafted to incorporate the concepts of cruelty and mistreatment."¹²⁵ Accordingly, Amestoy argued that the statute should criminalize physical and verbal forms of cruelty committed by care givers and all willful mistreatment of older and disabled people.¹²⁶

4. STATES WHICH CRIMINALIZE PHYSICAL AND EMOTIONAL ELDER ABUSIVE ACTS

As of February 1995, only Delaware,¹²⁷ Arkansas,¹²⁸ and Rhode Island¹²⁹ criminalize both physical and emotional abusive acts, regardless of whether mental anguish exists. Minnesota may soon join these states by enacting tough legislation against elder abuse.¹³⁰ To illus-

125. *Id.*

126. *Id.*

127. DEL. CODE ANN. tit. 31, § 3902 (Michie Supp. 1994).

128. ARK. CODE ANN. § 5-28-103 (Michie Supp. 1993).

129. R.I. GEN. LAWS § 23-17.8-10 (Michie Supp. 1994).

130. See MINN. STAT. § 609.231 (Draft No. 12C, Sept. 23, 1994) (made available to the author by Mamie S. Segall, Assistant Attorney General of Minnesota).

Currently, Minnesota, in MINN. STAT. ANN. § 626.557(d) (West 1987), defines abuse as "nontherapeutic conduct which produces or could reasonably be expected to produce pain or injury and is not accidental, or any repeated conduct which produces or could reasonably be expected to produce mental or emotional distress."

In the proposed amendments to the Vulnerable Adults Act, MINN. STAT. § 609.231 (Draft No.12C, Sept. 23, 1994), criminal elder abuse is defined as follows:

Any caregiver or facility operator, supervisor, employee, or volunteer who does any of the following is guilty of criminal abuse . . . :

(a) Engages in conduct with intent to produce physical or mental pain or injury to a vulnerable adult, and which conduct is not an accident or is not therapeutic conduct, including, but not limited to:

- (1) hitting, slapping, kicking, biting, corporal punishment;
- (2) the use of repeated or malicious oral, written or gestured language towards a vulnerable adult or the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening;
- (3) any aversive or deprivation procedure, unreasonable confinement or involuntary seclusion, including the forced separation of the vulnerable adult from other persons against the will of the vulnerable adult or the legal representative of the vulnerable adult;

. . . .

- (5) the act of forcing, compelling, coercing, or enticing a vulnerable adult against his or her will to perform services for the advantage of another.

trate the broadness of this fourth category of state statutes, Delaware's elder abuse statute defines abuse as

physical abuse by intentionally and unnecessarily inflicting pain or injury on an infirm adult; or . . . [a] pattern of emotional abuse, which includes, but is not limited to, *ridiculing or demeaning an infirm adult, making derogatory remarks to an infirm adult or cursing or threatening to inflict physical or emotional harm on an infirm adult.*¹³¹

Among the three states criminalizing physical and emotional abusive acts, only Delaware has been able to measure its statute's impact. Perhaps this is explained by the provision's age: Delaware's first elder abuse statute was enacted in 1986. In contrast, Arkansas's elder abuse statute was amended in 1993, and Rhode Island's elder abuse statute was amended in 1994.

Delaware's original statute was known as the patient abuse statute¹³² because it only criminalized physical and emotional abuse that occurs in facilities.¹³³ In 1991, Delaware's General Assembly supplemented this provision by enacting a second abuse statute,¹³⁴ more broadly criminalizing physical and emotional abuse that occurs in any

131. DEL. CODE ANN. tit. 31, § 3902(16) (Michie Supp. 1994) (emphasis added).

132. *Id.* tit. 16, §§ 1131-1140.

133. *Id.* § 1131(1) defines abuse as:

(a) Physical abuse by intentionally and unnecessarily inflicting pain or injury to a patient or resident. This includes, but is not limited to, hitting, kicking, pinching, slapping, pulling hair or any sexual molestation.

(b) Emotional abuse which includes, but is not limited to, ridiculing or demeaning a patient or resident, making derogatory remarks to a patient or resident or cursing directed towards a patient or resident, or threatening to inflict physical or emotional harm on a patient.

Id. § 1131(4) defines facility to "include any facility required to be licensed under this chapter. It shall also include any facility operated by or for the State which provides long-term care residential services." *Id.* § 1136(a) states that

Any person who knowingly abuses . . . a patient or resident of a facility shall be guilty of a class A misdemeanor. Where the abuse . . . results in serious physical injury then such person shall be guilty of a class D felony. Where the abuse . . . results in death then such person shall be guilty of a class A felony.

134. *Id.* tit. 31, §§ 3902-13.

setting, including a private residence.¹³⁵ In effect, this second statute has replaced the patient abuse statute.¹³⁶

Because of its broad statutes, Delaware has been successful in prosecuting emotional elder abuse. Emotional elder abuse cases were difficult or impossible to prosecute in Delaware before the patient abuse statute was passed in 1986.¹³⁷ Ten years ago, if emotional elder abuse cases had been prosecuted at all, a civil action probably would have been filed, resulting in, at most, a reprimand or a firing.¹³⁸ In 1986, the Delaware Office of the Attorney General received only four referrals of alleged abuse; of these, three abuse cases were opened, and only one abuser was convicted.¹³⁹ As a result of the patient abuse statute's enactment, the number of referrals in 1987 rose to seventy-three; out of those, forty-three cases were opened, and five abusers were convicted.¹⁴⁰ The following year, eighty-eight incidents were referred, fifty-three cases were opened, and sixteen abusers were convicted.¹⁴¹ Between 1990 and 1993, Delaware prosecuted almost eighty cases of emotional, physical, and financial abuse or neglect.¹⁴² Emotional abuse accounted for eighteen of those cases.¹⁴³ Barbara Webb,

135. See Tape of Carluccio, *supra* note 81. DEL. CODE ANN. tit. 31, § 3902(16) (Michie Supp. 1994) defines abuse to mean:

- (a) Physical abuse by intentionally and unnecessarily inflicting pain or injury on an infirm adult; or
- (b) A pattern of emotional abuse, which includes, but is not limited to, ridiculing or demeaning an infirm adult, making derogatory remarks to an infirm adult, or threatening to inflict physical or emotional harm on an infirm adult.

DEL. CODE ANN. tit. 31, § 3913 (Michie Supp. 1994) provides:

- (a) Any person who intentionally abuses . . . an infirm adult shall be guilty of a class A misdemeanor. . . .

- (c) Any person who intentionally abuses . . . an infirm adult, and causes bodily harm, permanent disfigurement or permanent disability shall be guilty of a class D felony. Where the abuse . . . results in death, such person shall be guilty of a class A felony.

136. Telephone Interview with Thomas E. Carluccio, *supra* note 58.

137. Reed, *supra* note 1, at B1 (statement by Barbara Zelnor, Medicaid Fraud Counsel of the National Association of Attorneys General).

138. Theresa Humphrey, *Elderly Abuse Law Seen as Model*, L.A. TIMES, Apr. 17, 1994, at A4.

139. DELAWARE OFFICE OF ATT'Y GEN., PATIENT ABUSE STATISTICS (1994) (made available by Thomas E. Carluccio, Delaware's Deputy Attorney General and Director of the Delaware Medicaid Fraud Control Unit, and on file with *The Elder Law Journal*). The patient abuse statute was enacted on May 13, 1986.

140. *Id.*

141. *Id.*

142. Humphrey, *supra* note 138, at A4.

143. *Id.*

Delaware's Administrator of Adult Protective Services, stated that "[g]etting these successful [emotional elder abuse] prosecutions in Delaware is sending a message to the community that these kinds of things will not be tolerated."¹⁴⁴

The Delaware elder abuse statute¹⁴⁵ punishes the act of abuse itself, not the act's impact on the victim. Because the Delaware statute does not require proof of mental suffering, the prosecutor does not have to prove that the victim suffered harm or distress.¹⁴⁶ The prosecutor only needs to prove that someone acted in an abusive manner—the words themselves are the harm.¹⁴⁷ If the victim, because of some mentally debilitating condition, does not understand or remember that he or she was emotionally abused, the prosecutor still has a viable case against the abuser.¹⁴⁸ As a result, the prosecutor can rely on witness testimony to support the case, rather than the victim's own testimony.¹⁴⁹ In such circumstances, the prosecutor's case will hinge on the credibility of witnesses.¹⁵⁰ The prosecutor must convince the jury beyond a reasonable doubt to believe the witness.¹⁵¹ As such, the prosecutor will want to see whether the witness has a motive to lie.¹⁵² Allowing conviction for mere proof of the abusive act rather than requiring proof of mental anguish makes convicting an elder abuser much easier.¹⁵³

Specifically, Thomas E. Carluccio, Delaware's chief elder abuse prosecutor,¹⁵⁴ does not arbitrarily decide to bring emotional elder abuse cases. When Carluccio takes a case, he examines a number of factors. Initially, he wants to ensure that the conduct technically meets the statute's requirements.¹⁵⁵ If the conduct passes this first test, Carluccio considers other factors. First, Carluccio examines jury appeal—the predicted public reaction toward the alleged abuse.¹⁵⁶

144. *Id.* (statement by Barbara Webb, Delaware's Administrator of Adult Protective Services).

145. DEL. CODE ANN. tit. 31, §§ 3902-13 (Michie Supp. 1994).

146. Tape of Carluccio, *supra* note 81.

147. *Id.*

148. Telephone Interview with Thomas E. Carluccio, *supra* note 58.

149. Telephone Interview with Thomas E. Carluccio, *supra* note 91.

150. *Id.*

151. *Id.*

152. *Id.*

153. Tape of Carluccio, *supra* note 81.

154. Specifically, Carluccio is the Deputy Attorney General of Delaware and Director of the Delaware Medical Fraud Control Unit.

155. Tape of Carluccio, *supra* note 81.

156. *Id.*

Carluccio will decide not to prosecute the care giver if he determines that a reasonable jury would not perceive the care giver's conduct as abusive.¹⁵⁷ Second, Carluccio examines the alleged abuser as a person.¹⁵⁸ Considerations include any past abusive conduct by the alleged abuser, the severity of the conduct, and whether the conduct was maliciously intended or simply an improper response to a difficult situation.¹⁵⁹ Carluccio recognizes that it is a tough job to provide care for elders. Care givers are under constant stress, occasionally subjected to patients who spit or curse at them.¹⁶⁰ Third, Carluccio examines the evidence.¹⁶¹ To sustain a conviction, he needs to prove beyond a reasonable doubt that the emotional elder abuse occurred.¹⁶² Finally, he examines whether prosecution of the conduct is constitutional.¹⁶³ An alleged abuser will prevail if the conviction would result in a violation of First Amendment rights or if the statute was unconstitutionally vague.¹⁶⁴

Three examples help illustrate these prosecutorial considerations. In the first example, a nursing home resident liked to press her call bell because she had difficulty getting up to do simple tasks.¹⁶⁵ The resident's constant ringing annoyed the nurses and the aides.¹⁶⁶ While waiting for a response, the resident overheard nurses and aides speak profanely about her.¹⁶⁷ The resident then informed the Delaware Medicaid Fraud Control Unit. Carluccio did not prosecute this matter because the conduct did not technically meet the standard set by the statute: the insulting statements occurred in another room and were not directly addressed to the patient.¹⁶⁸ Consequently, the matter was handled administratively.¹⁶⁹

In the second example, a nursing home resident afflicted with Alzheimer's disease had a doll whom she believed to be her live,

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* A call bell is a two-way listening device that allows the resident to hear into the nurses' station and allows a nurse or aide to hear into the resident's room. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

healthy, breathing daughter.¹⁷⁰ As a janitor cleaned the resident's room, he saw the doll unattended in a small crib.¹⁷¹ The janitor took a hanging lamp cord, tied it into a noose, and hung the doll from the ceiling.¹⁷² As the resident entered her room, she saw her "baby" hanging "dead."¹⁷³ Visibly shaken, she ran down the nursing home's corridors crying.¹⁷⁴ Instead of prosecuting, Carluccio offered the janitor an Attorney General's probation.¹⁷⁵ Carluccio was able to obtain a signed admission which he could use in a subsequent prosecution if the janitor violated his probation.¹⁷⁶ Carluccio decided not to prosecute because the janitor was a first-time offender and he was not a care giver.¹⁷⁷

In the third example, a nursing home resident was fearful of cigarette smoke.¹⁷⁸ If she saw the staff smoking at the nurses' station, she became upset and screamed at them to stop smoking.¹⁷⁹ After one such outburst, a nurse sought to "get a laugh" at the resident's expense.¹⁸⁰ The nurse ordered two thirteen-year-old volunteers to tell the resident that the resident had left her cigarettes at the nurses' station, to give the resident the cigarettes, and to tell the resident that she

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* An Attorney General's probation is a diversion program entered in lieu of a formal guilty plea but predicated on an offender's admission of guilt. Telephone interview with Thomas E. Carluccio, *supra* note 91. The probation is usually granted for abusers with no criminal record who did not cause serious injury. *Id.* Under the probation, abusers must admit to having committed the offense charged and agree not to work in health care for one year. *Id.* The probation has the practical effect of permanently barring abusers from practicing in both public and private Delaware health care facilities because they are put on the Delaware registry. *Id.* The probation usually includes conditions, such as requiring the abuser to go for counseling and/or pay for investigation costs. *Id.* Pursuant to probation, the abuser is monitored by the Attorney General's Office for one year. *Id.* If probation conditions are violated during that time, the abuser's admission will be used against him or her in a subsequent criminal prosecution. *Id.* Carluccio notes that the probation represents the difference in the underlying purpose of general criminal prosecutions and criminal health care prosecutions. In the former, the goal is to punish the individual, while in the latter, the goal is to deter future abuse. *Id.*

176. Tape of Carluccio, *supra* note 81.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

was permitted to smoke.¹⁸¹ After the two volunteers reluctantly followed these orders, the resident fled the room screaming.¹⁸²

Although technically the nurse committed a crime—emotional elder abuse—Carluccio did not prosecute the nurse, but instead gave her an Attorney General's probation.¹⁸³ Carluccio did not prosecute because the nurse had many personal problems, was under a great deal of stress, agreed to go to counseling, paid for the costs of investigation, and admitted the abuse.¹⁸⁴

D. Constitutional Issues

Abusers have a potential defense to criminal sanctions by attacking the constitutionality of their state's elder abuse statute. A statute, either on its face or as applied, can be stricken as unconstitutionally overbroad or vague. As a result, it is important to explore the constitutionally permissible scope of elder abuse statutes. Those states which criminalize physically and emotionally abusive acts are the most effective in deterring elder abuse. Therefore, establishing case law that upholds this type of broad statute against constitutional attacks are crucial.

The Delaware Supreme Court, in *Robinson v. State*,¹⁸⁵ addressed the constitutionality of Delaware's patient abuse statute,¹⁸⁶ the flag-ship of statutes criminalizing emotional elder abusive acts. The *Robinson* court affirmed the conviction of a nurse's aide for emotionally abusing an eighty-five-year-old nursing home resident,¹⁸⁷ and rejected the defendant's arguments that Delaware's patient abuse statute was

181. *Id.* Interestingly, the two 13-year-old volunteers had the common sense to think that their actions would emotionally abuse the patient. They only committed the acts after being ordered to by the nurse, against their will. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. 600 A.2d 356 (Del. 1991).

186. DEL. CODE ANN. tit. 16, § 1136(a) (Michie Supp. 1994).

187. The charges against the defendant arose on August 13, 1989, in room 400 at the Layton Home nursing facility. *Robinson*, 600 A.2d at 358. At the time of this incident, the defendant had been employed at the Layton Home for over two years as a nurse's aide. *Id.* Room 400, which was the home for four elderly residents, was 14 feet by 14 feet in dimension. *Id.* In this room, Jane Roe, 85 years of age, had been quietly sitting in her wheelchair. *Id.* While two housekeepers were working and other residents were in the room, the defendant approached Roe and falsely told her that someone had been stealing some of her clothes. *Id.* Roe, who was very possessive of her belongings, immediately became upset. *Id.* Throughout this incident, the defendant and Roe maintained an abusive dialogue, which became loud at times. *Id.* A total of six towels (as many as three at one time) were thrown at Roe by the codefendant as Roe sat confined in her wheelchair. *Id.*

unconstitutionally overbroad and vague.¹⁸⁸ Although *Robinson* only considered the patient abuse statute,¹⁸⁹ the court implicitly upholds the latter statute's constitutionality because the language of the two statutes is virtually identical: the sole difference is that the patient abuse statute protects only patients and residents of facilities and the broader elder abuse statute protects all "infirm adults" in any setting.¹⁹⁰

The Delaware court structured *Robinson* by observing the parameters set by the United States Supreme Court in *Village of Hoffman Estates v. Flipside*.¹⁹¹ *Flipside* suggests that where a statute is challenged as facially overbroad or vague, a court should first determine whether that statute affects "a substantial amount of constitutionally protected conduct."¹⁹² If a court finds that the statute does not affect such conduct, *Flipside* holds that the overbreadth challenge must fail.¹⁹³ According to *Flipside*, a court should then explore the facial vagueness challenge, and assuming the statute affects no constitutionally protected conduct, a court may uphold the challenge only if the statute "is impermissibly vague in all of its applications."¹⁹⁴

1. OVERBREADTH

The Delaware Supreme Court began its overbreadth analysis in *Robinson* by examining the patient abuse statute's legislative purpose. Delaware's General Assembly enacted the patient abuse statute out of

Although Roe was quite upset at this point, the defendant was just beginning her havoc. The defendant took a cup of water and, out of Roe's sight, used her fingers to throw drops of water on Roe. *Id.* At the same time, the defendant imitated the sound of spitting which further upset Roe. *Id.* Roe cried out for the defendant to stop spitting on her and to leave her room. *Id.* Apparently in response to Roe telling the defendant and the codefendant to "Get away from me you bitch," the defendant told her "It takes one to know one." *Id.* The defendant also admitted that she had called Roe "mean" and had told her to "shut up" and had argued briefly with Roe. *Id.*

In the meantime, the defendant had also placed a small artificial flowerpot on Roe's head. *Id.* When the flowerpot fell to the floor, the defendant and the codefendant laughed. *Id.* With Roe yelling "bloody murder," the defendant told Roe to "kiss [my] butt," stood in front of Roe, lifted her nurse's uniform, shook her buttocks, and placed it on Roe's meal table which was attached to her wheelchair. *Id.* The entire incident lasted approximately 15 to 20 minutes. *Id.*

188. See *id.* at 362-66.

189. The abuse in *Robinson* occurred in 1989, before enactment of the statute extending criminal liability beyond care facilities.

190. See *supra* notes 133 & 135.

191. 455 U.S. 489 (1982).

192. *Id.* at 494, cited in *Robinson v. State*, 600 A.2d 356, 362 (Del. 1991).

193. *Id.*

194. *Id.* at 495.

concern that patients and residents of long-term care facilities experience abuse which is not completely sanctioned by traditional criminal statutes.¹⁹⁵ The patient abuse statute was designed to protect some of society's most vulnerable members.¹⁹⁶ Consequently, the General Assembly, in 1986, enacted the elder abuse statute which prohibits the abuse, neglect, and mistreatment of patients and residents of long-term care facilities.¹⁹⁷

Without forgetting this statutory purpose, the Delaware court considered whether the patient abuse statute affects a substantial amount of constitutionally protected speech or is overbroad because it restricts others' First Amendment rights.¹⁹⁸ The Delaware court noted that the First Amendment does not protect all speech,¹⁹⁹ and even protected speech may be punishable at certain times and places.²⁰⁰ Accordingly, the Delaware court stressed that the government constitutionally can prohibit offensive speech as intrusive when a "captive" audience is unable to avoid the speech.²⁰¹

In captive audience cases, the United States Supreme Court has balanced the speaker's First Amendment rights with the government's interest in protecting the captive audience's privacy rights.²⁰² In the course of its examination, the Delaware court placed special

195. *Robinson*, 600 A.2d at 362 (citing 65 Del. Laws ch. 442 (July 7, 1986) (synopsis) (codified at 16 DEL. CODE ANN. §§ 1131-40 (Michie Supp. 1990)).

196. *Id.* Delaware's General Assembly found that

victims of patient abuse are often at the mercy of the[ir] tormentors, are dependent upon them for daily needs, and are therefore, reluctant to report incidents committed against them. Many times, victims are unable to effectively communicate what is being done to them.

Id.

197. *Id.*

198. *Id.* at 363.

199. *Id.* The United States Supreme Court has held that the following categories of speech are not protected by the First Amendment: fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); obscenity, *Roth v. United States*, 354 U.S. 476 (1957); words tending to incite riot, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and to a limited extent libel, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Robinson*, 600 A.2d at 363.

200. *Robinson*, 600 A.2d at 363 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985)).

201. *Id.* (citing *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (offensive radio broadcasts); *Lehman v. Shaker Heights*, 418 U.S. 298, 307-08 (1974) (advertisements on public buses and streetcars); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970) (offensive mailings); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (sound trucks)).

202. *Id.* (citing *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Cohen v. California*, 403 U.S. 15, 21-22 (1971); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736 (1970); *Martin v. Struthers*, 319 U.S. 141, 143 (1943)).

emphasis on two United States Supreme Court cases: *F.C.C. v. Pacifica Foundation*²⁰³ and *Frisby v. Schultz*.²⁰⁴ In *Pacifica Foundation*, the United States Supreme Court held that the F.C.C. had the authority to sanction licensees who engage in obscene, indecent, or profane broadcasting.²⁰⁵ *Pacifica Foundation* held that “[p]atently offensive, indecent material presented over the airwaves confronts the citizen . . . in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”²⁰⁶

The Delaware court also gave heightened attention to another United States Supreme Court case. In *Frisby*, the Supreme Court upheld an overbreadth and vagueness challenge against a statute which prohibited picketing in a traditionally public forum where the picketing centered on an individual residence (a captive audience).²⁰⁷ *Frisby* emphasized the significant government interest in preserving the sanctity of the home, which includes protecting the unwilling listener.²⁰⁸

Applying the above case law to the patient abuse statute, the Delaware court concluded that the elder abuse statute was not overbroad.²⁰⁹ The Delaware court reasoned that although residents and patients allow care givers to come into their homes by necessity, such invitation does not constitute a waiver of their privacy rights and their rights to be free from abusive conduct or speech.²¹⁰ Furthermore, the Delaware court found no reason to distinguish between the residential privacy rights held by patients and residents of long-term care facilities and the residential privacy rights of a homeowner which *Frisby* recognized.²¹¹ After balancing an emotional abuser’s First Amendment rights against the significant government interest in protecting

203. 438 U.S. 726 (1978).

204. 487 U.S. 474 (1988).

205. *Robinson*, 600 A.2d at 363 (citing *Pacifica Found.*, 438 U.S. 726).

206. *Id.* (quoting *Pacifica Found.*, 438 U.S. at 748).

207. *Robinson*, 600 A.2d at 363-64 (citing *Frisby*, 487 U.S. 474).

208. *Id.* at 364 (citing *Frisby*, 487 U.S. at 484). The Supreme Court, in *Frisby*, stated that

a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

487 U.S. at 485 (citing *Pacifica Found.*, 438 U.S. at 748-49; *Rowan*, 397 U.S. at 736; *Kovacs*, 336 U.S. at 86-87).

209. *Robinson*, 600 A.2d at 364.

210. *Id.*

211. *Id.*

the residential privacy rights of a “captive” patient or resident of a long-term care facility, the Delaware court held that the patient abuse statute does not reach a sufficient amount of constitutionally protected speech to justify a ruling of facial overbreadth.²¹²

2. VAGUENESS

Addressing the defendant’s second constitutional challenge, the Delaware court next examined whether the patient abuse statute’s emotional abuse component is unconstitutionally vague on its face. The Delaware court observed that the vagueness doctrine nullifies a criminal statute that is not written with “sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”²¹³ Furthermore, the constitutionality of a statute challenged as vague is closely affected by whether that statute includes a mens rea requirement.²¹⁴

With respect to the void for vagueness challenge in *Robinson*, the Delaware court first examined the scope of criminal liability for emotional abuse under the patient abuse statute.²¹⁵ The Delaware court noted that the statute only protects patients and residents present within a “facility.”²¹⁶ Furthermore, “ridiculing” or “demeaning” speech or conduct directed at a patient or resident or “derogatory remarks” made about a patient or resident are not criminally sanctioned unless the prohibited act(s) occur(s) within a facility, the prohibited act(s) were targeted at or directed towards a patient or resident of the facility, and the defendant performed the prohibited act(s) “know-

212. *Id.*

213. *Id.* at 365 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

214. *Id.* (citing *Colautti v. Franklin*, 439 U.S. 379, 395 & n.13 (1979)).

215. DEL. CODE ANN. tit. 16, § 1131(1)(b) (Michie Supp. 1990) defines emotional abuse as including, but not being limited to:

ridiculing or demeaning a patient or resident, making derogatory remarks to a patient or resident or cursing directed towards a patient or resident, or threatening to inflict physical or emotional harm on a patient.

Id. § 1136(a) states:

Any person who knowingly abuses, mistreats or neglects a patient or resident of a facility shall be guilty of a class A misdemeanor. Where the abuse, mistreatment or neglect results in serious physical injury then such person shall be guilty of a class D felony. Where the abuse, mistreatment or neglect results in death then such person shall be guilty of a class A felony.

216. *Robinson*, 600 A.2d at 365.

ingly."²¹⁷ Additionally, the Delaware court observed that the standard of liability is an objective one: a defendant's speech or conduct must be of the kind that reasonable people would recognize, in the context that they were done or spoken, as being ridiculing, demeaning, or cursing.²¹⁸ Accordingly, the Delaware court concluded that the patient abuse statute defines the criminal offense of emotional abuse with sufficient particularity such that reasonable persons can understand the forbidden conduct.²¹⁹ Moreover, the Delaware court found that the patient abuse statute's scope provides sufficient law enforcement guidelines which preclude the risk of arbitrary or discriminatory enforcement.²²⁰ Consequently, it rejected the defendant's facial vagueness challenge.²²¹

IV. Resolution and Proposal

Elder abuse is a widespread and growing problem. Because of their vulnerability, the elderly are particularly susceptible to the devastating impacts of emotional and physical abuse. Imposing civil sanctions through tort law is an ineffective remedy for elder abuse because many elders do not bring suits. Moreover, tort liability does not diminish an abuser's ability to continue to work in facilities inhabited by elders even after abuse is recognized. In addition, traditional criminal law does not fully punish all elder abuse, particularly most acts of emotional abuse. As stated by Rep. Mario Biaggi, Chairman of the Subcommittee on Human Services, "[m]ere outrage and righteous indignation does not solve a problem of the magnitude of elder abuse."²²² Therefore, states need to criminalize elder abuse, ensuring that elder abuse victims' rights are safeguarded.

As discussed previously, the states which impose some form of criminal liability on the abuser range from criminalizing only physical abuse to criminalizing physical and emotional abusive acts, regardless of evidence that the victim suffered mentally. Emotionally abusive acts should be a crime because often the victims are vulnerable and are at the mercy of their abusers. Moreover, the mental state of the

217. *Id.*

218. *Id.*

219. *Id.* at 366.

220. *Id.*

221. *Id.*

222. ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM, *supra* note 17, at vi (statement by Rep. Mario Biaggi, Chairman, Subcommittee on Human Services).

victim should not be a prerequisite to bringing a criminal charge against an abusive perpetrator. Often, elder abuse victims suffer from some sort of dementia and are unable to remember or comprehend that they were abused, or they are unwilling to testify. Therefore, unless the abusive acts themselves are criminalized, an abuser often will be able to avoid prosecution.²²³

Although the elderly comprise a majority of all adult abuse victims (approximately seventy percent),²²⁴ criminal liability for physical and emotional abuse should protect anybody at least eighteen years of age who would be considered vulnerable and dependant on others. The mentally and physically disabled, for example, are vulnerable and consequently need government protection from abuse. All vulnerable adults, not just the elderly, face the inherent problems of bringing tort actions and the insufficient deterrence of tort liability. Moreover, the problems that many elders have in remembering abusive conduct also plague other vulnerable adults. In addition, criminal liability should extend to any person upon whom vulnerable adults depend for care. This includes a relative acting as a care giver in a private setting or any employee of a facility where a vulnerable adult resides or is temporarily staying. In short, vulnerable adults are captive to physical and emotional abuse and deserve government advocacy to ensure their protection.

The following model legislation incorporates the above recommendations. To overcome overbreadth and vagueness challenges, the model legislation is precise in its definitions. Moreover, the model legislation includes a specific mens rea requirement for the defendant. Although the focus of this note has been on defining abuse, every criminal statute includes penalties, and this model legislation is no exception. The penalties section of the model legislation serves to show the importance of criminally grading abuse by the seriousness of the offense. The individual state legislatures should determine the particular sanctions, such as fines and/or imprisonment, roughly in accord with their state's respective sanctions for criminal battery and assault. Finally, many of the state statutes which criminalize elder abuse also include provisions criminalizing neglect and financial ex-

223. Tape of Carluccio, *supra* note 81.

224. *Elder Abuse: Curbing a National Epidemic, Hearing Before the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 101st Cong., 2d Sess. 4 (1990) (statement of Rep. Mary Rose Oaker).

plotation of elders. However, these are separate offenses and should be the subject of a separate discussion.

1. DEFINITIONS

(1) Criminal abuse. Any care giver or facility operator, facility supervisor, facility employee, or facility volunteer who intentionally or knowingly engages in any of the following conduct, and which conduct is neither accidental nor therapeutic, is guilty of criminal abuse:

(a) the infliction or threat to inflict physical pain or injury, including, but not limited to, hitting, slapping, kicking, pinching, biting, pulling hair, or corporal punishment;

(b) the use of repeated or malicious oral, written, or gestured language towards a vulnerable adult or the treatment of a vulnerable adult which would be considered by a reasonable person to be ridiculing, derogatory, humiliating, harassing, or threatening;

(c) unreasonable confinement or involuntary seclusion, including the forced separation of the vulnerable adult from other persons against the will of the vulnerable adult or the legal representative of the vulnerable adult;

(d) sexual contact or interaction involving a vulnerable adult without the vulnerable adult's informed consent.

(2) "Vulnerable adult" means any person eighteen years of age or older suffering from physical or mental infirmity or other physical, mental, or emotional dysfunction to the extent that the person is impaired in the ability to provide adequately for his or her own care and protection and is unable or unlikely to report maltreatment without assistance.

(3) "Care giver" means an individual or facility

(a) who has responsibility for the care of a vulnerable adult as a result of a family relationship, or

(b) who has assumed responsibility for all or a portion of the care of a vulnerable adult voluntarily, by contract, or by agreement.

(4) "Therapeutic conduct" means the provision of program services, health care or other personal care services for a bona fide purpose in the best interests of the vulnerable adult by

(a) an individual, facility, employee or person providing services in a facility under the rights, privileges, and respon-

sibilities conferred by state license, certification or registration; or

(b) by a care giver.

2. PENALTIES

In any prosecution for criminal abuse, the following penalties, in decreasing order of severity with (1) being the most severe offense and (5) being the least severe offense, apply if the conduct:

(1) results in the death of a vulnerable adult, the person may be sentenced to imprisonment for not more than — years and/or payment of a fine of not more than \$—;

(2) results in great bodily harm, the person or entity may be sentenced to imprisonment for not more than — years and/or payment of a fine of not more than \$—;

(3) results in substantial bodily harm or the risk of death, the person or entity may be sentenced to imprisonment for not more than — years and/or payment of a fine of not more than \$—;

(4) results in bodily harm or the risk of great bodily harm, the person or entity may be sentenced to imprisonment for not more than — years and/or payment of a fine of not more than \$—;

(5) in any other circumstance, regardless of the harm or risk of harm, the person may be sentenced to imprisonment for not more than — year(s) and/or payment of a fine of not more than \$—.

V. Conclusion

Physical and emotional abuse are pervasive problems among the elderly. Elders are often treated as “second-class citizens” and often have no advocate other than the government to protect their rights. Sufficient criminal liability needs to be imposed on abusers in order to deter physical and emotional elder abuse. The penalties of imprisonment and/or fines are not really the ultimate goal in criminalizing physical and emotional elder abuse. Instead, the penalties serve as a means to create a criminal record for a convicted abuser, and in conjunction with federal and some state statutes, keep those prone to elder abuse out of care-giving situations.

Neither physical nor emotional elder abuse should be tolerated. Too many elders suffer at the hands of the people whom they depend upon for care. Consequently, legislators need to enact tough measures such as proposed in this note to both sanction the abuser and

deter future abuse. As a society, we need to protect elders' rights to ensure that they are able to live in dignity and without abuse.

